Nos. 21-15120, 21-15138, 21-15200

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: LITHIUM ION BATTERIES ANTITRUST LITIGATION,

INDIRECT PURCHASER PLAINTIFFS,
Plaintiffs-Appellees / Cross-Appellees / Cross-Appellants,
v.
STEVEN FRANKLYN HELFAND,
Objector-Appellant/Cross-Appellee,
v.
MICHAEL FRANK BEDNARZ,
Objector-Appellee / Cross-Appellant / Cross-Appellee,
v.
CHRISTOPHER ANDREWS,
Objector-Appellant,
v.
PANASONIC CORPORATION, *et alia*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California, No. 4:13-md-02420-YGR

M. Frank Bednarz's Opening Brief

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Statement of Jurisdiction

The district court had jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d). Dkt. 256 ¶ 304.[1]

This Court has appellate jurisdiction under 28 U.S.C. § 1291. On December 10, 2020, the district court issued an order giving final approval to a class-action settlement under Rule 23(e) and granting a motion for attorney's fees to plaintiffs under Rule 23(h). 1-ER-2. The same day, the district court issued an order partially granting class

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[1] Appeal No. 21-15138 discusses the "standing" of non-repealer-state class members in this action and mentions Article III in passing; it is unclear whether the *pro se* appellant is making a jurisdictional argument. Andrews Opening Br. 12-14. Non-repealer-state class members lack so-called "antitrust standing," and cannot recover under federal law, but do have Article III standing. As this Court is surely aware, the requirement of "antitrust standing" is one of "statutory standing" that "does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional power to adjudicate the case." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014); *see discussion in Hartig Drug Co. v. Senju Pharm. Ltd.*, 836 F.3d 261, 270-73 (3d Cir. 2016).

Courts should not confuse the merits of the case with Article III standing. "[W]hether [plaintiffs] are entitled to the relief that they seek goes to the merits, not to standing." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 151 n.1 (2010). "One must not confuse weakness on the merits with absence of Article III standing." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (cleaned up).

member and objector Michael Frank Bednarz's motion for attorney's fees over plaintiffs' opposition. 1-ER-49. The orders are final decisions with respect to fees, the only issue that Bednarz appeals. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988).

On December 31, 2020, Steven Helfand filed the first notice of appeal of, among other things, these two orders, challenging, among other things, the order granting settlement approval and plaintiff's attorney's fee award, and the order granting Bednarz's attorney's fee award in part. 3-ER-383. The notice of appeal was timely under Fed. R. App. Proc. 4(a)(1)(A).

On January 14, 2021, Bednarz filed a notice of appeal of the two fee orders. 3-ER-375. This cross-appeal, filed within fourteen days of the first notice of appeal, is timely under Fed. R. App. Proc. 4(a)(3).

Statement of the Issues

The district court granted class counsel's fee request in full, and awarded Bednarz $250,000 in fees.

1) The Ninth Circuit states that "where lawyers compete for lead counsel status," an "ascertainable market" exists that courts must consider in determining a percentage award. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002); *accord In re Optical Disk Drive Products Antitrust Litig.*, 959 F.3d 922, 933-35 (9th Cir. 2020). Did the district court err as a matter of law when it awarded over 35% of a $113.45 million fund in fees and expenses while failing to apply *Vizcaino* and refusing to consider relevant a bid that would pay less than half that, simply because the firm withdrew its bid and agreed to merge its proposal with a competing application?

(Raised at 2-ER-96-97; 2-ER-139-40. Decided at 1-ER-38.)

2) Class counsel argued against the interests of repealer state class members both in the Ninth Circuit in Appeal No. 17-17367 (where it proposed that the Ninth Circuit affirm a final order requiring a *pro rata* distribution) and in proposing a 90/10 distribution instead of the 100/0 distribution recommended by a mediator. Did the district court err in holding there was no conflict or breach of fiduciary duty and granting the fee request in full?

(Raised at 2-ER-144-49. Decided at 1-ER-38-40; 1-ER-16-17.)

3) The district court found that Bednarz's appeal benefited repealer-state class members by $10 million. 1-ER-50. Did the district court err in holding that it could only award Bednarz fees on a lodestar basis because the $10 million benefit was not quantifiable or a common fund when the court had accurately quantified the benefit as worth $10 million to repealer-state class members?

(Raised at 2-ER-159-74. Decided at 1-ER-50.)

Standard of Review

A district court's award of attorneys' fees is reviewed for abuse of discretion. *Stanger v. China Electric Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016). The Court reviews "underlying factual findings for clear error" and "whether the district court applied the correct legal standard de novo." *Id.*

A decision based on an error of law is an abuse of discretion. *Chan Healthcare Group, PS v. Liberty Mut. Fire Ins. Co.*, 844 F.3d 1133, 1141 (9th Cir. 2017). An abuse of discretion occurs when the district court "omits consideration of a factor entitled to substantial weight." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009) (cleaned up). Failure to apply the doctrine of law of the case is an abuse of discretion. *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

Statement of the Case

The procedural posture is unfortunately convoluted because of piecemeal settlement and several current and previous appeals (including one, No. 21-15022, that this Court consolidated with Bednarz's cross-appeal and has already dismissed). But the issues in Bednarz's cross-appeal are straightforward.

This cross-appeal is a dispute over attorneys' fees in a state-law antitrust class action. The court awarded 29.8% of a $113.45 million fund in fees and over 35% including expenses, though that was over twice the market rate that one of the lead firms submitted as a bid to be class counsel; the court held that it need not consider the bid at all.

Under federal antitrust law, indirect purchasers of goods generally may not sue for money damages. But under state antitrust law, about thirty states ("repealer states") authorize indirect purchasers to bring these claims, while the rest follow federal law and do not. The settlement here involves a single fifty-state class, and pays both class members with viable claims and class members with no claims. If class counsel litigates against the interests of class members from repealer states, is that a breach of its fiduciary duty? The district court held not, and that class counsel's actions should have no consequences in their court-awarded fees. Class member and objector M. Frank Bednarz appeals that holding, and the total award of fees.

Bednarz successfully appealed a final judgment ordering *pro rata* distribution to all class members. The district court held both that Bednarz's objection and appeal created a $10 million benefit to repealer-state class members, but that Bednarz was not entitled to a percentage-of-the-benefit common-fund fee award because the $10 million benefit was not quantifiable for the class as a whole, and awarded him lodestar instead. Bednarz appeals that reasoning and conclusion. Plaintiffs, in a notice of appeal filed 27 days after the first notice of appeal and 48 days after the fee award, cross-appeal the court's award of fees to Bednarz.

A. Under undisputed background antitrust principles, half the class members have viable claims, and half the class members have no claims.

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), held that, under federal antitrust law, indirect purchasers generally may not recover damages from antitrust violators. *Id.* at 730. In other words, if A sells a price-fixed product to B, and B resells the product or uses the product in creating a good it sold to C, the indirect purchaser C generally may not recover damages from A under federal antitrust law; only the direct purchaser B has a federal cause of action. The Court reasoned that this rule prevents multiple entities from recovering for the same violation. *Id.* at 738.

Illinois Brick was a controversial decision, and dozens of states passed laws or issued judicial decisions rejecting it to permit indirect-

purchaser recovery under state antitrust laws. About thirty states today permit recovery (repealer states), while the remainder follow federal law and prohibit indirect purchasers from bringing claims (non-repealer states). 1-ER-58 n.1. (A little over two-thirds of the settlement claims here are from repealer-state class members. Dkt. 2573 at 2.)

B. Plaintiffs file class actions alleging that defendants had conspired to fix the prices of lithium-ion batteries.

Manufacturers use lithium-ion batteries in devices such as smartphones, laptops, cameras, and cordless power tools. Dkt. 1735 at 2. Plaintiffs allege that, in 2000, various manufacturers allegedly stopped competing and conspired to price-fix their lithium-ion batteries, with damages to indirect purchasers of just under a billion dollars. *Id.*; 1-ER-36; Dkt. 2459 at 16. In October 2012, plaintiffs' firm Hagens Berman filed the first suit on behalf of a putative class of indirect purchasers. Over the next few months, dozens of other plaintiffs brought antitrust suits for damages, eventually consolidated for pretrial proceedings in a multi-district litigation in the Northern District of California. The suits included class actions on behalf of direct and indirect purchasers of lithium-ion batteries.

C. Hagens Berman submits a bid to be lead class counsel with a three-firm committee beneath it, but accedes to join a competing bid as a three-firm co-lead counsel.

The court considered applications for appointment as Interim Lead Counsel of all Indirect Purchaser Plaintiffs. Several firms submitted applications for lesser roles in a leadership structure. At first, there were two competing sets of bids for Lead or Co-Lead Counsel.

