No. 16-364, 16-383

IN THE

Supreme Court of the United States

JOSHUA BLACKMAN,

Petitioner,

v.

AMBER GASCHO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, et al.,

Respondents.

JOSHUA ZIK, APRIL ZIK, AND JAMES HEARON,

Petitioners,

v.

AMBER GASCHO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, et al.,

Respondents.

On Petitions for a Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

RESPONSE IN OPPOSITION TO PETITIONS FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Does a district court per se abuse its discretion whenever it considers any factor other than the total amount of claims paid in calculating the benefit of a settlement to class members?

2. Does a district court per se abuse its discretion whenever the fee award paid to class counsel exceeds, even slightly, the amount of claims paid?

LIST OF PARTIES

Respondent Global Fitness Holdings, LLC ("Global Fitness") was the Defendant in the district court and the Defendant-Appellee in the United States Court of Appeals for the Sixth Circuit.

Respondents Amber Gascho, et al. were the Plaintiff class representatives in the district court and the Plaintiffs-Appellees in the United States Court of Appeals for the Sixth Circuit.

Petitioner Joshua Blackman, in Case No. 16-364, was an objector in the district court and Appellant in the United States Court of Appeals for the Sixth Circuit.

Petitioners Joshua Zik, April Zik, and James Hearon ("Zik Objectors"), in Case No. 16-383, were objectors in the district court and Appellants in the United States Court of Appeals for the Sixth Circuit.

RULE 29.6 STATEMENT

Respondent Global Fitness Holdings, LLC has no parent company and no publicly-held corporation owns 10 percent or more of Respondent's common stock.

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INTRODUCTION

At the request of the Court, Global Fitness submits this Response to the Petition filed by Joshua Blackman, an objector to the settlement at issue in this case, in Case No. 16-364 and to the Petition filed by the Zik Objectors in Case No. 16-383.

Contrary to Mr. Blackman's claim, there is no split amongst the Circuits on whether an attorneys' fee award can ever exceed the payout to the class members. All the Circuits recognize the discretion of district courts to award fees based on the facts and circumstances of the case and no Circuit has adopted a rigid per se rule. The attorneys' fee award in this case, although in excess of the payout to the class, was fair and reasonable because it properly recognized the benefit to the class in the face of the uncertain success of the claims.

STATEMENT OF THE CASE

In 2011, Amber Gascho and other Plaintiffs filed suit against Global Fitness on behalf of a class of members of Global Fitness facilities who were allegedly charged improper fees. Plaintiffs brought their claims under both common law causes of action, such as breach of contract and unjust enrichment, as well as various state consumer protection statutes. *See* Blackman App. 5a, 92a-93a. Pursuant to the Class Action Fairness Act, Global Fitness removed the suit to the United States District Court for the Southern District of Ohio. *Id.*

A. Settlement And Claims

In September 2013, after over two years of litigation, including extensive discovery, Plaintiffs and Global Fitness reached a settlement providing class members with compensation ranging from $25 to $75 and a simple claim process. *See* Blackman App. 6a-9a (detailing the terms of the settlement, as well as the notice-and-claims process).

Mr. Blackman made a claim for $25, as a member of both the settlement class and the "Gym Cancel" subclass. *Id.* at 9a. He had been a member for only three days and received a full refund upon cancellation. *Id.* While he suffered no actual damages, he fell within the broad definitions of the class and subclass.

B. Objections

Mr. Blackman and the Zik Objectors—who had their own class action against Global Fitness pending, *see* Blackman App. 93a—objected to the settlement. Mr. Blackman objected to the settlement on several grounds, but his primary objection was that class counsel's $2.39 million fee award was excessive. *See id.* at 9a-10a. The Zik Objectors reiterated this objection and also contended that the settlement did not adequately address the claims of class members who allegedly had a different membership contract and/or class members eligible to assert claims under the Kentucky Health Spa Act. *See id.* at 10a.

C. District Court Settlement Approval

The district court thoroughly considered all of the objections, and nonetheless held that both the settlement and the fee award were fair and

reasonable when all relevant factors were taken into account. *See* Blackman App. 77a, 172a.

Among other things, the district court noted that a similar class action against Global Fitness that included claims under the Kentucky Health Spa Act (among others) had been dismissed. *See id.* at 94a-95a. The district court recognized that this dismissal "called into question" the "viability of the bulk of plaintiffs' claims." *Id.* at 128a.

