24-425(L); 24-454

In the
United States Court of Appeals for the Second Circuit

D. JOSEPH KURTZ, Individually and on Behalf of All Others Similarly Situated, Gladys Honigman
Plaintiffs - Appellees,

v.

THEODORE H. FRANK,
Objector – Appellant,

v.

KIMBERLY-CLARK CORPORATION, COSTCO WHOLESALE CO.,
Defendants – Appellees.

On Appeal from the United States District Court
for the Eastern District of New York, Nos. 1:14-cv-1142, 2:15-cv-02910

REPLY BRIEF OF APPELLANT THEODORE H. FRANK

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Introduction

The parties' rebuttal in support of a lopsided, unfair settlement relies on mischaracterizations of appellant Ted Frank's arguments and misinterpretations of the law not supported by text, precedent, or factual data from past experience. The parties fail to provide legal justification for the settlement that awards class counsel $3.3 million, pays the class less than $1 million, and contains "red flag" provisions designed to benefit the attorneys over the class.

The parties don't dispute—or even acknowledge—that the district court found that an attorneys' fee award equal to 77% of the total settlement value was unreasonable or that the district court failed to provide a reasoned explanation for its decision to nevertheless approve a settlement where the slightly revised fee award still equaled over 73% of the total value. SPA-36. Instead, they focus on the court's application of the *Grinnell*[1] factors—an analysis that is necessary but not sufficient under Rule 23(e), OB32[2]—and an interpretation of Rule 23(e)(2)(C) that, inconsistent with its plain text, would allow parties to fleece the class by "making available" funds that everyone knows they will never recover.

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[1] *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).

[2] "OB" refers to Frank's Opening Brief; "PB" refers to plaintiffs' brief; and "DB" refers to defendant Kimberly-Clark's brief.

Not one of their arguments excuses the district court's reliance on a "broad prediction of the fairness of the [settlement] …," A-604, rather than the actual class recovery. The court incorrectly reasoned that Rule 23 calls for an "evaluation of a 'proposal,' not an outcome" and thus the analysis should focus on what the settlement is expected to provide class members. *Id*. The court then ignored the realistic expectation of a very meager class recovery.

Even if Rule 23(e) did allow direct courts to put aside the actual relief and analyze only the *expected* relief to class members, the parties don't dispute that they and every other class-action practitioner are well aware that claims rates in small-dollar consumer class actions such as this, especially with no direct notice to the class, almost always yield claims rates in the single digits. OB 24-26. Kimberly-Clark doesn't deny this fact but instead implausibly suggests that maybe class members appreciated their product so much that they intentionally refused their settlement recovery. Here, the low claims rate, with only 5% of the available relief paid to the class, was the expected outcome of the settlement. The parties structured the settlement to guarantee a low class recovery, with an artificially low cap of $7 on claims without a proof of purchase for flushable wipes purchased during the 14-year class period, no option to provide a sworn statement of purchases, no direct notice, and an onerous claims process that Frank, and likely many others, had difficulty navigating.

Unless this Court holds that the attorneys' fee award must be reasonable vis-a-vis the class's actual recovery, class counsels will continue to agree to this structure, protecting their own interests by having the defendant pay fees from an artificially separate fund, and thus preventing any reduction in their fees from benefiting the class. And defendants will continue to benefit from paying as little as possible to the class and recouping any reduction in the proposed fee award. Only the absent class members will suffer.

Rule 23(e)(2)(C) guards against this result. Perhaps recognizing that Rule 23(e)(2)(C)(ii)-(iii) requires exactly the analysis that Frank argued for and the district court neglected, the parties fight tooth and nail for an interpretation requiring only superficial review of the *proposed* (rather than actual or realistic) recovery, which is contradicted by the text directing courts to look at the effectiveness of distribution.

The settling parties also mischaracterize Frank's argument by insisting that he seeks a "bright-line rule." Of course, they never identify what "inflexible," "bright-line rule" he seeks. Nor could they. Frank is not asking the Court to decide every hypothetical settlement that could be proposed or to mandate that every fee award must be calculated as a set percentage of recovery rather than lodestar. The only issue is whether the settlement here passes muster under Rule 23(e)(2)(C)(ii)-(iii). And it does not—not by the language of the Rule, Circuit precedent, policy considerations, or intuitive notions of fairness.

