No. 24-425/No. 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,
Plaintiff-Appellee,
vs.
Theodore H. Frank
Objector-Appellant,
vs.
Kimberly-Clark Corporation, et al.,
Defendants-Appellees.

Gladys Honigman, et al.,
Plaintiffs-Appellees,
vs.
Theodore H. Frank
Objector-Appellant,
vs.
Kimberly-Clark Corporation, et al.,
Defendants-Appellees,

Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF IOWA, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, OHIO, SOUTH CAROLINA, TENNESSEE, UTAH, AND VIRGINIA ATTORNEYS GENERAL AS *AMICI CURIAE* IN SUPPORT OF OBJECTOR-APPELLANT AND REVERSAL

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STATEMENT OF AMICUS CURIAE

The Attorneys General of Iowa, Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Montana, Ohio, South Carolina, Tennessee, Utah, and Virginia are their States' chief law enforcement or legal officers. Their interest here arises from two interrelated responsibilities. First, Attorneys General have an overarching responsibility to protect their States' consumers. Second, the undersigned are responsible for protecting consumer class members under the Class Action Fairness Act, which creates a role for State Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 5 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens"); *id.* at 35 ("[N]otifying appropriate state and federal officials . . . will provide a check against inequitable settlements"); *id.* ("Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

Attorneys General submit this brief to further those discrete interests. This brief continues past State Attorney General efforts to protect consumers from class action settlement abuse. Past efforts have produced meaningful settlement improvements for

class members. *See, e.g.*, *Cowen v. Lenny & Larry's Inc.*, No. 17-cv-01530, Dkts. 94, 110, 117 (N.D. Ill. amended settlement approved May 3, 2019) (amended settlement class cash recovery from $350,000 up to about $900,000 after government involvement); *Allen v. Simiasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261, 268 (S.D. Cal. settlement approved Aug. 17, 2017) (class cash recovery increased from $0 up to about $700,000 following State Attorney General coalition amicus brief and district court rejection of initial settlement); *Unknown Plaintiff Identified as Jane V., et al., v. Motel 6 Operating LP*, No. 18-cv-0242, Dkts. 50, 52, 58, 63, 64, 75 (D. Ariz. amended settlement approved Aug. 2, 2019) (parties amended settlement agreement to increase minimum class member recovery from $50 to $75 and to remove class caps following Attorney General concerns about settlement distribution).

SUMMARY OF THE ARGUMENT

The district court asserts that an attorney fee award giving class counsel 73.4 percent of the total settlement value, "does not constitute a windfall." Dkt. 474 at 36. But when class members will recover less than $1 million while their attorneys will take home more than $3.1 million, there is no fairness to be found in the class action. And while the top-line number for the settlement contends that there may be almost $20 million in recovery for the class, that is illusory. Like a non-guaranteed contract in the National Football League, the eye-popping hypothetical total hides the likely actual recovery. Rather than $20 million, the class is likely to see less than $1 million in benefit. And so the $19 million that does not end up going to the class will end up back in Defendant's pocket.

Grossly disproportionate settlement allocations—like those that pay counsel three times what the class recovers—cannot be "fair," "reasonable," or "adequate" under Rule 23. Fed. R. Civ. P. 23(e)(2). While the district court reduced the requested attorneys' fees, it did not go far enough. The too-high ratio of attorneys' fees to class benefits is an abuse of discretion.

This Court should vacate the settlement approval and declare that no matter how fees are calculated, a court's first consideration must be the benefit to the class. The Attorneys General endorse

that approach as giving consumers critical protection by aligning the interests of class counsel with those of the class.

ARGUMENT

Class counsel should not recover three times as much as the class itself. Rule 23 allows a court to approve a class action settlement "only on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Such a disproportionate recovery, even following the district court's prudential decrease in attorneys' fees, is not fair, it is not reasonable, and it is certainly not adequate.

