IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1185
Consolidated with Nos. 22-1197, 22-1605

In re: FLINT WATER CASES

LUKE WAID,

Plaintiff

INDIVIDUAL PLAINTIFFS;
SETTLEMENT CLASS PLAINTIFFS

Plaintiffs-Appellees

v.

RICHARD DALE SNYDER, *et al.*

Defendant

RAYMOND HALL; ROBERT HEMPEL; ASHLEY JANKOWIAK

Objectors-Appellants

On Appeal from the United States District Court
For the Eastern District of Michigan,
No. 5:16-cv-10444-JEL-MKM

Reply Brief
of Appellants Hall and Jankowiak

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS

Adam E. Schulman
M. Frank Bednarz
1629 K Street NW, Suite 300
Washington, DC 20006
Telephone: (610) 457-0856
Email: adam.schulman@hlli.org

Attorneys for Appellants Raymond Hall and Ashley Jankowiak

Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Argument

The district court relied on information concealed from Flint residents to approve a common benefit fee of tens or hundreds of millions of dollars. Class Counsel denies that the Hall objectors have standing. PB19-21, 41-44.[1] These arguments depend on the premise that the district court would have prejudged *any* Hall argument, and on the false premise that reversing "special assessments" would result in an even higher fee. The appeal is justiciable.

As for the merits of Hall's discovery, Class Counsel cannot deny that $11 million worth of billing falsely attributed to "associates" was instead performed by temporary contract attorneys paid about $50/hour (a cost that would be passed through without markup to a corporate client) but charged at ten times that rate on the fee application. OB29-30. Class Counsel does not address the inconvenient fact that one of the four principal appointed firms did not even disclose the attorneys whose work supposedly entitles them to tens of millions of dollars from every settlement claimant. OB28. The district court relied on *in camera* submissions in setting its fee award, and Class Counsel offers no reason that class members should be handicapped in objecting to a fee motion by hiding bases of fees they're ordered to pay.

[1] "OB" and "PB," refer to Hall's opening brief and Class Plaintiffs-Appellees' response brief respectively. Non-class Plaintiffs-Appellee's (Liaison Counsel's) response brief exclusively addresses the Chapman Appellants' arguments, so Hall will not address it here. Because Class Counsel and Liaison Counsel are the real parties in interest to this appeal, Hall will refer to their arguments as such.

As for taxing unrepresented and late-represented claimants with special assessments, Class Counsel cannot distinguish *Lindy*'s prohibition against unequally applied fees. OB37-40. They resort to arguing that the Third Circuit overruled the *en banc Lindy* opinion *sub silentio*. It did not. They provide no reason to split with *Lindy*, and this Court should not.

I. Hall has standing to pursue both of his appellate issues.

Seeking to avoid the merits of Hall Objectors' appeal, Class Counsel contrive two distinct arguments against jurisdiction. *First*, they submit that Hall's appeal from their denial of access to billing and cost information is moot because the requested discovery involves lodestar and the court awarded fees on a percentage basis. PB1; PB19-21. *Second*, they assert that Hall lacks standing to appeal the fee structure that imposes special common fund assessments on late and unrepresented claimants including both Hall Objectors. PB42-45. Both arguments are ill-conceived and lack legal grounding.

To begin, the first contention is not an argument about standing, rather than the merits of Hall's arguments. If Hall is incorrect about the importance of the hidden billing records to the merits of his appeal, it means his appeal fails, not that this Court cannot rule upon it. But Hall is not incorrect on the merits, either.

The notion that the lodestar-and-expense-related discovery that Hall seeks "cannot make a difference" to Class and Liaison Counsel's fee award rehashes the harmless-error argument that Hall already preemptively refuted. OB24-25. An issue is moot only when it is "impossible…to grant any effectual relief." *Knox v. SEIU*, 567 U.S.

298, 307 (2012) (internal quotation omitted). Here, the only way that plaintiffs could be sure that discovery would make no difference is if the district court pre-decided the issue of the reasonableness of the fee request before hearing from objectors. That would be improper, as courts must courts hear objections and offer a "reasoned response" to all non-frivolous ones. OB28-29 (citing cases); *cf. also In re Dry Max Pampers*, 724 F.3d 713, 717 (6th Cir. 2013) (district court pledged at fairness hearing to file a significant written final approval order, but later that afternoon entered a near-verbatim copy of a proposed order submitted before the hearing).

