No. 22-1950

IN THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

In re Wawa, Inc. Data Security Litigation

Theodore H. Frank,
Appellant.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, No. 19-cv-06019

BRIEF OF UTAH, ALABAMA, ARKANSAS, INDIANA, KENTUCKY, MONTANA, SOUTH CAROLINA, TENNESSEE, TEXAS, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI* STATES

Amici curiae, the States of Utah, Alabama, Arkansas, Indiana, Kentucky, Montana, South Carolina, Tennessee, Texas, and Virginia, respectfully submit this brief in support of appellant Theodore H. Frank. The Attorneys General are their respective States' chief law enforcement officers. Their interest here arises from two responsibilities. First, the Attorneys General have an overarching responsibility to protect their States' consumers in their roles as chief law enforcement officers. Second, the undersigned have a responsibility to protect consumer class members under the Class Action Fairness Act ("CAFA"), which envisions 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 .... Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

Amici States submit this brief to further these interests, speaking on behalf of citizen consumers who will be harmed by a rule that permits class counsel to be the foremost beneficiaries of class action settlements and attorneys' fee awards based on the amount of relief made available rather than relief actually delivered to class members. *Amici* have an interest in precedent that sets judicious parameters for class action settlements that will impact future nationwide settlements such as this one.[1] Accordingly, *Amici* States file this brief to explain why this Court should reverse the district court's order.

SUMMARY OF THE ARGUMENT

This nationwide data breach case resulted in a settlement that gave consumer class members $80,000 cash and $2.8 million in low-value gift cards. Class counsel, by contrast, were awarded $3.2 million in fees. Class counsel should not fare better than their clients in class action settlements. Yet the court approved the settlement and fee award because class counsel requested fees based on $9 million in gift cards

[1] *Amici* States submit this brief as *amici curiae* only as to the attorneys' fee award; the Attorneys General take no position on the merits of the underlying claims, and this submission is without prejudice to any State's ability to enforce its laws or otherwise investigate claims related to this dispute.

defendant made "available" to class members. The Court should reverse and require fee awards to be based on relief actually delivered to class members. Such a rule better aligns the interests of class counsel and class members—motivating class counsel to structure settlements to maximize the relief for class members.

The fee award here is particularly excessive because it delivers low-value $5 gift cards emailed to class members. Studies show that only 2-4% will likely be redeemed. Even assuming a generous 5% redemption rate, this would mean that the true value to class members is $140,000 in gift cards and translates to class counsel capturing over 93% of the settlement value.

Because any reduction in fees here would increase the value of the gift cards, this Court can decrease the lopsided allocation that favors class counsel. If the Court requires the fee award to be based on the $2.8 million gift cards distributed, a 25% fee award would increase the gift cards to $4.48 million.

The Court should ensure that class members remain the foremost beneficiaries of class action settlements.

ARGUMENT

I. Attorneys' fees should be awarded based on settlement relief that class members *actually* receive.

Most class action lawsuits settle. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1285 (2002). But when it comes time to divide up the settlement proceeds, the interests of class counsel and class members "nearly always" diverge. *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). Class counsel has an incentive to obtain the maximum possible fee award, but that fee comes directly out of the class members' pockets.

This is true even if the settlement is structured as a constructive common fund or a pure common fund. In a pure common fund, the parties create a single fund from which the class and class counsel are paid. For example, a settlement could create a $10 million common fund from which class members receive $8 million and class counsel receive $2 million. With a pure common fund, a court can easily compare the class relief with the attorneys' fees for assessing whether the attorneys are requesting a reasonable percentage of the common fund.

A constructive common fund, however, "artificially" separates class counsel's fee award from the class recovery. *In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.* ("*GM Trucks*"), 55 F.3d 768, 821 (3d Cir. 1995). Class counsel often touts this separate fee negotiation as a good thing—somehow negotiating class relief first and then separately negotiating the fee award will benefit class members. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014). From an economic perspective, however, it makes no difference.

An economically rational defendant does not care how the money is allocated between the class and class counsel. *Id.* "Caring only about his total liability, the defendant will not agree to class benefits so generous that when added to a reasonable attorneys' fee award for class counsel they will render the total cost of settlement unacceptable to the defendant." *Id.* When the Seventh Circuit pressed class counsel in *NBTY* to explain why separate fee negotiations benefit the class, they "were left without an answer." *Id.*

The court instead should treat the separated-fee settlement as a "constructive" common fund—adding the separately negotiated fees to the class relief for purposes of assessing the fairness of the settlement

and its allocation between class members and class counsel. The court compares "(1) the fee to (2) the fee plus what the class members received." *Id*. at 781 (quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014)). Then, like the pure common fund, the court can assess whether the attorneys' fees constitute a reasonable percentage.

In making this comparison, however, the court must be wary of the *illusion* of class relief. Settling parties often employ various tools to make the class relief appear greater than it is. A "claims-made" structure is one means of masking the true value. In this type of settlement, a defendant does not make direct payments to class members but instead, agrees to make a certain amount "available" to the class; the defendant then makes payments only to those class members who file claims. *See Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1058-59 (9th Cir. 2019) (describing the "perverse incentives" created by a reversionary claims-made settlement). Class counsel then argues that the amount made "available" for potential payments is the value of the settlement in determining a reasonable attorneys' fee award.

