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

Reply Brief of Appellant Theodore H. Frank

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Introduction

In this Circuit, district courts confronting a request to approve a class-action settlement must assess the settlement value in economic reality. OB20 (citing cases).[1] Beginning with *GM Trucks*,[2] this Court has repeatedly rejected the "made available" fiction in favor of an "inquiry [that] needs to be, as much as possible, practical and not abstract." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013); OB25-29. The Rules Committee cemented this approach in its 2018 Amendments, by explicitly requiring courts to assess both 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).

Appellees simply ignore both the *GM Trucks* line of precedent and the plain text of Rule 23. Instead, they latch on to irrelevant dicta from *Baby Products*, out-of-circuit cases that predate the 2018 Amendments and arise in a different posture than review of settlement fairness, and a bevy of misguided district-court decisions. This Court's precedent and the Federal Rules control, and the district court had no discretion to credit sums that never leave Wawa's pocket or benefit the class. That is not finding facts or exercising discretion to weigh factors. It is simply "invent[ing]" the "applicable legal standard," something that the district court has no authority to do. *Fox v. Vice*, 563 U.S. 826, 836 (2011).

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[1] "JA," "OB," "PB," and "DB" refer to the joint appendix, Frank's opening brief, plaintiffs' brief, and defendant Wawa's brief respectively.

[2] *In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

Argument

I. The district court failed both to make an informed, economically-realistic, independent valuation of the settlement and to offer a reasoned response to Frank's objections.

Plaintiffs concede that district courts have a duty to protect absent class members from excessive fees and unfair settlements. OB13-23; PB38. The dynamics of class-action proceedings "impose[] a special responsibility upon [] courts to hear challenges to fee awards." *Gelis v. BMW of N. Am., LLC*, 49 F.4th 371, 379 (3d Cir. 2022) (quoting *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 728 (3d Cir. 2001)). But under plaintiffs' view of the law, there are no consequences for failing to do so: district courts have unbounded unreviewable discretion to value settlements however they wish case-by-case. PB16-17, 38-39.

This is mistaken. "A trial court has wide discretion but only when it calls the game by the right rules." *Fox*, 563 U.S. at 839. "[T]he trial court must apply the correct standard, and the appeals court must make sure that has occurred." *Id.* at 838. Treating unclaimed gift cards and unclaimed cash as part of the constructive common fund settlement value calls the game by the wrong rules. OB24-42; Section II below.

And the district court's duty also entails certain procedural obligations. The court may not defer to the parties' valuation of the settlement relief; rather, it "must bring an informed economic judgment to bear in assessing its value." *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 172 (3d Cir. 1975). Simply *knowing* the amount of direct settlement compensation is insufficient. *Contra* PB26. The law does not afford district courts the discretion to value constructive common funds by defaulting to imaginary hypothetical

maximums written into the parties' settlement. Rather, courts are "required to make a 'reasonable estimate' of the settlement's value." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 334 (3d Cir. 1998) (citing *GM Trucks*, 55 F.3d at 822); OB26-28.

In all cases a court must show its work. *Gelis*, 49 F.4th at 381; *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 302 (3d Cir. 2005) (citing cases). "It must make its reasoning and application of the law clear, so that this Court has a sufficient basis to review for abuse of discretion." *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 325 (3d Cir. 2019) (simplified).

So that lawyers seeking fees cannot "game the system," the court elects the fee methodology (lodestar or percentage), not class counsel. *Linneman v. Vita-mix Corp.*, 970 F.3d 621, 627 (6th Cir. 2020). And it must offer a "reasoned response" to any non-frivolous objections. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1262 (11th Cir. 2020); *see also Interfaith Cmty. Org. v. Honeywell*, 726 F.3d 403, 416 (3d Cir. 2013); *see generally Golan v. Saada*, 142 S. Ct. 1880, 1893 (2022).

Whether or not there is an objection, the court must hold counsel to its burden to justify its fee request "in all class action settlements." *GM Trucks*, 55 F.3d at 819; *see also Gelis*, 49 F.4th at 379-81 (reversing when counsel failed to document its lodestar hours). If class counsel has negotiated for clear sailing on its fee request, the court must "resolve[] against class counsel" "any doubts regarding hourly rates and billed hours." *In re Samsung Top-Load Washing Machine Mktg., Sales Practices & Prods. Liab. Litig.*, 997 F.3d 1077, 1094 (10th Cir. 2021).