Hagens Berman, which brought the first action, submitted a sealed bid in March 2013, unsealed in 2020, of a "reasonable fee structure." 2-ER-110.[2] The proposed fee structure was a grid of brackets of percentages based on the recovered amount (with percentages declining as recoveries became larger), and the procedural posture of the case. 2-ER-119. Fees would not exceed 17% of the fund. *Id.* Hagens Berman agreed to cap expenses billed to the class, including notice, at $3.5 million. *Id.* They argued a three-firm lead counsel structure, as two other firms proposed, "was simply too large and would lead to inefficiency, duplication, and waste." 2-ER-118. Thus, Hagens Berman argued, there should be a four-firm structure, with it as lead, and three firms serving under it as a Plaintiffs' Steering Committee. 2-ER-102-05.

[2] The original redacted version of the application is at Dkt. 108 and its attachments. The district court claims (Dkt. 2560 at 2-3) the court did not keep an unredacted version of that application, so we use the 2020 submission of the unredacted 2013 application in these excerpts.

Lieff, Cabraser, Heimann & Bernstein, LLP, which had filed one of the follow-on complaints, asked Hagens Berman for its support as co-lead counsel; Hagens Berman declined, and Lieff told Hagens Berman that, as a result it would contest Hagens Berman's leadership application. 2-ER-117. Lieff and another firm, Cotchett, Pitre & McCarthy, jockeyed for the lead counsel role, proposing "an unwieldy [Plaintiffs' Steering Committee] which would include essentially any firm that wished to participate" to maximize support at a contested hearing. 2-ER-118. Lieff and Cotchett sought to end the competition and include Hagens Berman in a co-lead position, but Hagens Berman refused at first. *Id*. According to Hagens Berman, firms competing with it for the lead counsel position then "encourage[d] other firms to file cases shortly before the organizational meeting of counsel, so that those firms could then vote for" their lead-counsel application. 2-ER-112 n.78.

At the April 2013 hearing for the lead-counsel role, firms spoke in favor of one or the other lead groups. Rather than compete for the lead-counsel role, and risk being frozen out by Lieff and Cotchett's "majority of firms" (2-ER-112), Hagens Berman acceded to ending the competition and agreed to a three-firm lead structure. 3-ER-357-59. Lieff name partner Elizabeth Cabraser assured the court that the three-firm structure would be "as efficient as necessary." 3-ER-361. Moreover, she expressly recognized that class counsel "have 27 states to represent on

the indirect purchaser side." 3-ER-360. With the compromise, there was no Plaintiffs' Steering Committee.

The court appointed the three firms as Interim Co-Lead Counsel in May 2013. Dkt. 194.

D. Plaintiffs propose and the court approves a *pro rata* allocation for a 2016 settlement with Sony.

In 2016, Sony was the first defendant to settle, paying $19.5 million to a settlement fund. The court-approved notice stated that the proposed distribution was *pro rata*. 3-ER-338. Plaintiffs' motion for final approval noted they proposed that "each class member receives the same treatment regardless of what state that person or entity resides in." 3-ER-333; *accord* 3-ER-337. Bednarz did not object to this settlement, but other class members, including appellant Christopher Andrews, objected that the proposed distribution was too vague; plaintiffs argued in response that the notice and motion for approval detailed *pro rata* distribution. 3-ER-326. The district court rejected the objections for this reason: "the details of the settlement's notice and allocation plan… [are] available on the PACER docket and on the [settlement] website." 3-ER-321. The court approved the settlement; Andrews appealed; the Ninth Circuit affirmed in 2019. Dkt. 2526.

E. The district court denies the indirect-purchaser plaintiffs' motion for class certification.

The initial indirect-purchaser plaintiff complaint sought a nationwide damages class, and, in the alternative, a state damages class for what it claimed were 29 repealer states. Dkt. 256. In response to a court request for letters on potential intended motions to dismiss, defendants noted their *Illinois Brick* defense. Dkt. 258.

In 2016, the indirect-purchaser plaintiffs moved for class certification of a nationwide class. Dkt. 1036. In the alternative, they asked for the court to certify a class of consumers from *only* the *Illinois Brick* repealer states. *Id.* at 51. This alternative certification would have omitted purchasers from non-repealer states from the class.

In April 2017, the district court denied the indirect-purchaser plaintiffs' motion without prejudice to renew because, in part, the proposed nationwide class did not satisfy Rule 23(b)(3)'s predominance requirement. 3-ER-309-13. Applying California choice-of-law principles, the court determined that a nationwide class would be inappropriate because "the interests of *Illinois Brick* non-repealer states in precluding indirect purchaser claims would be impaired more significantly" by applying California's antitrust law to the entire class "than California's interests would be impaired by limiting its application to *Illinois Brick* repealer states." 3-ER-313. "It is too much of a stretch to employ California law as an end run around the limitations [non-repealer] states

have elected to impose on standing" to protect their resident businesses. 3-ER-312 (cleaned up).

Class counsel's sealed September 2017 renewed motion for class certification sought a class of just repealer-state class members. Dkt. 2197 at 2-3. The court denied class certification a final time in March 2018 because of failings in expert testimony. Dkt. 2197. This Court declined to accept plaintiffs' Rule 23(f) appeal. Dkt. 2347.

F. Bednarz objects to unitary class treatment in the second tranche of settlements; class counsel defends *pro rata* distribution, and the district court adopts it.

Under a second tranche of settlements with three defendant groups, appellees Hitachi, NEC, and LG Chem would contribute a combined $44.95 million to a settlement fund. The settlements would distribute the settlement proceeds net of attorneys' fees and expenses *pro rata* to class members based on proof of the number of qualifying purchases of products with lithium-ion batteries. 2-ER-274. Class members from non-repealer and repealer states would be treated alike. That is, they would "receiv[e] the same treatment regardless of the state in which the person or entity resides." 3-ER-288.

In March 2017, the district court preliminarily approved the proposed settlements and certified for settlement only a nationwide class of indirect purchasers who "purchased goods containing lithium-ion

batteries manufactured by the defendants" during the class period. Dkt. 1714.

Class member Michael Frank Bednarz objected to the proposed settlement and class certification. Dkt. 1902. Bednarz had standing to object as a member of the class of indirect purchasers through his purchase of a laptop in 2006 and a lithium-ion battery replacement for his laptop in 2010. *Id.*; Dkt. 1907. Bednarz resides in Illinois and made these purchases when he resided in Illinois and Massachusetts—both repealer states that allow recovery for goods purchased by indirect purchasers under their own antitrust laws. *Id.* As a class member with a personal stake in the settlements' *pro rata* allocation to class members nationwide, Bednarz argued that the conflict between members from repealer states and members from non-repealer states diluted his recovery, precluded class certification, and failed Rule 23(e)(2). Dkt. 1902. He maintained that, given this intraclass schism, the class could not satisfy Rule 23(a)(4)'s adequacy requirement because the law required separate representation for repealer and non-repealer states. *Id.*

In response, class counsel defended the *pro rata* distribution treating differing class members identically. 3-ER-285-86; 3-ER-289.

The district court agreed with class counsel, certified the class, and approved the settlement in October 2017. It expressly rejected Bednarz's argument that "there are intraclass conflicts between consumers that

reside in *Illinois Brick* repealer states and those that reside in other states, which the allocation plan must take into account." 2-ER-279. The court expressly adopted a *pro rata* distribution "despite these differences" in state law in its opinion and final judgment. *Id.*; 2-ER-274.

The opinion mentioned that the court was approving "a pro rata plan of distribution, the specifics of which the Court shall approve at a later date" and ordered plaintiffs to submit a proposed distribution plan at the close of the claims period. 2-ER-274; 2-ER-276; 2-ER-280. Plaintiffs understood the "specifics" to describe finalizing the logistics by "tak[ing] into consideration factors such as the claims rate, the cost of distribution, and the need to reserve a small percentage of the fund," and the district court did not contemporaneously dispute that understanding. Dkt. 2026 at 3; Dkt. 2042.

Bednarz and Andrews appealed.

G. The remaining defendants settle while Bednarz's appeal is pending, and class counsel corrects the lack of separate representation for this third tranche of settlements.

While Bednarz's appeal was pending, the four remaining defendant groups settled. Class counsel, apparently in response to Bednarz's Rule 23(a)(4) objection and pending appeal, established an elaborate proxy for the separate representation: they retained a "Neutral" retired judge and two sets of independent attorneys to represent the two subclasses to make the strongest arguments for allocation. 2-ER-249-50;

2-ER-259-61. In December 2018, the Neutral recommended that the non-repealer state claims were "worthless" and "could not have meaningfully contributed to the settlement negotiations" and that there should therefore be an allocation split of 100/0 between repealer states and non-repealer states. 2-ER-263-71. The Neutral recommended a 90/10 split only "if the Court were to disagree with her conclusion" that the non-repealer-state claims were worthless. 2-ER-270-71.

