Nos. 11-1438 & 11-1857

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE: VOLKSWAGEN AND AUDI WARRANTY EXTENSION LITIGATION

VOLKSWAGEN GROUP OF AMERICA, INC., *et al.*,

Defendants-Appellants,

v.

MCNULTY LAW FIRM, *et al.*,

Interested Parties-Appellees.

On Appeal from a Final Order of the
United States District Court for the District of Massachusetts

Honorable Joseph L. Tauro, United States District Judge
Case No. 1:07-md-1790-JLT

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INTRODUCTION

In simply repeating back the same ungrounded conclusions offered by the district court, class counsel fail to address any of the substantial points raised in the opening brief.

They insist that Defendants affirmatively agreed to pay attorneys fees as part of the settlement in this case; yet they ignore our textual argument demonstrating that Defendants did no such thing, and fail to cite, much less discuss, any language in the settlement agreement showing otherwise. They insist that the New Jersey fee-shifting statute does not apply here because class members were not "prevailing parties" under governing New Jersey law; but they decline to respond to the crystal clear case law demonstrating precisely the opposite. And they insist that the New Jersey fee-shifting statute would not require application of the lodestar method in any event; yet they ignore the unassailable case law establishing that both entitlement to and calculation of attorneys fees are substantive issues for *Erie* purposes.

More fundamentally, class counsel fail to address the plain fact that this is not a fee-*spreading* case, in which the percentage method might apply, but a fee-*shifting* case, in which it cannot. In claiming that the percentage method is the prevailing approach in cases like this one, they cite almost entirely fee-*spreading* cases. And in an apparent attempt to obscure

this issue, they spend several pages arguing that the district court had the power to award fees under Fed. R. Civ. P. 23(h)—a purely procedural observation that is neither disputed nor relevant.

Even supposing the percentage approach were applicable here, class counsel do not dispute that the district court was required to calculate the actual value of the settlement and to determine a specific percentage of that value to award. Instead, they baldly misrepresent the facts, wrongly suggesting that the district court actually did make those determinations, when it plainly did not. Worse still, class counsel invoke a plainly inapplicable procedural technicality in a desperate effort to avoid what is now undeniably clear: the actual value of the settlement was less than $45 million. And they offer no defense of the district court's incredible refusal to acknowledge the *ten-fold* difference between that empirically-verified figure, on the one hand, and the high-end of class counsel's wildly inflated estimate of the "potential" value of the settlement, on the other.

Against this backdrop of misdirection and misrepresentation, the small handful of relevant arguments that class counsel do offer are unpersuasive. This Court accordingly should vacate the grossly disproportionate $30 million fee award and remand with instructions to award class counsel a $7.734 million lodestar fee.

I. THE DISTRICT COURT SHOULD HAVE USED THE LODESTAR METHOD.

A. The award of fees was authorized by the New Jersey fee-shifting law and not the settlement agreement.

1. The settlement agreement does not contain an agreement to pay attorneys' fees.

a. Class counsel argue, in the main, that the fee award in this case was authorized by the settlement agreement. In an apparent belief that Lewis Carroll had it right (*see The Hunting of the Snark* 3 (1876) ("I have said it thrice: What I tell you three times is true.")), they claim that "Volkswagen agreed to pay fees," committed to a "voluntary payment of fees," and entered into an "agreement to pay fees." Answering Br. 19-22. On this basis, class counsel reiterate, Rule 23(h) provided the district court with the "jurisdiction" (*id.* at 22) and "power" (*id.* at 25) to award fees, "grounded upon Volkswagen's agreement to pay fees" (*id.* at 16).

The problem, of course, is that the settlement does *not* include an agreement to pay fees. As we explained in the opening brief (at 37), the settlement agreement provides simply that "Class Counsel *will submit an application* to the Court for an award of reasonable attorneys' fees and expenses," and that any fees awarded may not be derived from the benefits to the class. A65 (emphasis added). No logical construction of that language could be taken to mean that Defendants independently promised to *pay* fees. Instead, it reflects an unremarkable understanding among the

parties that class counsel would *seek* fees (under whatever authority), subject to certain conditions. We made this textual argument in the opening brief (at 36-39), but class counsel offer no response. In fact, they fail to identify any settlement language upon which their argument might turn.

Class counsel rely instead upon an entirely different document: the class notice. Answering Br. 26-28. But the class notice offers them no help at all. To begin with, they do not (and could not) argue that the class notice is itself a contract.[1] Rather, as they see it, Defendants entered an "agreement to pay fees *[as] part of the settlement*," which simply was "memorialized in the Class Notice." *Id.* at 26-27 (emphasis added). Thus, class counsel imply, the exhaustively-negotiated and meticulously-drafted settlement agreement did not itself "memorialize" all of the terms of the settlement; and the parties, at some later point, supposedly finished "memorializing" the terms of the settlement in the class notice.

