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

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND CONSUMER BRANDS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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DISCLOSURE STATEMENTS PURSUANT TO RULES 26.1 AND 29 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby state that the National Association of Manufacturers and Consumer Brands Association have no parent corporations and have issued no stock.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that (1) no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person — other than the *amici curiae*, their members, or their counsel — contributed money that was intended to fund the preparation or submission of the brief.

Pursuant to Circuit Rule 29-3, counsel for *amici* sought consent of all parties to the submission of this proposed brief. All parties responded, and there were no objections to the filing of this *amici curiae* brief.

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INTEREST OF *AMICI CURIAE*

Amici Curiae are the National Association of Manufacturers (NAM) and Consumer Brands Association (CBA). The NAM is the largest manufacturing association in the U.S., representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 13 million men and women, contributes $2.87 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the U.S.

CBA represents the world's leading consumer-packaged goods companies, as well as local and neighborhood businesses. The consumer-packaged goods industry is the largest U.S. manufacturing employment sector, delivering products vital to the wellbeing of people's lives every day. The industry contributes $2 trillion to U.S. gross domestic product and supports more than 20 million American jobs. CBA's industry members are committed to empowering consumers to make informed decisions about the products they use and have long felt a unique responsibility to ensure their products align with the evolving expectations of consumers.

The NAM, CBA and their members have a strong interest in ensuring that courts have the tools to bring class actions to an end, particularly when the claims

are highly speculative but take years to litigate. Those tools include establishing a fair means for class recovery so members of the class who feel aggrieved can claim an award—here, a claims-made settlement—and a method for setting attorneys' fees for class counsel—here, segregating the attorneys' fees from the class recovery under the lodestar method. Without these tools, class actions will become exceedingly difficult to resolve before trial.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In this case, the perfect is proving to be the enemy of the good. Plaintiffs brought a class action against Defendant Kimberly-Clark, alleging the company's flushable wipes were not actually flushable. Class certification here was not based on any alleged property injuries—no clogged toilets, no clogged pipes, no flooding of basements, or other plumbing issues from using Defendant's wipes. Rather, this class of consumers alleged solely a benefit-of-the-bargain loss: they overpaid for their flushable wipes because *other purchasers* alleged such problems with the wipes they bought. For everyone in this appeal, the wipes were flushed presumably without incident. Further, if anyone preferred not using wipes they bought given this alleged risk, Kimberly-Clark offered a full refund. This litigation, therefore, is the quintessential example of the recent trend in speculative product class actions.

After nearly a decade of litigation—through two appellate decisions and daunting procedural and evidentiary issues—it has become clear that the class might

not obtain much, if any, relief if this case were to go to trial. At the same time, defendants are generally loath to take any class action to trial, even, as here, when they have a strong defense. The business interruptions, adverse publicity, and uncertainty of trials and jury verdicts create unacceptable risks. Faced with this reality, Plaintiffs and Defendants reached independent determinations that it was in their own best interests to settle the litigation. After arms-length negotiation, they reached a settlement comparable to other flushable-wipe settlements in the benefits conferred to the individual class members. Defendant set aside $20 million so that all aggrieved class members could receive compensation. The parties further agreed that class counsel would be paid through segregated attorneys' fees to be determined by the court based on the lodestar method, which has a long history of acceptance in this circuit. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) (calling lodestar an "accepted but not exclusive methodology" for attorneys' fees).