Class counsel proposed a 90/10 split in its motion for preliminary approval. Dkt. 2459. With the $49 million contribution from the final four defendants, the total settlement fund was $113,450,000, 11.7% of alleged single damages. *Id.* at 16. The March 2019 court-approved notice expressly distinguished between the third tranche of settlements, and their 90/10 split, and the first two tranches of settlements, which "do not differentiate between people who live in different states." 2-ER-243. The court's order approving notice stated that the court "is likely to find [the] proposed distribution plan fair, reasonable, and adequate." 2-ER-231.

In May 2019, Bednarz stated his opposition to the 90/10 split and class counsel's advocacy against full allocation to the repealer-state class members, but did not formally object to the settlement because of the pending appeal. Dkt. 2495. Bednarz did object to the proposed attorneys' fee award, arguing that the court should require disclosure of the sealed Hagens Berman bid and follow it. *Id.* Bednarz noted that the Neutral's

recommendation demonstrated the unfairness of the court's order of *pro rata* distribution in the second-tranche settlement. *Id.*

The district court refused to order disclosure because Hagens Berman's bid was irrelevant to its fee determination, and granted the full fee request. Dkt. 2516 at 5. The district court approved the third tranche of settlements over objections by other class members, including Andrews. Dkt. 2516. The court did not acknowledge its earlier orders of *pro rata* distributions or Bednarz's complaints about the issue. *Id.* Andrews and another objector appealed the August 2019 final judgment and fee award; Bednarz did not.

H. Bednarz's appeal succeeds over class counsel's defense of the *pro rata* distribution, and this Court vacates and remands the district court's approval of the second tranche of settlements' *pro rata* distribution.

In appeal No. 17-17367, Bednarz raised the intra-class conflict, noting that the *pro rata* distribution would cost repealer-state class members millions of dollars. In response, plaintiffs did not argue that *Illinois Brick* does not apply. Nor did they argue that the district court had not ordered a uniform *pro rata* distribution in its final judgment. Class counsel simply argued that a uniform *pro rata* distribution and unitary class certification was within the district court's discretion to approve and concluded "the district court's final approval order and the resulting judgment should be affirmed." Even after the December 2018

proceedings with the Neutral, Class Counsel repeated the request for unconditional affirmance in several Rule 28(j) letters and at oral argument in August 2019. *E.g.*, Rule 28(j) Letter of August 28, 2019, Appeal No. 17-17367 Dkt. 68 ("Plaintiffs urge the Court to affirm the settlements and allocation plan"); *see also* 2-ER-85-86.

In September 2019, this Court, finding that the district court's certification of the settlement class and rejection of Bednarz's objections was improperly cursory and inconsistent with its class certification order, vacated the district court's approval order of the second tranche of settlements and remanded for further proceedings. 2-ER-209-12. The Court expressly held that "The district court approved [Plaintiffs'] plan to distribute the settlement fund *pro rata* to settlement class members, regardless of whether their claim(s) arose in *Illinois Brick* repealer or non-repealer states." 2-ER-210. It expressed no opinion on the conclusions the district court should reach. *Id.* The decision mooted a pending Andrews appeal from the same order. Dkt. 2532.

I. On remand, class counsel proposes a 90/10 split.

Class counsel quickly proposed in December 2019 a revised distribution schedule for the second tranche of settlements with the same 90/10 split as the third tranche of settlements. Dkt. 2566. The motion for the revised distribution noted that the Sony settlement and its *pro rata* distribution was "final and unaffected by any of the" appeals. Dkt. 2566 at 13. The court issued an order for notice, Dkt. 2571, and revised it in

response to plaintiffs' administrative motion. Dkt. 2581; Dkt. 2583. The 2020 notice order, like the March 2019 notice order before it, expressly distinguished between the *pro rata* distribution plan for the finalized Sony settlement and the other two settlement tranches' 90/10 split. 2-ER-202.

J. The court orders new notice.

Notice issued, the parties briefed the fee motions and settlement and fee objections (Sections K and L below), and the court held a May 2020 fairness hearing. In August 2020, the court announced that all of its previous written orders designating settlement distributions and notice were erroneous, because the court had always intended to decide the allocation of the distribution at the end of the process. 2-ER-91-94. It issued an order to show cause why it should not issue new notice and a 90/10 global distribution for all three tranches of settlements. *Id.*

In response, both Bednarz and plaintiffs argued that the court's notice order was not inaccurate, pointing out that the court's written orders were explicit and unambiguous, superseded any contrary oral remarks at hearings, and were law of the case. 2-ER-68-90. Plaintiffs noted that they had expressly argued for an order providing *pro rata* distribution, and the court granted it "unambiguously." 2-ER-75-76. The "Ninth Circuit affirmed this Court's holding that the Sony settlement should be approved, along with its plan of allocation." 2-ER-76. Bednarz agreed with the court that a 90/10 distribution was preferable but pointed

out that the Sony judgment ordering *pro rata* distribution was final; the Ninth Circuit affirmed it; and it would be *ultra vires* for the court to modify that final judgment without a Rule 60 order. 2-ER-86-88. Bednarz feared delay from objectors from non-repealer states. *Id.*; *see also* Dkt. 2668.

Despite unanimous opposition, the court issued an order for new notice to the class with its preferred global 90/10 distribution scheme. 1-ER-53. It conclusorily "[found] no reason" for a Rule 60 order vacating its Sony judgment. 1-ER-57. It did not mention the arguments about the law of the case. In its final 2021 order, the court revisited the issue, and reasserted its position that the earlier orders did not establish *pro rata* distributions, and thus had authority to revisit distributions without vacating those orders. 1-ER-45-46.

There was thus new notice relating to the Sony distribution. Dkt. 2654. Though this decision led to later objections (Dkt. 2659; Dkt. 2666), there does not appear to be any appellate challenge to the court's modification of the final judgment of the original distribution scheme for the Sony settlement.

In response to those objections and Bednarz's statement to the court warning of the danger of delay from non-repealer-state objectors (Dkt. 2668), class counsel reversed its position on the court's authority to alter the plan of distribution without addressing its earlier arguments about law of the case. Dkt. 2691.

The court held new fairness hearings on the settlement and fee motions and objections in December 2020. Dkt. 2680.

K. Bednarz moves for fees; class counsel opposes; the court grants fees in part.

Bednarz timely moved for fees in March 2020. The amended plan on remand after Bednarz's successful appeal meant that repealer-state class members would receive $10 million more in settlement funds compared to the settlement and distribution plan the court had approved. Bednarz requested well under the 25% benchmark: 9% of that common benefit, $900,000, which would equate to a lodestar multiplier of just over 3 if the court did a cross-check. Bednarz argued that his asserted $297,439 lodestar—which conservatively excluded dozens of hours of time by senior attorneys and by Georgetown Law students and their instructor—was particularly efficient, and requested that the district court compare it to the undisclosed time class counsel spent on the appeal. 2-ER-152-90.

Class counsel opposed every single aspect of Bednarz's fee motion. Dkt. 2590. Bednarz's counsel's reply brief needed a 27-paragraph declaration to correct dozens of class counsel's factual misstatements. Dkt. 2591, 2591-1.

On December 10, 2020, the district court granted Bednarz's motion in part. 1-ER-48. Bednarz created a "material benefit to a portion of the class" of "approximately $10 million" "by challenging the original pro rata

equal distribution as between repealer and non-repealer state members of the class." 1-ER-49. The court noted "class counsel's initial acquiescence to the pro rata distribution, and abrupt shift of positions in the Round 3 settlements." 1-ER-50. But, the court concluded, there was no "increase to the common fund" because that money came at the expense of non-repealer class members. Thus, "the benefit to the class is not easily quantified," requiring the court to use lodestar instead of percentage-of-the-benefit. 1-ER-49. The court found the proposed hourly rates reasonable, but reduced the number of hours claimed, and awarded $250,000 deducted from class counsel's fee to avoid double-billing the class. 1-ER-50-51. The court, in asserting that the lodestar hours needed to be reduced, did not look at class counsel's still undisclosed hours on the appeal.

L. Class counsel moves for a Rule 23(h) award of over $40 million; Bednarz objects; the court grants the request in full.

Meanwhile, class counsel requested a Rule 23(h) award of 30% of the gross settlement fund and another $6.75 million in expenses—over $40 million of the $113.45 million fund. Dkt. 2588. (Though the court had earlier granted plaintiffs' fee request in full (Dkt. 2516), it agreed that the success of Bednarz's appeal required it to redo fees from scratch, and this Court vacated the fee award during a pending appeal, remanding to the district court to enter a new fee award. 1-ER-12 n.8.)