It may not be surprising, then, that the parties also focus their arguments on irrelevant issues. For example, plaintiffs spend nearly 1/3 of their substantive brief asserting that their awarded fees were reasonable under Rule 23(h), despite acknowledging that Frank is not pressing that issue on appeal.[3] And they spend additional pages addressing a waiver argument that even Kimberly-Clark disagrees with and that is belied by Frank indisputably raising the same issue on appeal that he raised before the district court.[4] *See* DB31-32 (Frank challenges whether "the relief provided to the class is adequate.").

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[3] Frank is not challenging the excessive attorneys' fee award under Rule 23(h) as a separate issue. Frank challenges the unreasonableness of the fee as part of his Rule 23(e) challenge to the settlement holistically. Plaintiffs again argue incorrectly that he can only "attack the fee award as excessive under Rule 23(h)." PB27. Rule 23(e)(2)(C), however, requires examination of the fee in relation to the relief provided. *Moses v. N.Y. Times Co.*, 79 F.4th 235, 244 (2d Cir. 2023). Indeed, long before the 2018 amendments, this was already Circuit law under Rule 23(e). *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 222-24 (2d Cir. 1987).

[4] Plaintiffs spend another couple of pages making attacks on the State Attorneys General who filed an *amicus* brief, largely focusing on their failure to appear in the district court pursuant to notices provided under the Class Action Fairness Act. But the Attorneys General had no obligation to appear in district court. 28 U.S.C. § 1715(f). Utterly neglecting the important substantive matters raised in the *amici*'s brief, Plaintiffs have waived any response.

None of the settling parties' arguments undercut Frank's position. Courts are obligated to closely scrutinize settlements to ensure the parties do not agree to a disproportionate allocation that benefits themselves at the expense of the class. *See* Section I. Rule 23(e)(2)(C) protects against such a misallocation and, here, the district court's approval of a settlement with a severely disproportionate allocation of value between class counsel's $3.3 million recovery and the class's sub-$1 million recovery should be reversed. *See* Section II.

Argument

I. The parties don't dispute the need for courts to scrutinize disproportionate allocations in claims-made settlements that likely signal the settlement is unfair under Rule 23(e).

Rule 23 mandates judicial scrutiny of class-action settlements. The parties' responses demonstrate why that scrutiny is especially necessary in settlements where funds are "made available" up to a certain amount but never paid to the class. Such a setup obscures the true allocation of the settlement relief and without close review, the court might base its review on the illusory "available" amount rather than the reality of the actual amount paid to the class. *See* Howard Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements,* 92 Notre Dame L. Rev. 859, 889-93 (2016). While claims-made settlements are not per-se unfair, PB41, the settling parties' decision to distribute relief through

a claims process that they designed and set the standards for is a relevant consideration in considering the effectiveness of relief.

Plaintiffs mischaracterize Frank's criticism of the district court, claiming that he said the court failed to "raise an eyebrow" with respect to the settlement's disproportion. PB28. That criticism was leveled at the *parties'* attempt to obscure the settlement's true disproportion from the court to facilitate smooth—but improper—approval. OB21 ("even the most deferential courts would raise an eyebrow if class counsel approached them with an undisguised $4,316,624.95 common fund (fees + costs + actual benefit + incentive awards) and proposed to appropriate $3,307,666.25 in fees and expenses (77%) for themselves"). Here, the district court initially recognized that a settlement allocating over 77% of the total value to the attorneys was unreasonable. But the court merely used a different calculation (addition of hours in a lodestar calculation rather than a percentage calculation) to reduce the fees from 77% to 73% and declare the settlement fair.