Objector, who founded the non-profit Center for Class Action Fairness, objected to the settlement. He pointed out the fairly low claims rate among the class, only about $1 million of this $20 million fund was paid. Yet, counsel received $3.17 million, which was 74 percent of the lodestar fee submitted. In stating his objection, he seeks to ban the use of claims-made settlements, segregated attorneys' fees, and lodestar-based calculations for class counsel fees—all of which have a long history of acceptance. Indeed, this Circuit, as well as the Federal Rules Committee, has

prioritized giving district courts the tools and flexibility to approve settlements and counsel fees so that class-action litigation can reach fair conclusions. Further, to the extent Objector is arguing for the establishment of a bright line rule barring district courts from approving a class settlement where the attorneys' fees exceed the actual relief collected by the class, these arguments are best made to the Rules Committee. Imposing such a rule here, with no notice, would have the perverse effect of forcing Defendants to continue litigating, and forcing both sides to risk an all-or-nothing trial verdict over a case that could have settled for a mutually acceptable amount.

For these reasons, *amici* respectfully request that the Court affirm the ruling below. The district court approved the settlement and calculated counsel's fees after asserting proper oversight, applying the Court's jurisprudence, following the federal rules, and hearing from Objector. This record is indicative of a court that upheld its fiduciary obligation to the class, not one that abused its discretion. Further, the bright-line rule Objector advances would handcuff the parties and the courts from ending this type of lengthy, low-dollar, benefit-of-the-bargain class actions.

ARGUMENT

I. THE MECHANISMS USED TO SETTLE THIS CASE ARE FULLY CONSISTENT WITH THIS COURT'S JURISPRUDENCE AND THE FEDERAL RULES OF CIVIL PROCEDURE.

A. The Court and Federal Rules Emphasize Flexibility, Not Bright-Line Rules, for Approving Class Settlements.

This Court has long recognized that class compensation and attorneys' fees are products of compromise, and has instructed courts to consider a multitude of factors when determining whether to approve the particular terms of a given settlement. *Haar v. Allen*, 687 F. App'x 93, 95 (2d Cir. 2017) ("By their nature, settlements are compromises that do not provide either side with all that they might have hoped to obtain in litigation."). These factors, first enunciated in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), include the complexity, expense and duration of the case; stages of litigation completed; risks of establishing liability and damages; ability of defendants to withstand judgment; class members' reaction to settlement; and reasonableness of the settlement fund in light of the best possible recovery and risks of litigation. *Id.* at 463. Other circuits have issued similar rulings setting forth their own factors to be considered. No circuit has adopted a bright-line rule for approving settlements.

Similarly, with respect to attorneys' fees, this Circuit has allowed district courts broad discretion in determining both the amount and mechanism for how fees are determined: they must be "reasonable" under the circumstances. *Goldberger v.*

Integrated Resources, Inc., 209 F.3d 43, 47 (2d Cir. 2000) ("What constitutes a reasonable fee is properly committed to the sound discretion of the district court."). A court's fee determination "will not be overturned absent an abuse of discretion, such as a mistake in law or a clearly erroneous factual finding." *Id.* In *Goldberger*, the Court specifically rejected efforts comparable to those here, "to 'junk' the lodestar" method. *Id.* at 50. The Court allowed district judges to base fee awards on many factors, including labor expended by counsel, complexity of the litigation, and quality of representation. *Id.* at 50.

In 2018, the Federal Rules of Civil Procedure were amended, drawing from these cases to identify core principles for approving class settlements. *See* Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note to 2018 Amendment ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."). The hallmark of the new rule—consistent with this Court's jurisprudence—was to ensure district courts have the *flexibility* they need to approve settlement and award attorneys' fees that are fair and reasonable under the circumstances in each case. *See* Fed. R. Civ. P. 23(e)(2)(C) (identifying four sets of factors to be considered). The Federal Rules Committee explained that the district court's review is to be "holistic." *Id.* Advisory Committee's Note to 2018

Amendment. It specifically rejected the type of bright-line rules sought here. *Id.* (providing "no rigid limits" for attorneys' fees).