Bednarz objected. 2-ER-122-51. *First,* Bednarz renewed his earlier objection (Dkt. 2495) that, under *Vizcaino v. Microsoft*, the sealed Hagens Berman bid reflected the appropriate benchmark and was surely less than 30%. *Second*, class counsel's repeated actions against the interests of repealer-state class members reflected a conflict of interest and a breach of fiduciary duty, and Bednarz argued that under Ninth Circuit law that class counsel should not collect any fee for their representation of the repealer-state class members. Even after failing to get the Ninth Circuit to affirm a *pro rata* distribution, and even after the neutral had recommended a 100/0 split between repealer-state and non-repealer-state class members, class counsel proposed a 90/10 split. At a minimum, Bednarz argued, the court should redistribute fees to give repealer-state class members the equivalent 100/0 benefit they would have received with faithful counsel following the Neutral's recommendation. In addition, there should be some consequence for the delay and expense of notice caused by class counsel litigating for several years to promote an unfair *pro rata* distribution. 2-ER-149 (citing authority).

Before the May 20 fairness hearing, Bednarz gave notice of this Court's May 15, 2020, decision in *Optical Disk Drive*; as a result, the court ordered Hagens Berman to produce its sealed bid, Dkt. 2640, and Hagens Berman did so May 22. 2-ER-99-121. From the unredacted version, class members learned for the first time that class counsel's fee request was seeking twice as much as what Hagens Berman had once told the court

was a reasonable market rate. The percentage for a $113.45 million settlement after class certification motions under the Hagens Berman bid was 14.56%, or $16,523,500. 2-ER-96; 2-ER-119. The bid also offered to cap expenses at $3.5 million, about half of what class counsel was seeking as expenses now. Bednarz argued that if the Hagens Berman bid applied, the Rule 23(h) award of fees and expenses for a $113.45 million settlement would be only $20,023,500, less than half of the $40.6 million class counsel was requesting now, and the class should not be paying double the market rate. 2-ER-96-97.

Class counsel argued that, despite *Optical Disk Drive*, the fact that the bid was not "accepted" made it irrelevant. Dkt. 2646. They did not contest Bednarz's calculations under the Hagens Berman grid.

On December 10, the district court awarded the full request of $33,829,176 in fees and $6,751,735.84 in expenses. 1-ER-47. The court held, without mentioning *Vizcaino*'s discussion of the relevance of bids, that the bid was irrelevant because it did not "secure appointment"; rather, Hagens Berman agreed not to compete with the other two firms' bid and agreed to a tripartite structure. 1-ER-38. It held that the percentage it awarded was not excessive because it was lower than class counsel's putative lodestar. 1-ER-37.

The court held that there was no conflict of interest in class counsel's "zealous advocacy" because Bednarz had appealed the distribution "prematurely," because the court had not "entertained or

decided the details of such a proposal." 1-ER-39-40. The court did not reconcile this finding with its finding in the contemporaneous order partially granting fees to Bednarz. The court also concluded that there was "no intraclass conflict" between repealer-state and non-repealer-state class members because "Class Counsel and the Class Representatives have litigated this action competently and vigorously since 2013 and have achieved an excellent result for *all* class members." 1-ER-18-19 (emphasis in original).

The court found "no objector offers any authority indicating that class counsel should bear the expense of the notice plan directed by the Court with respect to the revised distribution plan and the Court finds no reason to so order." 1-ER-47; *compare* 2-ER-149.

M. Post-decision appeals and developments.

On December 31, 2020, *pro se* Steven Helfand filed the first notice of appeal of several orders, challenging, among other things, the settlement approval, plaintiff's attorney's fee award, and Bednarz's attorney's fee award. 3-ER-383 (Dkt. 2685). The Court docketed this appeal as No. 21-15022. Helfand amended his notice of appeal (3-ER-382) on January 6, and this Court dismissed his appeal, No. 21-15022, on a joint motion on February 18.

On January 14, 2021, fourteen days after the first notice of appeal, Bednarz cross-appealed the two fee orders. 3-ER-375. R2691.

According to Andrews, he filed a timely notice of appeal of the order at Dkt. 2681. The district court did not docket Andrews's notice of appeal until January 15, 2021. 3-ER-370. This is Appeal No. 21-15138. An April 1 clerk's order accepted Andrews's explanation that his appeal was timely and discharged a February 24 order from this Court to show cause why his appeal should not be dismissed.

On January 27, 2021, twenty-seven days after the first notice of appeal, plaintiffs filed a putative notice of cross-appeal of the December 10 order partially granting Bednarz's motion for attorney's fees. 3-ER-367. Bednarz moved to dismiss plaintiffs' cross-appeal No. 21-15200 as untimely. This Court denied the motion on May 11 "without prejudice to renewing the arguments in the merits briefing."

Helfand's appeal sought to prejudice Bednarz's interest in settlement approval and Bednarz's award of attorneys' fees; Andrews aligns with Helfand in opposing settlement approval against Bednarz's interests. Thus, Bednarz is an appellee, in addition to being a cross-appellant and cross-appellee. Though the three remaining appellants are adverse to one another, on May 11, the Ninth Circuit ordered Bednarz to file a "first cross-appeal brief" simultaneous with Andrews's brief; Andrews has filed his brief three days early, and Bednarz responds to it in this brief without further delay.

In response to the 2019 Andrews appeal of the approval of the third settlement tranche, this Court affirmed in April 2021. 2-ER-60. The appellate decision states

> Although the inclusion of both repealer and non-repealer class members in the settlement class here created a potential conflict of interest between class members with claims of differing values, this conflict was mitigated by the district court's differential allocation of the settlement fund to class members in repealer and non-repealer states. … Furthermore, there is no indication that named plaintiffs in either repealer or non-repealer states lacked incentive to vigorously prosecute the case on behalf of the class.

2-ER-62-63. Andrews's *pro se* appellate briefs, which raised at least seven appellate issues, did not mention that class counsel had argued for a *pro rata* distribution for over half of the settlement fund at the expense of repealer-state class members, and did not mention the Neutral's recommendation.

Summary of Argument

Hagens Berman submitted a competitive bid for lead-counsel status here that would have produced a $20,023,500 Rule 23(h) award, less than half of the $40.6 million that they sought and the district court awarded. 2-ER-96; 2-ER-119; 1-ER-47. *Vizcaino v. Microsoft Corporation* and *In re Wells Fargo* command that district courts consider such competitive bids

as evidence of the appropriate benchmark. The district court expressly refused to do so. 1-ER-38. This failure to consider the most relevant factor for fees is, by definition, a reversible abuse of discretion.

Bednarz argued below that the district court should reduce the fee award because class counsel had a conflict of interest when class counsel argued against the interests of repealer-state class members that Bednarz had raised in his successful 2017 appeal. In deciding that appeal, this Court correctly noted that class counsel advocated for and the district court ordered a *pro rata* distribution for the second settlement tranche. 2-ER-210. Class counsel admitted this as well. 2-ER-75-76. The district court held that class counsel did not have the conflict of interest Bednarz alleged because the court had not "entertained or decided the details of such a proposal" and that Bednarz's successful 2017 appeal was thus "premature." 1-ER-39. Because the district court lacks the authority to overrule the Ninth Circuit or disregard its mandate, this decision is an abuse of discretion even if it weren't also a clearly erroneous reading of the history of the case. The district court's holding that there was no intra-class conflict because class counsel advocated on behalf of the entire class is also legal error because it contradicts Supreme Court precedent and is a *non sequitur*.

For these independent reasons, the district court's attorney-fee award to class counsel must be vacated.

Bednarz's appeal ended the *pro rata* distribution to the second tranche, creating an extra $10 million of benefit to repealer-state class members. He moved for fees of 9% of that common benefit, a fraction of the Ninth Circuit benchmark whether that benchmark is 25%, class counsel's actual 30% award, or even the 14.56% benchmark created by the Hagens Berman bid. The district court acknowledged that Bednarz had increased recovery to repealer-state class members by $10 million, but held that Bednarz was not entitled to a percentage-of-the-fund fee because the court could not quantify the benefits to the class as a whole because the additional repealer-state money came at the expense of other class members. 1-ER-49. The court's decision is a fundamental misunderstanding of the common-benefit doctrine. One does not measure a common benefit by subtracting resulting costs to losing parties. Bednarz litigated on behalf of repealer-state class members, and created a $10 million common benefit for that set of class members. Yes; a different set of class members lost a windfall as a result; another different set of class members saw a wash. But that does not mean that the $10 million common benefit to the repealer-state class members ceases to be quantifiable. Because the common benefit is quantifiable, it is error for the district court to hold it cannot use a percentage of the benefit. The district court should reverse the district court order and remand with instructions to grant Bednarz's modest fee request in full.

