26-946(L), 26-947

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, Individually and on Behalf of All Others Similarly Situated,
Plaintiffs - Appellees,

THEODORE H. FRANK,
Objector – Appellant,

v.

KIMBERLY-CLARK CORPORATION, COSTCO WHOLESALE CORPORATION,
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
Pamela K. Chen, District Judge

REPLY BRIEF
OF APPELLANT THEODORE H. FRANK

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Introduction

Kimberly-Clark was willing to pay $5.1 million to get a nationwide release on consumer and property-damage claims relating to its flushable wipes. The parties agreed to a settlement structure that split that sum up so that the class attorneys received $3.3 million, Kimberly-Clark got $800,000 back (because this money was earmarked for attorneys' fees in a segregated fund), and the class received less than $1 million, with the vast majority of the class receiving nothing.

Appellees, the settling parties, don't dispute that Rule 23(e)(2)(C)(ii) requires the district court to examine the effectiveness of "distributing relief to the class," including any claims process; they don't dispute that they deliberately selected the notice, claims, and fee provisions that ultimately produced less than $1 million in class recovery; they don't claim that they were surprised that the class received less than $1 million (with the vast majority of class members receiving nothing) under the distribution methods they chose; they don't dispute that a common fund could have distributed more money to the class at the expense of the attorneys; they don't dispute that the choice of a segregated fund benefited class counsel and diverted $0.8 million from the class to Kimberly-Clark. Appellees defend that result (DB42-DB43; PB55) as harmless to the class, but their defense assumes the very economic independence of fees and class recovery that *Kurtz II* rejected.

Parties intend the expected consequences of their intentional acts. *Restatement (Second) of Torts* § 8A (1965). So *of course* the parties intentionally reduced class recovery for the benefit of the attorneys, and the district court's conclusion otherwise, reiterated by appellees, is both a *non sequitur* and legal error. (The record evidence is in the black-and-white language of the settlement.) And *of course* the district court erred in treating the disproportion as if it were an inevitable consequence of a consumer class action settlement; it plainly wasn't.

Appellees do not dispute that if class counsel agrees to take such steps at the class's expense for their own benefit, they're in breach of their fiduciary duty to the class—the concept of class counsel's fiduciary duty to the class never appears in over 29,000 words of appellee and *amicus* briefing. And appellees do not dispute that such a breach of fiduciary duty by class counsel makes a settlement unfair. Instead, they simply deny that they intentionally throttled class recovery—even as they fail to dispute any of the premises that inexorably lead to that conclusion. The *ipse dixit* by the appellees and the district court contradicts the black-and-white language of the settlement, and does not save the upside-down ratio in this case, nor does it save the unfair segregation that cost the class about $800,000 for "no apparent reason." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011).

In *Kurtz II*, appellees fought hard to insist that the settlement that paid the class $1 million was really worth $20 million. *Kurtz v. Kimberly-*

Clark Corp., 142 F.4th 112, 119 (2d Cir. 2025) ("*Kurtz II*"). Having lost that battle, they now want to claim it never mattered at all. This Court should see through that. Class counsel "sold out its [clients'] interests in settling the case." *Id.* at 118 (simplified). If Rule 23(e)(2)(C)(ii) and (iii) are to have any meaning, this settlement cannot be approved.

I. The district court and appellees do not dispute the premises that establish the parties intentionally reduced class recovery to benefit the attorneys.

Rule 23(e)(2)(C)(ii) requires the district court to examine "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Appellees do not dispute this requirement, nor do they dispute that the rule demands scrutiny of the claims process actually chosen. See PB39-46; DB20-28.[1]

Consumers complained to Kimberly-Clark that the flushable wipes were not flushable, or damaged their plumbing. The parties could have provided direct notice to those class members. They didn't.

Supermarkets, pharmacies, and stores like Target have loyalty programs that track the purchases of consumers. Appellees wanting to maximize class recovery could have subpoenaed such records to generate lists for direct notice—or even direct distribution—to class members.

[1] OBxyz, PBxyz, DBxyz, and ABxyz refer to page xyz of Frank's Opening Brief, Plaintiff-Appellees' Brief, Defendant-Appellee's Brief, and the *Amici* Brief respectively.

E.g., *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). They didn't.[2]

Appellees could have chosen a higher individual claims cap than $7, or less burdensome documentation requirements to make claims. They didn't.

