No. 16-3554

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: SEARS, ROEBUCK AND CO. FRONT-LOADING WASHER PRODUCTS LIABILITY LITIGATION,

APPEAL OF: SEARS, ROEBUCK AND CO. and WHIRLPOOL CORPORATION

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 1:06-cv-07023, 1:07-cv-00412, and 1:08-cv-01832

The Honorable Magistrate Judge Mary M. Rowland

REPLY BRIEF FOR APPELLANTS SEARS, ROEBUCK AND CO. AND WHIRLPOOL CORPORATION

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INTRODUCTION

Defendants' opening brief showed that the district court's award of $4.8 million in attorneys' fees—more than five times the value of the settlement to the plaintiff class—rests on three legal errors that each require reversal.

First, the fee award vastly exceeds the 0.5 ratio that this Court has held is presumptively the cap for fees in settled class actions. A 0.5 ratio would have produced an award of no more than $900,000.

Second, the court should have reduced class counsel's lodestar to reflect the fact that the $900,000-or-less settlement was a small fraction of what plaintiffs sought in their complaints and earlier settlement demands, benefited a fraction of the class, could have been achieved much earlier had class counsel accurately assessed their case, and in no way warranted the effort reflected in the lodestar. Instead, the court rewarded class counsel for their inefficiency and failure to correctly value their case.

Third, instead of reducing the lodestar, the district court erroneously applied a 1.75 upward multiplier. That multiplier was arbitrary in amount and based on factors that were either already built into the lodestar or unwarranted by the work done and result achieved.

Class counsel refute none of this. Their response rests on two false premises. One is that this Court's ruling in *In re Southwest Airlines Voucher Litigation*, 799 F.3d 701 (7th Cir. 2015), supports the award here. It does not. *Southwest* is factually remote. And the legal principles on which it rests actually support *reducing* the award. The other premise is the fantasy that class counsel achieved an

"exceptional" result for their clients. They achieved nothing for the vast majority of the class but instead gave up their claims. For the rest, they got a possibility of compensation only barely better than Sears' warranty terms, which most never even pursued. In short, class counsel identify no legitimate basis for upholding their enormous fee.

Class counsel's brief even misstates the standard of review. As their own cases show, a "highly deferential" standard applies to review of fact-bound aspects of a fee award like "[n]umbers of hours and reasonable rates." *Dutchak* v. *Cent. States, Se. & Sw. Areas Pension Fund*, 932 F.2d 591, 596 (7th Cir. 1991); *accord Ustrak* v. *Fairman,* 851 F.2d 983, 987 (7th Cir. 1988). But defendants do not challenge hours or rates. They challenge the district court's faulty legal analysis. Class counsel themselves frame their arguments in terms of whether the district court "correctly interpreted and applied this Court's standards" and properly "justified" its multiplier. Appellees' Response ("Resp.") 23, 49 (headings). And they acknowledge (at 22) that "methodology," and "whether it reflects the proper procedure," receives "*de novo*" review.

As the Supreme Court has explained, the "substantial deference" given to district courts in highly factual areas like "allocating an attorney's time" does not extend to legal methodology: "the trial court must apply the correct standard, and the appeals court must make sure that has occurred." *Fox* v. *Vice*, 563 U.S. 826, 838 (2011) (vacating fee award). Here, the trial court made three separate legal errors in awarding fees of five times the maximum class recovery. Its massive and

disproportionate fee award should be reduced to no more than the $900,000 maximum class counsel recovered for their clients.

ARGUMENT

I. THE DISTRICT COURT SHOULD NOT HAVE AWARDED ANY MORE THAN $900,000 IN ATTORNEYS' FEES.

This Court and the Supreme Court have held that a fee award must be assessed in light of the benefits that counsel achieved for the client. Appellants' Opening Brief ("Br.") 22. Courts use two alternative analyses to overturn excessive fee awards. In settled class actions, this Court applies a ratio analysis to assess whether the ratio of the fee to the fee plus class recovery is reasonable. *Id.* at 22-24. More generally, courts adjust lodestars based on degree of success by comparing counsel's results to what they sought and the effort they expended. *Id.* at 32-39. Under either analysis, the less-than-$900,000 in class benefits recovered here should have resulted in no more than $900,000 in fees. *Id.* at 22-39. The district court instead awarded nearly $4.8 million—more than quintuple the class recovery.

Class counsel never come to grips with the degree-of-success analysis. And they incorrectly assert that ratio analysis does not apply here because they got an "exceptional" "full recovery" for class members that supposedly justifies the $4.8 million fee award under *Southwest*.

A. This Case Is Nothing Like *Southwest*.

Defendants' opening brief (at 30-32) showed that *Southwest* is both legally and factually inapposite. Class counsel's response confirms that their argument for this enormous fee award depends on analogizing their case to *Southwest*. They

claim (at 23) that the district court "followed" the legal principles in *Southwest* and "faithfully applied" them to support an award well in excess of the presumptive cap set forth in *Pearson* v. *NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014). The district court did neither of those things.

