No. 22-1950

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re Wawa, Inc. Data Security Litigation

Theodore H. Frank,
Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania, No. 19-cv-06019

Opening Brief of Appellant Theodore H. Frank

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Adam E. Schulman
1629 K Street, NW, Suite 300
Washington, D.C. 20006
(610) 457-0856

Attorney for Appellant Theodore H. Frank

Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Statement of Subject Matter and Appellate Jurisdiction

The district court had jurisdiction under 28 U.S.C. § 1332(d) because consumer plaintiffs' consolidated class-action complaint alleges claims that exceed $5,000,000 exclusive of interest and costs, there are over 100 members in the proposed class, and defendant Wawa, Inc. is a citizen of a state different from that of at least one class member. JA124.[1] For example, named plaintiff Amanda Garthwaite is a Virginia citizen, while defendant Wawa is a New Jersey corporation with its principal place of business in Pennsylvania. JA120, 123.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The lower court issued its final decision overruling class member Theodore H. Frank's objection and approving plaintiffs' motions for settlement approval and attorneys' fees on April 20, 2022. JA4, 31. Frank filed a notice of appeal on May 18, 2022. JA1. This notice is timely under Fed. R. App. P. 4(a)(1)(A). Frank, as a class member who objected to settlement approval below, JA147, has standing to appeal a final approval of a class action settlement or an accompanying fee award without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 299 (3d Cir. 2005); *see also In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727-31 (3d Cir. 2001).

In its May 24 Order, this Court instructed the parties to address the issue of appellate jurisdiction. Frank agrees with the consumer plaintiffs' and Wawa's responses.

[1] "JA" refers to the Joint Appendix, and "Dkt." to the docket below, No. 19-cv-06019 (E.D. Pa.).

No. 22-1743, App. Dkts. 12, 18. Though the employee and financial institution tracks remain pending in the consolidated litigation below, the court's April 20 order ending the consumer track is a § 1291 final decision. In a consolidated case or MDL, the constituent cases "retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party." *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018); *see also Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 (2015). There is an exception when a master complaint implements a merger of the distinct actions, *Gelboim*, 135 S. Ct. at 413 n.3, but no such merger occurred in this case. The operative consolidated complaint, disposed of by the settlement and final approval order, alleges consumer-track claims on behalf of only the consumer plaintiffs. JA93.

Statement of the Issues

1. This Court has long required district courts to make a "reasonable assessment" of the value of proposed class-action settlements, grounded in "economic reality," before granting approval and awarding attorneys' fees. *In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995) ("*GM Trucks*"). Added in 2018, Federal Rule of Civil Procedure 23(e)(2)(C) reinforces that precedent by requiring courts to consider the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" and "the terms of any proposed award of attorney's fees, including timing of payment." The only appellate courts to discuss these amendments hold that these rules require district courts to value a settlement by what the class actually, rather than hypothetically, received. *E.g.*, *Briseño v. Henderson*, 998 F.3d 1014, 1024 (9th Cir. 2021). Did the district court err as a

matter of law by valuing the settlement at the $9 million "made available," rather than the $2.8 million in gift cards and $80,000 in cash class members the settlement pays class members, and then awarding fees of more than what class members received under the settlement? (Raised at JA562-66, 577-78, JA621-22, JA726, Dkt. 298 at 4; Ruled on at JA21-22.)

Statement of Related Cases and Proceedings

There is no related case pending before this Court. Case No. 22-1743 was an appeal arising out of the same order in the same litigation; this Court consolidated the two appeals. The 22-1743 appellants voluntarily dismissed their appeal.

Statement of the Case

This is an appeal of an attorney fee award of $3.2 million in a class-action settlement where less than 3% of the class will receive a total of $80,000 in cash and $2.8 million in gift cards. Class member and appellant Ted Frank at first objected to the original version of settlement below. The parties agreed to modify the settlement to address Frank's objection to settlement approval, while leaving open Frank's objection to the disproportionate fee request.

A. Plaintiffs sue over the exposure of Wawa customers' personal information.

For most of 2019, hackers compromised Wawa's payment systems, exposing the credit and debit card information of about 22 million Wawa customers nationwide. JA98. Just after Wawa publicly notified customers of the data breach in December 2019, several plaintiffs sued Wawa on a variety of state-law claims. *E.g.* Dkt. 1. Soon, the

district court consolidated several cases in Docket No. 19-cv-6019. Dkt. 9. Over the next six months, counsel wrangled for appointment, resulting in orders setting three separate tracks for the consolidation litigation—a financial institution track, an employee track, and a consumer track—and appointing four firms as Interim Co-Lead Class Counsel (together "class counsel") for the consumer plaintiff class. Dkts. 119, 120. In their ultimately successful joint application to be appointed counsel for the consumer track plaintiffs, class counsel proclaimed that they had "learned from experience in data breach cases the importance of using a simple claim form and claims process to maximize class members' participation in any settlement." Dkt. 78 at 25. They promised that they would "requir[e] minimal effort or documentation to submit a claim." Dkt. 78 at 25.

Shortly after the appointment of counsel, the consumer plaintiffs filed their Consolidated Class Action Complaint. JA93.

B. Within nine months, and before any contested motion practice, the parties settle.

The consumer plaintiffs and Wawa reached a settlement in principle in September 2020, memorializing it and submitting it to the court for preliminary approval in early 2021. JA4; Dkt. 179. Under that initial proposal (Dkt. 181-1), the court would certify a class of "All residents of the United States who used a credit or debit card at a Wawa location at any time during the Period of the Data Security Incident of March 4, 2019 through December 12, 2019. Excluded from the Settlement Class are Wawa's executive officers and the Judge to whom this case is assigned." Dkt. 181-1 at 8. Wawa estimated that there are 22 million class members. Dkt. 181 at 6.

The proposed settlement provided three tiers of relief to class members who submitted a valid claim:

- Tier 1 claimants (those who could submit reasonable documentary proof of a transaction at Wawa during 2019 and could attest under penalty of perjury that they spent some amount of time monitoring their accounts) could file a claim for a $5 Wawa Gift Card. Dkt. 181-1 at 11. Tier one claims were subject to a $6 million cap and a $1 million floor, such that the gift card's value would be augmented or reduced if fewer than 200,000 or more than 1.2 million class members filed a Tier 1 claim. Dkt. 181-1 at 11.
- Tier 2 claimants (those who could submit the same documentary proof and attestation as Tier 1 claimants, and could also submit reasonable proof of an actual or attempted fraudulent transaction on the same card) could file a claim for a $15 Wawa Gift Card. Dkt. 181-1 at 11. Tier 2 claims were subject to a $2 million cap and no floor. Dkt. 181-1 at 11.
- Tier 3 claimants (those who could submit the same proof as Tier 1 and 2 claimants, but could also submit reasonable proof that they incurred out-of-pocket expenses that were not reimbursed) could file a claim for a cash payment of actually incurred expenses up to $500. Dkt. 181-1 at 12. Tier 3 claims were subject to a $1 million cap and no floor. Dkt. 181-1 at 12.

The Wawa Gift Cards are "e-gift cards" that are fully transferable and can be used for any item sold in stores aside from cigarettes or other tobacco or nicotine delivery products. Dkt. 181-1 at 9. At first they were subject to an expiration date, but

after an objection to the coupon nature of the expiration, Wawa agreed that they would not expire. JA612, 616. As we will discuss, the parties made other settlement modifications to address class-member objections.

Class members who failed to submit a claim or opt out would receive no compensation and the settlement's general release would release their claims. Dkt. 181-1 at 29. In the settlement, Wawa agreed to "injunctive relief" acknowledging that providing benefits to its valued customers shaped Wawa's previous decision to strengthen its data security systems; that the Wawa Board had authorized $25 million to improve Wawa's data security posture; and for two years Wawa agreed to retain an assessor to conduct an annual security audit, comply with standard encryption security procedures at the point of sale, and maintain written information security policies. Dkt. 181-1 at 13-14. The parties agreed to value this injunctive relief as at least $35 million. Dkt. 181-1 at 13.

