IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE WAWA, INC DATA SECURITY LITIGATION	Case No. 19-6019-GEKP Class Action
This document relates to: Consumer Track	

DECLARATION OF ADAM SCHULMAN

I, Adam Schulman, declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. I am a Senior Attorney with the Hamilton Lincoln Law Institute ("HLLI") and its Center for Class Action Fairness ("CCAF"), and counsel for objecting class member Theodore H. Frank in the above-captioned litigation.

3. Mr. Frank has filed a comprehensive declaration in this matter, attesting to class membership, and other background facts related to HLLI. Dkt. 263-1.

4. Frank does not contend that this Court needs to do any deep dive into subjective claims of feelings about settlement negotiation; the violations of class counsel's duty to the class and the purpose of settlement terms are available in black-and-white objective manifestations of the written language of the settlement agreement and the objective meaning of class counsel's representations to the Court and to the Third Circuit. As discussed below, each of those reflect attempts to structure the settlement to benefit class counsel at the expense of the class and collect a disproportionate share of the settlement benefit. However, should the court choose to consider subjective evidence, that evidence overwhelmingly supports Frank's position.

5. Because of the Third Amendment to the Settlement, every dollar that goes to class counsel is a dollar that doesn't go to the class. The Third Amendment ends the segregation of the fee award from the class award and instead creates a single common fund of about $6 million. This Court's Rule 23(h) award is a decision of how much of that $6 million to allocate to class counsel and how much to allocate to the class. For example, if the Court awards 20% of the common fund, then class counsel will receive $1.2 million instead of $3.2 million and the class will receive $4.9 million instead of $2.9 million.

6. In accordance with the Court's request at the December 5, 2023 remand hearing for further factual submissions related to Consumer Class Counsel's renewed request for attorneys' fees, I submit this declaration to supplement the record.

7. Paragraphs 8-19 below discuss the underlying facts of this lawsuit and Wawa's preexisting remedial measures. Paragraphs 20-36 discuss the initial settlement and preliminary approval. Paragraphs 37-76 discuss Frank's objection. Paragraphs 77-82 discuss the Second Amendment to the settlement. Paragraphs 83-90 discuss Frank's post-objection negotiation with Wawa and the resulting Third Amendment to the settlement. Paragraphs 91-107 discuss the fairness hearing and the Court's approval of the settlement and award of fees. Paragraphs 108-145 discuss Frank's appeal and the Third Circuit opinion. Paragraphs 146-152 discuss the lost time value of money.

The Data Breach, Lawsuits, and Wawa's Remedial Measures

8. For most of 2019, hackers compromised Wawa's payment systems, exposing the credit and debit card information of about 22 million Wawa customers nationwide. Dkt. 132 at 6.

9. Just after Wawa publicly notified customers of the data breach in December 2019, several plaintiffs sued Wawa on a variety of state-law claims.

10. Shortly after, on January 8, 2020, the Court consolidated several cases in docket No. 19-cv-6019. Dkt. 9.

11. On January 28, 2020, Wawa issued a press release stating that the company learned of reports of criminal attempts to sell cardholder data purportedly related to the breach. Wawa further stated that it had alerted its payment card processor, the Payment Card Brands, and card issuers to heighten fraud monitoring activities to help further protect any customer information. Wawa assured customers that they would not be responsible for fraudulent charges, urged them to enroll in free credit monitoring, and promised that it was continuing to take steps to enhance the security of its systems.

12. Earlier that same month, Wawa confirmed in the media that "ongoing implementation of EMV technology at gas pumps" had "been underway for months" and would be "complete at all of [its] stores before Oct. 2020." Pat Ralph, *Wawa improving payment security at convenience stores in wake of data breach*, PHILLY VOICE (Jan. 9, 2020), https://www.phillyvoice.com/wawa-improve-security-data-breach-credit-card-chip-reader-gas-

pumps/, *permanent link available at* https://web.archive.org/web/20200507222347/https://www.phillyvoice.com/wawa-improve-security-data-breach-credit-card-chip-reader-gas-pumps/]. A true and correct copy of this article is attached as Exhibit E.

13. I am aware of no current or past indication that Wawa will cease to operate the EMV security procedures since those procedures' 2020 implementation.

14. In February 2020, Wawa's board authorized $25 million of additional spending to improve its data security practices. Dkt. 301-1 at 14.

15. On information and belief, Wawa did so to forestall future events that could damage the company and create liability, as well as, in its own words, to "provid[e] benefits to its valued customers." Dkt. 301-1 at 14.

16. Over the next six months, counsel in the consolidated cases 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.

17. 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.

18. They promised that they would "requir[e] minimal effort or documentation to submit a claim." Dkt. 78 at 25.

19. Shortly after the appointment of counsel, the consumer plaintiffs filed their Consolidated Class Action Complaint. Dkt. 132.

