RECORD NOS. 12-1165(L); 12-1166; 12-1167

In The
United States Court of Appeals
For The Third Circuit

IN RE: BABY PRODUCTS ANTITRUST LITIGATION

CAROL MCDONOUGH ET AL.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMENDED BRIEF FOR APPELLEES

HAGENS BERMAN SOBOL SHAPIRO LLP
Elizabeth A. Fegan
1144 West Lake Street, Suite 400
Oak Park, IL 60301
Telephone (708) 628-4949
Facsimile (708) 628-4950

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
Fred Isquith
Mary Jane Fait
270 Madison Avenue
New York, NY 10016
Telephone: 212 545 4600
Facsimile: 212 545 4653

SPECTOR ROSEMAN KODROFF & WILLIS, P.C.
Eugene Spector
William G. Caldes
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone 215-496-0300
Facsimile 215-496-6611

Counsel for Appellees (Additional Counsel Listed on Signature Page)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

I. JURISDICTIONAL STATEMENT

Appellees agree with Appellant Kevin Young's ("Young") Jurisdictional Statement.

II. STATEMENT OF ISSUES AND SUMMARY OF ARGUMENT

1. *Where the Settlement Agreement in this antitrust class action provides for Class Members with proof of purchase of eligible baby products from Babies "R" Us to receive three times their actual or estimated damages and Class Members without proof of purchase to receive $5.00, was it an abuse of discretion for the District Court to approve a process for awarding any leftover money to cy pres recipients to be proposed by the parties and approved by the Court subject to the requirement that the recipients "serve the underlying interests of the class members?"*

No. The District Court properly applied the standards for *cy pres* distributions set in the Eastern District of Pennsylvania, *see, e.g., Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 576 (E.D. Pa. 2005), and vowed to ensure that any funds remaining after all claims are paid will be distributed to *cy pres* recipients that serve Class Members' interests. And, the District Court thoroughly considered the negotiated settlement and found that payment of treble damages to claimants with proof of purchase and $5.00 to claimants without proof of purchase struck a reasonable and fair balance between

keeping the standards for proof of class membership low, but not too low so as to encourage fraud. Thus, it was not an abuse of discretion for the District Court to direct any leftover funds to go to *cy pres*. *See* Section VII(A), *infra.*

2. *Where the Notice of the class action settlement that was sent to Class Members via e-mail and direct mail and published in nationwide periodicals contained all of the information required by Fed. R. Civ. P. 23, was it an abuse of discretion for the District Court to approve the Notice?*

No. Appellant does not contest that the Notice to Class Members "clearly and concisely state[d] in plain, easily understood language" the nature of the action; the class definition; the claims, issues, or defenses of the class; that the class member may appear through counsel; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on Class Members. *See* Fed. R. Civ. P. 23(c)(2). In approving the Notice, the District Court correctly rejected Appellant's claims that (a) the Notice should have identified potential *cy pres* recipients, even though there is no precedent or rule requiring that the Notice contain their identities; and (b) the Notice should have listed every form of proof that a Class Member could submit to demonstrate they purchased one of the products at issue from the Defendants, even though (i) Rule 23 does not require it; (ii) the types of proof that could be presented were identified in the Claim Form;

and (iii) Class Members had access to contact information for the Claims Administrator if they had questions. Thus, the District Court did not abuse its discretion in approving the Notice. *See* Section VII(B), *infra.*

3. *Where Plaintiffs' Counsel requested a 33 1/3 % attorneys' fee award, which represented just 37 % of Plaintiffs' Counsel's actual lodestar, plus an award of their actual out-of-pocket expenses from the common fund, did the District Court abuse its discretion in granting Plaintiffs' Counsel's requests?*

No. The District Court properly followed Third Circuit precedent that favors "the percentage-of-recovery method" in calculating attorneys' fees in a common fund case. *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 539 (3d Cir. 2009). In assessing the reasonableness of Plaintiffs' request, the District Court conducted an analysis of the ten factors identified by the Third Circuit in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000), and *In re Prudential Ins. Co. Am. Sales Practices Litig.*, 148 F.3d 283 (3d Cir. 1998) ("*Prudential*"). The District Court also conducted a lodestar cross-check and found that a 33-1/3% fee award resulting in the negative multiplier of .37 on actual lodestar was "well under the generally acceptable range and provides strong additional support for approving the attorneys' fees request." JA42-43. Thus, the District Court did not abuse its discretion in granting Plaintiffs' request for attorneys' fees and costs. *See* Section VII(C), *infra.*

III. STATEMENT OF THE CASE

Appellees agree with Young's Statement of the Case.

IV. STATEMENT OF FACTS

A. Background of Litigation

The first of the consolidated actions, *McDonough v. Toys "R" Us*, No. 2:06-cv-0242-AB, was filed in January 2006 and alleged that retailer Toys "R" Us, Inc., Babies "R" Us, Inc. Toys "R" Us-Delaware, Inc. (collectively, "BRU" or "Babies "R" Us") conspired with baby product manufacturers BabyBjorn AB, Britax Child Safety, Inc., Kids Line, LLC, Maclaren USA, Inc., Medela, Inc. Peg Perego U.S.A., Inc., and Regal Lager, Inc. to engage in resale price maintenance ("RPM") in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. JA16, 19.

The parties engaged in full merits discovery, consisting of "extensive document and deposition discovery, "including the review of over one million (1,000,000) pages … over thirty (30) depositions of fact witnesses, a three-day evidentiary hearing on Plaintiffs' motion for class certification, and … reports by and depositions of testifying expert witnesses." JA209. The parties also briefed the heightened pleading standards adopted by the Supreme Court in *Bell Atl. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court's revision to the standard – from *per se* to rule of reason – by

which resale price maintenance cases are to be judged in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), as well as the Third Circuit's *In re Hydrogen Peroxide Antitrust Litig*, 552 F.3d 305 (3d Cir. 2008), decision on Rule 23 class certification requirements. JA35; *see also* JA25-27.

Following the close of discovery, the Court granted, in part, Plaintiffs' motion for class certification under Fed. R. Civ. P. 23 of the *McDonough* Subclasses. JA116, 209. Subsequently, the complaint in the second of the consolidated actions, *Elliott v. Toys "R" Us, Inc.*, No. 2:09-cv-06151-AB, was filed to include time periods and products not covered by the *McDonough* certification ruling. JA20, 208-09. In early 2010, the Court granted Defendants' motion to sever the trials by manufacturer and scheduled the first trial for January 2011. JA124-25; *see also* JA25.

In May 2010, after a three-day in-person mediation session, followed by nearly five months of additional negotiations, the parties signed a Memorandum of Understanding on September 29, 2010. JA209-10. Following additional negotiations, the Settlement Agreement was signed on January 21, 2011. JA207-47.

B. Settlement Terms

1. Settlement Agreement and Allocation Order.

Under the Settlement Agreement and its amendments, Defendants paid $35,500,000 ("Settlement Fund") into an escrow account. JA216, 223.[1] On December 20, 2011, the District Court issued the Final Approval Order and an Allocation Order, which found the allocation of the Settlement Fund "fair, reasonable, and adequate and in the best interests of the Plaintiffs and the Settlement Subclasses as a whole." JA3; *see generally* JA1-8. The Allocation Order provides that the Settlement Fund be allocated in various percentages among the Settlement Subclasses. JA3-4. The "Settlement Class Amount" is the dollar amount within each of the funds for the individual Settlement Subclasses ("Individual Settlement Fund"). JA4. Allocation of the Settlement Fund is based on the alleged percentage overcharge as calculated by Plaintiffs' damages expert,

[1] Recent events highlight the ongoing risk the Class faced. First, Regal Lager failed to make its agreed upon payment of $260,000.00 so a prior Notice on the settlement website advised that the Settlement Amount had been reduced from $35,500,000.00 to $35,240,000.00 and that the claims against Regal Lager would not be released. JA136; Dkt. No. 790. By July 16, 2011, Regal Lager made its agreed upon contribution so the Settlement Amount was restored to $35,500,000.00, as originally noticed, and the District Court held that Final Approval would finally release the claims against Regal Lager. *Id*. Second, on December 29, 2011, Maclaren filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the District of Connecticut ("Bankruptcy Court"). On May 22, 2012, the Bankruptcy Court granted Appellees Motion for Relief from Automatic Stay, permitting Appellees to proceed against the Escrow. Case No. 11-52541 (Bankr. D. Conn.) Dkt. No. 81.

per product, the relevant time period, the evidence developed to date, risks of litigation and likelihood of recovery. JA47-50. Excluded from the Settlement Subclasses are all persons who validly and timely requested exclusion. JA230-31.