Courts cannot approve settlements that give class counsel windfall recoveries greater than recovery for the class without violating the federal rules. Rule 23 establishes four "primary procedural considerations and substantive qualities that should always matter to the decision whether to approve [a settlement] proposal." Fed. R. Civ. P. 23(e)(2) Advisory Comm. Notes to 2018 Amendment; *see Moses v. N.Y. Times Co.*, 79 F.4th 235, 242 (2d Cir. 2023). Among those: "the effectiveness of any proposed method of distributing relief to the class, including the method of processing member claims," and "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(ii)–(iii). The relief delivered to the class is a significant factor in

determining the appropriate fee award. Fed. R. Civ. P. 23(e)(2)(C) and (D) Advisory Committee Notes to 2018 Amendment.

Rule 23(e) protects "unnamed class members 'from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (citing 7B Fed. Prac. & Proc. Civ. § 1797 (3d ed. 2023 update)); *see also Gross v. Wash. Mut. Bank, F.A.*, 2006 WL 318814, at *4 (E.D.N.Y. Feb. 9, 2006). Courts should modify fees to protect class interests and ensure class counsel are not enriched at the class's expense. *See In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 127 n.9 (2d Cir. 2014) (citing *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1111 (7th Cir. 1982); *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 561–62 (E.D. La. 2009); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006)). Here, the district court approved such a disproportionate recovery for class counsel that counsel is enriched at the class's expense.

I. Awarding class counsel more than three times what the class received is an abuse of discretion.

While Defendants agreed to pay class members up to $20 million to release their claims, the class is actually receiving just $993,958.70. Meanwhile, Defendants will keep the remaining $19

million and class counsel get more than $3.1 million. That unbalanced outcome illustrates how some settlement provisions and fee calculations preclude consumer recovery, undermining Rule 23 and the court's duty to unnamed class members.

A. Claims made settlements that depress distribution rates and settlement provisions that divorce attorney fees from class recoveries produce disproportionate settlement allocations.

Multiple settlement provisions resulted in a grossly disproportionate ratio of attorney fees to class recovery. First, the "method of distributing relief to the class, including the method of processing class-member claims," Fed. R. Civ. P. 23(e)(2)(C)(ii), ensured that few consumers submitted claims and those that did seldom received more than a few dollars. The settlement required class members to submit claims listing the number of packages of flushable wipes purchased between February 21, 2008, and the settlement notice date. Dkt. 1358 at 32. Consumers then needed to recall the date of those purchases, and the store and State where those packages were purchased. *Id.* Such stringent requirements are difficult to meet for even the most conscientious consumers.

For the few class members who remembered every date, location, and store where they bought flushable wipes over the 14-year period, the settlement agreement restricted their recovery even more. For example, class members could submit only one claim

per household no matter how many class members lived in the household. *Id.* The settlement then limited claims to: (1) $0.70 per package up to $7.00 per household; or (2) $1.10 per package up to $50.60 for claims accompanied by proof of purchase. *Id.*

But those numbers do not tell the full story. "According to Class Counsel's calculations, as of September 19, 2023, the average claim actually conferred on Class members [was] $6.73, with $30.90 being the average for Class Members with proof of purchase and $6.28 for those without proof of purchase." Dkt. 474 at 18. Likely, when it came to inexpensive household items purchased over 14 years, few class members kept "the actual label or bar code portion of the package for the Products (not a photocopy or digital image)" or "the original photocopy or digital image of an itemized sale receipt generated by a retail seller showing the date and place of purchase, name of the Product purchased, and the amount paid." Dkt. 1358 at 32.

That overly stringent approach to relief for class members is tailor made to reduce claims made and claims paid out for several reasons.

First, "claims-made" settlements like this one—where class members must submit a claims form to receive compensation—often reduce the number and amount of class claims while leaving fee awards unaffected. *See Briseño v. Henderson*, 998 F.3d 1014,

1026 (9th Cir. 2021) (explaining redemption rates are "notoriously low" in claims-made settlements "especially when [they] involve small-ticket items"); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014) (supporting requiring only a "sworn statement" to allow recovery for a commodity product); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) ("Consumers cannot benefit from the [one-box refund] program unless they have retained their original receipt and Pampers-box UPC code, in some instances for diapers purchased as long ago as August 2008. [Objector] sensibly asks who does this sort of thing. We have no answer.").