The Settlement and Preliminary Approval

20. Before any contested motion practice, the parties settled in principle in September 2020, memorializing the agreement and submitting it to the Court for preliminary approval in early 2021. Dkt. 179.

21. The settlement covered an estimated 22 million class members. Dkt. 181 at 6.

22. That initial deal proposed to provide 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.

23. 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.

24. In this first version of the settlement, the gift cards were subject to the possibility of an expiration date after one year. Dkt. 181-1 at 9. Such an expiration date would have made them "coupons" under the Class Action Fairness Act. 28 U.S.C. § 1712.

25. 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.

26. The $5 and $15 caps on gift card value were arrived at as "a matter of negotiation" rather than as a result of "linear analysis" of the value of class members' claims. Dkt. 213 at 76.

27. 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 in February 2020 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.

28. The parties agreed to value this injunctive relief as at least $35 million. Dkt. 181-1 at 13.

29. The parties based this value on the costs to Wawa of implementing the data security practice changes. See Dkt. 274 at 2. They did not offset any costs that preexisted the settlement or even preexisted the litigation.

30. There is no evidence in the record that the injunctive relief provided for in the settlement obligates Wawa to do anything that it was not already doing. It merely subjects certain of those preexisting practices to a two-year period of semi-annual monitoring that is enforceable by judicial mechanisms. If there is a substantive change effected by the settlement's injunctive provision, the settling parties have never explained what it is. *See* Dkt. 274.

31. 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.

32. In the original settlement, if the Court awarded less than that amount, any excess sums would remain with Wawa. Dkt. 181-1 at 23.

33. Wawa would pay class counsel in cash, rather than gift cards.

34. 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.

35. The Court preliminarily approved the settlement and authorized notice. Dkt. 233.

36. The parties only provided notice to the class through signage publication in Wawa stores and the settlement website, and not to any individual class members. Dkt. 233 at 11-12, 14-15.

Frank's Objection

37. I learned of the settlement through media coverage around the time of preliminary approval. My research showed that the settlement was objectionable for many of the same reasons that we had successfully struck down or improved other settlements in other cases: it consisted of non-cash relief; it paid the attorneys much more than what the class was likely to receive; and it shielded those disproportionate fees from appellate scrutiny through the use of clear-sailing and fee-reversion clauses.

38. On September 21, 2021, I reached out to Wawa's counsel Gregory Parks (copying class counsel) seeking information about claim submission numbers, asking for clarification about notice, and expressing HLLI's concerns that the proposed settlement "may be unfairly apportioned."

39. A true and correct copy of this email is attached as Exhibit A.

40. Mr. Parks proposed setting up a call between myself and Wawa's counsel the week of October 11. We had a call the morning of October 12, 2021 and discussed HLLI's concern that there would be no payout of much more than $1 million under the settlement and our concern that

the tier one claimants could irrationally receive greater awards than the more injured two tier claimants. I floated the idea of using the mobile app/rewards program to provide direct notice to class members, and Mr. Parks responded that that wouldn't work because the app only encompasses a small group of people and the app works through charging the app with gift cards, not through any connection with credit or debit cards.

41. During that phone call, I also expressed that the reversion to Wawa of unawarded fees to class counsel was objectionable. Mr. Parks would have been familiar with this issue, because I had previously represented objectors to a 2016 settlement where Mr. Parks represented the defendant. *Rougvie v. Ascena Retail Group*, No. 15-cv-724 (E.D. Pa.). In that case, Mr. Parks's client had agreed to remove the fee reversion from the settlement to address my client's objection, and we discussed the possibility of Wawa doing the same thing here. At no time in these conversations did Mr. Parks deny that the agreement had clear-sailing and fee-reversion clauses.

42. Later that day, I sent an email to Wawa's counsel memorializing the call, stating that I would "follow up toward the end of the month on the claims data/amplification efforts" and "reiterat[ing] the possibility of Wawa agreeing to eliminate the fee reversion in exchange for our client agreeing to restrict our objection to fees only."

43. A true and correct copy of this email is attached as Exhibit B. At no point did Wawa contest my characterization of the settlement as containing a "fee reversion."

44. As promised, I sent a follow up email on October 29, 2021, to inquire again about the claims rates and amplification efforts. Mr. Parks did not respond until November 8, 2021, a few days before the November 12 objection deadline. I responded that I would happy to chat further before the filing deadline, but received no response before the deadline.

45. Meanwhile, class counsel had moved for $3.2 million in combined fees and expenses ($3,040,060 attributable to fees), uncontested by Wawa. Dkt. 257.

46. 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.

47. Class counsel 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 and cash "made available," though that number was substantially larger than what the class was scheduled to receive at the time of the fee application. Dkt. 258 at 10. The fee application did not disclose to the court what the class would actually receive, notwithstanding the command of Rule 23(e)(2)(C)(ii) and Third Circuit law in *Baby Products* that courts must consider that information in deciding whether to approve a settlement.