Class counsel negotiated for themselves the right to seek $3,200,000 in attorneys' fees and costs, with the "cooperat[ion]" of Wawa. Dkt. 181-1 at 23. In the original settlement, if the Court awarded less than that amount, any excess sums would remain with Wawa. Dkt. 181-1 at 23. Wawa would pay class counsel in cash, rather than gift cards.

To address opposition of employee-track plaintiffs (Dkt. 188), the parties amended the settlement to clarify that employees were not sacrificing claims related to data that was submitted "in a capacity as an employee or dependent rather than as a customer." Dkt. 201 at 2.

The district court preliminarily approved the settlement and authorized notice. JA359. Notice was provided only through publication in Wawa stores and the settlement website, and not to any individual class members. JA369-70, 372-73.

Class counsel requested $3.2 million in combined fees and expenses ($3,040,060 attributable to attorneys' fees), uncontested by Wawa. Dkt. 257. Class counsel argued that the court should award fees on a lodestar basis, but submitted no delineation or breakdown of their proclaimed 5942 hours of billing beyond aggregate hours by firm, biller, and rate. Dkt. 258 at 14-24.

Second, they argued that the fee request could pass a percentage-of-recovery crosscheck, because the $3 million fee was 24.9% of the $12.2 million "overall value of the Settlement" summing the $3.2 million fee and expense fund with the $9 million in gift cards made available. Dkt. 258 at 10. Class counsel "conservatively exclude[d]" the injunctive relief from the valuation of the denominator. Dkt. 258 at 12, 33. Class counsel was adamant that the settlement value should be measured by the total amount of gift cards made available, not by the value of the gift cards that were claimed, much less the value of the gift cards that are eventually redeemed. Dkt. 258 at 27-31.

C. Class member Frank objects and the parties amend the settlement to create an unambiguous common fund instead of a segregated fee structure.

Theodore H. Frank timely objected to the settlement approval and fee request on November 10, 2021. JA547-83. Frank documented his class membership and submitted a claim for a gift card. JA585.

Frank is the founder of the Center for Class Action Fairness, now part of the nonprofit Hamilton Lincoln Law Institute. JA585-86. CCAF's settlement objections have won hundreds of millions of dollars for class members and shareholders and several landmark appellate decisions protecting class members' rights. JA587-88. Frank has argued some of the leading decisions on the proper valuation of claims-made settlements, including *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); and this Circuit's decision in *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013). While the Center has lost some of the dozens of objections it has brought in the last eight years, it has won the majority of its federal appeals, including all three of the appeals it has prosecuted in the Third Circuit. *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316 (3d Cir. 2019); *Baby Products*; *Dewey v. Volkswagen, AG*, 681 F.3d 170 (3d Cir. 2012).

Frank objected that the settlement unfairly served class counsel's interests at the expense of the class. JA558-73. Class counsel had negotiated for itself the right to seek unopposed fees that Frank predicted would significantly outstrip what the class would receive: the structure of the claims-made settlement meant that class claims would be a fraction of the hypothetical $9 million amount made available. JA562, 563, 565-66, 569-71. On top of that, class counsel had segregated its fee fund so that if the district court eliminated any excess in their fee award, only Wawa—the party that had agreed not to oppose the fee request—and not the class, would benefit. JA571-73. Frank maintained that it would be legal error to value the settlement by the funds "made available" to the class especially because the bulk of relief to class members in this case was "coupon-adjacent" gift cards. JA559-60. The so-called injunctive relief could not

remedy the unfairness because that was simply a sum of money that Wawa's Board had allocated voluntarily in the wake of the data breach. JA568.

Additionally, because of the settlement structure using a floor only for Tier 1 claims, Frank expected that there would be the arbitrary and irrational result that Tier 2 claimants would actually recover less value than less-injured Tier 1 claimants. JA573-74.

Frank further objected in the alternative that, if the court granted settlement approval, the fee award should be limited to 25% of the true constructive common fund. JA574-80. Class counsel did not provide billing records with sufficient detail to allow the court to use a lodestar methodology to award fees. JA575-77. In any case, percentage-based awards better align the interest of class with class counsel, but only if they are tethered to the actually claims made, not a fictitious 100% claims rate. JA577-78. Finally, the available lodestar information confirmed that class counsel's $3 million request was unreasonable. JA578-80.

Just two days after Frank objected, the parties submitted a second amendment to the settlement. Dkts. 264, 264-1. This amendment fundamentally altered the settlement structure to provide that all Wawa mobile app users before December 12, 2019 would automatically be included as Tier 1 $5-gift card claimants even if they did not submit a claim. The amendment suggested that Frank had correctly anticipated the minuscule claims rate, and the claims administrator's later declarations confirmed this. Only 6,744 class members had filed a Tier 1 claim for a total gift card face value of $33,720 (under the original agreement, these claims would have been augmented 30-fold to $1 million); only 683 class members filed a Tier 2 claim for a total gift card face value of $10,245; and only 254 filed a Tier 3 claim for a total cash value of $79,829.71.

JA605-06, 772. There were more than 550,000 identifiable mobile app users (JA772); adding them into the $5 gift card Tier 1 pool resolved Frank's objection about intraclass allocation. Although a stark improvement over the $1.1 million of the original settlement, the $2.9 million was still less than class counsel's $3.2 million clear-sailing award, and Frank maintained his objection to the disproportion.

Frank negotiated with Wawa to unwind the segregated fee fund, so that any reduction in excess fees would augment class relief, and the parties agreed to the Third Amended Settlement Agreement as a result. JA620, 732. This amendment eliminated the fee segregation: any reduction in class counsel $3.2 million fee and expense request will augment the value of the settlement's gift cards *pro rata*. JA754-55. The amendment meant that the district court had the power to appropriately rebalance the constructive common fund's equilibrium simply by awarding a reasonable fee, and "bring the settlement into compliance with Rule 23(e)'s fairness requirement." JA621.

With the elimination of the fee segregation and with Wawa's confirmation that the settlement gift cards would not expire, Frank agreed to withdraw his objection to settlement approval, maintaining his objection to class counsel's Rule 23(h) request. JA617. Frank continued to maintain that a $3.2 million Rule 23(h) award for class counsel was unreasonable, because it would constitute over 50% of the constructive common fund: the class had been so indifferent to the settlement that it required four attempts and Frank's involvement to eliminate the settlement's deficiencies. JA622, 724-25.

Of the 22,000,000-person class, under 8,000 class members (0.035%—3 hundredths of one percent) submitted a claim to participate in the settlement. JA12.

Nearly all of the relief to be distributed to class members consists of the automatic distribution of $5 gift cards to mobile app users. 97% of the class will get no compensatory relief and will release their claims against Wawa.

D. The district court values the settlement relief by the amount "made available" and grants the fee award in full.

After a fairness hearing (JA632), the district court approved the settlement and granted class counsel's full request for $3.2 million fees and expenses. JA4.

The district court awarded fees on a percentage basis. JA18-25. But the Court did not calculate the fee as a percentage of the gift cards that were redeemed, claimed, or even distributed to class members; it calculated the fees based on a $12.2 million denominator—what it called the "entire constructive common fund." JA21-22. This $12.2 million consisted of both the negotiated $3.2 million fee and expense sum, and the $9 million in "caps" under the tier awards ($6m in Tier 1 gift cards; $2m in Tier 2 gift cards; and $1m in Tier 3 cash payments). Under that view, the $3 million fee request constituted a reasonable 24.9% of the entire constructive common fund. JA22. (In a footnote, the court agreed that the injunctive relief weighed in favor of approval, but did not include it in calculating the constructive common fund or otherwise. JA20 n.4.) The district court neither mentioned nor addressed the contrary authority Frank cited, either before or after the 2018 Amendments to Rule 23. It suggested instead that Third Circuit precedent supported its methodology. JA21.

Frank had objected to class counsel's lodestar calculation. The court agreed with Frank that percentage-of-the-fund was the appropriate methodology, but, when performing the lodestar crosscheck, overruled Frank's objections to its calculation.

JA23-26. The court found that the lodestar-crosscheck multiplier was 0.78, which supported the award. JA26.

Frank timely appealed. JA1.