Plaintiffs admit that in many of the cases Frank cites, the district court "failed to provide appropriate explanations when excising discretion or otherwise ignored applicable Rule 23 standards." PB29 (citing authorities). That's exactly what happened here: The district court found it would be unreasonable to pay class counsel such an unseemly high amount in the light of the meager $994,000 class recovery but then misapplied Rule 23(e)(2)(C) to conclude that changing how she calculated

the fees changed the unreasonable result to reasonable. Rule 23(e) does not change standards, however, depending on the fee calculation method applied. *See* OB37-38. The Ninth Circuit reached that conclusion in *Briseño v. Henderson*, 998 F.3d 1014, 1029-1030 (9th Cir. 2021), rejecting the argument that a lodestar fee-shifting methodology could dispose of a Rule 23(e) objection to misallocation in a claims-made settlement, even when, as here, the plaintiffs claimed to have intensely litigated a complex action for years and their fee would be paid from an ostensibly separate fund.

Plaintiffs are flat wrong that the parties have "no control" over whether class member file claims. PB41. The claims process would have distributed relief far more effectively had it distributed the full $20 million *pro rata*, or had it allowed every class member to claim the maximum payout of $50.60 with a sworn statement rather than requiring decade-old receipts for a low-cost disposable consumer item that the parties—like all of us—knew no one had kept. *See In re Dry Max Pampers Litig.*, 724 F.3d 713, 721 (6th Cir. 2013) (criticizing "assertions…premised upon a fictive world, where harried parents of young children clip and retain Pampers UPC codes for years on end…").

Kimberly-Clark acknowledges that it can be "difficult" to conduct a high-recovery claims process where there are "low-value claims," especially in a 15-year class period. DB59. Yet even the cases that it cites show that a possibility of greater recovery makes class members more

eager to jump through the hoop of filing a claim. DB59 (citing *McAdams v. Robinson*, 26 F.4th 149, 154 n.4 (4th Cir. 2022) ("Whether a claims rate is high partially depends on class members' expected recovery.") and *Pollard v. Remington Arms Co., LLC*, 896 F.3d 900, 906 (8th Cir. 2018) ("Class members that are entitled to a $10 or $12 voucher might find that the effort it takes to submit a claim is not a worthwhile investment of their time")).

It was a conscious choice for the parties to limit claims so radically, and they are responsible for the result. *See 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."). Frank detailed at length the anemic claims rates that are a hallmark of low-value claims-made settlements with no direct notice, such as this one.[5] OB24-26. Despite many other cases in which consumer classes have obtained purchase records from big box retailers that track club-card accounts and other customer accounts, the parties disclaimed an ability to recover such

[5] Plaintiffs argue that there was no way to provide direct notice to the consumer class, but, even if that were correct, it's beside the point. The point is that the parties knew that without direct notice—for whatever reason—the claims rate would be abysmal, particularly given all the other features of the claims process. And, with only 5% of the available amount claimed, it certainly was.

information here. *See, e.g.*, *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 2012 WL 4747441, 2012 U.S. Dist. LEXIS 143955, *8-*9 (E.D.N.Y. Oct. 4, 2012) (plaintiffs subpoenaed grocery store customer data to increase payments to class after objection); *see also, e.g.*, DB16-17. Neither plaintiffs nor Kimberly-Clark denies that this result is typical in a claims-made settlement structured like this one. While protesting that the "settlement required proof of purchase only to receive the maximum payment," they offer no explanation as to why they could not have simply required a sworn statement and undertaken standard fraud prevention and detection efforts such as those meant to catch foreign-based IP addresses making high numbers of claims—as many other settlements do.[6]

This is exactly why close scrutiny and proper application of Rule 23(e)(2)(C) matters. Otherwise, the natural incentives of the parties take over. The defendant wants to settle cheaply, with the fewest claims possible, and the plaintiffs' attorneys want to recover maximum fees. *See Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1058-59 (9th Cir. 2019). When the fees are not tied to recovery, plaintiffs' attorneys lack the

[6] Kimberly-Clark makes the absurd suggestion that the low claims rate was due not to class members thinking the burdens of the claims process were not worth $7, but because class members just really "liked the wipes" and therefore didn't file a claim. DB34. Frank is confident the Court will view this statement as the marketing gimmick that it is.

incentive to ensure a robust class recovery. OB26. Frank has not accused the parties of collusion; no such formal agreement is necessary for this imbalance to result because of these incentives. Despite the parties' overwrought concern about inflexibly "capping" fees and discouraging meritorious litigation, this approach would not "penalize class counsel" or prevent injured consumers from bringing meritorious cases to hold defendants accountable. Instead, it would protect absent class members by ensuring that the interests of their counsel—who are the ones best able to control the settlement process—are aligned with theirs. Like rising tides that lift all boats, both class members and counsel would benefit from greater recovery for the class.

