NO. 18-56371
CONSOLIDATED WITH NOS. 18-56272 and 18-56273

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOANNE FARELL; RONALD ANTHONY DINKINS; LARICE ADDAMO, On behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

RACHEL THREATT,
Objector-Appellant,

v.

BANK OF AMERICA, N.A.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California, No. 3:16-cv-00492-L-WVG

Opening Brief of Appellant Rachel Threatt

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
Anna St. John
M. Frank Bednarz
1629 K Street NW, Suite 300
Washington, DC 20006
(703) 203-3848
ted.frank@hlli.org
Attorneys for Objector-Appellant Rachel Threatt

Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of FRAP 26.1, Rachel Threatt declares that she is an individual and, as such, is not a subsidiary or affiliate of a publicly owned corporation and there is no publicly held corporation that owns ten percent or more of any stock issued by her.

Table of Contents

Corporate Disclosure Statement (FRAP 26.1) i

Table of Contents ii

Table of Authorities iv

Statement of Subject Matter and Appellate Jurisdiction 1

Statement of the Issues 2

Statutes and Rules 4

Preliminary Statement 5

Statement of the Case 5

A. Plaintiff brings a class action seeking damages for Bank of America's alleged violations of the National Bank Act 5

B. The parties settle, and plaintiffs seek approval of the settlement and their attorneys' fee request. 7

C. Class member-appellants Threatt, Sanchez, and Collins object to the settlement and attorneys' fee request. 10

D. Class counsel respond to objectors and reduce their fee request by $2 million. 12

E. The district court holds a fairness hearing and subsequently orders additional briefing regarding adequacy of representation given the potential conflicts between the subgroups of the class recovering cash and debt relief 13

F. The district court approves the settlement and awards class counsel their full request for attorneys' fees and expenses without applying a lodestar crosscheck 15

Summary of Argument 17

Argument 20

I. Because of inherent conflicts between class counsel and the class in class actions, courts must scrutinize settlement terms and attorneys' fee requests. 20

II. The district court abused its discretion by failing to scrutinize the economic reality of settlement relief when awarding a percentage-based fee; in the alternative, the settlement class should be de-certified for lack of adequate representation. 23

III. The district court's fee award cannot stand because, after neglecting a lodestar crosscheck, the court awarded fees equal to nearly 18 times class counsel's lodestar. 29

A. A lodestar crosscheck should be required for attorneys' fee awards made in class-action settlements, particularly when there are non-cash relief components in a settlement. 30

B. By failing to apply a lodestar crosscheck, the district court's fee award violated Rule 23(h)'s "reasonableness" requirement. 36

IV. At minimum, as a fiduciary for the class, district courts must provide a justification for declining to apply a lodestar crosscheck when an objector raises the issue. 38

Conclusion 43

Statement of Related Cases Under Circuit Rule 28-2.6 45

Certificate of Compliance Pursuant to 9th Circuit Rule 32-1 for Case Number 18-56371 46

Proof of Service 47

Table of Authorities

Cases

ACLU v. Barnes,
168 F.3d 423 (11th Cir. 1999) 40

Allen v. Bedolla,
787 F.3d 1218 (9th Cir. 2015) 2, 3, 26, 42

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 2, 28

Blue Cross & Blue Shield of Alabama v. Unity Outpatient Surgery Center,
490 F.3d 718 (9th Cir. 2007) 39, 40

In re Bluetooth Headset Prod. Liab. Litig.,
654 F.3d 935 (9th Cir. 2011) 3, 18, 20, 29, 30, 36, 40, 42

In re Chiron Corp. Sec. Litig.,
No. C-04-4293, 2007 WL 4249902 (N.D. Cal. Nov. 30, 2007) 28

In re Classmates.com Consol. Litig., No. 09-cv-0045-RAJ,
2012 WL 3854501 (W.D. Wash. Jun. 15, 2012) 5

In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,
109 F.3d 602 (9th Cir. 1997) 40

Dennis v. Kellogg Co.,
697 F.3d 858 (9th Cir. 2012) 3, 19, 27, 38, 39

Devlin v. Scardelletti,
536 U.S. 1 (2002) 1

Dewey v. Volkswagen A.G.,
681 F.3d 170 (3d Cir. 2012) 27

In re Dry Max Pampers Litig.,
724 F.3d 713 (6th Cir. 2013) 20, 26

Eddy v. Colonial Life Ins. Co of Am.,
59 F.3d 201 (D.C. Cir. 1995) 33

Fischel v. Equitable Life Assur. Soc'y of the U.S.,
307 F.3d 997 (9th Cir. 2002) 42

Foman v. Davis,
371 U.S. 178 (1962) 38

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 35

Harman v. Apfel,
211 F.3d 1172 (9th Cir. 2000) 4

In re HP Inkjet Printer Litig.,
716 F.3d 1173 (9th Cir. 2013) 33, 40

In re Hyundai & Kia Fuel Economy Litig.,
881 F.3d 679 (9th Cir. 2018) 31, 35

Interfaith Comty. Org. v. Honeywell Int'l, Inc.,
726 F.3d 403 (3d Cir. 2013) 39, 41

James v. Jacobson,
6 F.3d 233 (4th Cir. 1993) 39

Kerr v. Screen Extras Guild, Inc.,
526 F.3d 67 (9th Cir. 1975) 32, 36

Koby v. ARS Nat'l Servs., Inc.,
846 F.3d 1071 (9th Cir. 2017) 22, 26

Laffitte v. Robert Half Int'l,
376 P.3d 672 (Cal. 2016) 23

In re MagSafe Apple Power Adapter Litig.,
571 Fed. App'x 560 (9th Cir. 2014) 38

In re Mercury Interactive Corp. Secs. Litig.,
618 F.3d 988 (9th Cir. 2010) 38, 43

Merola v. Atlantic Richfield Co.,
515 F.2d 165 (3d Cir. 1975) 27

Nachshin v. AOL, LLC,
663 F.3d 1034 (9th Cir. 2011) 3

Nationwide Transport Finance v. Cass Info. Sys.,
523 F.3d 1051 (9th Cir. 2008) 37

New England Health Care Employees Pension Fund v. Woodruff,
512 F.3d 1283 (10th Cir. 2008) 41

In re Online DVD-Rental Antitrust Litig.,
779 F.3d 934 (9th Cir. 2015) 40

In re Oracle Secs. Litig.,
132 F.R.D. 538 (N.D. Cal. 1990) 34

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 2

Pearson v. NBTY, Inc.,
772 F.3d 778 (7th Cir. 2014) 5, 26

Perdue v. Kenny A.,
559 U.S. 542 (2010) 2, 19, 29, 31, 32, 33, 36, 37

In re Pet Food Prods. Liab. Litig.,
629 F.3d 333 (3d Cir. 2010) 32

Pinal Creek Group v. Newmont Mining Corp.,
352 F. Supp. 2d 1037 (D. Ariz. 2005) 37

Powers v. Eichen,
229 F.3d 1249 (9th Cir. 2000) 1, 3, 19, 39, 42

Radcliffe v. Experian Info. Solutions Inc.,
715 F.3d 1157 (9th Cir. 2013) 21

Redman v. RadioShack Corp.,
768 F.3d 622 (7th Cir. 2014) 34

Rodriguez v. Bumble Bee Foods, LLC,
No. 17cv2447, 2018 WL 1920256 (N.D. Cal. April 24, 2018) 32

In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liability Litig.,
867 F.3d 791 (7th Cir. 2017) 32

Stanger v. China Elec. Motor,
812 F.3d 734 (9th Cir. 2016) 37, 39

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003) 20, 22, 23, 24, 34

In re Steenes,
No. 17-3630, 2019 U.S. App. LEXIS 7543 (7th Cir. Mar. 14, 2019)............ 36, 41

Traxler v. Multnomah Cty.,
596 F.3d 1007 (9th Cir. 2010) 4, 39

United Nat'l Ins. Co. v. R & D Latex Corp.,
141 F.3d 916 (9th Cir. 1998) 39

United States v. Burr,
25 F. Cas. 30 (C.C. Va. 1807) 36

Van Horn v. Nationwide Prop. & Cas. Ins. Co.,
436 Fed. App'x 496 (6th Cir. 2011) 32

In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Products Liability Litigation,
895 F.3d 597 (9th Cir. 2018) 15

In re Washington Public Power Supply Sys. Litig.,
19 F. 3d 1291 (9th Cir. 1994) 37, 40, 42

Yamada v. Biocare Holding AG,
825 F.3d 536 (9th Cir. 2016) 30

Yamada v. Snipes,
786 F.3d 1182 (9th Cir. 2015) 4

Rules and Statutes

Fed. R. App. P. 4(a)(1)(A) 1

Fed. R. App. P. 4(a)(7)(A)(ii) 1

Fed. R. Civ. P. 23 .... 12, 21, 32, 33, 43

Fed. R. Civ. P. 23(a)(4) 2, 4, 13, 27

Fed. R. Civ. P. 23(g) 4

Fed. R. Civ. P. 23(h) 2, 4, 19, 21, 29, 30, 31

Fed. R. Evid. 701 37

Fed. R. Evid. 702 37

Notes of Advisory Committee to 2003 Amendments to Rule 23 27

12 U.S.C. § 1 1

15 U.S.C. § 77z-1(a)(6) 27

15 U.S.C. § 78u-4(a)(6) 27

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

42 U.S.C. § 1988 .... 31, 32, 33

42 U.S.C. § 1997e(d)(1) 33

Other Authorities

American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13 (2010) ("*ALI Principles*") 27