Appellees could have chosen a pure common-fund structure with *pro rata* distribution to guarantee a certain amount of class recovery. They didn't.

Appellees could have valued the release of property-damage claims as worth more than zero dollars to the class in the claims process. They didn't. Even if, as Kimberly-Clark suggests (DB53-DB54), such claims were too individualized for class treatment, the class members with property damage did have such individual claims, and those claims must have had settlement value to Kimberly-Clark to insist upon the scope of the release that they did and continue to fight for it after the district court at first questioned it; none of that settlement value showed up in a claims process to class members.

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[2] That even bad settlements like *Pearson* were able to divine lists of consumer-product class members for direct postcard notice puts the lie to Kimberly-Clark's assertion (DB48), unsupported by the record, that such direct notice is impossible. (Kimberly-Clark doesn't discuss loyalty program data, just "marketing" data.) That there is no "complete list" of class members doesn't mean that it's infeasible to generate a partial list of millions like *Pearson* did.

Any of these feasible changes to the claims process or the settlement, and dozens of others, would have improved class recovery; it was even conceivable to do so at no additional cost to the $5.1 million Kimberly-Clark was willing to pay. Frank isn't telling the appellees *how* to improve class recovery; he's merely noting that they could have if they wanted to prioritize the class's interests over that of the attorneys. Instead the parties chose a "selfish" structure that ensured class attorneys would get much more than the class.

Kimberly-Clark protests (DB36; DB42; DB51) that none of these changes are by themselves required by law, and while they're correct that Rule 23(e) doesn't micromanage the claims process, it's irrelevant to Frank's argument, which doesn't seek such micromanagement.[3] It's possible for a claims-made settlement, or a claims process with higher burdens than others, or even a segregated fund that doesn't injure the class, to be fair. Parties will necessarily need to move the levers of the claims process to tune class recovery to coincide with agreed-upon

[3] Worth noting that plaintiffs make a similar argument (PB42), but omit critical language: if "a proposed settlement is unreasonable in whole or in part, the court cannot simply rewrite the agreement—*it must reject the agreement or give the parties an opportunity to revise it*." *Fisher v. SD Prot. Inc.*, 948 F.3d 593, 605 (2d Cir. 2020) (emphasis added for quoted language plaintiffs omitted). Frank does not ask for rewriting; he asks for the rejection of the unreasonable agreement. (*Fisher* does not involve a Rule 23 settlement, *id.* at 598, but this particular quoted language is equally applicable to class settlements.)

settlement value. But what Rule 23(e) does require is looking at the objective *results*—the "effectiveness." These are negotiated *choices* with known consequences on class recovery. When those choices lead to unfair *results* that lead to impermissible disproportionality in a compromised claim, the settlement must be rejected, and it's up to the parties how to choose to fix it.

Similarly, Frank isn't arguing that "notice was inadequate." *Contra* DB48. Frank is arguing that notice reflected the parties' choices to reduce class recovery for the benefit of the attorneys. *Cf. Pearson*, 772 F.3d at 781-84 (discussing the many means by which parties can regulate class recovery). Again, the parties can choose to do that—they just have to live with an objective evaluation of the results of doing so if they overshoot the mark in trying to reduce class recovery and make the resulting settlement unfair in its disproportionality.

Kimberly-Clark's own briefing below stated that "[t]his Settlement was negotiated and agreed upon in light of the parties' knowledge of the outcomes in similar class settlements involving other companies' flushable wipes" and the company's own experience. Kimberly-Clark Br., Dkt. 499, at 6; *accord* SPA-15-16 n.10. The low claims rate was the expected consequence of the structure the parties selected, not an unforeseen or surprising shortfall. And what the parties cannot do is intentionally negotiate a settlement that compromises the class's recovery for the benefit of a disproportionate recovery for the attorneys.

