No. 17-17367

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: LITHIUM ION BATTERIES ANTITRUST LITIGATION,

INDIRECT PURCHASER PLAINTIFFS,
Plaintiffs-Appellees,

v.

MICHAEL FRANK BEDNARZ,
Objector-Appellant,

v.

PANASONIC CORPORATION; PANASONIC CORPORATION OF NORTH AMERICA; SANYO ELECTRIC CO, LTD; SANYO NORTH AMERICA CORPORATION; MAXWELL CORPORATION OF AMERICA; TOSHIBA CORPORATION; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; SAMSUNG SDI CO. LTD.; SAMSUNG SDI AMERICA, INC.; SONY CORPORATION; SONY ENERGY DEVICES CORPORATION; SONY ELECTRONICS, INC.,
Defendants,

HITACHI MAXWELL, LTD.; HITACHI, LTD.; LG CHEM AMERICA, INC.; LG CHEM, LTD.; NEC CORPORATION; NEC TOKIN CORPORATION,
Defendants-Appellees.

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

Reply Brief of Appellant M. Frank Bednarz

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Introduction

Plaintiffs' response has no excuse for the fatal legal defect in the settlements: members of a single, nationwide settlement class will recover equally under a pro rata distribution plan when approximately half the class indisputably has no claim for damages. That half of the nationwide class lives in states that have not passed statutes effectively repealing the federal bar on money damages for indirect purchaser price fixing claims under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Plaintiffs do not dispute that the settlements have the effect of diluting the recovery of those class members from "repealer states," who do have claims for money damages, by approximately half, costing them tens of millions of dollars. Plaintiffs instead laud their hard work obtaining relief for all class members nationwide—dismissing the authority of state lawmakers to balance the competing policy concerns discussed in *Illinois Brick* in favor of their own authority to decide what is best for resident class members. This is not "disruption for its own sake" (PB24): plaintiffs' position demonstrates the twin problems at the heart of these settlements: allowing all class members equal recovery both dilutes the recovery of those with legitimate damages claims in violation of Rule 23 and undermines the sovereign decisions of states in adopting antitrust laws that apply within their borders.

Rule 23 does not allow certification of a class that treats class members so unfairly. Plaintiffs ask this Court to substitute a district court's "familiarity" with a case for the heightened scrutiny required for settlement classes under *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997), and the choice-of-law analysis required under *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012). That substitution unlawfully

abrogates Rule 23's protections for class members. By failing to apply the appropriate rigorous analysis *at settlement certification*, the district court certified a settlement class with deep conflicts between repealer- and non-repealer-state class members—even after previously finding that those conflicts precluded *litigation* class certification. ER277-78. Plaintiffs barely suggest that this result is consistent with the Supreme Court's (a)(4) jurisprudence, citing only an out-of-context snippet from *Amchem* and a superficial difference between this case and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Nor does their (b)(3) predominance theory have any legal support, instead relying on an out-of-circuit outlier case and in-Circuit decisions that simply do not apply to a case where half of the class members are precluded by state law from any cause of action.

Class counsel may have wanted a nationwide settlement that would enable class counsel to represent the largest possible class without sharing fees with attorneys representing another subclass, but that result is deeply unfair to class members with legitimate claims, and demonstrably takes tens of millions of dollars out of their pocket, and contradicts Supreme Court precedent, Ninth Circuit precedent, and Rule 23. The district court erred as a matter of law when it certified the nationwide settlement class.

Argument

I. Rule 23(a)(4) precludes class certification.

A. Plaintiffs concede the district court erred by not subjecting the settlement-only certification to a heightened adequacy analysis.

Plaintiffs admit that "[s]ettlement classes, of course, are given heightened scrutiny in certain respects," above the level of scrutiny appropriate when certifying a class

for litigation. PB18;[1] *see Amchem*, 521 U.S. at 620 (Rule 23 requires "undiluted, even heightened, attention" to a settlement-only class certification); *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). It is obvious from the course of proceedings—denying a nationwide litigation class certification and then approving an identical nationwide settlement class—that the district court's scrutiny here was not "heightened" as the law demands but instead impermissibly severely diluted. And plaintiffs do not assert otherwise, implicitly conceding that the court's analysis did not meet the standard set forth in *Amchem*. Attempting to excuse this legal error, plaintiffs point to the district court's familiarity with the case, but that truism cannot suffice—a trial court will almost always be familiar with the case. Allowing mere familiarity (or more realistically, preference for settlement and clearing a docket of a complex case) to substitute for *Amchem*'s heightened scrutiny impermissibly nullifies a key protection for class members, and contradicts binding precedent.

