No. 24-1874

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

Neither plaintiffs nor Wawa disputes the historical record of this litigation. From the time that the parties reached settlement in early 2021 until this Court decided *Wawa I* in November 2023, the parties consistently and repeatedly acknowledged that Wawa had agreed not to oppose plaintiffs' fee request, and that the settlement purposefully separated that fee fund from the class's recovery. OB31-33.[1] After *Wawa I* questioned those side agreements on fees and rejected the justifications offered for them, 85 F.4th at 726, the parties coordinated an abrupt volte-face. They began to argue that Wawa never agreed not to oppose plaintiffs' fee request, nor did the initial three versions of the settlement intend for any excess fees to revert to Wawa. OB15.

A "cocktail" (PB28) of well-established doctrines—the mandate rule, law-of-the-case, judicial estoppel, waiver, and forfeiture—preclude this inconsistency. OB32, 33-34, 35-36. So too does any fair reading of the settlements themselves. OB34-35, 37. Because they have no good answer, plaintiffs urge this Court not to get "bogged down in the weeds" of *Wawa I*'s mandate on clear sailing nor to get "sidetracked in technical debates about party forfeiture or estoppel." PB29, 33. But these principles form a foundation of federal litigation; the last place they should be discarded is where 22 million class members' rights hang in the balance. *See* Section I, *infra*.

[1] "JA," "OB," "PB," and "DB" refer to the joint appendix, Frank's opening brief, plaintiffs' brief, and defendant Wawa's brief respectively. "Dkt." refers to the docket entries in the litigation below, No. 19-cv-06019 (E.D. Pa.).

The district court's failure to account for these fee agreements prejudiced its ultimate decision to include millions of dollars of unclaimed cash and coupon value in the denominator of its Rule 23(h) fee award. OB41 Plaintiffs do not assert otherwise; they simply insist that the district court was correct when it found no clear-sailing and intentional fee reversion. PB38. They do contest the other factors that were either improperly included in (OB42-43) or omitted from (OB43-45) the decision, but these rationalizations do not change the calculus. *See* Section II, *infra*.

The failure to account for the clear-sailing and fee reversion is sufficient reason alone to vacate the fee award. But this Court can and should go farther, to give district courts guidance on resolving the *Wawa I* dilemma: should attorneys' fees be calculated based on amounts claimed or amounts made available. *See In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig*, 55 F.3d 768, 819 (3d Cir. 1995) ("*GM Trucks*") (addressing fee standards even though denial of class certification and settlement approval "obviate[d] the need" to do so).

Argument

I. Class counsel segregated their fees from class recovery and safeguarded them with a clear-sailing agreement.

Not all consistency is the hobgoblin of little minds, only foolish consistency. *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 204 n.9 (3d Cir. 2006). And the consistency secured by the mandate rule, judicial estoppel, and preservation doctrine is not some foolish "technical[ity]." *Contra* PB33. It pillars the rule of law.

A. Clear sailing

When litigants tell this Court and the trial court alike that the attorneys' fee was "agreed to" and that this agreement was acceptable because of the arms' length mediated negotiation (OB31-32 & n.4), they don't get to subsequently flip-flop on that factual admission simply because *Wawa I* refused to accept their proffered justification for "the presence of the side agreements." 85 F.4th at 726-27. (Judicial estoppel applies even though the settling parties lost *Wawa I* because they made the same representations to secure final settlement approval from the district court. *Wawa I* did not disturb that final approval). *Wawa I* urges all "courts"—*plural*—"be on the lookout," not solely the singular district "court" in this case. *Contrast* 85 F.4th at 725, *with* DB7. Here, the district court had already "found" clear sailing to exist and accepted "insufficient" justification for its inclusion in the settlement agreement. 85 F.4th at 726. And *Wawa I* ratified that finding: "Wawa promised as part of the settlement not to challenge class counsel's request for an agreed-upon attorney's fee award." *Id.* at 725. *Wawa I* could not "[s]tart with the clear sailing provision" if it the provision did not exist. *Id.*