48. Class counsel "conservatively exclude[d]" the injunctive relief from the valuation of the denominator. Dkt. 258 at 10, 12, 31. They admitted that "because injunctive relief is often difficult to value" "Courts generally treat the existence of injunctive relief as a factor in determining the size of the percentage fee to approve, as opposed to adding the costs of the injunctive relief to the settlement value." Dkt. 258 at 32.

49. 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.

50. Class counsel declared that a district court would "abuse[] its discretion by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund." Dkt. 258 at 30 (quoting *Williams v. MGM-Pathe Comm. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997)).

51. Class counsel characterized their fee request as "agreed to by the parties." Dkt. 258 at 13. This is the very definition of a clear-sailing agreement.

52. Class counsel also argued that the fee payment "will not reduce any settlement benefits made available to the class," thus evincing an awareness of the fee reversion present in the settlement. Dkt. 258 at 9; *accord* Joint Declaration of Co-Lead Class Counsel in Support of Consumer Track Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Service Awards, Dkt. 259 at 18 ("The $3.2 million payment by Wawa will not reduce any settlement benefits made

available to the Class."). So not only was class counsel aware of the fee reversion in the settlement, they wrongly attempted to portray the fee reversion as a benefit to the class rather than what multiple federal appellate courts have recognized as a means to shield class counsel's fees from appellate scrutiny at the expense of the class.

53. This argument in class counsel's fee papers directly contradicts class counsel's claims at the post-remand December 5 hearing that they thought any reduction in fees would go to the class. The Court should consider the willingness of class counsel to make self-serving claims post-remand that directly contradict what they previously told the Court in writing when evaluating the credibility of any other self-serving claims they make post-remand.

54. Class counsel demonstrated that the intent of the fee reversion clause was to protect their disproportionate fee award from scrutiny, because they argued that "the Court's fiduciary role in overseeing the award is greatly reduced" "[w]here, as here, the fee award is to be paid separately by the defendant rather than as a reduction to the common fund." Dkt. 258 at 13.

55. On November 10th, 2021 I filed Theodore Frank's objection with the Court. Dkt. 263.

56. Frank documented his class membership and submitted a claim for a gift card. Dkt. 263-1.

57. Frank is the founder of the Center for Class Action Fairness, now part of the nonprofit Hamilton Lincoln Law Institute.

58. 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.

59. 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).

60. While CCAF has lost some of the dozens of objections it has brought in its history dating back to 2009, it has won the majority of its federal appeals, including all four of the appeals it has prosecuted in the Third Circuit. *In re Wawa, Inc. Data Sec. Litig.*, 85 F.4th 712 (3d Cir. 2023); *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).

61. Frank objected that the settlement unfairly served class counsel's interests at the expense of the class. Dkt. 263 at 12-27.

62. 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. Dkt. 263 at 16, 17, 19-20, 23-25.

63. 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. Dkt. 263 at 25-27.

64. Frank maintained (and continues to maintain) 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. Dkt. 263 at 13-14.

65. The putative injunctive relief could not remedy the unfairness of the disproportionate fee request because it did not obligate Wawa to do anything it was not already doing. In fact, the settlement acknowledges that Wawa's Board had already voluntarily committed $25 million in the wake of the data breach. Dkt. 263 at 22.

66. Defendants have the incentive to take voluntary remedial actions even without being allowed to credit those actions as "settlement benefit" under a subsequent settlement. Such voluntary remediation forestalls future harm and additional litigation and liability, and thus is simply a wise business decision. It also reduces the risk of attorneys' fees (by preventing class counsel from later claiming injunctive benefits as part of a settlement agreement). It also can be used to defeat class certification on certain theories of Rule 23(a)(4)'s adequacy requirement or

Rule 23(b)(3)'s superiority requirement. There is no adverse public-policy consequence from refusing to consider "injunctive relief" to be a settlement benefit when it is not consideration for the class's release of monetary damages claims. In fact, the contrary rule of the parties deters voluntary

67. Even when injunctive changes do provide a marginal benefit over the status quo ante, it is legal error to value that benefit based on the costs imposed on the defendant. Dkt. 263 at 22. For example, an injunction to spend $6 million on a Super Bowl ad where the Wawa CEO wears a dunce hat and tells viewers that he is "very very very very very very sorry about the data breach" would be of tremendous expense to Wawa, but of infinitesimal benefit to the class.

68. 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. Dkt. 263 at 27-28.

69. 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. Dkt. 263 at 28-34.

70. Class counsel did not provide billing records with sufficient detail to allow the Court to use a lodestar methodology to award fees. Dkt. 263 at 29-31.