1. The District Court Misunderstood *Southwest*.

The district court's reliance on *Southwest* rested on several fundamental misconceptions, which class counsel parrot in their response. The district court (A15) and class counsel (at 23) claim the ratio analysis is a mere "presumption" that *Southwest* permits courts to disregard. To the contrary, as defendants' opening brief explained (at 25), the "presumption" set forth in *Pearson* is not a presumption that the ratio should be considered; it is a presumption about what ratio is reasonable. Defendants' position is not, as class counsel say (at 25), that "a court *never* has discretion to award fees in excess of the . . . Ratio." Rather, defendants' position is the same as this Court's holdings in *Pearson* and *Redman* v. *RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014): Even if the lodestar method is applied, the ratio analysis must be applied as a cross-check, and the presumption is that fees should not exceed class benefits. Br. 25-26.

Nor are class counsel correct when they claim that "[e]mbracing Defendants' argument would require this Court to overrule its decision in *Southwest*." Resp. 25. *Southwest* does not change the central holdings in *Pearson* and *Redman*. *Southwest* expressly limited its ruling to the "distinctive" and "exceptional" settlement before the Court. 799 F.3d at 712. The *Southwest* opinion makes clear that any lack of

proportionality between the fee award and class benefits was acceptable only because of the unique settlement at issue there. *Id.*

By contrast, *Pearson* and *Redman* state *general* rules applicable to *all* fee awards based on a class action settlement. A ratio analysis must be applied: "[H]ours *can't* be given controlling weight," and a judge "*must assess* the value of the settlement to the class." *Redman*, 768 F.3d at 629, 635 (emphasis added); *Pearson*, 772 F.3d at 781. And fees exceeding class benefits are presumptively improper: "[T]he presumption should we suggest be that attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel." *Pearson*, 772 F.3d at 782.

The rules established by *Pearson* and *Redman* are not restricted to cases involving collusion between class counsel and defendants in settling fees, as the district court mistakenly believed. A15-18. Those decisions also rest on a concern present in litigated fee cases like this one: the perverse incentive for class counsel, unrestrained by "clients with whom they negotiate billing," to run up hours and claim higher fees without achieving greater class benefits. Br. 26.

Southwest is not to the contrary. It confirmed that a district court cannot mechanically apply the lodestar method, but "*need[s]* to bear in mind the potential for abuse . . . and *should evaluate critically the claims of success* on behalf of a class." 799 F.3d at 710 (emphasis added). It also recognized that the "conflicts of interest" that "come to the fore when attorney fees for class counsel are the issue" make a

"powerful argument" for restraining excessive fee requests in "most cases." *Id.* at 711-12.

By marginalizing *Pearson* and *Redman* and ignoring the narrow context and limited reach of *Southwest*, class counsel and the district court would allow an exception to swallow the rule.

2. The District Court Misapplied *Southwest*.

Class counsel also are incorrect in claiming that the district court "faithfully applied" the *Southwest* exception and the *Pearson* and *Redman* rule. Resp. 23. The district court did not apply any ratio analysis as a cross-check on the lodestar method. Br. 23-26. Nor did it fulfill its obligation to "evaluate critically the claims of success on behalf of [the] class." *Southwest*, 799 F.3d at 710.

Application of the ratio analysis would have revealed the fundamental defect in the district court's fee award. The settlement provided no more than $900,000 in value to the class, for which the district court awarded class counsel nearly $4.8 million. *Id.* at 23-24. With a ratio of at least 0.84, the district court's award is far beyond what this Court has deemed acceptable. *Id*. It is much higher than the **0.69 ratio** this Court overturned in *Pearson* as **"outlandish."** *Id.* at 24.

Southwest in no way supports this grossly disproportionate result. Class counsel (at 29-30) say *Southwest* authorized a fee award with a high ratio. But they point to claims data filed in the district court *on January 20, 2017*, long after this Court issued its 2015 opinion in *Southwest*. *Levitt* v. *Southwest Airlines Co.*, No. 1:11-cv-08176 (N.D. Ill.), ECF No. 353 ¶¶ 6, 16. This after-the-fact data is beside the point. What matters is whether, *at the time of this Court's opinion*, a ratio analysis

would have revealed a problem. As our opening brief explained (at 31), the *Pearson/Redman* ratio in *Southwest*, when this Court considered the case, was less than 0.40—well within the presumptively appropriate range. This Court therefore had no reason to undertake more exacting scrutiny.[1]

This Court also had no reason to be worried in *Southwest* about class counsel having overlitigated to increase their fees. Class counsel admit (at 25-26) that *Southwest* was litigated efficiently and effectively to reach an "excellent" settlement "[w]ithin a year of filing the complaint." By contrast, this case involved neither efficient litigation nor an excellent settlement. Rather, after burdening the courts for a decade, class counsel earned a meager recovery for a tiny fraction of the class. *Compare Eubank* v. *Pella Corp.*, 753 F.3d 718, 727-29 (7th Cir. 2014) (overturning disproportionate fees for modest relief after eight years of litigation).