Even if the district court were to employ the exact same fee methodology (percentage-based with a lodestar crosscheck) after discovery and further briefing, that discovery and briefing could *still* make a difference on crosscheck.[2] District courts often rely on the lodestar crosscheck as a reason to reduce fees. *E.g. Hillson v. Kelly Servs.*, 2017 WL 3446596, 2017 U.S. Dist. LEXIS 127717 (E.D. Mich. Aug 11, 2017); *In re Polyurethane Foam Antitrust Litig*, 168 F. Supp. 3d 985, 1012-13 (N.D. Ohio 2016); *In re*

[2] Moreover, the district court did not award a typical "percentage" award.

No one knows the amount of common benefit fees awarded below. Typically, a percentage-of-the-fund award pays attorneys a percentage of the fund for the common benefit work they provided to others, but the Fee Order only caps fees available for *both* common and private benefit. Only one aspect of the fee award grants a set amount: the 6.33% Common Benefit Assessment on the gross common fund. The majority of fees dispersed by the Fee Order likely come from special assessments, which vary depending on whether each claimant retained an attorney, and, if so, whether the claimant retained their attorney after August 20, 2020. OB37; Fee Order, RE 2105, PageID # 72088. The size of the common benefit fee award is unknown and presently unknowable.

Citigroup Inc. Sec. Litig., 965 F. Supp. 2d 369, 388-89 (S.D.N.Y. 2013) (noting that crosscheck is "particularly important in so-called mega-fund settlements" and "serves little purpose as a cross-check if [the lodestar] is accepted at face value"). Class Counsel's argument proves too much. In most of the cases Hall relies on for objectors' Rule 23(h) rights to review lodestar information (OB20-25 (citing *e.g.*, *Mercury*, *Keil*, *Redman*, *Reynolds*, *Johnson*)), plaintiffs' counsel sought and courts awarded percentage-of-fund awards. Indeed, the Eleventh Circuit mandates the percentage method as the baseline approach in common fund cases. *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991). It is not "impossible" that discovery and briefing on lodestar and expenses would affect the outcome of the attorney award; it is entirely possible, maybe even *likely*. Thus, Hall's discovery appeal is not moot. In *Green v. Nevers*, which Class Counsel relies upon (PB20-21), the discovery dispute was moot only because it went to a legal issue that had already been disposed of and affirmed on appeal. 196 F.3d 627, 632 (6th Cir. 1999)

Class Counsel's argument that Hall lacks standing to challenge the special assessments fares no better. Counsel theorizes that Hall Objectors would be no better off if the Court finds the special assessments (including the 17% special assessments charged to them) unlawful, because Hall would "pay class counsel 25% fees" instead "exactly the same as what they pay under the current structure." PB44. This is wrong. No mechanism in the settlement or Fee Order would *increase* payments in lieu of special assessments, and Class Counsel cites nothing for this premise. PB43-44. If this Court determines that the special assessments are unlawful, then Hall will pay only the 6.3%

global CBA.[3] Nothing in the Fee Order or Settlement pushes claimants into some other 25% bucket. Fee Order, RE 2105, PageID ## 72088-89, 72142.

Maybe Class Counsel really means that they could hypothetically submitting a *different* fee request for a uniform global 25% fee, or some other excessive percentage of the $626.25 million settlement. But Article III does not demand Hall prove that there is no counterfactual world in which the district court charge Hall the same amount "exercising its discretionary powers lawfully." *FEC v. Akins*, 524 U.S. 11, 25 (1998). Similarly, a plaintiff alleging discriminatory treatment need not prove that the government would not remedy the violation by "leveling up" rather than "leveling down." *Wiesmueller v. Kosobucki*, 571 F.3d 699, 702-03 (7th Cir. 2009); *accord Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2355 (2020). Class Counsel cannot "defeat standing either by blustering assertion or by more discrete representation that other ways can be found to maintain the challenged result" or that their next fee request can "find a way to recreate the same injury." 13A Charles A. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 3531.6 (2021).

Class Counsel also misconstrue "the bulk" of Hall's argument as "target[ing] the CBA as it pertains to unrepresented and late-represented Minors" rather than class members. PB43. Not so. Hall takes issue with the 17% and 25% special assessments imposed on unrepresented minor and class-member claimants alike. OB37 ("These beneficiaries, including both class and non-class members, are being charged an

[3] Hall's counsel has disclaimed its right to the 8% individually retained counsel maximum fee. OB43.

additional 17 or 25% of the value of their settlement award."). The district court taxed both unrepresented and late-represented minors and class members. OB7, 15-16; Fee Order, RE 2105, PageID ## 72088-89, 72142. True: the district court called the assessment against minors and late-represented claimants a "CBA," but the order emphasizes that "class counsel is awarded 25% of the value of the claims" of adult class members too. *Id.* at 72142. Plaintiffs' standing argument thus reduces to a game of legally insignificant semantics.