Pearson is directly on point—and the settlement reversed as a matter of law there, before having the benefit of the Rule 23(e)(2) amendments, was superior to this one in almost every way. The "selfish" (772 F.3d at 787) upside-down ratio in *Pearson* was more favorable to the class than the one here. The *Pearson* settlement provided direct notice to some class members, and injunctive relief; this one doesn't. *Id.* at 784-86. At no point do plaintiffs or their *amici* attempt to justify this settlement as consistent with *Pearson* (or even mention *Pearson*); defendant does so only by misstating Seventh Circuit law.[4]

Parties intend the expected consequences of their deliberate acts. *Restatement (Second) of Torts* § 8A (1965) (intent includes purpose or

[4] Kimberly-Clark misstates (DB37) all three Seventh Circuit cases it cites. *Pearson*, which reversed settlement approval, is a case about settlement fairness under Rule 23(e), not Rule 23(h), which *Pearson* never mentions. (On remand, the class recovered millions more in a renegotiated settlement.) The fees in *Kaufman*, which were 108% of the class benefit, involved three competing sets of attorneys (including attorneys for intervenors who successfully challenged two earlier versions of a settlement), and no appellant or objector alleged the disproportion as a reason to reject the settlement, so the court never addressed the issue. *Kaufman v. American Express Travel Related Servs. Co.*, 877 F.3d 276 (7th Cir. 2017). *Sears* was not a Rule 23(e) case adjudicating the fairness of a settlement, which no objector challenged, but a defendant's appeal of a Rule 23(h) award. *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, 867 F.3d 791 (7th Cir. 2017). *Sears* expressly reaffirms that courts should "presume that fees that exceed the recovery to the class are unreasonable." *Id.* at 793.

knowledge that the consequence is substantially certain to result). The combination of the settlement's explicit design features and the parties' acknowledged knowledge of how such features perform in comparable cases establishes that the sub-$1 million recovery was the anticipated result of the choices made. Appellees rely (PB40; DB21) on the district court's finding (SPA-15-16 n.10) that there is "no support in the record" for the assertion that the parties "intentionally structured the Settlement as to minimize the number of claims," but that finding is clearly erroneous and wrong as a matter of law: the parties didn't accidentally agree to a settlement with clauses that reduced recovery to under a million dollars, and no party claims that they didn't know what the consequences would be. There was nothing inevitable about the unfair ratio in this case. Tacit agreement to do so is all that is needed to be unfair to the class. Nothing in Rule 23(e)(2)(C) requires objectors to discover video evidence of a smoke-filled room with attorneys cackling and rubbing their hands together like Montgomery Burns when the objective manifestations of the settlement show the unfair ratio here.

Appellees dispute the feasibility of particular recovery provisions, but they do not dispute the settlement's actual terms, the known results of comparable claims processes, or the fact that unused fee dollars reverted to Kimberly-Clark. Their denial of intent therefore rests on a recharacterization of purpose—treating the structure as a negotiated outcome rather than a trade-off of class recovery for fees—without

contesting the factual premises that require the contrary inference as a matter of both common sense and law.

Class counsel argues against a strawman, falsely claiming (PB1; PB3; PB25; PB52) Frank wants a "*per se* invalid" rule that would never permit fees in excess of pecuniary compensation. This is wrong. Frank expressly argued:

> An upside-down ratio may be appropriate if the class is fully compensated and their claims aren't being compromised. Or perhaps the class is receiving intangible retrospective injunctive relief that is difficult to measure, making a pure pecuniary comparison unjust. But throttling the distribution of relief so that only a small fraction of the class recovers (as happened in both this case and *Hasemann*) is a compromise made by class counsel to benefit the defendant and the class counsel at the expense of the class. When that happens, it is fundamentally unfair and a breach of the attorneys' fiduciary duties to the client for the settlement to favor the attorneys at the expense of the class.

OB40. Frank is proposing a rule of decision consistent with the precedent, with the text of Rule 23(e)(2)(C), and with class counsel's fiduciary duty to the class. In contrast, the appellees offer no rule of decision for when Rule 23(e)(2)(C) creates a problem blocking settlement.

After having failed to persuade this Court in *Kurtz II* that a purely fictional $20 million fund is more important than what the class actually receives, they now want to assert that the difference between $20 million

and $1 million is irrelevant to settlement fairness. And there is nothing in Rule 23(e) that says "don't consider Rule 23(e)(2)(C)(ii) and (iii) in consumer settlements." This Court should reject appellees' attempt to create atextual exceptions to Rule 23(e)(2)(C)(ii) and (iii) in the settlement fairness inquiry. Settlement approval must be reversed.