Class counsel acknowledge (at 30) that this case lasted "*10 times* as long" as *Southwest*. And they do not dispute that fully 90% of their lodestar was accumulated *after* the resolution of the part of this case they say was "complex"—the class certification appeal. *See* Br. 35; Resp. 53. Class counsel say that having "five attorneys" spend months generating the vast majority of their lodestar post-

[1] In any event, the later-revealed claims data in *Southwest* do not help class counsel. They mischaracterize that data by failing to mention that, while fewer claims were filed than previously reported, Southwest agreed to triple the number of replacement coupons provided to claimants, increasing the total to 412,815 coupons. *Levitt*, ECF No. 353 ¶ 20. This increase results in a class benefit of between $2.06 million (412,815 coupons at $5 face value) and $1.24 million (412,815 coupons at $3 discounted value), depending on how the coupons are valued. With fees totaling $1.88 million (the original $1.65 million, plus $231,000 accumulated later (*id.*)), the *Pearson/Redman* ratio in *Southwest* is between 0.48 and 0.58, near the presumptive maximum and far below the 0.84 here.

remand was "efficien[t]." Resp. 8. But they do not dispute that much of that time—including over 2,300 hours of senior lawyer time—was devoted to poring over documents, many of which already had been reviewed in 2009 and 2010. Br. 9; Dkt. 564 at 37. Their own response (at 8) cites "analysis of the tens of thousands of documents" to prepare for depositions, but mentions only a single deposition post-remand. The vast majority of class counsel's lodestar was generated through post-remand document review with little substantive work. That is a far cry from the efficient single year of litigation in *Southwest*.

Class counsel try (at 47-48) to pin the blame on defendants for the prolonged litigation, claiming defendants "refus[ed] to even discuss settlement." In fact, class counsel and Whirlpool had repeated settlement discussions between 2009 and 2014. *See* Resp. 6-7 (acknowledging multiple pre-2015 settlement discussions). These discussions never went far due to *class counsel's* unreasonable positions. Each time the parties sat down before July 2014, class counsel made an astronomical demand to settle the "biofilm" claims and wanted even more on top to settle the CCU claims. Then, in July 2014, class counsel made an eight-figure demand to settle the CCU claims. Br. 10. It was not until Whirlpool prevailed at a class action trial on the biofilm claims that class counsel adopted a more reasonable position. *Id.* at 10-15. Far from choosing to litigate, defendants were *forced* to litigate by class counsel's unrealistic demands.

Nor was the six-figure settlement that class counsel achieved comparable to the "excellent" settlement in *Southwest*. In *Southwest*, the settlement provided

every class member with the same coupons that the defendants had cancelled. 799 F.3d at 704-05. Here, as we detail below, 95% of the class were not even eligible for relief, most of those eligible for relief did not file claims, and the relief available to eligible claimants is subject to a host of limitations, as a result of the many substantial concessions made by class counsel. In short, this case is nothing like *Southwest* where "the class members [got] back *exactly* what they had before," "*[n]o* class members ha[d] legitimate or even plausible claims to more," and class "counsel c[a]me away from the negotiating table with everything the client could hope for." 799 F.3d at 712 (emphasis added).[2]

Even if the recovery here were comparable to the recovery in *Southwest*, a $4.8 million fee still would be excessive. Nothing in *Southwest* suggests that a "full recovery" justifies abandoning all limitations on fee awards. Apart from strict proportionality, any fee must be reasonable under the general lodestar standards articulated in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), and its progeny. Br. 22, 33. Class counsel do not challenge the showing in our opening brief that those authorities measure the reasonableness of a fee in part by looking to whether the level of success justified the effort expended. *Id.* at 22, 32-39. Under those authorities, a $1,000 "full recovery" could hardly justify $10 million in attorneys' fees. And *Southwest* does not hold otherwise.

[2] There is no merit to class counsel's assertion (at 27-28) that the settlement here is somehow superior to the one in *Southwest* because it provided a few class members with cash. The *Southwest* class lost coupons, not cash. *Southwest*, 799 F.3d at 704-05.

B. This Is Not A Full Recovery Case.

In an effort to shoehorn this case into *Southwest*'s narrow exception to the proportionality rules established by *Pearson*, *Redman*, and other authorities, class counsel insist that they obtained a "full recovery" settlement, touting the recovery as "exceptional," "excellent," "full relief," "complete relief," "complete, full, dollar-for-dollar recovery," and "the best result possible." *E.g.*, Resp. 2, 3, 11, 12, 15, 20, 39, 41, 44, 57. Repetition of this rhetoric does not make it true. Class counsel's claims of "full recovery" are refuted by the undisputed record.