The Claim Form notified Class Members that, in order to recover the maximum possible amount from the Settlement Fund, they needed to submit proof that they purchased eligible baby products at BRU during the relevant time period. JA4-6, 276. If a Settlement Subclass Member submitted valid documentary proof of the actual price paid for a Settlement Product, the Settlement Subclass Member was eligible to receive a maximum of three times 20 percent of the actual purchase price of each Settlement Product purchased. JA4-6. If a Settlement Subclass Member did not submit documentary proof of the actual purchase price, but otherwise submitted a valid proof of purchase, the Settlement Subclass Member was eligible to receive a maximum of three times 20 percent of the estimated retail price (as calculated by Class Counsel) of each Settlement Product purchased. JA4-6, 266. If a Settlement Subclass Member did not submit any proof of purchase or purchase price at all, but otherwise submitted a valid, sworn and timely Claim Form, the Settlement Subclass Member was eligible to receive a one-time payment of $5.00 from each Individual Settlement Fund for which he or she was eligible. JA5.

The Claim Form further explained, "[a]cceptable proof may include receipts, cancelled checks, credit card statements, records from Toys "R" Us or Babies "R" Us, or *other records* that show you purchased the baby product and when the purchase was made." JA276; *see also* JA51, 486.

Depending on the number of claims submitted for payment from each Individual Settlement Fund, each claim may be subject to certain pro rata enhancements or reductions. JA4-7. Claims of Settlement Subclass Members that do not submit any proof of purchase or purchase price are not eligible for any enhancements, but may be subject to certain pro rata reductions. JA5-6. If the claims submitted would exhaust a particular Individual Settlement Fund, the claims may be subject to pro rata reductions. JA6. If the claims submitted do not exhaust an Individual Settlement Fund, the claims may be enhanced up to three times the authorized claims. JA5-6.

The Settlement also provides for a "spillover" fund so that monies remaining, if any, after payouts to a particular Settlement Class may be allocated to another Settlement Class until all are paid in full. JA50. The Settlement Agreement further states that any funds which remain after all claims have been paid per the Allocation Order shall be distributed to up to four non-profit organizations, subject to Court approval. JA52, 226. *See also* JA7-8.

2. Attorneys' fees and expenses.

Class Counsel requested attorneys' fees in the amount of $11,833,333.33, which represented 33-1/3% of the gross settlement amount. JA30. They also requested reimbursement of out-of-pocket litigation expenses in the amount of $2,229,775.60, as well as a $2,500.00 Incentive Award to each Named Plaintiff. JA30, 43-45, 46-47. Class Counsel's request for attorneys' fees in the amount of 33-1/3% of the total settlement amount represented a negative multiplier of 0.37 of Class Counsel's lodestar. JA42-43. Class Counsel devoted 81,200.82 hours to prosecuting this case, with a total reported lodestar of $31,839,355.33. JA36.

3. Notice and claims process.

Under the terms of the Settlement Agreement, Class Counsel provided Notice of the Settlement to Class Members. JA215, 252-53, 260-73, 280-90. The Notice informed Class Members of the material terms of the Settlement; the relief provided; the date, time and place of the final approval hearing; and the procedures and deadlines for opting out of the Settlement or submitting comments or objections; and that, if Class Members did not opt out, they would be bound by any final judgment in this case, including a release of claims, as required by Rule 23. JA273, 280-287, 289-290.

Notice of the Class Settlement was sent by direct mail and electronic mail to nearly 1,300,000 potential Class Members and was published in the media

nationwide. JA22-23, 449. By the June 6, 2011, opt-out or objection deadline, there were only 41 opt-outs and 10 objections, of which two of those objections were withdrawn or were submitted by a non-class member. JA23. By the fairness hearing, Class Members had submitted approximately 41,000 claims. JA23. In light of the "limited filings for exclusion and even fewer objections," the District Court found the "reaction of the class to the proposed settlement counsels in favor of approval." JA25.

Additionally, the Notice directed Class Members to a Settlement website where they could inspect the pleadings and obtain additional information as the case progressed, such as orders issued by the District Court and Class Counsel's motion for fees. *See*, *e.g.*, JA289, 372.

Each Settlement Subclass Member was required to submit a verified Claim Form. The first page of the Claim Form contained a summary of the case, an explanation of eligibility to recover a payment and instructions on how to receive a payment. JA275. *See also* pp. 7-8, *supra*. The rest of the Claim Form requested basic identification information from Class Members: name and contact information, baby product purchase information and a signed verification. JA276-278. *See also* p. 32, *infra*; JA275-278, 280.

The Notice specifically explained that the Claims Administrator would determine whether the information submitted by a claimant constituted valid proof

of purchase to qualify for a distribution from the Settlement Fund. *See*, *e.g.*, JA284. *See also* pp. 33-34, *infra*.

C. The District Court Approves the Settlement

On January 31, 2011, the District Court entered an Order preliminarily approving Plaintiffs' Settlement with Defendants, certifying eight Settlement Subclasses, and approving the proposed Notice. JA248-305.

Originally, *only nine* Class Members and one non-class member submitted objections to the Settlement Agreement and/or the Attorneys' Fees Motion. *See*, *e.g.*, JA23-25. In the final approval order, the District Court noted, "the limited number of objections reveals some measure of the strength and depth of the opposition." JA23.

On December 21, 2011, after extensive briefing, including a thorough review of the Settlement under the *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), and *Prudential*, 148 F.3d 283, factors, oral argument, a final fairness hearing, consideration of various objections and review of post-hearing submissions, the District Court granted Plaintiffs' Motion for Final Approval of Class Settlement, for Certification of Settlement Classes, for permission to disseminate Class Notice, and the entire award of attorneys' fees and expenses. JA19, 53; *see also* JA1-16. On January 4, 2011, the court amended its order. JA17-53.

The District Court ruled, "[t]he terms of the Settlement Agreement are adjudged to be fair, reasonable, and adequate and in the best interests of Plaintiffs and the Settlement Subclasses as a whole, and satisfy the requirements of Federal Rule of Civil Procedure 23(c)(2) and 23(e) and due process." JA13. Additionally, the District Court certified the eight Settlement Subclasses and directed the parties to implement the Settlement. JA12-13.

Regarding Notice, the District Court determined that the "form and method of notification utilized in this case met the due process requirements of *Federal Rule of Civil Procedure 23*." JA24. Further, the District Court found that Appellant Young had provided "no legal support for his claim that adequate notice depends upon the identification of hypothetical *cy pres* recipients." JA52. The Settlement Agreement expressly states that "the parties will jointly identify up to four (two by Plaintiffs and two by Defendants) not-for-profit organizations exempt from federal taxation." JA52; *see also* JA226. The District Court, therefore, "retain[s] the right to approve *cy pres* recipients" and "ensure that they serve the underlying interests of the class members." JA52.

The District Court similarly rejected Young's complaint that claimants receiving $5.00 should receive additional compensation instead of permitting a *cy pres* distribution. JA51. In approving the claims process and *cy pres* distribution, the District Court reasoned, "'class members who lack documentation of purchase

price or proof of purchase would be sorely disadvantaged and perhaps be unable to prove damages at an individual trial.'" JA51. The court further noted that "the standards are fairly low," and that such proof helps to "avoid encouraging fraud by awarding additional money to those without any form of documentation whatsoever." *Id*.

The District Court segregated the fees and expenses in determining Class Counsel's fee request, which constituted 33-1/3% of the gross settlement amount. JA30. Next, the District Court calculated the reasonableness of the lodestar amount, taking into account ten *Gunter/Prudential* factors identified by the Third Circuit. *See* Section VII(C)(2), *infra*. *See also* JA31-41. After '"engag[ing] in a robust assessment[] of the fee award reasonableness factors,'" the District Court sufficiently found that "five of the ten *Gunter/Prudential* factors count in favor, one against, and four are neutral" and thus, the majority support approval of the fee award. JA41.

The District Court's analysis of a lodestar cross-check confirmed the fee award is reasonable. JA31-43. The District Court found that the negative lodestar multiplier of .37 "is well under the generally acceptable range and provides for strong additional support for approving the attorneys' fees request." JA43.

Although the District Court approved Class Counsel's requests for expenses, the court noted that Class Counsel's delay in posting a copy of their Fee Petition,

which was available on Pacer, on the class settlement website, was an "unfortunate, but not fatal" "oversight." JA44-45. The court "[u]ltimately" recognized that despite the objections, '"[a]ttorneys who create a common fund for the benefit of the class are entitled to reimbursement of reasonable litigation expenses from the fund,'"[2] and Class Counsel's request for such expenses was "adequately documented, proper and reasonable." JA45.

D. The Appeal

Only three objectors now appeal the Settlement and/or Attorneys' Fees Motion: (1) Allison Lederer; (2) Clark Hampe; and (3) Kevin Young, who is represented by Theodore Frank of the Center for Class Action Fairness LLC ("CCAF"). *See generally* Br. Only Young submitted an appeal brief objecting to the Settlement; Lederer and Hampe simply joined by agreement. Document Nos. 003110864909, 003110865771. CCAF has filed several objections to attorneys' fee awards in class action settlements over the last few years, all seeking to reduce the attorneys' fees awarded to class counsel. JA365; *see also* JA336, 338-39, 342, 364-67.