Wawa I does not alter the definition of a clear-sailing clause and thus somehow reopen a question that it just decided. *Contrast Id.* at 717 n.3 (employing the standard definition: "defendants' agree[ment] not to contest class counsel's request for attorneys' fees up to an agreed amount") (internal quotation omitted), *with* DB8 & n.2; PB34 n.15. The settling parties were not simply silent; they made multiple affirmative representations relied on by the district court at final approval and by this Court in *Wawa I*. This "distinction" between inadvertent forfeiture and affirmative waiver "can

carry great significance." *United States v. Dowdell*, 70 F.4th 134, 140 (3d Cir. 2023) (internal quotation omitted). "A party's waiver should be enforced." *Id.*

The appellees offer little to no defense of the district court's reasoning that "agreed to" means something other than an agreement not to oppose. OB34. Grasping to answer why class counsel would cap their fee request with no reciprocal benefit, plaintiffs now say that it was simply a decision "to keep the case moving forward for the class's benefit." PB10. That is simply "not realistic." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014). Commercial class action attorneys are "'entrepreneurs' who take a case in the expectation of making money from it." *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 796 (11th Cir. 1999) (quoting Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991) and John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677 (1986)); *accord GM Trucks*, 55 F.3d 768, 801-03 (citing Coffee). This Court should be "loath to place such dispositive weight on the parties' self-serving remarks." *GM Trucks*, 55 F.3d at 804.

More importantly, this latest rationalization is inconsistent with plaintiffs' repeated and consistent representations until *Wawa I* came down. They repeatedly hammered on the idea that the fee was "agreed to" in their fee papers, plainly talking about an agreement as to the *amount* requested, not merely as to their right to make a contested request. Indeed, if it were the latter, then Wawa's counsel would need to

explain to their client why they did not oppose fees in November 2021, when the settlement was still structured to revert excess fees back to Wawa.

The point is not that all fee-capping provisions amount to clear-sailing provisions. *Contra* PB30. They don't. Rather, it's that a merely capped fee would never be touted to be "agreed to" by the defendant. And if it was, a defendant would immediately disabuse the court of that idea. Whether or not this agreement on fees comes sequentially after the agreement on class recovery does not matter; when fee agreement comes before final approval it is part of a packaged deal affecting the fairness of the settlement. *Wawa I*, 85 F.4th at 726; *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 308 (3d Cir. 2005); *GM Trucks*, 55 F.3d at 803 & n.24.

A fee-capping arrangement would also never be written using Paragraph 78's "cooperation" language. Wawa would have expressly "reserve[d] the right to object to Class Counsel's request for attorneys' fees." Settlement Agreement, *In re Home Depot, Inc. Customer Data Sec. Breach Litig.*, No. 15-cv-02999, Dkt. 181-2 ¶16 (N.D. Ga. Mar. 7, 2016); Settlement Agreement, *In re Target Corp. Customer Data Sec. Breach Litig.*, No. 14-md-2522, Dkt. 358-1 ¶7.2 (D. Minn. Mar. 18, 2015) (similar). As Frank pointed out, if this "cooperation" provision allowed *Wawa* to object, then *Wawa* could have also objected to settlement approval itself under that "cooperation" provision. OB34-35. Wawa says the district court "examined that context" but it did not. DB9.

Wawa I's mandate, judicial estoppel, preservation doctrines, and the settlement itself all preclude the district court's determination that Wawa never agreed to provide clear sailing for class counsel's fee request.

B. Fee reversion

It is the same story for the fee reversion that was "eventually removed in the Third Amended Settlement." *Wawa I*, 85 F.4th at 726. The parties offered—and the district court accepted—a revisionist account in which the reversionary structure was simply an oversight of omission. Frank details how that revisionism does not square with *Wawa I*, the history of proceedings, nor the settlement itself. OB36-37.

Plaintiffs criticize Frank's "drive-by treatment of these issues in the court below." PB34 n.15. But the district court permitted no briefing. Frank's counsel's remand declaration explained the factual predicate for the judicial estoppel and forfeiture arguments. JA1326-27. And he followed up on the preclusion argument at both remand hearings. JA1250, 1403. Plaintiffs' complaint appears to be that Frank didn't cite enough caselaw in counsel's remand declaration, but again, the district court had instructed "the last thing" it needed was "further briefs." JA1212. On appeal, Frank's opening brief sufficiently expounds the black letter preclusion and preservation doctrines. *See* OB31-36. Anyway, plaintiffs forfeit this issue by raising it only in a footnote. *Hassan v. City of New York*, 804 F.3d 277, 308-09 (3d Cir. 2015).