This case did not involve anything close to a full recovery. *Over 95% of the class* were not eligible for *any* relief because they did not experience a control unit malfunction and pay for a qualifying repair within three years of purchase. Br. 5-6, 16. Among those eligible to make claims, most did not do so. *Id.* at 17. And even those who submitted valid claims will get only limited relief. *Id.* at 29-30. No one gets the premium-price damages described in the complaints. *E.g.*, SA80; SA245. Nor does anyone get the consequential damages (*e.g.*, costs associated with using Laundromats), statutory damages, or prejudgment interest demanded by plaintiffs. *E.g.*, SA245; SA262. Repair damages are limited to two repairs (absent extraordinary circumstances). Replacement damages are limited to $300 (a fraction of the $800-$1,400 washer price). And service contract damages are limited to $100 (a fraction of the cost). As a result of the settlement's strict eligibility and relief limitations, the valid claim rate stands at only 0.3% and a mere $475,000 has been awarded to class members. Br. 17. These results are consistent with this Court's prediction when it approved class certification: only a few class members were

injured, so the settlement largely exonerated defendants. *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013).

Nor do class counsel credibly contest any of the facts summarized in the table in our opening brief (at 14-15) showing that they obtained only a small fraction of the relief they demanded. They do not dispute that they initially sought relief for *all* class members totaling more than $100 million. Br. 1, 38. They do not dispute that they demanded an eight-figure settlement in July 2014. Br. 38. And they acknowledge that they ended up with a settlement likely amounting, in their words (at 32), to a mere "$500,000 to $900,000."

To claim "full recovery," class counsel rely on the circular notion that what they received was all they ever wanted to receive. They say, contrary to their own pleadings, that they *never intended* to obtain relief for 95% of the class. They say claims rates should therefore be calculated based exclusively on the small portion of the class for whom they supposedly intended to recover. Then they dismiss their settlement concessions as trivial. Class counsel finally put forth a baseless collateral estoppel theory to try to prevent this Court from reviewing the district court's "full recovery" conclusion.[3] None of these points has merit.

Class-Wide Relief. Class counsel claim they never intended all class members to get damages. They say (at n.5) they "were *not* seeking premium-price

[3] As our opening brief explained (at 29), that conclusion was based on the district court's incorrect assumption that defendants had joined a declaration to that effect by class counsel. Defendants always contested class counsel's assertions that the settlement provided full recovery. *E.g.*, PSA198; SA286-90; SA349-50; SA356.

damages" and "*only* sought damages for CCUs that actually malfunctioned." The record dispels these assertions.

Both pre- and post-remand, plaintiffs' complaints expressly sought damages for *all* class members based on overpayment for washers with defective CCUs—a fact class counsel do not dispute. Br. 5-6, 12, 37. Plaintiffs initially alleged a design-defect theory in which *all* washers bought by class members contained a defective CCU. *Id.* at 5-6. Although they shifted to a manufacturing defect theory during class certification proceedings, class counsel never redefined the class to exclude buyers whose machines did not manifest the alleged manufacturing defect. *Id.* at 6-8. Then, post-remand, plaintiffs switched back to a design-defect theory, once again claiming that the control units in all washers were poorly designed. *Id.* at 11-12. Yet now, when it serves their interest in obtaining more fees, class counsel say they never wanted relief for all class members. The Court should not be deceived by this shell game in which class counsel's theory morphs to suit their latest objective.

Class counsel claim (at 45) that defendants' "*only* post-remand" evidence of counsel's sweeping claims for class-wide relief is the 2015 complaint. Class counsel's own response shows otherwise. They devote a good part of their response to discussing the "design-defect" liability theory that their expert, Dr. Pecht, developed post-remand. Resp. 8-11, 43-44. That theory alleged a design flaw "present in washing machines that used" CEM-1 boards. PSA181-82. As class counsel acknowledge (at 10-11), while they were gearing up for trial the parties agreed to a broad class definition based on this theory. That definition included "*all* persons or

entities who purchased" certain Whirlpool manufactured washing machines with CEM-1 CCUs. PSA98. By asserting an "all purchaser" class and pursuing a class-wide "design defect" theory, class counsel set up the liability trial to permit damages claims for those who experienced malfunctions *and* those who did not. If class counsel truly meant to recover only for class members whose machines manifested a defect, there would have been no reason to include *all* purchasers in the definition.[4]

Class counsel (at 45), like the district court, also accuse defendants of conflating injury and damages. They admit that they alleged that all buyers were *injured*, but claim they were seeking *damages* only for buyers whose washers manifested a defect. This is nonsense. If class members were injured by overpaying, that means they had damages. *E.g.*, *Suchanek* v. *Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir. 2014) (damages in consumer class action could include "the difference between the actual value" of the product "and the inflated price . . . paid"). Those damages are what class counsel's complaints pre- and post-remand alleged. Br. 5-6, 12. And those damages are what their expert's design-defect theory was intended to support.