Erichson, Howard M., *How to Exaggerate the Size of Your Class Action Settlement*, DAILY JOURNAL (Nov. 8, 2017) 21

Erichson, Howard, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859 (2016) 21

Estes, Andrea, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2016) 5

Gorsuch, Neil M. & Matey, Paul B.,
Settlements in Securities Fraud Class Actions: Improving Investor Protection, WASH. L. FOUND., 23 (2005) 34

Jones, Ashby,
A Litigator Fights Class-Action Suits, WALL ST. J. (Oct. 31, 2011) 5

Liptak, Adam,
When Lawyers Cut Their Clients Out of the Deal, N.Y. TIMES, Aug. 13, 2013 5

Walker, Vaughn R. & Horwich, Ben,
The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases, 18 GEO. J. LEGAL ETHICS 1453 (2005) 34

Wolfman, Brian,
Judges! Stop Deferring to Class-Action Lawyers, 2 U. MICH J. L. REFORM 80 (2013) 34

Wolfman, Brian & Morrison, Alan B.,
Representing the Unrepresented in Class Actions Seeking Monetary Relief, 71 N.Y.U. L. REV. 439 (1996) 34

Statement of Subject Matter and Appellate Jurisdiction

The district court has jurisdiction under 28 U.S.C. § 1331 because plaintiffs' class-action complaint alleges violations of the National Bank Act, 12 U.S.C. § 1, *et seq*. Dkt. 1.[1]

This Court has jurisdiction under 28 U.S.C. § 1291. The district court ordered final approval of the settlement and an award of attorneys' fees and costs on August 31, 2018, and final judgment was entered in the case on September 19, 2018. ER2; ER1. Objector Rachel Threatt, Estafania Osorio Sanchez, and Amy Collins, the appellants in this case, filed notices of appeal on October 17, September 21, and September 25, 2018, respectively, appealing the judgment and all opinions and orders that merged therein, including the order of final approval. ER35; ER39; ER42. These notices of appeal are timely under Fed. R. App. P. 4(a)(1)(A) and 4(a)(7)(A)(ii). Threatt, Sanchez, and Collins, as class members who objected to settlement approval and class counsel's fee request below, and will recover cash diluted from the net common fund after fees, have standing to appeal a final approval of a class action settlement and accompanying attorneys' fee award without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

---

[1] "ER" refers to Threatt's Excerpts of Record. "Dkt." refers to the district court docket in this case.

Statement of the Issues

1. Rule 23 requires the district court to investigate the "economic reality" of the settlement relief provided to class members in a class action settlement. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). Adequacy of representation under Rule 23(a)(4) requires the class representatives and members of the class to "possess the same interests and suffer the same injury as the class members," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-56 (1997) (internal quotation marks omitted), with "separate representation [by counsel] to eliminate conflicting interests of counsel," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). Did the district court err by either (i) awarding fees based on debt relief that was of illusory value without requiring Bank of America to disclose how that debt relief was valued by its accountants, or, if the value was not illusory despite its appearance as such, (ii) certifying a class with cash-relief and debt-relief subgroups competing for their share of a single settlement, when class counsel negotiated the settlement with the debt subgroup receiving what the court valued as a full refund while the cash subgroup received only a small fraction of the relief requested? (Raised at ER48-49; ER98-99; Dkt. 129 at 1-9; Dkt. 130 at 3-15; ruled on at ER8-ER10, ER13-16.)

2. Rule 23(h) allows a court to award "reasonable attorney's fees and nontaxable costs." There is a "strong presumption" that an attorneys' lodestar is reasonable without an enhancement multiplier, absent plaintiffs establishing "extraordinary circumstances" that justify a higher fee. *Perdue v. Kenny A.*, 559 U.S. 542, 546 (2010). Is a lodestar multiplier greater than eleven permissible where there were no extraordinary circumstances justifying an upward departure from plaintiffs' actual

lodestar and the district court failed to conduct a lodestar crosscheck to assess the reasonableness of a fee award? (Raised at ER50; ER54-55; ER59-62; 65-67; ER87-103; ruled on at ER16.)

3. This Court holds that district courts "must give 'a reasoned response' to all non-frivolous objections." *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012). This Court also holds that it is an abuse of discretion to award fees without due explanation. *Powers v. Eichen*, 229 F.3d 1249, 1256-58 (9th Cir. 2000). Did the district court abuse its discretion by failing to explain (a) its reasoning for refusing to apply a lodestar crosscheck that would have shown a multiplier greater than 11 or to respond to non-frivolous objections raising this issue or (b) its reasoning for refusing to require Bank of America to disclose how it had internally valued and accounted for the debt relief provided by the settlement? (Raised at ER57-59; ER83-85; Dkt. 129 at 6-7, 9; ruled on at ER16.)

Standard of Review for all Questions: A district court's approval of a class action settlement and award of fees and costs to class counsel is reviewed for an abuse of discretion. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011) ("*Bluetooth*"). But "though a district court has discretion to choose how it calculates fees, we have said many times that it abuses that discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward." *Id.* at 944 (cleaned up).

"'A court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact.'" *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015) (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011)). "[A]ny element of legal analysis that figures into the district court's [fee] decision

is reviewed de novo." *Yamada v. Snipes*, 786 F.3d 1182, 1207 (9th Cir. 2015). A court's failure to "give a 'reasoned response' to all non-frivolous objections" is likewise an abuse of discretion. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012). So too is a failure to explain why the district court exercised its discretion in a particular way. *Traxler v. Multnomah Cty.*, 596 F.3d 1007, 1015-16 (9th Cir. 2010). Questions of law are reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000).

Statutes and Rules

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

…

(4) the representative parties will fairly and adequately protect the interests of the class.

(g) Class counsel.

…

(4) Duty of Class Counsel. Class counsel must fairly and adequate represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties agreement. The following procedures apply:

…

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

Preliminary Statement

Attorneys with the Center for Class Action Fairness ("CCAF"), part of the newly formed non-profit Hamilton Lincoln Law Institute and previously with the Competitive Enterprise Institute, bring Objector-Appellant Rachel Threatt's objection and appeal. CCAF's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it was won hundreds of millions of dollars for class members. *See, e.g.*, Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling CCAF attorney Theodore H. Frank "the leading critic of abusive class action settlements"); Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising the CCAF's work); *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 WL 3854501, at *11 (W.D. Wash. Jun. 15, 2012) (same). This appeal is brought in good faith both to vindicate Threatt's interests as a prejudiced class member and to protect class members in this and future class actions against unfair and abusive settlements and overreaching fee requests.

Statement of the Case

A. Plaintiff brings a class action seeking damages for Bank of America's alleged violations of the National Bank Act.

In February 2016, Plaintiff Joanne Farrell filed a class action complaint against Bank of America, N.A. seeking damages arising from Bank of America's practice of assessing a $35 fee against deposit holders for failing to rectify an overdrawn deposit

account within five days. ER3; Dkt. 1 at 2. This fee is referred to as an "Extended Overdrawn Balance Charge" or "EOBC."

Bank of America required customers to sign a deposit agreement before opening a deposit account. Under the terms of that agreement, Bank of America charged a $35 overdraft fee anytime a deposit account holder wrote a check that was cashed against insufficient funds. ER3. While Bank of America had discretion whether or not to honor the overdrawn check by advancing funds to the payee, Bank of America levied the initial overdraw fee regardless of whether it did so. *Id.* Deposit account holders were required to pay back any advance of funds plus the fee incurred. *Id.* If an account holder failed to do so within five days, she incurred another $35 fee, *i.e.*, the EOBC, thus incurring fees of at least $70. *Id.*

Plaintiff's complaint alleged that by assessing the EOBCs, Bank of America was in reality charging account holders a usurious rate of interest that exceeded the limits set by the National Bank Act, because the EOBC was based solely on the account holder failing to repay the defendant for a period of time. Dkt. 1 at 2-3, 9-10. Plaintiff requested for herself and the class an award of damages, including twice the amount of the alleged usurious interest paid in the form of EOBCs. Dkt. 1 at 11.

Bank of America moved to dismiss plaintiff's complaint on the grounds that the EOBCs are fees not interest and therefore are not subject to the National Bank Act. The district court denied the motion but subsequently granted Bank of America's motion for certification of an interlocutory appeal of that denial based on its finding that there was substantial ground for a difference of opinion on the question. *See* ER3. The Ninth Circuit granted Bank of America's petition for a permissive interlocutory

appeal. *See* ER4. In the intervening time, Bank of America had filed an answer to plaintiff's complaint, and plaintiffs twice had moved to dismiss certain of its affirmative defenses. *See* ER3.

