Nos. 16-3382 & 16-3482

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-3382

MARK I. ADAMS and KATHERINE S. ADAMS,

v.

USAA CASUALTY INSURANCE COMPANY,
doing business as USAA, et al.,

v.

WYSTAN MICHAEL ACKERMAN,

KENNETH (CASEY) CASTLEBERRY,
Appellant,

STEPHEN O. CLANCY, et al.,

JOHN C. GOODSON, et al.,
Appellants,

LYN PEEPLES PRUITT,

WILLIAM B. PUTMAN, et al.,
Appellants,

COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS,
Amicus Curiae-Appellee.

Appeal from the United States District Court
for the Western District of Arkansas – Ft. Smith, No. 2:14-cv-02013-PKH.
The Honorable P. K. Holmes, III, Judge Presiding.

Brief of *Amicus Curiae*-Appellee
Competitive Enterprise Institute Center for Class Action Fairness

(CONTINUED ON INSIDE COVER)

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CENTER FOR CLASS ACTION FAIRNESS,
***Amicus Curiae-Appellee*.**

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Summary of the Case and Request for Oral Argument

Attorneys for plaintiffs and defendants in a federal class action agreed to a settlement in principle that would pay class counsel substantially more, and the class substantially less, than what the district court would approve. The attorneys agreed that they would forum-shop the settlement to a state court where there would be substantially less scrutiny of the settlement. They did not inform the court of this fact over the several months more that the case remained in federal court; indeed, the court did not learn of it at all until a magazine published an exposé of the scheme months later. The parties stipulated to a clerk-ordered dismissal without notice to the class and immediately filed a new suit in a state court, which approved the settlement and a $1,850,000 fee award without learning that only 4% of the class filed a claim and the primary beneficiaries of the settlement were attorneys.

After hearings on orders to show cause, the court found that the attorneys exhibited lack of candor and had dismissed the case for the improper purpose of seeking a more favorable forum and avoiding federal review at the expense of absent class members. The court issued, under Rule 11(b)(1) and its inherent power, a reprimand of five of the plaintiffs' attorneys for their role. Fifteen attorneys appeal, including ten who prevailed, suffered no sanctions, and have no appellate standing.

The court acted within its discretion in issuing sanctions, and appellants' request for *carte blanche* to engage in secret forum-shopping that prejudices absent class members runs afoul of class counsel's and courts' fiduciary duties to those class members. Appellee does not object to appellants' request for oral argument.

Corporate Disclosure Statement

Amicus curiae/court-appointed appellee Competitive Enterprise Institute is an IRC § 501(c)(3) non-profit corporation incorporated under the laws of Washington, D.C., with its principal place of business in Washington, D.C. It does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. The corporation is operated by a volunteer Board of Directors.

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Jurisdictional Statement

The Castleberry and Ackerman Appellants' jurisdictional statements are not complete and correct. True, the district court had jurisdiction under 28 U.S.C § 1332(d) and *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990). AB1.[1] And this Court has jurisdiction over the appeals of the "Reprimanded Counsel"[2] under 28 U.S.C § 1291. But this Court does not have jurisdiction over the appeals of the ten Non-Reprimanded Counsel.

Appellants assert that Non-Reprimanded Counsel have standing to appeal based on the district court's particularized finding that they violated Rule 11 and abused the judicial process. CB2; AB1. But this contradicts this Court's declaration that if judicial comments "[do] not amount to a sanction, they would not be appealable at all, except perhaps by writ of mandamus." *Baker Group, L.C., v. Burlington N. & Santa Fe Ry.*, 451 F.3d 484, 491 (8th Cir. 2006). Most other circuits agree. *United States v. Rivera*, 613 F.3d 1046, 1052-1053 (11th Cir. 2010) ("Most circuits have declined to exercise jurisdiction over challenges to naked findings of fact about even attorney misconduct because an order to vacate statements or findings in a judicial opinion alone would not usually affect any tangible interest, thus placing such an order outside of our Article III power

[1] We use the abbreviations "CB," "AB," "ADD," and "A" to refer to the Castleberry Appellants' Opening Brief, the Ackerman Appellants' Opening Brief, the Castleberry Appellants' Addendum, and the Joint Appendix respectively.

[2] For convenience, we follow Castleberry's terminology of "Reprimanded Counsel." CB1. "Non-Reprimanded Counsel" refers to the seven "Non-Reprimanded Counsel" identified by Castleberry, CB1, plus the three Ackerman Appellants, none of whom were sanctioned. AB15; ADD- 47.

to decide cases and controversies….We agree.") (internal quotation and citations omitted); *In re Williams*, 156 F.3d 86, 92 (1st Cir. 1998) (concluding that only judicial comments expressly identified as reprimands or sanctions are appealable); *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1200 (9th Cir. 1999) (agreeing with *Williams*); *Martinez v. City of Chicago*, 823 F.3d 1050, 1054-1055 (7th Cir. 2016) (only imposition of formal sanctions, monetary or non-monetary, creates an appealable order); *Nisus Corp. v. Perma-Chink Sys.*, 497 F.3d 1316, 1320 (Fed. Cir. 2007) ("a court's order that criticizes an attorney and that is intended to be 'a formal judicial action' in a disciplinary proceeding is an appealable decision, but … other kinds of judicial criticisms of lawyers' actions are not reviewable.").

With respect to Non-Reprimanded Counsel, the district court "ordered that no sanctions shall issue." ADD-47. Castleberry fails to mention *Baker*, the only relevant in-circuit authority, and incorrectly characterizes its position as a "minority view" that "is rejected…by almost all Circuits," though several maintain that view. CB3 n.2. Ackerman forthrightly acknowledges *Baker* but argues that it may be distinguished because the district court there only found that "ethical violations may have occurred." 451 F.3d at 491; AB1. But *Baker*'s reasoning is dispositive here. The *Baker* appellants argued that they had standing because of the district court's referral of possible ethical violations to an attorney disciplinary authority. *Id. Baker* held such referrals are not appealable because they are "analogous not to a censure or reprimand but to an order to show cause why sanctions should not be imposed." *Id.* (quoting *Teaford v. Ford Motor*

Co., 338 F.3d 1179, 1181 (10th Cir. 2003)). Show cause orders, in turn, are not appealable, because "no actual sanction has been imposed." *Teaford*, 338 F.3d at 1181.

Here, the district court explicitly refrained from referring any of the Appellants to disciplinary authorities. ADD-37 n.4. It issued its own show cause order. ADD-51-57. Because a show cause order is non-appealable, it follows *a fortiori* that Non-Reprimanded Counsel cannot appeal. Their efforts to convince the district court not to impose any sanctions upon them were successful. "Unwelcome language in a substantively favorable decision is not the kind of adverse effect that meets the requirement of actual injury." *United States v. Accra Pac, Inc.*, 173 F.3d 630, 632 (7th Cir. 1999). Courts "review[] judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (*per curiam*) (internal quotation marks omitted).

Moreover, most of the out-of-circuit cases relied on by Appellants (CB2-3; AB2) are distinguishable because the district courts either were not explicit in rejecting formal sanctions[3] or only reached the conclusion that a particularized finding of misconduct was appealable in dicta.[4] *In re Goldstein*, 430 F.3d 106 (2d Cir. 2005) is inapposite because, unlike here, it involved the district court's referral of the matter to a disciplinary committee. Even if the district court had made such a referral, this Circuit holds that is

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[3] *United States v. Talao*, 222 F.3d 1133, 1138 (9th Cir. 2000); *In re Wingerter*, 594 F.3d 931, 938 (6th Cir. 2010); *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1168-69 (10th Cir. 2003); *Adams v. Ford Motor Co.*, 653 F.3d 299, 304-06 (3d Cir. 2011); *United States v. Llanez-Garcia*, 735 F.3d 483, 491 (6th Cir. 2013)

[4] *Zente v. Credit Mgmt., LP*, 789 F.3d 601, 604 (5th Cir. 2015); *Keach v. Schenectady*, 593 F.3d 218, 225 (2d Cir. 2010).

insufficient to create jurisdiction on appeal. The weight of authority, including most notably *Baker*, would deny Non-Reprimanded Counsel standing to appeal.

The notices of appeal were timely under Fed. R. App. Proc. 4(a).

Statement of the Issues

In overseeing putative class actions, "the district court acts as a fiduciary, serving as a guardian of the rights of absent class members." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). Did the district court act within its discretion under Fed. R. Civ. P. 11(b)(1) or its inherent authority by reprimanding certain class counsel for forum-shopping their proposed class settlement into state court for the purpose of evading the district court's review where the known effect was to prejudice absent class members and where the court found a lack of candor and bad faith in their actions?

Shelton v. Pargo, 582 F.2d 1298, 1305 (4th Cir. 1978);

Standard Fire v. Knowles, 133 S. Ct. 1345 (2013);

Class Action Fairness Act of 2005, 28 U.S.C. § 1711, *et seq.*;

Thatcher v. Hanover Ins. Grp., Inc., 659 F.3d 1212 (8th Cir. 2011);

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

Statement of the Case

Appellants' statement of the case gives short shrift to certain factual findings made by the district court.

A. Litigation and a forum-shopped settlement.

Plaintiffs filed a putative class action against three USAA entities in the Circuit Court of Polk County, Arkansas, on December 5, 2013, and defendants removed to the Western District of Arkansas on January 15, 2014, under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). ADD-2. Defendants moved for partial judgment on the pleadings April 29, 2014. The parties stayed litigation repeatedly while they negotiated a settlement through a mediator. *Id.* On March 31, 2015, the parties reached a settlement in principle that would require dismissal of the action in federal court and refiling in Polk County. ADD-2-3. The parties did not disclose this to the district court. Instead, on April 15, 2015, defense withdrew their motion to dismiss, and the parties filed a joint Rule 26(f) report proposing several dates for continued litigation of the suit in district court, claiming that they expected the litigation to last into 2016. ADD-3, 22. The district court entered a scheduling order on the basis of the Rule 26(f) report. ADD-3.