71. In any case, Frank reasoned that 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. Dkt. 263 at 31-32.

72. Finally, the available lodestar information confirmed that class counsel's $3 million request was unreasonable. Dkt. 263 at 32-34.

73. Declarations from the claims administrator confirmed that Frank correctly anticipated the minuscule claims rate. 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. Dkt.

273 at 3-4; Dkt. 313 at 2. This would be a total of $1,079,829.71 for the class, about one third of the $3.2 million the class attorneys were requesting in fees.

74. Settling parties can predict claims rates with actuarial certainty. Indeed, there exists something called "settlement insurance" where a third party making such an actuarial prediction offers for a payment to assume the risk of an unusually high claims rate. Theodore H. Frank, *Settlement Insurance Shows Need for Court Skepticism in Class Actions*, OPENMARKET BLOG, *available at* https://web.archive.org/web/20170206214253/https://cei.org/blog/settlement-insurance-shows-need-court-skepticism-class-actions (Aug. 31, 2016).

75. Based upon prevailing claims rates in consumer class litigation, the lack of direct notice, the minimal value of each settlement gift card, and the documentation required by the settlement to make any valid claim, there was no realistic possibility of even approaching any of the ceilings set for the various claims tiers.

76. The parties introduced no evidence that they even expected a higher rate than the 0.035% that they realized (nor did they argue that on appeal).

The Second Amendment to the Settlement

77. After Frank objected, the parties submitted a second amendment to the settlement. Dkts. 264, 264-1.

78. Though the parties knew or should have known their claims rate would be miniscule, they waited until after Frank had reached out to express his concerns before they negotiated the Second Amendment, and after Frank filed his objection before they publicly filed the amendment.

79. 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.

80. There were more than 550,000 identifiable mobile app users (Dkt. 313 at 2); adding them into the $5 gift card Tier 1 pool resolved Frank's objection about intraclass allocation.

81. Although a stark improvement over the $1.1 million of the original settlement, the $2.9 million class distribution was still less than class counsel's $3.2 million clear-sailing award, and Frank maintained his objection to that disproportion.

82. Class counsel's filings before (and since) the Second Amendment to the Settlement argue that the value of the settlement must be determined by the amount "made available." By this fallacious legal argument, the Second Amendment, though it nearly tripled the amount the class members would actually receive, had no effect on the value or fairness of the settlement. The *only* reason to make the amendment that would cost Wawa an additional $1.8 million would be to blunt Mr. Frank's arguments about the disproportionality of the settlement allocation; class counsel has never conceded that there is any difference in settlement fairness between a settlement that pays class members $1.1 million and one that pays class members $2.9 million. There is no evidence currently in the record that the parties would have made this adjustment to the settlement if I had not contacted the settling parties about problems with the settlement and if Mr. Frank had not then objected. Even now, class counsel contends there should be no difference in their fee a court should award for the original settlement and the fee a court should award for the second amended settlement.

Frank's Post-Objection Negotiations with Wawa and the Third Settlement Amendment

83. After I reviewed the second settlement amendment, on November 18, 2021, I had a phone conference with Mr. Parks where we explored the possibility of withdrawing aspects of Mr. Frank's objection in light of the second settlement amendment and Wawa's potential flexibility on eliminating the fee reversion. I mentioned that, under the terms of the agreement, eliminating the reversion would require the written assent of class counsel. Mr. Parks suggested that he did not believe class counsel would currently endorse such an amendment because they would not want to appear to suggest that their fee request is excessive. He said he would reach out to class counsel to raise the issue further. At no point did he contend that the settlement did not have a clear-sailing agreement. At no point did he contend that Frank's proposed amendment was unnecessary because the settlement did not have a fee reversion. The fact that Mr. Parks was

concerned that class counsel would reject an amendment shows that Mr. Parks understood that the fee reversion was intended to be a benefit for class counsel at the expense of the class.

84. Five days later, on November 23, I sent a follow-up email to Mr. Parks recording that understanding of our phone call, and asking how plaintiffs had responded to the possibility of eliminating the fee reversion.

85. A true and correct copy of that email is attached as Exhibit C. It reads in relevant part "I wanted to follow up on last week's call, to see how plaintiffs responded to the possibility of not opposing an amendment to eliminate the fee reversion. My understanding from our call is that they would not currently endorse such an amendment bc they do not want to appear to be suggesting that their fee request is excessive." Mr. Parks did not contest any of the characterizations in that November 23 email.

86. Having not heard from Mr. Parks, I followed up again on November 29, and received a response two days later stating that "Class counsel have now advised that they have no objection to Wawa agreeing that any amounts not awarded to class counsel for fees and costs could go in equal shares to the recipients of the Tier 1 and Tier 2 gift cards."