Finally, the parties argue that Frank takes aim at claims-made settlements generally. Not so. Whatever the merits of claims-made settlements, the issue here is whether Rule 23 permits approval of *this* settlement, which awards the attorneys over 70% of the total value, where the parties set up a system that they knew would pay the class less than 5% of the available funds and they ensured that any reduction in fees was returned to Kimberly-Clark rather than used to supplement class recovery. This ineffective distribution process, paired with the preferential treatment for the attorneys in their fee award dooms the settlement, particularly given the standards of Rule 23(e)(2)(C)(ii)-(iii).

II. The settlement approval cannot stand because Rule 23(e) forbids preferential treatment to class counsel such as the payment of over $3 million to the attorneys compared to less than $1 million to the class here.

The parties don't dispute the gross imbalance that exists in the payments to the class versus the lawyers; instead, they argue that the court's application of the *Grinnell* factors was sufficient for settlement approval; that the court was correct that it needed only review the surface-level settlement *proposal*, not its reality; that the imbalance is not relevant where the court awards fees from a supposedly separate fund using a lodestar analysis; that even settlement class members without proofs of purchase recovered their full damages; and that Frank somehow waived his objection to the Rule 23(e)(2)(C) deficiencies that he has argued since Day 1. All of these arguments fail.

A. This Circuit holds that district courts must reject settlements that pay outsized attorneys' fees compared to the actual class benefit.

The parties contort the law in an effort to justify an unfair settlement that paid class counsel a fee award that constitutes three-quarters of the total benefit. Rule 23(e)(2)(C) required the district court to consider this imbalance no matter *how* the relief was distributed to the class (claims process or common fund) or *how* the fee award was calculated (lodestar or percentage of the benefit).

The proper analysis was for the district court to consider, among other Rule 23 provisions, "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" and whether "the relief provided for the class is adequate, taking into account … the terms of any proposed award of attorney's fees." Rule 23(e)(2)(C)(ii), (iii). The Rule does not limit or change the court's consideration of the fee award based on how it is calculated. District courts continue to have discretion to apply either the lodestar or percentage-of-the-benefit approach, but, in any case, Rule 23(e)(2)(C)(iii) mandates that the court consider the relief provided for the class in relation to the fees in determining settlement fairness. Subpart (ii)'s focus on the "effectiveness" of distributing relief, *i.e.*, actually getting relief to the class, further demonstrates the rule's call for a realistic analysis. Contrary to the district court's decision, the appropriate metric for both subparts is the actual relief provided to the class. *See* A-604.

This Court addressed Rule 23(e)(2)(C) in *Moses v. N.Y. Times Co.*, 79 F.4th 235 (2d Cir. 2023). It held, in accordance with the plain language of the rule, that "[t]he new Rule 23(e) makes clear that courts must balance the proposed award of attorney's fees vis-à-vis the relief provided for the class in determining whether the settlement is adequate for class members." *Id.* at 244 (quoting *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 607 (9th Cir. 2021)) (cleaned up). While the rule directs the court to

consider the *proposed* award of attorney's fees, the term "proposed" is conspicuously absent with respect to the "relief provided for the class." *Moses* confirms that "the relief actually delivered to the class" is critical in determining an appropriate fee award, and that courts are required to "'examine whether the attorneys' fees arrangement shortchanges the class.'" 79 F.4th at 244 (quoting *Briseño*, 998 F.3d 1014, 1024 (9th Cir. 2021)). Thus, this Circuit joined the Ninth and Tenth[7] in reading Rule 23(e)(2)(C)(iii) to look to the outcome of the claims process in determining class benefit. Since *Moses*, the Third Circuit has also concluded that the actual claims rate is an important indicia for Rule 23(e)(2)(C) fairness. *In re Wawa, Inc. Data Sec. Litig.*, 85 F.4th 712, 723 (3d Cir. 2023) ("when 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.'").