Jurisdiction exists for both of Hall's appellate issues.

II. The district court violated Rule 23(h) by refusing to allow objectors to review the details of lead counsel's billing and costs records, which would have shown excessive fees.

A. Flint residents should not receive less due process than a corporation.

Class Counsel does not deny that corporations generally get to review detailed billing to challenge fee requests they're being asked to pay. OB21-22. This arises from fundamental constitutional rights that corporations enjoy: "the Due Process Clause requires that opposing counsel have access to the timesheets relied on to support the fee order." *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 545 (9th Cir. 2016).

Class Counsel instead wrongly asserts (PB27) that no authority exists that "objectors to a class action have the same, enforceable due process interest" as a corporation ordered to pay attorneys' fees. False again. Hall cited (OB26) *Lawler v. Johnson*, which establishes exactly this proposition. 253 So. 3d 939, 948-52 (Ala. 2017).[4]

[4] Class Counsel similarly falsely claim (PB27) that Hall did not cite "authority that establishes their right to conduct their own lodestar cross-check." Again, Class

"Even though Alabama's Rule 23 has no equivalent to Federal Rule 23(h), courts considering whether Federal Rule 23(h) has been violated have generally recognized that there is a concomitant due-process issue as well." *Id.* at 948 (citing *Mercury*). Rule 23(h) "is essentially a codification of basic due-process principles." *Id.* at 948-49.

Class Counsel uses several *non sequiturs* to push their unpalatable argument that Flint residents deserve less process than a corporation. *Yamada*, they argue, was a case in which the district court employed the lodestar method. PB27. A distinction without a difference: the Ninth Circuit did not limit its holding to *lodestar* fee awards, but instead finds a due process right to access evidence "***relied on*** to support the fee award." *Yamada*, 825 F.3d at 545 (emphasis added). Other courts granting defendant's access to detailed billing have required disclosure even when awarding fees on a percentage basis. *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, 2018 U.S. Dist. LEXIS 140137, at *182 (N.D. Cal. Aug. 17, 2018) (Koh, J.) (citing *Yamada*); *Lawler*, 253 So. 3d 953-54; *see also supra* at 3 (citing cases). Just as in *Yamada*, the district court received billing records *in camera*, denied opposing counsel access to them, then relied on these hidden records to support the fee award.

Class Counsel argues that corporations "are paying that award out of their own pockets." PB28. But so are class members and participating claimants, who equitably own the common fund and possess the same concrete legal interest as a defendant

---

Counsel is mistaken. Hall observed that, beyond the Rule 23(h) precedent, E.D. Mich. L.R. 54.1.2 requires billing more detailed than that filed in this case so that the "parties against whom the award is requested" can "respond with any objections thereto." OB21.

subject to a motion for fee-shifting. It is "the value of [their] claims" that has "generated" the fund and thus the proceeds "belong solely to [them]." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (citing Am. Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. (b)). Both are "pay[ing] the fees." *Linneman v. Vita-Mix Corp.*, 970 F.3d 621, 632 (6th Cir. 2020). Reducing the net recovery is economically equivalent to paying fees out of pocket: in both cases the payee becomes marginally poorer. Flint residents should not be deprived of rights because they don't have pockets the size of corporate coffers.

Detailed billing matters in this case more than most "percentage" awards because of the obscured line between private and common benefit. Most funds paid under the settlement go to "plaintiffs represented by individual counsel under contingent fee agreements that, as a general matter, do not fall within the District Court's purview." PB6. Because the firms receiving common benefit fees—particularly the Liaison Counsel firms—represent the most valuable claimants (minors with lead testing results) individually, they are already well-compensated for work in each client's case. If firms submitted private benefit hours *in camera*, they are being credited twice for the work, double-dipping from some of the most disadvantaged people in the country.