Second, the settlement ensures any attorney fee reduction benefits Defendants rather than the class. The settlement keeps claims payments "separate and apart from" attorney fees and expenses, providing that one "shall not be affected in any way" by the other. Dkt. 432-1 at 15. "[T]his aspect of the Settlement" does not, in fact, "adequately protect[] the Class's interests." *Contra* Dkt. 474 at 15. Rather, it prevents a court from reducing attorney fees to correct an imbalanced settlement because the reduction will not affect class benefits. *See Briseño*, 998 F.3d at 1020 (explaining that because the attorney fee amount came directly from the defendant and was separate from the class settlement fund, "[i]f the court . . . sliced the agreed-upon attorneys' fees, that reduction would revert back to [defendant] rather than the class"); *Redman v.*

RadioShack Corp., 768 F.3d 622, 637 (7th Cir. 2014) (discussing the settlement "defect" of "placing the fee award to class counsel and the compensation to the class members in separate compartments"). "That the defendant will pay the attorneys' fees from its own funds . . . does not limit the court's obligation to review the reasonableness of the agreed-to fees." *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 850 (5th Cir. 1998). Making only a "perfunctory review in such a circumstance would disregard the economic reality that a settling defendant is concerned only with its total liability." *Id.* (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819–20 (3d Cir. 1995)).

Third, the "kicker," or "reverter," provision returns any unclaimed funds to Defendants rather than using them to increase class payments. "Funds reverted to the defendant provide no benefit to the class." *Hart v. BHH, LLC*, 2020 WL 5645984, at *8 (S.D.N.Y. Sept. 22, 2020). "Any benefit from funds reverted back or never tendered by Defendants are purely hypothetical." *Id.* Even if a court omits the reverted, "hypothetical" funds from its attorney fee calculations, the funds remain unavailable to the class. *See Pearson*, 772 F.3d at 786 ("The simple and obvious way for the judge to correct an excessive attorney's fee for a class action lawyer is to increase the share of the settlement received by the class, at the expense of class counsel. This route is barred unless the judge

invalidates the kicker clause.") (internal citation omitted); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) ("[A] kicker arrangement reverting unpaid attorneys' fees to the defendant rather than the class amplifies the danger of collusion."). Often, a settlement that combines a segregated attorney fee fund and a kicker clause is "a strategic effort to insulate a fee award from attack." Charles Silver, *Due Process and the Lodestar Method*, 74 Tulane L. Rev. 1809, 1839 (2000).

And Defendants have agreed they will not oppose the settlement, including an attorney fee award of up to $4.1 million. Dkt. at 6, 20–21. That "clear sailing" arrangement suggests class counsel has "bargained away something of value to the class." *Briseño*, 998 F.3d at 1026–27 (quoting *In re Bluetooth*, 654 F.3d at 948); *see also Redman*, 768 F.3d at 637 (explaining clear-sailing clauses are "questionable" because "the defendant won't agree to a clear-sailing clause without compensation").

Fourth, despite the onerous impositions on consumers to their recovery, the "quick-pay" provision pays attorneys' fees before class claims. Here, Defendants have agreed to pay attorneys' fees, litigation expenses, and lead plaintiff incentive awards within 30 calendar days following an order granting the fee application. Dkt. 432-1 at ¶ 6.4). Yet they will pay class claims in either 60 or 90 days depending on whether there is a challenge to the award of

attorneys' fees, expenses and/or class representative payments. *Id.* at ¶ 2.9. Quick-pay provisions suggest unfairness and, at minimum, increase the appearance of impropriety. *See Mikhlin v. Oasmia Pharm. AB*, 2021 WL 1259559, at *7 (E.D.N.Y. Jan. 6, 2021) ("[T]he timing of the proposed award of attorney's fees does not bolster the case for preliminary approval."); *see also Hart v. BHH, LLC*, 334 F.R.D. 74, 77 (S.D.N.Y. 2020) ("disagree[ing] that there is no harm to the class by paying attorneys first" and concluding that "[t]here are sound reasons for courts to ensure that the class has been compensated prior to attorneys in class-action settlements," including that "[c]ynically, money is the best way to keep lawyers engaged").