That is nonsense. When "the writing shows on its face that it is the entire agreement of the parties and 'comprises all that is necessary to constitute a contract, it is presumed that they have placed the terms of their

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[1] "A contract is formed upon acceptance of an offer." *Alison H. v. Byard*, 163 F.3d 2, 6 (1st Cir. 1998). No possible understanding of the class notice—directed without attribution of authorship to the class, to inform them of the terms of the proposed settlement and advise them of their right to participate in or opt out (JA412-JA419)—could be taken as an "offer" *by* anyone *to* anyone to be legally bound *for* any purpose.

bargain in this form to prevent misunderstanding and dispute, intending it to be a complete and final statement of the whole transaction.'" *Bendetson v. Coolidge*, 390 N.E.2d 1124, 1127 (Mass. App. Ct. 1979) (quoting *Glackin v. Bennett*, 115 N.E. 490, 491 (Mass. 1917)). That is precisely the case here: the parties agreed to settle the litigation "on the terms set forth in th[e] Settlement Agreement" (A49), and no other document. Where, as here, the agreement is complete, and the relevant language is unambiguous, it is beyond dispute that the Court may "not look beyond the four corners of the contract." *Indus Partners, LLC v. Intelligroup, Inc.*, 934 N.E.2d 264, 267 (Mass App. Ct. 2010). In response to this argument (Opening Br. 38-39), class counsel again stand mute.[2]

b. Unable to point to any language in the settlement agreement to support their theory that Defendants promised to pay attorneys' fees, class counsel finally rely on the district court's decision in *Dewey v. Volkswagen of Am., Inc.*, 728 F. Supp. 2d 546 (D.N.J. 2010), *appeal docketed* (3d Cir., No. 10-3652) (argued on Mar. 27, 2012). There, referencing the same contract language at issue here, the district court found, in conclusory fashion, that "defendants[] ... agreed to pay fees and expenses." *Id.* at 588

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[2] We also showed in the opening brief (at 39) that the class notice supports *our* reading of the settlement agreement anyway. If the class notice were meant simply to "memorialize" Defendants' previously-consummated promise to pay fees as part of the settlement, there would be no possible grounds for dispute to disclaim. Class counsel again offer no response.

n.62. That terse conclusion suffers from the same fundamental problem as class counsel's brief: it fails to identify what language could be read to bind the defendants in that case to pay fees. The *Dewey* opinion thus provides no reason to conclude that Defendants here "agreed" to pay fees.[3]

2. Fees were authorized by the NJCFA fee-shifting provision.

All of this leads inexorably to the conclusion that fees were authorized not by the settlement agreement, but by the New Jersey fee shifting statute underlying the complaint on the merits. Nevertheless resisting this conclusion, class counsel assert that there was "no finding or judgment whatsoever under New Jersey's CFA," no "adjudication" on the merits, and "no court-ordered change in the legal relationship between the parties." Answering Br. 19, 21. Thus, as they see it, members of the class were not "prevailing part[ies] under the CFA" and are not entitled to fees under that statute's fee-shifting provision. *Id*. at 21.[4]

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[3] Class counsel's suggestion that Defendants "conceded" at the fairness hearing that "the agreement 'says that the defendants are going to pay fees'" (Answering Br. 27 (quoting JA464)) is highly misleading. Read in context, it is perfectly clear that Defendants' statement that "the agreement simply says that the defendants are going to pay fees" (JA464) was an acknowledgement that they, *as opposed to the class*, would pay any fee award entered in this case.

[4] Class counsel thus appear to suggest that, if they are not entitled to fees under the settlement agreement itself, they are not entitled to "prevailing party" fees under the New Jersey fee-shifting law and should receive nothing. But if counsel truly believed that, the language of the agreement unambiguously would have provided the requisites for a contract to pay fees.

But here again, class counsel simply ignore the squarely contrary case law identified and discussed in the opening brief (at 30-31 & n.7). According to that law, a court-approved settlement undeniably *is* a basis for prevailing-party status if "the relief obtained in [the] settlement of the litigation is substantially that sought in the complaint, is evidenced by an enforceable judgment, and was brought about by the litigation." *Schmoll v. J.S. Hovnanian & Sons, LLC*, 927 A.2d 146, 147-148 (N.J. App. Div. 2007) (emphasis added). As we have explained (Opening Br. 31), each of these conditions is manifestly satisfied here.