Plaintiffs nevertheless urge the Court to create an "inadvisable"[8] split by interpreting Rule 23(e)'s metric as the relief that the settlement is expected to provide to class members, despite the illusory nature of the maximum $20 million fund here. PB46. Their only support for this

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[7] *In re Samsung Top-Load Washing Machine Mktg., Sales Practices & Prods. Liab. Litig.*, 997 F.3d 1077, 1094 (10th Cir. 2021) (adopting an earlier case's suggestion that attorneys' fees should be measured against "the amount actually paid to the class").

[8] *Janese v. Fay*, 692 F.3d 221, 227 (2d Cir. 2012).

argument is the Advisory Committee's Note to the 2018 Amendment to Rule 23(e)(2). But that note makes clear that the committee does not support a superficial review of the proposed settlement's terms for purposes of Rule 23(e)(2)(C)(iii), but rather a hard-nosed examination of the actual relief that will be provided to the class. The note suggests that courts should evaluate the claims process and even "direct[] that the parties report back to the court about actual claims experience." Thus, even under plaintiffs' cited authority, the court should have considered the low claims rate that was guaranteed, with Frank demonstrating in his objection that most of those claims would be for $7 or under due to class members' lack of receipts for the flushable wipes. Subpart (iii) also directs courts to consider the "timing of payment" as part of the analysis, but that is just one element of this broad factor and, contrary to plaintiffs, hardly means that the rule only "guards against counsel who sellout the class for a quick payoff." PB26.

Frank doesn't argue that district courts must replace *Goldberger*'s fee analysis with an "inflexible" percentage of the actual relief. *Contra* DB51. Moreover, the cases that Kimberly-Clark cites in support of its assertion that the Supreme Court and this Court have held that fees may be awarded on the basis of funds made available are not applicable here. *Boeing v. Van Gemert*, 444 U.S. 472 (1980), was solely about an attorneys' fee dispute between class counsel and defendants after a litigated judgment. It consciously reserved the question about a contingent claims-

made fund. *Id.* at 479 n.5. In *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007), the Court was interpreting Rule 23(h), and this analysis does not control the Rule 23(e) question of whether a settlement is fairly apportioned. *Masters* does not control the Rule 23(e) allocation problem present in this or other settlements because, there, class counsel were the appellants and were challenging only the sufficiency of the fee award. In contrast, cases cited by Frank—such as *Pearson v. NBTY*, 772 F.3d 778, 781 (7th Cir. 2024) (69% fee is "outlandish"), and *Pampers* (calling upon courts to look for "subtle signs" of self-interest by class counsel)—were appeals brought by objecting class members under Rule 23(e).

More fundamentally, *Masters* predates the 2018 amendments that added Rule 23(e)(2)(C)(ii) and (iii). Thus, to the extent that it could be read to inform the Rule 23(e) analysis, it is simply wrong after the 2018 amendments. Finally, *Masters* was clear that courts should consider the amounts claimed when needed to avoid windfall fee awards: "Use of the entire fund as a basis for computation does not necessarily result in a 'windfall' because the court may always adjust the percentage awarded to come up with a fee it deems reasonable in light of the *Goldberger* factors." *Masters*, 473 F.3d at 437. Since the 2018 amendments, district courts have declined to apply *Masters* when the unclaimed funds would revert to the defendant because "[f]unds reverted to the defendant provide no benefit to the class." *Hart v. BHH, LLC*, 2020 U.S. Dist. LEXIS

173634, 2020 WL 5645984 (S.D.N.Y. Sept. 22, 2020); *accord Hesse v. Godiva Chocolatier*, 2022 U.S. Dist. LEXIS 72641, *34 (S.D.N.Y. Apr. 20, 2022).

Fee awards in Section 1988 civil rights cases are likewise an inappropriate comparison point. Civil rights claims often involve small damages and nonmonetary relief; the fees are actually paid separately by the defendants (not just as a gimmick); and the individual plaintiffs have a personal relationship and regular communication with their attorney such that they have a level of autonomy that is nonexistent in class actions.