Finally, last year, this Court, in *Moses v. New York Times Co.*, applied the new Rule 23(e) to the Circuit's jurisprudence. 79 F.4th 235 (2d Cir. 2023). It held the rule supported *Grinnell*'s and *Goldberger*'s multifaceted approaches to settlements and attorneys' fees and affirmed the district courts' responsibility to holistically "evaluate the fairness, reasonableness, and adequacy of a class settlement." 79 F.4th 235, 242 (2d Cir. 2023). Under the new Rule, courts could not *presume* such fairness merely because the parties negotiated at arms-length. *Id*. at 243. In addition, the Court explained that the Rule accentuated additional factors that "may not have been highlighted" in prior cases. *Id*. The Court was concerned with making sure "unscrupulous counsel" could not sell out a class with meritorious claims for a cheap, quick payment. *Id.* at 244. That risk is not present here, where counsel sought to end drawn-out litigation where recovery at trial was unlikely.

B. Claims-Made Funds, Segregated Attorneys' Fees, and Lodestar Methods for Determining Attorneys' Fees Are Accepted Means for Reaching Settlement.

Under this Court's jurisprudence, there is no one-size-fits-all means for structuring settlements in consumer class actions. The parties and courts have "broad discretion" to reach settlements that are fair and reasonable under the specific circumstances of a case, which includes establishing a "reasonable fee" for class

counsel. *Goldberger*, 209 F.3d at 57. Indeed, class settlements regularly feature "claims-made" funds, segregated attorneys' fees, and lodestar methods for determining those fees unrelated to the percentage of claims collected. *See, e.g.*, *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 723 (2d Cir. 2023); *Fresno County Emp. Ret. Ass'n v. Isaacson/Weaver Family Tr.*, 925 F.3d 63, 68 (2d Cir. 2019). There is nothing unique about the settlement at bar.

In a claims-made settlement, the defendant establishes the amount of money available for satisfying the claims of the class, and the class members may obtain monetary recovery by submitting valid claims demonstrating their entitlement to payment. These types of settlements can often encourage the defendant to make more generous settlement offers, which can increase the overall class recovery. *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (Posner, J.). As a result, claims-made settlements have become common vehicles for providing large consumer classes with the option to collect awards. *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 639 F. App'x 880, 883 (3d Cir. 2016) (affirming claims-made fund because it "adequately prioritizes direct benefit to the class") (cleaned up); *McGreevy v. Life Alert Emergency Response, Inc.*, 2017 U.S. Dist. LEXIS 65085, *15 (S.D.N.Y. Apr. 28, 2017).

Often with claims-made settlements, the attorneys' fees are handled separately. Segregating attorneys' fees from the amount available to the class helps

reduce the "danger of conflicts of interest between attorneys and class members." *Kemp-DeLisser v. St. Francis Hospital & Med Ctr.*, 2016 WL 6542707, at *14 (D. Conn. Nov. 3, 2016) (cleaned up). It also helps to ensure "special care" is taken to protect the class's fund. *See* Martha Pacold, *Attorneys' Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. Chi. L. Rev. 1007, 1015–16 (2001). Accordingly, establishing the class's fund and then negotiating attorneys' fees separately is common and—contrary to Objector's assertion otherwise—*preserves* the adversarial stance between class counsel and defendant. The defendant has an incentive to seek cost savings at each step.

In these situations, courts have found the lodestar method for determining the attorneys' fees can "better accommodate[] the policy concerns in settling class actions on a claims-made basis.'" *McLaughlin v. IDT Energy*, No. 14-CV-4107 (ENV) (RML), 2018 WL 3642627, at *15 (E.D.N.Y. July 30, 2018) (citation omitted); 2 *McLaughlin on Class Actions* § 6:24 (20th ed. Oct. 2023 update). The court can consider the actual time class counsel invested in the case along with the complexity of the case and the other *Goldberger* factors. In some cases, where class recovery is high, this method can result in lower fees than if the counsel received a pure percentage of the fund fees. *See* Hon. Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 Geo. J. Legal Ethics

1453, 1466 (2005) (regression analysis indicated that lodestar cross-check reduced attorneys' fees by approximately 20% in common-fund cases). When class claims are low, the fee may exceed class recovery. Neither outcome is unreasonable *per se*. Either can be fair and reasonable in a given case.