87. During the first three weeks of December, Mr. Parks and I negotiated the language of the joint stipulation (Dkt. 269), as an understanding that Mr. Frank would withdraw his objection to the Rule 23(e) fairness of the settlement in exchange for the elimination of the fee reversion through the Third Amendment to the Settlement Agreement (Dkt. 269-1), and the stipulation's acknowledgment that the settlement gift cards would not be subject to expiration. The only beneficiaries of this *quid pro quo* were members of the class; if anything, Mr. Frank was not even offering consideration in exchange, because the amendments would moot his existing Rule 23(e) objections to settlement fairness.

88. In the stipulation, Frank maintained his objection to class counsel's Rule 23(h) request.

89. Frank then sought leave to file a supplement to address the Second and Third Settlement Amendments. Dkt. 270.

90. Frank's response detailed the process of negotiation that led to the Third Amendment. Dkt. 278 at 1. Frank described how the Third Amendment, by removing the fee reversion, empowered the Court to rebalance the allocation of settlement proceeds to "bring the settlement into compliance with Rule 23(e)'s fairness requirement." Dkt. 278 at 2. He explained that class counsel's fee request was still excessive in relation to the class's actual benefit, and in light of the fact that class counsel needed "four tries and the involvement of Frank to resolve unmistakable issues." Dkt. 278 at 3. He urged the Court to limit class counsel's recovery to 25% of the actual common fund, and thereby reciprocally increase class member recovery by about $1.6 million in gift card value. Dkt. 278 at 2-3.

The Fairness Hearing and District Court Approval

91. In response to Frank's objection, class counsel continued to assert that their fee should be based on unclaimed amounts "made available" under the settlement, arguing that "Supreme Court and Third Circuit precedent" entailed that result. Dkt. 272 at 38-44. They argued that an award less than what they requested would wrongly "penaliz[e] Class Counsel for the results they achieved." Dkt. 272 at 43. They also argued that Rule 23(e)(2)(C)(ii), relating the the effectiveness of claim processes, had no bearing on their motion for fees. Dkt. 272 at 44. They acknowledged the existence of the clear sailing clause, but justified it based on non-collusive arms-length negotiation. Dkt. 272 at 48-49. They never claimed that the Third Amendment's removal of the fee reversion was merely a "clarification" of their intention all along until after remand.

92. Wawa too, sought final approval. Dkt. 275. In accordance with the settlement's clear-sailing provision, it did "not object to an award of attorneys' fees and costs in the full amount contemplated by the Settlement Agreement." Dkt. 275 at 6-7.

93. Indeed, Wawa has fulfilled its "cooperat[ion]" obligation by doing more than merely not objecting to class counsel's fee request. Wawa's counsel submitted a declaration (Dkt. 274) that class counsel used in efforts to justify their fee award. Wawa also filed an appellee's brief against Frank's appeal even though that appeal was limited to the issue of attorney's fees. In that brief it stated that "Defendants believe the district court's decision was correct in all respects"

and "refer[red] the [Third Circuit] to Plaintiffs' briefing on the fee issue." Brief of Defendants-Appellees Wawa, Inc. and Wild Goose Holding Co., *In re Wawa, Inc. Data Sec. Litig*, No. 22-1950, at 3-4 (3d Cir. Nov. 9, 2022). Similarly, at the post-appeal remand hearing on December 5, 2023, counsel for Wawa made arguments in furtherance of Plaintiffs' fee request.

94. Wawa has taken such a position under its "coopera[tion]" obligation even though it would be in Wawa's financial interest to pay more of the $3.2 million fee fund as gift card value to class members and less of it as cash to class counsel.

95. On January 26, 2022, the Court held a fairness hearing on the motion for final settlement approval and award of attorneys' fees. *See* Dkt. 302.

96. At the hearing, class counsel reasserted that Frank is "incorrect that the Court should calculate attorneys' fees just based on the actual claims rate as opposed to what was offered. The cases are legion that say it's based on what was offered." Dkt. 302 at 97-98.

97. Class counsel asserted that the Seventh Circuit authority that looks to the amounts claimed was "overruled by a subsequent…case." Dkt. 302 at 98.

98. Even after the Third Amendment to the settlement eliminated the fee reversion so that the class would enjoy the benefit of fees negotiated (but unawarded) to class counsel, class counsel erroneously told that the Court that their fee "will not reduce any settlement benefit of the Class." Dkt. 302 at 33.

99. Subsequently, the Court approved the settlement and granted class counsel's request for $3.2 million in fees and expenses. Dkt. 314.

100. As Frank recommended, the Court awarded fees on a percentage basis, the method "generally favored" because it better aligns the interest of class counsel with that of the class members. *Compare* Dkt. 263 at 31-32, *with* Dkt. 314 at 15-22.

101. 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." Dkt. 314 at 18-19. 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. Dkt. 314 at 19.