Lest there be any doubt on this point, the New Jersey standard is indistinguishable from the federal standard: plaintiffs who achieve "a court-approved settlement" (even one "that is not embodied in a formal consent decree"), which brings about "material alteration of the parties' legal relationship," generally will "qualify ... as prevailing parties" and thus are "eligible for an award of attorneys' fees." *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 8-11 (1st Cir. 2011). Just so here. Class counsel now acknowledge this Court's holding in *Hutchinson* (Answering Br. 20 n.9), but proceed to disregard both it and the holding in *Schmoll*.

Finally, class counsel assert that the complaint alleged "violations of the consumer fraud statutes of several states," and not just of New Jersey. But that is a misleading description of the complaint. In fact, it alleges ex-

clusively a "violation of the New Jersey Act." JA29. To be sure, it also alleges violations "under the substantially similar consumer fraud statutes of [the class representatives'] respective states," but only on the *unrealized* condition that the district court declined to apply the New Jersey law uniformly to a nationwide class. JA28-JA29. Thus, as class counsel readily admit (Answering Br. at 22, n.10), they expressly argued in the proceedings below that the district court should "apply New Jersey law to every claim and every claimant in this action." Dkt. 85 at 11.[5]

There accordingly is no reason to doubt that class counsel were entitled to an award of fees under the NJCFA and that the court's authority for awarding fees arose under that law. As we noted in the opening brief (at 30), New Jersey substantive law would have governed an application for attorneys' fees if plaintiffs had prevailed on dispositive motions or after trial. *See also Dewey*, 728 F. Supp. 2d at 591-592 (the "fee-shifting statute would [have] control[ed] the fee issue in this case had the plaintiffs litigated to conclusion and prevailed on the CFA claim at trial"). That the

[5] As an alternative theory for resisting a statutory basis for the fee award in this case, class counsel observe that "claims were asserted on numerous theories" of liability. Answering Br. 16. But it is of no moment that class counsels' time spent litigating other claims may theoretically go uncompensated by a court-ordered award of fees; that is, after all, the ordinary course of things. Absent the NJCFA claim and its fee-shifting provision, class counsel would not be entitled to fees at all. In any event, the other claims were essentially coextensive with the NJCFA claim. We observed as much in the opening brief (at 30 n.6), but class counsel ignore the point.

case settled prior to an adjudication of the merits simply makes no difference. *Schmoll*, 927 A.2d at 147-148.

3. The district court accordingly was Erie*-bound to apply the New Jersey fee-shifting statute.*

In a transparent effort to avoid the undeniable consequences of this conclusion—specifically, that the district court was *Erie*-bound to apply the lodestar method to the fee request—class counsel resort to a sleight of hand. Citing a New Jersey *choice-of-law* case, they claim that "[u]nder New Jersey law, the issue of attorneys' fees is procedural," and thus *Erie* would not require application of New Jersey's lodestar method in any event. Answering Br. 25. But that is flatly incorrect.

It is well-settled that state choice-of-law rules have no bearing on the question whether an issue is procedural or substantive for *Erie* purposes: the Supreme Court has squarely "reject[ed] the notion that there is an equivalence between what is substantive under the *Erie* doctrine and what is substantive for purposes of conflict of laws." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)). Thus, as the Eleventh Circuit has put it, "[a] law may be substantive for *Erie* purposes (meaning it applies in federal court) yet procedural for other purposes, such as a choice of law analysis." *Horowitch v. Diamond Aircraft Indus., Inc.*, 645 F.3d 1254, 1265 n.5 (11th Cir. 2011) (citing *Sun Oil*); *see also Godin v. Schencks*, 629 F.3d 79, 85, n.10 (1st Cir. 2010) ("[A] nominally procedural state rule authorizing an

award of attorney's fees ... is substantive for purposes of *Erie* analysis."). That plainly is the case here; thus *Erie* mandates application of state law to the issue of attorney fees in this case. *See* Opening Br. 28-30.

B. The district court erred in refusing to apply the lodestar method either way.

Having said all of that, the district court erred in not applying the lodestar method regardless of the source of its authority for awarding fees. As explained in the opening brief (at 9, 46-49), there are two independent reasons for this conclusion.

1. The settlement agreement forecloses the percentage-of-fund method.

To begin with, in providing that fees may not be "derived"—that is, determined by inference—from the benefits to the class, the settlement agreement expressly rules out the percentage method. Even the district court recognized as much. A31.

In response, class counsel complain that our argument on this score relies on a "secondary" meaning of the word "derive." Answering Br. 40. But they misread the dictionary: the editors of *Webster's Third* have explained that the "order of senses" within a particular definition is merely "historical," is not meant to "establish" a "hierarchy of importance among them," and is often "arbitrary." *Webster's Third New Int'l Dictionary* 17a (1986). They therefore caution that "[t]he best sense is the one that most

aptly fits the context of an actual genuine utterance." *Id.* Here, that means reading the word "derive" as foreclosing the percentage method.