Though the district court discharged some of these responsibilities, it did not discharge them sufficiently. It offered no reason for valuing the constructive common fund at $12 million beyond the parties' stated caps in the settlement agreement. JA20-22. The parties introduced no evidence that they even expected a higher claims rate than the 0.035% that they realized. JA12. Nor do plaintiffs on appeal contend that they expected a higher rate.[3] As Frank explained in his objection, the low claims rate was inevitable because of the claims process's requirement of documentation to submit a claim. JA565-66. Frank pointed out that class counsel had acknowledged the need for a claims process that requires no more than minimal effort or documentation. JA566, JA725. He pointed out that counsel's vague fee submissions excluded class members' rights to meaningful review and cut short the district court's own discretion. JA575-77. The district court offered no reasoned response to these objections, each premised on undisputed facts.

To be sure, plaintiffs' argument (PB38-39) misunderstands how difficult it is for district courts to fulfill their responsibility given the "lack of meaningful assistance" from settling parties "intensely focused" on obtaining the court's ratification of settlement. *In re Snap Inc. Sec. Litig.*, 2021 WL 667590, 2021 U.S. Dist. LEXIS 34126, *11 (C.D. Cal. Feb. 18, 2021); OB16-17. Except in the unusual case that an objector steps forward, negotiated fee hearings are "*ex parte*" leaving the court "vulnerable to being misled, whether by affirmative misrepresentation or by half-truths that deceived

[3] Plaintiffs assert that "the claims rate was roughly 2.6%." PB14. That misstates the record, because 2.6% is the distribution rate (under the generous assumption that all Wawa mobile app users are class members), not the claims rate. JA12.

through their incompleteness." *Arkansas Tchr. Ret. Sys. v. State St. Corp.*, 25 F.4th 55, 65 (1st Cir. 2022); *see also In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277, 319 (3d Cir. 2005) (criticizing district court that indulged *ex parte* conferences and predetermined result before hearing from objectors). That's why, as a matter of law, fictional forms of relief cannot be included in the denominator of a fee calculation.

District courts can best fulfill their duty to class members with the "guidance" of a clear legal rule, not the "empty and amorphous test" plaintiffs propose. *Fox*, 563 U.S. at 836. It is poor policy to merely "set[] attorney's fees by reference to a series of sometimes subjective factors that place unlimited discretion in trial judges and produce disparate results." *Perdue v. Kenny A*, 559 U.S. 542, 551 (2010) (simplified); *cf. also Murphy v. Smith*, 138 S. Ct. 784, 790 (2018) (rejecting statutory interpretation that would have reintroduced "unguided and freewheeling" fee-setting "and the disparate results that come with it"). So, it's a red herring for plaintiffs to assert that the district court appropriately considered all the factors. PB18. Frank isn't challenging the weighing of factors; he's challenging the "rule of decision" that prevents factor tests from devolving into a "chopped salad." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001); *cf. also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986) ("major fault" of twelve-factor test was that "it gave very little actual guidance to district courts", "placed unlimited discretion in trial judges[,] and produced disparate results."). When the district court held that the constructive common fund includes sums that never leave Wawa's pockets, it made a category error. It mistook the fundamental rule of decision, neglecting "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 on 2003 Amendments to Rule 23.

Frank does not deny that there remains a sizable space for district courts to exercise case-by-case discretion and weigh relevant factors. Any number of discretionary factors can justify upward or downward departures from the typical 25% fee. Courts may exercise discretion to award 20% or 30% of the fund. But they have no discretion to award 25% of a fictional number. Doing that would violate the applicable rule of decision that illusory, unrealized benefits may not be included in a common-fund valuation.

Because the district court exceeded its discretion, and did not discharge its special responsibility to absent class members, this Court should vacate the fee order.