On June 16, 2015, the parties, again without any disclosure to the federal court, executed a settlement agreement identifying the reviewing court as the Circuit Court of Polk County, case number left to be determined. ADD-3; A-230-70. The settlement established a claims-made procedure: any moneys unclaimed by the thousands of class members would remain unpaid by USAA, which would receive a release of all of its

claims. ADD-11 & nn.8-9. As another judge has noted, defense counsel Ackerman has written independently of this case that claims-made settlements permit defendants to settle cases for cheaper. *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 299 n.5 (6th Cir. 2016) (Clay, J., dissenting). The settlement provided that USAA would pay $1,850,000 to class counsel, and further provided "clear sailing"—USAA was forbidden from challenging the appropriateness of the fee award. ADD-34, 54; A-259. Any reduction in the fee would revert to USAA, rather than to the class. A-259.

Arkansas state courts make it difficult for class members to exercise their right of objection, and exercise less stringent review of class action certifications and settlements. ADD-10-13; ADD-34. By contrast, Judge Holmes has a history of zealously protecting the interests of absent class members and policing overreaching counsel, and has expressed disfavor to clear-sailing provisions and reversionary clauses. ADD-55. Furthermore, Arkansas does not have CAFA's requirement of giving notice to relevant state attorneys general of a settlement. 28 U.S.C. § 1715.

On June 19, 2015, the parties jointly dismissed the federal suit by stipulation. ADD-3. The clerk entered the order on June 22, 2015. *Id.* The parties immediately refiled the suit in the Circuit Court of Polk County along with a joint motion to certify a class action and approve the stipulated class settlement that the parties had negotiated and executed while appearing in the federal action. *Id.* Despite representing in the settlement agreement that the class size likely topped out at 7,687 members, Respondents sent 15,027 notices. ADD-3. The notice, ten pages of small print, did not disclose the existence of the previous federal suit. A-407-16. Any class member wishing

to make a claim had to fill out and mail a detailed four-page claim form under penalty of perjury. A-417-20. Only 651 class members made claims; the settling parties have never disclosed to the federal or state courts how much cash was actually paid to the class; the district court held it to be nowhere near the "estimated potential settlement value" of $3.4 million. ADD-3 n.2. In their settlement papers, appellants told the state court that the settlement was making available a common fund, though it was not. ADD-21-22. The state court approved the settlement and full fee request on December 21, 2015, in an order whose form was approved by the settling parties. A-481.

B. The district court learns of the forum-shopping scheme, issues an order to show cause, and finds sanctions appropriate.

The district court learned of the state-court proceedings through a December 14, 2015 *Arkansas Business* story exposing the scheme and the attorney-friendly settlement; there is no evidence in the record that the press had previously covered efforts to evade federal scrutiny of class-action settlements or that any federal judges were previously aware of the problem. ADD-51 n.2; A92-97.

The district court *sua sponte* issued orders to all counsel of record to show cause why they should not be sanctioned under Rule 11(b)(1) (December 21, 2015) and its inherent authority (February 11, 2016). ADD-51-59. The court agreed with the *Arkansas Business* article that the tactic seemed to have been designed "for the purpose of evading this Court's review of their negotiated settlement" and that the federal court would not have approved the settlement. ADD-54-55.

In their lengthy responding papers of hundreds of pages, the attorneys did not mention *Thatcher v. Hanover Ins. Group, Inc.*, 659 F.3d 1212 (8th Cir. 2011). A-98-725, 728-803. At the February 18 show cause hearing, the district court expressed surprise over this omission, and asked if any counsel were unaware of the case; the Reprimanded Attorneys acknowledged awareness. Dkt. 55 at 29-31; ADD-20-21. They also admitted that the reversionary claims-made settlement was not a common fund, as they contended in state court (and in papers to the federal court, A-140). ADD-22.

On April 14, the district court held Rule 11(b)(1) violated because the attorneys engaged in improper forum-shopping to escape federal scrutiny of their class action. ADD-12-13. This "significantly curtailed" the rights of class members. ADD-19-20. Because of the Reprimanded Attorneys' awareness of *Thatcher*, they "knew from the time dismissal and return to state court was first raised in the settlement negotiations in this case until the time that the stipulation of dismissal was filed that dismissal for the purpose of seeking out a more favorable forum or avoiding an adverse decision is improper," yet failed to either move for settlement in the federal court or ask for a joint motion for dismissal with full disclosure to the district court. ADD-20-21. "Either they desired to conceal the purpose of their dismissal from the Court or they were recklessly indifferent to whether that purpose was proper." ADD-21.

Class counsel admitted that they wanted to deter objectors by taking advantage of favorable Arkansas procedure against objectors, but claimed to be especially worried about extortionate professional objectors. The district court found that "Plaintiffs' counsel was just as worried—and likely more worried—about actual, good-faith

objections to their proposed settlement as they were about any speculative 'professional' objections." ADD-10 n.7.

As partial support of its bad-faith determination, the court found evidence that Reprimanded Attorneys "engaged in misleading conduct" in their representations to the state court about the nature of the settlement. ADD-21-22.

The court found that the facts supporting Rule 11 sanctions supplied parallel grounds for sanctions under its inherent authority, providing extensive legal analysis. ADD-24-31. It suggested severe sanctions, including an injunction, for those attorneys found to have acted in bad faith, and reprimands or admonitions for those who hadn't, and ordered another hearing about the nature of the sanctions. ADD-23-24.

C. In response to additional argument, the district court reprimands five attorneys, and agrees not to sanction the others.

In advance of the hearing, the attorneys provided additional facts to the court, and the court modified some of its findings, entirely exonerating an attorney with minimal participation. Respondents disputed a finding that they misled the state court about the claims process or the federal court about the Rule 26(f) report, and the district court withdrew those findings. ADD-36-37.

Respondents made an argument that they had not been previously sanctioned for the conduct; the district court took this into consideration, but noted the *pro forma* nature of stipulated dismissals and concluded that there was not evidence that "the presiding [federal] judges had any real awareness of what happened post-dismissal." ADD-38. (The Respondents did not present any evidence that the federal courts in

question had considered the fairness of the state-court settlements or otherwise satisfied their fiduciary duty to absent class members.) The court further noted that there was a substantive difference between staying a federal action so a parallel state action may move forward to completion and dismissing a federal action to bring a brand new state-court suit undisclosed to the court. ADD-38-39.

The court disagreed with class counsel's argument that CAFA and 2003 amendments to Rule 23 "specifically" permitted their conduct, noting that the argument would "run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" ADD-39-42 (quoting *Standard Fire Ins. v. Knowles*, 133 S.Ct. 1345, 1350 (2013) and citing other authorities).

The Court noted that Eighth Circuit precedent expressly disapproved of mid-litigation forum-shopping tactics in "simple and clear" terms, and that eight of the Respondents knew of that precedent. ADD-42-45. It found mitigating evidence for the Ackerman Appellants, because of the countervailing instruction from USAA to settle and their "helplessness" in the face of their ethical obligation to follow that instruction. While this did not entirely excuse defense counsel's failure of candor to the Court, it meant that a bad-faith finding was not appropriate, because Rule 11 sanctions should not conflict with the duty to represent a client zealously. ADD-45-46.

The Reprimanded Attorneys had no such mitigating factor. The court agreed that injunctive relief was not necessary, and imposed the lesser sanction of reprimand. ADD-46-47. For the other Non-Reprimanded Attorneys who had acted for an

improper purpose but not in bad faith, the court found no sanctions were needed because the publicity to date was sufficient deterrence. ADD-46.

Appellants timely appealed. Because there was no appellee, this Court appointed *amicus* to defend the district court's decision as appellee.

Summary of the Argument

This Court should understand its deferential review of the district court's sanctions in the context of the unique problems presented by class-action settlements and the unique fiduciary duty district courts owe to absent class members. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). The incentive of a settling defendant is to minimize its total cost of settlement; the incentive of a settling class counsel is to maximize its fee. The two share a joint interest in tacitly agreeing to structure a settlement to reduce the amount the class receives. In the absence of meaningful judicial scrutiny under Fed. R. Civ. Proc. 23(e), settling parties can sacrifice the rights of absent class members for their own benefit, and a stipulated Rule 41(a)(1)(A)(ii) dismissal can have the effect, as it did here, of unfairly prejudicing absent class members.

Here, the settling parties agreed to a claims-made settlement where the proposed fees substantially exceeded the anticipated actual benefit to the class—a scenario where, in previous cases, the same district court had substantially reduced the fees of class counsel. Instead of presenting it to the federal court for scrutiny (and to the Arkansas Attorney General as 28 U.S.C. § 1715 would otherwise require), the parties intentionally forum-shopped the settlement to an Arkansas state court "for the improper purpose of

seeking a more favorable forum and avoiding an adverse decision." ADD-34. As a result, as the district court found, and the appellants do not seriously dispute, the forum-shopping benefited "Plaintiffs' counsel and Defendants at the expense of the class." *Id.*

Appellants propose a rule that allows such mid-litigation forum-shopping to avoid judicial scrutiny of class-action settlements at the expense of absent class members and leaves federal courts powerless to do anything about it. But this is not so. Rule 11(b)(1) permits sanctions for papers presented for "*any* improper purpose," and subjective bad faith is a permissible reason for such sanctions. Appellants conflate the standards for frivolousness under Rules 11(b)(2) and (3) with the "improper purpose" standard under Rule 11(b)(1). These are distinct inquiries and the district court appropriately found an improper purpose in the self-dealing at the expense of absent class members. This is a breach of fiduciary duty—and one to the same absent class members the district court itself has a fiduciary duty to. And given the Reprimanded Attorneys' admitted knowledge of the *Thatcher* precedent, and their lack of candor to the district court (and the failure to even mention *Thatcher* in their first responses to the order to show cause), the district court did not clearly err in finding bad faith for the lack of candor to the court. That lack of candor was critical to the district court's holding. ADD-45.

