Nos. 23-1063, 23-1163

In the Supreme Court of the United States

HOME DEPOT U.S.A., INC.,
Petitioner,
v.
BLUE CROSS BLUE SHIELD ASS'N, ET AL.,
Respondents.

DAVID G. BEHENNA,
Petitioner,
v.
BLUE CROSS BLUE SHIELD ASS'N, ET AL.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

The petitions seek review of a decision by a panel of the Court of Appeals for the Eleventh Circuit holding that the district court did not abuse its discretion in approving a settlement of protracted and complex antitrust class action litigation that (1) establishes a $2.67 billion common fund and provides for "historic" and "transformative" pro-competitive structural relief in the national health insurance market and (2) awards a common-fund attorney fee.

The Home Depot petition (No. 23-1063) presents the following question:

Whether public policy *categorically* prohibits an antitrust class action settlement that includes a release of future claims for injunctive relief based on the identical factual predicate of the settled claims and premised on conduct that is not clearly illegal under the antitrust laws?

The Behenna petition (No. 23-1163) presents two additional questions, both of which were forfeited and waived below:

1. Whether the district court abused its discretion in applying the percentage method in determining the reasonableness of a requested attorney fee award in connection with an antitrust class action settlement creating a common fund, while also applying a lodestar cross-check?

2. Whether the district court abused its discretion in awarding an attorney fee because it noted that the requested award fell below the 25% percentage "benchmark" established under Circuit precedent and

that, in any event, the fee award was reasonable under the Circuit's multi-factor fee analysis and a lodestar cross-check?

RULE 29.6 DISCLOSURE STATEMENT

Hibbett Retail, Inc., f/k/a Hibbett Sporting Goods, Inc., is a subsidiary of Hibbett, Inc. (Nasdaq: HIBB). Blackrock, Inc. (NYSE: BLK), owns ten percent or more of the stock of Hibbett, Inc.

None of the other corporations on whose behalf this Brief in Opposition is being filed—A. Duie Pyle, Inc.; American Electric Motor Service, Inc.; Avantgarde Aviation, Inc.; Barr, Sternberg, Moss, Lawrence, Silver & Munson, P.C.; Bartlett, Inc. dba Energy Savers; CB Roofing LLC; Casa Blanca, LLC; Comet Capital; Conrad Watson Air Conditioning Corporation; Consumer Financial Education Foundation of America, Inc.; Fort McClellan Credit Union; Free State Growers, Inc.; GC/AAA Fences, Inc.; G&S Trailer Repair Inc.; Galactic Funk Touring, Inc.; Gaston CPA Firm, P.C.; Hess, Hess & Daniel, P.C.; Iron Gate Technology, Inc.; Jewelers Trade Shop; Montis, Inc.; Pearce, Bevill, Leesburg, Moore, P.C.; Pete Moore Chevrolet, Inc.; Pettus Plumbing & Piping, Inc.; Pioneer Farm Equipment, Inc.; Rolison Trucking Co., LLC; Sadler Electric; Sirocco, Inc.; Vaughan Pools, Inc.—have a parent corporation and no publicly held corporation owns ten percent or more of the stock of any of them.

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INTRODUCTION[1]

This litigation began in 2012, when "fully-insured" subscribers to each of the 36 Blue Cross and Blue Shield health insurance plans (the "Blues") filed a class complaint alleging that the Blues and their Association had conspired to restrain trade in the national market for full-service commercial health insurance. The complaint alleged that the Blues engaged in various practices designed to restrict their ability to compete with each other when using Blue trademarks and non-Blue, or "Green," marks. App.3a-4a.[2] Over 40 similar class actions were filed nationwide, and they were consolidated into MDL proceedings before Northern District of Alabama Judge David Proctor. *Id.*

After a decade of "extraordinarily complex, protracted, and hard fought" litigation, App.48a, and five years of "protracted, complicated, and challenging"

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[1] We cite to Home Depot's petition as "Pet.," to Home Depot's appendix as "App.," to Behenna's petition as "Beh.," and to the attached Supplemental Appendix as "Resp.App."

[2] Fully-insured accounts "buy health insurance from Blue Cross, which as the insurer pays enrollees' medical costs, bears the risk that enrollees' claims will exceed premiums, controls the benefits structure, makes coverage decisions, and provides administrative services." App.5a. They are contrasted with purchasers of "self-funded" or "administrative services only" ("ASO") plans, which "do not buy health insurance." App.6a. Such purchasers, which include Home Depot and which are typically entities employing hundreds or thousands of people, self-insure for health care but purchase administrative services and unbundled products like vision, dental, and stop-loss insurance. *Id.*

settlement negotiations assisted by professional mediators and a special master, App.49a-50a, the parties entered a settlement agreement that created a $2.67 billion common fund and required, in the district court's words, "truly exceptional" and "historic" structural reforms to the Blue system that would provide "transformative, pro-competitive injunctive relief." App.99a, 50a, 140a. The district court also awarded attorney fees in the amount of 23.47% of the common fund, which it found to be reasonable in light of a lodestar cross-check and analysis of Eleventh Circuit factors.

The settlement, like all settlements, reflected a *compromise* of the parties' litigating positions. While the settlement will bring a permanent end to most of the practices challenged as anticompetitive by the subscribers, it allows certain challenged practices to continue, and it contains a standard provision requiring the existing subscribers to release their claims for market-wide, universal injunctive relief against those continuing practices, whether brought now or in the future. Such "releases of future claims," as the Eleventh Circuit panel below noted, "are an important part of many settlement agreements," App.14a, and they have been uniformly upheld so long as they are limited to claims against conduct at issue in the litigation, and so long as that conduct is not "clearly illegal," App.14a-17a.

Of the handful of objectors to the settlement (out of settlement classes with over 100 million members), only two remain, but neither raises questions warranting this Court's review.

1. Petitioner Home Depot seeks review of the panel's decision holding that the district court did not abuse its discretion in approving the settlement, arguing that the release is unlawful *per se*. According to Home Depot, public policy *categorically prohibits* any and all releases of future antitrust claims, including releases limited to claims against the conduct challenged in the settled litigation, even where those claims were reasonably disputable during a decade-long lawsuit. Both courts below rejected this radical categorical public policy rule, and Home Depot falsely accuses the panel of announcing its own radical categorical rule—that public policy *categorically permits* any and all releases of future antitrust claims, even against unrelated conduct not yet committed that is clearly illegal. The panel made no such ruling. To the contrary, it held, along with all other federal courts that have addressed the issue, that prospective settlement releases of future antitrust claims are permissible so long as two conditions are satisfied.

First, a settlement may release only future claims that are based on the "identical factual predicates" of the settled claims, a requirement that "mirrors" the familiar res judicata standard precluding future claims arising out of the same nucleus of operative fact as claims resolved in prior litigation. App.19a. Second, a settlement may not release claims based on conduct that is clearly illegal, such as *per se* violations of the antitrust laws for which there are no credible defenses. The district court and the panel held only, and correctly, that the standard release here satisfies both of these requirements.

The circuit decisions that Home Depot says conflict with the decision below do not satisfy these critical requirements. The two cases on which it principally relies suggest only that public policy bars *general* prospective releases that effectively grant the released party an unrestricted *license* to subject the releasor to any future anticompetitive practices it wishes, even *per se violations* of the antitrust laws. The other cases it cites involved either the application of state law or estoppel principles. There is no circuit conflict.

Home Depot charges that the panel "flout[ed]" and "trampled" three of this Court's decisions that, it says, establish and apply the supposed public policy rule categorically barring prospective settlement releases of antitrust claims. But none of those decisions even involved a release. And when one reads the decisions in their entirety, rather than just the sentence fragments carefully tweezed from the opinions and misleadingly quoted in the petition, it is clear that they are actually at war with Home Depot's proferred rule.

Thus, far from being "well-established" in precedent, not a single reported federal case, at any level, adopts or even articulates Home Depot's supposed public policy rule. Not one. And it is easy to understand why there is no such case, for Home Depot's categorical rule would effectively preclude the settlement of any antitrust claim seeking injunctive relief. If an antitrust plaintiff were forbidden to enter into a negotiated compromise that permitted continuation of *any* feature of the defendant's challenged conduct, the parties would be condemned to litigate the equitable

claim to final judgment, unless the plaintiff withdrew, or the defendant conceded, the claim. Home Depot's radical "all or nothing" public policy rule has no middle ground, no room for compromise, and it is thus irreconcilable with the strong judicial policy encouraging settlement of litigation, especially complex antitrust, civil rights, and other class actions. *See Evans v. Jeff D.*, 475 U.S. 717, 732 (1986) (rejecting rule proscribing negotiated fee waivers in class litigation in part because rule would discourage settlement); *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (discussing policy encouraging voluntary settlement of employment discrimination claims); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement.").

Indeed, if Home Depot's categorical rule were actually adopted, private plaintiffs would surely be deterred from bringing claims for injunctive relief at all, which would defeat the very public policy on which Home Depot's entire argument depends.

Nor is there any merit in Home Depot's lament that the panel's holding will allow settling "antitrust violators" like the Blues to continue their schemes "free from any future private enforcement." Pet.32. As the panel noted, only class members would be barred from bringing suit asserting a released claim. App.16a. Any new post-settlement subscriber to a Blue plan, and there are thousands of subscribers added every day, is free to bring any antitrust claim the subscriber wishes, including claims released under the agreement. So too are state and federal en-

forcement authorities—none of whom chose to challenge the conduct released in this decade-long case. *Id.* And Home Depot itself, as an opt-out from the Rule 23(b)(3) class certified in connection with the settlement, is free to bring an antitrust claim against the Blues challenging any conduct it wishes, including practices permitted to continue under the settlement, seeking treble damages caused by that conduct and individualized injunctive relief remedying that conduct. Home Depot is thus free to seek injunctive relief permitting it to receive multiple Blue bids for its own business. Resp.App.2a-4a. What it is barred from bringing is a claim seeking a nationwide, universal injunction prohibiting the conduct that the settlement permits to continue.

The subscriber representatives whom Home Depot disparages committed enormous amounts of their time, financial resources, and expertise to challenging the Blues' restraints in this massive multidistrict litigation. Home Depot, alone among 100 million class members, rises to object that "public policy" required the subscriber representatives to eschew the settlement's *certain* "historic" structural reforms and monetary relief and to go for broke, to fight on for "many years of further litigation ... in [the district court below and] dozens of other jurisdictions," App.88a, no matter how costly or how *uncertain* the result, all on the theory that subscribers were forbidden from prospectively releasing *any* of their equitable claims against *any* of the Blues' challenged conduct on *any* terms short of total capitulation by the Blues. Home Depot demands such "never settle" absolutism from the class, even though it never joined the litigation,

and has yet to file its own opt-out complaint.