Similarly, plaintiffs offer a flawed interpretation of Rule 23(e)(2)(C)(ii)'s factor relating to the "effectiveness of any proposed method of distributing relief to the class." Their claim that this factor addresses the allocation of settlement benefit "among class members, not between the class and class counsel" is unsupported and makes little sense. PB27. That is the function of Rule 23(e)(2)(D), not (e)(2)(C)(ii). The text of (C)(ii) calls out "the method of processing class-member claims," and it is situated next to subpart (iii) calling for scrutiny of attorneys' fees "vis-à-vis the relief provided to the class," *Moses*, 79 F.4th at 244. "The symbiotic review of proposed relief and attorneys' fees aligns with '[t]he express goal of [our] *Grinnell* opinions [which] was to prevent unwarranted windfalls for attorneys.'" *Id.* (quoting *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 49 (2d Cir. 1999)). While Rule

23(e)(2)(D) also would prevent misallocation among class members, the more significant risk that court must guard against is misallocation between class counsel and class members. *See* OB17-21.

Unfortunately, the parties resort to mischaracterizing the law in support of their arguments. For example, as to this Circuit's application of Rule 23(e)(2)(C) and this Court's supervisory role, Kimberly-Clark mischaracterized *Moses* as holding that the district court must "holistically" evaluate the *Grinnell* factors and the Rule 23(e)(2)(C) factors and this Court must uphold that "holistic weighing" so long as it is "located within the range of permissible decisions." PB30. But *Moses* was express that the "holistic" evaluation was of "the four factors outlined in Rule 23(e)(2)," and that evaluation specifically must include "taking into account—among other substantive considerations stated in the rule—the proposed attorneys' fees and incentive awards." *Moses*, 79 F.4th at 242. Likewise, the Ninth Circuit has soundly rejected a settling party's contention that a Rule 23(e)(2)(C) objection failed based on the "holistic assessment of settlement fairness." *McKinney-Drobnis*, 16 F.4th at 608-09. Thus, while courts still must apply the *Grinnell* factors in analyzing a settlement's fairness, courts must also consider the factors of Rule 23(e)(2)(C). And, further contrary to Kimberly-Clark's assertions, this Court "review[s] *de novo* any issues of law underlying the Rule 23 ruling, including the question of whether the district court applied the correct legal standard to the approval of the settlement." *Id.* Whether the

district court applied the correct legal standard set forth in Rule 23(e)(2)(C) is precisely the issue at hand.

The parties' citation to other cases in which counsel was paid more than the class are unavailing. All of Kimberly-Clark's cases except one pre-date the 2018 Amendments. *See* DB55-58 (citing cases). The one exception is *Roes*, 944 F.3d 1035, which, although not fully applying the new amendments, rejected the settlement because the district court failed to scrutinize warning signs of a disproportionately large attorneys' fee award, a reversionary clause, and a clear sailing provision. Notably, numerous courts in this Circuit have denied approval of settlements where class counsel has sought an excessive fee award. *See, e.g.*, *Cunningham v. Suds Pizza, Inc.*, 290 F. Supp. 3d 214, 225 (W.D.N.Y. 2017) (62.5% is an "unreasonable and improper" "windfall"); *Brown v. Sega Amusements, U.S.A., Inc.*, 2015 WL 1062409, 2015 U.S. Dist. LEXIS 28442 (S.D.N.Y. Mar. 9, 2015) (rejecting settlement where class counsel sought 56% of the proceeds); *see also In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 390 (S.D.N.Y. 2005) (calling it "anomalous and unacceptable for counsel to fare better than the Class").

Plaintiffs make the puzzling argument that Frank waived his arguments under Rule 23(e)(2)(C) by failing to argue below that the settlement was not adequate. What in the world would Frank be challenging if not the application of Rule 23(e)(2)(C), which specifically calls upon courts to "consider[] whether … the relief for the class is

adequate, taking into account" the effectiveness of the distribution of relief and the terms of the attorneys' fee award? *See, e.g.*, A-440. Even Kimberly-Clark disagrees with its co-appellees. DB31-32 ("Frank challenges … whether the 'relief provided to the class is adequate.'").