While other courts have been permissive about letting federal class actions be resolved in state court, there is no evidence in the record that they did so knowing that the resulting state-court settlements would not have met federal scrutiny; we cannot find any instance of press coverage of this forum-shopping scheme before the *Arkansas*

Business exposé. In any event, the district court considered this history in exonerating the Ackerman Appellants of bad faith.

The district court found that "some sanction is necessary to deter [Appellants'] future misconduct and vindicate judicial authority," ADD-46, and this is not clearly erroneous. A reprimand is a mild form of sanction, appropriate to the circumstances here where the reprimanded attorneys continue to be unapologetic for their actions.

Standard of Review

Appellants argue that the standard of review is "more exacting than under the ordinary abuse-of-discretion standard" because the district court imposed sanctions *sua sponte*. AB21; *accord* CB24. Yet, even in such a context, this Court applies deferential review. *E.g., MHC Inv. Co. v. Racom Corp.*, 323 F.3d 620, 624 (8th Cir. 2003). Moreover, a "more exacting" standard is inappropriate and should be inapplicable where, as here, a district court is tackling collusive misconduct by the parties that would never come before a court *unless* raised *sua sponte*. Nothing in this Court's precedents about *sua sponte* sanctions suggests that attorneys engaging in collusive behavior in class-action settlements are entitled to more appellate review than other kinds of misconduct, or requires courts to restrict such sanctions to matters rising to contempt. And given the inherent systemic risks of collusive misconduct in the class-action settlement context (*see* Section I.A below), and the probability that malfeasance will not be caught in nonadversary proceedings, district courts should, if anything, be given more discretion to impose sanctions for abusive behavior. *Cf. Eubank v. Pella Corp.*, 753 F.3d 718, 720

(7th Cir. 2014) (Posner, J.) (noting "disadvantage" district-court judges have in protecting class).

Furthermore, a court has more discretion to issue a light sanction like the reprimand the district court issued here: "the district court's discretion narrows as the severity of the sanction or remedy it elects increases." *Wegener v. Johnson*, 527 F.3d 687, 692 (8th Cir. 2008). And "[d]eterminations under Rule 11 often involve fact-intensive, close calls, and we give deference to the determination of courts on the front lines of litigation because these courts are best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted." *Jones v. United Parcel Serv., Inc.*, 460 F.3d 1004, 1010 (8th Cir. 2006) (internal citations, quotations and alterations omitted); *see generally Bryant v. Brooklyn Barbecue Corp.*, 932 F.2d 697, 699-700 (8th Cir. 1991). As in *Jones*, it is "unnecessary to resolve th[e] issue [of whether a contempt-like standard applies to *sua sponte* Rule 11 sanctions], because assuming that Rule 11 does require a finding of subjective bad faith to impose sanctions on a court's own initiative, the district court made such a finding here." 460 F.3d at 1010.

Similarly, the review of inherent-authority sanctions is for abuse of discretion. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991). This determination is "deferential" as well, calling for a determination not of "what [this Court] might have done if the situation had been presented to [it] originally, but rather, whether the district court abused its discretion in imposing the sanction. In particular, whether the extent of a sanction is appropriate is a question peculiarly committed to the district court." *Bass v.*

GMC, 150 F.3d 842, 851 (8th Cir. 1998) (internal quotation marks and citations omitted).

The district court's predicate factual finding of bad faith is reviewed for clear error, as is its factual finding that papers were filed for an improper purpose. *Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 803 (8th Cir. 2005); *In re Easton*, 882 F.2d 312, 315 (8th Cir. 1989); *In re Coones Ranch*, 7 F.3d 740, 744 (8th Cir. 1993). "Where there are two permissible views of the evidence, [this Court] must uphold the fact finder's choice between them." *Coones Ranch*, 7 F.3d at 743.

This Court may affirm the judgment below on any ground supported by the record, whether or not raised or relied on in the district court. *Christiansen v. W. Branch Cmty. Sch. Dist.*, 674 F.3d 927, 934 (8th Cir. 2012).

Argument

I. District courts have the authority, indeed the responsibility, to ensure that class counsel is upholding its ethical and fiduciary duties to putative absent class members at all times.

This Court can best understand the problem presented by Appellants' conduct, and why this Court must affirm the district court's order, in the unique context of the problems that class-action settlements present for courts.

A. As courts have repeatedly recognized, class action settlements present structural principal-agent problems.

Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds that

widely distribute harm. As with many other cases, some class actions must be settled, sparing both sides the costs and uncertainties of litigation. But as multiple courts recognize, class-action *settlements* create special problems for our adversary system, because in that *non*-adversary context, it is not always clear that class counsel will have the best interests of their clients at heart. The Sixth Circuit explains:

> Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. And thus there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own.

In re Dry Max Pampers Litig., 724 F.3d 713, 715 (6th Cir. 2013) (*"Pampers"*).

Thus, while class counsel and defendants have an incentive to bargain effectively over the *size* of a settlement, similar incentives do not govern their critical decisions about how to divvy it up—including the portion allocated to counsel's own fees. The defendant cares only about the bottom line, and will take any deal that drives it down. Meanwhile, class counsel have an obvious incentive to seek the largest portion possible for themselves, and will accept bargains that are worse for the class if their share is sufficiently increased. Humans are human, and unfortunately, the *people* at the bargaining table can all get something for themselves by favoring attorneys' fees over class recovery; as Judge Posner has explained: "From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount

but heavily tilted toward attorneys' fees." *Eubank*, 753 F.3d at 720. That is hugely problematic because our adversary system—and the valuable role class actions play within it—both depend upon *unconflicted* counsel's zealous advocacy for their clients, especially where (as here) those clients do not even get to choose their counsel for themselves.

The potential for conflict is structural and acute because every dollar reserved to the class is a dollar defendants will not want to pay class counsel. *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (fees and class recovery are a "package deal"). Defendants care only about minimizing payments and are indifferent to allocation, and so a court must ensure that counsel is not self-dealing at the class's expense. *Redman v. RadioShack*, 768 F.3d 622, 629 (7th Cir. 2014); *Pearson v. NBTY, Inc.,* 772 F.3d 778, 786-87 (7th Cir. 2014); *Pampers,* 724 F.3d at 718; *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011). The problem, however, is that class counsel has various tools available to hide some of the allocative decisions that get made between counsel and class recovery, and can very subtly trade benefits to the defendant for a bigger personal share. The primary object of these tools is to create the illusion of valuable relief to class members, which in turn justifies an outsized attorneys' fee request absent rigorous doctrinal tests designed to weed out this abuse.

To see this, imagine a lawyer actually and openly tried to compromise a class action with a straightforward cash settlement paying him $1.85 million and paying class members $300,000 or less—as this settlement ultimately did. It is hard to believe that any judge would approve that deal. *See, e.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th

Cir. 2012) (class counsel receiving even 38.9% of settlement benefit is "clearly excessive"); *Eastwood v. S. Farm Bureau Cas. Ins. Co.*, No. 3:11-cv-03075, 2014 U.S. Dist. LEXIS 142652 (W.D. Ark. Oct. 7, 2014) (substantially reducing fee). Accordingly, to have any chance of surviving review, such a deal must be structured to obfuscate the likelihood of this result. This is accomplished by larding the analysis with hypothetical class recoveries and difficult-to-calculate "benefits" that ultimately have little value to the class, but are cheap for defendants to provide and so easy to include in the deal.

Chief among the means to this end is a "claims-made distribution process," where defendants agree to make a large amount of money *available* but only pay out based on the claims that class members actually file. In consumer-fraud class actions, for example, it can be relatively difficult to identify exactly who bought the product and so should share in the class recovery. Incentivizing counsel to actually seek them out can help ameliorate the problem. But the frequently invoked alternative is for the defendant to agree to make a small amount available to all of the many people who might make a no-proof claim (say, $5 each for 10 million possible claimants), and to simply publish this fact in a newspaper or some such. The utterly predictable result is that the vast majority of class members go totally uncompensated because they do not file a claim. *See, e.g.*, *Pearson*, 772 F.3d at 782; *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175-76 (3d Cir. 2013); Alison Frankel, *A Smoking Gun In Debate Over Consumer Class Actions?*, REUTERS (May 9, 2014) (noting that median claim rate in such cases is "1 claim per 4,350 class members"); Jacob Gershman, *Value of Beck's Beer Settlement a Case Study in Class Action Math*, WALL ST. J. (Oct. 22, 2015) (same). The defendant gets off cheaply;

the class goes largely uncompensated, even if $5 was the full measure of their damages. *See Gascho v. Global Fitness Holdings, LLC*, 822 F.33d 269, 299 n.5 (6th Cir. 2016) (Clay, J., dissenting) (quoting Wystan M. Ackerman as evidence of the defense bar's belief that "the 'principal advantage' of opt-in, claims-made settlements…is that defendants would pay much less than if they simply mailed out checks").[5] But now class counsel can say they made $50 million available and thereby try to justify a fee award in the many millions of dollars. *See* Barbara J. Rothstein & Thomas E. Willging, Fed. Jud. Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 19-20 (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/$file/ClassGd3.pdf (claims-made settlement with reversion to the defendant of unclaimed funds is a "hot button indicator" of unfairness).