Summary of Argument

Courts recognize that Rule 23(e)(2)(C), created by amendment in 2018, forbids class-action settlements that disproportionately favor class counsel over their clients. *E.g.*, *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *cf. also Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (same holding pre-amendment). Thus, when plaintiffs seek more than $3 million in attorneys' fees for a settlement that recovers less than $80,000 in cash and roughly $2.8 million in low-denomination Wawa gift cards, courts should refuse. As a fiduciary for the class, the court must ensure that the class members remain "the foremost beneficiaries of the settlement." *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013). Rule 23(h) offers courts a "simple and obvious way" to correct an imbalance in a common-fund settlement: award a fee lower than that requested and correspondingly "increase the share of the settlement received by the class, at the expense of class counsel." *Pearson*, 772 F.3d at 786.

But the court below awarded fees based on all relief "made available" under the settlement, even relief that is not actually realized, and even if that "relief" never has any realistic possibility of being realized. JA20-22. Thus, the court's settlement valuation included $5 million in gift cards and $900,000 in cash that will never leave Wawa's coffers, and awarded class counsel the majority of the less than $6 million of actual settlement benefit. This Court calls such an upside-down allocation "troubling." *Baby*

Products, 708 F.3d at 169. In *Baby Products*, it was error for the district court to value $18 million of *cy pres* from residual unclaimed money as if the class had received the entire settlement fund without considering the class's direct benefit. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Id.* at 178. That reasoning applies all the more when the hypothetical funds are returned to the defendant without even the fig leaf of indirect benefit. Any other result would be absurd. The fee award must be vacated and remanded for recalculation under standards compatible with Rule 23 and this Court's precedent.

Argument

I. Because of the agency problem in class-action settlements, courts must safeguard class members from overreaching fee requests.

Frank's argument against the fee award and the district court's methodology does not come in a vacuum. It is based not just on precedent and the text of the Federal Rules (Section II below), but on the need for courts to police abuses in class-action settlements. The context for *why* the district court's decision is wrong as a matter of public policy is important.

Unlike most settlements in bilateral civil litigation, class-action settlements require court approval under Rule 23's standards. "The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of the unnamed class

members who by definition are not present during the negotiations." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) ("*Pampers*"). "Because class actions are rife with potential conflicts of interest between class counsel and class members, . . . judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Baby Products*, 708 F.3d at 175 (quotation omitted); *accord GM Trucks*, 55 F.3d at 785. Thus, courts themselves assume a derivative "fiduciary" role for absent class members. *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 326 (3d Cir. 2019).

The conflict between the class and its counsel becomes most pronounced at the terminal settlement stage of the litigation, when class counsel petitions the court for a fee award from the common fund. "[O]nce a class action reaches the fee-setting stage, plaintiffs' counsel's understandable interest in getting paid the most for its work representing the class comes into conflict with the class' interest in securing the largest possible recovery for its members." *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1252-53 (11th Cir. 2020) (internal quotation omitted). "[R]egardless how a total settlement package is formally structured," "every additional dollar given to class counsel means one less dollar for the class." *In re Cendant Corp. Litig.*, 264 F.3d 201, 256 (3d Cir. 2001). Because the dynamics of the process conspire against the class's interests, "a thorough judicial review of fee applications is required in all class action settlements." *GM Trucks*, 55 F.3d at 819.

But this review poses a problem for district courts because "the adversarial process is 'diluted' or entirely 'suspended' during fee proceedings, and fee requests often

go unchallenged." *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 168 (3d Cir. 2006) (ultimately quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000)). If the fees are awarded from a pure common fund, then the defendant, "having bought peace, [has] no dog in the hunt for fees." *Ark. Tchr. Ret. Sys. v. State St. Corp.*, 25 F.4th 55, 65 (1st Cir. 2022). In other words, "a defendant is interested only in disposing of the total claim asserted against it; the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *GM Trucks*, 55 F.3d at 819-20 (simplified). Meanwhile, although the class members have a direct financial stake in common fund fee requests, the size of each class member's stake provides "an insufficient incentive to contest" an overreaching fee request "because the cost of contesting exceeds the objector's pro rata benefit." *Id.* at 812 (internal quotation omitted); *accord Goldberger*, 209 F.3d at 53; *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992).

Or, as initially occurred here, the parties might structure their all-inclusive settlement as a constructive common fund, rather than as a pure common fund. In a constructive-common-fund settlement, the parties provide for class relief, and then additionally establish an "artificially separate fee" fund. *GM Trucks*, 55 F.3d at 768; *see generally Briseño*, 998 F.3d at 1026-27 (explaining the flaws with such a structure). In a constructive-common-fund settlement, any excess fees revert to the defendant, thus severing the class's direct financial stake in the request, and enabling class counsel to tell the court that their fees "will in no way reduce the recovery to any of the settlement class members." *GM Trucks*, 55 F.3d at 819; *accord* JA664 (class counsel erroneously telling the court that its fee "will not reduce any settlement benefit of the Class" even after the fee segregation was properly eliminated). In economic reality, a segregated fee

fund is merely a "gimmick for defeating objectors" and insulating counsel's fee request from scrutiny. *Pearson*, 772 F.3d at 786. One might think then that defendants would have the proper economic incentive to contest overzealous constructive-common-fund fee awards. But no, then the euphemistically-named "clear-sailing clause" steps in. It precludes a settling defendant from opposing class counsel's fee request. *Briseño*, 998 F.3d at 1026-27. In fact, the clear-sailing provision here not only precludes Wawa from contesting class counsel's $3.2 million request, it affirmatively obligates Wawa to "cooperate with Class Counsel" in connection with preparing the fee petition. JA755.

Given this background, courts operating on their own (and at times with the aid of public-minded objectors) must actively engage in the "singularly important" function of measuring and calibrating fee awards. Notes of Advisory Committee on 2003 Amendments to Rule 23. They must 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); *Brown v. Rita's Water Ice Franchise Co.*, 242 F. Supp. 3d 356, 357 (E.D. Pa. 2017) (noting, and resisting, "the temptation").

Federal courts, however, are endlessly busy; district judges are "conditioned in non-class contexts to view negotiated resolutions of disputes as preferable to litigated ones." Russell Gold, *"Clientless" Lawyers*, 92 WASH. L. REV. 87, 116 (2017). They are "unaccustomed to inquisitorial judging." Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 869 (2016). "They are overworked, they have limited access to quality information, and they have an overwhelming incentive to

clear their dockets." Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS. L. REV. 805, 829 (1997). So, unfortunately, they often defer to class counsel rather than exercise a zealous degree of oversight. Brian Wolfman, *Judges! Stop Deferring to Class Action Lawyers*, 2 U. MICH. J. L. REFORM 80, 82 (2013).

Empirically, courts grant class action settlement fee requests in full 78% of the time. Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 953 (2017). For comparison, District of New Jersey courts granted more than 94% of fee requests in full; Northern District of California courts granted only 57% of requests in full. *Id.* at 956. *See also* N.D. Cal. Procedural Guidance for Class Action Settlements, *available at* https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/ (providing standardized guidance and scrutiny for judges and practitioners). Whatever the reason for this variance, the fact remains that "[b]y submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to." *Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014). And the problem creates a one-way ratchet: "On average, fees were 27% of gross recovery during the 2009-2013 period, which is higher than the average fee percentage of 23% [during] the 1993-2008 period." *Eisenberg, et al.*, 92 N.Y.U. L. REV. at 947.

Still, even the most deferential courts would raise an eyebrow if class counsel approached them with an undisguised $6.2-million-dollar common fund and proposed to appropriate $3.2 million (52%) for themselves. Because that is so far beyond the "twenty-five percent benchmark" that courts often use "as a beginning point for

determining whether a particular fee is reasonable,"[2] such a request would be facially unreasonable under Rule 23. *See, e.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (38.9% fee award would be "clearly excessive"). Indeed, "[a]pplication of the factors listed in *Gunter* [*v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000)] has led to fee awards in many cases below what some have argued to be a 'benchmark' of 25%." Chief Judge Edward R. Becker, *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689, 778 (3d Cir. 2001). A fee of this magnitude breaches not only bounds of Rule 23 reasonableness, but the more distant bounds of professional conduct. *See In re Martin,* 67 A.3d 1032, 1041-42 (D.C. 2013) (collecting cases on ethical restrictions on excessive contingency fees).