B. The parties settle, and plaintiffs seek approval of the settlement and their attorneys' fee request.

In early October 2017, before Bank of America had filed its opening brief in its interlocutory appeal, the parties reached an agreement to settle. Dkt. 69 at 4. (The Ninth Circuit stayed the interlocutory appeal, No. 17-55847, while this settlement is pending. Dkt. 79, 126.) Plaintiffs moved for preliminary approval of the settlement agreement on October 31, 2017. Dkt. 69. The settlement defines the class as "[a]ll holders of [Bank of America] consumer checking accounts who, during [the period February 25, 2014 through December 30, 2017], were assessed at least one EOBC that was not refunded." ER129-130.

The settlement provides for a fund of $37.5 million in cash to be used to pay class members their respective share of the fund, class counsel's attorneys' fees and litigation costs, service awards for class representatives, and any hourly administrative charges. ER130; ER135-136; ER137. After those other items are deducted, the amount of cash left to pay class members is approximately $22.8 million, a small fraction of the fees charged those class members. Dkt. 125 at 4. If any residual cash remains following distribution to the class, a second distribution to the class will be made if economically feasible; otherwise, the residual will go to an unnamed charity. ER138. Subsequently, the plaintiffs designated the Center for Responsible Lending as the potential *cy pres* recipient. Dkt. 105 at 8; Dkt. 125 at 5.

The settlement also provides a credit of up to $35 for each EOBC, equal to full debt forgiveness, to class members whose accounts were closed with an outstanding balance stemming from EOBCs levied during the class period. ER131; Dkt. 125 at 4. The settling parties asserted that the value of the debt relief was $29.1 million, but Bank of America never disclosed how much of that outstanding debt was valued on its books as recoverable or had otherwise been written off already. Bank of America agreed to update credit bureaus regarding this debt reduction if it had reported any of the debt to credit bureaus. ER132; Dkt. 125 at 4. The record does not indicate how many class members had EOBC debt reported to credit bureaus by Bank of America. If the settlement's debt reduction brings the account balance to zero, Bank of America will report that the account was paid in full, and if not, Bank of America will report only that a partial payment has been made on the account. ER132. Any class member who both paid an EOBC and has remaining EOBC debt will receive both forms of relief. Dkt. 128 at 7. Also under the terms of the settlement, Bank of America agreed to pay all settlement administration costs other than the administrator's hourly service charges, costs estimated at $2.9 million. ER133; Dkt. 125 at 5. Bank of America and the settlement administrator will automatically credit the accounts of settlement class members who are current account holders and mail checks to those class members who are past account holders without requiring class members to submit a claim. ER135-136.

Bank of America agreed not to implement or assess EOBCs with respect to consumer checking accounts for a period of five years. ER131. A Bank of America executive testified that eliminating EOBCs will decrease its monthly revenue by

approximately $20 million, or $1.2 billion over the life of the injunction. *See* Dkt. 125 at 4. The settlement does not forbid Bank of America from charging account holders other fees to make up for any such loss in revenue from EOBCs, and Bank of America did not suggest that it would abstain from doing so.

Class counsel asserted that the $66.6 million alleged settlement value equaled approximately 9% of the $756 million in damages recoverable at trial. Dkt. 69-3 ¶ 24.

Class counsel initially requested $16,650,000 in attorneys' fees and $53,119.2 in litigation costs. Dkt. 80. Class counsel justified their fee request under the percentage-of-the-fund analysis, asking the court to award what they claimed equaled 25% of the "total $66.6 million value of the Settlement," which included the full $37.5 million cash fund, before administrative and other costs were paid, and the full $29.1 million face value for debt relief. Dkt. 80-1 at 9-10. The calculation did not include $2 million in administrative costs separately paid by Bank of America. Class counsel did not ask the district court to include the value of the prospective injunctive relief in the denominator portion of its percentage-based fee award. *See* Dkt. 80-1 at 9, 22.

Asking the district court to rely exclusively on the percentage-of-the-fund methodology, class counsel argued that the court was not obligated to perform a lodestar crosscheck in its fee analysis. The lodestar submitted by class counsel in declarations attached to their fee motion purported to show that they had worked 2,158 hours, a figure that included time spent litigating *other* cases that they claimed benefited the class, time spent on their fee application, and an estimate of future hours they believed they would work to complete the final approval process. Dkt. 80-1 at 20; *see* Dkts. 80-4, 80-5, 80-6, 80-7. Based on those hours, their claimed lodestar was

$1,428,047.50. Dkt. 80-4 ¶ 15. Their requested fees were more than 11 times this amount.

In support of their motion requesting attorneys' fees, class counsel submitted a declaration from Professor Brian T. Fitzpatrick. Dkt. 80-3. Relying on his analysis of case law addressing attorneys' fee awards, Fitzpatrick opined that the award requested by plaintiffs was within the range of reasonableness. Dkt. 80-3 ¶ 27. He further opined that a lodestar crosscheck was not required by law, but if it were, such an analysis would not change his opinion about the reasonableness of the fee award, even though he acknowledged the multiplier was "on the high end" compared to the case law he reviewed. Dkt. 80-3 at 15, 17.

C. Class member-appellants Threatt, Sanchez, and Collins object to the settlement and attorneys' fee request.

Class members and appellants Rachel Threatt, Estafania Osorio Sanchez, and Amy Collins objected to the settlement and attorneys' fee award. ER44; ER53; ER73.

Threatt is represented *pro bono* by attorneys at the non-profit Center for Class Action Fairness. As she testified in a declaration, Threatt brought her objection in good faith to prevent approval of an unfair settlement and an unreasonable attorneys' fee award. ER109. Threatt is a class member because she holds a Bank of America consumer checking account and was assessed at least one EOBC that was not refunded during the period February 25, 2014 through December 30, 2017. *Id.*

Threatt objected, *inter alia*, that before the settlement could be approved, the parties must amend the settlement clause addressing the distribution of residual funds to comport with limitations on *cy pres*. ER85-87.

Threatt also objected to the fee request by class counsel and argued that the fee award should be reduced to augment class recovery. Threatt argued that class counsel's lodestar was overstated because it included non-compensable hours such as pre-*Farrell* time for work on other litigation, anticipated future time that had not yet been expended, and time spent on class counsel's fee application. ER91-94. Once those hours were removed, class counsel's fee request was eighteen times their lodestar, equaling fees of more than $11,000 per hour; even when those hours were included, the fee request was still eleven times the lodestar. ER94-97. Threatt further argued that the percentage of recovery requested by class counsel was excessive because (i) the $66.6 million used in the denominator of the calculation was not all cash and should not be valued as such in the fee calculation; (ii) the percentage should be reduced to account for economies of scale; and (iii) the change in Bank of America's business practices will not benefit class members and therefore does not support a higher percentage of recovery. ER98-103.

Finally, Threatt argued that the district court should strike or disregard the Fitzpatrick Declaration because it contains inadmissible legal conclusions and other legal arguments regarding the calculation of attorneys' fees. ER103-105.

As a class member, Sanchez also received notice of this class action because, on more than one occasion, Bank of America charged her, and she paid, an EOBC. ER45. Sanchez filed a timely objection arguing that the class action notice was constitutionally deficient and misleading. ER46-47. She further objected that the cash benefit and debt-reduction benefits were in conflict such that the adequacy requirement could not be met without separate subclasses and separate representatives. ER48-49. She also argued

that the *cy pres* provision should be revised so that the class, rather than a third party, would receive a second distribution if economically feasible. ER49. She further argued that the court should not attribute any value to the forward-looking injunctive relief in evaluating plaintiffs' attorneys' fee request and, in any event, the requested fee was unreasonable and excessive and should be paid only on the $37.5 million cash benefit due to the illusory nature of the debt relief. ER49-50.

Collins was another holder of a Bank of America consumer checking account who was assessed at least one EOBC during the class period that was not refunded. ER71. Collins argued that plaintiffs' fee request was excessive, the Fitzpatrick declaration should be disregarded, class counsel's purported lodestar was inflated, and many of the factors relevant to awarding fees under a percentage-based analysis further evidenced that the requested fee award was unreasonable. ER59-67.

D. Class counsel respond to objectors and reduce their fee request by $2 million.

Following these and other class member objections, class counsel scheduled a mediation purportedly to resolve the concerns the objectors raised. Threatt declined to participate on the grounds that class counsel could resolve her concerns simply by correcting the objectionable portions of the settlement and attorneys' fee request as set forth in her objection and as consistent with Rule 23. *See* Dkt. 104-3 ¶¶ 43-44. The mediation did not result in any class members settling or withdrawing their objections.

See Dkt. 105 at 14.[2] Class counsel informed the district court that they were reducing their initial fee request by $2 million. Dkt. 106 at 2. Class counsel also informed the district court that they and Bank of America had agreed to designate the Center for Responsible Lending as the *cy pres* recipient, but did not propose any notice to the class of this selection. Dkt. 105 at 31-32.

E. The district court holds a fairness hearing and subsequently orders additional briefing regarding adequacy of representation given the potential conflicts between the subgroups of the class recovering cash and debt relief.

The district court held a fairness hearing on June 18, 2018. Dkt. 124. Threatt appeared at the hearing through counsel, the only one of the eleven objecting class members to do so. Dkt. 132 at 4.