II. Unpaid sums do not constitute settlement value.

Without even addressing the long line of Circuit precedent rejecting the "made available" fiction (OB26-28), or the 2018 Amendments reinforcing that precedent (OB35, 40), plaintiffs cling to their illusion. PB19-32. They offer no response to Frank's discussion of *GM Trucks*, *Prudential*, or *Cendant*. Instead, they skip over two decades of case law directly to *Baby Products*' dicta invoking *Boeing*. Even a case toward plaintiffs' side of the pre-2018 circuit split recognized that *Baby Products*' discussion of *Boeing* was "dicta." *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 284 (6th Cir. 2016). *Baby Products*' holding was that it is legal error for a court to approve a settlement without inquiring into "the degree of direct benefit provided to the class." OB27 (quoting 708 F.3d at 174). The rationale of that holding is that "[c]lass members are not indifferent

to whether funds are distributed to them [or not], and class counsel should not be either." 708 F.3d at 178.

In any event, even if *Baby Products*' dicta were a holding, it could not have "overrule[d]" binding circuit law already rejecting the "made available" fiction. 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.

Frank has already explained why that dicta misapprehends *Boeing* and is inapplicable to the facts here. OB29-31, 38-41. In fact, plaintiffs' own quotation (PB20) of *Boeing* is self-distinguishing. Class members here have no right "to share the harvest of the lawsuit upon proof of their identity": the settlement requires documentary proof of not only identity, but also of injury, to claim monetary recovery or Tier 2 coupon recovery. And the settling parties did not even try to show that there was any chance that the settlement ceilings could have been reached. OB41. A reversionary claims-made settlement is distinct from an actual settlement fund with a *cy pres* reversion (as in *Baby Products*). OB31. As relied on by *Baby Products*, the ALI allows that fees be "based on both the actual value of the…settlement to the class and the value of cy pres awards." 708 F.3d at 179 (quoting *Principles of the Law of Aggregate Litigation* §3.13(a)). At the same time, it disallows valuations based on sums that revert to the defendant. *See* § 3.13, cmt. a, illustration 1.

Frank argued that Rule 23(e)(2)(C)(ii) and (iii)'s requirement of evaluating "effectiveness" precludes rewarding class counsel on amounts "made available" but not realized. OB21-22; OB34-35. Plaintiffs provide no alternative interpretation of the text of the Rule. This forfeiture alone should end the inquiry.

Plaintiffs have good reason for neglecting the text; no reasonable interpretation supports the district court's position. "Effective" means "actual" or "producing, a desired, decisive, or desired effect" or "producing or capable of producing a result." *Effective*, *Merriam-Webster* (online version, *available at* https://www.merriam-webster.com/dictionary/effective) (last accessed Nov. 30, 2022). "Effective typically describes things—such as policies, treatments, arguments, and techniques—that do what they are intended to do." *Id.* For example, one might describe a vaccine as 96% effective. *Cf. id.* How does a court consider effectiveness without objectively and empirically *measuring* effectiveness? By plaintiffs' light, the FDA can evaluate the effectiveness of a vaccine by asserting "I subjectively think it will work" without looking at any data. If a court can treat a 0.035% claims rate or 2.6% distribution rate as identical to full take-up that compensates the entire class, it reads Rule 23(e)(2)(C)(ii) out of the Rules.

Understandably, plaintiffs instead focus on the cases on the other side of the pre-2018 Amendments circuit split. *See* OB37-38 (listing cases). Two of these cases (*Waters* and *Williams*) involved settling defendant appeals preceding the 2003 Amendments and the creation of Rule 23(h). When faced with an objector's appeal under current Rule 23(e)(2)(C), the Ninth Circuit tacked a different course. *See Briseño v. Henderson*, 998 F.3d 1014, 1024 (2021). The Eleventh Circuit too, has recently stated that the constructive common fund consists of "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). And many courts in the Second

Circuit have limited *Masters* to settlements that created a sum certain fund. OB39 n.4; *accord Cunningham v. Suds Pizza, Inc.*, 290 F. Supp. 3d 214, 224-25 (W.D.N.Y. 2017).