Argument

I. Ninth Circuit law requires the district court to use Hagens Berman's fee bid as the "starting point for determining a reasonable fee," and the district court erred in refusing to consider it at all.

The Ninth Circuit has a 25% "benchmark" for attorneys' fees—with a major exception. "[W]here lawyers compete for lead counsel status" in large-scale litigation, an "ascertainable 'market'" exists, and the resulting bidding is "evidence" of a "fee award's reasonableness." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049-50 (9th Cir. 2002). A district court is "required to consider" such bids in awarding fees. *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 933 (9th Cir. 2020).

Here, Hagens Berman bid for lead-counsel status with a fee-grid that no one disputes would have paid attorneys a $20 million Rule 23(h) award. Because Hagens Berman agreed to collude with its competitors for lead-counsel status and withdrew its bid, the district court held that the bid is irrelevant, and made a Rule 23(h) award of over twice as much money. This makes no sense as a question of law or of common sense—especially in an antitrust case over price-fixing.

Optical Disk Drive determined that a "proposed fee grid," submitted as part of a competitive bidding process for appointment of counsel is "a relevant circumstance the district court [is] required to consider." 959 F.3d at 333. When the "variance" between the *ex ante* bid and the

ultimate award is "significant," the district court must adequately explain the departure. But rather than explain such a drastic departure of over double the bid, the district court refused to consider the bid at all. The court reasoned that it was not "relevant" to the fee request because Hagens Berman had not secured its appointment through the bid. Instead of the single-firm lead with a three-firm steering committee Hagens Berman proposed, the court appointed instead a three-firm lead. 1-ER-37-38.[3]

This is wrong. The district court legally erred by concluding that the bid becomes irrelevant when it does not secure counsel's appointment in the precise structure proposed by that counsel. It is the *proposal* itself, rather than a court accepting the proposal, that makes the bid relevant to a determination of reasonable Rule 23(h) fees. "When counsel 'propos[es] a fee structure in a competitive bidding process, that bid,' not a percentage benchmark, 'becomes the starting point for determining a reasonable fee.'" *In re Wells Fargo & Co. S'holder Derivative Litig.*, 845

[3] The court's suggestion (1-ER-38) that Berman originally sought to "proceed alone" is clearly erroneous. 2-ER-102-05. Perhaps the district court thought it should double the fees awarded because it approved a more inefficient tripartite structure. This is itself a *non sequitur*—why should the court punish the class for the court's inefficient appointment mistake? But there is no record evidence that Berman's four-firm hierarchical structure underlying the bid would have entailed less duplication than the three-firm co-lead-counsel status the two competing applications agreed to.

Fed. Appx. 563, 564 (9th Cir. 2021) (quoting *Optical Disk Drive*, 959 F.3d at 934). *Wells Fargo* tethers *Optical Disk Drive*'s rule to the proposed bid, not to the court's acceptance of the bid.

For good reason. *Optical Disk Drive*'s rule is not simply a judicial estoppel rule holding class counsel to its promises in a successful bid for appointment. Rather, arising out of *Vizcaino*, the rule recognizes that the competitive and freely tendered *proposal* sheds light on the market rate class members should pay for the litigation. 290 F.3d at 1049-50. While *Vizcaino* declined to adopt the Seventh Circuit's market-mimicking approach across the board, it did recognize that, unlike a garden-variety employment action, "where lawyers compete for lead counsel status" in large-scale litigation, an "ascertainable 'market'" does exist. *Id.* Hagens Berman's bid, made when competing for lead counsel status, reflects the market rate in this antitrust case whether or not the court considered or accepted the bid. Thus, *Vizcaino* and *Optical Disk Drive* instruct that Hagens Berman's fee grid is probative evidence of the market rate and the district court must consider it as the starting point. The district court here did not change its refusal to consider the bid even after *Optical Disk Drive* led it to order the bid disclosed.

Ex ante bidding on fees serves the interest of class members and safeguards the very vitality of Rule 23. "Public confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d

672, 688-92 (Cal. 2016) (Liu, J., concurring). "[J]udges should reject consensus slates for leadership positions and use a competitive selection process where attorneys openly jockey to hold the leadership's monopoly power. Competing *for* the market, that is, competing to *become* the monopoly, may produce some of the same benefits of open market competition." Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 77-78 (2017); *Fresno County Employees' Ret. Ass'n v. Isaacson/Weaver Family Trust*, 925 F.3d 63, 71-72 (2d Cir. 2019) (endorsing *ex ante* bidding as a way for courts to discharge their fiduciary obligations to control costs); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 201 n.6 (3d Cir. 2000) (competitive bidding "appears to have worked well, and we commend it to district judges"). Failing to apply the *Optical Disk* framework matters; on remand in *Optical Disk* itself the district court refused to reinstitute class counsel $47.78 million fee award, reducing it to $31.02 million instead. *In re Optical Disk Drive Prods. Antitrust Litig.*, No. 10-md-02143-RS, Dkt. 3027, 2021 WL —, 2021 U.S. Dist LEXIS — (N.D. Cal. Jul. 2, 2021).

This is because reasons to depart from a bid are rare. Firms making bids are sophisticated plaintiffs' firms that understand the risks of litigation: indeed, Hagens included several contingencies in its bid, including the risk of having to survive a motion to dismiss, seek class certification, or take a case to trial. 2-ER-119; *see also Optical Disk Drive*, 959 F.3d at 935.

Ordinarily, in a competitive market, a firm proposing to a sophisticated client a rate that would result in an above-market return would find itself underbid by competitors willing to accept a smaller above-market return, until competition bid away all above-market rents. In the class-action context, however, the client is a diffuse body of individual claimants, typically with less at stake and thus little incentive and even less ability to negotiate down the rates offered by competing counsel. *Cf. Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 587 (N.D. Cal. 1999) (lack of sophisticated lead plaintiff, "together with the inherent conflicts and agency problems in class actions and the limited ability of the court to address such problems through case management" led court to determine that competitive bidding "is necessary to protect the interests of the putative class members"). So it is best when, just as in a competitive market, prospective class counsel themselves look at the expected opportunity cost, the expected chance that investment in the case would produce no return, and the expected size of a settlement in the litigation. They would then, as Hagens Berman did here, propose a contingency-fee percentage that compensates them for that expected risk and opportunity cost. *FTC Workshop—Protecting Consumer Interests in Class Actions,* 18 GEO J. L. ETHICS 1243, 1261 (2005) ("If you're going to award lawyers for the risk that they undertake in litigation, the best time to measure that risk, and in fact the only time that you can do so effectively, is at the outset of the case.").

"Empirical evidence suggests that ex ante fee negotiation is a key mechanism for reducing agency costs between counsel and the class they represent." *Laffitte*, 376 P.3d at 690 (Liu, J., concurring). By contrast, *ex post* fee evaluation is "likely to be distorted by hindsight bias." *Id.* "[I]t is inherently illogical for lawyers to undertake litigation on the basis of the risks and rewards they perceive at the beginning, yet be compensated on the basis of the risks and rewards the *court* perceives at the end of the litigation." *In re Oracle Secs. Litig.*, 131 F.R.D. 688, 692 (N.D. Cal. 1990) (Walker, J.). The major force that exerts downward pressure *ex ante*—the threat of losing the litigation to another firm—dissipates by the time of settlement, and self-serving statements about risk dominate the discussion.

The contrast between Hagens Berman's 14.56% sealed bid, and the ultimate 30% fee request in this very case demonstrates why competitive bidding is such a salutary practice. The sealed bid was made under competitive pressure; at that time, it was not guaranteed that Hagens Berman would be lead counsel. (Indeed, Hagens Berman ultimately agreed not to compete, after alleging that their competitors were rigging the process with straw complaints. 2-ER-112 n.78.) Class counsel its current fee request under non-competitive conditions; there is no risk that they would lose out to another firm. The difference between the two bids reflects a precise estimate of the value of competitive bidding to this class.

Class counsel will respond that Hagens Berman's bid only represents the market for solo representations, and does not implicate a proper fee for a resolution obtained by three firms. A close inspection, however, proves that the fee grid reveals the efficient market rate for obtaining a certain result at a certain stage in the litigation. 2-ER-119. True, Hagens Berman eventually acceded to a three-firm structure (3-ER-357-59) and so now must share the reasonable fee for the outcome plaintiffs achieved. But at the same time, Hagen Berman's original bid reflected the price of four firms: a lead counsel and a plaintiffs' steering committee. 2-ER-102-05. The change of structure from Hagen Berman's original four-firm plan with a single head to a three-firm co-lead counsel structure should not increase the reasonable price for the class's result. This is especially so when, before the appointment, one of the other lead counsel firm's name partners assured the court that the team would efficiently litigate. 3-ER-361. The lead firms have a "responsibility" and "obligation" as designated counsel to act "fairly, efficiently, and economically." Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22 (2004).