Further, Frank has argued consistently that the $7 cap for class members without proofs of purchase would improperly throttle claims rates. *See Pearson*, 772 F.3d at 783; *see also, e.g.*, A-437, A-440. The cap disregards how many products they purchased and their willingness to affirm to their purchases. It is particularly unreasonable, and belies the parties' assertions that claimants have achieved full recovery, when class members with proofs of purchase could claim up to $50.

As another example of the parties misdirecting their fire, they repeatedly assert that Frank seeks a "bright line" or "inflexible" rule that is "out of step" with other circuits. *See* PB2-3, 25, 31, 32; DB25, 50, 59. However, neither Frank's opening brief nor his objection in the district court argues for any sort of hard-and-fast inflexible rule. The only issue before the Court is whether the district court erred when it approved *this settlement*—where the attorneys recovered over 70% of the total value and included red-flag provisions in the settlement agreement. Whether another settlement with, say, a 45% allocation to class counsel and different settlement features, should be approved under Rule 23 is not at issue. Other circuits' precedent shows that this sort of standard—as in many areas of the common law—develops over time, based appropriately

on the specific cases filed with the courts, to provide guidance to the settling parties. *See, e.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (38.9% fee would be "clearly excessive"); *Roes*, 944 F.3d at 1051 (fee award of 45% of gross cash fund is "disproportionate"); *Allen v. Bedolla*, 787 F.3d 1218, 1224 n.4 (9th Cir. 2015) (fee award that exceeds class recovery by a factor of three is disproportionate); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"); *Redman v. RadioShack Corp.*, 768 F.3d 622, 630-32 (7th Cir. 2014) (55-67% allocation is unfair); *see also Briseno*, 998 F.3d at 1026 (reversing settlement approval where attorneys received $7 million and class received less than $1 million). Moreover, as these cases show, affirmance is what would place this circuit "out of step" with other circuits, particularly after the 2018 amendments. Reversal, on the other hand, would align with the rulings of these numerous other circuits that reject settlements that disproportionately favor class counsel over the absent class members.

B. The district court misapplied Rule 23 and legally erred by approving the settlement that the parties structured to disproportionately favor the attorneys rather than the class.

Kimberly-Clark claims that the district court didn't err by considering the $20 million "made available" in its settlement analysis, asserting that Frank didn't cite any page of the district court's decision "because it isn't there." DB50. But it is there. In its initial approval order,

pre-*Moses*, the district court held that "the key factor [to settlement approval] is whether the compensation available to the settlement class is fair and adequate, and not the extent to which the class takes advantage of the offer presented to them." A-604. The district court never swayed from this holding. While the court issued an amended approval order post-*Moses*, it stated that it would not revisit its analysis of the Rule 23(e)(2)(C)(i) and (ii) factors; instead, it "simply affirm[ed] its prior finding that these factors weigh in favor of final approval." SPA-14. As to 23(e)(2)(C)(iii), the district court held that the factor was met "[b]ecause the attorneys' fee award will not affect the Class's recovery," SPA-15, utterly ignoring that the parties had structured the fee award such that the $800,000 reduction in fees returned to Kimberly-Clark rather than augmenting the class's recovery, as it would have in a common-fund settlement. The district court nevertheless approved the settlement, even while recognizing that "about 95% of the purported $20 million benefit is 'purely hypothetical,'" and 73% of the total value would be recovered by plaintiffs' attorneys. SPA-24–25. The unfairness of the settlement did not change just because the district court awarded a lodestar-based fee that knocked off a couple of percentage points rather than one calculated from the illusory value.

The court failed to analyze fairness with respect to the amount *actually* received by the class or even the amount actually *expected* to be received by the class based on known claims-rate data. As Frank has

detailed at length, the fee award necessarily affects class recovery because a defendant only cares about the total payment, and the parties were able to influence if not control the amount claimed by the class.

The parties don't dispute this Circuit's precedent that there must "be some 'evidentiary foundation' in support of the proposed settlement," *Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2d Cir. 1982), or that such evidentiary foundation was lacking where the court found that the fee award "will not affect the Class's recovery."