Claim Rates. Class counsel assert (at n.13) that "[t]he accurate calculation of the claims rate is the percentage of class members *whose CCUs failed* who filed

[4] Defendants, of course, were ready to refute plaintiffs' theory at trial. Dr. Pecht did no data analysis, and his opinions had no empirical support. *See* PSA176-82. His report simply parroted an incorrect internal memorandum by a low-level Whirlpool quality engineer who did not have access to the relevant data. *E.g.*, PSA180-82; PSA185-86. Dr. Pecht's report nevertheless shows that plaintiffs developed a broad framework for seeking class-wide relief, which they abandoned to avoid trial and obtain a large fee.

claims." They rely on this proposition to support their claim rate figure of "likely over 16% of all class members who had CCUs that failed." *Id.* at 28. This is a fallacy.

Class action lawyers could make the same argument in every case. They could define a class including millions of mostly uninjured parties, enter into a settlement that would benefit only a handful, and then assert total victory and a 100% claims rate when those few people recovered their damages. That cannot be the correct analysis. Governing precedents make clear that counsel's degree of success must be measured against the total amount sought, considering the full scope of litigation. Br. 36; *see also In re Burlington N., Inc., Employment Practices Litig.*, 832 F.2d 430, 434-35 (7th Cir. 1987) (case cited by class counsel explaining that courts should compare results obtained to relief sought and affirming lodestar reduction).

The *actual* current claim rates show that defendants were correct all along—only a tiny percentage of the class experienced any CCU problem. Br. 17. Class counsel note that claims data are still being finalized. But they do not claim that the final payout to the class will exceed $900,000 or show that the *valid* claims rate will exceed even 1%. The claims deadline has passed, and class counsel do not contest the current claims data in defendants' table (Br. 17), including the miniscule valid claims rate of 0.3%.[5]

[5] Current claims data are not inconsistent with defendants' evidence of a 0.2% CCU defect rate. Class counsel conflate (at 1, 14) the "defect" rate with the overall

Settlement Concessions. Class counsel also say (at 46-47) they made only two "paltry concessions" between their July 2014 proposal and the settlement agreement. Neither of the two concessions was "paltry."

One concession was a drastic reduction of the settlement's coverage period. Whereas class counsel's July 2014 proposal placed no time limit on when a defect could manifest, the settlement limited that period to three years after purchase. Br. 10, 13. A three-year limit represented only a modest extension of Sears' warranty, which covered one year for labor and two years for parts. *Id.* at 13.

Class counsel claim (at 47) that the three-year limit was inconsequential because *their expert* found that malfunctions typically occur within three years. But they once again misrepresent the record. The source they cite is *not* their expert, but the district court's opinion approving the settlement, which in turn cites a declaration by class counsel. SA386-87. In that declaration, class counsel acknowledged the significance of the three-year concession, explaining that "Plaintiffs sought to negotiate an even longer time period," but defendants made clear that anything "beyond the agreed upon three year period . . . had the potential to terminate settlement discussions." PSA190. Class counsel's declaration also represented that defects usually occurred within three years, but he could not cite plaintiffs' expert in support of that assertion. PSA190-91. Contrary to what class counsel assert (at 47), neither the portions of Dr. Pecht's report in the record (PSA176-182) nor the remainder discuss when the alleged defects are likely to

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repair rate, and they incorrectly assume all claims relate to a CCU repair when there is no proof of that.

manifest. Indeed, Dr. Pecht's fatigue failure theory supported plaintiffs' claim that the alleged defects could manifest any time over the life of the washer. On its face, the three-year time limit significantly reduced the class recovery.

The other concession class counsel try to minimize is their agreement to a claims requirement instead of automatic payments for pre-qualified class members. As our opening brief explained (at n.6), this was a particularly significant negotiating point that had important consequences: 85% of those who would have been eligible for an automatic payment never submitted a claim. The lack of automatic payments is a principal reason why the class relief is so minimal.

The two concessions acknowledged by class counsel are far from the only settlement concessions they made. *See id.* at 12-16. They abandoned any effort to obtain relief for class members who did not experience a control unit malfunction. They gave up entirely on premium-price damages, consequential damages, and prejudgment interest. And they agreed to caps on the number of repairs eligible for reimbursement and the amount of reimbursement for replacement and service contract costs. Together, class counsel's concessions turned a $100-million-plus action into a less-than-$900,000 settlement. Br. 1, 10-16.

Collateral Estoppel. Class counsel maintain (at 42-43) that the district court's findings that the settlement provided "full monetary compensation" and "full relief" in its order approving settlement "are final and binding and Defendants are collaterally estopped from re-litigating them in this collateral appeal." They also say defendants somehow conceded this point by stating in support of settlement

approval that the settlement "provid[es] complete relief to any class members who possess a possible warranty claim" and is "likely better than what Plaintiffs and the class would have achieved at trial." These arguments are baseless.

Defendants said the settlement was better than what plaintiffs would have achieved at trial because plaintiffs were likely to *lose* at trial. PSA197-98; *see* Resp. 12 (acknowledging "hurdles" plaintiffs faced at trial). And defendants explained that the settlement "provid[es] complete relief to any class members who possess a possible warranty claim *because that buyer experienced a CCU malfunction . . . and paid out-of-pocket to fix the problem . . . up to the first three years of product life*." PSA193 (emphasis added). Defendants made clear that only a "small minority of Washer owners" would obtain relief under the settlement. PSA198.