Settlement provisions like these result in "huge disparit[ies] between the benefits that will actually be achieved for Class Members and the amount of funds that will revert to the Defendant." Dkt. 474 at 24. They also result in grossly disproportionate attorney fee allocations, undermining the fairness, reasonableness, and adequacy of a settlement.

B. The district court's attorney fee calculation perpetuated problematic billing practices and awarded fees without regard to class recovery.

To its credit, the district court tried to remedy these issues in its attorney fee calculation. The court recognized "unclaimed funds

should not be used when assessing the fee percentage." Dkt. 474 at 24. After finding that awarding fees based on the money the class received resulted in a 77.5 percent attorney fee award, the district court awarded fees based on lodestar. Dkt. 474 at 25. As seen in other settlements, the lodestar method—which takes the reasonable number of hours expended and multiples it by a reasonable hourly rate—does not necessarily solve underlying settlement issues and may introduces new ones.

Unlike the percentage fee method which "directly aligns the interests of the class and its counsel and provides a powerful incentive for efficient prosecution," "the lodestar [method] create[s] an unanticipated incentive to early settlements [and] tempts lawyers to run up their hours." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (quoting *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *25 (S.D.N.Y. Nov. 26, 2022) and *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002)); *see also* Report of Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 247–48 (1986) (explaining the lodestar method "encourages lawyers to expend excessive hours . . . engage in duplicative and unjustified work, inflate their 'normal' billing rate, and include fictitious hours or hours already billed on other matters").

Here, class counsel calculated a lodestar of $4,269,331.50 based on 5,662.88 hours of work, resulting in an average hourly rate of $753.92 per hour. Dkt. 445 at 8. In making their attorney fee petition, counsel dropped their lodestar request to $3,961,668.77, but the average hourly rate remained near $700 per hour. Dkt. 474 at 26. The average fee "would imply that few if any associates or paralegals had actually been used on the case" and is an "indication . . . that class counsel sought . . . excessive compensation." *Pearson*¸ 772 F.3d at 781 (addressing average fee of $538 per hour). Indeed, the court agreed that "the allocation of time is heavily weighted toward partners" with partners billing more than 68 percent of the hours. Dkt. 474 at 31.

Counsel also erred by calculating their lodestar using their current hourly rates rather than blended historical rates. Dkt. 474 at 27. Here, counsel based their calculation on current hourly rates even though litigation began eight years ago. Dkt. 474 at 27–29. For example, one attorney submitted information based on his hourly rate as a partner even though he spent six years of the case as an associate. Dkt. 474 at 28–29.

Even with historical rates, the proposed rates still might be at odds with the market. Here, "Class Counsel's current hourly rates—$800 to $1,350 per hour for partners, more than $500 for some associates, $265 to $375 per hour for paralegals, and $300 to

$400 per hour for litigation support personnel—exceed[ed] the prevailing hourly rates, including those approved in complex litigation." *See* Dkt. 474 at 30 (internal citation omitted); *see also* Dkt. 474 at 29–30 (identifying Eastern District of New York rates for complex litigation as: $325–$630 for partners, $200–$400 for associates, and $125–$240 for paralegals). "Furthermore, Class Counsel billed for work performed by a summer associate, which typically is not done." Dkt. 474 at 31–32 (citing *Okla Firefighters Pension & Ret. Sys. v. Lexmark Int'l, Inc.*, 2021 WL 76328, at *5 (S.D.N.Y. Jan. 7, 2021)).

The lodestar method exacerbates other billing issues that can inflate fee awards at the expense of the class. Here, "Class Counsel's billing records contain[ed] vague entries that lack[ed] sufficient specificity to enable a court to assess what tasks were completed." Dkt. 474 at 32 (quotation marks omitted) (quoting *Alcon Vision, LLC v. Lens.com, Inc.*, 2023 WL 8072507, at *5 (E.D.N.Y. Nov. 21, 2023)). "Such entries 'do not allow a court to assess what legal issues, in particular, the attorneys were researching, or which sections of a legal brief they were drafting, and whether the time spent was excessive or duplicative." *Id.* And "Class Counsel often engaged in block billing by combining several tasks into a single entry," which "makes it 'difficult if not impossible for a court to determine the reasonableness of the time spent on each of the

individual services or tasks provided . . . .'" Dkt. 474 at 32–33 (quoting *E.S. v. Katonah-Lewisboro Sch. Dist.*, 796 F. Supp. 2d 421, 432 (S.D.N.Y. 2011)).