As a practical matter, courts and parties often prefer *not* to use the lodestar method because it requires time to document the lawyers' work and evaluate how much of that work was necessary. *Goldberger*, 208 F.3d at 48–49 ("the primary source of dissatisfaction [with lodestar] is that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits"); *see also* Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 945 (2017) (surveying class actions in which courts used the lodestar method). Nonetheless, courts have found the lodestar can be the "only appropriate method of calculating fees" in some cases. *Goldberger*, 208 F.3d at 48.

II. THE DISTRICT COURT PROPERLY ASSESSED THE SETTLEMENT IN THIS CASE UNDER THE APPLICABLE LAW.

It is clear from the district court's ruling and record in this case that the court engaged in the proper analysis and applied the proper legal standards in approving the claims-made settlement and segregated attorneys' fees based on a lodestar calculation. It held hearings, took briefings from the Plaintiffs, Defendants and Objector, and spelled out the reasoning for its conclusions. It revisited the settlement

after the Court's ruling in *Moses*. In short, it upheld its responsibility to "serve as a guardian of the rights of absent class members." *McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010). It did not abuse its discretion.

The court explained that the amount of the attorneys' fee was driven, in large part, by the length and sophistication of the litigation, the rigor with which class counsel litigated the claims, and the concern that if the case were to go to trial the Plaintiffs would recover nothing. As this Court had previously observed, it was going to be challenging for Plaintiffs to establish product identification, injury, and causation. *See Kurtz v. Costco Wholesale Corp.*, 768 F. App'x 39, 40–41 (2d Cir. 2019) (questioning ability of Plaintiffs to prove a "price premium"). The district court also addressed the multitude of factors set forth in *Grinnell*, *Goldberger*, and Rule 23(e), making the following observations:

- "Over the course of the lifespan of this case, Class Counsel engaged in intensive litigation, entailing substantial discovery, motion practice, two appeals to the Second Circuit, class certification and settlement negotiations." *Kurtz v. Kimberly-Clark Corp.*, 2024 WL 184375 at *16 (E.D.N.Y. Jan. 17, 2024).

- "Plaintiffs would encounter substantial litigation risks at trial in seeking to establish liability and damages, as well as in maintaining the class action through trial particularly because of the factual and legal complexities in this action." *Id.* at *17.

- The fee was decided on a lodestar basis, and then reduced by 20%. *Id.* at *11, 12–15.

- From a public policy perspective, "Plaintiffs were unlikely to pursue their claims individually due to the burden of litigation." *Id.* at *17.

In the end, the court stated "the Settlement Agreement in this matter satisfies all four factors under Rule 23(e)(2) and the *Grinnell* factors." *Id.* at *18.

Indeed, this Court has approved numerous settlements with creative provisions when continued litigation would serve no one's interests. *See Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 727 (2d Cir. 2023) (affirming class counsel fee "more than doubled the lodestar"); *Hyland v. Navient Corp.*, 48 F.4th 110, 121 (2d Cir. 2022) (affirming settlement where "there was a grave risk that there would have been no recovery at all had the case proceeded") (cleaned up); *In re Petrobras Secs. Litig.*, 828 F. App'x 754, 760 (2d Cir. 2020) (refusing to second guess the district court because it was "intimately familiar with the case"); *City of Birmingham Ret. & Relief Sys. v. Davis*, 806 F. App'x 17, 18 (2d Cir. 2020) (affirming fee where class counsel spent "more than 10,000 hours" litigating a "complicated procedural and factual history [and] difficult legal issues").

Thus, the court properly exercised its discretion in approving a settlement that allowed a weak case to end with some class relief. It should be upheld.