V. RELATED CASES AND PROCEEDINGS

On December 29, 2005, *Babyage.Com, Inc., et al. v. Toys "R" Us, Inc. d/b/a Babies "R" Us et al.*, No. 2:05-cv-06792-AB, was filed in the Eastern District of

[2] JA45 (citing *In re Aetna, Inc. Sec. Litig.*, 2001 WL 20928, at *13 (E.D. Pa. Jan. 4, 2010)).

Pennsylvania, and was subsequently coordinated with *McDonough* by agreement and Court Order. *BabyAge*, which was not a class action, was dismissed on December 6, 2011, pursuant to a settlement.

VI. STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

The District Court's determination that the settlement was "fair, reasonable, and adequate" is reviewed for abuse of discretion. *Sullivan v. DB Invs., Inc*., 667 F.3d 273, 295 (3d Cir. 2011); *In re Cendant Corp. Litig*., 264 F.3d 201, 231 (3d Cir. 2001). The appellate court's role '"is to ascertain whether or not the trial judge clearly abused his or her discretion in approving or rejecting a settlement agreement.'" *Sullivan v. DB Invs., Inc.*, 667 F.3d at 295 (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010)). A District Court abuses its discretion if its "'decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.'" *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d at 312 (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 783 (3d Cir. 1995) ("GM Truck")).

VII. ARGUMENT

A. The District Court Did Not Abuse Its Discretion in Approving the Settlement and a Process For *Cy Pres* Distributions After Payment of Claims

Contrary to Appellant's suggestion that appellate review of the *cy pres* approval process is *de novo,* the abuse of discretion standard is applied to questions regarding a court's approval of a *cy pres* distribution process as part of a settlement agreement. *In re Lupron Mktg. & Sales Practices Litig.*, 2012 U.S. App. LEXIS 8263, at *22-23 (1st Cir. Apr. 24, 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. Cal. 2011); *In re Airline Ticket Comm'n Antitrust Litig*., 307 F.3d 679, 682 (8th Cir. 2002); *Wilson v. Southwest Airlines*, 880 F.2d 807, 811 (5th Cir. 1989).

Young raises two challenges to the potential *cy pres* distribution in this Settlement. First, Young attacks the District Court's (and Counsel's) credibility by unjustifiably suggesting that the District Court will redirect leftover funds to the judge's personal interests. To make this stretch, Young virtually ignores the District Court's holding that it "will ensure that they [the *cy pres* recipients to be proposed by the Settling Parties] serve the underlying interests of the class members," (JA52), which is wholly consistent with the very principles Young asks this Court to adopt. Second, Young requests that this Court renegotiate a hard-fought settlement that provides for awards of three times estimated damages to

Class Members that can demonstrate class membership with objective proof and awards of $5.00 per product (up to $40.00) to *anyone* that submits a claim form without objective proof of class membership. Each of these Objections should be rejected.[3]

1. The District Court's approval of a *cy pres* distribution process in which it will ensure that proposed *cy pres* recipients "serve the underlying interests of the Class Members" is not an abuse of discretion.

"In class actions, courts have approved creating *cy pres* funds, to be used for a charitable purpose related to the class plaintiffs' injury, when it is difficult for all class members to receive individual shares of the recovery and, as a result, some or all of the recovery remains." *Howe v. Townsend (In re Pharm. Indus. Average Wholesale Price Litig.)*, 588 F.3d 24, 33 (1st Cir. 2009) (citing 4 A. Conte & H. Newberg, NEWBERG ON CLASS ACTIONS § 11:20 (4th ed. 2002)). A *cy pres* fund as part of a class settlement can be useful to "'prevent the defendant from walking away from the litigation' without paying a full recovery because of practical obstacles to individual distribution." *Id*. (quoting *Mirfasihi v. Fleet Mortg. Corp*., 356 F.3d 781, 784 (7th Cir. 2004)). "[C]ourts are not in disagreement that *cy pres* distributions are proper in connection with a class settlement, subject to court

[3] Young's criticism that potential *cy pres* recipients were not named in the Notice is addressed in Section VII(B)(2)(a), *infra*.

approval of the particular application of the funds." 4 A. Conte & H. Newberg, NEWBERG ON CLASS ACTIONS, § 11:20, at 28 (4th ed. 2002).

Courts have approved *cy pres* funds in settlements in at least two circumstances: (1) when it is economically infeasible to distribute money to class members; or (2) when money remains after damages have been distributed to class members. *Howe*, 588 F.3d at 34. The latter situation "often arises because some class members never claimed their share." *Id*. Among other solutions, courts have approved giving money unclaimed after payout to class members to charities related to the plaintiffs' injuries. *Id*. (citing *In re Simon II Litig*., 407 F.3d 125, 131 (2d Cir. 2005); *In re Mexico Money Transfer Litig*., 267 F.3d 743, 746 (7th Cir. 2001); *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706-07 (8th Cir. 1997); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990)). Here, to the extent a *cy pres* fund exists, it will be because Class Members have not claimed their share of the settlement.

The Settlement Agreement provided that any Final Excess Amounts would be distributed *cy pres* to up to four recipients to be designated by the Settling Parties and submitted to the Court for oversight and approval. JA226. The Allocation Order defined "Final Excess Amounts" as the leftover money *after* all claims were paid up to treble damages as well as all attorneys' fees and expenses and all administrative costs related to the Settlement. JA7.

In approving the settlement, the District Court expressly held that it "will ensure that they [the *cy pres* recipients] serve the underlying interests of the class members." JA52. The District Court's holding is consistent with the well-established standard for *cy pres* distributions:

> A court may … *cy pres* principles to distribute unclaimed funds from a class action settlement. [Citation omitted.] In so doing, the court should consider (1) the objectives of the underlying statute(s), (2) the nature of the underlying suit, (3) the interests of the class members, and (4) the geographic scope of the case.

Schwartz v. Dallas Cowboys Football Club, Ltd., 362 F. Supp. 2d at 576 (citing *In re Airline Ticket Comm'n Antitrust Litig*., 307 F.3d at 682); *see also Gates v. Rohm & Haas Co*., 2011 U.S. Dist. LEXIS 30730, at *7-8 (E.D. Pa. Mar. 23, 2011); *In re Linerboard Antitrust Litig*., 2008 U.S. Dist. LEXIS 77739, at *11-12 (E.D. Pa. Oct. 3, 2008).

Nonetheless, Young spends pages arguing that this Court should adopt the American Law Institute's "guidelines" on *cy pres*, Br. at 19-24, even though the District Court's decision is wholly consistent with them. *See* Principles Law Agg. Lit. § 3.07 (ALI 2010) ("ALI Principles"). "The question before [this Court] is not whether the settlement complies with the ALI [Principles], but whether the District Court abused its discretion in approving the cy pres part of the settlement." *Howe*, 588 F.3d at 35 (citing *Bobby v. Van Hook*, 130 S. Ct. 13, 175 L. Ed. 2d 255, 2009

WL 3712013, at *3 (2009) (noting "American Bar Association standards and the like are only guides…." (internal quotations omitted)).

Here, the District Court's decision conforms with the ALI Principles. For example, § 3.07(c) of the ALI Principles states in part: "The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class." The District Court vowed to do just that. JA52. Thus, Young's musings that the District Court will look more favorably on "a settlement that provides money for a judge's preferred charity," Br. at 22, or will "play Santa Claus with settlement money," Br. at 23, are pure conjecture unsupported by the record.

Accordingly, this Court need not adopt the ALI Principles as Young urges. Since precedent for approving *cy pres* distributions is consistent with the ALI Principles *and* the District Court applied the correct standard, this Court should find that the District Court did not abuse its discretion in approving the Settlement.

2. The Court did not abuse its discretion in approving a *cy pres* distribution after Class Members with proof of class membership will receive treble damages.

The Settlement Agreement provides, before any *cy pres* distribution is to be contemplated, that all claims are paid. JA78, 226. The Plan of Allocation provides that Class Members who provide objective proof of purchase and price paid will receive up to three times 20% of their purchase price, which is treble the estimated

overcharge. JA4. Those who can show proof of purchase but cannot show proof of the price paid will receive up to three times 20% of the estimated retail price of the product. JA4-5. This ensures that Class Members have a wide range of objective evidence that they can submit with their Claim Forms to demonstrate that they purchased the baby products at BRU – even if the evidence does not reflect the price of the product. Moreover, *after extensive negotiation*, the parties agreed that claimants who can provide nothing more than a sworn statement will nonetheless receive $5.00 for each product subclass claimed. JA5. The Allocation Plan provides for awards to any persons who submit valid and timely claims.

But Young misunderstands and misrepresents the role of District Courts in approving class settlements. As this Court articulated in *Sullivan*:

> It is well established that settlement agreements are creatures of private contract law. A district court is not a party to the settlement, nor may it modify the terms of a voluntary settlement agreement between parties. Thus, a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action.