If courts allow earlier bids to drop out of the equation after a settlement, firms will cease to take their duty to represent the class fairly and economically seriously, and that value will be lost not only to the present class but also to future classes. *See Evans v. Jeff D.*, 475 U.S. 717, 737 n.29 (1986). Moreover, it creates additional perverse incentives to

end competition and collude for lead counsel status at the class's expense: not only does competition create risk that a court's appointment will freeze a firm out of litigation, but, if this Court affirms the district court's exception to *Optical Disk Drive*, it will send the message to plaintiffs' firms that the Ninth Circuit law *disadvantages* law firms that take the additional risk of competing for lead-counsel status on price instead of colluding to avoid such risk.

Indeed, consider a hypothetical where construction firms bidding on a project to build a skyscraper openly agreed to stop competing against one another and submit a single joint application, and then charged the purchaser double what the low bid would have been. There would be criminal prosecutions and treble damages for the difference under the Sherman Act. Here, however, the court used the fact that Hagens Berman agreed to merge its proposal with its only competing proposal as a reason to double the fee. 1-ER-38. It is absurd for the district court to use the same sort of agreement not to compete as a reason to double the charge to class members—*especially* in an antitrust class action. *Cf.* Joseph Ostoyich and William Lavery, *Looks Like Price-Fixing Among Class Action Plaintiffs Firms*, LAW360 (Feb. 12, 2014).

The district court committed reversible error when it failed to consider the Hagens Berman bid as the starting point for a reasonable fee.

II. The district court erred when it ignored the law of the case and held there was no conflict by denying the existence and effectiveness of class counsel's advocacy for a *pro rata* distribution plan.

Bednarz argued that class counsel breached its fiduciary duty to repealer-state class members when it chose to favor the interests of non-repealer-state class members and argue for *pro rata* (and then 90/10) distribution, instead of 100/0 distribution. This conflict of interest was inevitable when class counsel chose to merge the conflicting interests of these two subclasses into a single unitary class without separate representation. This would require a reduction in the fees—perhaps to zero for the moneys won by the repealer-state class members with colorable claims that class counsel compromised.

The district court dodged this inquiry by claiming that its judgments did not provide for and thus class counsel did not actually litigate for a *pro rata* distribution. 1-ER-39-40. This contradicts the "unambiguous[]" (2-ER-75-76) final judgments the district court entered; the arguments class counsel and the district court made contemporaneously; the notice to the class that class counsel repeatedly proposed and the district court repeatedly ordered; and, most importantly, what this Court found. Even if the district court disagrees with this Court, the Ninth Circuit is still the superior court of the two, and the district court may not ignore the Ninth Circuit's mandate.

The district court's finding (1-ER-18-19) that there was no conflict of interest between two subgroups with competing claims on the same pot of settlement money because the class counsel "achieved an excellent result for *all* class members" is a *non sequitur* and an error of law.

There was a conflict that, if ignored, will cost repealer state class members $11.3 million, and would have potentially cost repealer state class members much more had Bednarz's earlier appeal not succeeded. The district court erred in refusing to acknowledge it or do anything to rectify it.

A. A conflict of interest is grounds for fee reduction or elimination.

"The representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees." *Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012) ("*Rodriguez II*"). "A court has broad equitable power to deny attorneys' fees (or to require an attorney to disgorge fees already received) when an attorney represents clients with conflicting interests." *Id.* at 653. "[A] reasonable fee for an attorney who represents clients with conflicting interests is zero at least when the violation is one that pervades the whole relationship." *Id.* at 654 (internal quotations omitted). "In making such a ruling, the district court may consider the extent of the misconduct, including its gravity, timing, willfulness, and effect on the various services performed by the lawyer, and other

threatened or actual harm to the client." *Id.* at 655. "[I]t compounds injustice to allow the attorney to recover fees from the very party injured by the ethical violation." *Id.* at 654 (internal quotation omitted).

In common-fund class-action cases "these equitable principles" apply "even more assiduously" "because the district court has a special duty to protect the interests of the class, and must act with a jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is." *Rodriguez II*, 688 F.3d at 655 (internal quotations and citation omitted). Indeed, in class actions "[t]he responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 968 (9th Cir. 2009) ("*Rodriguez I*") (internal quotation omitted).

Thus, after *Rodriguez I* pinpointed a conflict of interest stemming from incentive-award agreements between class counsel and the named representatives that created financial incentives for the named representatives to agree with class counsel's settlement recommendations, the district court eliminated class counsel's fee award ***entirely***. *Rodriguez II*, 688 F.3d at 652. And the Ninth Circuit affirmed, even though the conflict "did not lead to an actual injury" to the class. *Id.* at 658; *accord id.* at 657 (noting argument that the "class suffered no hardship as a result of the conflict of interest"). A "knowing and willful

creation of a conflict of interest" itself was a breach of loyalty egregious enough to justify fee forfeiture. *Id.* at 657.

B. The court erred in ignoring the Ninth Circuit mandate, the law of the case, and the overwhelming evidence that class counsel successfully advocated for the *pro rata* distribution that the district court ordered.

The Ninth Circuit based its ruling on Bednarz's appeal on the finding that "The district court approved [plaintiffs'] plan to distribute the settlement fund pro rata to settlement class members, regardless of whether their claim(s) arose in *Illinois Brick* repealer or non-repealer states." 2-ER-210. So when the district court denies that its final judgment did not distribute the settlement fund *pro rata*, or denies that class counsel litigated for such a plan, or asserts that Bednarz appealed "prematurely," it is simply and erroneously disregarding the mandate. "[T]he mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court." *San Francisco Herring Ass'n v. Dep't of Interior*, 946 F.3d 564, 574 (9th Cir. 2019) (cleaned up). It "preserves the hierarchical structure of the court system, and thus constitutes a basic feature of the rule of law in an appellate scheme." *Id.* (cleaned up). The district court departed from the mandate without explaining why it was revisiting the Ninth Circuit's holding (even if a district court *could* reopen a Ninth Circuit holding). That by

itself would have been a *per se* abuse of discretion. *Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993) (law of the case).

The district court is also rewriting history. The Ninth Circuit's factual holding isn't just a mandate and law of the case, it's unmistakably correct. Everyone understood this to be true until the district court's 2020 attempt to show up the Ninth Circuit with an *ultra vires* rewriting of its final judgment in the Sony settlement approving a *pro rata* distribution.

To recap:

- The court-approved notice for the Sony settlement in the first tranche stated that distribution was proposed to be *pro rata*. 3-ER-338.
- Plaintiffs' motion for final approval of the Sony Settlement noted they proposed that "each class member receives the same treatment regardless of what state that person or entity resides in" and that this was fair because it "treats all class members equally." 3-ER-333; 3-ER-337.
- Class members objected that the proposed distribution was too vague; plaintiffs argued in response that the notice and motion for approval detailed *pro rata* distribution. 3-ER-326.
- The district court rejected the objections: "the details of the settlement's notice and allocation plan… is available on the PACER docket and on the [settlement] website." 3-ER-321. The district court did not write that it planned to figure out the

distribution later. The Ninth Circuit affirmed this decision. Dkt. 2526.

- In response to Bednarz's objection to the *pro rata* distribution in the second tranche of settlements, class counsel expressly defended the *pro rata* distribution treating differing class members identically. 3-ER-285-86; 3-ER-289; *cf. also* 3-ER-288.
- While the court suggested at the fairness hearing it might change the allocation at a future date, its final judgment under Rule 54(b) expressly adopted and ordered a *pro rata* distribution in the second tranche "despite these differences" in state law in its opinion and final judgment. 2-ER-279; 2-ER-274.
- In this Court, class counsel described the court's action as "approving a *pro rata* plan of distribution." Plaintiffs' Merits Br. 2, Appeal No. 17-17367 Dkt. 26 (July 16, 2018).
- In repeated status reports that the district court did not dispute, class counsel described the district court's orders as requiring *pro rata* distribution with every class member taking an equal per-device share, no matter if from a repealer state or a non-repealer state. 2-ER-85 (citing Dkt. 2350 at 1-2 (discussing estimated per-device recovery for each of the Round 1 and Round 2 settlements as *pro rata*)).