Ultimately, "the lodestar amount alone cannot tell us if the requested fees are reasonable. Counsel may have frittered away hours on pointless motions or unnecessary discovery, padding the lodestar." *Briseño*, 998 F.3d at 1026 (citing *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 665 (9th Cir. 2020)); *see Robert M. v. Kijakazi*, 2022 WL 1222462, at *1 (W.D.N.Y. Apr. 26, 2022) ("[T]he lodestar figure does not determine reasonableness") (citation omitted). The lodestar method is meant to place a ceiling on attorney fee awards, not a floor. *See, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 232 (2d Cir. 1987) (explaining that the court adopted the lodestar method to "temper [attorney fee] awards to prevent windfalls"). "[W]here the plaintiff has achieved only a very limited form of success, the full lodestar amount may be a windfall." *Bargas v. Rite Aid Corp.*, 2017 WL 10403361, at *5 (C.D. Cal. July 10, 2017).

A fee award cannot be fair or reasonable when it lacks any rational connection to the class benefit—as here, even with the court's 20 percent reduction. As Judge Richard Posner explained in reversing another class action settlement, "[t]he district judge made significant modifications in the settlement but not enough."

Pearson, 772 F.3d at 787. The 73.4 percent fee here "disserves the class," *id.*, and is an abuse of discretion.

II. Settlements with disproportionate attorney fee allocations are not fair, reasonable, or adequate under Rule 23 and attorney fees must relate to the class benefit.

While attorneys should be compensated for the work they perform, courts should scrutinize settlement provisions and fee calculations that benefit attorneys at the expense of class members. The class action settlement process already raises unique due process concerns and sometimes places class members at a disadvantage. *See In re Bluetooth*, 654 F.3d at 946. Class counsel has an incentive to obtain a large fee—a fee that inevitably comes from class members' pockets. *See, e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) (explaining "interests of class members and class counsel nearly always diverge"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("[C]lass actions are rife with potential conflict of interest between class counsel and class members."); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D.N.Y. 1989) (identifying the need to protect the "[c]lass from whose pockets the attorney's fees will come[.]"); Silver, *Due Process and the Lodestar Method*, 74 Tulane L. Rev. at 1820 ("The Due Process Clause requires [judges] to minimize conflicts between claimants and their representatives.").

Class action settlements require extra scrutiny because class members cannot rely on the usual adversarial relationship between the parties. *See In re Gen. Motors*, 55 F.3d at 819–20. To a defendant, the class award and fee award "represent a package deal." *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 264 (8th Cir. 1996). The defendant is "interested only in the bottom line: how much the settlement will cost." *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015). Because the defendant "is interested only in disposing of the total claim asserted against it, . . . the allocation between the class payment and the attorney's fees is of little or no interest to the defense." *In re Gen. Motors*, 55 F.3d at 819–20 (quoting *Prandini v. Nat'l Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977)).

Defendants' indifference on settlement allocation often requires courts to look for "subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Dry Max Pampers*, 724 F.3d at 718; *In re Bluetooth*, 654 F.3d at 947 (same); *see also In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir. 1987) (explaining concern in isolating situations "in which the client's interests are somewhat encroached upon by the attorney's interests"). Judicial scrutiny also "guards against the public perception that attorneys exploit the class action device to obtain

large fees at the expense of the class." *Strong*, 137 F.3d at 849 (citing *In re General Motors*, 55 F.3d 768 at 820).

With that dynamic in mind, State Attorneys General regularly present their class action settlement concerns to help protect consumers from settlement abuse.[1] The Attorneys General use CAFA notices to monitor class settlements and watch for settlement terms that undermine consumer interests. As repeat players in the class action process, the Attorneys General can spot arrangements that reward attorneys for settlements that provide little or no meaningful value to class members. And then those Attorneys General are well placed to register their objections. Such settlements harm consumers and undermine their faith in class action's ability to provide meaningful recovery.