II. The release and the segregated fund are further evidence of the improper tradeoff for fees.

Frank's opening brief (OB22-23) noted in detail the courts that have accurately described how segregated fee funds (sometimes called "kickers" in the precedent) cause problems and unfairness. For example, they're a "gimmick" that shields class counsel from class-member appellate standing to make a Rule 23(h) challenge. *Pearson*, 772 F.3d at 786.

At best, such segregation is superfluous; if class counsel asks for a reasonable fee and the settlement is otherwise fair and proportionate, the red flag of a segregated fund would by happenstance not injure the class. Thus, a settlement that is otherwise entirely fair and proportional shouldn't necessarily be struck because of the red flag of a segregated fee fund, even though the provision was designed to be unfair to the class.[5]

[5] Kimberly-Clark incorrectly argues (DB34-35) that the prior appeal implicitly rejected Frank's proposed rule. But *Kurtz II* expressly declined to reach Frank's challenge to the unfairness of the segregated fee structure's injury to the class. 142 F.4th at 121 n.6.

But that's not the scenario we have in this case. Kimberly-Clark's waiver of opposition to the $4 million fee request "reveals the defendant's willingness to pay, but the [segregated fund] deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Bluetooth*, 654 F.3d at 949. In this case, the segregation cost the class $800,000 Kimberly-Clark was willing to pay to obtain the nationwide release of consumer and property-damage claims. The unfair segregation of the fee fund *actually* cost the class money to protect class counsel's fee. A pure common-fund structure would have aligned interests differently: any fee reduction or shortfall in claims would have increased the amount available to the class instead of providing a windfall to Kimberly-Clark. Appellees do not dispute these mechanics. But these mechanics exactly resulted in class counsel "s[elling] out its [clients'] interests in settling the case" that *Kurtz II* warned about. 142 F.4th at 118 (simplified).

Class counsel defends itself (PB55) by ignoring Frank's argument, and simply repeating the district court's error (SPA-5) mischaracterizing the segregation as a benefit because a fee award supposedly "will not affect the Class's recovery." Frank's brief explained (OB37-OB38) why this is wrong, and appellees fail to address the underlying economic theory of that. *Kurtz II* endorsed the fundamental economics behind Frank's argument. The total package was negotiated together; how much Kimberly-Clark was willing to pay in fees depended on what it expected

to pay in class claims, and vice versa. 142 F.4th at 120; *accord* OB38 (discussing rational expectations).

While there are scenarios where the unfairness of a segregated fund is ultimately harmless to the class in the context of a proportional settlement and reasonable fee request, this case, where the segregated fund demonstrably and indisputably cost the class money, was not one of them. Here, "the attorneys' fees arrangement shortchanges the class.'" *Moses v. New York Times Co.*, 79 F.4th 235, 244 (2d Cir. 2023) (quoting *Briseño v. Henderson*, 998 F.3d 1014, 1024 (9th Cir. 2021)). This should require rejection of the settlement. The district court committed reversible error in considering the segregated fund a class benefit.

III. *Hasemann* approved a 12:1 settlement for reasons that render Rule 23(e)(2)(C) a dead letter. The district court's reliance on *Hasemann* repeats that error.

Frank argued (OB40-OB42) that *Hasemann* was erroneous and the district court's reliance on it impermissibly tainted its Rule 23(e)(2)(C)(ii) and (iii) analysis under the remand. SPA-17 (citing *Hasemann v. Gerber Prods. Co.*, No. 15-CV-2995 (EK) (JAM), 2025 WL 2773748 (E.D.N.Y. Sept. 29, 2025)). Appellees answer (PB51-53; DB40-41) Frank's criticism of *Hasemann* by insisting that fees may exceed the amount distributed to the class and that reliance on it could not be an abuse of discretion. Kimberly-Clark does not defend *Hasemann* at all. DB41. Plaintiffs call it "particularly persuasive" because the fees

were negotiated after the class relief, litigation was lengthy, and other factors supported approval. PB52. If these factors justify 12:1, they justify any ratio, and Rules 23(e)(2)(C)(ii) and (iii) are dead letters.