Class and Liaison Counsel flagged this potential problem themselves years ago. Prior to reaching an agreement that they would generally split common benefit attorneys' fees, Class and Liaison Counsel accused each other of spending excess time on (private) client development. OB8; Shkolnik Declaration, RE 444-2, PageID # 14150 (asserting that Class Counsel had categorized client solicitation as a common

benefit, and taking exception to Class Counsel allegedly "attempting to keep its common benefit work a secret, a practice which is rarely employed in the class action and mass tort arena… [and that Liaison Counsel attorneys] were unwilling to be participants in such a questionable process"); Class Counsel's Memo For Replacement of Co-Liaison Counsel, RE 404, PageID ## 13291-92 (describing "free dinners" hosted by Liaison Counsel to recruit clients to capture a larger "percentage of the award based on the retainer agreement"). Following these accusations, Class and Liaison Counsel "agreed *ex ante*" to split common benefit fees, eliminating their incentive to scrutinize each other's hours. Fee Motion, RE 1458, PageID # 57182. Transparency ensures that firms have not double-counted private benefit time in the common benefit fee award.

Judges should demand transparency in *every* class-action fee request, even those involving comparatively trivial matters like pop-up ads or breakfast cereal. *E.g.*, *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2013 WL 3814474, 2013 U.S. Dist. LEXIS 103038, at *3 (N.D. Cal. July 22, 2013); *see also* Presentation, RE 1899-1, PageID # 66481 (detailed billing provided in settlement concerning cereal). Courts must prioritize the "interests of absent class members over the interests in achieving settlement—not the other way around." *In re Hall*, 4 F.4th 376, 379 (6th Cir. 2021). A district court "would do violence to its judicial obligations were it to accept the amounts claimed at their value" "where the documentation is inadequate." *United Slate, Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495, 502 (6th Cir. 1984). Courts must

afford class members an opportunity to test documentation supporting the fee award they pay.

This fee award does not arise from a settlement for kitchen appliances or misleading cereal boxes, but from a fund for city residents who were poisoned. Counsel should be compensated for producing this settlement, but Flint residents should not have been hobbled in arguing against excessive attorneys' fees.

B. Discovery would vindicate the rights of absent class members.

Class Counsel argues that Rule 23(h) does not entitle objectors to discovery and alternatively that their fee application had sufficient detail. In fact, the fee application fails to meet even the barest minimum for disclosure—failing to even identify the billers at one of the four appointed law firms—and this failure, along with undenied errors in the fee application, requires discovery in this case.

Class Counsel asserts that Rule 23(h)(2) "contains no language evincing a substantive right to discovery," but they then admit that the rule provides procedural guarantees. PB21-22. Objection rights exist for a reason: absent class members are asked to waive their rights without affirmative action, and they are compelled to pay attorneys they did not retain. The rules require notice and a full opportunity to object; class members ought not be "handicapped" by deficiencies in the fee papers. *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014). Objectors must have the ability to "provide the court with critiques of the specific work done by counsel when they were furnished with no information of what that work was, how much time it consumed, and whether and how it contributed to the benefit of the class." *In re Mercury Interactive*

Corp. Secs. Litig., 618 F.3d 988, 994 (9th Cir. 2010); *accord Keil v. Lopez*, 862 F.3d 685, 705 (8th Cir. 2017). Simply put, Rule 23(h) requires "full information" to empower class members to capably object in their own best interests. *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1252 (11th Cir. 2020); *c.f. also* E.D. Mich. L.R. 54.1.2. Class Counsel correctly observes (PB13, PB24) that Rule 23(h) requires sufficient "*time*" for class members to review a fee request, but counsel misunderstands that the time is necessary to review *materials used to support a fee motion*. Content, as well as timing, is an essential component of notice and an opportunity to object.

This is why the Advisory Committee Notes to Rule 23(h) anticipate discovery related to fee objections, and instruct courts to consider "the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case." Advisory Committee Notes on 2003 Amendments to Rule 23(h) ("2003 Committee Notes"). *See also Mercury*, 618 F.3d at 994 (alluding to need to allow objector discovery when appropriate). Just as Rule 23(h) provides the procedure for class members to object, it provides a means and standard for objector discovery. "If the [fee] motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information." 2003 Committee Notes. Because the fee motion failed to provide "thorough information," Hall is relieved of that burden. Still, he has demonstrated (and Class Counsel cannot deny) that millions of dollars in claimed lodestar has misrepresented contract attorneys as "associates," which merits further investigation. OB29-32.