The ratio of class recovery to attorneys' fees in particular raises serious due process and fairness issues. *See, e.g.*, *In re Sw. Airlines*, 779 F.3d at 712; *Pearson*, 772 F.3d at 778; *Redman*, 768 F.3d at 630. There are "troubling consequences" of a settlement

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[1] Past coalitions of State Attorneys General have briefed district courts and courts of appeals throughout the country as well as the Supreme Court. *See, e.g.*, *Briseño v. Henderson*, No. 19-56297 (9th Cir. Apr. 10, 2020); *Frank v. Gaos*, No. 17-961 (U.S. July 16, 2018); *In re Google Inc. Cookie Placement*, No. 17-1480 (3d. Cir. July 10, 2017); *In re Easysaver Rewards Litig.*, No. 16-56307, Dkt. 21 (9th Cir. May 8, 2017); *In re Google Street View Elec. Comm. Litig.*, No. 3:10-md-02184, Dkt. 189-1 (N.D. Cal. Jan. 20, 2020).

approach that does not require "some rational connection between the fee award and the amount of the actual distribution to the class." *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1223 (2000) (O'Connor, J., writing on denial of certiorari) (advocating Supreme Court review "in an appropriate case").

Courts often reject settlements awarding more than 50 percent of the recovery to counsel. *See*, *e.g.*, *Pearson*, 772 F.2d at 781 (reversing "an outlandish 69 percent" fee); *Redman*, 768 F.3d at 630 (55 percent fee); *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014) (reversing 56 percent fee); *Benson v. Enter. Leasing Co. of Orlando, LLC*, 2022 WL 4354846, at * 2 (M.D. Fla. Sept. 20, 2022); ("a fee award of 60% of the class fund is unreasonable"); *Flerlage v. US Foods, Inc.*, 2020 WL 4673155, at *11 (D. Kan. Aug. 12, 2020) (59.5 percent fee unreasonable) *Tabiti v. LVNV Funding LLC*, 2019 WL 13261836, at *2 (N.D. Ill. Oct. 11, 2019) (reversing 58 percent fee); *Cunningham v. Suds Pizza, Inc.*, 290 F. Supp. 3d 214, 225 (W.D.N.Y. 2017) (rejecting a 160 percent fee as "unreasonable and improper").

The "central consideration" in any class action settlement is "*what class counsel achieved for the members of the class*" not "how much effort class counsel invested in the litigation." *Redman*, 768 F.3d at 633. "It does not matter that class action attorneys may have devoted hundreds or even thousands of hours to a case. The

key factor in assessing the reasonableness of attorneys' fees is the benefit to the class members." *Lowery v. Rhapsody Int'l, Inc.*, 75 F.4th 985, 994 (9th Cir. 2023) (citing *In re Bluetooth*, 654 F.3d at 942). Accordingly, "[t]he single most important action judges can take to support public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value for class members and society." Deborah R. Hensler, et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 33 (RAND Inst. for Civil Justice 1999); *see also* Manual for Complex Litigation (Fourth) § 21.71 (2004). Monetary recovery for the class is "often the true measure of success," and should influence the fee award. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993).

Judges can—and should—improve consumer outcomes in class actions by tying attorneys' fees to claims made by class members. *See In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 406 (D. Mass. 2008). "This approach will not only encourage more realistic settlement negotiations and agreements, but also will drive class counsel to devise ways to improve how class action suits and settlements operate." *Id.* Assessing attorneys' fees in relation to class awards will encourage class counsel to focus on the needs and desires of the class and devise better notice programs, settlement terms, and claims procedures. For example, making fees

depend on the amount class members receive would encourage counsel to negotiate settlement terms with automatic payments rather than a claims process or to create simple claims processes requiring minimal or no additional documentation. *See* Hensler, at 491. Realigning these incentives will better protect consumers.

CONCLUSION

The district court abused its discretion in approving the settlement agreement here. Accordingly, this Court should vacate the settlement approval and declare that no matter how fees are calculated, a court's primary consideration must be the value of the actual benefit to the class.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 4,620 words. It also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the fourteenth day of June, 2024, this brief was electronically filed with the Clerk of Court using the CM/ECF system, which will serve all counsel of record.

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