On June 28, 2018, the court ordered Bank of America and class counsel "to show cause as to why the absence of subclasses is not problematic for purposes of Federal Rule of Civil Procedure 23(a)(4)." ER19. In its order the court expressed "concern as to whether the adequacy element is met," in particular "whether there exists a conflict of interest between the named plaintiffs and the class they seek to represent." ER24. Because Threatt's counsel presented argument regarding the problem of disparate treatment of subgroups at the fairness hearing and Sanchez had objected to the conflict between the interests of class members receiving debt relief and those receiving cash

[2] Class counsel took the position that during mediation, some objectors agreed to the $2 million reduction, which the objectors then disputed. The district court disregarded this claim as unnecessary to its determination of reasonable fees. ER17.

relief, the district court allowed both of them to file a response to the parties' joint response to the order to show cause. ER24; ER26.

In their joint response, Bank of America and plaintiffs informed the district court that the cash and debt relief were negotiated separately and, in fact, "Class Counsel did not raise the issue of debt forgiveness for Class Members who had not paid [EOBCs] until they believed they had obtained as much cash as [Bank of America] was willing to pay Class members who had paid EOBCs." Dkt. 128 at 4; *id.* at 5 ("Only after Class Counsel believed that they had maximized that amount [of cash] did Class Counsel introduce debt forgiveness relief for Class Members with unpaid EOBCs."). They further stated that neither Bank of America nor class counsel ever "considered reducing the cash portion of the Settlement to increase the debt forgiveness portion—or vice versa." *Id.*

Threatt responded by pointing out that the two-stage settlement process described by the parties led to one of only two possible conclusions. Either: (1) class counsel negotiated inadequately and left significant value on the table during the first "cash negotiation" stage; or (2) the debt portion of the relief truly is a "throw in" that is worth little to Bank of America or class members. Dkt. 129 at 2. It was implausible that Bank of America agreed to a settlement for a small fraction of the value of the complaint and then more than doubled the value it was willing to surrender. *Id.* Threatt opined that the latter was more likely, which meant that, while there is not a fundamental conflict between the cash relief and debt forgiveness subgroups, the *de minimis* value of the debt relief reduced the purported value of the settlement advanced by the parties for purposes of the district court's approval analysis and fee award. *Id.*

Threatt noted that the court could readily determine the truth of the matter by requiring Bank of America to disclose how it accounted for the debt forgiveness component of the settlement relief on its books. *Id.* at 6-7, 9.

In her response, Sanchez similarly argued that the value of the debt relief is nowhere near the $29.1 million the parties claimed, but largely illusory to class members, and costs Bank of America little to nothing. Dkt. 130 at 3-4, 15. She pointed out that the disparate treatment between the debt and cash relief subgroups arose from the cash subgroup having to pay all of the attorneys' fees, incentive awards, and administrative costs, and noted as further evidence that none of the named plaintiffs were in the debt relief subgroup. *Id.* at 7, 9. As a solution, she proposed that the court either create a subgroup for debt relief class members to renegotiate the settlement, require that the settlement exclude debt relief class members, or reduce class counsel's attorneys' fees in proportion to the debt relief. *Id.* at 8.

F. The district court approves the settlement and awards class counsel their full request for attorneys' fees and expenses without applying a lodestar crosscheck.

On August 31, 2018, the district court entered an order granting class counsel's motions for final approval for the settlement and for attorneys' fees and costs. ER2. The district court overruled the objections to the adequacy of representation. Citing *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Products Liability Litigation*, 895 F.3d 597, 606-07 (9th Cir. 2018), the court reasoned that "the fact that the least represented [debt relief] group appears to have received more favorable treatment would seem to

suggest a lack of self-dealing on the part of the named representatives," all of whom were in the cash relief group. ER10.

The district court also rejected the objectors' argument that the debt relief is illusory. The court held that "[w]hile it may be true that it will cost [Bank of America] very little to provide the Debt Portion relief, it does not follow that the relief is meaningless to Debt Portion recipients." ER13. In support of this statement, the court cited Bank of America's ability either to undertake collection efforts itself or to sell the debt to another entity that would undertake such efforts. Debt subgroup class members thus benefited, the court stated, because the settlement "immunizes recipients from worrying about or suffering through any efforts to collect on this debt" and also by potentially improving credit scores once Bank of America reports the debt relief to the credit bureaus. *Id.* The court did not address Threatt's argument that such collection efforts were almost certainly foreclosed because of the high cost and low return to Bank or America, that nothing in the record suggested that Bank of America was actively undertaking or planned to undertake any collection efforts, that the debt would not be Bank of America's to collect were it to sell the debt, or that there was no evidence regarding the number of class members or amount of debt that Bank of America had reported to credit bureaus, or, if it had made a report, that a $35 reduction in a person's reported debt would have little if any impact on her credit score. Nor did the court require Bank of America to make any disclosures about how it internally had accounted for the debt relief or how much of the debt it had already written off, or explain why it was accepting the parties' *ipse dixit* characterization of the debt relief as being worth face value rather than requiring Bank of America to disclose its accounting value.

The district court granted class counsel's entire $14.5 million request for fees and expenses. ER16. (As noted, class counsel had reduced their original $16.65 million request by approximately $2 million.) Relying on *Bluetooth*, the district court held that it has discretion to "not apply the lodestar cross check," and therefore did not apply a cross check at all or even reference class counsel's lodestar. ER16. Instead, the court based its fee award on its determination that "the requested 21.1% [of the $66.6 million combined cash and debt relief] is significantly below the benchmark rate of 25%." ER16. It further held that even if the debt relief was illusory, the fee award was nevertheless justified because Bank of America's cessation of EOBCs for five years was worth "substantially more" than the $29.1 million cash relief. The district court further relied upon the result obtained, class counsel's skill and preparation, and the "hard fought" nature of the litigation (which it found based on "a cursory glance at the docket"). ER15. The court did not expressly rely upon the Fitzpatrick report, and did not address Threatt's objections to it.

The court granted the full request for $20,000 in service awards to the named plaintiffs. ER16.

The court shortly thereafter issued final judgment. ER1. The three objectors each timely appealed. ER35; ER39; ER49.

Summary of Argument

The class-action settlement at issue in this appeal resulted in a fee award to class counsel equal to 11 times their lodestar that, in reality, is an 18 multiplier, equating to fees of more than $11,000 per hour, once hours spent litigating *other* cases before this

one, hours spent on class counsel's own fee motion, and future hours are excluded. The class, meanwhile, recovered less than 10% of its potential damages, with cash payouts of less than 5% of potential damages. *See* Dkt. 80-3 ¶ 19. The district court reached this result by exercising its discretion to use only percentage of recovery to calculate fees without a lodestar crosscheck, interpreting *Bluetooth* as giving it the discretion to do so. ER14. But this is exactly the opposite of what *Bluetooth* commands.

> Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result. Thus, for example, where awarding 25% of a "megafund" would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead.

654 F.3d at 942 (citations omitted). The gigantic multiplier here is exactly the "windfall profits for class counsel" that constrains courts' discretion under *Bluetooth*.

Even if *Bluetooth* permitted a pure percentage-of-recovery approach with a gigantic multiplier without a crosscheck, the district court erred. The settlement relief included only $37.5 million in cash, which was reduced to less than $23 million available to pay the class after attorneys' fees, incentive awards, and other administrative expenses were deducted. The other form of relief was debt repayment that the parties valued at $29.1 million. But the parties offered next to no support for this lofty valuation for the debt relief. There is no indication that Bank of America planned any collection activities for such small amounts, nor is there any evidence that class members would receive any benefit from a notification to credit bureaus that either a partial payment of their debt

had been made or the nominal amount of debt had been paid; in fact, there was no evidence that Bank of America had reported the debt to credit bureaus to begin with.

As these facts suggest, the district court's $14.5 million award of attorneys' fees based on an uncritical acceptance of this settlement value, is unreasonable. The result is attributable to several fatal legal defects. First, the district court erred in the percentage-of-recovery calculation that it exclusively relied on to make the fee award. It committed legal error by valuing the illusory debt relief on a one-to-one cash equivalent in its fee analysis, and, if this valuation wasn't erroneous, then class counsel represented class members inadequately during the settlement negotiations by leaving millions of dollars in cash on the table, and the class representatives were inadequate for acquiescing in this result. *See* Section II. Second, the district court erred by failing to apply a lodestar crosscheck. A crosscheck was necessary to ensure the attorneys' fees adhered to the "reasonableness" requirement in Rule 23(h), particularly here, where the settlement included non-cash relief. *See Perdue v. Kenny A.*, 559 U.S. 542, 554 (2010) ("there is a 'strong presumption' that the lodestar figures is reasonable" without an enhancement multiplier). The result of this failure was an unreasonable fee award that constitutes a reversible abuse of discretion, no matter which method the district court applied. *See* Section III. Finally, the district court erred by failing to supply any reasoning for its decision to forego a crosscheck and failing to give a reasoned response to the class member objections identifying the need for such. *See* Section IV; *Powers v. Eichen*, 229 F.3d 1249, 1256-58 (9th Cir. 2000); *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012).

Argument

I. Because of inherent conflicts between class counsel and the class in class actions, courts must scrutinize settlement terms and attorneys' fee requests.