Home Depot's petition should be denied.

2. Petitioner Behenna seeks review of two questions: (1) whether courts are required, or merely permitted, to apply the percentage method when determining fees in connection with a common-fund settlement; and (2) whether in applying the percentage method, a court may presume that a fee of 25% or less of the fund is reasonable. But Behenna raised neither question below, and they are thus forfeited. Even worse, Behenna stressed below that he had deliberately "waive[d]" any argument that the district court erred in applying the percentage method to the fee award attributable to the common-fund recovery. *See infra* at 42-45. Behenna is thus seeking consideration of questions that are not properly before the Court. *See Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

Equally fatal to Behenna's petition is the disconnect between the questions he presents and his argument for why the decisions below are wrong. Behenna's central contention is that the district court was *required* to apply the lodestar method because the claims here were brought under a statute that provides for fee-shifting. But his questions are premised on the very different, indeed irreconcilable, notion that courts have discretion to apply *either* the lodestar or the percentage method in a common-fund case like this one.

Finally, even assuming the Eleventh Circuit required application of the percentage method in com-

mon-fund cases, that precedent hardly presents a serious conflict with cases that merely permit that method. Subtle differences notwithstanding, the percentage method is generally favored in common-fund cases throughout the federal judiciary. Behenna's attempt to manufacture a conflict with this Court's jurisprudence concerning the interpretation of fee-shifting statutes does not work either, for *none* of those decisions involved common-fund recoveries. And Behenna's argument regarding a supposed circuit split with respect to the use of "benchmark" percentages falls apart upon examination of the decisions he cites, which make clear that there is little practical difference in the approaches taken by the lower courts.

Behenna's petition should be denied.

STATEMENT

A. The Litigation

Over the ten-year course of this intensely adversarial litigation, the district court resolved over a dozen motions to dismiss. *Id.* The parties engaged in a massive discovery effort involving, *inter alia,* over 150 discovery motions, subscribers' successful challenges to hundreds of thousands of privilege assertions, production of terabytes of health insurance data, review of over 15 million pages of documents, and depositions of over 120 fact and expert witnesses. *Id.* *See* App.98a, 101a. Throughout this period, none of the large "self-funded" companies (like Home Depot) who purchase ASO plans, *see supra* note 2, sought to join the litigation on behalf of any such plans; nor did any government antitrust enforcement agency.

After several rounds of summary judgment motions, the district court in 2018 granted subscribers' motion for partial summary judgment on the standard of review, ruling that the *per se* standard should apply to the Blues' "aggregation" of alleged anticompetitive practices. App.4a; *see In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1267 (N.D. Ala. 2018). As the panel noted, the "district court did not rule on the standard that would govern individual restraints," such as the Blues' use of Exclusive Service Areas ("ESAs") for each plan's use of Blue marks, "if considered separately." App.4a (citing 308 F. Supp. 3d at 1258); *see* App.107a. The district court also recognized that the Blues had asserted an affirmative defense that they constituted a single economic enterprise with respect to their joint conduct relating to the Blue marks—a defense on which genuine disputes of material facts remained for trial. *Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d at 1263-66. The Blues unsuccessfully sought interlocutory review of the standard of review ruling. *In re Blue Cross Blue Shield Antitrust Litig.*, 2018 WL 7152887 (11th Cir. Dec. 12, 2018).

B. The Settlement

Even as the litigation continued, the parties in 2015 began intensive discussions to settle the dispute. Their negotiations were facilitated by experienced professional mediators but failed to gain traction, and so the district court charged the special master with assisting the effort. Over the course of the next three years, the special master conducted scores of meetings, calls, and mediation sessions. App.49a-50a.

The parties ultimately sought to negotiate a comprehensive settlement that would resolve the claims not only of fully-insured subscribers, but also of purchasers of "self-funded" plans. Accordingly, independent "self-funded counsel and a self-funded claimants' class representative were appointed to represent separately the self-funded claimants during the settlement negotiations." App.6a. Counsel for self-funded claimants received access to the discovery record and engaged independent experts to analyze damages and to assist in assessing possible settlements and in determining and negotiating a fair allocation of any settlement fund. App.50a.

In 2019, after years of "protracted, complicated, and challenging" negotiations, *id.*, the parties agreed to injunctive relief providing for substantial structural reforms to the Blue system. They next negotiated and agreed upon a $2.67 billion common fund. Over the following year, the parties worked, under the special master's continuing supervision, to memorialize their agreement in a comprehensive settlement agreement. App.50a-51a.

The relevant features of the agreement (excerpts of which are at App.175a-265a) include:

Settlement Classes. The agreement called for certification of classes under both Rule 23(b)(2) and 23(b)(3). The mandatory (b)(2) class sought *indivisible* injunctive relief—*i.e.*, injunctive relief that by its nature applies "as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). The (b)(3) class sought mone-

tary damages and *divisible* injunctive relief—*i.e.*, *individualized* relief available when each "class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Id.* (emphasis in original). The (b)(2) and the (b)(3) classes each included fully-funded and self-funded accounts; in addition, a "Self-Funded Sub-Class" was separately represented by "Self-Funded Sub-Class Counsel."

Settlement Fund. The agreement establishes a common fund of $2.67 billion, "one of the largest antitrust class settlements in history." App.98a. The Blues have no reversionary interest in the funds to be distributed to class members. App.243a.

Structural Relief. The district court found that although the monetary relief was extraordinary, "the truly exceptional aspect of this settlement is the structural relief." App.99a. The district court found that these "historic" reforms, App.50a, would provide "transformative, pro-competitive injunctive relief that will benefit" the class, App.140a, by "creating opportunities for more competition in the market for the purchase and administration of health insurance," App.60a. The structural reforms include:

- **Elimination of Restrictions on Competition by Non-Blue-Branded Companies.** The settlement requires the Blues to "eliminate and no longer enforce" their "National Best Efforts Requirement" ("NBE"), which was viewed by the subscribers to be "the most significant" of the Blues' competitive restraints. App.99a. The NBE had required each

Blue to generate at least two thirds of its national health revenues from Blue-branded businesses, thereby restricting their ability to compete using non-Blue, or "Green," brands. App.216a. The district court found that elimination of the NBE "unleashes Green competition, which will directly benefit the class." App.61a.

- **Promotion of Competition for National Accounts.** The settlement secures several reforms that will promote competition among the Blues for large national accounts, which are typically self-funded. Most importantly, each "Qualified National Account" (certain large accounts with geographically-dispersed employees that together account for 33 million subscribers) may now request a so-called "Second Blue Bid"—a second, previously prohibited bid from the Blue of its choice. App.220a-221a. Other provisions revise the Blues' bidding and "ceding" rules in order to open up opportunities for many accounts with a presence in multiple service areas to seek and obtain additional Blue bids. App.219a-220a; *see* App.61a-62a (summarizing reforms). These reforms "will produce additional choices for accounts and increased competition." App.62a.

- **Reforms to Other Rules and Policies.** The settlement includes additional pro-competitive reforms, including (i) restricting the application of "Local Best Efforts" requirements that capped "Green" contributions to revenues within a Blue's service area, App.6a-

7a; (ii) limiting the restrictions that can be placed on the acquisition of Blue Plans, App.62a-64a; (iii) eliminating or limiting restrictions on contracts between self-funded accounts and healthcare provider-vendors, App.217a-218a; and (iv) imposing restrictions on the use of "Most Favored Nation Differential" clauses in provider contracts, App.224a-226a.

- **Monitoring Committee.** The settlement establishes a Monitoring Committee to oversee the Blues' compliance with the settlement, to mediate certain disputes, and to review relevant Blue rules changes. App.227a-230a. The Committee "affords the Settlement Classes and the court substantial assurance of the Settling Defendants' compliance with the Settlement." App.65a.

The Release. The Blues would not have agreed to the settlement, of course, without a release. Modeled on releases approved in Eleventh Circuit and other cases, *see, e.g.*, *In re Managed Care*, 756 F.3d 1222 (11th Cir. 2014); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472 (E.D.N.Y. Dec. 16, 2019); App.19a-20a, the release was limited to claims relating to the practices and policies that subscribers had challenged. As the parties expressly stated in the agreement, in order "to put to rest with finality this controversy," the subscribers release "all claims that have been or could be asserted against Settling Defendants *based on the allegations in the Subscriber Actions*[.]" App.177a (emphases added).

The release provides that class members who have not opted out of the (b)(3) class release all claims "based upon, arising from, or relating in any way to" (i) the "factual predicates of the Subscriber Actions" as described in the relevant complaints; (ii) "any issue raised in any of the Subscriber Actions by pleading or motion;" or (iii) "mechanisms, rules, or regulations" adopted by the Blues that are "within the scope" of the agreement's structural relief provisions and are "approved through the Monitoring Committee Process." App.197a-198a. Members of the (b)(2) class who, like Home Depot, opt out of the (b)(3) class retain the right to assert claims for treble damages and for divisible, individualized injunctive relief, which includes, as the district court made clear, "the right to pursue in litigation more than one Blue bid based upon an Opt-Out's individual business and the facts and circumstances of the individual claims." Resp.App.2a. *See* App.10a.

C. Settlement Approval and Fee Petition Proceedings

After conducting a day-long hearing, the district court preliminarily approved the settlement, preliminarily certified the settlement classes, and approved a comprehensive notice plan. App.52a-53a. Direct notice of the settlement was sent to over 100 million class members, App.73a, and was supplemented by a "robust consumer media campaign," App.74a-76a. More than eight million claims were submitted. N.D.Ala.Doc.3029. Only 2,049 subscribers elected to opt out, and only 40 timely objections were submitted on behalf of 123 objectors—an objection rate of only slightly more than one in a million. App.102a.

In September 2021, subscribers moved for final approval of the settlement. N.D.Ala.Doc.2812. The motion was supported by fact and expert declarations and other voluminous materials affirmatively supporting the settlement's fairness, reasonableness, and adequacy and responding in detail to the objections.

The settlement agreement included a provision under which subscriber counsel would be permitted to seek a fee and expense award "up to a combined total of 25% of $2.67 billion." App.239a.[3] Subscriber counsel ultimately filed a detailed fee petition explaining why Rule 23(h), Eleventh Circuit precedent, and a "lodestar cross-check" confirmed the reasonableness of their request for an award of fees representing 23.47% of the common fund. App.142a-143a. The request was supported by a declaration from the special master attesting that counsel had incurred over $40 million in out-of-pocket litigation expenses, a counsel declaration detailing the colossal effort required to litigate the case that, as of August 2020, had resulted in a lodestar of just under $200 million, and reports by two experts who independently concluded that the requested award was reasonable. N.D.Ala.Doc.2733.