D. Sixth Circuit Affirmance

On appeal, the Sixth Circuit rejected Mr. Blackman's "proposed per se rule of unfairness," Blackman App. 17a, and concluded that "there is value in providing a class member the ability to make a claim, whether she takes advantage of it or not," *id.* at 40a. In rejecting the Zik Objectors' appeal, the Sixth Circuit noted that "the *Robins* court found no value in the plaintiffs' contract-based KHSA claims." *Id.* at 50a. Judge Clay dissented. *See id.* at 54a.

After denial of rehearing and rehearing en banc, these Petitions for *certiorari* followed.

REASONS FOR DENYING THE PETITIONS

I. The Seventh Circuit's[1] Decisions Are Easily Reconciled With The Sixth Circuit's Decision In This Case.

Petitioner Blackman, a former Sixth Circuit law clerk, is merely a technical class member who suffered no damages, but yet he asks the Court to remove discretion from district court judges to approve class action settlements that compensate injured members. Mr. Blackman had no actual damages because he cancelled his contract with Global Fitness within three days of executing it and received a full refund. Blackman App. 9a. He only qualified as a class member based on the broad class definition in the settlement agreement, designed to include rather than exclude possible claimants. In fact, he has no real stake in this case.

The premise of Mr. Blackman's arguments (and those of the *amici*) rests on distinguishable cases involving class action settlements that suffer from numerous fatal flaws, not just an excessive fee award. The primary case, *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), involved glucosamine nutritional supplements sold in retail stores like

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[1] While Mr. Blackman cites cases from other Circuits as well, he focuses primarily on the Seventh Circuit to demonstrate a conflict. *See* Blackman Pet. 22-27. His description of the Ninth Circuit as "approach[ing]" the Seventh Circuit and the Third Circuit as "in between the Sixth and the Seventh," *id.* at 24, suggest that he views the Seventh as the most extreme in favor of his position. Thus, Global Fitness's Response focuses on the Seventh Circuit.

CVS and Target. *Id.* at 779-780. The Seventh Circuit reversed the district court's approval of a class action settlement for many reasons, one of which was an excessive fee under the circumstances of the case. *Id.* at 779-780. A class of 4.72 million consumers, most of them elderly, was identified but only 30,245 claims were made (less than 1%). *Id.* at 781. The claims process was extremely burdensome, requiring class members to wade through a complex website, limited recovery to $12 without proof of purchase and to $50 with proof of purchase, and asked for information such as the date and place of purchase. *Id.* at 783. The settlement also included a worthless "substantively empty" injunction that required only token changes to the product label and left several "dubious claims" unchanged. *Id.* at 784-785 (describing the changes and lack thereof as having "no medical basis"). Finally, the attorneys' fee award was more than double the amount of money paid to the claimants. *Id.* at 780. Under these particular factual circumstances, the Seventh Circuit found the settlement should not be approved.

Similarly, the other two cases offered suffer from similar fact-dependent problems. In *Redman v. Radioshack Corp.*, 768 F.3d 622 (7th Cir. 2014), a coupon settlement, the class was difficult to identify and notice was sent to fewer than 5 million of the suspected 16 million class members. *Id.* at 628. Only 83,000 people made a claim. *Id.* Nor was there any attempt to estimate the "actual value" of the $10 coupons offered. *Id.* at 631. The court then delved into a detailed discussion about all of the problems with coupon settlements in class actions. *Id.* at 633-637. For all of these reasons and a fee award that exceeded the coupon value provided to the class, the court reversed approval of the settlement.

In *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014), the list of fatal flaws in the settlement were numerous. They included an ethical conflict involving class counsel, a complex claim form, an approval of the settlement before the end of the notice period, an arbitration procedure for certain claimants, defenses to individual claims reserved to the defendant, and the possibility of nothing more than an extension of a warranty. *Id.* at 722-726. The fee award was just another factor that made the settlement untenable.

These cases all hinge on their particular facts, and none of them implement a bright-line rule that, in an otherwise appropriate settlement, the attorneys' fee award can never exceed the payout to the class members. Instead, all of these settlements suffered from numerous other problems, which are not present in this case, that rendered the fee award inappropriate.

II. The Facts Of The Settlement In This Case Demonstrate That The Attorneys' Fee Payment Was Proper.

Both the district court and the Sixth Circuit focused on the reasonableness of the entire settlement, which provides a real benefit to over 49,000 people in the form of cash payments that range between $25 and $75. Blackman App. 6a-7a. Under all of the facts and circumstances of this case, both the district court and the Sixth Circuit approved all the terms of the settlement, including the attorneys' fee award.