Class Counsel argues that the district court could deny discovery because lodestar crosschecks are optional. Yet this Court reversed and remanded a percentage award where the district court did not discuss, among other factors, "the value of the services on an hourly basis." *Moulton v. U.S. Steel*, 581 F.3d 344, 352 (6th Cir. 2009). And has commended a district court for properly considering "the quickness in which the result was obtained and the economies of scale" as part of its lodestar crosscheck. *Bowling v. Pfizer*, 102 F.3d 777, 780 (6th Cir. 1996). These cases certainly evince at least a "preference" for conducting a lodestar crosscheck to a percentage award. *Contra* PB31. Other cases Class Counsel cites (PB30) concern the opposite scenario where the percentage is used to cross-check to lodestar, so do not resemble this case. "A percentage of the fund cross-check is optional…" *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 281 (6th Cir. 2014); *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 501 (6th Cir. 2011) (could have used "lodestar analysis alone"); *Linneman*, 970 F.3d at 628. Omitting *percentage* crosschecks makes sense. Courts frequently award lodestar fees when the value of settlement cannot be accurately ascertained.

But this Court need not resolve the question of whether the lodestar crosscheck is mandatory, preferred, or purely discretionary. The Court should require lodestar crosschecks for large settlement funds (OB25), but even if it does not the district court erred by curtailing Hall's ability to make and develop arguments based on the lodestar. Hall objected to the structure of the fee award (*see* Section III, *infra*) *and* to the percentage awarded, which he called a windfall. OB25. A settlement over $500 million would typically earn a fee of about 12%. Objection, RE 1548, PageID ## 60231-35

(recounting empirical data concerning fee awards in similarly-sized settlements). The *in camera* billing records directly pertained to Hall's objection. To use the percent-of-fund approach, the court must select a percentage, and the appropriate percentage depends on the amount of common benefit work attorneys invested. "With a fund this large, picking a percentage without reference to all the circumstances of the case…would be like picking a number out of the air." *See In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 12 F.3d 1291, 1297 (9th Cir. 1994). This is why other circuits uniformly reverse fee awards for failure to comply with Rule 23(h), even when district courts set fees based on the percent of fund. OB25. The district court answered Hall's argument in part by citing its review of records Hall had no access to.[5]

Gascho did not opine on this issue. There, the objector did not seek discovery; he merely argued that the scantness of the billing submissions did not support a lodestar-based award. The *Gascho* majority reserved judgment on that argument and the dissent agreed with it. 822 F.3d at 281, 297-98. *Gascho* does not suggest district courts can curtail class members' rights to make these arguments, and it does not control Hall's appeal.

When, as here, the fee papers do *not* provide the necessary "thorough information," objectors are entitled to discovery. *Cf.* 2003 Committee Notes. The

[5] Transparency would have also assisted appellate review because it would clarify whether the district court's finding that Hall's argument about contract attorneys marked up to $500/hour was "unsupported" and "improperly raised" because of some currently sealed part of the record. Fee Order, RE 2105, PageID # 72127. It appears the district court simply erroneously believed that Hall could not object to Liaison Counsel fees even though he's ordered to pay them, an independently reversable error. OB30. Appellees do not address this error.

district court erred in declining to follow the consensus of circuits by refusing to allow "a complete airing" of the fee objections. *Jordan v. Mark IV Hair Styles, Inc.*, 806 F.2d 695, 697 (6th Cir. 1986) (quoting 3B MOORE'S FEDERAL PRACTICE, ¶ 23.91 at 23-568 (1978)). Objectors cannot meaningfully respond to evidence entered in secret. If Rule 23(h) is not to be a nullity, this Court must reverse.

C. Counsel applying for common fund fees concealed basic billing detail from objectors.

As Hall observed (OB7, OB18-19, OB28), Levy Konigsberg, one of the four appointed firms seeking common benefit fees, did not even identify the attorneys whose work supposedly entitles the firm to tens of millions of dollars paid from every claimant. Class Counsel does not deny or excuse this astonishing failure, and instead gaslights when they assert "every law firm included in the fee request provided information indicating specific firm personnel who worked on the case, their title and rates." PB34. No, they did not. The appointed firms promised to provide a summary of these hours (OB7), the district court said it would request it (Fairness Hearing Trans., RE 1906, Page ID ## 67010-11), but absent class members never received it.

Class Counsel appears to tacitly admit they cannot defend some of the billing. Hall continues to contest expenses that might have been paid toward Liaison's Counsel's XRF bone testing program, which was at best a private benefit and at worst *harmful* to claimants who had inferior access to XRF testing and thus had their recoveries diluted by Liaison Counsel's clients who were tested by the thousand. OB31-33; Motion RE 1736, PageID ## 62815-16. Class Counsel answers this argument with

a negative pregnant: "Hall's motion for discovery failed to show a need for cost-related information ***as to class counsel***." PB40 (emphasis added). District courts cannot excuse counsel from documenting their costs. *See Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987) (abuse of discretion to award expenses without documentation). The broad categories of costs claimed by class and liaison counsel do not permit objectors to evaluate whether they were incurred for common benefit work, yet all claimants bear their expense.