The district court conducted a fairness hearing in October 2021 spanning two full days, hearing arguments and testimony from the parties and from several objectors, including Home Depot and Behenna.

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[3] Fee negotiations began after the parties had agreed in principle on monetary and equitable relief for the class. App.50a.

D. The District Court's Decisions

In August 2022, Judge Proctor issued a comprehensive decision approving the settlement, App.46a-172a, and a separate order approving subscriber counsel's fees and expenses, Resp.App.6a-13a. The court thoroughly analyzed the settlement in accordance with the criteria established under Rule 23(e)(2) and governing Eleventh Circuit precedent, and determined that it was fair, reasonable, and adequate. App.83a-104a.

The decision included a detailed analysis of the objections to the settlement. App.104a-150a. As relevant here, the court found that owing in part to the settlement's "historic" structural reforms, which made "material changes to the Blues' going-forward system which add significant procompetitive features," the post-settlement Blue system "is not clearly illegal." App.109a. The court overruled Home Depot's objection that public policy categorically prohibits, as a matter of law, settlements that release future antitrust claims. App.112a-122a. The court held that public policy does not bar the release here because it reaches only future claims that "by definition arise from continued adherence to the existing arrangements that are 'the factual predicates of the Subscribers Actions' or the injunctive relief provided under the Agreement." App.122a. It also rejected Home Depot's challenge to the Monitoring Committee, finding that "the only new rules and regulations [approved by the Committee] that may be subject to the release are those based on an identical factual predicate and related to the injunctive relief provided" under the settlement. App.120a.

The court also approved the fee petition. After analyzing the parties' voluminous supporting submission and Behenna's objection, it found that the requested percentage fee award of 23.47% was a reasonable common-fund award. App.138a-147a; Resp.App.6a-13a. The requested award was "well within the reasonable range" established under circuit precedent, App.142a, and was below 25%, which "is generally recognized as a reasonable fee award in common fund cases." *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1243 (11th Cir. 2011); *see* App.142a-143a. But the court did not end its analysis there. Instead, it conducted a lodestar cross-check and thoroughly considered the "*Johnson*" factors[4] informing the analysis of common-fund percentage awards. App.143a-147a. These additional analyses confirmed that the fee was reasonable. App.143a. The court overruled Behenna's objection that the fee request was governed by lodestar principles applicable to fee-shifting statutes, rejecting Behenna's contention that the settlement did not create a common fund: "Through their efforts in resolving this case, Subscribers' Counsel created a common fund. That is an unassailable fact." App.141a.

E. The Eleventh Circuit's Decision

Four objectors appealed the district court's decision, but Home Depot alone raised a public policy challenge to the release, and only *pro se* appellant Be-

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[4] *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *abrogated in part by Blanchard v. Bergeron*, 489 U.S. 87 (1989).

henna challenged the fee award. In a unanimous decision authored by Chief Judge Pryor, a panel of the Eleventh Circuit concluded that the district court did not abuse its discretion in approving the settlement and the fee petition. App.1a-45a.

The panel rejected Home Depot's contention that public policy favoring private antitrust litigation "categorically prohibit[s] releases of future antitrust claims." App.15a. Noting that "releases of future claims are an important part of many settlement agreements," App.14a, the panel cited a number of cases in which the Eleventh Circuit and its "sister circuits" had "approved and enforced prospective releases in antitrust cases," App.15a. Settlements including prospective antitrust releases are permissible, the court held, so long as they do not perpetuate clearly illegal conduct and release only "claim[s] based on the identical factual predicate as that underlying the claims in the settled class action." App.19a (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 377 (1996)). The court agreed with the district court (and the parties) that the language of the release, which was "no broader than other releases [the court has] approved," *id.*, "does not bar ... any claims related to conduct that was not challenged in the underlying lawsuit," App.20a. The panel also held that the district court did not abuse its discretion in finding that the post-settlement Blue system, including the ESAs, would not be clearly illegal in light of the procompetitive structural reforms provided by the settlement. App.17a-18a.

The panel also rejected Behenna's appeal of the

fee award. App.39a-42a. It concluded that Behenna had not before raised, or even "hinted at," the argument he pressed on appeal—that the district court erred by not conducting a "bifurcated analysis" that (a) used the lodestar method to assess fees attributable to work securing the settlement's injunctive relief and (b) used the common-fund method to assess fees attributable to work securing the monetary relief. App.39-40a. Accordingly, "Behenna forfeited that issue." App.40a. The panel went on to observe that even if Behenna had raised his novel bifurcation argument below, it was meritless. Because the settlement created a common fund, the district court acted appropriately, under long-standing precedent, both in using the percentage-of-the-fund method to assess the reasonableness of any award, and in applying that method to the facts. App.40a-42a. Noting that the district court had confirmed the award's reasonableness by performing a lodestar cross-check and a *Johnson* analysis, the panel concluded that the district court's "thorough analysis followed our precedents and was not an abuse of discretion." App.42a.

Home Depot and Behenna both unsuccessfully sought rehearing en banc. App.174a.

REASONS FOR DENYING THE PETITIONS

I. HOME DEPOT'S PETITION SHOULD BE DENIED

A. The Panel's Decision Is Fully Consistent With This Court's Precedent

The only way Home Depot can claim the panel

"disregarded," "flout[ed]," and "trampled this Court's antitrust precedents," Pet.21, 24-25, is by seriously mischaracterizing both the panel's decision and this Court's precedents.

1. Home Depot Mischaracterizes the Decision Below

a. Home Depot argued below, and repeats here, that public policy categorically prohibits releases of future antitrust claims. App.15a. The panel below rejected that absolutist view: "Public policy does not categorically prohibit releases of future antitrust claims." *Id*.

Home Depot mischaracterizes that unambiguous statement to mean the panel held that public policy *never* prohibits *any* prospective releases in antitrust cases. According to Home Depot, "the Eleventh Circuit's ruling is categorical: there is *no prohibition* on releasing future antitrust claims." Pet.32 (emphasis added); *see* Pet.21 (panel "held that *nothing* in federal law 'prohibits prospective releases in antitrust cases,' period" (emphasis in original)); Pet.3 ("The Eleventh Circuit blanketly 'approved prospective releases of antitrust claims.' "). Home Depot thus falsely asserts that the Eleventh Circuit has held that an antitrust plaintiff may prospectively release defendants from future antitrust liability for *anything*, including new, unrelated future conduct that is an admitted or obvious *per se violation* of the antitrust laws.

Home Depot's charge is belied by the panel's discussion of the caselaw holding that public policy *does prohibit* a prospective release of a disputed antitrust

claim in a settlement *unless* two conditions are satisfied: (1) the released future claim must be based on the "identical factual predicates" of the claims that were asserted, or could have been asserted, in the underlying suit, and (2) those factual predicates must not encompass conduct that is clearly in violation of the antitrust laws. App.13a-19a.

With respect to the first condition, the panel noted the identical-factual-predicate requirement largely "mirrors" the familiar standard for precluding claims under res judicata: "Under the identical-factual-predicate doctrine, a settlement agreement may release claims that share a common nucleus of operative fact with the claims in the underlying litigation." App.19a. The panel then turned to the specific language of the release here, and interpreted it, like the district court, to be limited "to claims arising from the factual predicates of the subscriber action. … The release does not bar any claims that could not have been litigated before settlement or any claims related to conduct that was not challenged in the underlying lawsuit." App.20a.

The court also reaffirmed its precedent holding that a settlement prospectively releasing antitrust claims may not be approved if it "perpetuates clearly illegal conduct," App.13a, but a settlement may be allowed to "perpetuate conduct when its illegality is uncertain." App.17a. In other words, the parties to an antitrust suit are permitted to enter a settlement agreement that prospectively releases a *disputed and disputable claim* of illegality under the antitrust laws, but not an admitted or otherwise *clear violation* of those laws. The panel agreed with the district court

that in light of the sweeping systematic reforms required by the settlement, the conduct the Blues were permitted to continue was not clearly illegal under the antitrust laws.[5]

In short, the panel did not hold, as Home Depot states, that public policy categorically permits *any and all* prospective releases in antitrust settlements. It held only that public policy permits such releases under well-recognized and defined limitations, and that the release here fell well within those limitations. There is nothing noteworthy, let alone certworthy, with respect to either holding.

b. Home Depot argues that the language of the release, contrary to the panel's "blinkered" and "cramped" interpretation, Pet.15, 28, broadly "covers claims that did not exist before the settlement and, indeed, could not have been litigated." Pet.23; *see* Pet.2, 13, 26. Home Depot is alone in its insistence that the release would preclude claims challenging as

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[5] Home Depot criticizes the panel for suggesting the settlement was valid because "it does not perpetuate clearly illegal conduct," Pet.26 (cleaned up), arguing this Court has never indicated that prospective releases are permissible "so long as a *court has not yet held* that the alleged restraint" is illegal. Pet.26-27 (emphasis added). An anticompetitive restraint could potentially be "clearly illegal" even if it has never been actually challenged and adjudicated as such, and the panel did not suggest otherwise. The panel merely noted that no court has held the Blues' ESA system to be *per se* violative of the antitrust laws, but its actual holding was that the post-settlement system would not be clearly illegal. App.18a. Home Depot itself conceded this in the district court: "Uncertainty exists regarding the illegality of the go-forward [*i.e.*, post-settlement] [Blue] system both as a factual matter and a legal matter." N.D.Ala.Doc.2875 at 4.

anticompetitive any future Blue conduct that is new and different from that challenged in this case.

First, both the subscribers and the Blues, as well as both courts below, are united in their understanding that the commonplace language of the release reaches, in the district court's words, only claims that "arise from continued adherence to the existing arrangements that are 'the factual predicates of the Subscribers Actions' or the injunctive relief provided under the Agreement." App.122a. And after the district court made clear that the release did not bar opt-out claims for individualized injunctive relief, including multiple Blue bids, *none* of the other 122 objectors complained about the scope of the release. The language of the release here, moreover, is materially indistinguishable from releases consistently upheld by the courts of appeals. *See* App.19a-20a (citing cases); *see also, e.g.*, *In re Gen. Am. Life Ins. Co. Sales Pracs. Litig.*, 357 F.3d 800, 803 (8th Cir. 2004); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 339 (3d Cir. 2010).