667 F.3d at 313 (internal quotation marks and citations omitted). This Court "accord[s] substantial deference to district courts with respect to their resolution of" issues involving plans of allocation among class members with varying claims. *Id*. at 326. This is because "such decisions 'require[] a balancing of costs and

benefits that can best be performed by a district judge.'" *Id*. (quoting *In re Insurance Brokerage Antitrust Litig.*, 579 F.3d 241, 271 (3d Cir. 2009)); *cf. id*. at 328 ("Courts 'generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.'" (quoting *In re Corel Corp. Inc. Sec. Litig*., 293 F. Supp. 2d 484, 493 (E.D. Pa. 2003))). The District Court acted well within its discretion when it "balance[ed] the costs and benefits" of the $5.00 per product cap on claims by those who only provide a sworn Claim Form.

Contrary to Young's argument, the potential *cy pres* fund is not taking damages away from the Class Members. The Settlement permits all Class Members to claim and be paid their damages – indeed those with any proof of purchase get treble their damages – before any money is paid to charity through *cy pres*. JA4-8. This process is like other, routinely-approved *cy pres* distributions because Class Members do not have a legal right to unclaimed funds. *Howe*, 588 F.3d at 34-35. *See also Powell*, 119 F.3d at 705-06 (refusing, after money in a settlement fund remained, to distribute the rest to class members because "neither party ha[d] a legal right" to the unclaimed funds); *In re Folding Carton Antitrust Litig*., 744 F.2d 1252, 1253-54 (7th Cir. 1984) (holding a *cy pres* distribution was appropriate when $6 million remained in a fund created to pay costs and extra

claims in a settlement because "neither the plaintiff class nor the settling defendants ha[d] any right" to the money).

Young nevertheless insists that the Class Members are entitled to receive leftover money and seeks to renegotiate the Settlement, arguing it is economically feasible to distribute the remaining proceeds to all claimants. Just as the Appellant did in *Howe* however, Young relies on and misunderstands the ALI Principles.

As explained by the First Circuit, the ALI Principles express "a policy preference, when settlement money remains, for redistributing that money to class members to ensure they recover their losses." *Howe*, 588 F.3d at 35. The *Howe* Court explained that "the ALI was concerned that *cy pres* funds are often inappropriate because 'few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery.'" *Id*. at 35 (quoting ALI Aggregate Litigation Draft § 3.07 cmt. b). *See also* ALI Principles, § 3.07 cmt. b.

But in *Howe*, persons with proof that they purchased the products at issue will be paid *treble damages* before any money is distributed through *cy pres*. JA4-5. The First Circuit found that the award of treble damages "set the benchmark well above the ALI's hope that class members might receive 100 percent recovery." *Howe*, 588 F.3d at 35. Here, the District Court correctly observed that "[t]he *cy pres* allocation will only come into play if all of the claimants in all of the

subclasses receive the maximum award legally available to them … and there is still excess settlement money." JA50-51.

Accordingly, the issue is not whether the $5.00 payment is full compensation for "class members." It is whether the defendants may compensate Class Members without any proof of purchase at $5.00 in exchange for a full release. This Court's opinion in *Sullivan v. DB Inv., Inc*. teaches that the District Court may approve that allocation and settlement. 667 F.3d at 314 (the Third Circuit has never "required the presentation of identical or uniform issues or claims as a prerequisite to certification of a class"). As the District Court explained, the notice plan and allocation strikes a reasonable and fair balance: the standards for proof of class membership are low, but not too low so as to encourage fraud by awarding damages upon no proof whatsoever. JA50-51. Moreover, the Settlement Agreement has a "spillover clause," which allows for "excess funds to move from one subclass to the next before distribution to third-party non-profit groups." JA52. The District Court acted well within its discretion in approving the *cy pres* distribution of any residual funds to be made after all awards have been paid.

B. The District Court Did Not Abuse Its Discretion in Approving the Settlement and Granting Dissemination of Class Notice

Young contends that the District Court's decision regarding whether Notice of the Settlement was adequate "is plenary." Br. at 2. However,[4] "'a District Court's decision regarding the form and content of notices sent to class members is reviewed only for an abuse of discretion.'" *Sewell v. Bovis Lend Lease, Inc.*, 2012 WL 1320124, at *7 (S.D.N.Y. Apr. 16, 2012) (citation omitted). *See also Faught v. American Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2011) (appellate court's review of class notice "is limited to whether the district court abused its discretion"); *Bailey v. White*, 320 Fed. Appx. 364, 367 (6th Cir. 2009) (courts "review the reasonableness of the notice for an abuse of discretion"). "Moreover, Federal Rule of Civil Procedure 23(e) itself makes clear that determinations about

[4] Young cites *In re Diet Drugs Prod. Liab. Litig.*, 89 Fed. Appx. 314, 316 (3d Cir. 2003), but the only issue on appeal was whether the appellant's "due process was violated because Wyeth failed to show that it actually mailed the notice package to her." Here, Young does not claim a due process violation regarding receipt of Notice. To the extent Young argues that the appropriate standard of review is whether the court applied an incorrect legal standard or wrongly interpreted Rule 23, Young conflates the applicable standard of review pertinent to class notice – abuse of discretion – with circumstances under which an appellate court *may find* an abuse of discretion. *See GM Truck*, 55 F.3d at 783 (appellate court may find an abuse of discretion where the "'district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact'" (citing *International Union, UAW v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir. 1987)).

settlement notices in class actions are *within the discretion* of the District Court." *In re Diet Drugs Prods. Liab. Litig.*, 93 Fed. Appx. 338, 342 (3d Cir. 2004).

Young argues that Notice to the Class was inadequate because, "as interpreted by the District Court … [the Settlement] permits substantial recovery in instances where the class notice and claim form actually provided to the class said it was unavailable." Br. at 13. In accusing the Court and parties of "bait and switch" tactics, Young ignores the actual content of the Notice and the Claim Form approved by the District Court. While Young argues that class notice must delineate each and every way in which Class Members could be eligible for an award, such a heightened level of specificity is neither practicable nor required under the Federal Rules of Civil Procedure.

1. Young does not contest that the Notice contained all of the information required by Rule 23.

Under Rule 23(e) of the Federal Rules of Civil Procedure, a court must direct notice in a reasonable manner to class members who would be bound by a proposed class settlement. "The notice need not be unduly specific." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 231 (D.N.J. 1997). *See also In re WorldCom, Inc.*, 347 B.R. 123, 140 (S.D.N.Y. 2006) (notice not required to be "highly detailed or exact," as notice can only contain a limited amount of information). Rather, to satisfy the requirements of Rule 23 and constitutional due process, notice of a proposed class settlement must be "designed

to summarize the litigation and the settlement and 'to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation.'" *Prudential*, 148 F.3d at 326-27 (citing 2 A. Conte & H. Newberg, NEWBERG ON CLASS ACTIONS § 8.32 at 8-109). *See also In re Prudential Sales Practices Litig.*, 177 F.R.D. at 231 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950)).

Notice to class members should "clearly and concisely state in plain, easily understood language" the nature of the action; the class definition; the claims, issues, or defenses of the class; that the class member may appear through counsel; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on class members. *See* Fed. R. Civ. P. 23(c)(2). Young does not claim that any of these factors are absent from the Notice here, because each are specifically addressed in the Notice. JA273, 280-287, 289-290. For that reason alone, this Court should find that the District Court did not abuse its discretion. JA24, 252-253.

2. This Court should reject Young's suggestions "about what could have been in the Notice" where the Notice complies with Rule 23.

If notice is found to comport with Rule 23 and due process, suggestions from class members regarding other additions to the Notice should be rejected. *See Prudential Sales Practice Litig.*, 177 F.R.D. at 240 n.l8 (dismissing class

member's suggestions "about what could have been in the Class Notice" where the content of the notice otherwise satisfied due process and Rule 23). Despite the fact that the Notice complies with Rule 23, Young maintains that the Notice must meet certain additional requirements, insisting that (i) the Notice must identify potential *cy pres* recipients; and (ii) the Notice is "unfair" because it does not list *every* form of proof that a Class Member could submit to demonstrate they purchased one of the products at issue from the Defendants. Br. at 16. Both contentions are meritless.

a. There is no precedent requiring the identification of *cy pres* recipients in the Notice.