Relatedly, it is important to note that all class-action settlements inhabit a difficult place in our adversary system: a district court has *litigants* before it who (1) want to settle, (2) have almost all of the financial interest in the case, and (3) have all the information, and they are both arrayed against *third-party* objectors who ask the court to forge onward in a litigation that the litigants want to give up. It is very easy to take the words of both the active parties about what to expect in the claims process, or what certain injunctions

[5] *But see* AB7 (claiming "USAA wanted a 'claims made' settlement so that (a) those policyholders who were entitled to additional moneys would be fully compensated if they file a proper claim and (b) USAA would not be required to comb through thousands of files to determine who might be entitle to relief."). While there's nothing untoward about defense attorneys wanting their client to pay less, they should acknowledge that intent.

are worth, or what deals are possible, and reflexively view objectors as only flies in the ointment. That makes the tools discussed above all the more dangerous, and multiplies the injurious effects of clauses used to further restrict objector participation or the incentive for district court scrutiny. Simply put, the inflation of settlement value for the sake of a fee award is—for structural reasons—already too easy because of the lack of adversary presentation, *see, e.g.*, *Eubank*, 753 F.3d at 719-20, and yet settling parties have developed a variety of mechanisms to make it easier still. One such "gimmick" is the use of "clear sailing" and segregated fee/"kicker" clauses to ensure that (1) the defendant will not be allowed to challenge a fee request and (2) any reduction in an excessive fee request is returned to the defendant rather than to the class, ensuring that class members do not have the incentive or standing to challenge an excessive fee request. *E.g.*, *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969 (8th Cir. 2016) (lamenting that "clear sailing" provisions in class action settlements "deprive[] the court of the advantages of the adversary process"); *Johnston,* 83 F.3d at 246 n.11 ("the potential for abuse is heightened by the defendants' agreement not to contest fees up to a certain point"); *Pearson*, 772 F.3d at 786 (fee segregation is a "gimmick"); *Bluetooth*, 654 F.3d at 947-49 (fee segregation and clear sailing are "warning signs"). The settlement forum-shopped to state court contains these self-dealing clauses. A-259.

To avoid these distortions of the class action system, first "the law relies upon the fiduciary obligations of the class representatives and, especially, class counsel, to protect [class members'] interests." *Pampers*, 724 F.3d at 718 (internal quotation marks omitted). Failing that however, Rule 23 assigns to courts superintendent "fiduciary"

responsibilities of their own to absent class members. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d at 932 (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)). The vitality of the class-action mechanism depends on *how* courts scrutinize such settlements, and whether their doctrinal tests correctly align the incentives of class counsel with those of the vulnerable, absent class members whose claims they purport to settle away. When courts simply defer to the settling parties, class counsel and defendants can each realize unfair windfalls at the expense of absent class members.

But it does no good for federal courts to provide the correct scrutiny if settling parties can settle their federal actions in jurisdictions that fail to provide that scrutiny or, worse, not only fail to provide that scrutiny, but fail to provide recourse to injured absent class members to object. The district court's sanctions orders recognize the need to police the ethical obligations of class counsel vis-à-vis their client absent class members. If the district court's measured response cannot stand, it will send a clear signal to less scrupulous members of the class action bar that when they plan the place and structure of their settlement, they can head for favorable fora without any real necessity to ensure maximum recovery for the people class actions are meant to serve.

B. Rule 23(e) does not impede the district court's authority to issue sanctions in a precertification class action, where the potential for abuse is greater, not lesser than post-certification.

To mitigate the agency problems discussed above, Rule 23(e) requires court approval of any settlement or dismissal of the "claims, issues, or defenses of a certified class." Appellants maintain that the district court read Rule 23(e) in an

"unprecedented," "infirm," and "indefensible" manner, to countenance the court's review of a precertification dismissal. CB 19, 30-34; AB 31.

This is wrong for several reasons. Most importantly, the scope of the district court's authority to sanction does not turn on the scope of its ability to conduct fairness reviews of precertification dismissals under Rule 23(e). Regardless of whether the district court was "divested of authority" to review the stipulation of dismissal,[6] it was not divested of authority to sanction abuses of the judicial process that betrayed class counsel's fiduciary duty to absent class members. ADD-14 (citing cases, *e.g., Cooter v. Gell & Hartmarx*, 496 U.S. 384, 395 (1990) ("district courts may enforce Rule 11 even after the plaintiff has filed a notice of dismissal under Rule 41(a)(1)")); *see also Mellott v. MSN Commc'ns, Inc.*, 492 Fed. Appx. 887, 890 (10th Cir. 2012) ("it does not appear improper for the court to be presented with the issue of inherent-power sanctions after dismissing the plaintiff's case")).

Relatedly, the court's fiduciary duty to class members is not simply a "non-delegable duty to review the settlement under Rule 23(e)" (CB28); it arises from the structure of a proceeding that adjudicates the rights of a vast many parties that are not present, have varied interests, and are afforded rights by law. *See* Rules 23(a)(4), (g)(4) (requiring court to rigorously analyze whether class members are adequately represented); (b)(3) (requiring court to rigorously analyze whether class action is superior device for litigating members' claims); (c)(2) (requiring court to direct the best

[6] Indeed, the district court specifically noted that it was "not sitting in review of the [state-court] settlement." ADD-11.

notice practicable to absent class members); (h) (requiring court to limit counsel fees to no more than what is reasonable). *See also* ADD-41 (noting Rule 23(d) obligations to protect absent class members).

The sanctionable conduct below was not merely the Rule 41 dismissal without court approval. Rather, it included the conspiracy to then forum-shop an already consummated settlement to a state venue that is less scrupulous about safeguarding the interests of absent class members—and to hide this from the district court, despite knowledge of Eighth Circuit precedent condemning mid-litigation forum-shopping. Unlike the typical Rule 41 case, "Respondents did not 'start over again' after their dismissal" (ADD-42-43) but simply sought a ruling from a different judge because they were concerned about what their current federal judge would say about their settlement. Appellants' lengthy discussion of the 2003 amendments to Rule 23(e) are beside the point.

Castleberry distorts (CB30) the district court's remark that "if the Court were to agree with it, it would necessitate a reexamination of whether a Rule 11 violation occurred at all" (ADD-39) to be simply about Rule 23(e)'s application to precertification dismissals. But the court was actually referring to Respondents' argument that Rule 23 "specifically allow[s] the conduct which occurred here" (ADD-39) (*i.e.* the dismissal ***and*** the refiling of a state court action for the purpose of presenting a questionable settlement in a venue against absent class members' interests). Needless to say Rule 23(e) does not endorse that. In the precertification scenario contemplated by a Rule 23(e) unconditional dismissal there is no prejudice to absent class members.

Crucially, counsel's fiduciary duty to absent class members attaches before certification occurs. *E.g., Bluetooth*, 654 F.3d at 946 ("Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement."); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("*GMC Pick-Up*") ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed."); *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978) ("By the very act of filing a class action, the class representatives assume responsibilities to members of the class."); *see generally* Nick Landsman-Roos, *Front-End Fiduciaries: Precertification Duties and Class Conflict,* 65 STAN. L. REV. 817, 841 (2013) ("If anything, a greater fiduciary duty should be imposed prior to certification…"). A hornbook Castleberry relies upon recognizes as much: "pre-certification class counsel owe a fiduciary duty not to prejudice the interests that putative class members have in their class action litigation." JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 4:27 (9th ed. 2012) (cited at CB19).

Correspondingly, the district court's fiduciary duty to absent class members attaches at the precertification stage when a class action complaint is filed; it is not simply a "misplaced" "altruistic concern" at the precertification stage. *Contrast* AB32 *with Shelton v. Pargo*, 582 F.2d 1298, 1305 (4th Cir. 1978) (court has the duty "to checkmate any abuse of the class action procedure, if unreasonable prejudice to absentee class members would result, irrespective of the time when the abuse arises").

Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013) does not indicate that absent class members are owed no fiduciary duties before certification. *Contra* AB32. Exactly to the contrary, *Standard Fire* was driven by the fact that it would be a breach of fiduciary duty (for several of the class attorneys involved in this case) to bind putative class members to a stipulation that capped their maximum recovery for no reason but to avoid federal jurisdiction. *Standard Fire*, 133 S. Ct. at 1349 ("a court might find that [plaintiff] is an inadequate representative due to the artificial cap he purports to impose on the class' recovery") (citing *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827 (7th Cir. 2011) (Easterbrook, J.)).

An artificial stipulated cap like that at issue in *Knowles* is impermissible because fiduciary duty includes the duty to maximize the class's recovery. *See In re Bank America Corp. Secs. Litig.*, 775 F.3d 1060, 1068 (8th Cir. 2015); *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015) ("it is unfathomable that the class's lawyer would try to sabotage the recovery of some of his own clients"); *see also* American Law Institute, *Principles of the Law of Aggregate Litig.* § 1.05, *cmt.* f (2010) (fiduciary duty "forbids a lead lawyer from advancing his or her own interests by acting to the detriment of the persons on whose behalf the lead lawyer is empowered to act."). Similarly, class counsel's fiduciary duty entails that they cannot sacrifice class recovery for "'red-carpet treatment on fees.'" *Pampers*, 724 F.3d at 718 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)).