With no path to an exorbitant fee as a direct share of a common fund, settling parties often seek to obscure the relative allocations between lawyers and class members by artificially inflating the settlement's apparent value. The illusion of a large settlement benefits both class counsel and a defendant: "The more valuable the settlement appears to the judge, the more likely the judge will approve it. And the bigger the settlement, the bigger the fee for class counsel." Howard M. Erichson, *How to Exaggerate the Size of Your Class Action Settlement*, DAILY JOURNAL (Nov. 8, 2017).[3] Without judicial oversight to weed out such practices, class members are left with disproportionate settlements in which class counsel recovers far more than their proportional 25% share. *See Erichson*,

---

[2] *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 361 (3d Cir. 2010) (Weis, J., concurring and dissenting).

[3] *Available at* https://www.dailyjournal.com/articles/344700-how-to-exaggerate-the-size-of-your-class-action-settlement.

Aggregation as Disempowerment, 92 NOTRE DAME L. REV. at 874-893 (discussing five common mechanisms to inflate settlement valuations: (1) spurious injunctive relief; (2) coupons; (3) *cy pres*; (4) onerous claims procedures; and (5) reversions and claims-made settlements). Except for *cy pres*, each of these ailments afflicted the settlement process in this case.

A "claims-made" structure is among the most common tools used to conjure the mirage of value. In claims-made settlements, rather than make direct payment to class members, a defendant agrees to make a specified amount of money available to the class, in theory at least, but only pay out on the claims that class members file. *See Pearson*, 772 F.3d at 782-83 (describing perverse incentives created by a claims-made settlement); *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1058-59 (9th Cir. 2019) (same).

Settling parties expect that the amount the defendant will pay will be nowhere near the amount "made available" because "notoriously low" claims rates are endemic to class actions, particularly without any direct notice to the class. *Briseño*, 998 F.3d at 1026 & n.3; *see also, e.g.*, *In re Carrier iQ, Inc. Consumer Privacy Litig.*, No. 12-md-02330-EMC, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016) (prominent settlement administrator found a median claims rate of 0.023% in settlements with publication-only notice); *Pearson*, 772 F.3d at 782 ("the percentage of class members who file claims [in consumer class actions] is often quite low"). Settling parties can fine-tune claims procedures to adjust claims rates with near-actuarial certainty; indeed, a defendant can purchase "settlement insurance" precisely because claims rates are so predictable. Ted Frank, *Settlement Insurance Shows Need for Court Skepticism in Class Actions*, CEI OPEN MARKET blog (Aug. 31, 2016). In this case, given the documentation

required to file any claim (even a Tier 1 claim for a $5 gift card) and the lack of direct notice, Frank expected that the claims rate would fall well below one percent. JA565-66. Under a claims-made structure, class members recover—and a defendant pays—much less than when a defendant disburses funds directly to the class in a common fund. At the same time, class counsel can, as they did here, boast about the amount purportedly "made available" and seek to justify a large fee award, even though class members will receive a small fraction of that amount.

The way to ameliorate this problem is to motivate counsel to seek out absent members by tying fees to the amounts the class *actually* receives. As long as class counsel can maintain the illusion of an amount "made available" that justifies their fee award, and defendants can buy peace at a fraction of that amount, class counsel has every incentive to ensure that their putative clients will neither make claims nor receive cash. This Court and several others have long interpreted Rule 23 to look at "economic reality" rather than abstract fiction. *GM Trucks*, 55 F.3d at 821-22; *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 334, 338, 342 (3d Cir. 1998); *In re Cendant Corp Prides Litig.*, 243 F.3d 722, 741 n.25 (3d Cir. 2001); *Baby Products*, 708 F.3d at 179 n.13; *Pearson*, 772 F.3d at 781-82; *Pampers*, 724 F.3d at 721; *Strong v. BellSouth Telcomms.*, 137 F.3d 844, 852-53 (5th Cir. 1998). Rule 23 now expressly requires courts to see through that illusion; it requires that district courts consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Rule 23(e)(2)(C)(ii). And it requires that courts assure themselves that class's recovery is commensurate with "the terms of any proposed award of attorney's fees." Rule 23(e)(2)(C)(iii). Both appellate courts interpreting

Rule 23 after the amendments have repudiated the "made available" fiction. *Briseño*, 998 F.3d at 1026; *In re Samsung Top-Load Washing Machine Mktg., Sales Practices & Prods. Liab. Litig.,* 997 F.3d 1077, 1094 (10th Cir. 2021).

Injunctive relief is another tool that enables class counsel and the defendant to inflate the perceived value of the settlement. The value of injunctive relief is "easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003). Defendants benefit from res judicata following judicial approval of the settlement and the minimal cost of any incremental relief, while class counsel hopes for approval of a higher fee request. Here, class counsel deployed the settlement's injunctive relief—Wawa's expenditure of money on additional data security protocols that dates back to well before the settlement was reached—as background flavor to support their fee request. JA408-09. And the court accepted that point, although it correctly excluded the $35 million valuation from the constructive common fund. JA20 n.4.

Lastly, settlements can provide coupons or other non-cash relief, a "prime indicator of suspect settlements," to puff up settlement valuations. *GM Trucks*, 55 F.3d at 803. To some degree, coupon relief has fallen out of favor since the passage of the Class Action Fairness Act now requires that fees attributable to such relief be based on a percentage of those coupons actually redeemed. 28 U.S.C. § 1712; *see generally McKinney-Drobnis v. Oreshack*, 16 F.4th 594 (9th Cir. 2021). This settlement provides that less than 3% of the face value of the class's recovery will be paid in cash, the rest will be paid in $5 or $15 Wawa gift cards, with the vast majority of claimants receiving a $5 gift card. To be sure, at preliminary approval, the parties submitted evidence that 97.2%

of the value loaded onto Wawa gift cards is ultimately redeemed. Dkt. 181 at 8. But that is far different than electronic gift cards that are randomly distributed via email to class members without any expression of interest. JA726-27; *see generally Swinton v. Squaretrade, Inc.,* 454 F. Supp. 3d 848, 866 (S.D. Iowa 2020) (citing surveys and an expert report and concluding "a redemption rate of 3%" is "typical"). Whether or not these Wawa gift cards constitute coupons for purposes of the Class Action Fairness Act, this Circuit requires that district courts "bring an informed economic judgment to bear in assessing its value." *Merola v. Atlantic Richfield Co*., 515 F.2d 165, 172 (3d Cir. 1975); *see also GM Trucks*, 55 F.3d at 822 (pre-CAFA).

~~~

Excessive fee awards visit costs not just on absent class members in the particular case, but on the class system as a whole. Fee awards that exceed class recovery intensifies the "perception among a significant part of the non-lawyer population…that class action plaintiffs' lawyers are overcompensated for the work that they do." *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. at 692. They reify the lamentable proverb that "[a] lawsuit is a fruit tree planted in a lawyer's garden." *Detroit v. Grinnell Corp*., 495 F.2d 448, 469 (2d Cir. 1974) (quotation omitted). They erode public confidence in the class action device itself. *See generally Report on Contingent Fees in Class Action Litigation*, 25 REV. LITIG. 459, 466 (2006) ("The most frequent complaint surrounding class action fees is that they are artificially high, with the result (among others) that plaintiffs' lawyers receive too much of the funds set aside to compensate victims.").
~~~

That "public confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 692 (Cal. 2016) (Liu, J., concurring). "If class actions are typically seen as shakedowns by plaintiffs' lawyers trying to make a buck, class action filing or settlement will send a different message than if class actions are seen as compensatory." Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 2001 (2016); *see also* Gold, 91 NOTRE DAME L. REV. at 2029 (noting empirical surveys of the public reveal that they believe class members should be compensated and class actions are currently dysfunctional). To prevent any further erosion and to rehabilitate the class device, "it is important that courts should avoid awarding 'windfall fees' and that should likewise avoid every appearance of having done so." *Piambino v. Bailey*, 757 F.2d 1112, 1144 (11th Cir. 1985); *accord Fessler v. Porcelana Corona De Mexico*, 23 F.4th 408, 419-20 (5th Cir. 2022).