102. The Court neither mentioned nor addressed the contrary authority Frank cited, either before or after the 2018 Amendments to Rule 23. Adopting class counsel's position, the Court held that "attorney's fees should be analyzed based [on] the entire constructive fund rather than the claims filed" and faulted Frank for "not address[ing] the Third Circuit precedent to the contrary." Dkt. 314 at 18.

103. In a footnote, the Court concluded that the injunctive relief weighed in favor of approval class counsel's fee request, but did not include it in calculating the constructive common fund or otherwise. Dkt. 314 at 17 n.4.

104. It found that "clear-sailing provisions are common in class action settlements" and the agreement here posed no problem given the non-collusive arms'-length negotiation. Dkt. 314 at 19.

105. It also found that "the need for several amendments and [Mr. Frank's] own contributions" did not weigh against the requested fee, because "the parties' flexibility in negotiating amendments as needed should be applauded rather than censured." Dkt. 314 at 20.

106. Employing the percentage method of awarding fees, the Court did not address Frank's objection to insufficient documentation of billing records.

107. It overruled his objections to the calculation of the lodestar itself and found that the crosscheck-multiplier was 0.78, which supported the award. Dkt. 314 at 20-23.

Frank's Appeal and the Third Circuit Opinion

108. Frank appealed the award of attorneys' fees. Dkt. 321.

109. Employee track plaintiffs also objected and appealed, but upon information and belief, dismissed their appeal after receiving a side settlement.

110. It is economically burdensome and irrational to object, so it is not surprising that no other absent class members appeared. *See generally* Debra Lyn Bassett, *Class Action Silence*,

94 BOSTON U. L. REV. 1781, 1799 (2014). It is the cogency of the objections that matters, not the quantity. *In re GMC Pick-Up Trucks Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995) (finding that "class reaction factor" does not weigh in favor of approval, even when low number of objectors in large class, when "those who did object did so quite vociferously").

111. On appeal Frank maintained that the Court erred in including unclaimed funds in the calculation of the constructive common fund. Far from being "contrary" to Third Circuit precedent, Frank explained how Third Circuit law consistently looks to economic reality when valuing class settlements, and how this precedent was reinforced by the addition of Rule 23(e)(2)(C)(ii)-(iii) in 2018. Frank cataloged the factors that supported basing fees on the actual recovery in this particular case: (1) 97% of the class will receive nothing but will lose their right to sue, (2) more than 97% of the value provided under the settlement comes in the form of coupon-adjacent gift cards, (3) the $5 and $15 gift card caps were a matter of negotiation, not a matter of the operation of law, (4) the minimal participation rate was expected, especially given the lack of any direct notice to class members, (5) at the time of appointment class counsel acknowledged the need to simplify the claims process and promised only "minimal effort or documentation" would be required to submit a claim, (6) class counsel insulated their fees with a clear sailing and fee reversion structures.

112. While crediting the Court for correctly excluding any injunctive relief valuation from the common fund accounting, Frank contended that codifying Wawa's preexisting practices changes did not confer any incremental value on the class.

113. Frank maintained that, as a joinder device, a Rule 23(b)(3) class action's purpose, in litigation or at settlement, is to compensate class members for harm sustained.

114. As such, class members should be the "foremost beneficiaries" of any settlement. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013).

115. While deterrence of defendant misbehavior can be a salutary side effect of class action proceedings, getting a defendant to "make available" a pot of gift cards and cash that no

one expects will ever leave Wawa's pocket is not a "deterrent" "equally valuable" to actually paying out money. *Baby Prods.*, 708 F.3d at 178.

116. 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).

117. A coalition of attorneys general from eleven states filed an amicus brief in support of Frank's appeal.

118. In response, class counsel argued that the Court properly based its fee on the amounts made available regardless of whether they were claimed, again arguing it would have been an abuse of discretion for the Court to base its calculation on the amounts claimed. Brief of Plaintiffs-Appellees, *In re Wawa, Inc. Data Sec. Litig.*, No. 22-1950, at 21 (3d Cir. Nov. 9, 2022). They complained that "Frank's brief goes on and on about how reversions or kickers can be an indication of self-dealing or unfairness" even though the settlement "was amended to remove that provision." *Id.* at 19 n.9.

119. Like Frank, class counsel acknowledged that the Court did not "include the parties' monetary valuation of [the injunctive] benefits in calculating the fee award." *Id.* at 32-33. And, consistent with what they had requested in their fee motion, they endorsed that approach. *Id* at 33.

120. A Third Circuit panel of Judges Matey, Freeman, and Fuentes held argument on March 20, 2023.

121. On November 2, 2023, the Third Circuit issued its opinion vacating this Court's fee award. *In re Wawa, Inc. Data Sec. Litig.*, 85 F.4th 712 (2023).

122. *Wawa* concludes that the amendments to the settlement were "not enough to ensure class counsel receives only a reasonable fee." *Id.* at 715.