III. THE BRIGHT-LINE RULES OBJECTOR SEEKS WOULD HANDCUFF THE COURTS, PROLONG LITIGATION, AND LIKELY LEAD TO WORSE OUTCOMES FOR THE CLASS.

Rather than allow courts to assess settlements based on the current framework involving a multitude of factors, Objector proposes a bright-line rule: claims-made settlements, segregating attorneys' fees, and using the lodestar method for

determining fees should not be permitted. Instead, attorneys' fees should be limited to a percentage of the claims-made amount and never exceed the relief to this class. Such a rule would deprive parties and courts of traditional tools in resolving class actions and is better directed at the Rules Committee for prospective consideration. Further, in arguing for this rule, Objector makes inaccurate assumptions of how class-action plaintiffs and defendants litigate their cases and their motivations.

First, Objector posits that the lodestar method incentivizes plaintiffs' counsel with weak cases to "drag out the litigation" to maximize their fees. Br. at 38. Not so. Courts do not award lodestar fees based solely on time spent; they consider the validity of the time entries, the competence of counsel, and the need for the time spent on the litigation. *See Goldberger*, 209 F.3d at 50. It is not a pure mathematical calculation based on numbers provided—here, the court reduced the fee because of these factors. Further, if class counsel here were limited to a percentage of claims collected, they would have had no incentive to settle. *Cf. Fresno County Employees' Ret. Ass'n v Isaacson/Weaver Family Trust*, 925 F.3d 63, 71 (2d Cir. 2019) ("class counsel's safest bet for securing a large fee award is to prosecute the action until the point at which settlement is the best available option and thereafter maximize her client's returns"). Cases such as the one at bar that are exposed as weak after years of litigation would end up going to trial in hopes of a payday or voluntarily dismissed to avoid sinking more resources into a losing cause. *See* Morris A. Ratner, *A New*

Model of Plaintiffs' Class Action Attorneys, 31 Rev. Litig. 757, 805-07 (2012) (cautioning against encouraging attorneys to litigate the case until they are certain that it is worth nothing).

Neither result is optimal for plaintiffs or defendants. *See* Andrew Trask & Andrew DeGuire, Betting the Company: Complex Negotiation Strategies for Law & Business 236 (2013) ("since both sides will experience loss aversion, the status quo will be vigorous litigation"). The solution to weak claims is not to trap parties into even longer litigation and force them to endure the expenses, risks, and uncertainties of trial and the subsequent appellate process. Settlement is also best for the class so those who feel aggrieved can have access to compensation.

Second, Objector misstates a defendant's incentives as trying to "get out of a case as cheaply as possible" without regard to counsel fees. Br. at 14. To the contrary, when users of consumer products have a viable dispute with the manufacturer of those products, the manufacturer often has an incentive to ensure its consumers are satisfied with the remedy to facilitate continued brand loyalty. Often, such remedies are provided, as here, before any piggy-back litigation is filed. In addition, companies may choose to settle weak claims rather than pressing them to trial, thereby *overpaying* customers, to avoid costs of paying their counsel, risks of adverse media attention, or business interruptions of litigation. But they are loath to pay class counsel more than necessary; companies targeted repeatedly in class-action

litigation are hardly indifferent to whether money goes to counsel or their customers. *See. e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95, 100–04 (1974); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 882–83 (1987).

Today, class-litigation costs in the United States have exploded in large part due to the type of speculative litigation at bar. The costs totaled a staggering $3.37 billion in 2021, continuing a rising trend that started in 2015. *See* Carlton Fields, *Class Action Survey* 7 (2022).[1] About 57.9% of major companies are engaged in class actions, with the average number of class matters per company rising from 4.4 in 2013 to 8.9 in 2021. *See id.* Defendants have learned that money paid to entrepreneurial counsel will fund further class actions, and those actions will likely be targeted against defendants that do not vigorously contest fees.