B. Plaintiffs' reliance on readily distinguishable cases and irrelevant facts does not justify the district court's finding of adequacy.

Plaintiffs discuss the two controlling Supreme Court cases—*Amchem* and *Ortiz*—only in passing in their response to Bednarz's adequacy argument. PB17-18. Instead, they rely heavily on the unpublished split decision in *In re Transpacific Passenger Air Transportation Antitrust Litigation*, 701 F. App'x 554 (9th Cir. 2017), as well as a smattering of other cases that involve wholly different facts. None of plaintiffs' authority establishes

[1] OB and PB refer to the opening brief and plaintiffs' merits brief respectively. As in the opening brief, ER refers to the Excerpts of Record.

that Rule 23(a)(4) allows the fundamental conflict at issue here between class members from repealer states and non-repealer states.

First, plaintiffs offer no rebuttal to a fundamental difference between this case and *Transpacific*. As Bednarz pointed out in his opening brief (OB22-23), the *Transpacific* majority held that subclasses were not required under Rule 23(a)(4) on the basis of "speculative conflicts" that had not been raised as affirmative defenses or ruled on by the district court at the time of settlement approval. 701 Fed. App'x at 556. A critical distinction between *Transpacific* and the present case—one which plaintiffs do not challenge—is that the intraclass conflict is *not* speculative here. Rather,

- class counsel acknowledged the *Illinois Brick* issue at the hearing on appointment of lead counsel (Dkt. 148 at 81);
- defendants raised and briefed the defense (Dkt. 258); and
- the district court indisputably recognized the *Illinois Brick* conflict by denying the initial motion for class certification because the *Illinois Brick* defense created an irreconcilable conflict among the claimed nationwide class of indirect purchasers. ER278.

After "find[ing] that a nationwide class under the Cartwright Act would not be appropriate" because of the *Illinois Brick* conflict, the district court directed that "[a]ny renewed motion for class certification should take this determination into account." ER278. And, indeed, following that instruction, plaintiffs abandoned their quest to certify a nationwide indirect purchaser class against the non-settling defendants. IPP Corrected Second Renewed Motion for Class Certification, Dkt. 2383.

Plaintiffs assert *ipse dixit* that because they signed the settlement agreements before the district court entered its order denying certification, the conflict remained "speculative" for purposes of the court's approval analysis. PB2; PB7. Not so. By the time the parties signed the settlement agreements in late 2016, the conflict was fully on display. The parties had presented the issue to the district court multiple times in both oral and written submissions. *See supra*. Indeed, recognizing the obvious conflict between class members who have a claim and those who manifestly do not, the *plaintiffs themselves* had argued, in the alternative, for certification of a class of repealer states. Dkt. 1036. And, in any event, the Rule 23(a)(4) analysis must take into account the facts that are revealed as the case proceeds. *Cummings v. Connell,* 316 F.3d 886, 896 (9th Cir. 2003); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612-13 (8th Cir. 2017). Here, the district court had already issued its order denying class certification based on the repealer-state/non-repealer-state conflict by the time the motion for final approval of the settlements was filed or ruled on. Dkts. 1735, 1921, 2003.

Second, plaintiffs say that *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 895 F.3d 597 (9th Cir. 2018), allows the sort of fundamental conflict at issue here. But they flatly misread *Volkswagen*. The objectors there raised a far different sort of conflict than the black-and-white all-or-nothing conflict here between class members from repealer and non-repealer states. *Volkswagen* arose from the "clean diesel" scandal in which Volkswagen installed emissions defeat devices in nearly a half million U.S. vehicles. The purported conflict was comingling vehicle owners and vehicle sellers in a single settlement class. Vehicle sellers were those who sold their