Young criticized the Notice for failing to identify potential *cy pres* recipients without citing any precedent delineating such a requirement. JA52; Br. at 26. Rather, the citations Young provides merely support his position that the District Court should not have an unfettered ability to choose a *cy pres* recipient. Br. 26. Here, the District Court explicitly recognized that, if there are unclaimed funds after distributions have been made to the Class, it will ensure that those funds are distributed to *cy pres* recipients that "serve the underlying interests of the class members." JA52. This is hardly unfettered discretion of the type about which Young speculates. *See also* Sections VII(B) & (B)(1), *supra.*

This case is consistent with a long line of cases in which courts have approved *cy pres* recipients *after* the settlement is approved, notice has been sent to

class members, all claims have been paid and the remaining funds are identified for *cy pres* distribution. *See, e.g., In re Lupron Mktg. & Sales Practices Litig.*, 2012 U.S. App. LEXIS 8263, at *7-10 (1st Cir. Apr. 24, 2012) (affirming approval of settlement agreement providing for *cy pres* distributions of unclaimed funds, where at the end of a four-year claims administration process, $11.4 million remained unclaimed); *Shapira v. City of Minneapolis*, 2012 U.S. Dist. LEXIS 58217 (D. Minn. Apr. 26, 2012) (identifying remaining funds leftover in class action settlement fund after all claims paid and approving appropriate *cy pres* recipient); *Briggs v. United States*, 2012 U.S. Dist. LEXIS 18278 (N.D. Cal. Feb. 14, 2012) (same); *Stefaniak v. HSBC Bank United States, N.A.*, 2011 U.S. Dist. LEXIS 144346 (W.D.N.Y. Dec. 12, 2011) (same); *In re Visa Check/MasterMoney Antitrust Litig*., 2011 U.S. Dist. LEXIS 122680 (E.D.N.Y. Oct. 24, 2011) (same); *Gates v. Rohm & Haas Co*., 2011 U.S. Dist. LEXIS 30730 (E.D. Pa. Mar. 23, 2011) (same).

It makes more sense to assess the appropriate *cy pres* recipients after all claims have been paid and administration costs determined. The approval, objection and appeal process can take years and proposed recipients may close or cease to exist in the interim. The amount of money that may be left is unknown until after all claims are paid and, depending on the amount, may better be split among recipients than to go to one recipient. The parties' focus at the outset is

better spent on getting the money to claimants and not on *cy pres*. However, the parties cannot force Class Members to submit claims nor to cash their checks once the funds are disbursed. Thus, at that point in time, consideration of appropriate *cy pres* recipients is timely.

Young's hypothetical ramblings regarding the potential for collusion among the District Court, and/or the lawyers and charitable organizations, absent disclosure of the *cy pres* recipients in the Notice, should be given no weight. There is certainly no evidence in the record to support his conspiracy theories, nor case law requiring the identification of *cy pres* recipients before remaining funds are known.

Accordingly, the District Court did not abuse its discretion in determining that it was appropriate to approve the Settlement with the reservation that, in the event that there are excess funds, it will ensure those funds go to *cy pres* recipients which serve the underlying interests of the Class Members.

b. Class Members were on notice that proof of purchase could be demonstrated through various forms.

The Claim Form notified Class Members that, in order to be eligible for an award of three times the overcharge from the Settlement Fund, they needed to submit proof that they purchased eligible products at BRU. JA276. The Claim Form provided certain examples of "acceptable proof" that "may" be sufficient to evidence such purchases, including receipts, cancelled checks, credit card

statements or records from BRU. JA276. As Young recognizes, the Claim Form also expressly indicated that "other records" would be acceptable to demonstrate proof of purchase. *Id*.

While Young asserts that the terms of the Settlement disallow alternatives to producing a receipt as proof of purchase, Br. at 15, the plain language of the Claim Form – and other documentation available to Class Members – provides for any number of forms of proof of purchase. *See, e.g.*, JA276. At the Final Fairness Hearing, Young's attorney also expressed a concern that "class members are being asked to … hold onto receipts for three years, six or 12 years" in order to obtain recovery under the Settlement. JA479. Class Counsel explained that Class Members without a receipt could still obtain recovery if they established that they purchased the product at BRU. JA485.

Young's attorney questioned whether his wife – "not a hypothetical example" – could submit a photograph as sufficient proof of purchase. JA477-478. Class Counsel thus explained to the District Court that, "pictures, any other evidence showing that it was – maybe a BRU stamp on it, something to show that it was bought at BRU" could be sufficient proof of purchase. JA486. The District Court's acknowledgement of this form of proof did not modify the Settlement, as Young suggests.

The Claim Form and the Notice also explicitly encouraged Class Members to contact the Claims Administrator for "free help" with any questions regarding the claims process. *See, e.g.*, JA278; JA283. *See also* JA289. The Claims Administrator's contact information was clearly provided in both English and Spanish at the bottom of *each* page of the Claim Form and on the Notice and the Summary Notice. *See, e.g.*, JA275-278, 280. *See also Adams v. Southern Farm Bureau Life Ins. Co.*, 493 F.3d 1276, 1287 (11th Cir. 2007) (finding notice "constituted 'the best notice practicable under the circumstances'" where parties distributed notice through multiple first class mailings and a national newspaper, and provided a website, telephone number and mailing address for class members' questions); *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 67-68 (S.D.N.Y. 2003) (notice complied with Rule 23(c)(2) and 23(e) where notice package provided the terms of the settlement, advised class members that they would be bound by the settlement unless they excluded themselves, included a statement relating to class members' individual benefits and listed a toll-free telephone number for questions).

In addition, the Notice directed Class Members to a Settlement website where they could inspect the pleadings and obtain additional information as the case progressed, such as orders issued by the District Court and Class Counsel's motion for fees. JA289, 372. *See Mangone v. First USA Bank*, 206 F.R.D. 222,

233 (S.D. Ill. 2001) (class notice sufficiently described litigation where notice stated it was intended as a summary and class members could inspect the pleadings at the courthouse). Indeed, the District Court's Amended Memorandum granting final approval of the Settlement was at the top of the list of documents available to Class Members on the Settlement website. *See* http://babyproductsantitrustsettlement.com/docs.php, last visited May 9, 2012. Accordingly, the Notice and Claim Form sufficiently notified Class Members that they could submit many different forms of proof of purchase.

Young also asserts that the District Court improperly permitted the fund administrator the discretion to decide claims and that Class Members were not provided notice of the administrator's role. Br. at 13-14. This argument again ignores the content of the Notice and the Claim Form. The Notice specifically indicated that the Claims Administrator would determine whether the information submitted by a claimant constitutes valid proof of purchase. *See, e.g.*, JA284. The Notice also notified Class Members that the distribution of the Settlement proceeds would take place "after review, determination, and audit of the Claim Forms by the Claims Administrator and approval by the Court of the Claims Administrator's recommendations as to the specific amounts to be paid to the Claimants." JA284. Thus, the Notice was clear and well within the Court's discretion for approval.

Ultimately, Young's complaint is that alleged Class Members without proof of purchase receive $5.00 upon submission of a Claim Form, rather than three times the estimated price of the product they claim to have purchased. "This is essentially a dispute with the form of compromise Plaintiffs and [their] counsel chose to accept by settling, and not a basis for deeming the settlement agreement's terms unfair or inadequate." *Wilson v. Airborne, Inc.*, 2008 WL 3854963, at *9 (C.D. Cal. Aug. 13, 2008) (overruling objections that settlement was inadequate in limiting recovery for class members without proofs of purchase to the price of six boxes of the product). *See* Section IV(D), *supra*. Young "fail[s] to understand that the form and amounts of benefit provided were arrived at as a result of hard-fought negotiations between experienced class action attorneys." *Thompson*, 216 F.R.D. at 65 ("Although some of the objectors may prefer relying on other or additional factors to determine the amount that each class member may recover, it is well established that '[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" Class Counsel.'"). Indeed, in reaching the Settlement, Class Counsel engaged in extensive negotiations with the Defendants, allocated the Settlement Amount based upon advice from their expert and provided Class Members notice of this allocation. *See*, *e.g.*, JA19, 483.

Further, requiring proof of purchase is "patently fair, particularly because an individual who is unable to establish that he or she is in the Settlement Class would never be able to carry their burden of proof in a civil lawsuit against Defendants for the claims asserted in this lawsuit." *Mangone*, 206 F.R.D. at 235.[5] As the District Court found, for example, "'class members who lack documentation of purchase price or proof of purchase would be sorely disadvantaged and perhaps be unable to prove damages at an individual trial.'"[6] JA51 (citing JA451).

Therefore, Class Members were provided Notice that complied with Rule 23, and the District Court did not abuse its discretion in approving the Settlement and the Notice.

C. The District Court Did Not Abuse Its Discretion in Approving the Award of Attorneys' Fees and Expenses

Contrary to Young's argument,[7] this Court reviews a District Court's award of attorneys' fees and expenses for abuse of discretion. *See, e.g.*, *In re Insurance*

[5] Such proof helps to discourage fraud "by awarding additional money to those without any form of documentation whatsoever." JA51.

[6] The Claim Form is not burdensome. *See* Sections IV(B)(1, 3), *supra*. *See also* JA275-278.

[7] *See* Br. at 3. None of the cases Young cites concern discretionary review of a class fee award. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 312, 327 (vacating and remanding District Court's class certification decision); *EBC, Inc. v. Clark Bldg. Sys.*, 618 F.3d 253, 262, 277 (3d Cir. 2010) (affirming District Court's summary judgment ruling in a non-class breach of contract case); *Elcock v. Kmart Corp.*, 233 F.3d 734, 744-45 (3d Cir. 2000) (affirming in part and reversing in part

Brokerage Antitrust Litig., 579 F.3d 241, 285 (3d Cir. 2009) (finding no abuse of discretion in affirming the class settlement attorneys' fees and expenses); *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 163-64 (3d Cir. 2006) (same); *Sullivan v. DB Inv., Inc.*, 667 F.3d at 332 (finding no abuse of discretion in affirming the class settlement attorneys' fee award). "The standards employed for calculating attorneys' fees awards are legal questions subject to plenary review, but '[t]he amount of a fee award … is within the district court's discretion so long as it employs correct standards and procedures and makes findings of fact not clearly erroneous.'" *AT&T Corp.*, 455 F.3d at 163-64 (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 299 (3d Cir. 2005)). District courts must '"clearly set forth their reasoning for fee awards so that [the Third Circuit] will have a sufficient basis to review for abuse of discretion."' *Id*. at 164 (quoting *Rite Aid*, 396 F.3d at 301).