2. The percentage approach is categorically inapplicable in fee-shifting cases like this one.

That is not all. As we observed in the opening brief (at 6-10), the so-called "common fund" and "common benefits" doctrines provide an alternative basis for awarding fees in class actions, wholly apart from statutory and contractual fee-shifting. Common fund and common benefit cases do not involve fee-*shifting*, but fee-*spreading*. *See* Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 250-251 (1985). And of particular relevance to the issues presented in this appeal, a district court may calculate a fee award in such fee-spreading cases "on the basis of a reasonable percentage" of the recovery. *United States v. 8.0 Acres of Land*, 197 F.3d 24, 33 (1st Cir. 1999).[6]

For all of the reasons detailed in the opening brief (at 39-46), it is self evident that this is *not* a fee-spreading case. There is no common fund here, and nothing about the settlement—which left the amount of fees

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[6] We argued (Opening Br. 43 n.11) that the "common benefits" doctrine is currently disfavored, and that this Court has never adopted it and arguably rejected it. Class counsel disagree, claiming that the Supreme Court reaffirmed the doctrine in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). But *Chambers* merely recognized in passing that the "common *fund*" doctrine is one of the "narrowly defined circumstances" in which "federal courts have inherent power to assess attorney's fees." *Id.* at 45 (emphasis added). It said not one word about the common *benefits* doctrine.

open and unsettled—implicates a "conflict between the class and its counsel" over a fixed sum of money such that the settlement here emulates, in "economic reality," a "common fund situation" by simultaneously settling both fees and the underlying claims. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820-821 (3d Cir. 1995) ("*GM Trucks*"). In fact, the settlement agreement expressly forbids fee-spreading and mandates fee-shifting. A65. Class counsel conspicuously decline to dispute any of this.

Class counsel's implied concession that this is not a fee-spreading case is tremendously significant: we are not aware of a single appellate decision holding that a district court may apply the percentage-of-fund method outside of the fee-spreading context. But that is not surprising, for as this Court said in *Weinberger*, "[i]f an alternative method is not expressly dictated by applicable law," as the percentage approach may be in traditional fee-spreading cases, it is "best to calculate fees by means of the time-and-rate method known as the lodestar." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 526 (1st Cir. 1991). That is especially true with respect to class actions, like this one, involving claims under the NJCFA. Even when fees "are authorized by ... the parties' agreement" in such cases, New Jersey rules expressly require application of the lodestar method. N.J. Court Rule 4:32-2(h) (incorporating by reference Rule 4:42-9); *see*

Furst v. Einstein Moomjy, Inc., 860 A.2d 435, 447 (N.J. 2004) (calculation of fees under Rule 4:42-9 requires the lodestar approach). And, again, the district court was *Erie*-bound to apply substantive New Jersey fee-shifting rules. *See* Opening Br. 28-30.[7]

In nevertheless insisting that "[c]ourts throughout the United States have the discretion to use POF methodology in awarding fees" (Answering Br. 32), class counsel cite a barrage of more than two dozen cases decided over the past 35 years. But in rattling off this massive list of cases, class counsel fail to mention that, apart from *Dewey* and *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830 (E.D. La. 2007), every case they cite is a fee-spreading, or more embarrassing yet, a *lodestar*, case.[8]

For example, class counsel assert that "courts in the First Circuit have regularly applied the percentage of fund analysis" in cases like this

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[7] Massachusetts law would require the same result. *See In re AMICAS, Inc. Shareholder Litig.*, 27 Mass. L. Rptr. 568 (Mass. Super. Ct. 2010) (noting that "Massachusetts appellate courts have not expressly authorized the use of the percentage method" even in "common fund" cases, and concluding that the "lodestar remains the appropriate standard" in all instances under Massachusetts law) (citing *American Trucking Ass'ns, Inc. v. Sec'y of Admin.*, 613 N.E.2d 95, 104-105, 415 Mass. 337, 352-353 (1993)).

[8] Class counsel also tout (at 32-33) the supposed virtues of the percentage method, but only in the abstract. As we explained in the opening brief (at 47-49), however, none of the rationales for the percentage method was actually advanced in this case. On the contrary, the manipulation that took place here, and the uncertainty that followed, are certain to discourage early settlements like this one if the decision below is allowed to stand.

one. Answering Br. 31. In support of that claim, they cite just three cases decided over the past 16 years, each of which involved a fee-spreading award from an actual common fund.[9] Elsewhere, they say that "POF has become by far the most prevalent approach" for awarding fees in complex class actions. *Id.* at 34. To substantiate that claim, they cite just one district court case and three out-of-circuit cases decided over the past 21 years, each of which *also* involved a fee-spreading award paid to class counsel out of a true common fund.[10]

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[9] *See Mann & Co., PC v. C-Tech Indus., Inc.*, 2010 WL 457572 (D. Mass. 2010) ("$1 million Settlement Fund" and a 17.5% fee award deducted from the fund); *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30 (D.N.H. 2006) ($10.5 million "common settlement fund" paid "into escrow," and a 21.5% fee award deducted from the fund); *In re Fleet/Norstar Sec. Litig.*, 935 F. Supp. 99 (D.R.I. 1996) (defendants paid "$5,875,000 plus interest" into a fund to "be distributed to qualifying shareholders" after a 20% "deduction [for] counsel fees and expenses").