123. It singles out "two considerations that loom large in that calculation: the ratio between the fee award and amount recovered by the class members, and side agreements between class counsel and the defendant." *Id.*

124. The decision sustained Frank's objection as "correct." *Id.* at 719. This Court "erred" when it "1) considered only the funds made available to class members rather than the amount actually claimed during the claims process; and 2) inadequately scrutinized any side agreements between class counsel and Wawa." *Id.*

125. Although setting a reasonable fee "involves discretion, it is not without detailed demands." *Id.* at 723.

126. "In cases where defendants keep any unclaimed funds, making their liabilities contingent upon the presentation of individual claims, courts must place greater weight on the claims rate." *Id.* (internal quotation omitted).

127. "[W]hen class members must do more than raise their hands to get their payment, the claims rate offers valuable insight into the 'effectiveness' of 'the method of processing class member claims.'" *Id.* (quoting Fed. R. Civ. P. 23(e)(2)(C)(ii)).

128. The decision notes the distinction between claiming cash and claiming gift cards. "Courts should take special notice when class members are offered discounts and tickets while others—like counsel—get cash." *Id.*

129. In addition to considering these factors in assessing the benefit conferred on the class, courts "must be on the lookout for clear sailing clauses" and "fee reversions." *Id.* at 725. These are among the "subtle signs that 'class counsel have allowed pursuit of their own self-interests" to override their duty to absent class members. *Id.* at 719 n.8 (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011)).

130. The Third Circuit concluded that this Court felt itself bound to only consider the funds made available rather than the settlement value actually claimed, even though there was no such requirement in "history or precedent." *Id.* at 725 & n.3 (quoting Dkt. 314 at 16, 18, 19).

131. Remarking that the result of the distribution process is "a sensible startling line to begin the fee analysis," *Wawa* remanded for consideration of the amounts distributed to and expected to be claimed by the class. *Id.* at 725.

132. *Wawa* does not mention the injunctive relief because the plaintiffs did not ask for affirmance on the alternative ground that there was an injunction.

133. Next, *Wawa* turns to the clear sailing clause, finding that this Court had provided insufficient justification for the side agreements. That the side agreements resulted from fee negotiations overseen by a mediator and occurring after the parties had reached agreement on class relief, "is alone insufficient." *Id.* at 726. It does not guarantee that the "end product" is a fairly allocated settlement. *Id.* (quoting *Bluetooth*, 654 F.3d at 948).

134. In addition to scrutinizing disproportion, Rule 23(e) requires a "hard look" at clear sailing. *Id.* at 719, 724. This means that this 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).

135. Finally, *Wawa* turns to the fee reversion that was present in the initial settlement and later removed in the Third Amendment. *Id.* at 726-27. As a general matter, it finds the fee reversion bewildering. As the Ninth Circuit describes it, "there is no plausible reason why the class should not benefit from the spillover of excessive fees." *Briseño v. Henderson*, 998 F.3d 1014, 1027 (9th Cir. 2021) (cited by *Wawa*, 85 F.4th at 726).

136. *Wawa* reaches the "unfortunate conclusion" that class counsel prefer fee reversions because they insulate counsel's fee requests from objector and court scrutiny, especially when "combined with a clear sailing clause." 85 F.4th at 726. *Wawa*'s conclusion is supported by the statement of Mr. Parks during our November 18, 2021 call, when he suggested he did not believe class counsel would not endorse the fee reversion removal lest they imply that there fee award could be excessive. *See* Exhibit C.

137. On information and belief, Wawa subsequently persuaded class counsel that it was in the settlement's ultimate interest to remove the fee reversion.

138. *Wawa* finds that the eventual removal of the fee reversion was "a welcome change, but not as welcome as if the fee reversion had never existed." *Id.* at 727. By the time of the Third

Amendment, the objection deadline had long passed and the deterrent effect of a fee reversion had already occurred.

139. *Wawa* refers to the clear sailing and fee reversion terms as evidence of "collusion," but Frank never argued that there was express collusion between the parties. In my view, the Third Circuit used "collusion" as semantic shorthand for the inherent agency problem between principal and agent (class counsel and class members) in class action litigation, a problem that often leads to class counsel's self-interest prevailing through excessive fee terms at the expense of class members' recovery. That is the same problem with clear sailing and fee reversions as Frank briefed it in his objection, and on appeal. It is the same problem as recognized by Professor Erichson in his article that is cited approvingly three times by *Wawa*. *See* 85 F.4th at 717 n.3 (citing Erichson to define "clear sailing" clause); 85 F.4th at 719 n.8 (citing Erichson's list of red flag provisions in class action settlements); 85 F.4th at 723 n.19 (citing Erichson's skepticism of *cy pres* provisions). Put simply, the "fruitful" issue is whether "actual terms of the settlement" serve the "self-interest" of class counsel and the defense, not whether those terms are the product of backroom "collusion" or "nefarious conspiracy." Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 871 (2016). As Erichson explains, "[e]ven if discussion of fees is postponed until after other settlement terms are reached, and even if a mediator oversees the discussion, there is much to be lost and nothing to be gained by allowing a defendant to participate in deciding how much class counsel ought to be paid for achieving a class action settlement." *Id.* at 903.

140. A true and correct copy of Professor Erichson's *Aggregation as Disempowerment* law review article is attached as Exhibit D.

141. After remand at the December 5 remand hearing, and at the preparation call of counsel the week before that hearing, class counsel for the first time argued that the settlement has never contained a clear sailing clause and that the Third Amendment's elimination of the fee reversion was merely a "clarification" of what they intended all along. Previously, they had sought to justify these unjustifiable provisions; now they claim they do not exist. These arguments (that

the clear-sailing agreement does not exist and that the fee reversion never existed) are contrary to this Court's findings in its first approval order, contrary to the Third Circuit's decision (*see* 85 F.4th at 726-27), and contrary to class counsel's own positions taken throughout this litigation. Even if they were not contrary to the mandate, nor absurd on their face, they have forfeited these arguments.

142. Because "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense," the arms'-length negotiation of the fee provision between class counsel and defendant (as required by Rule 23(e)(2)(B)) does not safeguard the fairness of the allocation between class counsel and class members (as required by Rule 23(e)(2)(C)). *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995) (internal quotation omitted); *accord Briseño*, 998 F.3d at 1030 (satisfying (e)(2)(B) does not mean (e)(2)(C) is satisfied); *see also Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014) (calling it "naïve" to rely on "arms-length negotiation by experienced counsel" to ensure settlement fairness).

143. Rules 23(e)(2)(C)(ii)-(iii) call for an inquiry into the objective outcome of the settlement negotiations, not an inquiry into the subjective motivation of the negotiating parties.

144. HLLI takes the institutional position that it is legal error under Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iii) to ever award fees or value claims-made settlements based upon amounts "made available" that have no realistic possibility of being claimed by or distributed to class members.

145. We understand that *Wawa* allows courts in their discretion to base calculations on amounts "made available" in certain circumstances. We think those circumstances are not present here, but nonetheless preserve our categorical argument for future review if necessary.

Lost Time Value of Money

146. At the remand hearing, the Court requested calculation of the class's lost time value of money from the delay in distribution of funds during the period that the case was on appeal.

147. One could ask how the delay impacted the spending power of the class's proceeds. According to the Bureau of Labor Statistics' inflation calculator

(https://www.bls.gov/data/inflation_calculator.htm), the projected sum to be distributed—$2,905,195—has the same buying power in April 2022, as $3,085,490.35 in November 2023, based on CPI inflation rate. Under that approach, the delay has cost the class $180,295.35. That number would be different if Wawa price changes are materially different than the CPI inflation rate.

148. The class's lost time value of money should be attributed to the plaintiffs and class counsel. By repeatedly arguing that it would be an abuse of discretion to base class counsel's fees on the amounts claimed, they induced the major error that required the Third Circuit to vacate the fee award.

149. The delay of an appeal, and the necessity for several amendments to the settlement (the last of which was negotiated by Frank with Wawa over the initial objection of class counsel) reflect negatively on the quality and efficiency of class counsel's representation.

150. Skill, efficiency, and quality of representation are relevant consideration in setting counsel's fee award. *Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (listing inter alia "skill and efficiency of the attorneys involved"); *Prandini v. National Tea Co*., 557 F.2d 1015, 1019-20 (3d Cir. 1977) ("Quality . . . includes efficiency."); *Baby Prods.*, 708 F.3d at 178 (noting "quality of representation").

151. When determining class counsel's fees, it is "essential to separate out the benefits attributable to class counsel" and not to credit class counsel for the work of other actors. *In re Prudential Ins. Co of Am. Sales Practice Litig.*, 148 F.3d 283, 338 (3d Cir. 1998); *In re Cendant Corp. Prides Litig*., 243 F.3d 722, 741 (3d Cir. 2001).

152. "[B]ecause counsel fulfilled their responsibility to obtain this [settlement] on the [fourth] try," this Court should "decrease the fee award to recognize the efforts of Objector." *See McDonough v. Toys "R" Us, Inc*., 80 F. Supp. 3d 626, 651 (E.D. Pa. 2015) (internal quotations omitted).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 19, 2023 in Alexandria, VA.

Adam Schulman

CERTIFICATE OF SERVICE

I hereby certify that on this day I filed the foregoing with the Clerk of the Court via ECF thus effectuating service on all counsel who are registered as electronic filers in this case.

DATED: December 19, 2023

/s/ Adam Schulman
Adam Schulman