The Third Circuit routinely affirms fee awards in common fund cases where district courts apply a percentage-of-recovery method using the *Gunter/Prudential* factors as well as a lodestar cross-check. *See, e.g., In re Insurance Brokerage*, 579 F.3d at 279-85 (affirming fee award because the district court provided a well-reasoned analysis of the *Gunter* factors and lodestar cross-check); *AT&T Corp.*, 455 F.3d at 163-69 (affirming fee award because the district court provided a

---

jury verdict concerning plaintiffs' expert proof of damages and award in a non-class personal injury case).

thorough analysis of the *Gunter/Prudential* factors and lodestar cross-check); *Sullivan*, 667 F.3d at 329-33 (same). Here, the District Court conducted a full analysis of the requested fee under the *Gunter/Prudential* factors and used the lodestar cross check. *See* Sections VII(C)(2-3), *infra*. *See also* JA30-43.

In an attempt to discredit the District Court's decision, Young mistakenly calculates the fee amount to be $14 million by combining fees and expenses. Br. at 44-45. Next, Young's argument that Class Counsel is "recovering more than their clients" is misleading and ignores prevailing Third Circuit precedent. Indeed, the 33-1/3% award falls within the range of amounts approved by this Court in similar cases. *See* Section VII(C)(2), *infra*. Finally, the lodestar cross check revealed that Class Counsel will only receive payment for approximately 30 percent of the actual time they expended to prosecute this hard-fought case. *See* Section VII(C)(3), *infra*. Thus, the District Court's fee award was not an abuse of discretion. *See* Sections VII(C)(1-4), *infra*. *See also* JA30-43.

1. Courts award attorneys' litigation expenses separately from, and in addition to, awarding attorneys' fees from a common fund.

At the outset, Young's argument that Class Counsel's fees are too high is based on an egregious miscalculation of total fees. Class Counsel requested attorneys' fees in the amount of $11,833,333.33, which represents 33-1/3% of the gross settlement amount. JA30. They also requested reimbursement of out-of-

pocket litigation expenses in the amount of $2,229,775.60, as well as a $2,500.00 Incentive Award to each Named Plaintiff. JA446.

In an attempt to inflate the total fee amount and percentage, Young inaccurately claims Class Counsel is seeking "40% of the gross settlement fund." Br. at 44, 46. Young combines both the attorneys' fees and expenses to increase the total to $14 million or 40% of the gross settlement. *Id*. at 45. Young insists, without citing any legal authority, there is "no reason to separate the inquiry on fees and expenses." *Id*. Nothing in the law or record supports this combined calculation nor is the segregation of fees and expenses "artificial." *Id*. As a rule, courts award attorneys' litigation expenses separately from, and in addition to, awarding a percentage fee from the fund. *See* pp. 44-45, *infra* (citing many cases, in which courts awarded attorneys a percentage of the common fund in fees, in addition to litigation expenses incurred).

Indeed, Young cites case law that supports the segregation of fees and expenses. *See, e.g., Erie County Retirees Ass'n. v. County of Erie*, 192 F. Supp. 2d 369, 378 (W.D. Pa. 2002) (subtracting expenses from the total request in order to determine a reasonable percentage amount of the settlement fund); *Lachance v. Harrington*, 965 F. Supp. 630, 646, 652 (E.D. Pa. 1997) (same).

Here, the District Court assessed the reasonableness of the fee award by applying the percentage-of-recovery method, which involved a thorough analysis

of the *Gunter/Prudential* factors. JA31-41. *See* Section VII(C)(2), *infra*. The District Court additionally applied a lodestar cross-check analysis to confirm the reasonableness of the fee award. JA41-43. *See* Section VII(C)(3), *infra*. Second, the District Court separately analyzed Class Counsel's expense request by examining each Class Counsel firm's declarations and detailed expense reports. JA43-45. Similar to other complex class actions, the District Court found the "high costs" in this case "to be expected," "adequately documented, proper and reasonable." *Id.*

2. The District Court properly applied the percentage-of-the-fund method in finding the fee award reasonable.

Young concedes the Third Circuit "recommends a percentage-of-recovery method," but ignores established law for determining what constitutes a reasonable percentage fee award. Br. at 41-43. The law for determining the reasonableness of a class fee award is well-settled. Both the ALI Principles § 3.13, and the MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.71(2004), relied upon by Young, actually support the District Court's application of the percentage-of-the-fund approach and lodestar cross-check. Br. at 42-43. Young ignores these facts. Br. at 41-42; JA31-41. *See also In re Diet Drugs*, 582 F.3d at 539; *Prudential*, 148 F.3d at 333; *see also* THE MANUAL FOR COMPLEX LITIGATION § 14.121 (4th ed. 2004) (reporting that "the vast majority of courts of appeals now permit or direct District Courts to use the percentage method in common-fund cases"). Furthermore, the Supreme

Court has consistently endorsed awarding attorneys' fees using the percentage-of-the-fund method. *See, e.g., Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-67 (1939); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

Next, in determining what constitutes a reasonable percentage fee award, the District Court properly considered the ten factors identified by the Third Circuit in *Gunter*, 223 F.3d 190, and *Prudential*, 148 F.3d 283. JA31-41. *See also In re Diet Drugs*, 582 F.3d at 540. The *Gunter/Prudential* factors include the following:

> (1) the size of the fund created and the number of beneficiaries, (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of the litigation, (5) the risk of nonpayment, (6) the amount of time devoted to the case by plaintiffs' counsel, (7) the awards in similar cases, *Gunter*, 223 F.3d at 195 n.1; *Prudential*, 148 F.3d at 336-40, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement, *Prudential*, 148 F.3d at 338-40; *see also AT&T*, 455 F.3d at 165 n.34. [*In re Diet* Drugs, 582 F.3d at 540.]

Here, the District Court provided a well-reasoned analysis of these *Gunter/Prudential* factors. JA31-41. The District Court held that the balancing of these factors weighed in favor of approving the fee award, finding: (a) "the size of

the fund and the number of people who will receive the maximum damages" favor approval since the $35 million is "big enough to benefit the class members, but not large enough to qualify for a mega-fund reduction in fees" (JA32-33); (b) the number of objections was small, but objections concerning class counsel's delayed posting of the attorneys' fees motion "somewhat counsel against approving the proposed settlement" (JA33-34, 36-43); (c) lead counsel's "considerable experience" and success in facing "formidable legal opposition" "weighs in favor of approval" (JA34-35); (d) the heightened pleading standards adopted by Supreme Court in *Twombly*, *Leegin*, and *Iqbal*, as well as the Third Circuit's *Hydrogen Peroxide* decision, "made the case more complex and extended the duration of the litigation, weighing in favor of approval" (JA35; *see also* JA25-27); (e) the risk of nonpayment was minimal and therefore, was a neutral factor (JA35-36), *but see infra* footnote 1; (f) the record supports that time spent by Class Counsel "was necessary for the successful prosecution of this case considering both the complexity involved and the defense mounted by defendants" (JA36); (g) awards in similar cases, including by the Third Circuit, considered in conjunction with the lodestar cross-check weighs in favor of approval (JA36-38; *see also* JA41-43); (h) the absence of government assistance in litigating the case supports approval (JA39); (i) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained is

a neutral factor, depending on particular facts and circumstances (JA40); and (j) the absence of innovative terms of settlement is a neutral factor (JA40). In sum, after "engag[ing] in a robust assessment[] of the fee award reasonableness factors," the District Court found that "five of the ten *Gunter/Prudential* factors count in favor, one against, and four are neutral" and thus, the majority support approval of the fee award. JA41.

Young discounts a proper analysis of the *Gunter/Prudential* factors and instead argues that "attorneys are recovering more than their clients," and that "[a] settlement should be valued by the amount the class *actually* receives." Br. at 42, 45-46. Young's focus on his calculation of $8.1 million-worth of claims ignores the $35.5 million common fund and ignores the *Gunter/Prudential* factors.

Young narrowly misconstrues Rule 23 Advisory Committee Notes (2003), claiming the District Court should have "defer[red] some portion of the fee award until actual payments to class members are known." But the Advisory Committee Notes make clear that in ensuring that attorneys' fees are "fair and proper," courts can look at a "variety of factors," and that "it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorneys' fees award." *See* Notes of Advisory Committee on 2003 Amendments to Rule 23. *See also Cendant Corp*., 264 F.3d at 256 (explaining that the Third Circuit, despite criticisms, has "generally accepted" the percentage of

recovery method and has "directed district courts to consider numerous factors, as well as recommending that they employ a lodestar "cross-check"). The Advisory Committee Notes further emphasize "this subdivision [23(h)] does not undertake to create new grounds for the award of attorney fees or nontaxable costs." Notes of Advisory Committee on 2003 Amendments to Rule 23.