To be clear: Frank is not complaining that class counsel settled the case with Wawa for $6.1 million instead of $50 million or even $7 million. If parties negotiating at arm's length believe the appropriate compromise of the value of litigation is $6.1 million, so be it. But what class counsel may not do is exaggerate the value of a settlement, and then extract a disproportionate share of the settlement value as fees. This happened here: the class will receive less than $2.9 million, while the attorneys get $3.2 million.

II. The district court legally erred in awarding counsel a percentage of the gift cards and cash that class members will never receive.

Standard of Review: An attorneys' fees award accompanying a class settlement is reviewed for abuse of discretion. *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 299 (3d Cir. 2005). Abuse of discretion occurs "if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous." *Id.* (quoting *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727 (3d Cir. 2001)). Or if the court fails to consider an essential factor. *Lony v. E. I. Du Pont de Nemours & Co.*, 886 F.2d 628, 633-34 (3d Cir. 1989). Whether the court has employed the correct legal standard is a legal question "subject to plenary review." *Rite Aid*, 396 F.3d at 299. Questions of law about the interpretation of the Federal Rules of Civil Procedure, such as Rules 23(e)(2)(C) and 23(h), are reviewed *de novo*. *PR Management, S.A., v. Devon Park Bioventures, L.P.*, 19 F.4th 236, 242 n.4 (3d Cir. 2021).

A. A constructive common fund comprises only the sums that the defendant will pay to class members, not those that it has merely "made available."

"Cases are better decided on reality than on fiction." *Pampers*, 724 F.3d at 721. Especially in class action cases that implicate the rights of millions of class members, the court's "inquiry needs to be, as much as possible, practical and not abstract." *Baby Products*, 708 F.3d at 174. But when the district court evaluated class counsel's fee request, it violated that cardinal principle of class action adjudication. It determined that "attorney's fees should be analyzed based [on] the entire constructive fund rather than the claims filed." JA21. By this, the court meant it would value the settlement at a

fictional $12.2 million: the sum of (1) the maximum $6 million cap for Tier 1 claims ($5 gift cards), (2) the maximum $2 million cap for Tier 2 claims ($15 gift cards), (3) the maximum $1 million cap for Tier 3 claims (cash), and (4) the negotiated $3.2 million fee and expense fund. JA19, 20, 22, 28. Thus, it overruled Frank's objection that the fee request constituted a disproportionate majority of the common fund.

That was a legal miscue: "[i]n mathematical terms, the equation for the percentage method in constructive common-fund cases effectively works like this: the actual payment to counsel is the product of (1) the percentage the court decides to award, and (2) *the payment to the class* plus the expected payment to counsel (together, the class benefit)." *In re Home Depot Inc., Customer Data Sec. Breach Litig.*, 931 F.3d 1065, 1092 (11th Cir. 2019) (emphasis altered). In other words, the "ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781 (quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014)). "Basing the award of attorneys' fees on this ratio, which shows how the aggregate value of the settlement is being split between class counsel and the class, gives class counsel an incentive to design the class process in such a way as will maximize the settlement benefits actually received by the class, rather than to connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class." *Id.*

Though the district court faulted Frank for "not address[ing] the Third Circuit precedent to the contrary" (JA21), this Circuit has long been the vanguard of the economically realistic approach that Frank advocates, dating back at least to Judge Becker's "masterful opinion" first invoking the constructive-common-fund doctrine in

GM Trucks. 55 F.3d at 823 (Gibson, J., concurring in the central holding and with the judgment). In *GM Trucks*, the parties proposed to settle a class action by providing the owners of millions of General Motors pickup trucks with $1000 coupons toward the purchase of a new truck, or the option to send $500 coupons to a third-party of their choosing. *Id.* at 780. Class counsel contended that the settlement was worth about $2 billion, based on an expert report that projected 34-38% of the class would redeem the coupons for new trucks and an additional 11% of the class would sell the coupons for $500. *Id.* at 807. This valuation was only a fraction of that "made available" under the settlement. But still, this Court refused to credit it. Instead, it instructed that when a district court values a constructive common fund, it "needs to make some reasonable assessment of the settlement's value and determine the precise percentage represented by the attorneys' fees." *Id.* at 822. It "need[s] to determine a precise valuation of the settlement on which to base its award." *Id.* at 822. Courts must assess the settlement in "economic reality" and discount value that is "too speculative." *Id.* at 821-22. *GM Trucks* rejects the "made available" fiction.

Just a few years later, this Court reiterated the principles of *GM Trucks* in *Prudential*, 148 F.3d 283 (1998). *Prudential* found that "[n]umerous courts have concluded that the amount of the benefit conferred logically is the appropriate benchmark against which a reasonable common fund fee charge should be assessed." *Id.* at 338 (internal quotation omitted). To do this, "the district court [is] required to make a 'reasonable estimate' of the settlement's value." *Id.* at 334 (citing *GM Trucks*, 55 F.3d at 822). But the particular settlement in *Prudential* presented a valuation difficulty, because its "ultimate value [was] dependent on the final number of claims remediated under the

settlement." *Id.* The *Prudential* district court overcame this difficulty by awarding an "immediate fee payment based on a percentage of the guaranteed minimum recovery…, while requiring future payments to be based on actual results." *Id.* And this Court endorsed that "bifurcated fee structure" as "an appropriate and innovative response." *Id.* In one sense the settlement here does not admit of the same valuation problem as *Prudential*; the claims period has now passed: more than 97% of the class will get nothing, the vast majority of the 3% will receive $5 gift cards, with a total face value just shy of $2.8 million. JA605-06, 772. Of course, it remains to be seen what percentage of that gift card value will be realized here. But it cannot be more than $2.8 million. Again, the essential takeaway from *Prudential* is that unclaimed amounts may not enter the constructive-common-fund calculus. "What is important is that the district court evaluate what class counsel actually did and how it benefitted the class." *Prudential*, 148 F.3d at 342.

Again, this Court returned to the issue in *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001). There, an objecting class member appealed the award of attorneys' fees to class counsel in a constructive-common-fund settlement. *Cendant PRIDES* reaffirmed appellate courts' "special responsibility" to protect class members against "the danger inherent in the relationship among the class, class counsel, and defendants." *Id.* at 728-730. On the merits, *Cendant PRIDES* vacated the fee award for various reasons, but it made (without any apparent prompting from the appellant) one comment that is particularly germane to the valuation issue. Though the district court had described its fee award as 5.7% of a reversionary $341.5 million fund, this Court demurred. Because "any unclaimed portion of the fund returned to Cendant," "the

award actually amounted to more than 5.7% of the total recovery." *Id.* at 741 n.25. Of the $341.5 million available only $263.5 million had been claimed, so class counsel's fee actually "constituted 7.3% of the total fund." *Id.*

Finally, *Baby Products*. *Baby Products* vacated approval of a settlement that proposed to provide roughly $3 million to class members, $14 million to class counsel, and $18 million to third-party charities. 708 F.3d 163, 169-70. The Court reiterated foundational principles regarding the evaluation of proposed class settlements and fee awards. Direct benefit to class members matters; "[c]lass members are not indifferent to whether funds are distributed to them [or not], and class counsel should not be either." *Id.* at 178. Courts should ensure that class members, rather than their counsel, are "the foremost beneficiaries of the settlement." *Id.* at 179. To do that, courts should inquire into "the degree of direct benefit provided to the class," an inquiry that "needs to be, as much as possible, practical and not abstract." *Id.* at 174. *Baby Products* places upon district courts a duty "to affirmatively seek out" necessary information about claims data and to "withhold final approval of a settlement until the actual distribution of funds can be estimated with reasonable accuracy." *Id.* (internal quotation omitted). *Baby Products* "confirm[s] that courts **need** to consider the level of direct benefit provided to the class in calculating attorneys' fees." *Id.* at 170 (emphasis added). That means courts "should begin by determining with reasonable accuracy the distribution of funds that will result from the claims process." *Id.* at 179. As in *Prudential*, that may require courts "to delay a final assessment of the fee award to withhold all or a substantial part of the fee until the distribution process is complete." *Id.* (quoting Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION, § 21.71 (4th ed. 2008)). *Baby Products* even notes Congress's

legislative rejection of the "made available" fiction in the Class Action Fairness Act, reasoning that even in a non-coupon settlement, "this statutory provision further supports the proposition that the actual benefit provided to the class is an important consideration when determining attorneys' fees." *Id.* at 179 n.13.

