In the United States Court of Appeals for the Third Circuit

No. 02–3389

ALBERT ZUCKER; STANLEY HERSHFANG;
and JACOB JOSEPH MILLER

v.

WESTINGHOUSE ELECTRIC CORPORATION;
J.C. MAROUS; and P.E. LEGO
(D.C. Civil No. 91–cv–354)

WILLIAM C. RAND, Stockholder Objector,
owner of 100 shares of CBS Corporation common stock,
Appellant.

On Appeal from the Order of the U.S. District Court for the
Western District of Pennsylvania Denying
Attorneys' Fees to Pro Se Litigant

BRIEF FOR AMICUS CURIAE
IN SUPPORT OF AFFIRMANCE

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Amicus Curiae in Support of Affirmance

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I. INTRODUCTORY STATEMENT

William Coudert Rand is a lawyer who owns 100 shares of CBS Corporation stock. On October 1, 1999, he filed a pro se objection to a request by plaintiffs' counsel in the underlying shareholder derivative litigation for an award of $750,000 in attorneys' fees. It was Rand's position that plaintiffs' counsel deserved no attorneys' fee.

Then–Chief Judge D. Brooks Smith of the U.S. District Court for the Western District of Pennsylvania entered an order granting, in part, plaintiffs' request for attorneys' fees. Chief Judge Smith's order required CBS to pay $582,443.44 to plaintiffs' counsel.

Rand pursued a pro se appeal to the U.S. Court of Appeals for the Third Circuit. On September 10, 2001, a unanimous three–judge panel of this Court reversed the attorneys' fee award, holding that the shareholder derivative suit conferred no benefit on the corporation and thus plaintiffs' counsel were entitled to no attorneys' fee. *Zucker* v. *Westinghouse Elec. Corp.*, 265 F.3d 171, 175–78 (3d Cir. 2001).

After prevailing on appeal, Rand sought in the district court an award of attorneys' fees for the time he spend litigating on a pro se basis his objection to the plaintiffs' request for attorneys' fees. The

district court, in the order that is the subject of this appeal, ruled that Rand was not entitled to recover attorneys' fees because he participated in the case as a pro se litigant.

The trial court's ruling is correct and should be affirmed. In *Kay* v. *Ehrler*, 499 U.S. 432 (1991), the Supreme Court unanimously ruled that a pro se lawyer is not entitled to recover attorneys' fees under 42 U.S.C. §1988 for prevailing on a federal civil rights claim. Thereafter, federal appellate courts have refused to award attorneys' fees to prevailing pro se lawyer–litigants under other federal fee–shifting statutes.

There is no persuasive reason why a different result should follow where a pro se lawyer seeks attorneys' fees under the common fund doctrine in a shareholder derivative action. Rand did not incur any attorneys' fee obligation to anyone. He was not authorized to litigate on anyone's behalf other than his own. And many of the other reasons the Supreme Court supplied in *Kay*, and federal appellate courts have provided in *Kay*'s aftermath, for denying attorneys' fees to pro se lawyers under fee–shifting statutes apply even more persuasively under the common fund doctrine. Accordingly, the trial court's order should be affirmed.

II. INTEREST OF THE AMICUS CURIAE

This Court on November 24, 2003 entered an order appointing Howard J. Bashman to serve as amicus curiae and file a brief supporting affirmance of the district court's order.

III. COUNTER–STATEMENT OF THE ISSUES PRESENTED

1. Did the district court err in concluding that a pro se lawyer is not entitled to recover attorneys' fees under the common fund doctrine in a shareholder derivative suit?

Standard of review: This Court explained in *Planned Parenthood v. Attorney Gen. of N.J.*, 297 F.3d 253, 265 (3d Cir. 2002), that "[w]e review *de novo* the standards and procedures applied by the District Court in determining attorneys' fees, as it is purely a legal question." This Court further noted that findings of fact are reviewed for clear error, and the reasonableness of the fee award is reviewed for abuse of discretion, "but a court abuses its discretion when its ruling is founded on an error of law or a misapplication of the law to the facts." *Id.*

2. Has Rand waived his ability on appeal to seek an "incentive fee" by failing to seek that relief, in the first instance, from the district court?