[10] *See In re Lupron Mktg. & Sales Practices Litig.*, 2005 WL 2006833 (D. Mass. 2005) ("defendants transferred $150 million into an escrow account" and the court allocated "25 percent of the fund ... as a fee award"); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) (remanding to the district court to "select[] the percentage of the fund [to] award[] as fees" in a case with a "fund of $3,000,000 to pay all claims"); *Hayes v. Haushalter*, 105 F.3d 469 (9th Cir. 1997) ("the court [allocated] 25% of the settlement fund" for attorneys' fees); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294 (3d Cir. 2005) (vacating a "fee [award] of 25% of the settlement fund"). A final case, *In re Air Crash Disaster*, 549 F.2d 1006 (5th Cir. 1977), is manifestly inapposite. It involved a dispute between lead class counsel and the local retained counsel of individual class members over the apportionment of individual fees paid pursuant to individual retainer agreements.

Almost every other case that class counsel cite to support their vague and ill-defined argument that the district court had discretion to apply the percentage-of-fund method is similarly unhelpful. Several actually involve application of the *lodestar* method.[11] The majority, however, simply involve fee-spreading, whether in the common fund context[12] or the common benefits context.[13] In one state-law case, on which class counsel place sub-

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[11] *See* Answering Br. 30 (citing *Arenson v. Bd. of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974) (awarding an enhanced lodestar fee)); *id.* at 32 (citing *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998) (affirming a lodestar award)); *id.* at 35 (citing *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411 (2d Cir. 2010) (affirming a lodestar award in a common-fund case involving "a settlement fund totaling $2.5 million")); *id.* at 37 (citing *Weinberger*, 925 F.2d at 523 (affirming a lodestar award and observing that the common fund doctrine "does not literally apply" in cases like this one)).

[12] *See* Answering Br. 32-33 (citing *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993) (affirming a fee award of a "twenty percent share" of the "settlement fund")); *id.* at 33 n.12 (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) (observing that "plaintiffs and their attorneys [were] adversarial," and affirming "a fee of 28% of the settlement fund")); *id.* at 37 (citing *In re Computron Software*, 6 F. Supp. 2d 313 (D.N.J. 1998) (awarding "twenty-five percent of the Settlement Fund" in fees under the percentage approach to prevent "the members of the class [from being] unjustly enriched" at the expense of "counsel responsible for generating the fund")); *id.* at 39 (citing *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993) (common fund case involving a 5.25% fee to be deducted from a $50 million "settlement fund")).

[13] *See* Answering Br. 30 (citing *Faught v. Am. Home Shield Corp.*, 661 F.3d 1040 (fee-spreading award in the form of a 25% assessment against all payments "received by class members through the [claims] process"), *superseded* 668 F.3d 1233 (11th Cir. 2011)); *id.* (citing *GM Trucks* (simultaneous settlement of merits and fees)); *id.* at 38 (citing *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73 (D.D.C. 2011) (simultaneous settlement

stantial emphasis (*see* Answering Br. 36-37 (citing *In re New Mexico Indirect Purchasers Microsoft Corp. Antitrust Litig.*, 149 P.3d 976 (N.M. Ct. App. 2006)), the parties even expressly agreed as part of their settlement agreement that "the amount of the attorneys' fees will be determined upon the basis of the 'common fund' doctrine" and not as a "statutory fee." 149 P.3d at 987. There was no such agreement in this case.

That leaves just *two* out-of-circuit, district court cases—*Dewey* and *Turner*—to support class counsel's fanciful claim (Answering Br. 34) that the percentage-of-fund method is "by far the most prevalent approach" for awarding fees in fee-*shifting* class actions like this one. But neither provides any reason to conclude that the percentage-of-fund method is permissible in fee-shifting cases at all, much less that it is the norm. In *Turner*, for example, the parties *agreed* that that the court should apply the