According to plaintiffs, Frank "barely mentioned the reversion issue" in his first appeal and even "unequivocally waived that argument at the final approval hearing." PB15 n.2; *accord* PB12. Wrong on both counts. After the Third Amendment removed the fee reversion, Frank did withdraw his objection to settlement approval on that basis, but he continued to argue that the initial fee segregation and unfair settlement proposals were relevant to the question of fee reasonableness because they reflected a lack of efficiency of counsel. *E.g.*, JA998. While they now characterize Frank as "barely

mention[ing]" the issue on appeal, at the time they complained that "Frank's brief goes on and on about how reversions or kickers can be an indication of self-dealing or unfairness." Brief of Plaintiffs-Appellees, *In re Wawa, Inc. Data Sec. Litig.*, No. 22-1950, Dkt. 34 at 19 n.9 (3d Cir. Nov. 9, 2022). Both before and after remand, Frank has maintained that the existence of the side agreements is additional reason to look at the amounts claimed (rather than the amounts "made available") when awarding percentage fees. JA1322-26.

It isn't *Frank's* "suggestion" that the reversionary structure "operated as a 'gimmick for defeating objectors.'" PB37 n.17. It's *Wawa I*'s conclusion! 85 F.4th at 726 (quoting *Pearson*, 772 F.3d at 786). *Wawa I* was correct; parties negotiate a segregated fee so that class counsel can argue to the court that class members have no interest in that payment of fees and the court's oversight obligations are correspondingly reduced. Here, class counsel argued so repeatedly. OB37 (citing JA740; Dkt. 258 at 9; Dkt. 258 at 13). Of course, this Court has long found that argument to be "patently meritless" since all components of the settlement form a "constructive common fund." *GM Trucks*, 55 F.3d at 820. "[A] thorough judicial review is required in all class action settlements." *Id.* at 819. But still, as here, class attorneys commonly cling to the fiction of a negotiated fee that does not affect the class's recovery.

Plaintiffs' story (PB36) of the inadvertent fee reversion, echoing the district court (JA22-29), reveals a central misunderstanding. It was error to focus on whether there was an illicit "opportunity for the parties to come to any so-called 'side agreement'" (PB36 (quoting JA22)), because as the settling parties admitted in front of the *Wawa I* panel, intentional fee segregation was "something that [was] negotiated at the

mediation." OB36 (quoting Transcript of Oral Argument, No. 22-1950, at 13:58-14:02). Nor does that admission stand alone; the intentionality of the fee reversion is written into the settlement. OB37 (quoting JA1033). The district court violated the mandate by finding otherwise.

Although Frank preempted it (OB38-39), the plaintiffs still fixate on the district court's finding that there was no collusion. PB3, 23, 30. Again, Frank's objection is not that the parties "colluded," it's that class counsel appropriated too great a share of the settlement (with the indifference of Wawa). OB38-39; *accord* Brief of Attorneys General as *Amici Curiae* 15-16. So there's no 'gotcha' to say that Frank concedes the absence of "collusion." *Wawa I* expressly rejects the very idea that a properly mediated negotiation legitimizes clear-sailing and kicker provisions. 85 F.4th at 726. "[T]he mere presence of a neutral mediator, though a factor weighing in favor of a finding of non-collusiveness, is not on its own dispositive of whether the end product is a fair, adequate, and reasonable settlement agreement." *Id.* (quoting *In re Bluetooth Headset Prods. Liab. Litig*, 654 F.3d 935, 948 (9th Cir. 2011)). *Contrast* PB36 (still relying on the presence of the mediator).

Clear sailing is pernicious—in conjunction with a segregated fee fund—not because parties exchanged promises through illicit secret channels, but because it paves the way for an "end product" that is lopsided in favor of class counsel to the detriment of class members. *Compare* Fed. R. Civ. P. 23(e)(2)(B) (requiring a fair arm's length negotiation), *with* Rule 23(e)(2)(C)(iii) (requiring a fair allocation of settlement funds between the class and its counsel).