Similarly, in *Prudential,* 148 F.3d 283, the court considered whether class counsel should receive a percentage of the funds that would have been available to the class under a related but separate "task force plan" that was largely the result of state governmental regulators' efforts. The "crux" of the inquiry was "distinguishing those benefits created by class counsel from the benefits created under" the government plan. *Id.* at 338. No such governmental or other plan exists in this case. And Class Counsel did not receive assistance from the Government or public agencies. JA39. Young's other authorities are likewise distinguishable. *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561 (E.D. Pa. 2001) (finding 100% lodestar and expenses in a non-common fund settlement were too high given the terms of the settlement agreement); *In re HP Inkjet Printer Litig.*, 2011 WL 1158635 (N.D. Cal. Mar. 29, 2011) (attorneys' fees which totaled *more* than the total value of a coupon settlement were not reasonable);*Wal-Mart Stores, Inc. v. Visa U.S.A.*

Inc., 396 F.3d 96, 121 (2d Cir. 2005) (denying attorneys' fees totaling 9.68 times the lodestar figure).

Indeed, in common fund cases, courts have explicitly ordered that class counsel's percentage fee be calculated *before* the deduction of any amount attributable to the costs of notice or administrative expenses. In *Lachance v. Harrington,* 965 F. Supp. 630, 649 n.15 (E.D. Pa. 1997) (cited in Young's original Objection (JA324)), the court refused to "deduct the expenses of administering the common fund from the gross settlement fund" for the purposes of allocating the attorneys' fees because (1) "the costs of administering the fund are an uncontrollable part of the litigation established by the framework of Rule 23" and the court did not want to incentivize class counsel to cut corners in class notice and administration, and (2) "it would be extremely burdensome on the court to calculate an attorney fee if the costs of administering the class were to be deducted because a great deal of class administration expense is incurred *after* the court enters judgment on the adequacy of the settlement and attorney fees." *Id*. (emphasis added).

Despite the District Court's thorough analysis, Young emphasizes the application of a "twenty-five percent benchmark" and suggests Class Counsel's 33-1/3% recovery is therefore, unreasonable. Br. at 46. But "courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus

expenses." *In re Ravisent Techs., Inc. Sec. Litig.*, 2005 U.S. Dist. LEXIS 6680, at *40 (E.D. Pa. 2005); *In re Automotive Refinishing Paint Antitrust Litig*., 2008 U.S. Dist. LEXIS 569, at *9-10 (E.D. Pa. 2008) (awarding requested fees of one third of the multi-million dollar settlement fund); *In re Remeron Direct Purchaser Antitrust Litig*., 2005 U.S. Dist. LEXIS 27012, at *10 (D.N.J. Nov. 9, 2005) (awarding fees of 33-1/3% from $75 million settlement fund); *Godshall v. Franklin Mint Co.*, 2004 U.S. Dist. LEXIS 23976, at *18 (E.D. Pa. Dec. 1, 2004) (awarding a 33% fee and noting that "[t]he requested percentage is in line with percentages awarded in other cases"); *In re General Instrument Sec. Litig*., 209 F. Supp. 2d 423, 433-34 (E.D. Pa. 2001) (awarding 1/3 of a $48 million settlement fund); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 150 (E.D. Pa. 2000) (an "award of one-third of the fund for attorneys' fees is consistent with fee awards" by District Courts in the Third Circuit); *In re Greenwich Pharm. Sec. Lit*., 1995 U.S. Dist. LEXIS 5717, at *16-17 (E.D. Pa. 1995) (holding that "[a] fee award of 33.3 percent is in line with the fee awards approved by other courts"); *In re FAO, Inc. Sec. Litig*., 2005 U.S. Dist. LEXIS 16577, at *5 (E.D. Pa. May 20, 2005) (awarding fees of 30% and 33%).

Ignoring clear precedent, Young relies on cases that actually favor percentages greater than 25% (or the percentage requested by the class counsel). *See, e.g.*, *In re Pet Foods Prods. Liab. Litig.*, 629 F.3d 333, 361 (3d Cir. 2010)

(Young cites concurring and dissenting opinion, but majority opinion approved the requested 31% attorneys' fee, plus expenses, and remanded on other grounds); *Erie County Retirees Ass'n v. County of Erie*, 192 F. Supp. 2d at 373 (approving a fee award of 38% of common fund plus expenses); *Sullivan v. DB Inv.*, 667 F.3d at 333 (noting its approval of the 25% fee request fell "within this range," and citing three studies demonstrating average percentage fee recoveries in large class action settlements of 31%, 27-30%, and 25-30%). These cases reference a 25% "benchmark" in passing but then consider a number of different factors, including a lodestar cross-check to determine if the fee requested is indeed reasonable. In many cases, that analysis leads the court to conclude that fee of greater than 25% is appropriate.

In support of a 25% benchmark and sweeping "limits" on attorneys' fees, Young also cites *In re Bluetooth Headset Prod. Liab. Litig*., 654 F.3d 935, 942 (9th Cir. 2011), but that case is distinguishable because the class action settlement provided for a $100,000 *cy pres* award, zero dollars for economic injury, $800,000 for class counsel and $12,000 for class representatives. 654 F.3d at 938, 946. The Ninth Circuit found: "the district court made (1) no explicit calculation of a reasonable lodestar amount; (2) no comparison between the settlement's attorneys' fees award and the benefit to the class or degree of success in the litigation; and

(3) no comparison between the lodestar amount and a reasonable percentage award." *Id*. at 943.

The facts here are inapposite. The District Court made an explicit calculation of a reasonable percentage fee, taking into account the ten *Gunter/Prudential* factors identified by the Third Circuit. *See* pp. 45-47, *supra*; JA31-41. In evaluating these factors, the District Court also compared the fee award and the benefit to the class as well as the degree of success in the litigation in finding the approval justified. *See* pp. 45-47, *supra*; JA31-32, 35-36. The record is clear that Class Counsel prosecuted this case against the top firms in the nation and defeated them at every critical juncture. JA34-35. Essentially, Class Counsel played the crucial role of private attorneys general of the antitrust laws at a time when the DOJ and FTC did not take action first. JA39. Class Counsel negotiated a settlement that provides for up to three times actual damages (20% overcharge) for individual consumers who demonstrate Class membership. JA5-6. Finally, the reasonableness of the fee award was confirmed by the District Court's lodestar cross-check. JA31-41.

3. The District Court properly applied the lodestar cross-check to confirm the reasonableness of the fee award.

Again, Young mentions, but does not apply or recognize that the District Court properly analyzed a lodestar calculation as a cross-check on the percentage fee award. Br. at 40-41. *See also* JA31, 41-43. The cross-check is not designed to

be a "full-blown lodestar inquiry," but rather an estimation of the value of counsel's investment in the case. *Third Circuit Task Force Report, Selection of Class Counsel*, 208 F.R.D. 340, 422-23 (2002). The Third Circuit recommends the use of the lodestar cross-check "as a means of assessing whether the percentage-of-recovery award is too high or too low." *In re Diet Drugs*, 582 F.3d at 545 (citing *Rite Aid*, 396 F.3d at 306-07).

The cross-check analysis is a two-step process. First, the lodestar is determined by multiplying the number of hours reasonably expended by the reasonable rates requested by the attorneys. *See Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028 (9th Cir. 2000). Second, the court determines the multiplier required to match the lodestar to the percentage-of-the-fund request made by counsel and determines whether the multiplier falls within the accepted range for such a case.

Although Young ignores the fact that the District Court's lodestar cross-check analysis conforms to Third Circuit law, he relies upon cases in support of such practice where courts found even larger percentage fee awards reasonable. *See, e.g., Erie County Retirees Ass'n. v. County of Erie*, 192 F. Supp. 2d at 373 (applying lodestar cross-check and approving a fee award of 38% of common fund plus expenses); *In re LG/Zenith Rear Projection TV Class Action Litig.*, 2009 U.S. Dist. LEXIS 13568, at *23-25 (D.N.J. Feb. 18, 2009) (applying lodestar cross-

check and awarding the requested fees of 5.7% of settlement which constituted a lodestar multiplier of 1.5); *Lachance*, 965 F. Supp. at 649-50 (applying lodestar cross-check and awarding requested attorneys' fees of 30% of common fund plus expenses (figures calculate to negative multiplier of 0.88)).

Here, the District Court properly applied both steps in the cross-check analysis in finding the loadstar reasonable. JA41-43. In examining sworn declarations by Class Counsel including detailed supporting time and expense records and taking account of the five years of hard-fought litigation, including but not limited to multiple rounds of briefing on motions to dismiss, for judgment on the pleadings and for summary judgment, full merits discovery, and a three-day evidentiary hearing on class certification, the District Court first found the rates and total lodestar reasonable. JA41-42. *See also* Section IV(A), *supra*.