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amounting to "a constructive common fund")); *id.* (citing *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241 (3d Cir. 2009) (an agreement "to establish [a] settlement fund to provide relief to" the class and a separete fund to pay attorneys fees, which was "analogous" to a typical "common fund" situation)); *id.* (citing *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000) (simultaneous-settlement of merits and fees)); *id.* at 41 (citing *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241 (8th Cir. 1996) (simultaneous-settlement case in which "[t]he award to the class and the agreement on attorney fees represent a package deal")); *id.* (citing *In re LG/Zenith Rear Projection Television Class Action Litig.*, 2009 WL 455513 (D.N.J. 2009) (simultaneous settlement of merits and fees)); *id.* at 42 (citing *Lopez v. Youngblood*, 2011 U.S. Dist. Lexis 99289 (E.D. Cal. 2011) (simultaneous-settlement case in which the $2 million fee award amounted to 28.5% of the total payout)).

percentage method. *See* 472 F. Supp. 2d at 858-859. Thus, although the court employed the percentage approach under circumstances similar to those presented here, it did so only at the behest of the parties, who never suggested it should do otherwise.

And in *Dewey*, the court inexplicably concluded that "no fee shifting occurs" in cases where the defendant "agrees" to pay attorneys' fees (728 F. Supp. 2d at 588), and suggested that the facts there implicated fee-spreading because the parties had simultaneously resolved "both 'the fee and settlement,'" which "'c[a]me from the same source'" (*id.* at 592 (quoting *GM Trucks*, 55 F.3d at 821)). There is reason to believe that conclusion was simply incorrect; but whatever might be said about *Dewey*, there is simply no dispute in *this* case that the fee award represents fee-shifting and not fee-spreading.

3. Class counsel's Rule 23 argument is a red herring.

Rather than addressing these issues head-on, class counsel dedicate a substantial portion of their answering brief (at 22-26, 29) to their argument that "Rule 23 governs all class actions in federal court" and accordingly "provided the authority to award fees in the present case." Answering Br. 24-25. And they devote nearly three pages (at 23-25) to *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1431

(2010), where the Supreme Court held that states may not forbid the maintenance of a Rule 23 class action in federal court.

Rule 23 and *Shady Grove* are both red herrings. True, one of the questions presented is whether the award of fees was authorized "by law" (that is, by the New Jersey fee-shifting statute) or "by the parties' agreement" (that is, by the settlement agreement). But pointing to Rule 23 merely brings that question into focus; it does nothing to answer it. It also does nothing to answer the question of what fee-calculation methodologies are permissible in any given case. That, again, is a substantive legal issue that must be resolved in diversity cases like this one by reference to *state* law. *See* Opening Br. 28-30. Here, regardless whether the fee award is authorized by statute or by agreement of the parties, the relevant state law and the plain language of the agreement mandated the lodestar method.[14]

II. THERE WAS NO BASIS FOR APPLYING A LODESTAR MULTIPLIER IN THIS CASE.

At bottom, it is clear that the district court's authority for awarding fees in this case arose under the New Jersey fee-shifting law and not the

[14] We noted in the opening brief that Massachusetts, and not New Jersey, law most likely governs interpretation of the settlement agreement, but that choice-of-law would not make a difference given the plain language of the agreement. Class counsel do not disagree. The question of what law would govern the fee determination, assuming (1) fees were authorized by the agreement and (2) the agreement did not expressly foreclose the percentage approach, is similarly irrelevant: either state would have required the lodestar approach. *See supra* n.7 & accompanying text.

settlement agreement. And it is equally clear that the district court should have applied the lodestar method either way. For their part, class counsel do not dispute our contention (Opening Br. 50) that, assuming the district court erred by not employing the lodestar method, the most sensible solution is to remand with instructions to enter an award based on the $7.734 million lodestar cross-check.

They do, however, suggest that the lodestar amount should be enhanced by a multiplier. As they see it, "the [district] court properly considered all of the factors applicable to lodestar multipliers" and "appl[ied] [the] factors identified in *Coutin v. Young & Rubicam P.R.*, 124 F.3d 331, 337 n.3 (1st Cir. 1997)." Answering Br. 52 (citing A36-41). But that, again, misrepresents the district court's opinion. The district court never once cited *Coutin* and, apart from listing just *six* of the *twelve* factors identified in that case, it never actually engaged in an analysis of any of them.

Apart from that, class counsel do not dispute that, under New Jersey law, a multiplier is available only in "unusual circumstances" (notably absent here) and may not exceed 50 percent of the baseline lodestar. *See* Opening Br. 50. They also fail to respond to our observation (*id.* at 51 n.14) that, even under the percentage approach, the district court's multiplier was nothing but a results-driven effort to ensure that the cross-check corresponded with the percentage-based fee award. Even on that score, the

unexplained multiplier failed—it supported a cross-check of less than $20 million (A41), and the district court inexplicably declined to reevaluate the award in light of the 50% mismatch between the crosscheck and percentage amount. *See* Opening Br. 56.