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"Exhaustive findings of fact" (PB19) provide no reason to affirm when those findings fall outside of the permissible range allowed by *Wawa I's* mandate, contradict the settlement itself, and cannot be reconciled with the settling parties' representations throughout the litigation.

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

The district court's failure to recognize the side agreements on fees colored its eventual decision to award class counsel a percentage of the value that was "made available" but undistributed. OB41. Plaintiffs disagree that the side agreements existed, but never contend that district courts have the discretion to ignore such provisions when they exist. PB38. Thus, if the Court agrees with Frank in Section I, that is sufficient grounds to vacate the fee award. But the problems run deeper. OB42-45.

The settling parties prefer to talk about what Frank isn't challenging. He's not challenging Rule 23(a)(4) adequacy of representation, or Rule 23(c)(2) adequate notice. PB19. And he's not asking this Court to vacate the settlement approval. PB19, DB4-7. Yet, just as in the first appeal, Plaintiffs falsely assert that Frank does not dispute the Rule 23(e) fairness of the settlement PB19, 23. And again, the record belies the claim; Frank has consistently maintained the settlement ***could*** have met the standard of Rule 23(e) had the district court reduced the fees to effectively rebalance the settlement. JA996-97 ("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); *accord* JA1319. As the Attorneys General *amici* explain (at 14-19), the fee award, and more

generally the apportionment of the settlement pot, affects the fairness of the settlement. OB19-28. Affirming the district court's award of the full fee request would lock in an unfair allocation.

Again, as they did in the first appeal, Plaintiffs repeatedly attempt to use Frank's non-appeal of the settlement approval against him. PB23, 37 n.18. Frank's side agreement with Wawa cured the settlement's fatally-flawed reversion clause and indisputably benefits the class by allowing class members to access the excess from the negotiated fee fund. 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.

Yes, Frank isn't challenging representational adequacy or class notice. He's also not challenging numerosity or ascertainability. These are all irrelevant for the Rule 23(h) issue that he raises on appeal. Plaintiffs suggest that "Rule 23(a)(4) provides the first and foremost way" to address "structural conflict[s]." PB22. But Frank is referring to the principal-agent problem inherent in all class proceedings. The solution to that problem is not decertifying every class action when class counsel files a fee motion. Rule 23(h) is not surplusage; it provides the solution.

Wawa I takes Rule 23(h) seriously, but the settling parties do not. Frank contextualizes (OB19-30) Rule 23 jurisprudence, not as a "polemic" (PB28) or an "overt attempt" "to re-litigate *Wawa I*'s express holding" (PB32 n.13). Nor does that background depart from "settled Third Circuit law." *Contra* PB27. One can arrive at the same understanding by reading Judge Becker's "truly masterful" treatment of class

action conflict issues in *GM Trucks*. 55 F.3d at 823 (Gibson, J., concurring in the central holding and with the judgment).

Plaintiffs' hosannas to discretion and "broad deference" (PB21, 24, 27) go to the intensive fact-finding and "estimates in calculating and allocating an attorney's time," not to a district court's legal methodology. *Fox v. Vice*, 563 U.S. 826, 838 (2011). "A trial court has wide discretion when, but only when, it calls the game by the right rules." *Id.* The fee methodology itself—such as what factors are permissible to consider when determining whether to include unclaimed amounts in the denominator of a percentage-based fee award—"is purely a legal question" reviewed *de novo* on appeal. *Planned Parenthood v. Attorney General of New Jersey*, 297 F.3d 253, 263 (3d Cir. 2002). Frank explains at length why, for at least four reasons, the district court's decision to credit the amounts made available violated Rule 23 "in the context of this case." OB41-45

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"[C]ourts must place greater weight on the claims rate" when funds are reversionary, especially "when class members must do more than raise their hands" to get a payment. *Wawa I*, 85 F.4th at 723. Appellees do not dispute that the claims process here required class members to do more than raise their hands to get a payment. They had to submit purchase documentation to claim even a gift card; to receive cash, they also had to submit proof of out-of-pocket expenses that were not reimbursed. OB5-6. That triggered the requirement to "place greater weight on the claims rate."
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Notwithstanding a cursory mention (JA38), the district court placed no greater weight on the claims rate than it had in its first fee order.[2]

None of the plaintiffs' justifications bear out. They argue that the claims rate has no bearing where the class notice is legally adequate. PB39. But these are distinct questions. Rule 23 contains subsections that deal with notice. *See* Fed. R. Civ. P. 23(c)(2), (e)(1). But Rule 23 separately instructs that the fairness inquiry consider "the effectiveness of any proposed method of distributing relief, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii) (quoted by *Wawa I*, 85 F.4th at 723).