D. The court's reliance on billing records militates against sealing these records from Flint residents asked to foot the bill.

While summary information often suffices for performing a lodestar crosscheck (PB34-35), the district court substantially prejudiced objectors by relying on records they lack access to. OB29-32. Class Counsel makes much of the peculiarities of *Shane Group, Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299 (6th Cir. 2016), but ultimately elides the key principles that Hall cites. OB27-28.

Evidence considered by a court in reaching its decisions constitute "judicial records" and only "compelling" reasons can justify sealing such records. *Shane Group*, 825 F.3d at 305. "The line between these two stages, discovery and adjudicative, is crossed when the parties place material in the court record." *Id.* That detailed billing records had been submitted to the Special Master, and thus entered into the adjudicative record, is more—not less—reason that they should have been disclosed to class members. OB25-27 (explaining why Special Master review cannot substitute for class member and public access). Lacking access to the underlying billing, Hall was unable to

make arguments to the district court, or before the Special Master (as often occurs in fee disputes (OB34)). The district court's essentially *ex parte* review of billing disserved Flint claimants. For example, the Special Master's report does not meaningfully address the misrepresentation of contract attorneys as "associates," nor their inflated billing rates, issues that Hall flagged as meriting investigation. Declaration, RE 1548-7, PageID ## 60284-85; Discovery Motion, RE 1586, PageID # 61007.

Shane Group does not limit principles of transparency and openness to settlement adjudication, as Class Counsel suggests. PB36-37. In fact, this Court identified billing records as one aspect of the excessive secrecy in that case. *Shane Group*, 825 F.3d at 310.[6] The same principles logically apply to class action fee adjudication. Indeed, *Shane Group* adopts the reasoning of *In re Cendant Corp.*, 260 F.3d 183 (3d Cir. 2001), an appeal that involved a question of attorneys' fees, not settlement approval. 825 F.3d at 305-08.

Class Counsel cannot find a "compelling" reason to keep records sealed that the district court expressly relied on, so suggests that disclosure could reveal tactical information about ongoing litigation. But Hall anticipated this argument. OB28 n.5. In

[6] Class Counsel quibble (PB37) that this was not an "express holding," but cannot deny the Court issued a well-considered and persuasive instruction "[t]o guide the proceedings on remand." 825 F.3d at 309.

Class Counsel argue that the fee request here "go[es] further" because it breaks hours into "eighteen distinct categories of case activities." PB37-38. In fact, as Hall observed at the fairness hearing, the summary disclosures in this case closely resemble the inadequate records filed in *Shane Group*. Presentation, RE 1899-1, PageID ## 66479, 66482; Fairness Hearing Transcript, RE 1906, PageID # 67012. As discussed above, one of the four fee-applicant firms failed to provide even "employee information with corresponding hours and rates." PB37.

fact, Hall moved to avoid the problem entirely 20 months ago by offering to receive billing information under the Protective Order and with instructions not to share it with ongoing defendants. Discovery Motion, RE 1586, PageID # 61010. Class Counsel has not been able to come up with a compelling reason to hide records relied upon by the district court.

Class Counsel cannot provide a scintilla of evidence that the district court ever considered, let alone offered a reasoned response to this argument, which independently merits reversal. OB28-29.

III. The 25% and 17% special assessments violate a foundational principle of the common fund doctrine: fees must be spread uniformly.

Hall's opening brief explains the historically-rooted requirement that common benefit fees be spread proportionally among the beneficiaries. OB35-39, 46. It also explains the public policy underlying that rule and how the district court does not provide any sound reason, let alone the "extraordinary circumstances"[7] necessary, for deviating from this requirement. OB39-45.

Class Counsel seek refuge in the district court's discretionary balancing of the *Ramey* factors. PB9-11, 14-19, 46. This is a red herring; Hall isn't challenging the weighing of factors or the choice of 25% rather than 20%. "A trial court has wide discretion but only when it calls the game by the right rules." *Fox v. Vice*, 563 U.S. 826, 839 (2011). "[T]he trial court must apply the correct standard, and the appeals court

[7] *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 119 (3d Cir. 1976) (*en banc*).

must make sure that has occurred." *Id.* at 838. Approving a fee structure that disproportionately taxes certain beneficiaries is calling the game by the wrong rules

Hall does not seek "appellate review of what essentially are factual matters." *Contra* PB15. Courts do not have discretion to violate a core principle of the historical equitable practice that common fund fees must be spread ratably among beneficiaries. This appeal doesn't implicate the weighing of factors, finding of facts, or selecting of percentages; it presents questions regarding of law regarding methodology and process.