At bottom, the district court provided no explanation at all to support its decision to apply a multiplier, dedicating *just five words* to the subject: "Assuming a multiplier of 2.50." A41. Class counsel, who already will be compensated at $500/hour for both attorney *and* staff time under the unenhanced $7.734 million lodestar award, offer no real defense of that unexplained and indefensible assumption.

III. EVEN UNDER THE PERCENTAGE-OF-FUND APPROACH, THE DISTRICT COURT ABUSED ITS DISCRETION.

We showed in the opening brief (at 52-58) that, even under the percentage approach, the district court grossly abused its discretion for at least two independent reasons. *First*, it declined to calculate the value of the settlement or determine an appropriate percentage of that value to award in attorneys' fees. *Second*, the court purported to base the $30 million award on the benefits hypothetically made available to the class, rather than on the claims actually submitted. In response to the first argument, class counsel again misrepresent the district court's opinion; and in response to the second, they dodge our point on the merits and assert that we have waived the argument. Neither response has any merit.

A. The district court did not determine the value of the settlement or a percentage of the value to award.

Class counsel do not dispute that a district court applying the percentage method must "[a]t the very least … make some reasonable assessment of the settlement's value and determine the precise percentage represented by the attorneys' fees." *GM Trucks*, 55 F.3d at 822. Unable to contest this basic legal principle, class counsel instead state that "[t]he court properly estimated the value of the settlement in its consideration of a reasonable fee" and re-characterize our argument on this point as a "conten[tion] that the court over-estimated the settlement's value." Answering Br. 44. That is absolutely false.

It is not clear where in the district court's opinion class counsel believe the court announced its determination of the settlement's value, or what they believe that determination was—they do not cite anything for their bald misstatement that "[t]he court properly estimated the value of the settlement." Answering Br. 44. Some four pages later, however, they simply assert (without express attribution to either the special master or the district court) that "the aggregate value of the benefits" was "$222,932,831," quietly citing to the special master's report. *Id.* at 48 (citing A12, A22); *see also id.* at 15 (similar).

But as we explained in the opening brief (at 19, 53 n.16), the special master never made such a finding. Instead, in merely *describing* class

counsel's expert's rebuttal report, he observed that the sum total of the revisions to the expert's original opinion "aggregates a value amount at $222,932,131." A12.[15] Again, the special master was perfectly clear that he believed the value of the settlement to be "somewhere between the extremes," and he would "not attempt[] to settle [the] dispute between the two experts." A13. The district court, for its part, took the same approach. Confronted with the two experts' radically divergent predictions, it neither undertook its own independent valuation of the settlement nor even acknowledged the actual facts as they developed. Instead, it merely "t[ook] note of the special master's views" (A36), without resolving any of the issues left open by the special master.

Against this backdrop, class counsel's claim that the $30 million award is 13.5% of the $222.9 million valuation, which is "far lower than percentages usually applied" (Answering Br. 48), is simply wrong. The district court never determined the value of the settlement—which has since been proven to be less than $45 million—or a specific percentage of that value to award. It therefore is impossible to know how the district court derived its suspiciously-round $30 million figure. That lack of reasoning is, by itself, a basis for reversal. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005) ("[D]istrict courts [must] clearly set forth their rea-

[15] In his later supplemental memorandum, the special master increased this figure by $700 to account for an arithmetical error. A22.

soning for fee awards so that [the courts of appeals] will have a sufficient basis to review for abuse of discretion").[16]

B. This Court can and should consider the actual claims data in reviewing the fee award.

Class counsel say that the district court "properly considered the entire *potential* value of the settlement," regardless of the value of the claims actually made. Answering Br. 55 (emphasis added). But to support this contention, they simply cite a series of cases involving common funds. As we explained, however, in *non*-common-fund cases like this one, where the valuation of the settlement is uncertain, other courts of appeals have said that district courts should "consider[] the actual claims awarded," rather than "illusory" potential claims that are never filed. Opening Br. 57 (quoting *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 852-853 (5th Cir. 1998)). Class counsel offer no response to *Strong* on that point. That omission is especially notable in this case, given the self-evident manipulation that took place here: there was a *ten-fold* disparity between the high-end figure that class counsel claimed the settlement "potentially" was worth

[16] For this reason, class counsel's protracted accounts of their "litigation efforts" (Answering Br. 6-9, 46-48) and the battle of the experts concerning the value of the settlement (*id.* at 9-15, 44-45) are beside the point. It is impossible to tell whether, much less how, the district court took any of that into account.

($475 million (JA231)), and the true value that has since been proven with actual claims data (less than $45 million (JA535)).[17]

Rather than addressing our argument on the merits, class counsel accuse us of attempting "to enlarge the record on appeal" (Answering Br. 53), noting that we cited to materials demonstrating the actual value of the reimbursement claims, submitted in support of Defendants' motion to vacate. Because we did not specifically challenge the district court's denial as moot of the motion for leave to file that evidence, they contend, we have waived any argument concerning the propriety of that order, and accordingly the materials are not a part of the record on appeal (*id*. at 54).