It does not matter that the fees were negotiated after the class relief. This Court has said that "formal segregation tells us little" about settlement negotiations, because fees and class recovery are "inevitably intertwined" and a defendant's "willingness to pay" fees depends on what it "anticipates paying out to the class and vice versa." *Kurtz II*, 142 F.4th at 120. Both sides know when they negotiate class relief that the fee negotiation is coming, so class relief and fees remain a "package deal," even when the fee talks "are structurally segregated" and later. *Id.* (citation omitted).

As discussed in Section I, Frank does not argue every upside-down ratio is "*per se* invalid." *Contra* PB52. One "may be appropriate" if the class is "fully compensated" and its claims "aren't being compromised." OB40. This rule "comes from" (DB40) Rule 23(e)(2)(C), which asks whether relief is "adequate, taking into account" attorneys' fees. When the class is fully compensated, fees do not come at the expense of the class. When over 90% of the class goes unpaid and the attorneys get over three times as much, they do. OB19.

True, the ratio is not "singularly dispositive," and a lopsided settlement "may ultimately be fair," but only "upon consideration of all the requisite factors." *Kurtz II*, 142 F.4th at 121. This does not imply any

ratio is permissible. Kimberly-Clark says (DB35) Rule 23(e)(2)(C) is not "an only child." But a factor that fails to matter even when a court "cannot countenance" the fee (*Hasemann*, 2025 WL 2773748, at *9) is the disfavored stepchild. Even the district court in *Hasemann* recognized that the proposed 19:1 fee-to-recovery ratio cast doubt on the settlement's fairness before reducing fees to a still-extraordinary 12:1 ratio. *Id.* at *5, *10.

The district court did not "merely" discuss *Hasemann*. *Contra* DB41. Following *Hasemann* rather than the "urgent red flag" *Briseño* saw at 7:1, the district court called the disproportion a "superficial" concern. SPA-17, 19. Citing *Hasemann*, it concluded from counsel's eight years of "extensive work" that they had not undervalued the class's claims. SPA-18. This is wrong. This Court already held in this case that a Rule 23(h) analysis "cannot suffice" under Rule 23(e). *Kurtz II*, 142 F.4th at 121.

Class counsel did not settle "quickly." OB31. But that's necessary, rather than sufficient. It remains impermissible to settle for "a higher attorney's fee," with a generous fee arrangement for counsel, even if not "quickly." *Kurtz II*, 142 F.4th at 118. The disproportion is the "evidence of unfairness" plaintiffs cannot find (PB53), because counsel's share "sheds light" on how much was negotiated for the class "in the first place." *Kurtz II*, 142 F.4th at 118.

Plaintiffs' "several other cases" involved, unlike here, relief other than money. PB53 n.12; SPA-17 & n.13. As discussed above, *Sears* was an appeal "limited to" fees, so it never asked whether a settlement was fair under Rule 23(e). 867 F.3d at 792. *Sears* does not support plaintiffs' position. Unlike in *Sears*, plaintiffs negotiated a $4.1 million unopposed fee fund as part of the constructive common fund. Moreover, plaintiffs quote the exception (PB53) but skip the rule, which is to "presume that fees that exceed the recovery to the class are unreasonable." *Id.* at 793.

And *Baby Products* is a strange case for plaintiffs to cite. PB53. The Third Circuit found the allocation of $14 million in attorneys' fees and expenses, $18.5 million to "*cy pres* recipients," and "only about $3,000,000" to class members "troubling." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169-71 (3d Cir. 2013). It warned that a "restrictive" claims process, under which class members "lacked the documentary proof necessary," "casts doubt" on a settlement. *Id.* at 176. An excessive fee allocation suggests that "the foremost beneficiaries" may be "class counsel, and not their client." *Id.* at 179. There's more than a suggestion here: the lion's share of the $5.1 million Kimberly-Clark was willing to pay for a national release of claims well beyond the scope of "price premium" claims is going to class counsel.

IV. Public policy supports aggressive policing of Rule 23(e)'s proportionality requirement.

The question on appeal is whether class members should be required to compromise their monetary claims for a settlement disproportionately rewarding their attorneys. Plaintiffs and *amici* devote several pages (PB58-61; AB13-16) for the proposition that consumer class actions can enforce laws and deter wrongdoing when individual claims are too small to litigate. But so what? Frank doesn't claim otherwise. The answer cannot be that *any* payment to class counsel is permissible because it hypothetically promotes private enforcement or deterrence. Rule 23(e) separately requires courts to protect the class from its agents' conflicting incentives in apportioning fees and relief. *Kurtz II*, 142 F.4th at 118-20. This Court's recognition that substantial fees may promote deterrence was expressly conditioned on those fees being "genuinely earned" under Rule 23(h) *and* proportional under Rule 23(e). *Id*. at 121.