Given all of this Third Circuit precedent, from *GM Trucks* to *Baby Products*, it is not entirely clear what the district court meant by "the Third Circuit precedent to the contrary" to Frank's view of settlement valuation. JA21. It is true there is one non-precedential case from this Court errantly valuing a settlement based on the amounts made available rather than the amounts claimed. *See Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 Fed. Appx. 880, 882-84 (3d Cir. 2016). So too did a district court decision that the court below relied heavily upon. *See In re Comcast Corp. Set-Top Cable TV Box. Litig.*, 333 F.R.D. 364 (E.D. Pa. 2019). To be sure, both *Landsman* and *Comcast* reach their conclusions by invoking dicta from *Baby Products*.

Although *Baby Products* involved a *cy pres* structure rather than a reversionary one, it looked to what the Supreme Court had said on "essentially the same issue when calculating percentage fee awards against a settlement fund that will partially revert to the defendant." 708 F.3d at 177 (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980)). According to *Baby Products*, *Boeing* had "confirmed the permissibility of using the entire fund as the appropriate benchmark" in that scenario. As discussed in section II.B below, that dicta misapprehends *Boeing* and contradicts earlier Third Circuit case law.

Still, it is relevant to address why *Baby Products* thought that it was wise to eschew a blanket rule "requiring district courts to discount attorneys' fees when a portion of an award will be distributed *cy pres*" in favor of allowing district courts "case by case"

"discretion." *Id.* at 178-79. Namely, "[t]here are a variety reasons that settlement funds may remain even after an exhaustive claims process—including if the class members' individual damages are simply too small to motivate them to submit claims. Class counsel should not be penalized for these or other legitimate reasons unrelated to the quality of representation they provided. Nor do we want to discourage counsel from filing class actions in cases where few claims are likely to be made but the deterrent effect of the class action is equally valuable." *Id.* at 178. The district court put significant stock in this language. JA21. But none of it has any bearing here.

As counsel for Wawa conceded at the hearing on preliminary approval, the $5 and $15 caps on gift card values were "a matter of negotiation" not a result of "linear analysis" of the value of class members' claims. JA325. It was that negotiated value that was too small to prompt claims. This is analogous to *Baby Products*, where the settlement imposed an arbitrary $5 cap for most class members' claims. And this Court concluded there: "We think it more likely that many class members did not submit claims because they lacked the documentary proof necessary to receive the higher awards contemplated, and the $5 award they could receive [without documentary proof] left them apathetic." *Id.* at 176. *Baby Products* explicitly questioned the parties' suggestion, and the district court's conclusion, that requiring documentation of claims is a "fairly low bar." *Id.* at 175. Yet the claims structure imposed here was even more restrictive than that in *Baby Products*: plaintiffs accepted a documentation and attestation requirement before class members could submit ***any*** claim, even a most basic $5 gift-card Tier 1 claim.

Confirming the inevitability of the depressed claims rate, at the time of appointment, class counsel promised they had "learned from experience in data breach cases the importance of using a simple claim form and claims process to maximize class members' participation in any settlement." Dkt. 78 at 25. They promised that they would require of class members only "minimal effort or documentation to submit a claim." *Id.* The settlement they eventually proposed breached that promise. It was a foregone conclusion that the class would not end up as the foremost beneficiary under class counsel's proposed settlement, and the court should have considered that fact in assessing the quality of counsel's representation.

But the court remained concerned about the possibility of "discourag[ing counsel] from filing such class action lawsuits." JA21. It seems doubtful that getting a defendant to agree to a settlement "fund" of which most never leaves its pocket, could ever constitute an "equally valuable" "deterrent." *Baby Products*, 708 F.3d at 178 (*cy pres*). Even more to the point, Rule 23 is not a substantive bounty-hunting provision that allows class counsel to treat the class as a free-floating entity existing only to permit counsel to operate as a private attorney general. Rule 23 is a procedural joinder device that aggregates real individuals with real claims into a class if certain prerequisites are satisfied. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). Under Rule 23, "the concept of class actions serving a 'private attorney general' or other enforcement purpose is illegal." S. Rep. No. 109-14, at 58-59 (2005); *cf. also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-69 (1975) (judiciary cannot award fees on non-legislatively sanctioned "private attorney general" model). The class device works in tandem with the judicial role of "providing relief to claimants, in individual or

class actions, who have suffered, or will imminently suffer, actual harm." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (simplified).

For a similar reason, the district court was correct to exclude from the common fund accounting the putative $35 million injunctive relief, consisting of data security business practice changes that Wawa implemented in the wake of the data breach, and valued entirely based on the costs imposed on Wawa. JA20 n.4. To their credit, class counsel didn't directly ask the court to include the injunctive relief in the common fund accounting, but they certainly did use it as a foil to assert how "conservative" their fee request was. *See* Dkt. 258 at 10, 27, 31, 33. Perhaps they recognized the general rule that prospective injunctive relief, "easily manipulable by overreaching lawyers," may not typically be included as part of the value of the common fund. *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003).

But even the gesture at the $35 million valuation was misbegotten, as was the district court's decision to accept the injunctive relief as supporting the fee request. "[T]he standard under Rule 23(e) 'is not how much money a company spends on purported benefits, but the value of those benefits to the class.'" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011) (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009) (Walker, J.)). It is "egocentrism" to assume that the class members are concerned about the costs incurred by Wawa. *Pampers,* 724 F.3d at 720; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (putting defendant out of business not valuable to class members). What is more, the settlement acknowledges $35 million costs were not instigated by the settlement; they were Wawa's voluntary business expenditures, authorized by the Wawa

Board in February 2020. JA744. An injunction to obligate a defendant to continue doing what it was doing has "no real value." *Koby v. ARS Nat'l. Services, Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017). Wawa's voluntary, pre-settlement changes, later codified in the settlement, do not count as a compensable class benefit. *See In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 556 (7th Cir. 2017) (comparing "state of affairs before and after the settlement" to find relief "utterly worthless"); *Pampers*, 724 F.3d at 719. Courts must distinguish benefits generated by the settlement from relief provided independently of the settlement. *Prudential*, 148 F.3d at 338.

Below, seeking to refute the simple rule of settlement valuation announced in *Redman* and *Pearson*, class counsel incorrectly asserted that the Seventh Circuit had "overruled" those cases. JA729 (citing *In re Sears, Roebuck and Co. Front-Loading Washer Prods. Liab. Litig.*, 867 F.3d 791 (7th Cir. 2017)). *Sears* did no such thing: it did not involve the division of a common fund at all (constructive or otherwise) between class counsel and the class. That is to say, while *Sears* signed off on a fee award that outstripped the class recovery, the defendant did not provide class counsel any clear sailing, so the amount of the attorneys' request did not form a constructive common fund that Third Circuit law recognizes. *GM Trucks*, 55 F.3d at 819-20. Instead, in *Sears* the defendant litigated the issue of the proper lodestar-based fee award to the Seventh Circuit. When there is no agreed-to clear-sailing amount, and the "amount of those fees is left completely undetermined," there is no "constructive common fund." *Home Depot*, 931 F.3d at 1082. What occurred in *Sears*, therefore, is exactly the staggered process that the Third Circuit recommends. *In re Community Bank of N. Va. Litig.*, 418

F.3d 277, 308 (3d Cir. 2005). *Community Bank* endorsed the Third Circuit Task Force's recommendation that "fee negotiations be postponed until the [class] settlement was judicially approved, not merely until the date that the parties allege to have reached an agreement." *Id.* (quoting *GM Trucks*, 55 F.3d at 804).

Why is this difference important? When fees are negotiated as part of a larger settlement, it means that class counsel is necessarily compromising class recovery to obtain clear sailing. In contrast, when fees are litigated bilaterally after relief is obtained, then it is "relief ordered by a court rather than relief provided by a settlement." *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750, 752 (7th Cir. 2010). No risk of Rule 23(e) self-dealing exists in a post-judgment Rule 23(h) dispute, because plaintiffs' counsel does not settle absent class members' rights while negotiating protection for their own fees, and the defendant's liability to absent class members is not compromised an iota post-judgment. When class counsel compromises the class's claims, they must accept compromising on their own fees such that the two are proportional, because Rule 23(e)(2)(C) requires fee awards in settlements to be proportional to the class relief for a settlement to be approved.