Case in point here. The notice was not the single or even the leading cause of the claims depression in this case. Rather, it was the documentary burdens on claimants combined with the impossibility of claiming cash, and the low negotiated value of the settlement gift cards. OB42-43; *compare In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 176 (3d Cir. 2013) ("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 left them apathetic.").

The financial institution track settlement pending below stands as a foil. There, Financial Institution plaintiffs negotiated a cash settlement that allowed claimants to claim thousands of dollars without documentation, resulting in a claims rate of 15%. Financial Institution Plaintiffs' Amended Motion for Final Approval, Dkt. 460 (Oct. 21, 2024). Wawa maintains (Dkt. 466) that Financial Institution plaintiffs were too

[2] Again, it also misstated the claims rate as "about 2.56%" when the actual claims rate is .03% or three-hundredths of one percent. OB42.

diligent in stimulating claims, but the point remains. Even without the unilateral claims stimulus, the claims rate reached "about 4.5 percent"— 150 times(!) higher than the 0.03% claims rate induced by class counsel's negotiated settlement in this consumer track.

Like the district court, Plaintiffs invoke the "economic reality of class action data breach litigation, in which class members have little motivation to make a claim no matter how effectively class counsel represented them." PB39. Plaintiffs cannot resort to equity here. Not only are class counsel experienced data breach attorneys, at the outset of the case, in a quest to win appointment, they assured the court that they had learned from low claims rates in other cases, and would avoid that by making the claims process as easy as possible. There are certain firms who have followed through on these promises, learning from experience and improving consumer privacy claims rates. *See* Jenna Greene, *Why Edelson made a (catchy) music video about class-action claims rates*, REUTERS (Apr. 7, 2022), https://www.reuters.com/legal/litigation/why-edelson-made-catchy-music-video-about-class-action-claims-rates-2022-04-07/. To the detriment of the class, class counsel made no progress here. If anything, the claims rate here was lower than comparable mass data breach settlements. JA1140. Counsel's fee should reflect their product.

More generally, these public policy arguments are simply "backward." OB43. Rule 23(h) should encourage socially beneficial litigation that benefits class members; not litigation that class members are (at best) indifferent to. Aligning the interest of class counsel and the client class is the primary reason that federal courts prefer the percentage-of-recovery method: it "rewards counsel for success and penalizes it for

failure." *E.g., GM Trucks*, 55 F.3d at 821; *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998); *In re Cendant Corp Prides Litig.*, 243 F.3d 722, 732 (3d Cir. 2001); *S.S. Body Armor I, Inc. v. Carter Ledyard & Milburn LLP*, 927 F.3d 763, 773 (3d Cir. 2019).

For similar reasons, plaintiffs gain no traction from adverting to a salutary "deterrent effect." PB40. Obligating Wawa to make to make available a pot of money (mostly gift cards, really) with no expectation that it will ever pay it out doesn't constitute an "equally valuable" "deterrent" to actual payments. *Baby Prods.*, 708 F.3d at 178 (cy pres). Nor does obligating defendants to adhere to business practices that they have already implemented and have no indication of changing.

Maybe plaintiffs are saying that Wawa's payment of attorneys' fees is sufficient deterrence. At least one notable academic advocates for exactly this attorneys-take-all approach. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047 (2010) (proposing that it would be appropriate to pay attorneys 100% of the fund without mentioning attorneys' fiduciary duties once). But this Court, in line with others, has correctly renounced the notion that Rule 23 is "indifferent" to class member compensation. *Baby Prods.*, 708 F.3d at 178; *accord Wawa I*, 85 F.4th at 723-25.

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*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring) (simplified).