Class counsel again misrepresent the facts. To begin with, they describe the materials cited in the opening brief as having been "stricken." Answering Br. 54-55. In fact, the materials were submitted as part of a motion that simply was denied as moot: In support of the motion to vacate the fee award (Dkt. 280 (Apr. 21, 2011)), Defendants submitted a motion for leave to file supplemental materials (JA524) after the initial settlement claims period closed, to demonstrate the actual value of those claims. Six days later, the district court issued a single order denying on the merits the motion to vacate, and denying as moot the motion for leave to file the

[17] Class counsel's absurd suggestion (Answering Br. 57) that the "potential value" of the settlement was actually over $1 billion makes the risk of manipulation in cases like this one all the more evident.

supplemental materials. A44. Defendants shortly thereafter filed a notice of appeal from that order, specifically including the denial of the motion to file the supplemental materials. JA557-558.

We unambiguously argued in initial briefing before the district court (Dkt. 203, at 1), the subsequent motion to vacate (Dkt. 281, at 15-19), and the opening brief on appeal (at 25-26, 56-58) that the district court should have taken account of the actual value of the claims filed. The district court's ministerial decision to deny as moot the supplemental-materials motion, in the course of rejecting our substantive argument on the merits, changes nothing. Our challenge to both decisions is necessarily the same: if the court had properly considered the actual value of the claims filed, then the motion for leave to file the evidence demonstrating the value of those claims plainly would not have been moot.

In any event, this hardly is a case in which we are trying "to enlarge the record on appeal." Answering Br. 53. While it is true that this Court "may not entertain newly proffered evidence for the first time on appeal" (*Ne. Drilling, Inc. v. Inner Space Servs., Inc.*, 243 F.3d 25, 41 (1st Cir. 2001)), that rule is intended to prevent the parties from presenting new material that "could have been offered in the trial court" in the first instance. *In re Colonial Mortg. Bankers Corp.*, 186 F.3d 46, 50 (1st Cir. 1999). That rule has no application here. The supplemental materials *were*

offered before the district court, which simply "decline[d] to reconsider" our argument that it should take them into account. A44. Class counsel's effort to hide behind a procedural technicality to avoid the facts reflected in those materials—namely, that the settlement agreement is actually worth less than $45 million—is fruitless. And their unwillingness to defend the merits of district court's puzzling refusal to acknowledge the empirically-verified value of the settlement is even more telling.[18]

C. The district court did not conduct a de novo review of the special master's report and recommendation.

Finally, class counsel claim—notwithstanding Rule 53(f)(4)'s promise of "de novo" review—that the district court "was entitled to give some deference to Special Master Van Gestel's findings and recommendations" (Answering Br. 50) and there was nothing improper about the special master's "assistance in the draft order which adopted most of the Special Master's findings, conclusions and recommendations" (*id.* at 54).

That is incorrect. It is well understood that "*de novo* review means ... with no deference at all" and implies a "duty of *independent* review." *Ta-*

[18] Class counsel assert that "[t]he stricken materials only relate to the number of actual warranty reimbursement claims filed, and not to the potential value of the entire settlement." Answering Br. 55. But Defendants' expert explained that the "actual data" provided by Rust Consulting "obviates the need for relying on [class counsel's expert]'s assumptions" in other respects—assumptions that turned out to be massively "inflated." JA534-536.

voulareas v. Piro, 817 F.2d 762, 777 (D.C. Cir. 1987) (emphasis added); *see also Ziaee v. Vest*, 916 F.2d 1204, 1208 (7th Cir. 1990) ("'De novo' review means without deference."). By delegating to the special master the responsibility for drafting its "de novo" opinion in this case—the equivalent of this Court employing a district judge to write a "de novo" appellate opinion affirming the district judge's own ruling—the district court plainly denied Defendants the *independent*, non-deferential review to which they were entitled. That is another basis for reversing the district court's groundless fee award.

CONCLUSION

If the Court concludes that the lodestar method should have applied, the order awarding fees should be vacated and the case remanded with instructions to award $7,734,000. If the Court concludes that the district court had discretion to apply the percentage method, the order awarding fees should be vacated and the case remanded with instructions for a new district judge to calculate an appropriate fee by reference to the actual value of the benefits obtained by the class.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,985 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

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April 2, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 2, 2012 the foregoing Reply Brief for Appellants was served electronically upon all counsel of record via CM/ECF. Two hardcopies of the Reply Brief for Appellants also were served by third-party courier for delivery within three days upon:

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