Third, Objector is wrong about how segregated attorneys' fees work in suggesting the 20% reduction in the attorneys' fees should be directed to the class. *See* Br. at 16. As discussed above, the purpose of segregating attorneys' fees is to alleviate the concern that fees provided to counsel impact the money available to the class. The court assesses the amount the *defendant* has to pay class counsel for representing the plaintiffs *in addition to* the amount intended to compensate the

[1] https://classactionsurvey.com

class. The fact the district court reduced the attorneys' fees after *Moses* and in light of excessive billing does not entitle Plaintiffs to that amount. It just means the Defendants must pay class counsel less.

Amici appreciate that Objector and his *amici* appear driven to reduce class counsel's incentives for waging speculative litigation by reducing attorneys' fees. Fewer speculative class actions is a worthy goal, but their arguments do not apply to ***this*** case and cannot be imposed here as bright-line rules. This settlement produced a better outcome than continuing this litigation for both Plaintiffs and Defendants.

IV. THE WAY TO DISINCENTIVIZE NO-BENEFIT CLASS ACTIONS IS TO DISMISS OR DECERTIFY THEM, NOT REMOVE VIABLE WAYS OF ENDING THEM.

The solution for avoiding speculative price-premium and piggy-back class actions is to enforce the pleading standards and rigorously assess each Rule 23 requirement at class certification—not to foreclose settlement. *See generally* Philip S. Goldberg & Andrew J. Trask, *No-Injury and Piggyback Class Actions: When Product-Defect Class Actions Do Not Benefit Consumers*, 19 U. of Mass. L. Rev. 181 (2024). The mere fact that a product could cause alleged harm to some consumers should not be leveraged into a "price premium" class action on behalf of all consumers who *did not* sustain any actual harms from any alleged defect. *See* Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation: Where Should Tort Law Draw the Line?*, 80 Brook. L. Rev. 599, 628 (2015) ("Rather than

claim a product caused physical harm, the lawsuits often seek to recover for alleged pecuniary losses" from an unmanifested defect or alleged misrepresentation.).

Experience has shown the difficulty in valuing class actions for settlement when the class members were neither actually misled nor suffered measurable injury. *See generally* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & Contemporary Problems 97 (1997). As Defendants point out, those who bought Kimberly-Clark flushable wipes and did not believe the wipes were worth the price they paid were offered a full refund completely independent of this litigation. In these situations, it is not surprising that absent class members have little interest in claiming an award; they do not feel aggrieved and view returning the claim form as not worth the effort. *See* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 419 (2014) (finding "very small percentages of class members actually file and receive compensation from settlement funds").

Nevertheless, when class actions such as this one are filed and certified, merely having to litigate it, regardless of the merits, "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Defendants are placed in an untenable position. Defense

costs can run into tens of millions of dollars, and these actions can drag on for years. In these situations, "innocent companies" need to be able to settle claims. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 149 (2008); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail").

Parties need the flexibility and tools used in this case to end litigation. The district court upheld its fiduciary obligations to the class by approving a settlement that is consistent with this Court's extensive jurisprudence. The district court's ruling should be upheld, and this litigation should be allowed to come to an end.

CONCLUSION

For the reasons discussed above, the Court should affirm the district court's discretionary decision to approve the settlement.

Respectfully submitted,

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Dated: September 13, 2024

CERTIFICATE OF COMPLIANCE

I certify that this brief 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 2016 in 14 point Times New Roman font for text and footnotes.

I further certify that this brief contains 4,287 words and complies with the type-volume limitations of Fed. R. App. P. 29 and Second Circuit Rule 32.1.

/s/ Philip S. Goldberg
Philip S. Goldberg

Dated: September 13, 2024

CERTIFICATE OF SERVICE

I certify that on September 13, 2024, I caused service of the foregoing brief to be made by electronic filing with the Clerk of the Court using the ACMS system, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

/s/ Philip S. Goldberg
Philip S. Goldberg

Dated: September 13, 2024