Moreover, collateral estoppel could not apply here. "Collateral estoppel refers to the effect of a judgment in foreclosing litigation *in a subsequent action* of an issue of law or fact that has been actually litigated and decided." *McDonald* v. *Adamson*, 840 F.3d 343, 346 (7th Cir. 2016) (emphasis added); *accord La Preferida, Inc.* v. *Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 906-07 (7th Cir. 1990) (class counsel's case explaining that collateral estoppel applies in "subsequent suits" to issues "essential" to a prior "final judgment"). The district court's opinion approving the settlement was an interlocutory decision in the *same action* as its fee opinion, which defendants appeal here precisely because there is no basis for concluding that class counsel achieved a "full recovery."

C. Class Counsel's Other Authorities Do Not Justify The District Court's Ruling.

Class counsel cite a hodgepodge of other authorities they claim support the district court's legal analysis. None of them does.

Class counsel first cite (at 36-37) several cases from this Circuit for the proposition that fees can exceed client recovery when the recovery is "spectacular." There is nothing remarkable about this proposition—and nothing spectacular about the meager recovery here. Additionally, three of the cases class counsel cite—*Estate of Enoch* v. *Tienor*, 570 F.3d 821 (7th Cir. 2009), *Montanez* v. *Simon*, 755 F.3d 547 (7th Cir. 2014), and *Richardson* v. *City of Chicago*, 740 F.3d 1099 (7th Cir. 2014)—were not consumer class actions; they were individual civil rights cases alleging serious misconduct by government officials. That is why the reasoning in *Pearson* and *Redman* requiring proportionality in class action fee awards would have had no application in those cases (which all predated *Pearson* and *Redman* anyway). And that is why non-monetary value like "'important social benefits'" was considered in evaluating counsel's success. *Enoch*, 570 F.3d at 824; *accord Ustrak,* 851 F.2d at 989. Such authorities do not govern a case like this involving a routine class action settlement, very limited compensation, and no broader societal benefits. *See* Br. 42-43.[6]

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[6] Class counsel also invoke *City of Riverside* v. *Rivera*, 477 U.S. 561 (1986). But the plurality opinion in that case expressly limited its approval of a disproportionate award to the civil rights context. *Id.* at 573-74 (distinguishing "private" suits "benefitting only the individual plaintiffs"). And Justice Powell's concurring opinion, which supplied the fifth vote, advocated an even more exacting standard for evaluating counsel's success. *Id.* at 585-86 (Powell, J., concurring).

These cases are distinguishable in other ways as well. This Court in *Richardson* and *Montanez* affirmed significant ***reductions*** from counsel's lodestar for lack of success, as the district court should have done here. *Richardson*, 740 F.3d at 1101-04 (80% reduction); *Montanez*, 755 F.3d at 556 (50% reduction). In *Enoch*, this Court held that the district court reduced the lodestar too far but "ma[de] no suggestion as to what the fees should be" on remand. 570 F.3d at 824. Even an award of counsel's full lodestar in *Enoch* would have satisfied the *Pearson/Redman* ratio (a $328,740 lodestar for a recovery of $635,000). *Id.* at 822-23.[7]

Class counsel also cite a number of cases from other jurisdictions, including other courts of appeals, various Illinois state courts, and a California federal district court. Other courts of appeals may not require a proportionality analysis in settled class actions, but this Circuit does, as at least one of the cited cases expressly recognizes. *See Gascho* v. *Global Fitness Holdings, LLC*, 822 F.3d 269, 285-86 (6th Cir. 2016); *see also id.* at 299 (Clay, J., dissenting) (describing this Court's ratio approach as "a simple, common-sense rule"). Class counsel's references to Illinois law (at 37-38) also are misplaced. As the district court properly found, federal law governs fee determinations under this Circuit's law; Illinois law has no application here. A11. As for the California district court's decision in *Chambers* v. *Whirlpool Corp.*, No. 8:11-cv-01733 (C.D. Cal. Oct. 11, 2016), ECF No. 351, that decision was

[7] Class counsel are wrong in arguing (at 36) that *Enoch* "rejected the holding of *Cooke* [v. *Stefani Mgmt. Servs., Inc.*, 250 F.3d 564 (7th Cir. 2001)]," a case cited in defendants' opening brief. *Enoch* never mentions *Cooke*, let alone overrules it.

wrong for many of the same reasons the decision here is wrong. Br. n.14. That is why defendants (and several objectors) have appealed it. *Id.*[8]

None of these inapposite authorities changes the fact that the district court erred as a matter of law when it awarded over five times the class benefits in fees. Br. 22-39. It cast aside the ratio analysis. And it failed to apply a downward multiplier to reduce the lodestar for lack of success. This Court should correct those legal errors and reduce the fee award to $900,000 or less. *Id.*

II. THE DISTRICT COURT SHOULD NOT HAVE APPLIED A LODESTAR MULTIPLIER.

The district court legally erred when it applied an *upward* multiplier to enhance the lodestar by 75%. As our opening brief showed (at 39-43), the district court's multiplier is inconsistent with the Supreme Court's decision in *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542 (2010). As in *Perdue*, the district court's choice of a "75% enhancement" "appears to have been essentially arbitrary." *Id.* at 557. Also as in *Perdue*, the district court relied on factors to support its enhancement that were already "subsumed in the lodestar." *Id.* at 553. Class counsel's response never comes to grips with *Perdue*, much less establishes the "rare and exceptional circumstances" that could warrant a multiplier under *Perdue*. *Id.* at 552.