Unlike settlements in bilateral civil litigation, class-action settlements and fee awards require court approval pursuant to the standards set out in Federal Rule of Civil Procedure 23. The need for this additional layer of review, during which the court acts as a fiduciary of the class, arises from the self-interested incentives inherent in class actions. Because class members are not present during the negotiations, "there is always the danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013).

As this Court has observed, the potential for conflict at the settlement stage of class actions is structural and acute because every dollar reserved to the class is a dollar defendants cannot pay class counsel. "Ordinarily, 'a defendant is interested only in disposing of the total claim asserted against it,' and 'the allocation between the class payment and the attorneys' fees is of little or no interest to the defense.'" *Bluetooth*, 654 F.3d at 949 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003)). Thus, while class counsel and defendants have proper incentives to bargain effectively over the *size* of a settlement, similar incentives do not govern their critical decisions about how to *allocate* it between the payments to class members and the fees for class counsel. *Id.*; *see also Pampers*, 724 F.3d at 717.

The dysfunction that can result from these incentives is a problem because class actions often are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with diffuse harm. Our adversary system—and the value of our class actions within it—depends upon unconflicted counsel's zealous advocacy for their clients, especially where those clients are absent class members who do not get to choose their counsel for themselves and may not even know their legal rights are at stake. *Cf. Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1167 (9th Cir. 2013). As a result, rigorous adherence to the safeguards of Rule 23 is necessary to ensure that counsel is not self-dealing at the class's expense. Where, as here, class counsel request a fee that allocates too much of their clients' recovery to themselves, a district court has a legal obligation to reduce the fee to a reasonable amount. Fed. R. Civ. P. 23(h).

Various tools enable class counsel to obscure settlement misallocations. The tools function primarily by artificially inflating the settlement's apparent relief. The illusion of a large settlement benefits both class counsel and a defendant: "The more valuable the settlement appears to the judge, the more likely the judge will approve it. And the bigger the settlement, the bigger the fee for class counsel." *See* Howard M. Erichson, *How to Exaggerate the Size of Your Class Action Settlement*, DAILY JOURNAL (Nov. 8, 2017).[3] Without judicial oversight to weed out such practices, class members are left with settlements in which an outsized portion of their recovery goes to class counsel. *See* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859 (2016).

---

3 *Available at* https://www.dailyjournal.com/articles/344700-how-to-exaggerate-the-size-of-your-class-action-settlement.

Injunctive relief is one tool with which class counsel and the defendant are able to inflate the perceived value of the settlement. The value of injunctive relief is "easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Staton*, 327 F.3d at 974. Defendants benefit from *res judicata* following judicial approval of the settlement and the minimal cost of such relief, while class attorneys hope for approval of a higher fee request.

The critical question for a reviewing court is whether the change achieved by the settlement actually benefits class members. If an injunction is forward-looking, as here, then the relief does little for the class of consumers who were injured in the past. Here, for example, members who either no longer have Bank of America consumer accounts or who will not incur overdraft fees in the future will not benefit at all from Bank of America's cessation of EOBCs. *See Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1079-80 (9th Cir. 2017). Class counsel failed to carry their burden of showing that the class defined to include consumers who incurred EOBCs in the past will benefit and, thus, the district court should have wholly excluded this change in practices from its fee analysis. Likewise, in economic reality members of the debt relief subgroup will not benefit materially from the forgiveness of a nominal amount of debt that was never going to be collected anyway. And, again, class counsel failed to carry their burden of showing the debt relief was worth the $29.1 million they claimed and the district court erred by adopting that value on the parties' say-so without asking Bank of America to disclose how much of that debt had already been written off as an uncollectable loss.

The vitality of the class-action mechanism depends on zealous scrutiny by the judiciary and the application of doctrinal tests that properly align the incentives of class

counsel with those of the vulnerable, absent class members whose claims they settle away. "[P]ublic 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, 692 (Cal. 2016) (Liu, J., concurring). The district court's scrutiny failed to meet this standard and, as a result, it awarded class counsel fees in an amount many times what is reasonable under Rule 23(h). This matters to class members because "[i]f fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Staton*, 327 F.3d at 964.

II. The district court abused its discretion by failing to scrutinize the economic reality of settlement relief when awarding a percentage-based fee; in the alternative, the settlement class should be de-certified for lack of adequate representation.

The percentage-based fee award fails as unreasonable under Rule 23(h) because the district court awarded 21.1 percent of the full $66.6 million purported settlement value when over $29 million of that amount was illusory. The parties essentially acknowledged the valueless nature of this relief in the joint response they filed in response to the district court's order to show cause regarding conflicts of interest between the debt relief and cash relief subgroups. There, they explained how they first negotiated the cash relief and, only after class counsel believed they had "maximized the amount of cash [Bank of America] was willing to pay did [they] introduce debt forgiveness relief for Class Members with unpaid EOBCs into the negotiation." Dkt.

128-1 ¶ 7. In other words, class counsel and Bank of America negotiated for the $37.5 million cash portion of the settlement, with class counsel ultimately reaching a point at which Bank of America refused to increase the amount. Only at that point did class counsel bring up the subject of relief for the debt subgroup of the class.

This two-stage negotiation process leads to one of two possible conclusions. Either:

(1) class counsel negotiated inadequately and left significant value on the table in the first "cash negotiation" stage—because a rational economic actor such as Bank of America cares about its total bottom-line liability, not the form of the relief or the stage at which it is negotiated (*see* Section I); or

(2) the debt portion of the relief truly is a "throw in" that is worth little to either Bank of America or class members.

If the latter is true and the value of the debt relief is immaterial (the more likely of the two possibilities), then the district court erred by using the inflated settlement value for its percentage-based calculation. The result was an unreasonable fee award. *See Staton*, 327 F.3d at 974 ("only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees."). The sequence of negotiation strongly suggests that the debt relief was in fact a "throw-in" item for Bank of America, sought by class counsel so as to create the illusion of valuable relief and unobjectionable to Bank of America because of its *de minimis* actual accounting value. Why else would

Bank of America agree to include the relief—purportedly valued at over $29 million—at the back-end of the negotiations after it had refused to increase the settlement consideration beyond the negotiated cash payment?

The likelihood that Bank of America will recover outstanding EOBC fees from consumers whose accounts have been closed for months and years is virtually nil, and the reasons this is true are also why the value of the debt relief is equally worthless to class members. The small dollar amounts make the debt uncollectible. It would cost Bank of America more to pursue payment from these former customers than it would recover, and it is highly unlikely that former bank customers with closed accounts will return to voluntarily pay the outstanding EOBC fees. While Bank of America could sell the debt to a collection agency, the sale value is only pennies on the dollar (largely because of the collection problems identified above) and, then, Bank of America would no longer own the debt and could not forgive it. The credit reporting component of the debt relief similarly adds limited to no value. The parties failed to establish that *any* class member would benefit from this purported relief. Banks that report to credit bureaus already have a legal obligation to correct reported information. Bank of America did not provide the amount of EOBC debt that it would report as paid to the credit bureaus, and, in any event, the relatively small change in a consumer's outstanding debt occasioned by the settlement will have no material effect on the individual's ability to obtain credit. (It is hard to imagine a credit score significantly changing, or a potential creditor changing its lending decisions, based on outstanding unpaid debt going from $2500 to $2465 or even $75 to $40. The material events adversely affecting the account holders' credit were the facts of the overdraft and account closure.) Debt-portion class

members thus receive only *de minimis* value from the settlement—payment of debt they never would repay anyway and which Bank of America almost certainly accounts for as worth pennies on the dollar, and, at best, an immaterial change to their credit profile.

While the debt relief was immaterial to both class members and Bank of America, however, it served to increase the likelihood that the district court would approve the settlement and award the full amount of attorneys' fees requested by class counsel. *See* Section I. And, in fact, class counsel relied upon the full purported value of the debt relief (then $29.1 million) to justify a fee request based on the combined value of the cash and debt relief. Dkt. 80-1 at 10.

It was legal error for the district court to accept the debt relief's proffered valuation without a more searching inquiry. As a fiduciary for the class, the district court had a duty to inquire into the economic reality of the relief—not simply accept the face value proffered by parties who have a mutual interest in inflating that value. *See Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015) (court must look at the economic reality of a class-action settlement, and has duty to make inquiries to determine this); *Koby*, 846 F.3d at 1079 (settling parties "bore the burden of demonstrating that class members would benefit from settlement's injunctive relief"). The purpose of this legal rule is to align class counsel's interests with their clients' to the greatest extent possible in order to motivate class counsel to deliver actual relief to the class. Like the Ninth Circuit, courts throughout the nation have adopted this common-sense rule, requiring attorneys' fees to be tied to the actual settlement value and requiring the exercise of informed economic judgment in evaluating non-cash relief. *E.g.*, *Pearson*, 772 F.3d 778; *Pampers*, 724 F.3d at 719, 722 (rejecting settlement where class members "receive[d]

nothing but illusory injunctive relief" and placing the burden on the settling parties to demonstrate settlement value); *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 172 (3d Cir. 1975) ("[T]he district court must bring an informed economic judgment to bear in assessing [the non-monetary relief's] value."); Notes of Advisory Committee on 2003 Amendments to Rule 23 ("it may be appropriate to defer some portion of the fee award until *actual payouts* to class members are known" (emphasis added)); *id.* ("fundamental focus is the result *actually achieved* for class members" (emphasis added); *id.* (citing 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest *actually paid* to the class" (emphasis added))). *See also* American Law Institute, *Principles of the Law of Aggregate* Litigation § 3.13 (2010); *cf. Dennis*, 697 F.3d at 868 (chronicling problem of "fictitious" fund valuations that "serve[] only the 'self-interests' of the attorneys and the parties, and not the class").