vehicles after the defeat-device scandal became public (and therefore suffered damages in the form of a lower resale value). Vehicle owners were those who still owned an affected vehicle; the restitution amount they recovered was reduced if they had acquired their vehicles after the scheme was public, *i.e.*, if they were "new owners," who presumably purchased the sellers' cars with full knowledge of the vehicle's defect. Eligible new owners and eligible sellers effectively "split" the restitution amount, as each received half of the amount that eligible owners (who were not "new" owners) recovered. *Id.* at 606-07. Examining the settlement for conflicts of interest, this Court compared the strength of eligible sellers' claims to the amount they recovered and found it was "sensible" and "fully explicable" and did not demonstrate unfairness to eligible sellers or otherwise reveal an insurmountable intra-class conflict. *Id.* at 609. The record showed that "in most instances," the restitution amount accounted for the loss realized by eligible sellers when they sold their vehicles. *Id.* And, critically, no one disputed that all owner and seller class members owned an affected vehicle during at least part of the class period and were entitled to damages. In short, rough justice is permissible for administrative efficiency so long as the shortcuts taken have *de minimis* effect. *In re Mexico Money Transfer Litigation,* 267 F. 3d 743, 746-47 (7th Cir. 2001) (Easterbrook, J.).

But "class treatment will be inappropriate even if [the class is large and individual claims are small and the defendant treated class members identically], when recovery depends on law that varies materially from state to state" as in "antitrust and securities litigation, where … state laws may differ in ways that could prevent class treatment if they supplied the principal theories of recovery." *Id.* And that is exactly what we have

in this case. The difference is not *de minimis*, but one that affirmatively eliminates the claims of class members in non-repealer states; this is not "rough justice," but an unfair wealth transfer of about half of the settlement fund, $20 million, from class members with claims to class members with no claims.

The amount recovered by class members from repealer states is not structurally explicable or sensible under any notion of fair play. Repealer state class members will recover a mere half the settlement value of their claims, solely because class counsel has forced them to give up half their recovery to people who have *no* claim to *any* recovery—that is, class counsel lumped them into a single class with purchasers from non-repealer states who have no claim for damages and agreed to an equal pro rata distribution of settlement funds. That's a far cry from the situation in *Volkswagen*, where the settling parties crafted a resolution for class members, all of whom had been injured and all of whom stood to recover considerable relief, but whose injuries differed to some degree and so would recover in differing (if imperfectly calculated) amounts. It's more analogous to the hypothetical case where the *Volkswagen* settlement class included Subaru drivers and had a *pro rata* distribution.

Thus, when plaintiffs fall back on the argument that "[s]ome variation in the relief available to class members is as much the norm as the exception" (PB13 (citing *Volkswagen*, 895 F.3d at 609 n.16)), that comment properly characterizes the amounts offered as seller restitution in *Volkswagen*—the settlement "generally fairly compensated" for the economic losses the sellers incurred on average, even if certain individual sellers may not have been made entirely whole by the recovery. *Id.* at 609; *but compare In*

re Literary Works in Elec. Databases, 654 F.3d 242 (2d Cir. 2011) (requiring subclassing and separate representation, even without a showing that class counsel and class representatives had shortchanged any subclass). But this is a straw man, because Bednarz's argument acknowledges that when a settlement contains relatively immaterial conflicts or allocations, a court may permit efficiency concerns to override "fine lines." *Mexico Money Transfer*, 267 F.3d at 747. This Court has observed in another case cited by plaintiffs that "the prospects for irreparable conflict of interest are minimal [where there are] relatively small differences in damages and potential remedies." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998). In *Hanlon*, after all, all class members "ha[d] the same problem" and the same remedy: "an allegedly defective rear latchgate which requires repair or commensurate compensation." *Id.* But that's far different from the situation here, where about half the class has a damages remedy, while the other half does not—a legal reality that plaintiffs do not dispute. In antitrust cases, settlements typically (and rightly) pay money only "to those claimants in states where the law permits recovery by indirect purchasers" and not to nationwide classes. *E.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944, 2016 WL 3648478, at *2 (N.D. Cal. July 7, 2016). That's because it is impossible for recovery from the fund by purchasers in non-repealer states not to cannibalize recovery by purchasers in repealer states.