District courts have an obligation to scrutinize the terms of a proposed common fund fee with a "jealous regard" for class members and an "eye to moderation." OB40 (quoting cases). Unfortunately, they often defer to class counsel rather than exercise a zealous degree of oversight. *E.g.,* Brian Wolfman, *Judges! Stop Deferring to Class Action Lawyers*, 2 U. MICH. J. L. REFORM 80, 82 (2013). It is difficult to overcome the "natural temptation to approve a settlement, bless a fee award, sign a proposed order submitted by plaintiffs' counsel, and be done with the matter." *Marshall v. Deutsche Post DHL & DHL Express (USA) Inc.*, 2015 WL 5560541, 2015 U.S. Dist. LEXIS 125869, *2 (E.D.N.Y. Sept. 21, 2015).

These dynamics of class-action settlement proceedings "impose[] a special responsibility upon appellate courts to hear challenges to fee awards." *Gelis v. BMW of N. Am., LLC*, 49 F.4th 371, 379 (3d Cir. 2022). The same dynamics also favor "guidance" of clear legal rules, not the "empty and amorphous test" plaintiffs propose. *Fox*, 563 U.S. at 836. If this Court licenses district courts to overstep the guardrails of Rule 23(h) procedure and the historical boundaries of the common fund doctrine, it

would beget "unlimited discretion [and] disparate results." *Perdue v. Kenny A*, 559 U.S. 542, 551 (2010) (simplified). These bright-line boundaries "bring[] clarity and consistency"—"values [that] serve judges and parties alike." *Tomei v. Parkwest Med. Ctr.*, 24 F.4th 508, 513 (6th Cir. 2022); *accord Daunt v. Benson*, 956 F.3d 396, 424-25 (6th Cir. 2020) (Readler, J., concurring in the judgment). And ultimately, as in this case, transgressing these boundaries would work to the disadvantage of those unnamed class members farthest away from the negotiating table. *E.g.*, OB31, 39.

Beyond pointing to discretion, Class Counsel, like the district court, defend the special assessments in the service of "parity." PB45. Hall has already explained why that rationale is contrary to law (OB38, 41), is inequitable (OB41-42, 44-45), and isn't even realized by the fee structure imposed here (OB42-43). The proportionality rule doesn't "demand[]" that unrepresented and late-represented claimants pay less in total attorneys' fees than claimants with individual counsel. *Contra* PB47. That depends on whether claimants retain expensive individual counsel or *pro bono* counsel. And those arrangements "are simply irrelevant" to what matters: that all claimants should pay the same common benefit percentage. *Lindy*, 540 F.2d at 119. Although Class Counsel purport to find a distinction in the "extensive record" of this case (PB48), there is no daylight between the "parity" reasoning of the *Lindy* district court and the court below. OB38. And just as the effort to create parity in *Lindy* was "only marginally effective," so too here.[8] OB43. The injustice here is worse than that in *Lindy*. There, the

[8] Class Counsel states that the court awarded individually retained counsel 25% of their clients' awards. PB44 n.20 (citing Fee Order, RE 2105, PageID # 72143). But individually retained counsel did not move for fees; lead counsel simply moved for a

unrepresented claimants cross-subsidized the represented claimants, but at least it wasn't a full subsidy; their total fees were still less than claimants who contracted for and obtained individual services. 540 F.2d at 108, 119 (about 11.3% for unrepresented claimants and about 21-41% for represented claimants). Under the fee structure here, claimants who received *individual* services bear not a marginal cent more of those costs. Why not a personal accountant, or physician, or educational consultant, psychiatrist or XRF bone testing technician? No administrable limiting principle exists for the "parity" rationale (and the district court expressly rejected it when it comes to bone testing).