Next, the District Court calculated the negative multiplier of .37 and found that the negative multiple was "well under the generally acceptable range and provides strong additional support for approving the attorneys' fees request." JA42-43. Young presents no evidence regarding average fee awards when the lodestar cross check results in a negative multiplier, such as is this case here. And case law relied upon by Young explains that reasonable class action lodestar multipliers range from 1 to 4. *See, e.g., In re LG/Zenith Rear Projection TV Class Action Litig.*, 2009 U.S. Dist. Lexis 13568, at *24 (approving a lodestar multiplier

of 1.55). Class Counsel's negative multiplier of 0.37 is well below the range accepted in the Third Circuit. *See, e.g., In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524 545 (3d Cir. 2009) (multiplier of 2.6 or 3.4 not unreasonably high); *In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d at 497 (granting attorneys' fee award when the multiplier was 1.03); *Cullen v. William Med. Corp.*, 197 F.R.D. at 150 (approving multiplier of 2.04). Class Counsel prosecuted this action at a loss. JA370. The District Court's analysis of the lodestar cross-check confirms that the 33-1/3% request is eminently reasonable. JA41-43. Young presents no support for his suggestion that the District Court departed from this well-established framework of class settlement management.

4. The District Court's treatment of *cy pres* recovery the same as money paid to Class Members was appropriate and not an abuse of discretion.

Young argues that there should be "a downward adjustment of attorneys' fees" in light of the potential *cy pres* recovery. Br. at 44. Young erroneously reasons that any *cy pres* recovery should result in a reduced common fund since "[t]he class benefit conferred by *cy pres* payments is indirect and attenuated." Br. at 43-44. The law Young cites does not support this proposition.[8] First, ALI Principles § 3.13 actually favors basing attorneys' fees on *cy pres* awards. *See also*

[8] Indeed, Courts have held the exact opposite – that *cy pres* distributions are intended to and do provide a benefit to the class, particularly absent class members. *See, e.g., In re Linerboard Antitrust Litig.*, 2008 U.S. Dist. LEXIS 77739, at *10.

§ 3.07 (including *cy pres* payments in the calculation of attorneys' fees to ensure attorneys recover adequate fees even in "negative value" or small-claim cases). Section 3.13(b) also supports the District Court's analysis of the percentage-of-the fund approach and lodestar cross-check in this common fund case.

Second, Young fails to cite any Third Circuit law on point which supports this reduced *cy pres* valuation approach. *See, e.g.*, *Perry v. FleetBoston Fin. Corp*., 229 F.R.D. 105, 120 (E.D. Pa. 2005) (not a common fund case); pp. 49-50, 54, *supra* (*Lachance*, 965 F. Supp. at 649); *Stanton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003) (failing to employ the percentage or lodestar method as well as the cross-check to the common fund). Similarly, Young's focus on *In re Heartland Payment Sys., Inc*., 2012 U.S. Dist. LEXIS 37326 (S.D. Tex. Mar. 20, 2012), is not compelling. In that case, the Southern District of Texas Court found the *cy pres* provision appropriate and applied the twelve *Johnson* factors in analyzing the reasonableness of attorneys' fees. *Id*. at *85-87, 116-134 (applying the percentage method and lodestar cross-check). The Texas court expressly stated that the "Third Circuit[] caution[s] District Courts not to use a rigid benchmark but instead to consider the particular circumstances of each case based on factors similar to this circuit's *Johnson* factors." *Id*. at *115-16. A balancing of the *Johnson* factors supported a negative adjustment of the benchmark attorneys' fees. *Id*. at *133-34. In looking at the awards in similar cases, the Texas court found that the proposed

unadjusted benchmark represented the "highest percentage recovery of any of the data-breach settlements to date." *Id*. at *133. Additionally, class counsel agreed to reduce the fee award since the fee request far exceeded the reduced *cy pres* value and was comparable to the limited fund available to claimants. *Id*. at *138-39. Under the lodestar cross-check, the Texas court found a 5.3% negative adjustment down to 20% appropriate to account for the *Johnson* factors and was also close to the amount calculated under the percentage method. *Id*. at *134.

Third, Even if a *cy pres* distribution is not the most direct way to benefit class members, the Supreme Court has held that class counsel has a claim to a portion of any unclaimed settlement funds procured on behalf of class members. Absent class members' "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs." *Boeing Co. v. Van Gemert*, 444 U.S. at 480. Therefore, courts must require "every member of the class to share attorney's fees to the same extent that he can share the recovery." *Id*.

Here, the balancing of the *Gunter/Prudential* factors, similar to the *Johnson* factors, support the fee award and is consistent with the percentage method

properly employed by the District Court. JA31-43. *See also* Section VII(C)(2), *supra*. The 33-1/3% benchmark is not an anomaly for Third Circuit common fund cases and is reasonable. JA36-37. The 0.37 multiplier is "already well under the generally acceptable range," and therefore, does not support an increased downward adjustment of fees. JA43. The court in *Heartland* recognized that many courts do value *cy pres* amounts the same as money paid directly to class members. *Heartland*, 2012 U.S. Dist. LEXIS 37326, at *106-07. Third Circuit law does not support reducing any *cy pres* valuation in determining the reasonableness of fee award.

Accordingly, the District Court did not abuse its discretion in approving the fee award.

CONCLUSION

For all of the foregoing reasons, this Court may properly affirm the Order of the District Court and deny the Appeal.

Dated: June 11, 2012

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Elizabeth A. Fegan
Elizabeth A. Fegan

HAGENS BERMAN SOBOL SHAPIRO LLP
1144 West Lake Street, Suite 400
Oak Park, IL 60301
Tel.: (708) 628-4949
Fax: (708) 628-4950

Steve W. Berman
George W. Sampson
Ivy Arai Tabbara
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Tel.: (206) 623-7292
Fax: (206) 623-0594

Eugene A. Spector
William G. Caldes
Jeffrey L. Spector
SPECTOR ROSEMAN KODROFF
& WILLIS, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Tel.: (215) 496-0300
Fax: (215) 496-6611

Mary Jane Fait
Theodore B. Bell
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC
55 West Monroe Street, Suite 1111
Chicago, IL 60603
Tel.: (312) 984-0000
Fax: (312) 984-0001

Fred T. Isquith
Thomas H. Burt
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC
270 Madison Avenue
New York, NY 10016
Tel.: (212) 545-4600
Fax: (212) 545-4653

CLASS COUNSEL

Combined Certifications

1. Certification of Bar Membership

I hereby certify that I, Elizabeth A. Fegan, Class Counsel, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit as of March 5, 2012.

2. Certification of Service

I hereby certify that, on this 11th day of June, 2012, I electronically filed the foregoing brief on the electronic docketing system for the Court of Appeals for the Third Circuit, thereby effecting service on counsel of record under L.A.R. 113.4. I hereby certify that, on this 11th day of June, 2012, I caused ten true and correct copies of the foregoing brief to be mailed via UPS Next Day Air to: Office of the Clerk, United States Court of Appeals for the Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, PA 19106.

I hereby certify that, on this 11th day of June, 2012, I caused this foregoing document to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users (all counsel has consented to electronic service):

Theodore H. Frank, *Objector Counsel-Appellant*
Christopher Bandas, *Objector Counsel-Appellant*
William Caldes, *Class Counsel-Appellee*
Carolyn Feeney, *Defendant Counsel-Appellee*
Elizabeth A. Fegan, *Class Counsel-Appellee*
Michael Hahn, *Defendant Counsel-Appellee*
David Martin, *Defendant Counsel-Appellee*
Neil McDonell, *Defendant Counsel-Appellee*
Kendall Millard, *Defendant Counsel-Appellee*
James H. Price, *Objector Counsel-Appellant*
Melissa Rubenstein, *Defendant Counsel-Appellee*
Eugene Spector, *Class Counsel-Appellee*
Jeffrey Spector, *Class Counsel-Appellee*
Mark Weyman, *Defendant Counsel-Appellee*
Margaret Zwisler, *Defendant Counsel-Appellee*

3. Certification of Word Count

I hereby certify that this brief complies with the page limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 12,534 words in the main body of the brief, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the typestyle requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

4. Certification of Identical Compliance of Briefs

Pursuant to L.A.R. 31.1(c), I hereby certify that the electronic and hard copies of this brief in the instant matter contain identical text.

5. Certification of Virus Check

Pursuant to L.A.R. 31.1(c), I hereby certify that a virus check of the electronic .PDF version of the brief was performed using Sophos security software, and the .PDF file was found to be virus free.

Dated: June 11, 2012

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Elizabeth A. Fegan
Elizabeth A. Fegan

HAGENS BERMAN SOBOL SHAPIRO LLP
1144 West Lake Street, Suite 400
Oak Park, IL 60301
Tel.: (708) 628-4949
Fax: (708) 628-4950