Fourth, that a "national class" brings more "collective bargaining power … to the table" does not override the protections of Rule 23(a)(4). PB14. A larger class will almost always have more *aggregate* bargaining power than a smaller one, as a defendant typically is willing to pay additional amounts to secure a greater number of releases. But

the purchase of large amounts of res judicata is typically a warning sign that the class's interests may have been compromised, not a reason to pull out the rubber stamp. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000). It is cold comfort to a repealer state class member that the aggregate settlement amount increases by a small nuisance value through including non-repealer states in the class when his personal recovery is diluted by half. There is no record evidence that including the non-repealer states doubled the settlement value, nor could there be, because the defendants and class counsel surely understood that *Illinois Brick* would be fatal to claims in non-repealer states if class counsel's long-shot choice-of-law theory were (as it was eventually) rejected. Class counsel could have properly leveraged class members' collective bargaining power by creating subclasses with separate representation for the repealer and non-repealer states—but that would have required dilution of class counsel's fees. So be it: class counsel's fiduciary duty to the class means that they need to dilute their own fees before diluting the recovery of class members of repealer states.

Finally, plaintiffs detail at length the efforts they undertook in the "labor-intensive litigation" (PB4), but those details are irrelevant in this appeal. *Cf. In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013) ("class counsel's hard work on an action is presumably a necessary condition to obtaining attorney's fees, it is never a sufficient condition"). Bednarz does not allege that plaintiffs' counsel's lack of diligence made them inadequate representatives. In fact, he expressly disavowed any challenge to the total settlement amount achieved and does not claim that the settlement is the product

of collusion. OB28. The inadequate representation is structural—arising from the nationwide settlement that failed to differentiate between repealer and non-repealer class members—not any lack of vigor by plaintiffs' counsel in litigating the case. And it will cost class members from repealer states tens of millions of dollars.

II. The fundamental material difference between repealer and non-repealer states precludes Rule 23(b)(3) predominance.

According to plaintiffs, Rule 23(b)(3) does not require one shred of legal commonality as long as the class's claims are factually similar. PB15-18. In other words, so long as Rule 23(a)(2)'s commonality requirement is satisfied, Rule 23(b)(3) predominance is met. But Supreme Court precedent, this Court's law, and fundamental class-action principles all reject this radical argument.

Take for example both the majority and dissenting opinion in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Justice Scalia's majority held the commonality requirement of Rule 23(a)(2) not only required demonstrating "a violation of the same provision of law," it also required demonstrating that the violation occurred in a similar manner classwide. *Id.* at 350. Justice Ginsburg's dissent, on the other hand, thought that the majority had incorrectly imported the "more demanding [predominance] criteria of Rule 23(b)(3)" into Rule 23(a)(2). *Id.* at 375. But plaintiffs would have it that *both* Justice Scalia and Justice Ginsburg are incorrect, and that mere factual commonality is enough to meet even the more demanding Rule 23(b)(3) predominance requirement. All nine justices reject that proposition.

Yes, as plaintiffs note, *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011) holds otherwise, and Bednarz discussed that outlier in his opening brief. OB25-26. But *Sullivan* stands alone. In this Circuit, for (b)(3) purposes, the "common questions must be a significant aspect of the case that can be resolved for all members of the class in a single adjudication." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1067 (9th Cir. 2014) (internal quotations and alterations omitted), *abrogated on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). Under this rule, common facts unmoored by common legal questions cannot satisfy (b)(3).

Plaintiffs seek refuge in the Special Master's report and recommendation in *In re Cathode Ray Tube Antitrust Litigation* ("*CRT*") as supposedly evidencing the Northern District of California's willingness to find predominance satisfied where states have different statutory schemes applicable to indirect purchaser actions. PB16. But *CRT* supports *our* position. There, the court approved separate "indirect purchaser state classes" under which money damages were paid only to purchasers in the District of Columbia and 21 states that allow indirect-purchaser recovery. 2016 WL 721680, at *11; *CRT*, 2016 WL 3648478, at * 11. Here, the settlements did not create separate classes or subclasses to account for the claims of sharply different value held by class members in repealer and non-repealer states, respectively. Similarly, plaintiffs cite *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), for the proposition that "independent of any variation in state law, there were still sufficient common issues to warrant a class action." PB16. But *Hanlon,* which did not involve antitrust claims, possessed only "slightly differing remedies based on state statute or common law," and "to the extent distinct

remedies exist, they are local variants of a generally homogenous collection of causes." *Id.* at 1022. Even then, this Court observed that though small variations in state law "do not necessarily preclude a 23(b)(3) action, … class counsel should be prepared to demonstrate the commonality of substantive law applicable to all class members." *Id.* No such demonstration is possible here, as the district court already found in this case. Once again, the case on which plaintiffs rely actually supports Bednarz's argument.