- The Neutral understood the first two sets of settlements to require *pro rata* distribution and those decisions to be final. 2-ER-254-55.
- While Bednarz's appeal was pending, class counsel proposed, and the court approved in March 2019, notice that expressly distinguished between the third tranche of settlements and their 90/10 split; and the first two tranches of settlements, which "do not differentiate between people who live in different states." 2-ER-243. The court's order approving that notice stated that the court "is likely to find [the] proposed distribution plan fair, reasonable, and adequate." 2-ER-231.
- During Bednarz's Ninth Circuit appeal No. 17-17367, class counsel acknowledged and defended the *pro rata* distribution in briefing, oral argument, and Rule 28(j) letters. *E.g.*, Rule 28(j) Letter of August 28, 2019, Appeal No. 17-17367 Dkt. 68 ("Plaintiffs urge the Court to affirm the settlements and allocation plan"). Class counsel never contended that Bednarz's appeal was not ripe or that the district court could change the distribution later without a Ninth Circuit order.
- When the court first suggested in August 2020 in an order to show cause (2-ER-91) that it had never ordered *pro rata* distribution, every response to the order, including from class counsel, corrected the court's misunderstanding of the history

and procedural posture of the case, and noted that there *was* a final order for a *pro rata* distribution. 2-ER-68-90. Class counsel called the court's original order "unambiguous[]." 2-ER-75-76.

- And even in its order partially granting Bednarz fees, the court recognized that Bednarz's appeal created a "material benefit to a portion of the class" of "approximately $10 million" "by challenging the original pro rata equal distribution as between repealer and non-repealer state members of the class." 1-ER-50.

Yet the district court disregarded the factual determination of this Court and ordered new notice and a different distribution for the Sony settlement. 1-ER-53.

The district court's conclusion to the contrary (1-ER-45-46; 1-ER-54) relies on the 2017 order's language about the "specifics" of a "proposed distribution plan." 2-ER-274; 2-ER-276; 2-ER-280. But class counsel contemporaneously understood those "specifics" to describe finalizing the logistics by "tak[ing] into consideration factors such as the claims rate, the cost of distribution, and the need to reserve a small percentage of the fund," rather than differential allocation across states that the district court had already rejected. Dkt. 2026 at 3. The district court did not contemporaneously dispute that understanding. Dkt. 2042. The district court's reading contradicts what class counsel called (2-ER-75-76) the "unambiguous[]" language of its own order. An allocation that gives different payments to different class members based

on what state they live in is not the "*pro rata*" distribution the judgment ordered. Had Bednarz waited to contest the *pro rata* distribution, class counsel would be telling the Ninth Circuit that he forfeited the issue.

Nor do the district court's oral statements at a fairness hearing (1-ER-7-8) support its conclusion. A later written opinion will control over previous conflicting oral pronouncements. *E.g., Parsons v. Ryan*, 912 F.3d 486, 498 (9th Cir. 2018). And the district court issued repeated written opinions reaffirming its unambiguous decisions to order *pro rata* distributions for the first two tranches of settlement. *E.g.*, 2-ER-231 (approving notice of distribution plan discussed at 2-ER-243); Dkt. 2571 (approving language at 2-ER-202).

Perhaps the district court, after the Ninth Circuit reversed it, regrets the several orders where it required *pro rata* distribution or notice to the class discussing *pro rata* distribution. Certainly, class counsel regrets it, and is now adopting the district court's position after previously telling the court that its suggested position was wrong because of law of the case. *Compare* 2-ER-68-83 *with* Dkt. 2671. But there is no authority for *nunc pro tunc* correction of a final judgment the Ninth Circuit has vacated.

The district court's order reallocating the Sony settlement was *ultra vires* because the district court failed to vacate its previous final judgment affirmed by the Ninth Circuit ordering *pro rata* distribution. Even if a district court could choose to override a mandate, it would have

been an abuse of discretion because the district court did not apply the doctrine of law of the case. *Thomas*, 983 F.2d at 155. For better or worse, no non-repealer-state class members this decision prejudices have appealed it. And Bednarz does not seek reversal of this aspect of the error, which benefits him as a repealer-state class member.

What concerns Bednarz is that the district court repeated its factual and legal error when it held it had not "entertained or decided the details of [a *pro rata*] proposal" (1-ER-39-40), and rejected Bednarz's objection as a result. This Court's decision says otherwise, and the district court committed reversible error in contradicting the mandate.

C. Repealer-state and non-repealer-state class members had conflicting interests, as class counsel repeatedly and the court on occasion recognized. The court erred as a matter of law holding otherwise.

If the "interests of those within the single class are not aligned," and the named parties seek "to act on behalf of a … class rather than on behalf of discrete subclasses," then it will be impossible for any one representative or group of representatives to adequately represent the entire class, and the unitary class simply can never satisfy the Rule 23(a)(4) adequacy requirement. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997); *accord Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999). "[T]he linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the

rest of the class." *Dewey v. Volkswagen A.G.*, 681 F.3d 170, 183 (3d Cir. 2012). Class counsel cannot simultaneously maximize the value of the claims of repealer-state class members and non-repealer-state class members, because they are both fighting for shares from the same pie. Though one subgroup has a much stronger claim than the other, class counsel resolved the conflict in the first two settlements through the Procrustean means of treating all class members alike, effectively selling out the repealer-state class members.

The district court recognized that a proposed nationwide class was untenable for litigation purposes because of the *Illinois Brick* problem. 3-ER-290; 3-ER-309-13. But the court failed to discharge its responsibilities in the settlement context, giving short shrift to Rule 23 analysis and holding the rule satisfied "for settlement purposes" with conclusory, and unsupported, certitude. 2-ER-278; 2-ER-211-12. This gets it backwards. With one exception not applicable here, the Supreme Court requires "undiluted, even heightened" scrutiny for class certification in the settlement context compared to the litigation context, because "a court asked to certify a settlement class will lack the opportunity … [to later] adjust the class, informed by the proceedings as they unfold." *Amchem*, 521 U.S. at 620.

The court's holding that there couldn't be a conflict because class counsel did a good job for all of the class members in settling the case (1-ER-18-19) is erroneous as a matter of law. Rule 23(e) "was designed to

function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)." *Amchem,* 521 U.S. at 621; *accord In re Literary Works in Electronic Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011). "Although all affected members of the plaintiff class are interested in maximizing their individual compensation, severally they accomplish that goal in different ways." *Literary Works*, 654 F.3d at 251. Adequately litigating for the class as a whole does not demonstrate that counsel did not breach its fiduciary duty to subclasses.

We might give credit to the class counsel for creating a proxy for separate representation by appointing counsel to argue distribution to the subclasses to a Neutral for the third tranche of settlements. Some courts have said that a similar proxy for subclassing is sufficient to satisfy Rule 23(a)(4) even in a unitary class. *E.g.*, *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 432 (3d Cir. 2016); *cf. also* 2-ER-62 (rejecting 23(a)(4) appeal by Andrews because the 90/10 distribution "mitigated" the "potential conflict"). We need not resolve whether this analysis is correct, though, because class counsel did not use a separate-representation process for the first two settlement tranches until after Bednarz's appeal succeeded.

And what the creation of an expensive proxy process arguing possible distribution schemes to a paid neutral adjudicator shows is that class counsel knew that it got it wrong the first two times when it argued

for uniform distribution against the repealer-state class's interests. Class counsel was well aware of the *Illinois Brick* issue well before the first settlement: one of the co-lead counsel expressly stated at the interim appointment hearing that they had been appointed to represent citizens of 27 states. 3-ER-360. July 2013 filings identified the materially different claims of repealer-state and non-repealer-state class members. Dkt. 256; Dkt. 258. Instead, class counsel chose in the first two tranches of settlement to represent a national class at the expense of those repealer-state class members. And that's an impermissible conflict. The district court implicitly recognized as much when it refused to certify a unitary litigation class precisely because of the lack of Rule 23(b)(3) predominance. 3-ER-309-13. And the court implicitly recognized it again when it noted "class counsel's initial acquiescence to the pro rata distribution" required Bednarz's opposition and justified Bednarz's own fee request. 1-ER-50.

The court's August 2020 order reallocating the Sony settlement (1-ER-53) also demonstrates why class counsel has conflicted interests in representing both repealer-state and non-repealer-state class members simultaneously. Class counsel has failed to zealously advocate for the non-repealer-state class members by failing to make the more-than-a-little-colorable challenge to the district court's disregard for law of the case in that order. But if they *had* defended the non-repealer-state class members' interests, it would have been impermissibly at the expense of

repealer-state class members. This no-win scenario just shows that when two subgroups are fighting for allocation of a single pot reflecting a compromise of their claims, it is mathematically impossible for a single class counsel to simultaneously advocate for maximum recovery for both subgroups.

Simply put, class counsel "cannot have had an interest in maximizing compensation for *every* category" simultaneously. *Literary Works*, 654 F.3d at 252 (emphasis in original). In *Literary Works*, there were three subclasses of class members entitled to different compensation; the Second Circuit panel did not dispute that the solo representation of a unitary class may have arrived at a fair distribution, but, as a matter of law, that unitary class representation was irretrievably conflicted, and the subgroups were entitled to separate representation. *Id.* at 253. The "'essential allocation decisions' among categories of claims" requires separate representation. *Id.* at 251 (quoting *Amchem*, 521 U.S. at 627).