Second, Home Depot's repeated assertion that the language of the release precludes "new claims for injunctive relief that could not have been brought during the litigation," Pet.23, is wrong. Nowhere does Home Depot mention the language elsewhere in the settlement agreement expressly stating what it "releases": *"all claims that have been or could be asserted against Settling Defendants based on the allegations in the Subscriber Actions*[.]" App.177a (emphasis added). Nor does Home Depot mention that the release contains its own interpretive standard: it is to be construed to extend "to the fullest extent permitted by

law," App.244a-245a, which the parties fully understood to limit its scope to future disputed claims based on "the allegations in the Subscriber Actions."[6] App.177a. And in any event, both courts below *held* that the release is limited to future claims based on the identical factual predicate as the settled claims, and *that* conclusively limits it as such in future cases.

In sum, Home Depot's attack on the panel's reading of the release is as meritless as it is uncertworthy.

c. Throughout the petition, Home Depot carefully ignores the critical distinction between a *disputed and disputable claim* that challenged conduct constitutes an antitrust violation, which can properly be released from future liability in a settlement, and challenged conduct that *is a certain, or per se, antitrust violation*, which cannot. Thus, it wrongly charges that the courts

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[6] Home Depot also complains that the release covers "any" post-settlement Blue rules approved by the Monitoring Committee. Pet.2, 12, 23. But once again, the decisions below flatly rejected Home Depot's reading of the release, finding that it covers *only* those post-settlement rules that are "within the scope" of the injunctive relief provisions of the settlement agreement and that are approved as such by the Committee. *See* App.18a, 20a, 66a-67a, 118a-120a. "Any new agreement or anticompetitive restraint that is above and/or beyond those within the scope of the Settlement *is not released* and can be subject to a legal challenge." App.120a (emphasis added). Far from expanding the release beyond the factual predicates of the litigation, the Monitoring Committee provisions provide a process by which subscriber representatives can review new rules to ensure their consistency with the relief provided under the settlement. The Committee thus "affords the Settlement Classes and the court substantial assurance of the [Blues'] compliance with the Settlement." App.65a. *See also* App.7a.

below approved a release "that not only perpetuate[s] ongoing antitrust *violations* but also immunize[s] the violator[s] from future claims challenging those *violations*." Pet.15 (emphases added); *see* Pet.2, 16. As discussed above, *supra* at 16, 18, 20-22, the courts below took care to determine that the challenged conduct that would be covered by the release was *not* clearly in violation of the antitrust laws. App.17a-18a; App.106a-109a. The settlement prospectively releases only hotly *disputed and disputable claims*, not anything "clearly illegal."

2. Home Depot Mischaracterizes this Court's Precedents

Home Depot says the panel "disregarded and misread this Court's precedents regarding the release of future antitrust claims." Pet.24. Yet none of the three cases it cites even involved a release. And Home Depot supports this charge only with context-free sentence fragments misleadingly extracted from the Court's opinions.

a. Home Depot places its heaviest reliance on *Lawlor v. National Screen Service Corp.,* 349 U.S. 322 (1955), arguing that the panel "disregarded" the decision in holding that the identical-factual-predicate doctrine permits an antitrust plaintiff to prospectively release "claims that share a common nucleus of operative fact with the claims in the underlying litigation." App.19a. Although Home Depot agrees with the panel that the identical-factual-predicate doctrine largely "mirrors res judicata," Pet.28-29 (quoting App.19a), it says that ordinary principles of claim preclusion are "irrelevant here," for they are overridden

by "the separate substantive principle of antitrust law prohibiting the prospective release of antitrust claims." Pet.28-29. Home Depot chides the panel for not even citing *Lawlor*, "a telling omission," it says, given that "*Lawlor* [is] this Court's foundational decision on prospective releases of antitrust claims." Pet.24.

To start, far from a "foundational decision" on prospective antitrust releases, *Lawlor* did not involve a release at all, prospective or otherwise. The case concerned only a question of res judicata: "whether the plaintiffs in the present [1949] suit are suing upon the 'same cause of action' as that upon which they sued in 1942 and lost." *Lawlor*, 349 U.S. at 326. And *Lawlor's* res judicata analysis offers no support for—indeed, it is at war with—Home Depot's supposed categorical rule "prohibiting the prospective release of antitrust claims." Pet.29.

Plaintiffs in *Lawlor* were middlemen in the movie poster business, buying copyrighted advertising posters from major movie producers and leasing them to theater operators. By 1942, three producers had granted exclusive licenses to National Screen to manufacture and distribute posters to theater operators, and plaintiffs brought an antitrust action claiming that National Screen and the producers had conspired to establish a monopoly in poster distribution. *Lawlor*, 349 U.S. at 324. In 1943, the parties entered a settlement in which National Screen agreed to grant sublicenses to plaintiffs to distribute posters, and the case was voluntarily dismissed with prejudice. *Id.* In 1949, plaintiffs filed a second antitrust suit, but this time they sued not only the same producers, but also five

additional major producers, all of which had licensed their posters exclusively to National Screen after the dismissal of the prior suit. *Id*. at 324-25. Plaintiffs also alleged new anticompetitive acts by the defendants, including deliberately slow and erratic deliveries and tying arrangements. *Id*. at 328.

Defendants argued that plaintiffs' claims were precluded because the 1943 judgment dismissing the prior case was res judicata. This Court began its analysis by noting that "the conduct presently complained of was all subsequent to the 1943 judgment." *Id*. And that is where the analysis would have ended under Home Depot's supposed rule categorically prohibiting prospective antitrust releases (if the case had actually involved a release). But the Court then emphasized, critically, that the 1949 suit not only alleged "new antitrust violations[, including] ... deliberately slow deliveries and tie-in sales, among others," but also named five new producers that "did not even enter the alleged conspiracy until after the judgment on which they now rely[.]" *Id.* at 328-30. It followed that "the 1943 judgment ... cannot be given the effect of extinguishing claims *which did not even then exist and which could not possibly have been sued upon in the previous case*." *Id.* at 328 (emphasis added). Accordingly, while both suits may have involved "essentially the same course of wrongful conduct," they plainly were not "based on the *same* cause of action." *Id.* at

327 (emphasis added).[7]

Lawlor is thus in perfect harmony with the decision below. Nowhere in any of the opinions in the case is there any mention of a release, which alone explains why the panel did not address the case. But if the settlement of the 1943 action in *Lawlor* had actually included a prospective release, the identical-factual-predicate analysis applied by the panel below would have substantially "mirrored" the *Lawlor* Court's res judicata analysis and compelled the same result: the hypothetical 1943 release could not have validly precluded plaintiffs from bringing their 1949 antitrust claim because the latter claim was based on a *different* conspiracy involving *additional* conspirators engaged in *new* anticompetitive practices. Here, in contrast, the release reaches only future claims based on the identical factual predicate as the claims that were, or could have been, asserted in this case.[8]

[7] The Court also rejected defendants' strange argument that plaintiffs were precluded from bringing their 1949 suit because they had agreed in the prior case to dismiss their injunctive relief claim. Reiterating that the latter suit did not assert "the same cause of action" as the earlier suit, the Court noted that "[a]cceptance of [defendants'] novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata." *Id.* at 329. The Court thus rejected a theory of res judicata that would interpret the stipulated dismissal of an injunctive relief claim as precluding a future antitrust claim based on different factual predicates.

[8] Home Depot emphasizes that "each act in furtherance of a continuing anticompetitive conspiracy that injures a plaintiff creates a new factual predicate for a new claim, even if the basic

b. Home Depot also relies heavily on a sentence fragment in a footnote in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) Quoting that fragment, torn from its context, Home Depot says that "a 'prospective waiver of a party's right to pursue statutory remedies for antitrust violations' should be 'condemn[ed] … as against public policy.' " Pet.14 (quoting *Mitsubishi*, 473 U.S. at 637 n.19); *see id.* at 21-22, 24, 27, 29, 32-33. According to Home Depot, *Mitsubishi* flat-out held that prospective releases of all antitrust claims are categorically forbidden, and the panel "waved [it] aside" in ruling otherwise. Home Depot is mistaken.

Mitsubishi involved an antitrust dispute among parties to an international sales agreement that contained both an arbitration clause and a choice-of-law clause. Citing the "liberal federal policy favoring arbitration agreements," *Mitsubishi*, 473 U.S. at 625, the Court's principal holding was that the arbitration clause could be enforced to compel the international arbitration of a Sherman Act claim, notwithstanding the public policy encouraging antitrust enforcement through private federal litigation. The footnote cited

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nature of the conspiracy remains unaltered." Pet.22. None of the decisions cited for this proposition support its challenge to the release. *Lawlor*, as we have demonstrated, addressed a very different preclusion argument, involving a new and very different antitrust conspiracy. And the relevant discussions in both *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997), and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), concerned claim accrual for statute of limitation purposes; neither addressed the application of res judicata or the scope of a permissible release.

by Home Depot addressed the concern of certain amici that the choice of law provision, which called for application of Swiss law "in all respects," could be interpreted by the arbitral panel to require decision "under Swiss law rather than the U.S. Sherman Act," thus precluding the federal antitrust claim altogether. *Id.* at 637 n.19. The Court dismissed the concern, noting that if "choice-of-forum [international arbitration] and choice-of-law [Swiss] clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.*

The panel, unlike Home Depot, read the *entire* footnote to mean exactly what the *entire* footnote says: "The [*Mitsubishi*] Court was concerned about the complete absence of a statutory remedy for any antitrust violation: ... it stated only that categorically barring parties from seeking relief under the Sherman Act regardless of the underlying claim would violate public policy." App.15a-16a. In other words, public policy forbids an agreement in which one party prospectively waives the protections of federal antitrust laws *altogether*, effectively denying the party access to *any forum* "to pursue statutory remedies for antitrust violations." That is a far cry from the context of an agreement, as here, settling hotly disputed, and disputable, class claims in antitrust litigation, where the class, in *exercising in a court of law* its "right to pursue statutory remedies for [alleged] antitrust violations," has prospectively released only certain equitable claims based on the identical factual predicate of the settled claims. As the panel noted, nowhere in *Mitsubishi* did

this Court "hold that *every* prospective release of antitrust claims would violate public policy[.]" App.16a (emphasis in original).

c. Finally, Home Depot cites *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), but only in passing. It places its real reliance on the Justice Department's amicus brief, snippets from which it quotes throughout the petition. Pet.1, 8, 21-22, 30-31. The problem with relying on the brief, however, is that this Court flatly rejected the Department's position. But Home Depot has a much bigger problem, for *Italian Colors* eviscerates the public policy rationale on which Home Depot's entire argument is founded.