Gascho (PB28) also preceded the 2018 Amendments adding Rule 23's explicit requirement that courts consider the effectiveness of class distribution. But even then, the *Gascho* dissent correctly followed *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014). "[W]here the vast majority of class members do not claim their awards, [and] unclaimed money remains with the defendant, district courts should not be allowed to engage in unreasonable, counterfactual valuations of the fund—even supposed compromise measures, as the district court did here" *Gascho*, 822 F.3d at 300 (Clay, J., dissenting). "[E]conomic reality" should govern. *GM Trucks*, 55 F.3d at 821. The district court valued the settlement as though the settlement ceilings had been reached, even though there was no evidence of even a possibility that could occur. Neither plaintiffs nor *Gascho*'s majority address, much less refute, any of the three reasons Frank gave (OB38-42) why *Boeing* does not apply to a claims-made settlement.

Sears Front-Loading Washer does not support plaintiffs' position. OB33. Unlike in *Sears*, plaintiffs negotiated a $3.2 million unopposed fee fund as part of the constructive common fund. And they insulated it with clear-sailing and reversion clauses, both "gimmick[s]" to suppress scrutiny and provide class counsel with a superficial and comfortable fallback argument for why a court should not bother to reduce their fees. *Pearson*, 772 F.3d at 786; *see also Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825 (7th Cir. 2018) (rejecting a functionally *ex parte* appeal by plaintiffs after the district court refused to award fees on a "made available" basis). Even after the Third Amendment unwound the fee reversion here, at the fairness hearing class counsel

misinformed the district court that their attorneys' fees "will not reduce any settlement benefit of the class." JA664.

Frank doesn't argue that the Amendments' addition of Rules 23(e)(2)(C)(ii)-(iii) "changed this calculus" (PB17), but that the new rules simply confirm that the long-established line of cases focused on economic reality (*GM Trucks, Prudential, Cendant, Baby Products, Dry Max Pampers*, *Pearson*, etc.) is correct and *Gascho*'s majority is not. OB20-21. Post-Amendments, plaintiffs offer only a smattering of district court decisions. PB23, 31-32. Again, Frank does not deny that, operating under the natural inclination to approve negotiated fees (OB16-17), many district courts have gotten it wrong and credited the "made available" fiction without comprehensive consideration of whether *Boeing* applies to claims-made settlements. That only shows the needs for further appellate guidance.

Plaintiffs contend that *Briseño* is no obstacle because "the district court here *did* analyze the substantive settlement terms and actual payouts to class members vis-à-vis the requested fee and found these terms to be reasonable." PB27. That's wishful thinking; the court analyzed the fees only with respect to a fictional "constructive common fund" that includes unclaimed amounts. JA20-22. And plaintiffs can't distinguish *Briseño* on the ground that the court was aware of the direct benefit; that was also true in *Briseño*. *See In re Conagra Foods, Inc.*, 2019 U.S. Dist. LEXIS 238325, 2019 WL 12338387 (C.D. Cal. Oct. 8, 2019) (cataloging precise number of timely claims).

Plaintiffs falsely assert that Frank "acknowledges that the settlement here meets the fair, reasonable, and adequate standard of Rule 23(e)." *E.g.*, PB27 (citing JA621). Their record citation belies the claim; as Frank has consistently maintained, the

settlement could have met the standard of Rule 23(e), had the district court had reduced the fees to effectively rebalance the settlement. JA620-21 ("Apportioning a settlement's recovery 50/50 between the class and class counsel does not satisfy Rule 23(e)…the Court *can* bring the settlement into compliance with Rule 23(e)'s fairness requirement and then approve it") (emphasis added). Plaintiffs repeatedly attempt to use Frank's non-appeal of the settlement approval against him. PB36 n.17, 42. Frank's side agreement with Wawa cured the settlement's fatally-flawed reversion clause and indisputably benefits the class. It is thus particularly disappointing that, after negotiating the harmful reversion clause, plaintiffs try using Frank's success in correcting it to maximize their leverage in defending counsel's fees. But the explanation for the litigation posture is simple. After Frank successfully negotiated with Wawa to unwind the fee reversion, he could correct the disproportionate allocation of fees (*i.e.*, the remaining violation of Rule 23(e)(2)(c)(iii)), using the vehicle of a Rule 23(h) fee objection. *Pearson*, 772 F.3d at 786 (quoting *Redman*, 768 F.3d at 632). Because the issues run together in this common-fund settlement posture, the Rule 23(e) issue *is* effectively before this Court. *Contra* PB42.