A. There Is No Evidence Of Collusion Between Global Fitness And Counsel For The Plaintiffs.

Most of the arguments presented by the objectors and the *amici* revolve around the allegation of collusion between Global Fitness and Plaintiffs' counsel. Yet the only evidence presented is the total payout to the class ($1.6 million) compared to the total amount of attorneys' fees approved by the court ($2.39 million), combined with low participation in a claims-made settlement. None of these facts, either alone or combined, show any evidence of collusion.

The claims-made settlement process was necessary because most of the records held by Global Fitness were not accurate beyond a very short period of time. *See* Blackman App. 42a-43a, 154a-155a. The notice process in this case was extensive and the claims process was simple. Class members provided basic contact information, identified which class or classes they fit into, and attested that the information was correct. *See id.* at 8a-9a. This resulted in over 49,000 claims being approved by the settlement administrator. *Id.* at 9a.

B. Global Fitness Had Viable Defenses To The Claims And Had Already Successfully Defeated All Claims In Another District Court.

The dismissal of all of the claims in *Robins v. Global Fitness Holdings, LLC*, 838 F. Supp. 2d 631 (N.D. Ohio 2012) demonstrates that Global Fitness has viable defenses to the claims of the class, and therefore provides further evidence that the settlement fairly, reasonably, and adequately compensates the class, given the uncertainty of any

potential recovery. The district court explained that the factual and legal issues in *Robins* were similar and therefore "the viability of the bulk of plaintiffs' claims is called into question by . . . [the] dismissal . . . in the *Robins* action." Blackman App. 128a. Mr. Blackman does not challenge this finding, and the Zik Objectors' attempt to distinguish their claims is unpersuasive.

The Zik Objectors' claims arise under the Kentucky Health Spa Act, KRS 367.900, *et seq*. Zik Pet. 17. These claims relate to alleged failure to make required disclosures and allegedly improper fees charged after cancellation or transfer of the contract by facility members. *Id.* at 17-18. The Kentucky consumers in *Robins*, Tanya Baker and Danette Green, asserted similar claims concerning cancellation fees related to their contracts, which were dismissed. Thus, their claims fall precisely within the class of contracts the Zik Objectors purport to represent and cover identical claims that the *Robins* court found inadequate. *See Robins*, 838 F. Supp. 2d at 650-651. As explained by the *Robins* court, Global Fitness did not violate the Kentucky Health Spa Act when it charged the disputed fees. *See id.* at 651. Thus, at least one court found Global Fitness's defenses meritorious.

C. Global Fitness Has A Strong Interest In Entering Into A Settlement That Will Be Approved.

Global Fitness's understandable desire to minimize its total payout did not outweigh its significant interest in achieving settlement approval. At the time Global Fitness agreed to this settlement, it had sold all of its interests in the operations of the fitness clubs it owned and was no longer doing business as a

health club in any state. *See* Blackman App. 129a. Global Fitness has every incentive to agree to a settlement that is both affordable and approvable.

The Sixth Circuit correctly recognized that a categorical rule on payout ratios contravenes the discretion granted to district courts to approve settlements. Blackman App. 36a. In addition to the factors already discussed above that weighed in favor of this settlement, the claims in this case were based primarily on violations of state consumer protection statutes that specifically allow for the award of attorneys' fees. *See id.* at 36a-37a. Accordingly, the fact that the fee amount awarded to Plaintiffs' counsel exceeded the payout to the class members should not be surprising or inherently objectionable.

Counsel for the settling parties considered the facts and the law, including the strength of the claims and defenses available to both parties. The detailed analysis by the district court in granting approval to the settlement agreement and the detailed opinion by the Sixth Circuit in upholding the district court's decision reflects these considerations.

As the Seventh Circuit itself has observed, "[*p*]*er se* rules often represent the abdication of judicial discretion rather than its informed exercise." *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 422 (7th Cir. 1977). By reducing the settlement options available to parties, the rigid categorical approach sought by Mr. Blackman may encourage protracted litigation, thereby delaying and often effectively reducing class members' eventual compensation. Among other things, Mr. Blackman's laser focus on the total amount of claims paid ignores the benefits (both monetary and non-monetary) of immediate and certain relief to class members that a

settlement provides. Currently, district courts have the discretion to consider the nuances of a particular class action in reviewing the fairness and reasonableness of a settlement and any corresponding fee award. If this Court eliminates that discretion by imposing a per se rule of reasonableness, parties may be forced to litigate to conclusion otherwise resolvable cases.

CONCLUSION

For all of the foregoing reasons, the Court should deny Mr. Blackman's and the Zik Objectors' Petitions and allow the lower court rulings to stand.

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Respectfully submitted,

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