As expected, Kimberly-Clark argues that a cap greater than $7 would have resulted in a windfall for claimants. Again, however, the complaints sought more than $7 per class member and included noncompensatory damages as well. *See, e.g.*, A-170 (seeking statutory, compensatory, and punitive damages for violating New York General Business Law §§ 349 and 350). The parties don't dispute that at the very minimum, the § 349 New York Business Law claims allowed class members to recover the greater of actual damages or fifty dollars. Thus, enhanced recovery would not result in "a windfall." *See Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) (no windfall or unjust enrichment to redistribute to class members when alleged damages are greater than the sum after redistribution). And class members are releasing property damage claims that have not been fully vetted or litigated. Those class members with proof of purchase are eligible to recover $50.60, and there is not any evidence that even a $50.60 recovery provides full and total

relief. (That the parties considered it appropriate to provide for recovery up to $50.60 shows that the $7.00 was not a maximum amount of damages due to class members.) The settlement does not allow class members to obtain this higher recovery by submitting a sworn statement or other means; rather, it unreasonably requires them to have saved decade-old receipts or packing materials. In short, the parties negotiated a settlement that foreclosed *pro rata* recovery for the class, made it difficult for class members to claim even the bare minimum of $7, and also precluded any rebalancing of the fees to supplement class relief.

As also expected, attempting to justify their attorneys' fees, plaintiffs detail their efforts in the litigation. But "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013); *see also Briseño*, 998 F.3d at 1026 (court must scrutinize settlement disproportion under Rule 23(e) even when a reduced lodestar was awarded in lengthy litigation). True to that maxim, Rule 23(e)(2)(C)(iii) required the district court to consider the proposed fee award in the light of the relief provided to the class. It was error for the court to approve the settlement after such a small haircut to the fees that, in any event, did not improve the class recovery.

C. The district court erred in considering the "red flag" of a fee reversion to the defendant a benefit to the class under Rule 23(e)(2)(C)(iii).

Seeking to justify the district court's incorrect view that the fee reversion "will not affect the Class's recovery" and "adequately protects the class," the parties also make the economically unsound argument, rejected by numerous courts, that paying attorneys' fees from a separate fund did not reduce the settlement relief for the class. *See* DB47. That fiction is "the opposite of what Rule 23(e) now requires." *Moses*, 79 F.4th at 246; *cf. also Gallego v. Northland Group*, 814 F.3d 123, 129 (2d Cir. 2016) (segregated fee fund didn't ameliorate the fact that "the intended result of the settlement was 'mass indifference, a few profiteers, and a quick fee to clever lawyers.'") There's no dispute that the entire settlement amount came from the same source—Kimberly-Clark. And there is no sound reason for allowing plaintiffs minimize court review of their fee award through a façade of separation. The parties make little effort to dispute that the class was harmed by the reversion, as the court's $800,000 fee reduction would have increased the class recovery had the fees not been held separately, and had the parties structured the settlement to prioritize effective distribution of relief to the class.

The district court's Rule 23(e)(2)(C)(iii) analysis should have evaluated not only the amount of fees but also the structure of those fees as part of its consideration of "the overall fairness of the settlement," and not as a separate issue. *See Moses*, 79 F.4th at 246.

Plaintiffs argue that the obvious incentives of defendants to discourage claims is balanced by "plaintiffs hav[ing] every incentive to encourage a robust claims process where all class members file valid claims." PB41. But that's the problem with a constructive common fund: Plaintiffs have no such incentive when their fees are negotiated separately, in a separate fund, rather than tied to actual class relief. The parties might not have direct "control" over whether class members will file claims, PB41, but they *can* structure the process to make it more likely that they will. *See* Section I. Here, they did the exact opposite. Had the district court scrutinized the settlement with the correct legal standards, it would have been rejected, as it cannot withstand scrutiny under Rule 23(e)(2)(C).

Conclusion

For these reasons, this Court should reverse the district court's approval of the settlement.

Dated: September 27, 2024

Respectfully submitted,

/s/ Anna St. John

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I hereby certify that on September 27, 2024, I attempted to electronically file the foregoing with the Clerk of the United States Court of Appeals for the Second Circuit using the ACMS / CM/ECF system, but the system was not operable and I was unable to load the site, log on, or file though the system. I further certify that on September 27, 2024, I provided a copy of this filing by email to all who are ECF-registered filers in this case.

/s/ Anna St. John
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