Class counsel had a conflict of interest, and tried to resolve it in the first two tranches of settlement at the expense of repealer-state class members. "The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that those [repealer-state class members] would have chosen." *Ortiz*, 527 U.S. at 857. The district court erred as a matter of law and as a matter of common sense in holding otherwise.

D. The district court's errors were prejudicial, because the conflict here is worse than the one zeroing fees in *Rodriguez II*.

As in *Rodriguez*, class counsel here labored under a conflict of interest through their attempt to represent a unitary nationwide settlement class, thus tying the fate of repealer-state class members with colorable state-law claims to those without such claims without a Supreme Court reversal of *Illinois Brick*. But this case is worse than *Rodriguez*, where there was no actual harm to class members. Had class counsel succeeded in their quest to defeat Bednarz's appeal in No. 17-17367, class counsel's conflicted loyalties would have cost the repealer-state subclass more than $10 million in the second tranche of settlements. And even now, class counsel's refusal to advocate for the Neutral's 100/0 proposed allocation will cost repealer-state class members 10% of the $113.45 million settlement fund—unless a court reduces the attorneys' fees and reallocates that money to repealer-state class members, as Bednarz suggested below.[4]

***

Class counsel's conflict here will cost repealer-state class members millions of dollars, and could have cost them millions of dollars more if

[4] Doing so would resolve the legitimate issues raised in Andrews's Appeal No. 21-15138 without Andrews's more extreme proposed remedy of entirely throwing out the settlement and class certification. *Cf.* 2-ER-123-26 (responding to similar *pro se* Rule 23(a)(4) objection).

Bednarz's appeal had not succeeded—a far worse circumstance than the technical conflict that entirely eliminated class counsel's fees in *Rodriguez*. The district court committed reversible error when it invented facts to pretend this conflict didn't exist.

III. Because the district court found that Bednarz created a $10 million benefit for repealer-state class members, it erred when it held it could not quantify the benefit of Bednarz's appeal and could not award a percentage of the benefit.

Objectors who provide a material benefit to class members through their objections and appeals have a right to fees as a matter of law. *See, e.g., Rodriguez II,* 688 F.3d at 658-59; *In re Southwest Airlines Voucher Litig.*, 898 F.3d 740, 745 (7th Cir. 2018). Objectors "may claim entitlement to fees on the same equitable principles as class counsel." *Rodriguez II*, 688 F.3d at 658. When objectors successfully prosecute an appeal, one would be "remiss" to "not acknowledge this benefit" when it leads to an altered result upon remand. *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 744 (3d Cir. 2001); *accord Rodriguez II*, 688 F.3d at 659-60.

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (citing cases).

Bednarz's appeal ended the *pro rata* distribution to the second tranche, creating an extra $10 million of benefit to repealer-state class

members. 2-ER-209. He moved for fees of 9% of that common benefit, a fraction of the Ninth Circuit benchmark whether that benchmark is 25%, class counsel's actual 30% award, or even the 14.56% benchmark created by the Hagens Berman bid. The district court acknowledged that Bednarz had increased recovery to repealer-state class members by $10 million, but held that Bednarz was not entitled to a percentage because the court could not quantify the benefits to the class as a whole because the additional repealer-state money came at the expense of other class members. 1-ER-49.

The court's decision is a fundamental misunderstanding of the common-benefit doctrine. One does not measure a common benefit by subtracting costs to losing parties. Bednarz litigated on behalf of repealer-state class members, and created a $10 million common fund for that set of class members. That a different set of class members whose interests Bednarz was litigating against lost a windfall as a result does not mean that that $10 million common benefit ceases to be quantifiable. Because (1) the class of beneficiaries is sufficiently identifiable, (2) the benefits can be accurately traced, and (3) the court could shift the fee with exactitude, it is error for the district court to hold it cannot use a percentage of the benefit. *Indep. Living Ctr. of S. Cal., Inc. v. Kent*, 909 F.3d 272, 285 (9th Cir. 2018).[5] Bednarz has "recovered a determinate

[5] For equitable reasons, the court charged Bednarz's fee to class counsel's share of the common fund rather than the repealer-state class

fund for the benefit of every member" of the class from repealer states. *Boeing*, 444 U.S. at 479.

This Court should reverse the district court order and remand with instructions to grant Bednarz's modest fee request in full.

Conclusion

This Court should vacate the award of attorneys' fees to class counsel and remand for an award that recognizes the Hagens Berman bid as a benchmark and that considers class counsel's conflict of interest in litigating against the interests of repealer-state class members.

The Court should reverse the partial denial of Bednarz's fee request, and remand with instructions to award the full $900,000 he requested, a fraction of what Ninth Circuit law entitles him.

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members, who would otherwise be on the hook for a double fee. 1-ER-51; *accord Southwest*, 898 F.3d at 747 (ordering objector fees payable from class counsel).

Dated: July 19, 2021

Respectfully submitted,

/s/ Theodore H. Frank

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FRAP 34(a)(1) Statement Regarding Oral Argument

Bednarz requests oral argument. His appeal raises important questions about attorney-fee issues. In addition, the record below consists of thousands of docket entries, and oral argument will assist the panel navigate any questions they have about the record. Experienced appellate counsel, who has previously successfully argued in the Ninth Circuit (including in Bednarz's previous appeal here, No. 17-17367) and Supreme Court, represents Bednarz here.

Statement of Related Cases

I am aware of related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

1. Consolidated Appeals

The Court has consolidated Appeal Nos. 21-15022, 21-15138, and 21-15200 with this appeal.

Pro se Appellant Helfand appealed the approval of the settlement, the award of plaintiffs' attorneys' fees, the award of fees to Bednarz, and a number of other orders unrelated to this case in Appeal No. 21-15022. Bednarz's appeal is a cross-appeal of the Helfand appeal. The Court dismissed Appeal No. 21-15022 on February 18, 2021.

Pro se Appellant Andrews brought Appeal No. 21-15138, appealing the approval of the settlement and the award of plaintiffs' attorneys' fees.

Appeal No. 21-15200 is an untimely cross-appeal by plaintiffs of the award of fees to Bednarz, brought 27 days after Helfand's first notice of appeal. Bednarz moved to dismiss plaintiffs' cross-appeal No. 21-15200 as untimely. This Court denied the motion on May 11, 2021. "without prejudice to renewing the arguments in the merits briefing."

2. Earlier Appeal by Bednarz

Appeal No. 17-17367, decided September 16, 2019, is Cross-Appellant Bednarz's successful appeal of the court's approval of the second tranche of settlements. 2-ER-209.

3. Earlier *Pro se* Appeals

Appeal No. 16-17235, is an appeal by Patrick Sweeney of a stipulation dismissing some defendants. The Ninth Circuit dismissed the appeal for failure to prosecute on March 7, 2017. Dkt. 1701.

Appeal No. 17-15795, decided September 4, 2019, is Andrews's unsuccessful appeal from the court's approval of the first settlement tranche. Dkt. 2526.

Appeal No. 17-15857, is an appeal by Patrick Sweeney from the court's approval of the first settlement tranche. The Court dismissed the appeal for failure to prosecute on June 7, 2017. Dkt. 1832.

Appeal No. 17-17369, is Andrews's appeal of the court's approval of the second tranche of settlements, mooted by Appeal No. 17-17367.

Appeal No. 19-16803, decided August 18, 2020, is Andrew's unsuccessful appeal from the court's approval of the third settlement tranche. Dkt. 2719.

4. Other Earlier Appeals

Appeal No. 17-17241 is a non-party appeal by Simplo Technology in this case over a discovery issue that it voluntarily dismissed on November 27, 2017. Dkt. 2080.

Appeal No. 18-15125 is a non-party appeal by Flextronics over an order in this case enjoining them from prosecuting claims against defendants that settled the direct-purchaser class action. Flextronics voluntarily dismissed the appeal on March 15, 2019.

Appeal No. 18-80042 is a Rule 23(f) appeal by plaintiffs over the court's order denying class certification. The Court denied permission to appeal on June 27, 2018.

Appeal No. 19-16855 is an appeal by Objector John Morgan over the court's initial attorney-fee award and approval of the third tranche of settlements. Morgan voluntarily dismissed the appeal on January 12, 2021.

Executed on July 19, 2021.

/s/Theodore H. Frank
Theodore H. Frank

Ninth Circuit Rule 32-1 Certificate of Compliance

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 12,302 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on July 19, 2021.

/s/Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on July 19, 2021, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of this filing to all who are ECF-registered filers.

/s/Theodore H. Frank
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