Standard of review: This Court has ruled that an appellant who failed to raise an issue in the district court has waived the ability to raise the issue on appeal. *See Brenner* v. *Local 514, United Bhd. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir. 1991).

IV. COUNTER–STATEMENT OF THE CASE

William Coudert Rand, a lawyer based in New York City, owns 100 shares of stock in CBS Corporation. On October 1, 1999, Rand appeared pro se in the underlying shareholder derivative suit pending in the U.S. District Court for the Western District of Pennsylvania to object to plaintiffs' counsel's request for an attorneys' fee in the amount of $750,000. App. 66.

After entertaining Rand's objection, then–Chief District Judge D. Brooks Smith entered an order granting attorneys' fees to plaintiffs' counsel in the amount of $582,443.44. App. 69. Rand filed a pro se notice of appeal from that order to the U.S. Court of Appeals for the Third Circuit. *Id.*

On September 10, 2001, this Court issued a published opinion holding that CBS received no benefit from the underlying shareholder derivative litigation and thus no award of attorneys' fees in favor of the

plaintiffs was justified. *See Zucker* v. *Westinghouse Elec. Corp.*, 265 F.3d 171, 175–78 (3d Cir. 2001).

Within days after this Court's mandate in *Zucker* returned to the district court, Rand filed a motion in the district court requesting an award in his favor of attorneys' fees and expenses. App. 72. According to the time records that accompanied Rand's motion, at his standard hourly rate of $250 per hour, Rand deserved to be paid $67,100 in attorneys' fees. App. 74–84. The attachment also noted that Rand had incurred $672.59 in expenses. App. 84–85. But, instead of seeking to be paid the total of these two sums, Rand's motion requested payment of $250,000. App. 72.

The trial court's docket entries reveal that the district court denied Rand's motion on October 16, 2001, the very day on which it was filed. App. 70. On October 25, 2001, Rand filed a stipulation in the district court between himself and CBS asking for the district court's approval of an agreement whereby CBS would pay him a total of $95,000 on account of the attorneys' fees that he had "incurred" plus his out–of–pocket expenses. App. 95–97.

In a reported memorandum opinion and order entered August 20, 2002, *see In re Westinghouse Sec. Litig.*, 219 F. Supp. 2d 657 (W.D. Pa. 2002), Chief Judge Smith denied any payment to Rand on account of attorneys' fees but ordered CBS to pay Rand $672.59 in expenses.

The district court's opinion explains that Rand's request for attorneys' fees was being denied because Rand had not incurred any liability for such fees. App. 6. The district court wrote that the denial of fees was consistent with the Supreme Court's decision in *Kay* v. *Ehrler*, 499 U.S. 432 (1991), with the pro se attorneys' fee cases that have issued in *Kay*'s aftermath, and with the Supreme Court's earlier ruling in *Trustees* v. *Greenough*, 105 U.S. 527 (1881). App. 6–9.

The district court's opinion closed with the following explanation:

> Denying fees to a pro se objector, however, does not deter objectors from obtaining counsel to independently evaluate the merits of a settlement and to pursue meritorious objections. Moreover, there are several advantages to a rule that encourages counseled objections in the context of a securities fraud class action or derivative suit. First, it guarantees that all shareholders, regardless of their status, are treated equally. Second, it ensures that pro se attorney objectors are treated the same as other pro se attorney litigants who are not entitled to an award of fees for their personal services in civil actions which directly involve their interests. Third, a rule encouraging counseled objections discourages unnecessary involvement of shareholder attorneys who may be tempted to advance garden variety

> objections because of the prospect of an award of attorney fees for their personal service.

App. 9–10.