This can lead to extraordinarily disproportionate results that favor the attorneys over the class members. In *Briseño v. Henderson*, 998 F.3d

1014 (9th Cir. 2021), the Ninth Circuit reversed a class action settlement approval where the settling parties claimed that the settlement was valued at over $100 million. *Id.* at 1031. "Yet, when the dust settled, [defendant] shelled out less than $8 million, with a mere $1 million of that going to the class" compared to nearly $7 million going to class counsel. *Id.* at 1020. Class members received only about 1% of the $95 million defendant made "available" for potential payouts. *Id.* at 1026. This feeble result came as "no surprise" to the parties because they "knowingly structured" the settlement that way. *Id.* at 1026 & n.3. "So little goes to the class members in a claims-made settlement, such as this one, because the redemption rate is notoriously low, especially when it involves small-ticket items." *Id.*

Likewise, the parties here knowingly structured the settlement to achieve a weak result. Even though the parties had email addresses for over 575,000 customers, the settling parties still required class members to file claims to receive the $5 or $15 emailed gift cards. JA605-06. It was thus no accident that there were originally only approximately 7,400 gift card claims totaling $44,000, less than 1% of the $9 million made "available." *Id.* The parties amended the settlement to email the $5 gift cards

directly to class members only after the objector filed his objection. If, at the outset, class counsel knew they would be paid based on the amount class members would actually receive, they would have been motivated to ensure that class members received as much as possible.

Courts are tasked with policing the "inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees." *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003). A clear rule that requires trial courts to look beyond the *potential* payouts in claims-made settlements better aligns the incentives of class counsel and class members. If attorneys' fees are calculated based on *actual* disbursements to the class and not just the amount made available, then class counsel is motivated "to design the claims process in such a way as will maximize the settlement benefits actually received by the class." *NBTY*, 772 F.3d at 781.

This Court should reverse the fee award and require the reasonableness of the award to be based on the $2.8 million in gift cards actually received by the class members and not the $9 million in gift cards made available.

II. Class counsel will likely capture over 93% of the true settlement value because redemption rates of low-value gift cards are extremely low.

This settlement provides $80,000 in cash, $2.8 million in gift cards, and $3.2 million in fees and expenses, which means that class counsel captures over 50% of the constructive common fund. But it's likely even worse than that. Nearly 99% of class members receiving the gift cards are being emailed $5 gift cards. *See* Dkt. 264 at 1, 264-1 at 10.[2] It is likely that a very small percentage of those gift cards will actually get used. A generous estimate that 5% of the gift cards will be redeemed would mean that class members will receive only $220,000 in relief ($80,000 cash + $140,000 coupons). This would also mean that the attorneys would capture over 93% of the true settlement value ($3.2 million of $3.42 million).

An estimate of 5% redemption is generous for low-value gift cards that are emailed. "[R]edemption rates for email coupons delivered through desktop channels is around 2.7%, and coupons delivered via email accessed through a mobile device (as opposed to a computer) were redeemed at a rate of 2% to 4%." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 866 (S.D. Iowa 2020) (citing Alex Brown, *Study Shows ROI*

[2] "Dkt." refers to the docket below, No. 19-cv-06019 (E.D. Pa.).

for Mobile Coupon Redemption, PointOfSale.com (Apr. 13, 2015), https://pointofsale.com/study-shows-roi-for-mobile-coupon-redemption/ (last visited Sept. 14, 2022). Plaintiffs argued below that 97.2% of money loaded onto Wawa gift cards is redeemed. *See* Dkt. 181 at 8. But unlike customers that purposefully purchase or load a gift card, class members here will be receiving the emailed gift cards out of the blue. Thus, the emailed gift cards are much closer to a "corporate issued promotional coupon [with] redemption rates of 1-3%." James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445 (2005); *see also id.* at 1448 (noting multiple cases with redemption rates below 1%).

Low-redemption low-value coupon settlements present particularly severe risks to the class. "Congress was rightfully concerned with [coupon] settlements: by decoupling the interests of the class and its counsel, coupon settlements may incentivize lawyers to 'negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees.'" *In re HP Inkjet*, 716 F.3d at 1177–78 (quoting S. Rep. No. 109–14, at 29–30). Congress was well aware of the disadvantages facing class

members in the settlement process and the fact that class members were often bound to imbalanced settlements that did not serve their interests. *See, e.g.*, S. Rep. No. 109–14, at 16–20 (citing examples of coupon settlements "in which most—if not all—of the monetary benefits went to the class counsel, rather than the class members those attorneys were supposed to be representing").

Indeed, one of the key abuses CAFA targeted was "coupon settlement[s], where defendants pay aggrieved class members in coupons or vouchers but pay class counsel in cash." *In re HP Inkjet*, 716 F.3d at 1177; *see also* CAFA, Pub. L. No. 109–2, § 2, February 18, 2005, 119 Stat. 4 ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where ... counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value . . . ."). Thus, in *In re HP Inkjet*, the Ninth Circuit held that CAFA requires that class counsel's fee award must be calculated based on the amount of coupons actually redeemed. 716 F.3d at 1182.

CAFA requires fee awards to be based on the amount of gift cards actually redeemed by the class and not just the face value made available. Accordingly, *at a minimum*, the fee award here should be based on

the $2.8 million distributed rather than the $9 million made available.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed.

DATED this 15th day of September, 2022.

Respectfully submitted,

/s/ Melissa A. Holyoak

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,285 words.

Dated: September 15, 2022

/s/ Melissa A. Holyoak
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CERTIFICATE OF SERVICE

I certify that on September 15, 2022, I caused service of the foregoing brief to be made by electronic filing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all parties with an email address of record, who have appeared and consent to electronic service in this action.

Dated: September 15, 2022

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