The plaintiffs in *Italian Colors* were merchants that brought an antitrust class action claiming that American Express used monopoly power to extract supra-competitive fees. Their agreement with American Express required that any dispute be resolved by arbitration on an individualized basis, not on a class basis. The plaintiffs, supported by the Justice Department, based their challenge to that clause on the undisputed fact that the cost to each merchant of individually arbitrating its claim would far exceed the claim's value, even after trebling; the clause would thus effectively deny them *any* recourse under the antitrust laws. The arbitration clause thus fell squarely within, plaintiffs argued, *Mitsubishi's* public policy ban on "agreements that 'operat[e] ... as a prospective waiver of a party's *right to pursue* statutory remedies'" for antitrust violations. *Italian Colors*, 570 U.S. at 235 (quoting *Mitsubishi*, 473 U.S. at 637 n.19). The Court nonetheless upheld the clause, reasoning that

the class action waiver did not eliminate the merchants' "right to pursue" statutory antitrust remedies, but rather "merely limits arbitration to the two contracting parties." *Id.* at 236. That the claim "is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* (emphasis in original).

Home Depot's supposed categorical public policy prohibition on settlement agreements prospectively releasing antitrust claims is at odds with *Italian Colors*. For if the public policy favoring private antitrust enforcement does not forbid a general provision in a commercial contract that effectively denies *any* forum to countless potential antitrust plaintiffs, then surely it does not forbid an agreement, as here, that compromises disputed antitrust class claims where the class has, for over a decade, *exercised in a court of law* its "right to pursue statutory remedies for antitrust violations" and has prospectively released only future equitable claims based on the identical factual predicate of the claims asserted in the underlying action.

In short, it is Home Depot that "trample[s] this Court's antitrust precedents." The panel followed and obeyed them.

B. There Is No Circuit Split

Home Depot likewise fabricates a supposed four-to-three circuit split based on its mischaracterization of the panel's decision and its misreading of the circuit court decisions alleged to conflict with it. There is no such conflict.

1. As discussed, *supra* at 20-22, Home Depot

wrongly asserts that the panel announced a categorical rule allowing a settlement to release *all* claims based on future conduct, no matter how obviously illegal that conduct is and no matter how unrelated to the claims being settled. The panel announced no such rule. Instead, it held that prospective settlement releases are permissible so long as they comply with the identical-factual-predicate doctrine and do not perpetuate clearly illegal conduct. App.17a-20a. Home Depot fails to cite a single case holding—or even suggesting—that it is impermissible for a settlement to release defendants from future claims based on the same factual predicates as the settled claims, where the challenged conduct is not clearly illegal.

Redel's Inc. v. General Electric Co., 498 F.2d 95 (5th Cir. 1974), the case upon which Home Depot relied most heavily below, did not involve a litigation settlement release at all, much less a release of future claims premised upon the identical factual predicate of specific conduct challenged in an antitrust dispute. Rather, it involved the interpretation of a "general release provision" in a franchise agreement that blanketly released the franchisor "from all claims, demands, contracts, and liabilities ... as of the date of the execution of this [franchise] agreement." *Id.* at 97. *See* App.16a. The issue was whether that general release barred the franchisee's claim for price discrimination the franchisor was alleged to have committed both before and after executing the agreement.

The Fifth Circuit held that the release's "unambiguous" language made clear that it applied only retrospectively, and so it protected the franchisor from legal liability *of any kind*, including antitrust liability,

only for conduct that predated the agreement. *Redel's*, 498 F.2d at 98-99. The court went on to note, in dicta, that public policy considerations would in any event prevent the "prospective application of a *general* release to bar private antitrust actions arising from subsequent *violations*" of antitrust laws. *Id*. at 99 (emphases added). This passage thus stands for the unremarkable proposition that public policy prohibits enforcement of a *general* release granting the released party an unrestricted *license* to commit against the releasor whatever future antitrust "violations" it chooses to. The panel was thus manifestly correct in reading *Redel's* to hold only that public policy would prohibit a prospective release "if it were to bar claims arising from later antitrust violations without any factual or temporal limitation." App.16a.

Far from conflicting with the decision below, *Redel's* says nothing about the validity of standard prospective releases in settlement agreements compromising antitrust class actions, let alone that such releases are categorically barred. *See Payment Card*, 2019 WL 6875472, at *26 (*Redel's* condemned a general release that "broadly released 'all claims, demands, contracts, and liabilities' without narrowing the scope to antitrust violations alleged or that could have been alleged or those based on continuing conduct.").

Redel's relied on the Eighth Circuit's decision in *Fox Midwest Theatres, Inc. v. Means*, 221 F.2d 173 (8th Cir. 1955), which is distinguishable for the same reason. *Fox* involved the application of the parol evidence rule in connection with a dispute over the inter-

pretation of a settlement agreement resolving a theater operator's antitrust claims against a competing theater operator and eight movie producers, alleging that the defendants had conspired to place the plaintiff operator "in an … inferior film playing position." *Id.* at 175. At issue was the meaning of the agreement's general release provision, which defendants contended was included merely "out of abundance of caution" to make clear that the release would not be construed "to have discharged future claims, demands and causes of action" by the plaintiff. *Id.* The Eighth Circuit rejected this interpretation, concluding that it would render the provision "contractually meaningless," for if the plaintiff theater operator had given such an unlimited general release of "continued *or new* ... conspiratorial acts," it would be unenforceable: "Any contractual provision which could be argued to absolve one party from liability for future *violations* of the anti-trust statutes against another would to that extent be void as against public policy." *Id.* at 180 (emphases added).

Like *Redel's*, *Fox* thus stands for the proposition that public policy prohibits a general release that effectively licenses the released party to commit any future antitrust violations at will against the releasor, no matter how clearly illegal. *Fox* says nothing about the validity of a prospective release that, far from "absolv[ing]" the defendant absolutely "from liability for future [antitrust] violations," applies only to disputed claims premised on the identical factual predicate of the claims underlying the settled litigation. *Id.*

Notably, the Eighth Circuit subsequently made

clear that antitrust class action settlements that "perpetuate[]" challenged pre-settlement conduct do not violate public policy so long as the conduct is not clearly illegal. *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123-24 (8th Cir. 1975). That is the identical principle applied by the panel below.

Home Depot also relies on a footnote in *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008), asserting that the Third Circuit "rejected the idea that a ... release *could bar* claims for 'events which occur after the execution of the release.' " Pet.18 (emphasis added). That is not true.

The issue in *Toledo* was whether the plaintiff's Sherman Act claim was barred by a prior settlement in which the parties entered a mutual release of all "claims ... as of the date of this release." 530 F.3d at 210 n.2; *see id.* at 215 n.7, 217. Given that clear language, the Third Circuit held only that the release "does not apply to claims for antitrust damages based on events which occur after the execution of the release." *Id.* at 218 n.9. The Third Circuit said nothing about whether a settlement release *could bar* claims for post-release events—let alone events that merely continue conduct challenged and settled in prior litigation that was not clearly illegal.[9]

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[9] The opinion includes a "cf." cite to the Third Circuit's earlier decision in *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975), for the parenthetical proposition that "parties may not waive liability for future antitrust violations." *Toledo*, 522 F.2d at 218 n.9. Again, this merely observes (in

Finally, Home Depot relies on two Sixth Circuit decisions, Pet.19-20, but neither helps its cause. *Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc.*, 648 F.3d 452 (6th Cir. 2011), held only that under the law of Tennessee, a general release covers only claims that were "in existence and within [the parties'] contemplation at the time it is executed." *Id.* at 459-60 (citing *Sherman v. Am. Water Heater Co.*, 50 S.W.3d 455, 459 (Tenn. Ct. App. 2001)) (internal quotation marks omitted). It did not address public policy considerations arising under federal antitrust law—or under any other federal law—concerning prospective settlement releases. The principle it applied is also consistent with the identical factual predicate doctrine applied by the panel here.

The other Sixth Circuit decision, *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, 386 F.2d 757 (6th Cir. 1967), is also inapposite. It did not involve a litigation settlement release. Rather, it involved review of a ruling that the plaintiffs were *estopped* from seeking antitrust damages allegedly caused by a regulation issued by the defendant because they had "participated" in the regulation's adoption. The trial court held that the plaintiffs' involvement had "in effect" compromised their claim, and they were thus estopped from seeking damages for injury caused by the board's post-regulation actions. *Id.* at 758-59.

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dicta) that a general release giving blanket immunity for future "violations"—*i.e.*, clearly illegal conduct—may be void for public policy reasons. That says nothing about the ability to release future claims against the conduct challenged in a particular case that was not clearly illegal.

The court of appeals reversed, holding that summary judgment as to the estoppel defense was unwarranted because the record did not establish that there were "undisputed facts showing *any* voluntary compromise and settlement of plaintiffs' treble damages claim." *Id.* at 759 (emphasis added). The court also observed that "[p]laintiffs *clearly* never signed any such release agreement" that would bar their damages claim. *Id.* (emphasis added). The necessary implication of this observation is that if the plaintiffs *had* signed an agreement narrowly releasing their specific treble damages claim, it would have been valid. For if the court believed, as Home Depot argues, that *any* prospective release of antitrust claims is categorically prohibited, that is all the Sixth Circuit would have needed to say. To be sure, the court did go on to state that if such a release had in fact been "executed in a fashion calculated to waive damages arising from future *violations* of the antitrust laws," that hypothetical general release of clear antitrust violations would violate public policy. *Id.* (emphasis added). The context of the court's statements makes clear it was not categorically prohibiting *any* agreement releasing *any* future antitrust claims. It certainly did not hold that settlement agreements prospectively releasing disputed claims limited to the same factual predicate as settled claims are somehow invalid. No court has held that.

In sum, none of the decisions cited by Home Depot hold that a settlement release is invalid if it releases future claims that (a) are limited to the identical factual predicate as the settled claims, and (b) are based on conduct that is not clearly illegal. Thus, none of

Home Depot's cases conflict at all with the panel's decision upholding the release here.

2. Home Depot attempts to embellish its claim that there is an "entrenched" circuit split by citing decisions from the Seventh and Second Circuits that are on the Eleventh Circuit's side of the alleged split. Pet.15, 17-18 (citing *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Ltd.*, 161 F.3d 443 (7th Cir. 1998) and *VKK Corp. v. Nat'l Football League*, 244 F.3d 114 (2d Cir. 2001)). Those decisions do indeed align with the decision below; but that merely means they do not conflict with decisions from any other circuits for the reasons described above.