Unlike *Sears*, from the outset here the $3.2 million fee and expense fund has been a key part of the constructive common fund. Indeed, the final amended settlement makes that explicit, by turning the constructive common fund into a pure common fund structure. JA754-55. Conversely, sums that are made available, but are not paid, and never had a realistic expectation of being paid, are not part of that constructive common fund. *E.g. Pearson*, 772 F.3d at 781.

If there were any lingering doubts that the yardstick for measuring settlement

value is actual, rather than hypothetical, recovery, the 2018 Amendments to Rule 23 dispelled them. Ratifying this Court's position in *GM Trucks, Prudential*, *Cendant*, and *Baby Products*, the amendments now require courts to consider the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" and the "the terms of any proposed award of attorney's fees, including timing of payment." Rule 23(e)(2)(C)(ii)-(iii). Both entail looking to the amounts actually claimed, not those that could have "potentially" been claimed. *Briseño*, 998 F.3d at 1026; *accord In re Samsung Top-Load Washing Machine Mktg., Sales Practices & Prods. Liab. Litig.,* 997 F.3d 1077, 1094 (10th Cir. 2021) (requiring "findings . . . based on the terms of the settlement and in light of then-prevailing information on the class participation rate."). And the reference to the timing of the payment of attorneys' fees alludes to the problematic situation in *Baby Products* or *Prudential* when class counsel seek to cement their fee before the results of the claims process are known. By crediting class counsel at the hypothetical maximum recovery, the district court turned Rule 23's new subsection inert. Treating reversions as equivalent to claimed amounts would make the question of the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" irrelevant. *Contra* Rule 23(e)(2)(C)(ii).

In sum, the district court erred in crediting unclaimed value as part of constructive common fund, and thereby allowing class counsel to capture for itself more than half of the actual value of the settlement.

B. In class settlements, percentage-based fee awards must be tied to actual value conferred on class members.

In nearly a dozen published decisions beginning with *GM Trucks*, this Court has explained that the percentage-of-recovery method of awarding fees is generally preferred because it allows courts to award fees from the fund "in a manner that rewards counsel for success and penalizes it for failure." *GM Trucks*, 55 F.3d at 821; *Prudential*, 148 F.3d at 333; *Cendant PRIDES*, 243 F.3d at 732; *Rite Aid*, 396 F.3d at 300; *AT&T*, 455 F.3d at 164; *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 280 (3d Cir. 2009); *In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 330 (3d Cir. 2011) (*en banc*); *S.S. Body Armor I, Inc. v. Carter Ledyard & Milburn LLP*, 927 F.3d 763, 773 (3d Cir. 2019). Indeed, the court below recited that exact proposition. JA18-19. But then it applied the percentage-of-recovery method in a way that did not reward success nor penalize failure. In crediting the value of unclaimed cash and gift cards, the district court's methodology sabotages the key virtue of the percentage method—the fact that it "directly aligns the interests of the class and its counsel." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (internal quotation omitted); *see generally* Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809, 1812-21 (2000) ("the percentage method minimizes conflicts better than the lodestar method").

The purpose of a percentage-based equitable award is to "avoid the unjust enrichment of those who benefit from the fund that is created, protected, or increased by the litigation." *Court Awarded Atty. Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 250 (1985); *accord GM Trucks*, 55 F.3d at 821. In no way are the twenty

million odd class members whose claims are being released for no compensation unjustly enriched by funds Wawa has made available but will never pay out. In no sense can unclaimed amounts, whether gift cards or cash, constitute a "fund-in-court." *Task Force Report*, 108 F.R.D. at 250. "In cases involving a claims procedure or a distribution of benefits over time, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered. It is common to delay a final assessment of the fee award and to withhold all or a substantial part of the fee until the distribution process is complete" Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION § 21.71 (4th ed. 2008) (quoted in part by *Baby Products*, 708 F.3d at 179). Other commenters agree. American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(a) (2010) ("Attorneys' fees in class actions, whether by litigated judgment or by settlement, should be based on both the actual value of the judgment or settlement to the class"); *Report on Contingent Fees in Class Action Litigation*, 25 REV. LITIG. 459, 476 (2006) ("The amounts actually paid reflect what counsel actually accomplished and should be the sole basis for the fee."); Notes of Advisory Committee on 2003 Amendments to Rule 23 ("One fundamental focus is the result *actually achieved* for class members…the court may need to scrutinize the manner and operation of any applicable claims procedure").

Purporting to follow *Boeing*, several courts have allowed class counsel to be awarded a percentage of amounts that either revert to the defendant or revert to *cy pres*. *E.g.*, *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1296-97 (11th Cir. 1999); *Williams v. MGM-*

Pathe Communications Co., 129 F.3d 1026, 1027 (9th Cir. 1997); *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, 333 F.R.D. 364, 386-87 (E.D. Pa. 2019); *cf. also Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 283-88 (6th Cir. 2016) (affirming "a middle of the road approach, selecting a midway point between the benefit available to the entire class and the actual payments made" as part of a percentage crosscheck). By contrast, other courts have refused to apply *Boeing* in the context of a claims-made constructive-common-fund settlement. *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 831-32 (7th Cir. 2018); *Pearson*, 772 F.3d at 778; *Strong v. Bellsouth Tel. Inc.*, 137 F.3d 844, 852 (5th Cir. 1998); *see also Gascho*, 822 F.3d at 299-300 (Clay, J., dissenting). These latter courts are correct: *Boeing* is inapplicable here for at least three reasons.

First, *Boeing* has no relevance to adjudicating a settlement allocation that is unfairly slanted toward class counsel. *Boeing* involved not a settlement, but a litigated judgment where Boeing was ordered to deposit a sum total in escrow at a commercial bank. After an extensive notice and search program, 47% of the class's potential claims had been accounted for. 444 U.S. at 476 n.4. Because there was no settlement compromising the class's claims, there was no inherent risk of class counsel self-dealing at the class's expense. *See Pearson*, 772 F.3d at 782 (distinguishing *Boeing* as a case in which the "harvest created by class counsel was an actual, existing judgment fund").

While *Masters* did involve a settlement, it did not address the distinction between a fee that follows a litigated judgment and one that follows an agreed-upon settlement award. The opportunities for abuse are far greater in the settlement context. To illustrate, this Court has expressed a concern that class counsel not be "penalized"

where "individual damages are simply too small to motivate them to submit claims." *Baby Products*, 708 F.3d at 178. This concern has force where counsel obtain the maximum judgment available to them under law. It does not have force, however, in the context of settlements where claims are capped at a stipulated percentage of the amounts sought under the complaint, or as here arbitrary figures agreed to as "a matter of negotiation." JA325. For then, the parties can contrive to make the value of the award so feeble ($5 here) as to dissuade an average class member from filing a claim at all. *See Pearson*, 772 F.3d at 781. Also, the *Masters* court did not confront the ubiquitous Rule 23(e) allocation problem present in typical settlements because class counsel were the appellants there, and were challenging only the insufficiency of the fee award. *Briseño*, *Pearson,* and *Pampers* (unlike *Masters*, *Williams*, and *Waters*) were appeals brought by objecting class members.[4]

Second, the 2003 and 2018 amendments to Federal Rule of Civil Procedure 23, and the passage of the Class Action Fairness Act in 2005, supersede *Boeing*. Rule 23(h), added with the 2003 amendments, re-centered the inquiry on "the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members." Notes of Advisory Committee

[4] Several district courts in the Second Circuit decline to apply *Masters* when the unclaimed funds would revert to the defendant, rather than to a *cy pres* recipient. "*Masters* stands for the proposition that the denominator should be the benefit inured to the class. Funds reverted to the defendant provide no benefit to the class." *Hart v. BHH, LLC*, 2020 U.S. Dist. LEXIS 173634, 2020 WL 5645984 (S.D.N.Y. Sept. 22, 2020); *accord Hesse v. Godiva Chocolatier*, No. 19-cv-972, 2022 U.S. Dist. LEXIS 72641, *34 (S.D.N.Y. Apr. 20, 2022).

on 2003 Amendments to Rule 23. "For a percentage approach to fee measurement, results achieved is the basic starting point." *Id.* The 2018 Amendments make explicit the need to consider the "effectiveness" of the claims process and the negotiated fees based on the relief actually provided to the class. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iii). And the Class Action Fairness Act tethers fees in coupon settlements to the value of those coupons actually redeemed by class members, legislation that this court has read as "support[ing] the proposition that the actual benefit provided to the class is an important consideration when determining attorneys' fees." *Baby Products*, 708 F.3d at 179 n.13. All said, *Boeing* marks an "older line of cases" that eventually "prompted legislative rejection of compensating lawyers on the face value of the settlement, regardless of the take-up rate of the benefits by class members." Samuel Isaacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM. L. REV 3165, 3171-72 (2013).

The new rules reflect common-sense intuitions. Attorneys' fees should be tied directly to what clients receive, and permitting a class member to fill out a claim form in order to receive a check simply is not equivalent to getting money to that class member directly. *See Briseño*, 998 F.3d at 1026 (repudiating hypothetical $95 million valuation of claims-made settlement when class members "ended up receiving only about 1% of that touted amount"). "Given these recent amendments to Federal Rule 23 and the concerns expressed in Ninth Circuit cases" like *Briseño*, it is appropriate to treat *Williams* as "an outlier" whose "holding should be carefully and narrowly construed." *Stanikzy v. Progressive Direct Ins. Co.*, 2022 WL 1801671, 2022 U.S. Dist. LEXIS 98999, at *16 n.3 (W.D. Wash. Jun. 2, 2022).

Third, to whatever extent it remains valid and applies to settlement proceedings at all, *Boeing* applies only to cases with actual common funds, not hypothetical claims-made funds like this one. *Pearson* is directly on point, reversing a district court that premised its calculation of settlement value on the fiction that $3/class member was "made available" to the 4.7 million class members who received direct notice of the settlement. *Pearson*, 772 F.3d at 781. There was no actual fund, no litigated judgment, and no "reasonable expectation…that more members of the class would submit claims than did," and thus *Boeing* was inapplicable. *Id.* at 782; *accord Strong*, 137 F.3d at 852 (*Boeing* only applies to "traditional common fund" not a claims-made settlement where "no fund was established at all"); *Camp Drug Store*, 897 F.3d at 832 (*Boeing* doesn't apply to claims-made settlement that "did not establish, definitively, an amount for the benefit of the class members"); *Fitzgerald v. Gann Law Books*, 2014 U.S. Dist. LEXIS 174567, 2014 WL 8773315 (D.N.J. Dec. 17, 2014) (similar). *Boeing* itself recognizes this distinction. 444 U.S. at 479 n.5 (expressly reserving decision on whether its common-fund analysis applies to claims-made scenarios).

Unlike in *Boeing*, in this case, there's no "determinate fund" with each class member possessing "an undisputed and mathematically ascertainable claim to part of a lump-sum judgment" "upon proof of their identity." *Boeing*, 444 U.S. at 479-80. The ceilings for Tier 1, Tier 2, and Tier 3 claims here do not reflect the actual value of eligible claims among the class. The parties could have just as well set the arbitrary ceilings at $50 million, $25 million, and $25 million. By that fiat, they would then generate a $100 million settlement? Claptrap! Actual class-member participation determines the

real value of the settlement, not the "phantom" value assigned by class counsel. *Strong*, 137 F.3d at 852.

Public policy demands that fee awards be attuned to the result actually achieved for the class. Crediting counsel for imaginary benefits would "undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class" and "could encourage the filing of needless lawsuits." *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000) (O'Connor, J) (respecting denial of certiorari). Class counsel asks this Court to split with *Pearson* and *Strong* and depart from its precedent; they endorse a proposed rule that equates a settlement that awards cash directly to class members with a settlement employing a restrictive claims process. If that happens, settling parties will always be inclined to agree to the more burdensome claims process that ensures class counsel extracts the maximum amount of fees and defendants pay the minimum amount of money to settle the case. *Briseño*, 998 F.3d at 1025 (considering these incentives). That scenario threatens absent class members' due process right to adequate representation.

A hypothetical demonstrates the absurd incentives class counsel's interpretation creates. Imagine two settlements of the hypothetical class action *Coyote v. Acme Products*:

Settlement One	Settlement Two
Acme Products mails a $50 check to each of one million class members who bought their mail-order rocket roller skates.	One million members have the right to fill out a twelve-page claim form requesting detailed product and purchase information, supporting documentary evidence, and a notarized signature attesting to its accuracy under penalty of perjury. The claim form must be hand-delivered in person between the hours of 8:30 a.m. and 9:30 a.m., on July 4, 2021, at Acme's offices in Walla Walla, Washington. Class members with valid claim forms receive $100.

It would be malpractice for a class attorney to refuse Settlement One and insist on Settlement Two. Virtually all class members would prefer Settlement One to Settlement Two. A defendant would prefer Settlement Two to Settlement One as substantially cheaper. But under class counsel's proposed interpretation of *Boeing*, Settlement Two is worth twice as much as Settlement One, and entitles the class attorneys to twice as much in attorneys' fees. Instead, this Court should prefer the rule that "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class." *Pearson*, 772 F.3d at 781.

Class counsel might try to distinguish the hypothetical Acme "Settlement Two"; after all, this settlement permitted claimants to file claims online rather than hand-deliver them, and demanded only the onerous documentation from claimants, not notarization. But making that argument concedes Frank's point that valuing "potential" benefits is improper without considering the likelihood that a class member will *actually* obtain the benefit. If it is improper to fully value Acme "Settlement Two" because

only 0.01% of the class will make claims, why is it appropriate to value this settlement by its "potential" benefits when it has a claims process where less than 0.04% of the class *actually* make claims? (Another 2% receive $5 gift cards automatically; that still leaves over 97% in the cold.) There is no principled dividing line: the way to judge the validity of a distribution process—and to motivate class counsel to maximize the result actually obtained by the class—is to rely solely on the amount that the claims process will actually pay the class. Any other interpretation would contradict Rule 23(e)(2)(C)(ii)'s "effectiveness" language. This is an *objective* standard: one judges "effectiveness" by results, rather than by how hard the parties self-servingly claim to have tried. The court below did not mention "effectiveness" or Rule 23(e)(2)(C)(ii).

Below, class counsel argued that they should be paid not based on the results they achieved but based on how hard they had worked—*i.e.*, their lodestar. But, "[p]laintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013). And in this Circuit, the lodestar should not be permitted to "trump" or "displace" the primary reliance on the percentage of common fund method. *Rite Aid*, 396 F.3d at 307 ("trump"); *AT&T*, 455 F.3d at 164 ("displace"). Lodestar is not "outcome determinative." *Baby Products*, 708 F.3d at 180 n.14. After Frank pointed out that class counsel had not submitted billing records that would even allow a lodestar-based award (JA575-77), the district court correctly forsook the base-lodestar method. But still, class counsel's request is telling: they believed that they were better positioned to seek their fee based on 6000 undocumented hours in a lightly litigated action than as a percentage of the result they had achieved.

Conclusion

This Court should vacate the fee award. Its mandate should make clear that on remand, the district court must recalculate the percentage of the fund using the actual payments to the class as the denominator, and then award a percentage that makes the class the foremost beneficiary of the settlement.

Dated: September 8, 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

Attorney for Objector-Appellant
Theodore H. Frank

Combined Certifications

1. Certification of Bar Membership

I hereby certify under L.A.R. 28.3(d) that I, Adam E. Schulman is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. **Certification of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,872 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Garamond font.

3. Certification of Service

I hereby certify that on September 8, 2022, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

4. Certification of Identical Compliance of Briefs

In accordance with L.A.R. 31.1(c), I hereby certify that the electronic and hard copies of this brief in the instant matter contain identical text

5. Certification of Virus Check

In accordance with L.A.R. 31.1(c), I hereby certify that a virus check of the electronic PDF version of the brief was performed using McAfee Internet Security software and the PDF file was found to be virus free.

Executed on September 8, 2022.

/s/ Adam E. Schulman
Adam E. Schulman