Similarly *Eyak Native Village v. Exxon Corp*, 25 F.3d 773, 781 (9th Cir. 1994) (cited by plaintiffs at PB16), did not analyze any Rule 23 certification requirements at all, much less the predominance requirement. It simply made the generic observation that Rule 23 is a joinder device involving multiple claims "usually arising from the same set of operative facts" in the course of determining whether to remand certain of the class actions to state court based on the removal statute. *Id. Eyak Native Village* certainly does not stand for the proposition that *all* claims, even those with distinctly different rights to damages, have common issues that predominate simply because they arise from the same set of operative facts. And even if it did, it would have been superseded by all nine justices' position in *Dukes*. Plaintiffs' attempt to turn this out-of-context snippet into an anything-goes holding shows the weakness of their case.

Plaintiffs also argue that class members nationwide should recover equally because every class member may have been "affected in the same way" by defendants' alleged price fixing. PB15. So what? A California citizen victimized by a spouse's affair is affected in the same way as if he or she were a North Carolina citizen, but only the latter has a cause of action under state law for alienation of affection. That is just the

way federalism works. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 386-87 (1932) (Brandeis, J., dissenting). Plaintiffs are welcome to ask the Supreme Court to overrule *Illinois Brick* (and defendants may wish to ask the Court to overrule *California v. ARC Am. Corp.*, 490 U.S. 93 (1989)) to get that uniformity. But until then, citizens from different states have different rights. Rule 23, along with other federal rules of procedure, "must be interpreted with some degree of sensitivity to important state interests and regulatory policies." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 418 (2010) (Stevens, J., concurring in part and in the judgment) (cleaned up). Balancing the competing concerns identified in *Illinois Brick*, state legislatures have made different decisions about whether to provide their residents with a damages remedy for price-fixing that affects component parts of their purchases. "In our federal system, states may permissibly differ on the extent to which they will tolerate a degree of lessened protection for consumers" in favor of competing concerns, and it is error for a district court not to "recognize[e] each state's valid interest" as reflected in its laws. *Mazza*, 666 F.3d at 592 (cleaned up). To the extent that class counsel or class members disagree with those laws, their recourse is with the legislatures and other policy makers with authority over the issue. *Id.* Plaintiffs' request this Court to override the will of sovereign states and to declare that non-repealer state class members "should not be left without a remedy," PB15, but that misunderstands the separation of powers. As a practical matter, class members in repealer states—who have a recognized right to damages—are legally affected differently than class members in non-repealer states, who know they have no right to recover for indirect price fixing.

While *Amchem* noted generally that predominance could be readily met in cases alleging violations of the antitrust laws, PB17, *Amchem* was implicitly speaking of the uniform *federal* antitrust laws, just as *Mexico Money Transfer* did explicitly. *Amchem* certainly does not remotely suggest a default rule that all *state-law* antitrust claims can be certified on nationwide basis. *Amchem* itself mentioned "differences in state law" as a factor that compounded the individual questions and ultimate lack of predominance. 521 U.S. at 624. Post-*Amchem* decisions show how courts and legal practitioners have interpreted these statements. Typically, class action settlements either create separate classes or subclasses for repealer and non-repealer states, usually with different damages calculations, or they exclude non-repealer states entirely. *See, e.g.*, *In re Packaged Seafood Prods. Antitrust Litig.*, 277 F. Supp. 3d 1167, 1181 (S.D. Cal. Sept. 26, 2017) ("Previously, the Court dismissed Plaintiffs' putative nationwide class claims in large part because the putative class included plaintiffs in states without legislation or interpretation permitting indirect-purchaser recovery and in those states, such choices evince a policy judgment that should not be cast aside." (cleaned up)); OB29 (citing cases).