Breach of one's fiduciary duty is subject to judicial sanction. *E.g., In re Bird*, 353 F.3d 636, 637 (8th Cir. 2003); *Weisman v. Alleco, Inc.*, 925 F.2d 77, 80 (4th Cir. 1991) (a

"'gross violation' of the attorney-client relationship…would, standing alone, justify the imposition of Rule 11 sanctions."); *see also* American Law Institute, *Principles of the Law of Aggregate Litig.* § 1.05(c)(3) (2010) ("To promote adequate representations, judges may: enforce fiduciary duties on named parties and their attorneys."). So, the district court was exactly right to use its supervisory powers to protect the interest of potential class members. ADD-41. By contrast, the district court declined to sanction the Ackerman Appellants, because of the mitigating factor that their "representative duty was to their client, USAA." ADD-45. While the district court did not use the word "fiduciary," it was that concept that motivated its decision, and the breach of fiduciary duty provides an alternative reason for holding that there was an "improper purpose."

Appellants' theory about solicitude for precertification dismissals contradicts the consensus doctrine that requires heightened scrutiny to reviewing precertification settlements and the accompanying deferred class certifications (in recognition that negotiations in such a context breed more questionable arrangements). Yet Appellants would have district courts apply less scrutiny (in fact none) to stipulated dismissals of a precertification class than for a certified class. *Contrast, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) (observing that "settlement-only class certification" requires "undiluted, even heightened" attention that is "of vital importance"); *Dennis*, 697 F.3d at 864 ("where…class counsel negotiates a settlement agreement before the class is even certified, courts must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.") (internal quotation omitted);

GMC Pick-Up, 55 F.3d at 805; *see also Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1146 (8th Cir. 1999) (distinguishing *Amchem* because it was a case about the "need for additional protections when the settlement is not negotiated by a court designated class representative") (internal quotation marks omitted).

This case—in particular the unfair settlement ushered through in state court—is a prime example of why the law does and should disfavor precertification accords. Moreover, Castleberry critiques the district court's finding that the purpose for dismissing was "evading federal review" and "federal judicial scrutiny" (ADD-30-31, 44) because "no federal review was warranted under Rule 23(e)" (CB 20, 34). This is bootstrapping: the parties intended to settle; they had a choice of settling in federal court or state court; they unquestionably chose to evade the federal court, and to hide this fact from that court. The scrutiny the district court is describing is that which would have attached had the parties presented their pre-certification settlement to the federal court.

Additionally, as the district court concluded, Appellants' interpretation of Rule 23 is contrary to the purposes of the Class Action Fairness Act of 2005 ("CAFA"). ADD-41-42. Appellants purport that CAFA's pro-federal bent only applies to situations where the defendant is held hostage against its will in state court. Not so. CAFA also serves to prevent state-court abuse of absent class members. *See* 28 U.S.C § 1711, note § 2(a)(3), (4); S. RPT. 109-14 at 4, 14 (2005) (expressing concerns about lawyers who "'game' the procedural rules and keep nationwide or multistate class actions in state courts whose judges have reputations for readily certifying classes and approving

settlements without regard to class member interests"; and about "state court judges…unable to give class action cases and settlements the attention they need"). It would be ironic—especially after *Knowles* disapproved of other gimmicks to evade federal review of class actions—to hold that CAFA prohibits judges from acting to prevent gamesmanship of the system to evade federal review.

Ackerman argues that CAFA ultimately failed to enact a provision in the 2003 version of the act that would have allowed absent class members to remove cases to federal court, in addition to defendants. AB32 n.8 (citing S. RPT. 108-123 (2003)). But no one is debating whether this case was properly removed from state to federal court by the Defendants in January 2014. The only question is whether federal oversight can act to sanction settling parties that engage in gamesmanship to forum-shop back into state court a year-and-a-half later to the detriment of absent class members for the purpose of evading rigorous scrutiny of their settlement. As the district court noted, the Appellants' reading of Rule 23 and CAFA runs "directly counter to CAFA's primary objective." ADD-39-42; *see especially* ADD-41-42 (citing authorities).

For reasons discussed above and below, the district court's sanctions order should be affirmed regardless of how the 2003 amendments to Rule 23 are interpreted. But it's worth noting that several courts disagree with Appellants' reading of the revised Rule 23(e). *Tombline v. Wells Fargo Bank*, N.A., No. 13-cv-04567, 2014 U.S. Dist. LEXIS 145556 (N.D. Cal. Oct. 10, 2014) (observing "uncertainty" and noting that N.D. Cal's decisions have "generally assumed" that 23(e) still applies to pre-certification dismissals) (internal citations omitted).

Castleberry argues that there is "no basis" in the Advisory Committee Note for the district court's belief that the amendment to Rule 23(e) was intended only to allow class reps to settle their individual claims precertification. CB31. Not so. The Advisory Committee notes observe that the pre-amendment "language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims," demonstrating that this problem was exactly what that particular 2003 amendment meant to solve. *Cf. also White v. NFL Players Ass'n*, 756 F.3d 585, 592 (8th Cir. 2014) (when "plaintiffs have no authority to bind the absent members of a class by settling those claims" "no court approval would be necessary to protect the interests of absent class members").

The 2003 amendments to Rule 23 cannot justify an anything-goes approach to pre-certification dismissals, especially after CAFA and *Knowles*. Because fiduciary duties to putative class members attach at the time class counsel files the complaint, a court that does not look behind the veil of the dismissal is derelict in its own duties. And because such derelictions by the district court are effectively unreviewable (how can a prejudiced absent class member even know to intervene before dismissal to object, much less appeal?), it becomes all the more important to grant discretion to district courts that do scrutinize dismissals to be able to police abuses.

II. The ultimate reprimand imposed on select members of class counsel's team was judicious, based on by factual findings supported by the record, and tailored to the deterrent purposes of judicial sanctions.

A. Dismissal for the purpose of forum-shopping constitutes an improper purpose and an abuse of the judicial process when it prejudices absent class members.

1. The district court had discretion to sanction class counsel for forum shopping under Rule 11 and its inherent authority.

Under Rule 11, a district court may impose sanctions if an attorney presents a pleading, written motion, or other paper "for any improper purpose *such as* to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. Proc. 11(b)(1) (emphasis added). Ackerman advances an unacceptably narrow interpretation of Rule 11. They claim the conduct at issue was "antithetical to the types of conduct specifically forbidden" under the rule because this action resolved a federal action rather than delay it (AB23). But, as the text expressly provides, Rule 11(b)(1)'s list of improper purposes is "only illustrative," not exhaustive. *Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 807 (5th Cir. 2003) (*en banc*) (a filing to create a media event "seeking personal recognition" suffices as an "improper purpose" even if one assumes it was not "to harass"). The rule broadly encompasses litigation actions taken for reasons that transgress Fed. R. Civ. P. 1's goals of a "just, speedy and inexpensive determination of every action." *See, e.g., Blackwell v. Dep't of Offender Rehab.*, 807 F.2d 914, 915-16 (11th Cir. 1987) (per curiam) ("failure to discharge [the] duty of candor in initially not disclosing to the court the terms of settlement" warrants sanctions).

In making an improper-purpose determination, a factfinder is not limited to objective evidence; rather, "subjective bad faith or malice may be important" to demonstrating improper purpose. *See In re Polyurethane Foam Antitrust Litig.*, 165 F. Supp. 3d 664, 670 (N.D. Ohio. 2015) (settlement offer from objector to class counsel seeking pay-off was improper, even though acceptance of the offer would have terminated the litigation). *See also Brown v. Fed'n of State Med. Bd.*, 830 F.2d 1429, 1436 (7th Cir. 1987); *Jones*, 460 F.3d at 1010-11. Ultimately, the district court only sanctioned those whom it found to have acted in bad faith. ADD-46-47.[7] A finding of "subjective bad faith"—like the findings below (ADD-20-23, 36, 45)—can reveal an improper purpose. *See Jones*, 460 F.3d at 1011.

Even under plaintiffs' proposed "[f]raudulent or otherwise wrongful" definition of improper purpose, the dismissal here qualifies, as it constituted a breach of class counsel's fiduciary duty. If Appellants' goal truly was to resolve the litigation through the proposed settlement fairly, while simultaneously binding absent class members to it, the just course was to propose the settlement to the district court, not to voluntarily agree to dismiss the action with the secret intention to refile the action in a court with

[7] Ackerman states that those who were not found to have acted in bad faith cannot be sanctioned under inherent authority of the court. AB24. This is a correct statement of law, but has no application here, as the district court imposed no sanction on them. No inherent authority was needed "as a mechanism for finding an abuse of the judicial process" because that finding is not itself a sanction, nor is it appealable, even if this Court holds that the Rule 11 finding is.

fewer protections for absent class members. The self-dealing breach of fiduciary duty alone demonstrates wrongfulness.

Both sets of appellants contend that because their dismissal without court approval was "objectively reasonable" as a matter of the law of Rule 23 and Rule 41 it cannot constitute an improper purpose or abuse of the judicial system. AB24-26, 34; CB24-25. The error in this argument is confusing legal or factual frivolity, proscribed under Rule 11(b)(2) and (b)(3), with improper purpose proscribed under Rule 11(b)(1). Unlike in the cases appellants rely on—most notably *Wolfchild v. Redwood Cty*, 824 F.3d 761 (8th Cir. 2016)—the district court didn't sanction class counsel because the filing was without legal basis.[8] (Indeed, the arguable legal basis combined with the interest to zealously represent the client was what protected Ackerman from a bad-faith finding. APP-46.) Rather, the court concluded that there was subjective bad faith and an improper purpose under Rule 11(b)(1). If class counsel had dismissed the case to benefit the class members rather than to benefit themselves at the *expense* of their clients, they'd be able to claim they were in the same boat as Ackerman.[9]

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[8] For this reason, *Mcknight v. GMC*, 511 U.S. 659 (1994), is inapposite too.