On August 28, 2002, Rand filed a notice of appeal from the portion of the district court's decision that denied attorneys' fees. App. 12. After Rand filed his opening brief on appeal on April 21, 2003, CBS filed a brief stating, in light of its stipulation agreeing to pay a total of $95,000 to Rand, that it was taking no position on the merits of the appeal.

On November 24, 2003, this Court entered an order appointing Howard J. Bashman to serve as amicus in support of affirmance. The order allows Rand to file a reply brief after he receives this brief.

V. COUNTER–STATEMENT OF FACTS

The settlement of the underlying shareholder derivative action, which gave rise to the request for attorneys' fees by plaintiffs' counsel that Rand appeared pro se in the district court to oppose, produced only a $250,000 insurance payment to CBS that would have been paid in any event to settle a companion securities fraud class action. App. 2–3.

Because the district court ruled as a matter of law that Rand was not entitled to attorneys' fees given his status as a pro se litigant, the district court did not further evaluate the merits of the attorneys' fee

request. While presumably CBS's agreement to pay Rand a total of $95,000 would be entitled to some deference in determining whether such an award is reasonable, the district court would nonetheless have to examine whether *any* fee could appropriately be awarded given this Court's earlier conclusion in *Zucker* v. *Westinghouse Elec. Corp.*, 265 F.3d 171 (3d Cir. 2001), that the entire shareholder derivative action produced no benefit to CBS that would justify any award of attorneys' fees.

Rand no doubt would contend that his actions alone prevented the shareholder derivative action from costing CBS an additional $582,443.44 in attorneys' fees. But whether to focus only on the final stages of the shareholder derivative action, in which Rand's involvement saved the case from proceeding from bad to worse from CBS's perspective, or whether the overall lack of benefit to CBS should continue to preclude any award of attorneys' fees, as it did in *Zucker*, would be something for the district court to consider in the first instance in the unlikely event that this Court were to overturn the trial court's decision that Rand was precluded as a matter of law from recovering attorneys' fees due to his status as a pro se litigant.

As will be explained further in the Argument section of this brief, Rand has made objecting to attorneys' fee awards in shareholder derivative actions something of an avocation. *See*, *e.g.*, *Kaplan* v. *Rand*, 192 F.3d 60 (2d Cir. 1999) (overturning $1 million award to plaintiffs' counsel in shareholder derivative action after Rand objected that settlement conferred no substantial benefit on Texaco). And Chief Judge Smith's order was not the first time that Rand has failed in his effort to obtain attorneys' fees for his successful pro se actions in opposing a large attorneys' fee award. *See In re Texaco Inc. S'holder Derivative Litig.*, 123 F. Supp. 2d 169 (S.D.N.Y. 2000), *aff'd*, 28 Fed. Appx. 83 (2d Cir. 2002).

VI. STATEMENT OF RELATED CASES AND PROCEEDINGS

Amicus is aware of no currently–pending cases or proceedings related to this appeal.

VII. SUMMARY OF THE ARGUMENT

A pro se lawyer whose actions have benefited the corporation in a shareholder derivative suit is not entitled to recover an award of attorneys' fees because the lawyer has not incurred any attorneys' fees. Moreover, the lawyer is not entitled to payment for the personal

services he provided while litigating in his own interest. *See*, *e.g.*, *Trustees* v. *Greenough*, 105 U.S. 527, 537–38 (1881).

The Supreme Court's unanimous ruling in *Kay* v. *Ehrler*, 499 U.S. 432 (1991), establishes that pro se lawyers are not entitled to recover attorneys' fees when they prevail on a statutory claim for which Congress has expressly authorized fee–shifting. *Kay* and its progeny provide strong persuasive support for the district court's ruling.

If anything, the arguments for denying attorneys' fees to a pro se lawyer in a common fund case are even stronger than in a case governed by an express fee–shifting statute. Common fund cases, by definition, involve a party whose actions if successful will benefit not only himself or herself but also many similarly situated others. As a result, in an action to create or safeguard a common fund, the need for competent and detached counsel is heightened. Indeed, the underlying shareholder derivative suit in this matter demonstrates that common fund cases can produce a negative recovery, thereby injuring the supposed beneficiaries of the action.