Plaintiffs also misquote Frank when they assert that he "*concedes* that under the methodology the district court used, the fee award 'constituted a reasonable 24.9% of the entire constructive common fund.'" PB3 (emphasis in original). Frank actually says that in the district court's "view," the fee constituted a reasonable 24.9%. OB11. But that view—crediting fictional amounts that went unclaimed as part of the constructive common fund—is "a legal miscue." OB25. And, thus, the district court abused its

discretion by "bas[ing] its ruling on an erroneous view of the law." *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1006 (2022) (internal quotation omitted).

For the most part, Wawa does not defend the "made available" fiction. It does, however, call "baseless" the Attorneys General's prediction that there will be a low redemption rate of the settlement gift cards, pointing to the record evidence of high redemption rates for purchased gift cards. DB8-10. Perhaps the 97.2% figure bears on the anticipated redemption rate for the roughly 8,000 class members who affirmatively claimed a settlement gift card. But the record has nothing to say about the likely redemption rate for those more than 550,000 individuals who will automatically receive an emailed gift card. *Amici* are correct that the rate of redemption on unsolicited coupons, even broadly flexible ones, will be far lower than that. OB21-22; *see Swinton*, 454 F. Supp. 3d 848, 866 (S.D. Iowa 2020) (citing surveys regarding promotional email coupon redemption rates between 2-4%); *Rougvie v. Ascena Retail Grp., Inc.*, 2019 U.S. Dist. LEXIS 28229 (E.D. Pa. Feb. 21, 2019) (7.5% redemption rate of $10-$30 mostly unsolicited coupons to Justice brand stores); Declaration of David Tjen, *Knapp v. Art.com*, No. 3:16-cv-00768-WHO, Dkt. 84-7 (N.D. Cal. Aug. 29, 2018) (0.7% redemption rate of $10 unsolicited coupons to Art.com).

More significantly, that the class's recovery is almost entirely non-cash makes this an even easier case. *See Kim v. Allison*, 8 F.4th 1170, 1181-82 (9th Cir. 2021) (reversing district court's valuation of a hybrid cash/in-kind settlement because court looked to the hypothetical maximums instead of "the timely submitted claims already made"). If the "made available" fiction does not govern when the amounts made available are

actually cash,[4] surely it cannot govern when the amounts mostly come in the more "suspect" form of "non-cash relief." *GM Trucks*, 55 F.3d at 803. Even if *Boeing* applied to claims-made settlements under previous versions of Rule 23, no appellate case that plaintiffs cite ever applied *Boeing* to hypothetical funds consisting of non-cash instruments. Plaintiffs request an unprecedented extension of *Boeing* that disregards Rule 23(e)(2)(C)(ii).

Lastly, Wawa notes that the settlement notice included a press release and earned media coverage along with a website and physical signage. Earned media, common to any major consumer class settlement, is incidental to, but not a substitute for meaningful Rule 23 notice. Here, it is undisputed that there was no individual notice even though Wawa possessed contact information for some class members. *Contra Larson v. AT&T Mobility LLC*, 687 F.3d 109, 123-30 (3d Cir. 2012). For purposes of this appeal, that lack of individual notice means that the pitiful claims rate—three hundredths of one percent—was predictable. *See* JA565-66; *Briseño*, 998 F.3d at 1026 & n.3.

By valuing the constructive common fund at the parties' stipulated $12 million (combined cash and gift card) maximum, by disregarding the fact that most of the funds made available would revert to Wawa, and by ignoring the fact that class counsel's fee request exceeded class recovery, the court committed reversible legal error.

[4] *See e.g., Prudential*, *Cendant*, *Baby Prods.*, *Pearson*, *Briseño.*

III. No other factors justify the district court's misaccounting of the constructive common fund.

Plaintiffs offer a handful of other rationalizations for the district court's lopsided division of the common fund. PB36-39. None persuade.

Plaintiffs tout the fact that they voluntarily reduced their fees below their putative lodestar. PB36-37. But the district court correctly declined their invitation to award fees on a lodestar basis. *Compare* JA18-26 (applying percentage methodology with lodestar crosscheck), *with* JA 664 (requesting lodestar method with percentage crosscheck) *and* Dkt. 258 at 14-33 (same). It couldn't have done so because class counsel's unsatisfactory billing records didn't allow scrutiny into the proposed lodestar. Summary breakdowns like those submitted cannot sustain a lodestar-based award. *Gelis*, 49 F.4th at 379-81; JA575-77. In a lightly litigated action that entered mediation right after consolidation and appointment of counsel, class counsel's "reduced" bill implausibly approached 6,000 hours. But even if the facially-dubious lodestar would have withstood scrutiny, a large lodestar cannot justify a lopsided allocation of the settlement fund. OB44 (citing cases). "[H]ours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel." *Redman*, 768 F.3d at 635; *accord Briseño*, 998 F.3d at 1026.

Plaintiffs also invoke the important public policy of encouraging socially beneficial consumer protection lawsuits. PB37. But suits that don't generate benefits for class members and, more specifically, settlements that "make available" funds that have no hope of leaving defendants' pockets, are not socially beneficial. As Professor Gold explains, socially beneficial deterrent effects of class actions depend on cultivating

well-functioning litigation that actually compensates class members. Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997 (2016). For decades, courts have recognized the indispensable need to ensure the class members remain the focal point of the litigation and that courts avoid every appearance of awarding counsel windfall fees. OB22-23 (citing cases). Only by "vigorously examin[ing] fee allowances" can courts stem "the potential for abuse" "and thus respond to the criticism that Rule 23 results in windfall fees for lawyers and little benefit to the actual claimants." *Dunn v. H. K. Porter Co.*, 602 F.2d 1105, 1110 (3d Cir. 1979).

When class counsel genuinely strive to get relief to class members, they find a way. The renegotiated settlements on remand in *Baby Products*, *Pearson*, and *Briseño* demonstrate that.[5] Rule 23, properly "applied with the interests of absent class members in close view,"[6] does not find nuisance settlements that merely pay off class counsel and the named representative to be socially beneficial. *Frank v. Gaos,* 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting); *In re Subway Footlong Sandwich Mktg & Sales Practices Litig.*, 869 F.3d 551, 556 (7th Cir. 2017); *cf. also Zucker v. Westinghouse Elec. Corp.*, 265 F.3d 171, 177-78 (3d Cir. 2001) (derivative settlement). Providing "nominal and

[5] *See McDonough v. Toys "R" Us*, 80 F. Supp. 3d 626, 660 n.36 (E.D. Pa. 2015) (approving amended settlement that increased class recovery from about $3 million to about $17.5 million); *Pearson v. Target Corp.*, No. 1:11-cv-07972, Dkt. 288 (N.D. Ill. Aug. 25, 2016) (approving amended settlement that increased class recovery from less than $1 million to several million dollars); *In re Conagra Foods, Inc.*, No. 11-cv-05379, Dkt. 807 (C.D. Cal. Sept. 30, 2022) (proposing amended settlement that increases class recovery from less than $1 million to $2 million).

[6] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997)

symbolic" benefits to class members while turning "persons other than class members [into] the chief beneficiaries" constitutes "misuse of the class action mechanism." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *accord Baby Prods.*, 708 F.3d at 179 (expressing concern that "class counsel, and not their client, may be the foremost beneficiaries of the settlement"). A world where class counsel can profitably settle cases while providing minimal actual recovery to the class is a world that encourages attorneys to bring meritless suits for nuisance settlements instead of tougher suits against real wrongdoers. That's the opposite of deterrence.

Plaintiffs do not grapple with the awful public policy consequences (OB43) of the rule that they prefer. This isn't a case in which the value of the individual underlying claims compelled $5 and $15 gift card amounts. OB30 (citing JA325). This isn't a case in which legal or factual circumstances precluded monetary compensation. This isn't a case in which the low payout surprised anyone. OB19-20, 31. This isn't a case in which plaintiffs created a unique prospective societal benefit that the defendant refused to do voluntarily. OB32-33. There is no public policy reason to affirm the fee award and settlement division in this case. And there is no public policy reason to adopt a rule that allows district courts to credit phantom relief.

Conclusion

This Court should vacate the fee award, making 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: November 30, 2022

Respectfully submitted,

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

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I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,464 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.

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/s/ Adam E. Schulman
Adam E. Schulman