[9] Castleberry also argues that "improper" in *Thatcher* meant "incorrect" rather than "wrongful," and thus would not be a grounds for finding an "improper purpose." CB22. This argument is both incorrect and wrongful. *Thatcher* examined what was at "the crux of the issue of whether the motion to dismiss was being used for the improper purpose of seeking a more favorable forum." 659 F.3d at 1215. *Thatcher* understood perfectly well that it was using "improper" in the same Rule 11(b)(1) sense of "improper purpose." One does not speak of an "incorrect purpose" outside of the law of evidence.

Frivolousness and improper purpose necessitate distinct inquiries. *See Whitehead*, 332 F.3d at 805 ("A district court may [sanction an attorney making a non-frivolous argument] where it is objectively ascertainable that [the] attorney submitted a paper to a court for an improper purpose") (*en banc*); *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 931-932 (7th Cir. 1989) (*en banc*) (Easterbrook, J.) ("A paper interposed for any improper purpose is sanctionable whether or not it is supported by the facts and the law.") (internal quotation marks omitted); *Blackwell*, 807 F.2d at 915-16 ("attorney's failure to discharge his duty of candor in initially not disclosing to the court the terms of the settlement" merited sanctions even though filing was legally reasonable). As the district court correctly noted, and the appellants ignore, there is a "difference between unilaterally taking an improper action and transparently making a good-faith argument to a court that such an action is not improper and should be allowed." ADD-43. *Blackwell* supports this distinction.

Turning to the specific context of Rule 41(a)(2), this Circuit has been unequivocal that forum-shopping to the prejudice of an opposing party is impermissible. *E.g., Thatcher*, 659 F.3d at 1214 ("[W]e have repeatedly stated that it is inappropriate for a plaintiff to use voluntary dismissal as an avenue for seeking a more favorable forum."); *Hamm v. Rhone-Poulenc Rorer Pharm., Inc.,* 187 F.3d 941, 950 (8th Cir. 1999) ("a party is not permitted to dismiss merely to escape an adverse decision nor to seek a more favorable forum."). Although *Thatcher* involved many counsel also present in this case, none of them mentioned the binding precedent in their initial responses to the show

cause order, and that compounded lack of candor surely influenced the bad-faith finding.

Appellants argue that the forum-shopping prohibition applies only to contested dismissals under Rule 41(a)(2), not to voluntary dismissals under Rule 41(a)(1). CB 35-44, 50-52; AB 18, 33-34. But one should distinguish between Rule 41(a)(1)(A)(i), which grants a plaintiff a unilateral right to voluntarily dismiss without prejudice in limited circumstances, and Rule 41(a)(1)(A)(ii), where a stipulated dismissal in the class-action context may be for the improper purpose of colluding (explicitly or tacitly) to prejudice absent class members' rights. *See* ADD-48; ADD-9 n.6 ("Nor does agreeing to dismiss for improper purposes make the dismissal proper—especially where, as here, the ultimate class settlement bears at least some hallmarks of collusion that would require a federal court to give the settlement close scrutiny"); ADD-34 (finding that the settlement "benefitt[ed] Plaintiffs' counsel and Defendants at the expense of the class"); *cf. Eubank*, 753 F.3d at 720; *Johnston*, 83 F.3d at 246 & n.11.

No, Rule 41(a)(1)(A)(ii) doesn't specifically speak to this scenario—but the rule was created before Rule 23 class actions existed, and never considered the problem of prejudice to absent class members, especially since the act of forum-shopping collusive settlements was not commonplace before CAFA increased federal scrutiny in 2005, and was never publicly identified as a problem before this district court learned about it—though the settling parties absolutely knew what they were doing, as the district court found. In class actions, district courts should scrutinize all "unopposed" motions, like the stipulated motion for dismissal, just as the district court in *Eastwood* appropriately

scrutinized the settlement notwithstanding the lack of objections. *Hamm* and *Thatcher*'s concerns in the Rule 41(a)(2) context are equally applicable to the Rule 41(a)(1)(A)(ii) context in the unique setting of Rule 23 class action settlements, given that failing to import those concerns would ensure that absent class members will incur prejudice and CAFA and Rule 23 will be subverted. Castleberry admits that the anti-forum shopping rule serves to "protect" other parties from "prejudice." CB21. Speaking of "both parties" (*id.*) however makes no sense when there are absent parties who are adversely affected. At best, appellants have a colorable argument that they could have presented to the district court to let them stipulate a dismissal—but instead they tried to hide the ball from the district court in repeated filings, precisely because they anticipated that the district court would likely have enjoined the abusive tactic. It was the lack of candor in depriving the district court of any opportunity to take steps to fulfill its own fiduciary duty that ultimately resulted in sanctions. ADD-45 (emphasizing lack of candor). It would be disastrous to condone that lack of candor, and Appellants forfeit any attempt to defend it by failing to contest the finding in their briefs.

Forum- and judge-shopping is more, not less concerning when it involves class actions because the rights of so many absent class members hang in the balance. "In the class action context, ... forum shopping takes a different, and more sinister, form. It entails the ability of class counsel to commence an action in a forum that is most favorable to counsel's own (rather than the class members') interests, such as a forum in which judges are predisposed to exercising little scrutiny of class action settlements." Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions*,

73 N.Y.U. L. REV. 765, 775 (1998). "[T]here is[] a serious problem of judge shopping in the disordered realm of class action litigation." *Smentek v. Dart*, 683 F.3d 373, 376 (7th Cir. 2012); *see also Knowles*, 133 S. Ct. 1345 (describing scheme of Reprimanded Counsel to artificially cap their client class members' recovery to avoid federal jurisdiction under CAFA); *Lusby v. Gamestop Inc.*, 297 F.R.D. 400, 416 (N.D. Cal. 2013) (suggesting that settling parties dismissed and refiled their case to avoid the scrutiny of one of of the most exacting district court judges on the bench).

None of the Eighth Circuit cases Appellants cite involving Rule 41(a)(1) (CB36-38; AB26-28) were class actions. For example the district court in *Gardiner* even distinguished the private voluntary settlement there from a class action where the Court should be "very concerned" about the settlement. *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1185 n.6 (8th Cir. 1984). The vast majority of the out-of-circuit cases are also not class actions, and those that are involve 41(a)(1)(A)(i), not 41(a)(1)(A)(ii). CB40-43; AB26-29.[10] Appellants fail to recognize that class action cases are "different." *Pampers,* 724 F.3d at 717. The Fourth Circuit has cogently explained why the distinction is so weighty:

[10] Importantly, in the class actions *Chen* and *Logue* (CB40), class counsel sought a venue that would be more favorable to the substantive adjudiciation against the defendants, rather than one that would be more hostile to the rights of absent class members at the time of settlement. The latter is a breach of fiduciary duty; the former is not. *Chen v. eBay Inc.*, No. 15-cv-05048, 2016 WL 835512 (N.D. Cal. Mar. 4, 2016); *Logue v. Nissan N. Am., Inc.*, No. 08-2023, 2008 WL 2987184 (W.D. Tenn. July 30, 2008)).

> [B]y asserting a representative role on behalf of the alleged class, [class counsel] voluntarily accepted a fiduciary obligation towards the members of the putative class they thus have undertaken to represent….Because of this the District Court should have both the power and the duty, in view of its supervisory power over and its special responsibility in actions brought as class actions, as set forth in 23(d), to see that the representative party does nothing, whether by way of settlement of his individual claim or otherwise, in derogation of the fiduciary responsibility he has assumed, which will prejudice unfairly the members of the class he seeks to represent. Apart, then, from the question whether 23(e) provides authority for judicial control over settlements and compromises by representative parties or not, the District Court would appear to have an ample arsenal to checkmate any abuse of the class action procedure, if unreasonable prejudice to absentee class members would result, irrespective of the time when the abuse arises.

Shelton v. Pargo, 582 F.2d 1298, 1305-06 (4th Cir. 1978). *See also Crawford v. F. Hoffman-La Roche Ltd.*, 267 F.3d 760, 764 (8th Cir. 2001) (citing *Shelton* favorably).

One case Appellants place particular emphasis on is *Wolters Kluwer Fin. Servs., Inc v. Scivantage*, 564 F.3d 110 (2d Cir. 2009). This was neither a class action, nor a Rule 41(a)(1)(A)(ii) dismissal. Whereas the district judge in *Wolters Kluwer* endeavored to protect a consenting plaintiff from its own decision to dismiss its case, here the district court was discharging its duty to protect the putative absent class members in this case from breaches of duty by its self-appointed representatives. *Compare Wolters Kluwer*, 525 F. Supp. 2d 448, 545 n. 341 (S.D.N.Y. 2007), *with* ADD-34, 41, 54. Whereas the district court in *Wolters Kluwer* believed Rule 41 itself was intended to deter forum shopping *per se*, the court here recognized, in accord with the teachings of *Thatcher* and *Hamm*, that judge and forum shopping are untenable when they prejudice non-consenting parties,

i.e., the absent class members. *Compare Wolters Kluwer*, 525 F. Supp. 2d at 546 (Rule 41 "does not exist to allow a plaintiff to commence in one court… and then 'judge-shop' to seek expedient relief in a new Court…when this Court notes deficiencies in plaintiff's counsel's advocacy"), *with* ADD-10-13 & n.11 (cataloguing the ways in which absent class members were prejudiced by the dismissal and refiling of settlement in state court, relying on many of defense counsel's previous briefs), ADD-21 ("at the very least" counsel should have "ma[de] a joint motion for dismissal that the Court would be required to analyze in light of *Hamm* and *Thatcher*"), ADD-26 ("the Court was not treated as a forum in which to resolve a dispute but as leverage in negotiations that benefited everyone but the class members"); ADD-41 (describing court's obligation to putative class members).