It is thus no surprise that in the paradigmatic common fund scenarios — class actions or shareholder derivative suits — the Federal

Rules of Civil Procedure already require the district court to ensure that the named plaintiff(s) have competent attorneys to represent them and the aligned interests of class members or similarly situated stakeholders. *See* Fed. R. Civ. P. 23(a) & 23.1.

Here, by contrast, appellant William Coudert Rand seeks a ruling that would allow a pro se lawyer to recover attorneys' fees for his own efforts in successfully opposing a counsel fee award to the plaintiffs' lawyers in the underlying shareholder derivative suit. But the drawbacks of Rand's proposed rule far outweigh its benefits. For example, why should payment for time spent litigating only be available to pro se lawyers, and not to other successful pro se litigants? And if pro se lawyers are to receive this financial encouragement to challenge the fairness of class action and shareholder derivative suit settlements, how can federal district courts legitimately prevent pro se lawyers from serving simultaneously as lead plaintiff and lead counsel in class actions and shareholder derivative suits?

It is far from clear, given the overall negative return to CBS Corporation in the underlying shareholder derivative suit, whether Rand would be deserving of attorneys' fees for defeating the plaintiffs'

attorneys' fee request had he served instead as counsel to another objecting CBS shareholder. In other words, the language of this Court's ruling in *Zucker* v. *Westinghouse Elec. Corp.*, 265 F.3d 171 (3d Cir. 2001) — the decision in which Rand prevailed in opposing an award of attorneys' fees to plaintiffs' counsel in the underlying suit — may sweep broadly enough to mandate or at least allow the denial of Rand's fee request were it not otherwise barred as a matter of law.

Here, of course, the district court denied Rand's request for attorneys' fees because a pro se litigant, even one who is a lawyer, is not entitled to recover attorneys' fees under the common fund theory in a shareholder derivative suit. That ruling, for the reasons explained herein, is correct and should be affirmed.

VIII. ARGUMENT

A. The district court properly refused to award attorneys' fees to a pro se lawyer under the common fund theory in a shareholder derivative suit

Under the so–called "American rule," litigants in the United States must bear the cost of their own attorneys' fees unless the case is governed by an exception to that rule. *See Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). One type of exception exists

where a statutory cause of action includes a fee–shifting statute providing that the prevailing party can recover its attorneys' fees from the losing party.

The Supreme Court of the United States granted review in *Kay* v. *Ehrler*, 499 U.S. 432 (1991), to resolve a circuit split over whether pro se lawyers who prevail as plaintiffs in lawsuits filed under the federal civil rights statute, 42 U.S.C. §1983, are entitled to recover attorneys' fees pursuant to 42 U.S.C. §1988. Section 1988 is a fee–shifting statute that provides for an award of attorneys' fees to the prevailing plaintiff in a federal civil rights suit.

In *Kay*, a unanimous Supreme Court held that the fee–shifting statute *did not* entitle a prevailing pro se lawyer–plaintiff to an award of attorneys' fees. The Court's discussion of the issue began as follows:

> The question then is whether a lawyer who represents himself should be treated like other *pro se* litigants or like a client who has had the benefit of the advice and advocacy of an independent attorney.
>
> We do not think either the text of the statute or its legislative history provides a clear answer. On the one hand, petitioner is an "attorney," and has obviously handled his professional responsibilities in this case in a competent manner. On the other hand, the word "attorney" assumes an agency relationship, and it seems likely that Congress contemplated an attorney–client relationship as the

> predicate for an award under §1988. Although this section was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain assistance of competent counsel in vindicating their rights.

499 U.S. at 435–36 (footnotes omitted).

Toward the end of its opinion, the Court explained further:

> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross–examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.

Id. at 437–38 (footnote omitted).

In the aftermath of *Kay*, federal appellate and district courts have applied its rationale to a variety of other fee–shifting statutes to deny recovery of attorneys' fees to prevailing pro se lawyer–litigants. Attorneys' fees were denied to prevailing pro se lawyer–litigants under the Freedom of Information Act in *Burka* v. *United States Dep't of Health & Human Serv.*, 142 F.3d 1286, 1290 (D.C. Cir. 1998); *Ray* v. *U.S. Dep't of Justice*, 87 F.3d 1250, 1252 (11th Cir. 1996); and *Manos* v.

United States Dep't of the Air Force, 829 F. Supp. 1191, 1193 (N.D. Cal. 1993).

Likewise, courts have denied an award of attorneys' fees to pro se lawyer–litigants under the Equal Access to Justice Act. *See Kooritzky* v. *Herman*, 178 F.3d 1315, 1319–21 (D.C. Cir. 1999); *S.E.C.* v. *Waterhouse*, 41 F.3d 805, 808 (2d Cir. 1994).

Similarly, in *Hawkins* v. *1115 Legal Serv. Care*, 163 F.3d 684, 694–95 (2d Cir. 1998), the Second Circuit denied an award of attorneys' fees to a pro se attorney who prevailed on her claims under both the federal civil rights act and Title VII. And in *Belmont* v. *Associates Nat'l Bank*, 119 F. Supp. 2d 149, 166–67 (E.D.N.Y. 2000), the district court denied an award of attorneys' fees to a pro se lawyer who prevailed on a claim under the Truth in Lending Act.

As a result of these decisions, the earlier, pre–*Kay* cases that Rand cites on page 13 of his opening brief have absolutely no precedential value. One of the overruled cases that Rand cites is worth mentioning, however, for what an ultimately vindicated dissenting opinion has to say on a subject that is relevant to the question presented here.

In *Duncan* v. *Poythress*, 777 F.2d 1508 (11th Cir. 1985) (en banc), the en banc U.S. Court of Appeals for the Eleventh Circuit considered whether a pro se lawyer qualifies for an award of attorneys' fees under 42 U.S.C. §1988 as the prevailing party in a civil rights suit. The majority, in a decision that *Kay* would later overrule, held that the pro se plaintiff could recover attorneys' fees. In dissent, Circuit Judge Paul H. Roney, joined by another of his colleagues, wrote:

> This case turns on the meaning of the word "attorney." Although the majority believes the "plain language" of section 1988 "does not preclude an award of fees to a lawyer representing herself," we have simply been unable to find any definition which permits a decision that a *pro se* lawyer has an attorney. Set forth in an Appendix to this opinion are the definitions found in over two dozen dictionaries. Without exception they define the word "attorney" in terms of someone who acts for *another*, someone who is employed as an agent to represent *another*, someone who acts at the appointment of *another*. A basic principle of agency law is that "[t]here is no agency unless one is acting for and in behalf of *another*, since a man cannot be the agent of himself." 2A C.J.S. *Agency* §27, at 592. For there to be an attorney in litigation there must be two people. Plaintiff here appeared *pro se*. The term "*pro se*" is defined as an individual acting "in his own behalf, in person." By definition, the person appearing "in person" has no attorney, no agent appearing for him before the court. The fact that such plaintiff is admitted to practice law and available to be an attorney for others, does not mean that the plaintiff has an attorney, any more than any other principal who is qualified to be an agent, has an agent when he deals for himself. In other words, when applied to one person in one

> proceeding, the terms "*pro se*" and "attorney" are mutually exclusive.

777 F.2d at 1517–18 (Roney, J., joined by Henderson, J., dissenting) (footnote omitted).

In the nearly thirteen years since the Supreme Court's decision in *Kay* issued, the Third Circuit has so far only cited that decision in one published opinion. In *Woodside* v. *School Dist. of Phila. Bd. of Educ.*, 248 F.3d 129 (3d Cir. 2001), this Court extended the holding in *Kay* to rule that an attorney–parent does not qualify to receive attorneys' fees for representing his minor child in administrative proceedings under the Individuals with Disabilities Education Act. In so ruling, this Court followed the Fourth Circuit's decision in *Doe* v. *Board of Educ.*, 165 F.3d 260 (4th Cir. 1998), which had reached the same result.

The question of first impression that Rand's case presents is whether a pro se lawyer should be entitled to receive attorneys' fees under the common fund doctrine in a shareholder derivative suit. Generally speaking, the common fund doctrine provides that one whose actions give rise to a common fund for the benefit of himself and others is entitled to recover a reasonable attorneys' fee from the fund as a whole. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 256 (3d Cir. 2001).

In *Zucker* v. *Westinghouse Elec. Corp.*, 265 F.3d 171, 175–76 (3d Cir. 2001), this Court further refined the common fund doctrine in the context of a shareholder derivative suit, holding that the plaintiff is not entitled to recover attorneys' fees unless the corporation received a substantial benefit from the institution and resolution of the derivative litigation.

It is obvious that common fund litigation differs significantly from the statutory causes of action that include fee–shifting statutes. Statutory claims filed in cases involving fee–shifting statutes tend to arise in actions brought by one or a small number of plaintiffs. By contrast, in common fund cases, the population that may be affected by the prosecution of the action tends to be much larger.

Accordingly, this Court should recognize that the need for, and desirability of, an actual non–pro se attorney representing the plaintiffs' interest in the typical common fund case is even greater than the need for separate and detached counsel in a FOIA, TILA, EAJA, IDEA, or civil rights suit. It is perhaps for this reason that the Federal Rules of Civil Procedure require a federal district court, in both a class action and in a shareholder derivative suit, *see* Fed. R. Civ. P. 23(a) & 23.1, to

determine the adequacy of representation, which is simply another way of saying the adequacy of plaintiff's counsel. Class actions and shareholder derivative suits do not tend to be initiated by pro se plaintiffs who happen to be lawyers, and any cases that are initiated that way do not remain so for long once a federal district judge becomes involved in managing the litigation.

By affirming the district court's decision in this case, this Court will appropriately discourage pro se lawyers from litigating a common fund action in the hope of achieving a big payday if the matter succeeds. Such discouragement is needed to avoid having pro se lawyers who fail to bring matters to a successful conclusion from injuring the rights of others who are not directly before the court. As the underlying shareholder derivative suit in this case demonstrates, not every common fund action ends up conferring a benefit on the intended beneficiaries. *See Zucker*, 265 F.3d at 178.

So very much of Rand's opening brief on appeal focuses on arguing that the concerns that have led courts to impose blanket bans on awarding attorneys' fees to pro se lawyer–litigants do not apply under the particular facts of this case. The district court, however, did not

base its decision to deny to Rand the stipulated attorneys' fee award on details peculiar to Rand's case; rather, the district court held as a matter of law that pro se lawyer–objectors are not entitled to recover attorneys' fees because no such fees were incurred and because the rationale of *Kay* and its progeny establish the benefit of having an independent lawyer involved.

An additional weakness in Rand's argument on appeal is that he fails to provide any principled basis on which a pro se lawyer should recover attorneys' fees but a prevailing non–lawyer should recover nothing on account of the time he or she expended in litigating. This Court, of course, long ago precluded the recovery of attorneys' fees by non–lawyers litigating pro se. *See Cunningham* v. *FBI*, 664 F.2d 383, 387–88 (3d Cir. 1981).

As Judge Roney explained in his dissent from the Eleventh Circuit's en banc ruling in *Duncan*:

> If one cabins the word attorney by its dictionary definition, however, there is not a shred of evidence that Congress would treat *pro se* litigants who happen to be attorneys differently from *pro se* litigants of other vocations, businesses or professions. Differences in qualification between attorneys and non–attorney *pro se* litigants would seem of little analytical use because in both instances the *pro se* party has necessarily prevailed in the litigation, just

> to make an attorney's fees claim under section 1988. What a *pro se* plaintiff does for a living should be irrelevant for purposes of a section 1988 analysis. The costs to an attorney in representing himself may in many instances be no greater than the costs to *pro se* litigants of other vocations taking time from their regular work to represent themselves. To argue that an attorney can be an attorney for herself, but a non–lawyer cannot because she is not an attorney, is syllogistic at best, and at worst a path to a result without regard to the meaning of words.

777 F.2d at 1518 (Roney, J., joined by Henderson, J., dissenting).

Finally, any fear that denying attorneys' fees to pro se lawyer–litigants would deprive shareholders of the sort of positive results that Rand's original objection produced in this case would be unfounded. Rand himself appears to have embarked on a cottage industry that consists of making pro se objections in exchange for the potential of an award of attorneys' fees should the objections prove meritorious. Yet this case is not the only instance where Rand has prevailed on his objections, to the benefit of himself and his fellow shareholders, only to be denied any attorneys' fee for his having litigated pro se. *See*, *e.g.*, *In re Texaco Inc. S'holder Derivative Litig.*, 123 F. Supp. 2d 169 (S.D.N.Y. 2000). If the potential for recovery of attorneys' fees is as lucrative as Rand appears to have hoped but for his pro se status, assuredly there are other, non–party attorneys who will agree to represent parties such

as Rand in challenging what seem to be improperly large attorneys' fee awards in shareholder derivative suits.

For all of the foregoing reasons, then–Chief District Judge D. Brooks Smith was entirely correct in holding that a pro se lawyer is not entitled under the common fund doctrine to recover attorneys' fees in a shareholder derivative suit.

B. Rand's argument in the alternative, that he should receive an incentive fee, is waived due to his failure to raise it in the district court

Rand argues in the alternative that he should be awarded an "incentive fee." *See* Brief for Appellant at 18–20. The appendix on appeal, which contains Rand's motion for attorneys' fees, his affidavit in support thereof, his proposed stipulation with CBS, and the district court's ruling on Rand's fee request, fails to establish that Rand asked the district court to award an incentive fee in lieu of, or in addition to, the attorneys' fee that Rand had requested.

Moreover, in contravention of the Federal Rules of Appellate Procedure and this Court's local rules, Rand's opening brief on appeal fails to specify the denial of an incentive fee as an issue on appeal (in violation of Fed. R. App. P. 28(a)(5)) and fails to include "a designation

by reference to specific pages of the appendix or place in the proceedings at which [this issue] was raised, objected to, and ruled upon" (in violation of 3d Cir. LAR 28.1(a)(1)).

Given the New York–based federal district court's denial in early December 2000 of Rand's request for attorneys' fees in his role as a prevailing pro se objector, *see In re Texaco S'holder Derivative Litig.*, 123 F. Supp. 2d 169 (S.D.N.Y. 2000), Rand had to know before he filed his fee request here in October 2001 that his recovery of attorneys' fees was far from assured. Nevertheless, the appendix on appeal is bereft of any indication that Rand had asked the district court to award an incentive fee either in addition to or in place of an attorneys' fee award.

Few principles are better established than that an appellant may not assign as error on appeal a matter that was not presented to and preserved in the trial court. *See Belitskus* v. *Pizzingrilli*, 343 F.3d 632, 645 (3d Cir. 2003). Accordingly, this Court should hold that Rand's request for an incentive fee has been waived.

IX. CONCLUSION

The district court's order denying attorneys' fees to pro se litigant William Coudert Rand should be affirmed.

Respectfully submitted,

Dated: December 24, 2003

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Howard J. Bashman
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Amicus Curiae in
Support of Affirmance

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: December 24, 2003

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Howard J. Bashman

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing document were served via first class United States mail upon the persons, at the addresses, and on the date that appear below.

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