That *Amchem* and *Ortiz* involved "sprawling classes of asbestos plaintiffs" is not a valid basis for refusing to apply their holdings; just as in those cases, here, the repealer and non-repealer state class members' "legal rights clashed hopelessly" in an "irreconcilable conflict." PB18. *Amchem* and *Ortiz* instruct that common issues cannot predominate when one half of the class has claims with a right to damages and the other half

does not. *See, e.g., Mazza*, 666 F.3d at 590-96; *Perras v. H & R Block*, 789 F.3d 914, 918 (8th Cir. 2015).[2]

Plaintiffs also try to distinguish *Ortiz* by noting that the settlement there did not allow class members to opt out. PB18. But nothing in *Ortiz* limited its holding to cases in which class members do not have an opt-out right. "Regardless of whether class members are given opt-out rights, the court is still required to ensure that representation is adequate and that the settlement is fair to class members." *Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996). *See also Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1179 (9th Cir. 1977) (Kennedy, J., concurring) ("I do not believe that a provision for opting out of the class provides an entirely satisfactory answer to the claim that a lead attorney failed to discharge that duty of representation. Particularly where the settlement could be easily modified to resolve the class conflicts, the dissident members should not be required to take the settlement or leave it."). Any suggestion that class members' failure to object or opt out, particularly in a large-scale consumer class action that did not provide individualized notice, be interpreted as agreement with the settlement terms or

[2] Plaintiffs attempt to further expand the availability of the class device for indirect purchasers by arguing all that's required is a "single common question." PB17. This quote addressing (a)(2) commonality is taken out of context from *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011), and, as discussed above, is not the correct standard for (b)(3)'s predominance requirement. *See Mazza*, 666 F.3d 581 (finding that while plaintiffs could satisfy their "limited burden" to show an (a)(2) common question they could show (b)(3) predominance of neither legal or factual questions).

provide any indication of the settlement's fairness is belied by "common sense and empirical study." *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 388 (C.D. Cal. 2007); *see also, e.g.*, *Redman v. Radioshack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (describing it as "naïve" to infer assent from silence); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561 (2004) ("Common sense indicates that apathy, not decision, is the basis for inaction."); *cf. also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013) (Alito, J., concurring) (inaction in response to an opt out form is not consent).

Finally, plaintiffs' half-hearted attempt to distinguish *Mazza* should be rejected. Plaintiffs note that *Mazza* involved a choice-of-law analysis and involved a litigation, not a settlement class (though they acknowledge that "[s]ettlement classes, of course, are given heightened scrutiny in certain respects"). PB18. But this Courtt found predominance lacking in *Mazza* because the laws of multiple states applied to class members and those materially differed from one another. 666 F.3d at 589-94. That is the issue here as well. Common issues cannot predominate when the underlying claims of the class members are governed by materially and irreconcilably different laws.

III. Plaintiffs' attempt to narrow Rule 23(e)(2) does not make fair or reasonable the district court's *pro rata* allocation plan that awards class members without viable claims the same amount as those with colorable claims.

Plaintiffs wrongly suggest that the exclusive factors for determining whether a settlement is fair and reasonable are the red flags identified in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011), and, in the absence of those or express collusion, this Court must defer to the district court. PB20-21. This cramped

reading of Rule 23(e)(2) is contrary to law and would deny class members the rule's broad catch-all protections. "The release of claims for no relief is the most obvious red flag, but there are other troubling situations. For example, claims may go implicitly uncompensated if class members with different claims receive the same relief." 4 Newberg on Class Actions § 13:60.

Bluetooth expressly instructed that courts should look for *any* "subtle signs" that class counsel prioritized their own interests and those of "certain class members"—not only the three critical signs present in that settlement. 654 F.3d at 947. And though the absence of outright collusion is necessary for settlement approval, it is not sufficient; even the case cited by plaintiffs on this point expressly states that the settlement still must be fair, reasonable, and adequate. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (cited at PB21).

Plaintiffs don't dispute that in determining whether a potential settlement is fair and reasonable, a court must weigh several factors, most importantly, the strength of the plaintiffs' case against the amount offered in settlement. *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004). Yet plaintiffs do not cite to any point in the record where the district court did so. Instead, plaintiffs resort to an incomplete discussion of the Rule 23(e) analysis. They focus on potential settlement concerns that Bednarz expressly disavowed, such as the sufficiency of the aggregate settlement amount, arms-length settlement negotiations, and an absence of explicit collusion. PB20-21. If the district court had weighed the strength of plaintiffs' case against the amount of settlement recovery here, the settlement would not have passed muster. A

class member from a non-repealer state has *no claim* and thus should recover nothing or, at most, some nominal amount as the nuisance value, while a class member from a repealer state has a legitimate claim whose settlement value is cut in approximately half due to dilution from the non-repealer claims included in the same settlement class. The disparity between the respective claims and the amount of settlement for each flunks that test.

Plaintiffs assert that settlements in which "all [class members] stand to benefit equally lessens the likelihood that there was collusion." PB21 (quoting *Hanlon*, 150 F.3d at 1027). Even if there were any basis for this proposition (why on earth would colluding parties be less likely to agree to a less complex uniform settlement than non-colluding parties?), the absence of collusion is necessary, but not sufficient—and not at all at issue here. (No collusion is required for class counsel and defendant to agree to illegally short-change a subclass of class members not at the bargaining table when it's in both of the settling parties' economic self-interest to do so. The defendant wants the broadest release possible at the lowest expense without caring about the allocation, and the class counsel does not want to share its fees with a separately represented subclass.) Meanwhile, plaintiffs fail to engage with the rule's requirement—and basic fairness principle—that similarly situated class members must be treated similarly, and dissimilarly situated class members must not be arbitrarily treated the same. *See* OB27 (citing authorities). As *Ortiz* states expressly, "[t]he very decision to treat [class members] all the same is itself an allocation decision with results almost certainly different from the results that [the two groups with different rights to damages] would have chosen." 527

U.S. at 857. Plaintiffs don't dispute that class members from repealer states had materially different claims than those from non-repealer states, or that the class members from repealer states recovered materially less under the *pro rata* allocation plan than they would have under an allocation plan that more closely adhered to the "strength of the plaintiffs' case." *Churchill Village*, 361 F.3d at 576. The result is grossly unreasonable and unfair to class members from repealer states such as Bednarz, who had their recovery cut in half by the inclusion of class members who would have no right to any monetary recovery in routine bilateral litigation. Rule 23(e) protects against such a result.

Contrary to plaintiffs' suggestion, remand for the "limited purpose of modifying the distribution/allocation plan for class members in non-repealer states" is not a viable solution to these fairness problems. *See* PB11. The plaintiffs have demonstrated that they wish to dilute the recovery of the repealer-state class members, and need to be replaced as class representatives. They knew of the *Illinois Brick* problem at the front end, and have defended shortchanging repealer-state class members at the district court and in this appeal. That breach of fiduciary duty disentitles class counsel to the mulligan they request. *Cf. Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012) (affirming district-court decision to zero out attorneys' fees in antitrust class-action settlement where class counsel attempted to deprive the class of adequate representation by creating a conflict of interest). To ensure that those class members are adequately represented with respect to all terms of the settlement, including the allocation of relief as well as the release of claims, each group requires separate representation during the negotiation of those terms. *E.g., Ortiz*, 527 U.S. at 856, 857. Furthermore, it would be legally improper for

plaintiffs' counsel to be allowed to tinker with the allocation plan simply to salvage the settlement without also requiring correction of the certification deficiencies. OB20-22 (citing authorities).

IV. The district court completely failed to conduct any choice-of-law analysis before certifying a nationwide class.

Plaintiffs do not dispute that Ninth Circuit law holds that a district court abuses its discretion when it fails to conduct a choice of law analysis or rigorously analyze differences in state laws before certifying a single nationwide settlement class under Rule 23(b)(3). *See Mazza*, 666 F.3d at 589-91. Plaintiffs' defense of the district court's analysis appears to rely on a single sentence in the court's final approval order. According to plaintiffs, this demonstrates that the district court in fact conducted a choice-of-law analysis, and they argue there's nothing wrong with such a "succinct" finding, particularly given the court's multi-year involvement in the litigation. PB22 (citing ER8).

But the district court did not, in fact, undertake *any* choice-of-law analysis. It simply stated in response to the objectors' arguments that, "[a]s to the [intraclass conflict] objection, the Court finds that, for purposes of the settlement, common issues predominate, even if individual state laws might have affected some settlement class members' right to recovery had the case proceeded to trial." ER8. But this finding was an attempt to bolster its absence-of-conflict finding and not a choice-of-law analysis; thus, the court cited Rule 23(a)(4) and (b)(3) cases such as *Transpacific* and *Sullivan*. *Id.* "[F]our years of factual familiarity with this case," PB22, does not substitute for the requisite analysis. As if to underscore this point, when the district court actually analyzed

the choice-of-law issues in its earlier order denying class certification, it rejected a class that would apply California's antitrust law nationwide. ER278; *see* OB30-31. A "succinct" conclusory statement cannot possibly explain the difference in results when the more detailed analysis reached the correct, opposite conclusion.

Plaintiffs argue that remand for additional choice-of-law findings would serve "no practical purpose." PB23. This is wrong. Presumably, if this Court were to remand, the district court would undertake a conflict-of-law analysis in good faith. It is likely the district court would reach the same conclusion that it did when it analyzed choice-of-law issues in its certification order, and find sharp, certification-defeating differences in the claims held by class members from repealer and non-repealer states. If anything, the choice-of-law analysis is so obvious under *Mazza* that this Court can perform it and reject certification, because class counsel makes no claim that the district court erred in refusing to let California dictate the law of non-repealer states. ER278.

Contrary to plaintiffs' suggestion, the adequacy of the overall settlement amount (which, again, Bednarz does not challenge) and the supposed fairness of a distribution plan at the time of preliminary approval (when a court is not giving a settlement close scrutiny) cannot insulate the proposed class and settlement from a court's close scrutiny at the final approval stage. *See* PB23. If it did, then the Rule 23(e) fairness hearing would simply be a redundant formality, and it would be a due-process violation to fail to give absent class members notice and an opportunity to be heard at the preliminary-approval hearing that class counsel incorrectly claims to be dispositive.

Plaintiffs correctly note that *In re Hyundai & Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018), is vacated and pending *en banc* review, and no longer good law. But Bednarz's argument does not depend on the *Hyundai* majority; as Bednarz noted, even under the *Hyundai* dissent's analysis, there is reversible error here. OB31. Bednarz will file a Rule 28(j) letter when the *Hyundai en banc* decision comes down.

While the choice-of-law analysis of whether California law may apply to the nationwide class here may itself be a single common question, PB23, the resulting divisions within the class once the district court answers "no," preclude common questions from predominating or representation that is adequate without further subclassing. *See* Sections I and II above. Plaintiffs' proposed rule of decision leads to the absurd result that any multistate—or even multinational—class could satisfy class-certification requirements simply by making a frivolous argument for a single-jurisdiction choice-of-law ruling. If that were the law, *Mazza* would have reached the opposite result.

Plaintiffs in a footnote suggest that indirect purchasers have uniform nationwide claims under the Wilson Tariff Act of 1894, 15 U.S.C. § 8. PB24. "The summary mention of an issue in a footnote, without reasoning in support" forfeits an appellate argument. *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.4 (9th Cir. 1996). But in any event the argument is wrong and fundamentally unserious. Plaintiffs cite absolutely no authority for the proposition that indirect purchasers have federal Section 8 claims when they are precluded from recovery under 15 U.S.C. § 1 and *Illinois Brick*. None exists. "The antitrust provisions of the Wilson Tariff Act follow the same pattern as the Sherman Act," and do not expand remedies. *United States v. Cooper Corp.*, 312 US 600, 608

(1941); *accord Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 513 F. Supp. 1100, 1162-64 (E.D. Pa. 1981) (Becker, J.). *Sullivan* does not attempt to base its decision on distinguishing the Sherman Act and Wilson Tariff Act. And plaintiffs thought so little of the Wilson Tariff Act argument in the district court that they did not even mention it in their 86-page motion for class certification. Dkt. 1036. That they make it in this Court is a sign of desperately throwing spaghetti at the wall to save an indefensible decision below.

At a minimum, remand is necessary for the district court to make findings for the purpose of undertaking a choice-of-law analysis, but the Court can go further and simply rule that choice of law precludes the class certification.

Conclusion

This Court should decertify the class, reverse the district court's settlement approval, and remand for further proceedings.

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Respectfully submitted,

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for Case Number 17-17367

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,396 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 August 28, 2018.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on August 28, 2018, 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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