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[8] The difference class counsel point out (at n.33) between the *Chambers* settlement valuation cited in defendants' opening brief (of $2.5 million) and the low-end valuation cited by the *Chambers* district court (of $4.22 million) is explained by the fact that, in the Ninth Circuit, notice costs often are included in valuing class benefits, while, in this Circuit, they ordinarily are not. *E.g.*, *Huyer* v. *Buckley*, 2017 WL 640771, at *2 (8th Cir. Feb. 16, 2017) (recognizing different approaches). As Whirlpool explained in *Chambers*, the estimated low-end settlement value in *Chambers* ***without*** notice costs is $2.5 million, but is $4.22 million ***with*** notice costs. ECF No. 246 at 1-3.

Class counsel instead try (at 49-50) to justify the district court's chosen multiplier as being commensurate with the supposed "mean multiple in class actions in this Circuit" of 1.85 from 1993-2008 and 1.75 from 2009-2013. These numbers are misleading. The study class counsel cite did not average multipliers awarded in this Circuit. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees in Class Actions: 2009-2013* (N.Y.U. Ctr. for Law, Econ. and Org., Working Paper No. 17-02, 2016). Rather, it analyzed predominantly percentage-based fee awards and "divid[ed] the fee award by the lodestar" to determine what multiple of the lodestar the award represented. *Id.* at 7, 25. This analysis is irrelevant here, where the fee award was based purely on the lodestar. Furthermore, the same source shows that average fee awards in class actions in this Circuit are *mere fractions* of class recovery—not multiples of it. *Id.* at 12; Br. 24.

Beyond this, mean multipliers are irrelevant under *Perdue*. The Third Circuit recently rejected an argument for a lodestar enhancement based on the mean multiplier in that Circuit, explaining that after *Perdue*, "average" multipliers do not matter. *Dungee* v. *Davison Design & Dev., Inc.*, 2017 WL 65549, at *2-3 (3d Cir. Jan. 6, 2017). Rather, a district court needs to justify any multiplier by showing why the case is "rare" and "exceptional." *Id.* (remanding for failure to apply *Perdue* properly).

The district court in this case acknowledged *Perdue's* "rare and exceptional" standard. A47. But it promptly disregarded that standard when it awarded a multiplier based on factors that *Perdue* forbids. Citing a case but misapplying its

rule is legal error. *E.g.*, *Bethel Conservative Mennonite Church* v. *C.I.R.*, 746 F.2d 388, 391 (7th Cir. 1984) (reversing for misapplying cited case).

And class counsel simply repeat what the district court said about the factors supposedly supporting the 1.75 multiplier (degree of success, novelty and complexity, and public interest) and cite another factor (contingency) the district court properly rejected. Nothing in class counsel's response cures the fundamental defects in the district court's analysis.

Degree of Success. In both *Perdue* and *Pennsylvania* v. *Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565-66 (1986), the Supreme Court held that superior results matter only in cases involving superior attorney performance not already captured in the lodestar through higher rates. Br. 40. Ignoring this rule, class counsel point to the district court's findings of full recovery—*i.e.*, superior results—to justify their fee enhancement. Resp. 52. This argument is not only factually incorrect (*supra* pp. 10-16), but foreclosed by Supreme Court law. Br. 40. The only success-related factor that matters is attorney performance. As our opening brief explained (at 41), any superior performance was fully compensated by the district court's award of generous hourly rates.

Novelty and Complexity. *Perdue* further held that novelty and complexity are usually reflected in the lodestar and therefore are not grounds for a fee enhancement. 559 U.S. at 553. Echoing the district court, class counsel cite the class certification appeal in this case as a basis for concluding that they addressed novel and complex issues. But they do not dispute that the lodestar already included all

hours spent on CCU-related appellate work, meaning that this enhancement double-counted. Br. 41. They also do not contest that the vast majority of their hours were spent on post-remand proceedings that even the district court acknowledged were not novel or complex—indeed, they involved little more than repetitive document shuffling. *Id.* at 9, 41-42.

Public Interest. The district court's reliance on the "public interest" to justify a multiplier also double-counted, because public interest is the reason for fee-shifting provisions in the first place. *Id.* at 42. Although this Court has indicated that public benefits such as vindicating constitutional rights may justify a multiplier in certain cases, no public rights are at issue here. *Id.* at 42-43.

Class counsel say (at n.43) the mere fact "[t]hat this case proceeded as a class action . . . reflects wide-reaching societal impact" justifying a multiplier. But if that were the rule, multipliers would be appropriate in *every* class action, no matter how run-of-the-mill. And as *Perdue* held, multipliers are meant to be "rare and exceptional"—not routine. Class counsel do not cite any class action awarding a multiplier based on public interest considerations. The only case they cite, *Gastineau* v. *Wright*, 592 F.3d 747 (7th Cir. 2010), is an *individual* case in which this Court never analyzed whether the case advanced the public interest, but simply mentioned this possibility while upholding a *downward* adjustment of the lodestar. *Id.* at 748-49.

Contingency. Even the district court refused to base its multiplier on the contingent nature of class counsel's fees. A52. Class counsel nevertheless insist (at 50-51) that contingency justifies enhancement.

The cases class counsel cite are inapplicable here by their own terms. Those cases authorize contingency-based multipliers only in common fund cases, where the money for a fee award is coming out of the class's pockets. *Skelton* v. *Gen. Motors Corp.*, 860 F.2d 250, 252-53 (7th Cir. 1988); *Florin* v. *Nationsbank of Ga., N.A.*, 34 F.3d 560, 564 (7th Cir. 1994); *Cook* v. *Niedert*, 142 F.3d 1004, 1013-15 (7th Cir. 1998). In such cases, there is no "danger of unduly burdening the defendant with a multiplier," and "there is no injustice in requiring plaintiff class members to shoulder the burden of compensating counsel for prosecuting the class' case without any assurance of compensation." *Florin*, 34 F.3d at 564-65.

Those are not the circumstances here. This is not a common fund case, and as class counsel repeatedly emphasize (at 18, 48 n.39), the money for the fee award is coming from *defendants*' pockets. When that is true, class counsel's cases make plain that "courts ***may not*** enhance a fee award above the lodestar amount to reflect risk of loss or contingency." *Florin*, 34 F.3d at 564 (emphasis added); *Cook*, 142 F.3d at 1014-15.

Indeed, the Supreme Court has repeatedly rejected contingency as a basis for a multiplier in fee-shifting cases. *City of Burlington* v. *Dague*, 505 U.S. 557, 562-63 (1992) (rejecting argument that fees for "attorneys who have been retained on a contingency-fee basis must go beyond the lodestar"); *Perdue*, 559 U.S. at 558

("reliance on the contingency of the outcome" to support multiplier "contravene[d]" *Dague*). And, as class counsel acknowledge (at 50) and the district court found (A52), this is a fee-shifting case: one of plaintiffs' claims was brought pursuant to a fee-shifting statute. Because this is a fee-shifting case and attorneys' fees are not coming from a common fund, contingency is not a basis for enhancing a lodestar.

In sum, Supreme Court precedent squarely forecloses the award of a multiplier in this case. This Court should, at a minimum, reverse the district court's 1.75 multiplier.

III. THE DISTRICT COURT'S FEE AWARD CONTRAVENES KEY POLICY OBJECTIVES STATED IN GOVERNING PRECEDENTS.

Defendants' opening brief (at 43-48) described important policy considerations that further support overturning this fee award. It explained why unrestrained lodestar awards like this one, left unchecked, will make settlements more difficult, more likely to be collusive, and more likely to be appealed.

Class counsel (at 55) try to side-step this well-supported showing with their *ipse dixit* that defendants' policy arguments are "self-centered" and "wrong." In their view, *Pearson* and *Redman* show that absent collusion, courts should exercise essentially no scrutiny of class action attorneys' lodestar claims. As we have explained, however, collusion was not the only concern animating *Pearson* and *Redman*—this Court also expressed significant concern with class counsel's incentive to run up hours, unconstrained by watchful clients. Br. 26-27. Characterizing "inflated attorneys' fees" as "an endemic problem in class action[s]," this Court has scrutinized class counsel fee requests to ensure they are

"proportioned to the *incremental* benefits" actually "confer[red]." *Reynolds* v. *Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002). Numerous scholars likewise have recognized the need to ensure that class action attorneys are rewarded only for the true value they provide. Br. 43-48.

The ratio analysis, degree-of-success analysis, and upward multiplier analysis in *Perdue* all perform this essential function. The district court failed to apply any of these principles correctly. Allowing the district court's award to stand would foster precisely the collusive and wasteful practices this Court has set out to curb in recent rulings. Br. 43-48. The fee award should be vacated.

CONCLUSION

Defendants ask this Court to vacate the district court's fee award and direct entry of an order awarding fees no greater than $900,000.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

I certify that the foregoing Reply Brief of Appellants:

(i) complies with the type-volume limitation in 7th Cir. R. 32(c) because it contains 6,988 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), as well as the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 12-point Century Schoolbook font.

s/ Timothy S. Bishop
Timothy S. Bishop

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2017, I caused the Reply Brief of Appellants to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system, which will send notice to the following CM/ECF users:

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