Plaintiffs now conjure a different justification for the special assessments: the level of work individually retained counsel put into the litigation. PB48-49. This argument fails for several reasons. *First*, and perhaps most fundamentally, the special assessments don't operate on the attorneys, they operate on the claimants themselves and the value of their claims. Fee Order, RE 2105, PageID ## 72088-89, 72142. If those individually retained counsel conferred a common benefit through their work, then they can be included in a lawful common fund fee, spread ratably. If they did not, then they are at most entitled to a fee from their individual client as a matter of private contract. In no event, however, should non-client claimants be asked to subsidize other

"cap" on individually retained attorneys' fees, as the Fee Order itself recognizes repeatedly. Fee Order, RE 2105, PageID ## 72063-64, 72080-81, 72088. The order's "award[]" to individually retained counsel is thus one of administrative convenience to the administrator, rather than the *sua sponte*, *sub silentio*, and unlawful increasing of negotiated contingency percentages that fall below 25%.

claimants' personal benefits—obtained from their individually retained counsel—through paying disproportionate shares of the common fund fee.

Second, the finding that some individually retained counsel "expended time filing their own lawsuits and that a few responded to motions to dismiss" does not even track the fee structure. That is, the size of each claimants' common fund fee share doesn't depend on whether their individually retained counsel did anything at all, just whether they were retained by a certain date. Retention of a private attorney, even when also filing a complaint, cannot be a *per se* common benefit. *Gerena-Valentin v. Koch*, 739 F.2d 755, 759 (2d Cir. 1984) ("where multiple litigation is brought, a duplicative action which contributes virtually nothing to the ultimate result cannot justify an award of counsel fees."); *Lindy*, 540 F.2d at 111. Attorneys cannot "simply manufacture [common benefit] fees for themselves by filing a complaint," let alone merely retaining a claimant as a client. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Litig.*, 914 F.3d 623, 642-43 (9th Cir. 2019) (quoting *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 196-97 (3d Cir. 2005) and explaining general distinction between common benefit and individual benefit work).

And the district court's own earlier case management order on time and expense procedures recognized this inescapable enforceable distinction between common benefit work and individual benefit work. CMO, RE 507, PageID # 15829. Despite plaintiffs' *post hoc* rationalization, the district court never used its finding regarding individually retained counsel's work as a reason for the special assessments either. Rather, it used it only as a reason to set 25% as the individually retained counsel fee

cap. Fee Order, RE 2105, PageID # 72103. Hall does not contest or appeal the 25% and 8% contingency fee caps that the district court set on individually retained counsel.

Finally, Class Counsel repeat the district court's claim that the special assessments reflect the fact "the fact that there would not be a settlement to participate in, at all, but for the work of Plaintiffs' Counsel and in particular, PLG." PB49. But that is true for all claimants, so it does not justify disproportionate special assessments visited on some disfavored claimants, rather than following *Lindy*. Class Counsel' own gloss—that those paying special assessments "*received* greater common benefit"—is without citation to the record. And it's indeed inconsistent with the record, which demonstrates that unrepresented and late-represented claimants will obtain less common benefit from the settlement, because of its compensation grid (providing bonuses, for example, for claimants with bone scanning or neurological testing evidence) favoring represented claimants. OB44-45.

With no way to distinguish *Lindy*, Class Counsel resort to arguing that *Diet Drugs* "overturned" it *sub silentio*. PB49. As a panel decision *Diet Drugs* could not have "overturned" binding circuit law, let alone an *en banc* decision like *Lindy*. 3d Cir. I.O.P. 9.1; *Brown v. Sage*, 941 F.3d 655, 665 (3d Cir. 2019) (Smith, C.J., concurring). The earlier-decided precedent would control if the precedents are incompatible. *Id.* But, as Hall already discussed, *Diet Drugs* is distinguishable because the common benefit apportionment discrepancy there was not great in the context of the fee award as a whole. OB40. Here, as in *Lindy*, it is enormous. OB37. This is dispositive.

Conclusion

For these reasons, this Court should vacate the district court's order awarding fees and remand with instructions to permit objector review of lodestar and to eliminate the disproportionate special assessments.

Dated: December 21, 2022

Respectfully submitted,

/s/ Adam E. Schulman

Adam E. Schulman
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Telephone: (610) 457-0856
Email: adam.schulman@hlli.org

Attorneys for Appellants Raymond Hall and Ashley Jankowiak

Certificate of Compliance with Fed. R. App. Proc. 32(a)(7)(C)

This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 6,212 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii), as counted by Microsoft Word 2019.

This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Garamond font.

Executed on December 21, 2022.

/s/ Adam E. Schulman
Adam E. Schulman

Proof of Service

I hereby certify that on December 21, 2022, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

Executed on December 21, 2022.

/s/ Adam E. Schulman
Adam E. Schulman
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Telephone: (610) 457-0856
Email: adam.schulman@hlli.org

Attorneys for Appellants Raymond Hall and Ashley Jankowiak