* * *

If, on the other hand, the court had scrutinized the actual value of the debt relief and found an evidentiary basis for class counsel's claim that the debt relief is material and is in fact worth $29.1 million, then class counsel and the class representatives provided inadequate representation under Rule 23(a)(4). "[T]he linchpin of the adequacy requirement is the alignment of interests and incentives between the representatives and the rest of the class." *Dewey v. Volkswagen A.G.*, 681 F.3d 170, 183 (3d Cir. 2012). So, if the "interests of those within the single class are not aligned," and the named parties and class attorneys seek "to act on behalf of a … class rather than on behalf of discrete subclasses," then those representatives cannot possibly represent the

entire class, and the class as structured fails the adequacy requirement. *Amchem*, 521 U.S. at 625-26.

The parties' own sworn description of their settlement negotiations reveal the inadequacy of class counsel and the class representatives in trying to represent both cash and debt subgroups here. In short, class counsel left significant money on the table that could have been allocated to the cash subgroup. If Bank of America was actually willing to increase the total settlement amount by over $29 million after class counsel believed they had wrung every last penny from their coffers, then at least some of that relief should have been shared with the cash subgroup. Under the settlement, the cash subgroup will recover well under a tenth of its damages, while the debt subgroup will have its entire debt amount forgiven. Meanwhile, the cash subgroup is on the hook for the full amount of attorneys' fees, incentive awards, and administration costs that should be borne equally by the class. The named representatives failed to object or actively monitor class counsel to avoid this inequitable result.

Although the class representatives are part of the cash subgroup and presumably have an interest in achieving favorable results, any claim of adequate representation depends on the fiction that class representatives are engaged and active monitors of the proceedings and class counsel. But the class representatives' agreement to a settlement that misallocates the relief (and provides for an excessive fee award) is evidence here that they failed to represent the class adequately. *See, e.g.*, *In re Chiron Corp. Sec. Litig.*, No. C-04-4293, 2007 WL 4249902, at *11 (N.D. Cal. Nov. 30, 2007) (in light of the excessiveness of a 25% fee award, "it does not appear that [lead plaintiff] has made an effort to maximize the net recovery of absent class members. Nor does it appear that

[she] negotiated a fee agreement in a way that reflects the market value of lawyer services."). The large incentive awards received—$20,000 for the named plaintiffs (ER16)—more than offset any shortfall in cash recovery for EOBC fees paid.

This Court should either reverse and remand for the district court to determine a fee award that properly accounts for the *de minimis* value of the debt relief or de-certify the class due to inadequate representation.

III. The district court's fee award cannot stand because, after neglecting a lodestar crosscheck, the court awarded fees equal to nearly 18 times class counsel's lodestar.

The district court might have caught the unreasonableness of its percentage-based fee award that credited the illusory value of the debt relief if it had conducted a complete legal analysis. Adding to the district court's error, however, the court refused to apply a lodestar crosscheck to determine the reasonableness of the fee award. ER16. Instead, it used "a mechanical or formulaic approach" of percentage of recovery without considering whether this resulted in a windfall. *Bluetooth*, 654 F.3d at 944. The court neglected this analysis even though a lodestar crosscheck would not have been unduly burdensome. To the contrary, class counsel submitted their lodestar, and the numbers were right in front of the court. *See* Dkts. 80-4, 80-5, 80-6, 80-7. While a court has discretion to apply either the percentage-of-recovery or lodestar analysis in the first instance, a lodestar crosscheck is necessary to ensure the fees meet Rule 23(h)'s "reasonable" standard. Under that standard, as interpreted by *Perdue v. Kenny A.*, "there is a strong presumption that the lodestar is sufficient" without an enhancement multiplier. 559 U.S. at 546. The crosscheck is particularly necessary when the relief

includes a non-cash component, such as the debt relief here, due to the inherent difficulty of placing a monetary value on such relief. The 11.66 multiplier—which was closer to 18 once facially unreasonable hours were removed from the lodestar—fails Rule 23(h). It is especially unreasonable that the class is receiving only 9% of its alleged damages while class counsel receives thousands of dollars an hour.

A. A lodestar crosscheck should be required for attorneys' fee awards made in class-action settlements, particularly when there are non-cash relief components in a settlement.

The district court relied on *Bluetooth* in holding that it did not need to conduct a lodestar crosscheck. ER14. This was a misreading of that decision:

> Though courts have discretion to choose which calculation method they use, ***their discretion must be exercised so as to achieve a reasonable result***. Thus, for example, where awarding 25% of a "megafund" would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead.

Bluetooth, 654 F.3d at 942 (citations omitted, emphasis added).[4] Here, though the class received only a small fraction of the cash sought, class counsel received eleven times its asserted lodestar, and more than $10,000/hour for work actually performed on this case (as opposed to other cases). This is exactly the unreasonable "windfall" prohibited by *Bluetooth*, and thus the district court erred.

[4] Below, plaintiffs quoted out of context this Court's language in *Yamada v. Biocare Holding AG*, 825 F.3d 536 (9th Cir. 2016), to claim that the lodestar crosscheck is discretionary. But *Yamada* addresses percentage crosschecks of a base lodestar award; it is irrelevant here.

In *Perdue v. Kenny A.*, the Supreme Court held that "there is a 'strong presumption' that the lodestar figures is reasonable" without an enhancement multiplier. 559 U.S. 542, 546, 554 (2010). An enhancement is justified only in "rare and exceptional" circumstances where "specific evidence" demonstrates that a lodestar fee alone "would not have been adequate to attract competent counsel." *Id.* at 554 (cleaned up). Here, in contrast, the fee award equaled more than 11 times class counsel's claimed lodestar and nearly 18 times their lodestar once one removes hours spent on *other* litigation pre-dating this case, class counsel's fee motion, and estimates of future hours not yet worked. The district court refused to analyze the reasonableness of the fee award under the metric of *Kenny A.* at all. Yet, the double-digit multiplier it awarded clearly fails the "reasonable" directive of Rule 23(h)'s text.

Kenny A.'s limitation on lodestar enhancements was made with respect to attorneys' fees awarded pursuant to 42 U.S.C. § 1988, which provides that a prevailing party in certain civil rights actions may recover "a reasonable attorney's fee as part of the costs." Rule 23(h) similarly provides, for class action settlements, that "the court may award reasonable attorney's fees and nontaxable costs." The limitation on § 1988's "reasonable" fee awards should apply equally to "reasonable" fee awards made under Rule 23(h). A number of courts have recognized both the common textual standard and public policy reasons that make the presumption of *Kenny A.* equally applicable in the class-action context. *See, e.g.*, *In re Hyundai & Kia Fuel Economy Litig.*, 881 F.3d 679, 706-07 (9th Cir. 2018) (applying *Kenny A.* to Rule 23(h) fee award pursuant to

settlement)[5]; *Bluetooth*, 654 F.3d at 942 n.7 ("the *Kerr* [*v. Screen Extras Guild, Inc.*, 526 F.3d 67, 70 (9th Cir. 1975),] factors only warrant a departure from the lodestar figure in rare and exceptional cases") (internal quotation marks omitted); *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liability Litig.*, 867 F.3d 791 (7th Cir. 2017) (applying *Kenny A.* to reduce 1.75 multiplier to 1); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 361 (3d Cir. 2010) (Weis, J., concurring and dissenting) (referring to *Kenny A.* as an "analogous statutory fee-shifting case"); *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. App'x 496, 500 (6th Cir. 2011); *Rodriguez v. Bumble Bee Foods, LLC*, No. 17cv2447, 2018 WL 1920256, at *8 (N.D. Cal. April 24, 2018) (declining to apply multiplier because a lodestar fee is "presumptively reasonable").

There is no justification for claiming that "reasonable" fees in the context of cases vindicating civil rights under § 1988 should be interpreted differently than "reasonable" fees in the context of class action cases. Nothing in the text of Rule 23 (or § 1988, for that matter) suggests otherwise. If a fee award equal to an attorneys' lodestar is a reasonable fee for the purpose of encouraging a party to vindicate civil rights, then surely it is reasonable in the context of a consumer class action such as this one. While class counsel are likely to argue that the absence of fee-shifting in the underlying statute here makes *Kenny A.* inapplicable, that argument overlooks this common "reasonableness" command. The purpose of awarding reasonable fees is "to induce a capable attorney to undertake [a meritorious] representation" by assuring him that he

---

[5] Though *Hyundai* has been vacated to be reheard *en banc*, this rehearing was granted only to address an unrelated question of class certification. The fee discussion of *Hyundai* remains persuasive.

will be paid for that work. *Kenny A.*, 559 U.S. at 552. The aim is to enforce the law, "not to provide a form of economic relief to improve the financial lot of attorneys." *Id.* (cleaned up). If anything, the need to encourage attorneys to vindicate the fundamental civil rights of individuals unable to afford an attorney, particularly in cases that may not result in a money judgment, is far greater than in a garden variety class action over a $35 banking charge. *Cf., e.g, Eddy v. Colonial Life Ins. Co of Am.*, 59 F.3d 201, 204 (D.C. Cir. 1995) (contrasting ordinary commercial litigation to "the civil rights statutes [which] advance dignitary as well as economic interests").