Amici say that a proportionality requirement would impose a rigid ceiling and imperil meritorious small-claims suits. AB4-5, AB9-16. *Amici* describe settlements producing valuable injunctive relief or involving fee-shifting statutes that may support fees exceeding cash distributions. AB4, AB9. Contrary to amici's accusation (AB4) that Frank "acknowledges, but then disregards" these circumstances, none justifies the actual allocation in this settlement. OB40-41 (identifying circumstances in which disproportionate fees may be justified). No

valuable injunction exists here, nor has complete relief been provided. Instead the settlement releases millions of consumers' damages claims while paying claimants less than one third of counsel's $3.3 million payday. Fee-shifting statutes do not vitiate Rule 23(e)'s independent inquiry into whether the compromise fairly treats absent class members. *Kurtz II*, 142 F.4th at 120.[6]

Plaintiffs stress counsel's eight years of litigation, which produced a "negative" [*sic*, they mean fractional] lodestar multiplier, and alleged improvements in Kimberly-Clark's products. PB59-61. Those considerations may bear on the reasonableness of fees under Rule 23(h); they do not establish that the class received an adequate bargain under Rule 23(e). Indeed, the longer counsel works, the more attorneys would have a perverse incentive to settle in exchange for fees based on hours

[6] Kimberly-Clark misleadingly invokes *Douyon v. NY Medical Health Care, P.C.* as an example of disproportionate GBL § 349 fees (DB36), but it involved fee shifting for both "the maximum statutory damages under the FDCPA, $1,000, as well as $50 towards her GBL § 349 claim." 49 F. Supp. 3d 328, 341 (E.D.N.Y. 2014). The disproportion there reflects Congress's decision to authorize fees for vindicating individual statutory rights, and attorneys who achieve complete recovery are often entitled to more. OB30; OB40. In any event, Kimberly-Clark's repeated references (DB35-DB36) to pre-2018-amendment cases have zero applicability to the interpretation of Rule 23(e)(2)(C), created by the 2018 amendments. The one post-2018 case isn't any better. *Fisher* (DB36) wasn't a class settlement, and wasn't governed by Rule 23(e)(2)(C). 948 F.3d at 598.

logged rather than benefits obtained. Billable hours cannot transform a weak case into a meritorious one nor an inadequate settlement into a fair one. "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). Nor do industry-wide improvements, available to class members and non-class members alike, provide consideration for the class's released damages and property-damage claims. And the district court's $800,000 fee reduction went back to the alleged tortfeasor, not to the persons surrendering those claims. OB39; DB43.

Amici invoke the alleged benefit of deterrence and Judge Posner's observation that a violator should bear the cost of its violation (AB15-16), but their argument suffers from three fundamental flaws.

First, deterrence does not excuse a settlement that primarily benefits class counsel rather than the class because it is not a "superior" form of litigation under Rule 23. A settlement may not be certified when it "do[es] little more than turn [defendant's] settlement with [named plaintiffs] into a general release of liability from all similarly situated plaintiffs at minimal extra cost while furthering a cottage industry among enterprising lawyers." *Gallego v. Northland Group*, 102 F. Supp. 3d 506, 510-11 (S.D.N.Y. 2015), *aff'd in relevant part*, 814 F.3d 123 (2d Cir. 2016). This Court endorsed that holding, reasoning that certification of a settlement for "meaningless" or "trivial" relief is not superior to other methods of adjudication. 814 F.3d at 129. Deterrence is

not enough to rationalize attorneys' fees. *Cf. Kaplan v. Rand*, 192 F.3d 60, 71-72 (2d Cir. 1999) (rejecting fees for illusory derivative settlement relief notwithstanding claimed litigation difficulties). Attorneys' efforts cannot substitute for class benefit under Rule 23—or Article III, as discussed below.