Moreover, Home Depot fails to mention other decisions, in addition to *MCM* and *VKK*, that support the panel's analysis. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 108 (2d Cir. 2005) ("Class actions may release claims, even if not pled, when such claims arise out of the same factual predicate as settled class claims."); *Managed Care*, 756 F.3d at 1236) (because the challenged post-settlement conduct "merely constitute[d] a continuation of the conspiracy alleged" in the prior class action, it was appropriately covered by the release), *cert. denied Medical Ass'n of Georgia v. WellPoint, Inc.*, 574 U.S. 1153 (2015).

C. Adoption of Home Depot's Supposed Public Policy Rule Would Be Bad Public Policy

Far from compelled by public policy, a rule categorically prohibiting releases of future claims in antitrust settlements would be at war with sound public

policy.

As previously discussed, *supra* at 4-5*,* adoption of Home Depot's public policy rule would make it practically impossible for parties to compromise antitrust claims for injunctive relief, thus undermining the important public policy favoring the settlement of disputes, especially complex multidistrict class actions. This practical reality would also deter antitrust plaintiffs from bringing equitable claims in the first place, and thus defeat the very policy on which Home Depot's entire argument is based.

Home Depot speculates that the Blues will attempt to invoke the release in hypothetical future litigation even if a "dramatic[]" "change in market conditions … make[s] existing restraints anticompetitive." Pet.23. That conjecture provides no basis to reject, *ab initio*, the standard release in this settlement. Application of the release to any such hypothetical future claim is properly addressed if and when such a claim is made in a live controversy.

Home Depot also argues that, absent a categorical bar on prospective antitrust releases, "plaintiffs' firms in concert with antitrust defendants," will yield to "incentiv[es] to reach settlements that ensure sizeable attorneys' fees awards," Pet.31, in derogation of their ethical responsibilities to the class. "This case," it says, "illustrates the point." *Id.*

As to class actions in general, Rule 23(e) specifically requires careful judicial review to ensure that proposed settlements are "fair, adequate, and reasonable." The courts, including the Eleventh Circuit, uniformly hold that under Rule 23(e), a "district court

thus takes on a type of fiduciary role for the class..." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1265 (11th Cir. 2021). The 2018 amendments to Rule 23(e) strengthened this fiduciary role, "codif[ying] … four 'core concerns' " designed in part to ensure that the courts, both trial and appellate, conduct a careful "inquiry aim[ed] to root out settlements that may benefit the plaintiffs' lawyers at the class's expenses." 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 13.50 (6th ed. 2023).

And *this* case does illustrate *that* point. Judge Proctor's inquiry under Rule 23(e) could not have been more conscientious and searching. Just read his opinions (not to mention his 3100-entry docket sheet). And he found:

> The court is well-acquainted with Class Counsel's performance in this case. It has spent scores of hours with them and observed their work.... The Settlement was extensively negotiated over the course of five years with the assistance of experienced mediators and with input from a number of subject matter experts. The parties experienced multiple impasses and worked diligently to navigate those difficult decisions.... The court is more than satisfied that the Settlement was negotiated at arm's length, and there was no collusion.

App.86a-87a; *see* App.164a.

And the court of appeals, Home Depot's pejorative comments notwithstanding, also did its job, carefully,

faithfully, and well.

II. BEHENNA'S PETITION SHOULD BE DENIED

Home Depot's petition, while meritless, at least raises a question it raised below. The same cannot be said of Behenna. But even if the questions presented by Behenna were properly before this Court, he presents no basis for this Court to question the panel's review of the thorough analysis underlying the district court's exercise of discretion in awarding attorney fees.

A. The Questions Presented Were Forfeited and Waived Below and Are Otherwise Not Suitable for Review

Behenna poses two questions: (1) whether courts are *required*, rather than just *permitted,* to apply the percentage method when determining attorney fees in common-fund cases; and (2) whether courts applying the percentage method in such cases may "presume" that a fee of no more than 25% of the fund is reasonable. Beh.i. It is difficult to conceive of a case less suitable than this one for presenting these questions.

1. Analysis of the petition's certworthiness begins, and should end, with the fact that Behenna not only forfeited but expressly waived the questions he now seeks to present. *See Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012) (describing difference between forfeiture and waiver).

a. Behenna acknowledges that as "[r]elevant here," his argument to the district court was that "fees should be limited to the lodestar because the Sherman

Act is a fee-shifting statute." Beh.12 (citation and internal quotation marks omitted). Behenna argued that the district court was *required* to use the lodestar method because this was, he said, a fee-shifting case, not a common-fund case. The district court rejected Behenna's argument, finding as "an unassailable fact" that through their efforts, "Subscribers' Counsel created a common fund." App.141a.

Behenna, the only class member to appeal the fee award, abandoned on appeal the argument he made below, and offered an entirely new, and convoluted, argument of his own invention. The district court, he now argued, should have conducted a "bifurcated fee" analysis, under which it would be required to somehow disaggregate and separately determine (1) the portion of the fee attributable to work related to securing injunctive relief, which *must* be analyzed under the lodestar method, and (2) the portion attributable to work securing monetary relief, which should be analyzed under the common-fund (percentage) method. App.39a-40a; *see* Beh.13.

The panel correctly held that because Behenna had never before "hinted at" the bifurcated-fee analysis he was offering on appeal, he had forfeited the argument. App.40a. Indeed, as the panel observed, Behenna's district court argument "that the settlement is not a common fund case directly contradicts his argument on appeal that the district court should have applied a common fund analysis to the damages-related attorneys' fees." *Id.* The panel nevertheless went on to consider, and reject, Behenna's argument

that the district court should have conducted a bifurcated-fee analysis. App.40a-41a.

Behenna's petition does not seek review of the decision that he forfeited his homemade bifurcated-fee argument. No, he abandons that argument altogether, just as he had abandoned his district court argument. Now he seeks to raise a *third* and *fourth* issue, neither of which he raised below: *i.e.*, whether the district court had discretion, but was not *required*, to apply the percentage method to the entire $2.67 billion common fund created by the settlement, and whether in applying the percentage method, the district court was barred from using any presumptively reasonable benchmark percentage. These issues were not raised below, and thus were forfeited; they are not properly before the court. *See Delta Airlines*, 450 U.S. at 362 (question presented in petition but not raised in court of appeals "is not properly before us"); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *United States v. Jones*, 565 U.S. 400, 413 (2012).

b. Behenna's forfeiture alone compels denial of his petition. But there is more. Behenna filed a rehearing petition and sought to clarify his position on appeal. Behenna could hardly have been clearer that he had intentionally *waived* his argument that the district court erred in applying the percentage method to the award attributable to the common-fund recovery: "He *did not appeal* the district court's overruling of his objection that the lodestar analysis should have applied to the Section 4 common fund," and was "*not appealing the district court's common fund treatment*"

of the monetary relief claims. C.A.Doc.237 at 5 (emphases added). He was "allowed," he urged, "to *waive* the Section 4 lodestar issue." *Id.* (emphasis added).

Because Behenna now seeks review of the decisions by the courts below regarding "the common fund treatment" of the entire fee request, Behenna seeks review of issues that, by his own express admission, he chose "to waive." This further compels denial of the petition, even ignoring Behenna's troubling failure to bring his waiver to the Court's attention. *See Wood*, 566 U.S. at 474 (court of appeals abused its discretion in reaching waived defense).

2. An independently dispositive problem with Behenna's petition is that neither question he poses has any real-world bearing on the fee analyses conducted by the courts below. There is no indication that the result would change if the Court were to provide Behenna's favored answers to either of his questions. Indeed, the signs all point overwhelmingly in the opposite direction.

The fee petition was supported by, *inter alia*, a 71-page brief, a 41-page lead-counsel declaration (with 100 pages of supporting exhibits) detailing the colossal litigation effort counsel undertook on behalf of the class and documenting the lodestar as of August 2020, a declaration from the special master attesting to counsel's $40 million in out-of-pocket expenditures and the master's own regular audit of counsel's time and expenses, and comprehensive reports from two experts supporting the fee request. N.D.Ala.Doc.2733. These materials established the reasonableness of the requested fee quite apart from

the 25% benchmark.

Judge Proctor reviewed all of these materials, as well as materials submitted by the handful of class members, including Behenna, who objected to the fee. He also heard argument, including from Behenna, on the fee award at the fairness hearing.

If the district court had been inclined to reflexively approve the petition simply because it fell under a 25% benchmark, it could have cited that undisputed fact and called it a day. But the court went on to confirm the reasonableness of the award by conducting a searching analysis of the *Johnson* factors, and by performing a lodestar cross-check. App.143a-147a; Resp.App.7a-11a. Also considered by the court was the settlement's "historic injunctive relief," App.144a, which was not separately valued in the fee award. There can be no serious doubt that these considerations, weighed by a judge with firsthand knowledge of the efforts counsel undertook on behalf of the class over a decade of hard-fought litigation, played a much more important role in his decision than any 25% benchmark. The court's decision also makes clear that it would have exercised discretion to choose the percentage method in any event.

Nor did the Eleventh Circuit simply rubber-stamp the fee award because it fell below a benchmark. It concluded that Judge Proctor had conducted a "thorough analysis" that included an independent review of the evidence supporting the requested fee, as well as a lodestar cross-check, and it held that Judge Proctor had not abused his discretion

in conducting that analysis. App.40a-42a. Moreover, while the panel noted that Circuit precedent indicated that the percentage method "should be used" in common fund cases, its actual holding was that the district court "did not abuse its discretion" in using that method here. App.41a.

3. Another serious problem is the disconnect between Behenna's questions presented and his arguments for why the panel decision is "wrong." Beh.22-29. Behenna's central contention is that under this Court's precedent, the lodestar method *must* be used in common-fund cases brought under fee-shifting statutes. Beh.25 ("*Perdue requires* fees awarded pursuant to such provisions to apply the lodestar method." (emphasis added)). *See also* Beh.22-23. Behenna is wrong about that, and he fails to show that *any* circuit agrees with his view. But the pertinent point is that Behenna's contention cannot be reconciled with his questions: whether a court has discretion to apply *either* the percentage or lodestar methods, and whether it may use a presumptive 25% benchmark in common-fund cases employing the percentage method.[10]

B. Behenna's Petition Does Not Present Certworthy Questions

Even if Behenna's questions were properly before

[10] Behenna's argument attacking, under Rule 23(h), the supposed "prepayment" of a portion of the fee pursuant to the settlement's so-called "quick pay" provision, Beh.26, is also completely divorced from both of his questions. Moreover, Behenna conceded at the fairness hearing that *he did not object to the payment*. N.D.Ala.Doc.2865 at 291:23-292:9, 294:4-17. He is thus

the Court, neither merits this Court's consideration.