Belying this point, where drafters intend for "reasonable fees" to deviate from the common lodestar standard, they make that express in the text. For example, the Prison Litigation Reform Act alters the lodestar method by permitting the recovery of only fees that were "directly and reasonably incurred in proving an actual violation of the plaintiff's rights," and only where the fee amount "is proportionately related to the court ordered relief for the violation; or … was directly and reasonably incurred in enforcing the relief ordered for the violation." 42 U.S.C. § 1997e(d)(1). In the absence of similarly more specific direction in the text of Rule 23, its "reasonable" standard logically makes lodestar a presumptively sufficient fee, just as the Supreme Court held with respect to the "reasonable" standard for attorneys' fees in 42 U.S.C. § 1988.

Even without relying on *Kenny A*, at least one member of this Court has previously declared that "courts must cross-check percentage-based fees against a lodestar calculation." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1198 (9th Cir. 2013) (Berzon, J., dissenting) (uncontradicted by the majority on this point). The need for a lodestar crosscheck is particularly necessary where the relief obtained is not easily

monetized, as the result here exemplifies.[6] Injunctive relief is notoriously difficult to quantify, and this problem is multiplied by the incentives that both parties have as they advocate for settlement approval. *See Staton*, 327 F.3d at 973; *In re Oracle Secs. Litig.*, 132 F.R.D. 538, 544 (N.D. Cal. 1990) (Walker, J.) (describing a sweetheart injunctive settlement coupled with "arrangements to pay plaintiffs' lawyers their fees" as the "classic manifestation" of the class-action agency problem); *cf. also Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014) ("at least in a case such as this, involving a non-cash settlement award to the class, [a provision to provide unopposed fees] should be subjected to intense critical scrutiny by the district court").

Because of the potential to discourage hasty, undervalued settlements with generous attorney payments, legal scholars, practitioners, and judges have even gone so far as to call the lodestar cross-check "essential." Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 503 (1996); *see also* Brian Wolfman, *Judges! Stop Deferring to Class-Action Lawyers*, 2 U. MICH J. L. REFORM 80, 84-85 (2013) (describing risk of cheap, quick, and undervalued settlement); Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASH. L. FOUND., 23 (2005), *available at* http://www.wlf.org/upload/0405WPGorsuch.pdf (lodestar cross-check is an "important safeguard"); Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a*

---

[6] The forward-looking injunctive relief is also difficult to monetize, but because there is no evidence that it materially benefits the class and because class counsel did not ask the district court to award fees based on its value, a determination of its value is not properly before the Court.

Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases, 18 GEO. J. LEGAL ETHICS 1453, 1454 (2005) ("[W]e argue that courts making common fund fee awards are ethically bound to perform a lodestar cross-check.").

Like the injunctive relief in *Staton*, here, "the true cost of [the debt relief] to the defendant—and the true benefit to the plaintiff class—is a matter of speculation." 327 F.3d at 973. It is clear, however, that it is not worth anything near class counsel's $29 million estimate. By accepting that figure at face value—perhaps in part due to the difficulty in coming up with a more reasonable estimate on its own—the district court's percentage-of-recovery analysis resulted in a wildly excessive attorneys' fee. A lodestar crosscheck would have guarded against this result. *See id.* (discussing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998), where the Court affirmed the district court's fee decision where it crosschecked the result and "reject[ed] the idea of a straight percentage recovery because of its uncertainty as to the valuation of the settlement"); *see also Hyundai*, 881 F.3d at 707 (explanation of lodestar enhancement is even more necessary "given objectors' concerns that the settlement confers only modest benefits to the class").

Finally, without a lodestar crosscheck, there is no consequence for class counsel who tender unreasonable bills. Here, for example, class counsel improperly included hundreds of hours that, under Circuit precedent, should not have been billed to the class. *See* Section IV below. Without an examination of lodestar, class counsel get away with improperly billing their putative clients for tasks such as their own request for fees, work on other cases, and time they haven't even worked yet. Had the district court examined the lodestar here, and excluded those hours, the shock of an award that pays

the lawyers $11,000 per hour may have prompted the court to divert some of the fees back to the class members.

B. By failing to apply a lodestar crosscheck, the district court's fee award violated Rule 23(h)'s "reasonableness" requirement.

The district court neglected its duty to ensure a "reasonable" fee award by refusing to apply a lodestar crosscheck. ER16. Instead, it awarded class counsel's full request for 21.1% of the combined cash and debt-relief without even scrutinizing the actual value of that relief. ER14. The district court made the award based not only on this incomplete legal analysis. It also relied upon some of the very factors that the Supreme Court instructs should not be used to justify a fee award above lodestar—in particular, those factors that are "subsumed in the lodestar calculation," either in the number of hours or hourly rate. *Kenny A.*, 559 U.S. at 553; *see also Bluetooth*, 654 F.3d at 942 n.7 (many *Kerr* factors relevant to determining a reasonable fee are subsumed within the lodestar). "A motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *In re Steenes*, No. 17-3630, 2019 U.S. App. LEXIS 7543, at *5-*6 (7th Cir. Mar. 14, 2019) (quoting with alteration *United States v. Burr*, 25 F. Cas. 30 (C.C. Va. 1807) (Marshall, C.J.)). Here, the district court abused its discretion by acting contrary to such sound legal principles.

Based only on "a cursory glance at the docket," the district court reasoned that its fee award was justified because "this was a hard fought battle." ER15-ER16. But the "complexity of a case generally may not be used as a ground for an enhancement because these factors presumably are fully reflected in the number of billable hours recorded by counsel." *Kenny A.*, 559 U.S. at 553 (internal quotations omitted). The

district court also cited what it perceived as the "tenacity and great skill" of class counsel. Again, however, "the quality of an attorney's performance" already is "reflected in the reasonable hourly rate" and "should not be used to adjust the lodestar." *Id.* (cleaned up); *accord Bluetooth*, 654 F.3d at 942 n.7. Class counsel's hourly rates certainly already account for these factors. Partners billed their time at $650-$800 per hour and associates at $250-$400 per hour. Dkts. 80-4 at 2-3; 80-5 at 4; 80-6 at 3; 80-7 at 2.

Similarly, a multiplier based on outstanding results requires some "exceptional success" beyond the "expectancy of excellent or extraordinary results" already baked into pricey hourly rates. *In re Washington Public Power Supply Sys. Litig.*, 19 F. 3d 1291, 1304 (9th Cir. 1994) ("*WPPSS*"). For those reasons, the burden is on the attorney seeking fees to produce "specific evidence that the lodestar fee would not have been adequate to attract competent counsel" before a district court can apply an enhancement. *Kenny A.*, 559 U.S. at 554 (internal quotation marks omitted); *see also Stanger v. China Elec. Motor*, 812 F.3d 734, 739 (9th Cir. 2016) ("Because there is a strong presumption that the lodestar amount represents a reasonable fee, adjustments to the lodestar are the exception rather than the rule." (internal quotation marks omitted)). But plaintiffs submitted no evidence of this kind. The only "evidence" submitted by counsel was the Fitzpatrick declaration. The declaration was not admissible and should have been excluded entirely by the district court because it contains inadmissible legal conclusions and other legal arguments regarding the calculation of attorneys' fees. Testimony regarding matters of law is inadmissible under either Rule 701 or 702 because "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Nationwide Transport Finance v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008)

(internal quotation omitted). It is well established that "that expert testimony by lawyers, law professors, and others concerning legal issues is improper." *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1043 (D. Ariz. 2005). To its credit, the district court did not rely on the declaration to support its fee decision. The declaration cannot now save the fee award on appeal. The district court further erred by citing Bank of America's cessation of charging EOBCs as a relevant factor justifying the fee award. ER15. As described above, however, and as the district court failed to analyze, that relief provides little to no value to the class.

IV. At minimum, as a fiduciary for the class, district courts must provide a justification for declining to apply a lodestar crosscheck when an objector raises the issue.

In the alternative, because district courts act as a fiduciary for the class, they must provide a justification for declining to apply a lodestar crosscheck—certainly at least when a class member raises the issue. *See Dennis*, 697 F.3d at 864 ("To survive appellate review, the district court … must give a reasoned response to all non-frivolous objections" (internal quotation marks omitted)). Plaintiffs' admitted lodestar multiplier in this case exceeds 11, and the real lodestar multiplier surpasses 17 (when billing for other matters and non-compensable pursuits is appropriately excluded). Yet the district court did not mention these facts or justify its failure to discount them. The district court instead conducted "a cursory glance at the docket" to find the litigation hard-fought. ER15. But "[b]ecause the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage," the district court "must assume the role of fiduciary," a role entailing much more than "cursory" responsibility toward absent class

members. *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (internal quotation marks omitted); *see also In re MagSafe Apple Power Adapter Litig.*, 571 Fed. App'x 560, 564 (9th Cir. 2014) (remanding where a 1.5 multiplier was applied without an explanation of "why a multiplier was necessary to adequately compensate class counsel").

First, any proper exercise of discretion must be supported. A decision without reasoning is an abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). This is true of class action fee awards. *Powers*, 229 F.3d at 1256-58; *Stanger*, 812 F.3d at 739. Abuse of discretion occurs due to "a failure or refusal, either express or implicit, actually to exercise discretion, deciding instead as if by general rule, or even arbitrarily, as if neither by rule nor discretion." *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993). A district court must *explain* how it exercised discretion because this Court "must be able to ascertain how the district court exercised its discretion." *Traxler v. Multnomah County*, 596 F.3d 1007, 1015 (9th Cir. 2010). When the district court gives "no reasoned decision to review, and no basis upon which to evaluate its exercise of discretion," it becomes "impossible for [a reviewing court] to do [its] judicial duty." *Blue Cross & Blue Shield of Alabama v. Unity Outpatient Surgery Center*, 490 F.3d 718, 725 (9th Cir. 2007). "Put another way, 'meaningful appellate review for abuse of discretion is foreclosed when the district court fails to articulate its reasoning.'" *Traxler*, 596 F.3d at 1016 (quoting *United Nat'l Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916, 919 (9th Cir. 1998)).

Second, "the district court must show it has explored comprehensively all factors, and must give a reasoned response to all non-frivolous objections." *Dennis*, 697 F.3d at 864 (cleaned up). "[W]here, as here, an objecting party has challenged specific

types of work and states why it is contended that the hours claimed are excessive, the reviewing court must support its findings with a sufficient articulation of its rationale to allow for meaningful appellate review." *Interfaith Comty. Org. v. Honeywell Int'l, Inc.*, 726 F.3d 403, 416 (3d Cir. 2013). Here, Threatt *did* challenge the excessive fee request, lodestar multiplier, as well as specific billings, noting that class counsel had billed the class for hundreds of hours in other matters and that "[a]n attorney is not entitled to be paid in a case for the work he or another attorney did in some other case." *ACLU v. Barnes*, 168 F.3d 423, 430 (11th Cir. 1999), quoted at ER92. Threatt also noted that the fee request violated this Circuit's black letter law by including "[t]ime spent obtaining an attorneys' fee in [a] common fund case[]," which is "not compensable because it does not benefit the plaintiff class." *WPPSS*, 19 F.3d at 1299, quoted at ER93.

Third, this Court has frequently "encouraged courts to guard against an unreasonable result by cross-checking their calculations." *E.g. Bluetooth*, 654 F.3d at 944; *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997); *WPPSS*, 19 F.3d at 1296-98. Again, as expressed by the dissent in *HP Inkjet*, a lodestar crosscheck should be mandatory. 716 F.3d at 1198. But regardless, this Circuit's uniform encouragement of that crosscheck has no meaning if district courts can dispense with it for no other reason than stating that they have discretion to dispense with the crosscheck. Additionally, Threatt, as well as Collins, argued at length why a lodestar crosscheck should be performed in this case. ER87-94; *see also* ER55; ER59-ER62. The objection merited a reasoned response even if crosscheck is not mandatory in all cases.

The district court failed to explain its reasoning or respond to non-frivolous objections to the grotesque lodestar multiplier. The district court instead asserted that it had the discretion to decline conducting a lodestar crosscheck, and in the next sentence it "therefore finds it proper to exercise this discretion and not apply the lodestar crosscheck." ER16. But even if the district court does possess discretion to overlook lodestar, this statement does not itself justify the exercise of that discretion; this amounts to empty *ipse dixit*. "I can, therefore I will" is a model of kingly decree, not judicial reasoning. *See Steenes*, 2019 U.S. App. LEXIS 7543, at *5-*6.

The district court's failure here is akin to the reversible error in *New England Health Care Employees Pension Fund v. Woodruff*. 512 F.3d 1283 (10th Cir. 2008) (reversing approval of a class action settlement in a securities fraud case). The *Woodruff* district court summarized the contentions of the non-settling defendants and then "simply 'overruled'" their objections by "noting only that the provisions were 'either legally required, or [were] legally appropriate' in the case '[b]ased on the reasons stated, arguments advanced, and authorities cited by [settling defendant] in its reply.'" *Id.* at 1290 (quoting district court). The Tenth Circuit held such cursory examination to be "insufficient" because it did not allow the appellate court "to know the path the district court followed." *Id.* Similarly, the district court in *Honeywell* simply credited plaintiffs and asserted it would not second-guess the disputed billing—much like how the district court here found that "a cursory glance at the docket demonstrates that this was a hard fought battle." ER15. "This perfunctory statement does not allow for meaningful appellate court review." *Honeywell*, 726 F.3d at 403. At minimum, the unreasoned fee award must be vacated. *Id.*

Plaintiffs may argue that the district court declined to conduct a crosscheck due to findings mentioned elsewhere in its order—because "of how high Class Counsel scores on the factors analyzed above," ER15, or because the percentage-of-fund award allegedly fell below the 25% benchmark, ER16. These *post hoc* rationalizations cannot withstand scrutiny. While the district court obviously found the settlement praiseworthy, it never articulated why it should not conduct a lodestar crosscheck. "[T]he district court never stated the grounds on which it ultimately relied. . . . As a result, [the Court of Appeals] cannot conduct meaningful appellate review." *Powers*, 229 F.3d at 1258.

Nor does a fee award less than 25% eliminate the need for scrutiny, even with a less squishy fund than that here. "The district court abuses its discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward." *Id.* at 1256. "[C]ourts cannot rationally apply any particular percentage . . . in the abstract, without reference to all the circumstances of the case." *WPPSS*, 19 F.3d at 1298. Such scrutiny is not required simply as a superfluous exercise to give cover to fee awards; rather, this Court has recognized that a 25% fee award may constitute an inappropriate "windfall" when a case settles early in litigation, as this case did. *Fischel v. Equitable Life Assur. Soc'y of the U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002). The district court did not investigate the manifest windfall here, but at best mechanically assumed that a fee award supposedly less than the 25% of the fund benchmark was reasonable by definition.

The district court provided insufficient attention to the fee request in spite of its fiduciary obligation to absent class members. Its order did not mention the clear-sailing provision, and, as outlined above, the order incorrectly valued the debt relief portion of

the settlement. Therefore, *Bluetooth* and *Allen* independently require, at a minimum, remand for the district court to evaluate the reasonableness of the fee award under the correct legal standard. *E.g.*, 654 F.3d at 947-48 (finding reversible error because, *inter alia*, district court "ignored the clear sailing provision"); *id.* at 943 (reversible error when district court fails to compare fees to results achieved for the class in evaluating fairness of fees). Again, this is not merely a technicality, but goes to the fundamental conflict of the class action settlement process. A district court must "act with a jealous regard to the rights of those who are interested in the fund." *Mercury Interactive Corp.*, 618 F.3d at 994 (internal quotation marks omitted). A faithful fiduciary would not make its principal pay $6720/hour for 2158 hours of dubiously-claimed legal work—much of it performed in other cases, and including 64.75 hours ($435,067!) spent on preparing the fee application.

District courts have an independent responsibility to ensure that fee awards are fair, and this independent scrutiny ensures that absent class members' due process rights are protected under Rule 23.

Conclusion

The fee award should be vacated, and the case remanded for calculation of fees based on class counsel's lodestar, after hours incurred unreasonably or with no benefit to the class are removed. In the alternative, if the debt relief was worth the $29.1 million upon which the district court awarded fees, class certification should be reversed and the case remanded for the district court to create subclasses with separate counsel and representatives for the class members eligible for debt relief and those eligible for cash

relief to renegotiate the settlement. At the very least, the case should be remanded for the district court to provide reasons for its failure to apply a lodestar crosscheck to the fee award.

Dated: March 25, 2019

Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank
Anna St. John
M. Frank Bednarz
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
(703) 203-3848
ted.frank@hlli.org
Attorneys for Objector-Appellant Rachel Threatt

Statement of Related Cases
Under Circuit Rule 28-2.6

Farrell v. Bank of America, N.A., No. 18-56272, and *Farrell v. Bank of America, N.A.*, No. 18-56273, arise from the same district court judgment and raise the similar issue of the reasonableness of the district court's fee award under Federal Rule of Civil Procedure 23(h) and have been consolidated with this appeal.

Farrell v. Bank of America, N.A., No. 17-55847, is a 28 U.S.C. § 1292(b) interlocutory appeal by Bank of America from the district court's denial of its motion to dismiss. It is currently stayed pending resolution of the settlement.

March 25, 2019

/s/ Theodore H. Frank
Theodore H. Frank

Certificate of Compliance
Pursuant to 9th Circuit Rule 32-1 for Case Number 18-56371

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 12,466 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on March 25, 2019.

/s/Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on March 25, 2019, 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 such filing to all who are ECF-registered filers.

/s/Theodore H. Frank
Theodore H. Frank