Moreover, the district court in *Wolters Kluwer* erred by reprimanding the entire Dorsey & Whitney firm after imputing the bad faith of one of its partners. 564 F.3d at 114. *Wolters Kluwer* affirmed the non-monetary sanctions that were individually imposed upon the culpable attorney. *Id.* at 116. Here, the district court made specific findings of bad faith with respect to individual Reprimanded Counsel without imputing bad faith to any other associated parties. ADD-20, 44-47. These findings were thoroughly considered, contemplated and modified after taking into account show cause proceedings that lasted more than half a year, even giving appellants the "benefit of the doubt" on evidence that was borderline. *See* ADD-36-37. The district court exercised its discretion deliberately and allowed appellants several opportunities to be heard.

In addition to Rule 11, the district court also sanctioned under its inherent authority to punish abuses of judicial process done in bad faith. ADD-43 n.6. This conclusion is well-supported in fact and precedent, and was not an abuse of discretion. "Judge-shopping clearly constitutes 'conduct which abuses the judicial process.' The district court's inherent power to impose dismissal or other appropriate sanctions therefore must include the authority to dismiss a case for judge-shopping." *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998). While *Hernandez* reversed the sanction of dismissal in that case because the district court failed to consider lesser sanctions, the thoughtfulness of the district court's modulating the sanctions level cannot seriously be contested here. In general, courts do not hesitate to condemn judge-shopping and find it sanctionable.[11]

Castleberry asserts that it was error for the district court to rely on its inherent powers because the "challenged conduct falls directly within the scope of Rule 11." CB55. This argument contradicts their protestations that forum-shopping was not an

[11] *Vaqueria Tres Monjitas, Inc. v. Rivera-Cubano*, 341 F. Supp. 2d 69, 73 (D.P.R. 2004), *reconsideration den'd* 230 F.R.D. 278 (D.P.R. 2005); *Zhang v. Equity Office Props. Trust*, Civ. No. 06-2265, 2007 U.S. Dist. LEXIS 219 (D. Minn. Jan. 3, 2007); *John Akridge Co. v. Travelers Cos.*, 944 F. Supp. 33, 34 (D.D.C. 1996) (imposing inherent authority sanctions for "blatant forum shopping" evidence); *cf. also Boyer v. BNSF Ry.*, 824 F.3d 694 (7th Cir. 2016) (sanctioning plaintiffs' counsel for re-filing class action dismissed in Wisconsin federal court with different plaintiffs in Arkansas state court because it was "a patent effort to evade the two courts"); *Boyer v. BNSF Ry.,* 832 F.3d 699 (7th Cir. 2016) (denying rehearing and finding inherent authority alternate ground to sanction counsel for forum shopping); *Nat'l Treasury Employees Union v. IRS,* 765 F.2d 1174, 1177 n.5 (D.C. Cir. 1985) (Ginsburg, J.) (suggesting loose standard for *res judicata* would permit conduct that smacks of judge-shopping).

improper purpose under Rule 11(b)(1). Ultimately though, the assertion fails because there is overlap in the situations that call for general Rule 11(b)(1) sanctions and those that call for general inherent power sanctions. While Congress can limit the inherent power of the courts to impose sanctions, nothing in Rule 11(b)(1) does so. "[T]he inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991); *contrast Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 899-900 (8th Cir. 2009) (inherent-power sanctions analysis should not obscure *specific* Rule 37 sanctions regime that occupies the field of discovery misconduct). But even if Castleberry was correct that a district court must pick one or the other and never permit overlap, it would not help their appeal. Either the sanctions order can be affirmed under Rule 11(b)(1), or else it could be affirmed based on the inherent authority of the court.

2. The district court correctly concluded that shifting to state court to avoid federal scrutiny of class settlements prejudiced absent class members.

The return to state court does not just feel underhanded and evasive; it was affirmatively prejudicial to absent class members. Appellants' briefing makes clear that class counsel were the ones demanding forum-shopping the class settlement into state court and that defense counsel acquiesced in that in light of their client's interests. AB7-8. This mirrors the prototypical class action incentive problem discussed above in Section I.A. Defendants are indifferent to the allocation of settlement proceeds between class counsel and class members, while class counsel have let the draw of a large payday get the better of their fiduciary duties.

It is telling that class counsel's best counter-narrative is that they were endeavoring to make it difficult for absent class members to object and to appeal a judgment overruling their objection. ADD-10 n.7; CB46. But this motive itself is improper. Class members have a right to object to a settlement that binds them, and it cannot be the goal of their counsel to burden that right. *See Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 84 n.3 (1st Cir. 2015) ("Because parties to a settlement have a shared incentive to impose burdensome requirements on objectors and smooth the way to approval of the settlement, district courts should be wary of possible efforts by settling parties to chill objections"); *In re Chiron Corp. Sec. Litig.*, No. C-04-4293, 2007 U.S. Dist. LEXIS 91140, at *29 (N.D. Cal. Nov. 30, 2007) ("Frustrating the settlement is exactly what class members are entitled to do, if they think the settlement is not fair. The class' 'frustration rights' should not themselves be frustrated.").[12]

[12] The district court rejected the argument that class counsel was more afraid of extortionate objectors than good-faith objectors, ADD-10 n.7, but it is worth noting that there are additional reasons why the "extortionate objector" concern is a bogus excuse. Nothing stopped the settling parties from adding a clause to their settlement making explicit the equitable right of disgorgement for class members against objectors who extract payment without court approval or benefit to the class. Alternatively, the proposed final approval order could bind settling parties to the mast and forbid them from making such payments—without the promise of extortionate payment, the extortionate objector would not show up in the first place. Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1659-66 (2009). And Rule 11(b)(1) or Fed. R. App. Proc. 38 sanctions would be possible against an objector who filed a meritless objection for the improper purpose of extortion. *Polyurethane Foam*, 165 F. Supp. 3d at 670.

Moreover, while Due Process does not ground a categorical right of appeal, curtailing that right is against class members' interests and is improper in its own right. *See Crawford v. Equifax Payment Servs., Inc.,* 201 F.3d 877, 881 (7th Cir. 2000) ("appellate correction of a district court's errors is a benefit to the class"). Objectors serve an indispensable role by reintroducing an adversarial element at the settlement stage. *E.g.*, *Pearson*, 772 F.3d at 787; *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 278 F.3d 175, 202 (3d Cir. 2002); *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003); *Bezdek*, 809 F.3d at 84 n.3.

Arkansas state courts make it difficult for class members to exercise their right of objection (ADD-10-11), and exercise less stringent review of class action certifications (ADD-12) and settlements (ADD-13). By contrast, Judge Holmes has a history of zealously protecting the interests of absent class members and policing overreaching counsel. *See Eastwood*, 2014 U.S. Dist. LEXIS 142652; *Day v. Whirlpool Corp.*, No. 2:13-cv-02164, 2014 U.S. Dist. LEXIS 169026 (W.D. Ark. Dec. 3, 2014). *Eastwood* involved a claims-made settlement comparable to the one is in this case. There class counsel proposed a $1.2 million fee by falsely characterizing the settlement as a "$3.6 million common fund," though it was actually a claims-made settlement where only 304 claims were made. Judge Holmes correctly held that "the total value of the settlement should be measured from the perspective of the class and the benefit the class will receive from the common fund." *Eastwood*, 2014 U.S. Dist. LEXIS 142652, at *15-*16. Ultimately, there was not a single objector and *Eastwood* approved the settlement and tried to resolve the inequity simply by reducing the fee request by

roughly half rather than sending the parties back to the drawing board to reallocate the settlement benefit. Nonetheless, *Eastwood* is a very good reason to think that class counsel wanted to judge-shop to avoid a court that takes seriously its "responsibility of scrutinizing attorney fee requests." *Johnston*, 83 F.3d at 246; *accord* ADD-55 n.11 (noting counsel may have been aware of *Eastwood*).

Castleberry responds that the "hallmarks of collusion" observed by the district court—a claims-made reversionary settlement, with a clear sailing provision and a disproportionate segregated fee fund—are "factually and legally unsupported and extraneous to its improper purpose analysis." CB44-47. Factually, the record is undisputed: the settlement the parties submitted in state court resulted in an approximate 4% claims rate such that the value to class members of the settlement was dwarfed by the unopposed $1.85 million fee award that was sought and granted by the state court. ADD-3.

Legally, the district court was correct to surmise that this "selfish" arrangement is untenable. *Pearson*, 772 F.3d 778; *Pampers*, 724 F.3d 713; *Bluetooth*, 654 F.3d 935; *Allen v. Bedolla*, 787 F.3d 1218 (9th Cir. 2015). Castleberry notes that a few other appellate courts have upheld unbalanced settlements like this one. CB46 (citing unpublished Eleventh Circuit *Poertner* decision and the divided *Gascho*). These cases are not the law of the Eighth Circuit.[13] Clear sailing is inherently suspect in this Circuit under *Johnston*

[13] Moreover, *Gascho*, which admittedly created a circuit split with *Pearson*, is the subject of a pending *certiorari* petition supported by seventeen state Attorneys General as *amici*, including Arkansas's. *See* http://www.scotusblog.com/case-files/cases/blackman-v-gascho/ (last accessed November 16, 2016). Note that the

and *Galloway*, 833 F.3d 969. *See also Stewart v. USA Tank Sales & Erection Co.*, No. 12-cv-05136, 2014 U.S. Dist. LEXIS 27560, at *25 (W.D. Mo. Mar. 4, 2014) (Kays, C.J.). *Galloway* also reaffirmed that class settlement fee awards must be in proportion to the value claimed by the class. 833 F.3d at 975 (affirming lower court's fee reduction from nearly $150,000 request to less than $20,000 where anything more "would be unreasonable in light of class counsel's limited success in obtaining value for the class.").

Furthermore, *Poertner* and *Gascho* are distinguishable; both had straightforward one-page claims procedures, while this one had a complicated four-page form (A-417-20) that appears to have been designed "with an eye toward discouraging the filing of claims." *Compare Pearson*, 772 F.3d at 782-83, *with Gascho*, 822 F.3d at 274. The district court found the claims process here "a barrier to payout," and the parties do not mention, much less challenge this finding. ADD-11 n.9.

That the settling parties might have been able to make a colorable argument for approving the settlement and fee in federal court by asking for an extension of *Gascho* does not change that they deliberately chose to avoid doing so to the prejudice of absent class members.

Nor are these considerations in any way "extraneous" to the "improper purpose" inquiry. The merits of the settlement bear on whether class counsel has acted in accord with, or at odds with its fiduciary duty to absent class members. Here, unfortunately, it is the latter. "[C]lass counsel agreed to accept excessive fees and costs to the detriment

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forum-shopping allowed the parties to avoid giving 28 U.S.C. § 1715 notice to the Arkansas Attorney General, and this can be considered another improper purpose.

of class plaintiffs, [and in so doing] breached their fiduciary duty to the class." *Lobatz v. U.S. West Cellular of Cal., Inc.,* 222 F.3d 1142, 1147 (9th Cir. 2000).

Class counsel was not simply "avoiding an adverse decision" (CB42); it was avoiding a decision adverse to its own interests to the prejudice of its clients' interests. Judge Holmes was properly regulating the representative parties in a class proceeding in his court. He was not sitting in review of the state court's judgment nor was he "second guessing" a "separate sovereign." AB32.

B. That other federal tribunals have not censured class counsel's scheme in the past does not immunize it from sanctions now; if anything the recurring behavior underscores the need for sanctions.

Appellants describe several cases in which plaintiffs have dismissed suits in federal court to consummate class-action settlements in state court. CB8-11, 28-29; AB35-36. This history speaks volumes, but only about the breakdown of the adversarial process in the class-action settlement context.

"Even the most dedicated trial judges are bound to overlook meritorious [issues] without the benefit of an adversary presentation." *Bounds v. Smith*, 430 U.S. 817, 826 (1977), *overruled in part on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996). The practical realities of crowded dockets, coupled with the full-throated endorsement of both normally-feuding parties, induces district court judges to sign off on every settlement. Jessica Erickson, *The Market for Leadership in Corporate Litigation*, 2015 U. ILL. L. REV. 1479, 1526 (2015) ("judges continue to rubber stamp most settlements presented to them."); Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L.J. 55, 87 (2014) ("Despite the fact

that the rules suggest courts should not rubber-stamp settlement agreements, they do so on a routine basis."); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997) ("No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members."); Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 411 (2011) ("Busy judges will then face their own personal and professional conflicts with resisting and scrutinizing settlements."); *accord* AB23 ("most judges" would view a settlement that "freed [them] to deal with other cases on [their] docket" as "a presumably salutary development").

District courts are customarily faced with an inherent "disadvantage in evaluating the fairness of the settlement to the class" because of lack of substantive adversarial presentation. *Eubank*, 753 F.3d at 720; Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. --, -- (forthcoming 2016) ("district judges, predisposed to favor settlement and unaccustomed to inquisitorial judging, have been too willing to approve problematic class settlements"). Thus, this Court charges "the district court [to] act[] as a fiduciary, serving as a guardian of the rights of absent class members." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d at 932 (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)). Appellants thus wrongly equate the district court's unusually high fidelity to this fiduciary duty with an unlawful deviation from a proper practice. There is no evidence that the district courts that shrugged at a settlement pursued in state court were told or independently considered whether the

state-court settlements were a form of forum-shopping in breach of class counsel's fiduciary duties to the absent class members. That these federal district courts took the easy way out and ignored their own fiduciary duty to absent class members and didn't inquire about clerk-ordered dismissals is unfortunate evidence of a systemic problem, rather than thoughtful precedent prohibiting courts from engaging in best practices. CAFA did not pass until 2005, and *Knowles*, giving it real jurisdictional effect in this Circuit, was only decided in 2013. *Someone* had to be the first judge to recognize the loophole that attorneys were attempting to exploit at the expense of absent class members, and there was no press coverage of the practice until the *Arkansas Business* story in this case, and no evidence that any other court was previously aware of the issue.

Thus, the court correctly noted that the fact "[t]hat it has become standard practice for some Respondents only further convinces the Court that this conduct is an abuse of the judicial process." ADD-26. "Recidivism is relevant in assessing sanctions." *City of Livonia Employees' Ret. Sys. v. Boeing Co.*, 711 F.3d 754, 762 (7th Cir. 2013); *see also MHC Inv. Co.,* 323 F.3d at 627 (affirming sanctions where "behavior was not a single incident"). Accordingly, Ackerman, who "had never engaged in such a settlement procedure previously" (AB8), escaped sanction.

This case has a salient factual distinction with the six cases the parties rely on as precedent for their conduct here. There, attorneys candidly informed the federal courts about the settling parties' intention to effectuate settlement in state court. CB29. Here, the settling parties kept the district court judge in the dark regarding their proposed

return to state court, thus bolstering the court's finding of an improper purpose. ADD-21, 37; *see Blackwell*, 807 F.2d 914; *Welk v. GMAC Mortg., LLC*, 720 F.3d 736, 739 (8th Cir. 2013) (affirming sanctions where litigant's deliberate attempt to ignore cases that he argued "suggests that he has the intention of deceiving or misleading the court into ruling in his favor."). While those federal courts acted suboptimally in failing to determine whether there was prejudicial forum-shopping, they at least had the opportunity to act. The lack of candor here was a *sine qua non* of the bad-faith finding that led to sanctions.

C. The district court soundly exercised its discretion to impose a "mild form" of sanctions tailored to the deterrent purpose of Rule 11.

Reprimanded Counsel insist that a formal reprimand was unduly excessive, amounting to an abuse of discretion. CB48-49. Contrary to Reprimanded Counsel's claim, a reprimand is not on the more severe end of sanctions spectrum. *See* Reprimand, BLACK'S LAW DICTIONARY (10th ed. 2014) ("a form of disciplinary action that … declares the lawyer's conduct to be improper but does not limit his or her right to practice law; a **mild form** of lawyer discipline that does not restrict the lawyer's ability to practice law." (emphasis added)); *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 455 (5th Cir. 1998). Reprimand is only one step more severe than an admonition, which is warranted "where the attorney's sanctionable conduct was not intentional or malicious, where it constituted a first offense, and where the attorney had already recognized and apologized for his actions." *Jenkins v. Methodist Hosps.*, 478 F.3d 255, 265 (5th Cir. 2007). No apologies here.

At the same time Reprimanded Counsel states that the reprimand serves no deterrent purpose. CB53-55. While the district court did state in passing that the appellants "are unlikely to repeat this misconduct," (ADD-23), the court's ultimate conclusion was that "some sanction is necessary to deter their future misconduct and vindicate judicial authority." ADD-46; *see also* ADD-27 (finding "this pattern of abuse" in Reprimanded Counsel's other cases since *Thatcher*). The court itself noted that Appellants are overreading this "unlikely to repeat" language. ADD-45 n. 7.

The district court demonstrated its due attention to modulation by specifically finding "a lesser sanction" than what it originally proposed appropriate as "just as effective a deterrent." ADD-46. The totality of the record across multiple hearings and rounds of briefing demonstrate there was no abuse of discretion. The ultimate reprimand was far less than the court considered at the outset, further demonstrating restrained exercise of its discretion. Moreover, the court also concluded that to the extent its sanctions were "in excess of what is sufficient to deter future misconduct…it is appropriate to impose that sanction against each Respondent to vindicate judicial authority" under its inherent powers. ADD-31.

The fact of the matter is that the parties still unapologetically defend their right to silently forum-shop away from a judge that would scrutinize their settlement and safeguard absent class members' interests. This makes Castleberry's reliance on *Pacific Dunlop Holdings v. Barosh* (CB53) inapposite. There, the sanctioned attorney, on "four separate occasions before the district court awarded sanctions….expressly notified the court of its plan" without objection from the district court, suggesting no likelihood of

repetition requiring sanctions. 22 F.3d 113, 119 (7th Cir. 1994). "Here, [Appellants] did not invite the Court's review of their dismissal tactic and make good-faith arguments for its propriety but instead effected their dismissal in a manner calculated to evade review." ADD-43.

Second Nat'l Bank reversed sanctions where the district court failed to give the respondent particularized notice that it intended to impose "so unusual a sanction" (*i.e.*, "requiring counsel to produce and distribute an instructional video addressing the impropriety" of certain deposition conduct). *Second Nat'l Bank v. Jones Day* 800 F.3d 936, 945 (8th Cir. 2015). A reprimand does not present that problem, and the district court held multiple hearings with substantial notice.

This Court should affirm the district court's well-reasoned, modest exercise of its disciplinary authority for the purpose of protecting vulnerable class members and deterring future abuses of the class action system that would allow class counsel to evade CAFA's attempt to hold them to their fiduciary duty to clients.

Conclusion

This Court should affirm the district court's order, and should dismiss the Non-Reprimanded Attorneys' appeals for lack of standing.

In the event that this Court holds that sanctions are inappropriate because of the happenstance that previous courts have failed to police similar behavior despite *Thatcher*, it should reaffirm the protections of Rule 23, CAFA, and *Knowles,* and hold that mid-litigation forum-shopping to evade federal scrutiny of class-actions is sanctionable in future cases.

Dated: November 17, 2016

Respectfully submitted,

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Dated: November 17, 2016

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