1. Behenna contends that ten circuits *allow* district courts to apply either the lodestar or percentage methods in common-fund cases, while only the D.C. and Eleventh Circuits *require* application of the percentage method. Beh.15-19. But even taking Behenna's description of this supposed split at face value, and ignoring that the result in this case would surely have been the same even if the Eleventh Circuit merely permitted rather than required the percentage method, the most Behenna has shown is that, while the percentage approach is favored virtually everywhere, the Eleventh and D.C. Circuits favor it the most. *See* NEWBERG § 15:67 (empirical data showing extensive use of percentage method, either alone or supplemented by lodestar cross-check).[11]

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again raising a question he forfeited and waived below, and doing so without bringing his concession to the Court's attention. (Behenna's actual argument below—that the "quick pay" provision showed that this was *not* a common-fund case—is irreconcilable with the premise of his petition.). In any event, the "quick pay" provision was not a "payment" at all; it authorized an *advance* on any common-fund fee that was awarded, an advance that was fully secured by an irrevocable letter of credit and that would be repaid, with interest, if any final fee award is less than the amount of the advance or if the settlement does not become effective. App.239a-240a. Behenna's 23(h) argument is also meritless. The decisions Behenna relies on, Beh.27-28, involving fee requests filed *after* the deadline for objections had passed, are inapposite, as the fee petition here was filed months *before* that deadline.

[11] *Cf. Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1263 (10th Cir. 2023) (noting Circuit's "preference" for the percentage approach); *Visa*, 396 F.3d at 121 ("trend in this Circuit

This is hardly a serious or "entrenched" split calling out for this Court's intervention.

Behenna identifies *no* circuit court decision suggesting that the lodestar method is the required or presumptive approach to common-fund fee awards, much less identifies a serious circuit split on this question. *See* NEWBERG § 15:66 (no circuit requires lodestar method). He argues that use of the percentage approach in common-fund cases conflicts with this Court's precedent, but *all* of the decisions he cites involve the application of fee-shifting statutes in cases that do not involve a common-fund recovery.[12] And *none* of them even suggest that the lodestar must or should govern the calculation of common-fund fee awards.[13] The award of a fee based on lodestar in a case involving a fee-shifting statute and no common fund simply says nothing about the appropriate award

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is toward the percentage method"); *Gelis v. BMW of N. Am., LLC*, 49 F.4th 371, 379 (3d Cir. 2022) (percentage method is "generally favored").

[12] *See* Beh.7-9, 25-26, 29 (discussing *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Burlington v. Dague*, 505 U.S. 557 (1992); *Blum v. Stenson*, 465 U.S. 886 (1984); *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010)).

[13] Behenna mischaracterizes *Perdue* as "holding" that lodestar "is the correct method in common-fund cases settling claims" brought under statutes containing fee-shifting provisions. Beh.25. *Perdue* did not involve a common fund and addressed only how the lodestar was to be calculated under 42 U.S.C. § 1988 and other fee-shifting provisions. 559 U.S. at 546-47; *see Equifax*, 999 F.3d at 1279 ("Nothing in *Perdue* considered the appropriate method for calculating attorney's fees in a common fund case.").

in a settlement creating a massive common fund.

Moreover, this Court has itself distinguished the determination of fees under fee-shifting provisions from "the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum*, 465 U.S. at 900 n.16. That distinction makes sense, given the differences between fee-shifting and common-fund regimes. *See also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (attorney who recovers a common fund for benefit of a class "is entitled to a reasonable attorney's fee from the fund as a whole" in order to avoid the unjust enrichment of the class); *Florin v. NationsBank of Ga.*, 34 F.3d 560, 564-65 (7th Cir. 1994); NEWBERG §§ 15:25, 15:53.

2. With respect to the 25% benchmark issue, the most that Behenna can conjure is a supposed two-to-two split. Beh.19-22. But the supposed split evaporates when one examines the cases on which Behenna relies. Start with the decision below, which described Circuit precedent as noting that courts "typically" award fees of 20-30% of the fund, and treating the mean of that range as a "rough" benchmark, with fees in the 20-25% range as "presumptively reasonable." App.41. Hardly the stuff of a bright-line rule, even leaving aside that the district court was not content to rely upon any such presumption but instead undertook a "thorough analysis" of the reasonableness of the requested fee, including a lodestar cross-check. App.42a.

On the other side of the supposed split is *Voulgaris*, where the Tenth Circuit, in affirming a 33%

award, simply declined to adopt a "bright-line" benchmark and instead noted that "awards across a range of percentages may be reasonable." 60 F.4th at 1263-64. And even *Goldberger v. Integrated Resources*, in which the Second Circuit expressed concerns about "the essential notion of a benchmark," noted that one such concern was that a benchmark could offer a "tempting substitute for the searching assessment that should properly be performed in each case." 209 F.3d 43, 51-52 (2d Cir. 2000). Here the district court conducted just such a "searching assessment," and the panel reviewed that assessment, notwithstanding the Eleventh Circuit's endorsement of a "rough" 25% benchmark. App.41a. Practically speaking, there is very little if any daylight between the approaches of these circuits. *See* NEWBERG § 15:78 (empirical data show "little difference" in fee practices between circuits endorsing benchmarks and circuits rejecting them).

Behenna also cites three decisions, two from the Nineteenth Century, for the proposition that the "benchmark" approach conflicts "with this Court's case-specific scrutiny in common-fund cases." Beh.23. Once again, the courts below did engage in such "case-specific scrutiny." And none of the decisions he cites suggests that the award here was unreasonable. To take the most "recent" example, the Court in *United States v. Equitable Trust Co. of New York*, reduced the fee awarded because the litigation risk "was small," "[t]he material facts were few and demonstrable," the "applicable legal principles were fairly certain," and the attorneys received "much helpful service" from the Government. 283 U.S. 738, 746

(1931). The precise opposite is true here, on each of those factors. *See* App.143a-144a.[14]

3. Behenna closes his petition, much like Home Depot does, by casting aspersions, implying that counsel entered into, and the district court approved, an arrangement in which the interests of the class were sold out in exchange for fees. Beh.32-33. Even though Behenna has never challenged the fairness, adequacy, and reasonableness of the settlement before, and indeed had previously indicated his agreement with the district court's findings regarding the "truly exceptional" nature of the settlement's structural relief, C.A.Doc.237 at 10, he now disparages the settlement as one providing minimal monetary and "diluted" injunctive relief. Beh.33. But leaving Behenna's about-face aside, Behenna's concerns, like Home Depot's, are addressed by the duties that Rule 23 imposes on courts to closely scrutinize class action

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[14] Behenna notes, Beh.29-30, that this Court has sometimes criticized use of the *Johnson* factors, but he again relies solely on decisions that involved fee-shifting statutes with no common fund. This Court has never suggested that the *Johnson* factors have no utility in cases in which a common fund is created. Nor was *Johnson*'s "central holding" abrogated in *Blanchard v. Bergeron*, 489 U.S. 87, 93-94 (1989). Beh.30. *Blanchard* held only that Congress in enacting § 1988 did not "embrace" *Johnson*'s suggestion that fees should *never* exceed the percentage negotiated in a contingency fee contract.

settlements, and Judge Proctor's scrupulous observance of those duties here. *See supra* at 40-41.[15]

CONCLUSION

The Court should deny both petitions.

May 29, 2024

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[15] Behenna also suggests that the fee award here is emblematic of the approach taken by courts across the country and shows the judiciary's failure to police excessive awards. Beh.31-32. Behenna's argument below, however, hinged in part on his claim that the award here was an outlier that was not supported by awards in analogous cases. But regardless of whether the courts' application here of well-established common-fund fee principles resulted in an anomalous award (as Behenna argued below) or one in line with other cases (as Behenna suggests now), that application does not present the type of important, cross-cutting legal question meriting this Court's review.

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APPENDIX

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Master File No.: 2:13-CV-20000-RDP
This document relates to Subscriber Track

[Filed September 7, 2022]

IN RE: BLUE CROSS BLUE SHIELD)
ANTITRUST LITIGATION)
)
(MDL NO.: 2406))
)

AMENDMENT TO FINAL ORDER AND JUDGMENT GRANTING APPROVAL OF SUBSCRIBER CLASS ACTION SETTLEMENT RELATING ONLY TO THE RELEASES PROVIDED BY OPT-OUTS

On the court's own motion, pursuant to Federal Rule of Civil Procedure 60(a), and with the settling parties' consent, the Final Order and Judgment Granting Approval of Subscriber Class Action Settlement is **AMENDED** as follows with regard to the releases provided by Opt-Outs under the Settlement:

I. Section II(C) of the court's August 9, 2022 Order (Doc. # 2931 at 15-16) is AMENDED as follows:

C. Settlement Class Release

Upon the Effective Date of the Settlement, Releasors (Class Representatives and Settlement Class Members) who have not timely and validly excluded themselves (*i.e.*, opted out) will have fully released all claims against the Releasees ((i) Individual Blue Plans, (ii) BCBSA, (iii) NASCO,[1] and (iv) Consortium Health Plans, Inc.,[2] as well as related entities). (*Id.* ¶¶ 32, 1(vvv), 1(www)). Opt-Outs will release all claims for indivisible injunctive or declarative relief against the Releasees. However, a Self-Funded Account opt-out does not release any claims for individualized declaratory or injunctive relief, which may include the right to pursue in litigation more than one Blue bid based upon an Opt-Out's individual business and the facts and circumstances of the individual claims. The releases apply to Releasors and their related persons and entities, such as dependents and beneficiaries under their respective benefits plans.

The Releasors agree to release any and all known and unknown claims:

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[1] NASCO is a healthcare technology company owned by several Blue Plans and is involved in processing claims.

[2] Consortium Health Plans, Inc. is a marketing company owned by several Blue Plans and provides marketing assistance regarding national accounts to BCBSA and the Blue Plans.

> based upon, arising from, or relating in any way to: (i) the factual predicates of the Subscriber Actions (including but not limited to the Consolidated Amended Class Action Complaints filed in the Northern District of Alabama) including each of the complaints and prior versions thereof, or any amended complaint or other filings therein from the beginning of time through the Effective Date; (ii) any issue raised in any of the Subscriber Actions by pleading or motion; or (iii) mechanisms, rules, or regulations by the Settling Individual Blue Plans and BCBSA within the scope of Paragraphs 10 through 18 approved through the Monitoring Committee Process during the Monitoring Period.