Second, "public confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 692 (Cal. 2016) (Liu, J., concurring). Disproportionate fees undermine public confidence in class actions and, consequently, their effectiveness as a mechanism of private enforcement. "If class actions are typically seen as shakedowns by plaintiffs' lawyers trying to make a buck, class action filing or settlement will send a different message than if class actions are seen as compensatory." Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 2001 (2016). Empirical surveys confirm that the public generally believes class actions should be compensatory, but are often cynically misused for attorney benefit. *Id.* at 2029; *see also* Third Circuit Task Force Report, Selection of Class Counsel, 208 F.R.D. 340, 343-44 (2002). Courts ought to police these unhealthy arrangements "[f]or the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974).

Finally, deterrence works only when it distinguishes wrongdoing from lawful conduct. Not every defendant who rationally settles is a violator. Where attorneys can profit substantially by resolving weak suits for nuisance value regardless of class recovery, the costs of litigation fall on good actors as well as bad ones; the marginal deterrent against actual misconduct diminishes. OB42-44 (citing, *e.g.*, Nobel Prize-winner Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968)). Requiring counsel to obtain meaningful benefits for the class does not disfavor meritorious claims; it rewards counsel for vindicating them and going after wrongdoing, rather than just deep pockets.

Kimberly-Clark speculates that requiring proportional attorneys' fees would encourage counsel to bring the same nuisance suits but settle them more quickly, rather than invest in developing meritorious claims. DB39. This gets the incentives backwards. A quick settlement obtaining little for the class should not support a disproportionate fee merely because counsel spent fewer hours litigating. Tying compensation to class recovery removes, rather than creates, the incentive to settle cheaply. Conversely, developing meritorious claims increases the potential recovery for the class and thus the potential compensation for counsel. Proportionality aligns counsel's incentives with those of the class in meritorious cases by eliminating any temptation for class counsel to accept cumbersome claims procedures in return for generous fees.

Amici express confidence that *Goldberger* fee review protects absent class members (AB10-12), but this repeats a contention this Court already rejected. The reasonableness of a fee under Rule 23(h) and the fairness of a settlement under Rule 23(e) are *distinct questions*; the former cannot substitute for the latter. *Kurtz II*, 142 F.4th at 120-21. The provisions protect different interests. A class action is not a bounty program in which private attorneys may sell their absent clients' releases in exchange for funding "enforcement" generally. Article III empowers federal courts to redress injuries to plaintiffs, "not a freewheeling power to hold defendants accountable for legal infractions." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021); *see also Thole v. U.S. Bank*, 590 U.S. 538, 541-42 (2020). These principles underscore, rather than displace, Rule 23's requirement that courts keep "the interests of absent class members in close view." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997). Counsel owe fiduciary duties to their clients, not to an abstract public interest in regulatory enforcement. Deterrence is a welcome consequence of vindicating class members' claims, not a justification for waiving those claims in support of disproportionate attorneys' fees.

Public policy is served when attorneys do well for themselves by doing good for the class—not when their compensation is severed from the relief that class members actually obtain.

History demonstrates that Frank's proposed rule does benefit meritorious litigation. When Frank's nonprofit successfully vacated approvals of settlements of colorable cases for their disproportion in cases like *Pearson*, *Briseño*, *Baby Products*, and *Frank v. Gaos*, 586 U.S. 485 (2019), consumers received millions of dollars more in modified settlements on remand—and, more often than not, the attorneys received the same or higher fees. It turns out that attorneys respond to incentives. When courts tell attorneys that they don't get paid unless their clients do, attorneys magically discover ways to get money to injured consumers after assuring appellate courts it was infeasible to do so.

Frank's proposed rule, adopted by *Pearson* and other cases, seems to only hurt attorneys bringing borderline-frivolous cases and agreeing to nuisance settlements that don't pay class members anything. When appellate courts throw out settlements in cases like that,[7] the attorneys slink away rather than continue to litigate a meritless case against an innocent defendant. When attorneys are discouraged from bringing baseless extortionate lawsuits for nuisance value, that's a feature, not a bug.

Public policy—including the public policy of deterring corporate wrongdoing—supports rejecting this settlement.

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[7] *E.g.*, *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *In re Walgreen Shareholder Litig.*, 832 F.3d 718 (7th Cir. 2016); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013).

Conclusion

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

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Respectfully submitted,

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I hereby certify that on November 6, 2026, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Second Circuit using the ACMS system, which will provide notification of such filing to all who are ECF-registered filers.

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