In passing, plaintiffs allude to the fact that their proclaimed lodestar exceeded the district court's award. PB26 (using the common misnomer: "negative multiplier"). Yet the district court never considered the lodestar crosscheck as a reason for selecting "amounts made available" over an "amounts claimed" methodology. JA28-40. Indeed, it acknowledges that it did not revisit the question of the lodestar on remand from *Wawa I*. JA47 n.14. That makes sense. At the time of its initial fee award, the district court had declined plaintiffs' invitation to award fees on a lodestar basis *Compare* JA1184-92 (applying percentage methodology with lodestar crosscheck), *with* Dkt. 258 at 14-33 (requesting lodestar method with percentage crosscheck). This decision was correct because class counsel's unsatisfactory billing records didn't allow scrutiny into the proposed lodestar. Summary breakdowns like those plaintiffs submitted cannot sustain a lodestar-based award. *E.g., Gelis v. BMW of N. Am., LLC*, 49 F.4th 371, 379-82 (3d Cir. 2022); *see* JA745-50. On remand, plaintiffs submitted no further lodestar detail.

Even if class counsel had documented a large lodestar, that would not have justified a lopsided allocation of the settlement fund. "[H]ours can't be given controlling weight in determining what share of the class action settlement pot should go to class

counsel." *Redman v. RadioShack Corp.*, 768 F.3d 622, 635 (7th Cir. 2014); *accord Briseño v. Henderson*, 998 F.3d 1014, 1026 (9th Cir. 2021). Lodestar crosschecks cannot "trump" or "displace" the primary reliance on the percentage of common fund method. *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005) ("trump"); *In re AT&T Corp. Secs. Litig*, 455 F.3d 160, 164 (3d Cir. 2006) ("displace").

Lastly, injunctive relief that only codified the status quo was no reason to elect an "amounts made available" methodology. OB44-45. Factually, no one disputes that the settlement commits Wawa to court enforcement of its existing practices. The problem is that *legally*, an injunction codifying the status quo confers no benefit when the defendant has no inclination to change those practices. OB44-45 (citing, *e.g.*, *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017)). Little common sense is needed to understand that Wawa is not going to undo the data privacy point-of-sale EMV transition that ostensibly cost millions of dollars to accomplish. OB44. Indeed, Wawa's counsel submitted multiple declarations on the injunctive relief without a single intimation that Wawa might considering undoing its EMV conversion. JA988-91, 1274.

One non-precedential decision, *Poertner v. Gillette Co.*, 618 F. App'x 624, 629 (11th Cir. 2015), accepted the legal proposition that class counsel could claim credit for business practices changes catalyzed by the filing of the lawsuit. PB42 n.20. Other courts have persuasively rejected that rule. *E.g.*, *Koby; Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002). At settlement, courts must be attuned to the consideration that the class members receive in exchange for their release of claims. Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 875 (2016)

(singling out the injunctive relief in *Poertner* as particularly illusory) (cited favorably by *Wawa I*, 85 F.4th at 717 n.3, 719 n.8, 723 n.19).

Nor does this fair accounting rule discourage defendants "from implementing prompt remedial measures." *Contra* PB42. Defendants get the immediate benefit of forestalling future liability. *Koby*, 846 F.3d at 1080. And by implementing prompt remedial measures they may even thwart certification of existing class proceedings. *See In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (concluding Rule 23(a)(4) representational adequacy missing when plaintiffs sought relief already available through a voluntary recall). No doubt, the settling parties would prefer a rule where they can seamlessly "creat[e] the illusion of accomplishment." Erichson, 92 NOTRE DAME L. REV. at 874-75. But defendants don't need that extra benefit to motivate them to fix a problem. And there's no good reason why plaintiffs should receive preferential fee treatment when they bring garden variety consumer claims rather than momentous civil rights claims. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (repudiating idea that voluntary changes make civil rights plaintiffs prevailing parties for fee shifting purposes).

In any event, this whole debate is somewhat beside the point, because Wawa began implementing its new data security practices even before the lawsuits were filed, not merely before the settlement was reached. OB44 (quoting JA1392).

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On the fundamental question that *Wawa I* remanded for further consideration of, the district court both considered improper factors and failed to consider proper factors.
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Conclusion

This Court should vacate the fee award and remand for proceedings consistent with *Wawa I*.

Dated: December 17, 2024

Respectfully submitted,

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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.

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