(*Id.* ¶ 1(uuu)). Thus, the Released Claims in certain circumstances will include those "mechanisms, rules or regulations" enacted after the Effective Date that are approved by the Monitoring Committee during the Monitoring Period, but only to the extent those "mechanisms, rules or regulations" relate to the provisions enumerated in Paragraphs 10 through 18 of the Settlement.

The Releasors retain their right to assert certain claims relating to coverage, benefits and administration of claims that arise in the ordinary course of business and are not "based in whole or in part on the factual predicates of the Subscriber Actions or any other component of the Released Claims discussed in this Paragraph." (*Id.*).

Additionally, Providers who are Settlement Class Members retain the right to assert any claims arising from their sale or provision of health care products or services, and Settling Defendants have agreed not to raise Providers' releases under this Settlement as a defense to Providers' claims brought in their capacity as Providers of health care products or services in MDL No. 2406. (*Id.*).

II. Paragraph 17 of the court's August 9, 2022 Order effecting the APPROVAL OF THE SETTLEMENT AGREEMENT (Doc. # 2931 at 87-88) is AMENDED as follows:

17. The Opt-Outs identified in Document # 2928 are **EXCLUDED** from the Damages Class and the divisible Second Blue Bid relief pursuant to properly made exclusion requests. They may not make any claim on or receive any benefit from or under (a) the Settlement Fund, whether monetary or otherwise, or (b) any benefit under Paragraph C(15), the Second Blue Bid portion of the injunctive relief. Nonetheless, the identified Opt-Outs may not pursue any claims released under the Settlement Agreement regarding indivisible relief on behalf of those who are bound by this Final Judgment. For purposes of clarity, a Self-Funded Account that opted out does not release any claims for individualized declaratory or injunctive relief, which may include the right to pursue in litigation more than one Blue bid based upon an Opt-Out's individual business and the facts and circumstances of the individual claims. All other claims for indivisible declaratory or injunctive relief released under the Settlement Agreement are released. Each

Settlement Class Member not appearing in Document # 2928 is **BOUND BY THIS FINAL JUDGMENT AND WILL REMAIN FOREVER BOUND**.

DONE and **ORDERED** this September 7, 2022.

/s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Master File No.: 2:13-CV-20000-RDP

[Filed August 9, 2022]

IN RE: BLUE CROSS BLUE SHIELD)
ANTITRUST LITIGATION)
)
(MDL NO.: 2406))
)

ORDER AWARDING SUBSCRIBER PLAINTIFFS' COUNSEL ATTORNEYS' FEES AND EXPENSES

This matter is before the court on Subscriber Counsel's Motion for Approval of Their Attorneys' Fees and Expenses Application. (Doc. # 2733). In the Motion, Subscriber Counsel seek an order: (1) awarding attorneys' fees in the amount of $626,583,372.10, and (2) awarding reimbursement of costs and expenses in the amount of $40,916,627.90.

In accordance with the accompanying Order and Judgment Granting Final Approval of Class Action Settlement and Appointing Settlement Administrator, Subscriber Counsel's Motion for Approval of Their Attorneys' Fees and Expenses Application (Doc. # 2733) is **GRANTED**. It is **ORDERED** as follows:

1. This Order incorporates by reference the definitions in the Settlement Agreement dated October 16, 2020 (Doc. # 2610-2) (the "Settlement Agreement") and all capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Settlement Agreement.

2. The court has jurisdiction to enter this Order, over the subject matter of the Subscriber Actions, and over all parties to the Subscriber Actions, including all Settlement Class Members.

3. Notice of Subscriber Counsel's request for an award of attorneys' fees and of costs and expenses was provided to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Settlement Class of the request for an award of attorneys' fees and expenses satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, due process, and all other applicable law and rules, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

4. Subscriber Counsel are hereby **AWARDED** attorneys' fees in the amount of $626,583,372.10, representing 23.47% of the Settlement Fund. The court **FINDS** this amount to be fair and reasonable. Subscriber Counsel are **FURTHER AWARDED** $40,916,627.90 in payment of litigation costs and expenses to be paid from the Settlement Fund, which sum the court finds to be fair, adequately documented,

reasonable, and necessary to the representation of the Settlement Class.[1]

5. In making this award of attorneys' fees to be paid from the Settlement Fund, the court has applied the percentage of the fund method mandated by the Eleventh Circuit. *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th. Cir. 1991). The court has found that the attorneys' fee award, which represents less than 23.5 percent of the $2.67 billion Settlement Fund that has been created for the benefit of the Subscriber Class, falls within the lower half of the "benchmark range" of 20% to 30% established in this Circuit. *In re Home Depot Inc.*, 931 F.3d 1065, 1076 (11th Cir. 2019). Moreover, although not required to do so, the court has cross-checked the fee by examining the factors that the Eleventh Circuit has directed courts to consider when evaluating a fee award. *Faught v. American Home Shield Corp.*, 668 F.3d 1233, 1242-43 (11th Cir. 2011). Such a cross-check shows that the award is fully supported by those factors:

(a) The Settlement has resulted in a substantial monetary award and in significant injunctive relief for the class;

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[1] In accordance with the terms of the Settlement Agreement, approved Subscribers Counsel may apply for up to $7 million from the Notice and Administration Fund to "reimburse plaintiffs' counsel's actual and reasonable fees and expenses incurred for Notice and Administration." Settlement ¶ 28(h). These costs and expenses will be reimbursed from the Notice and Administration Fund, not the common fund generated for the Class.

(i) The Settlement has created a common fund of $2,670,000,000 in cash that is to be paid within 30 calendar days of the Effective Date of the Settlement pursuant to the terms of the Settlement Agreement, distributed to authorized claimants in accordance with the Plan of Distribution that has been approved by this court, and which will benefit the members of the Subscribers Class; and

(ii) The Settlement also provides historic, transformative, pro-competitive injunctive and equitable relief that will greatly benefit the members of the Subscribers Class;

(b) The case presented a myriad of difficult factual issues, requiring substantial discovery to resolve, including the production of millions of pages of documents and the taking of scores of depositions;

(c) The case raised novel and complex legal questions;

(d) Through August 15, 2020, Subscribers Counsel had already devoted 434,054.6 hours to litigating the complex factual and contested legal questions presented in the Subscriber Actions, which had resulted in a lodestar of $194,226,321.65;

(e) Subscriber Counsel are among the most experienced litigators in the country, and they conducted the litigation and worked to achieve the Settlement with skill, zeal, and expertise;

(f) The fee in this case was contingent upon obtaining relief for the Class, and there was a

significant risk that Subscriber Counsel would recover nothing;

(g) Given the enormous commitments of time and resources, as well as the significant risk entailed in developing and litigating this case, few attorneys would have been willing to take it on;

(h) This private enforcement action required a substantial commitment of time, personnel, and other resources to this case effectively precluded Subscriber Counsel from other employment;

(i) The amount of attorneys' fees awarded and of costs and expenses to be paid from the Settlement Fund are fair and reasonable and consistent with awards in similarly complex cases; and

(j) Although the use of the lodestar cross-check is not required in this Circuit, *In re Home Depot*, 931 F.3d at 1091 n.25, the court nevertheless undertook that analysis. As the expert testimony presented in support of the Fee Motion confirms, the lodestar multiplier of 3.23 that the award represents would be fully consistent with the multipliers that courts have found reasonable in similarly complex mega-fund cases.

6. In making this $40,916,627.90 award of litigation costs and expenses to be paid from the Settlement Fund, the court has considered and found that:

(a) The recovery of costs and expenses is authorized by the Settlement Agreement;

(b) Those costs and expenses have been adequately documented and reviewed by the Special Master appointed by the court; and

(c) Those costs and expenses were both reasonable, necessary, and incurred for the benefit of the Settlement Class.

7. Due and adequate notice has been given to the members of the Settlement Class in satisfaction of the requirements of Rules 23(c)(2) and 23(e)(1) of the Federal Rules of Civil Procedure and Constitutional Due Process, stating that Subscriber Counsel may submit a fee and expense application seeking an award of attorneys' fees plus reimbursement of expenses up to a combined total of 25% of the $2.67 billion fund, *i.e.*, $667,500,000, and the court has concluded that no meritorious objections to the requested attorneys' fees and expenses were raised.

8. In early 2022, the court received Special Master Ed Gentle's *in camera* Report, and subsequent Supplement (containing the comments of impacted Counsel), making a recommendation regarding the allocation of the common benefit recovery among Subscriber and ASO Counsel.

a. Special Master Gentle conducted an innovative interview process which allowed each impacted Law Firm to describe for the Special Master what it did to advance the case and how its services might have been unique compared to those of others.

b. The court finds that the approach taken by the Special Master, in (1) compiling the time, capital and expense records that provided the data for

the Report, and (2) weighting the data among the lawyers in the Report, was transparent and objective. The objectiveness of this approach was corroborated by the overwhelming support for the Report from impacted Counsel. As one commenter stated,

> We want[] to commend the Report. It is obviously the result of careful and thoughtful work of you and your staff. The interview process that you conducted gave voice to the Firms that usually remain unseen in these cases, and it allowed Leadership and your office to probe into a Firm's accomplishments and contributions in order to assess their contributions to the case holistically. The Report was particularly innovative in this regard, and provides a robust record to support the (common benefit) allocation. That is in addition to the prowess of your accounting team that contemporaneously reviewed and audited the time and scores of 70+ law firms from more than 8 years. The proposed allocation is buttressed by both economic and objective support.

c. The court concludes that the allocation recommended in the *in camera* Report is fair and reasonable, and is hereby **APPROVED**.

9. The court takes notice of its previous Orders regarding protocols for Plaintiffs' Counsel time and expense submissions. (Docs. # 80 and 163). With Subscriber and ASO Counsel's duties with respect to this MDL, other than with regard to implementing the Subscriber and ASO Settlement with the Blue Cross Blue Shield Entities, being completed, the court hereby

RELIEVES Subscribers and ASOs Counsel of any further obligations under these time and expense Orders. The court notes, however, that there will be additional time keeping by Subscriber and ASO Counsel in connection with the Settlement itself. These submissions will be reviewed by the Special Master and the Settlement Proponents.

10. Any appeal or any challenge affecting this court's approval regarding any attorneys' fees and expense application **SHALL** in no way disturb or affect the finality of the Judgment.

11. The court retains exclusive jurisdiction over the parties and the Settlement Class Members for all matters relating to this Settlement, including the administration, interpretation, effectuation or enforcement of this Order.

12. In the event that the Settlement is terminated or the Effective Date of the Settlement otherwise fails to occur, this Order shall be rendered null and void to the extent provided for in the Settlement Agreement.

DONE and **ORDERED** this August 9, 2022.

/s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE