NO. 19-56297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT BRISENO, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

M. TODD HENDERSON,
Objector-Appellant,

v.

CONAGRA FOODS, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California, No. 2:11-cv-05379-CJC-AGR

Appellant M. Todd Henderson's Opposition to Motion for Summary Affirmance and Cross-Motion for Sanctions

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Introduction

Plaintiffs have filed a baseless motion for "summary affirmance" without even mentioning, much less refuting or distinguishing, many of the binding Ninth Circuit precedents or Federal Rules of Civil Procedure upon which Henderson relies. The "controlling" precedent plaintiffs cite has nothing to do with Rule 23(e) compromises at the expense of class members. Plaintiffs' motion should be denied. Henderson cross-moves for sanctions under 28 U.S.C. § 1927 and for other equitable relief permitted by FRAP 2.

I. Plaintiffs' argument improperly conflates contested attorneys' fees after a litigated judgment with a Rule 23(e) inquiry over settlement fairness where both the fees and the class recovery are the product of compromise. It is frivolous as an argument for affirmance, and even more frivolous as part of a motion for summary affirmance.

Objector Henderson is challenging a settlement approval under Rules 23(e) and (e)(2)(C)(iii) because class counsel impermissibly self-dealt to favor themselves by compromising the class's claims and taking $6.85 million in fees out of a $7.8 million settlement. Ninth Circuit law under Rule 23(e) thus requires reversal, even before the 2018 amendment creating Rule 23(e)(2)(C)(iii) enshrined Ninth Circuit precedent into the Federal Rules. *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035 (9th Cir. 2019); *Allen v. Bedolia*, 737 F.3d 1218 (9th Cir. 2015); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944-45 (9th Cir. 2011); *accord In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). *See* Opening Br. 24-39. *Pearson* called a settlement where class counsel received twice as much as the

class impermissibly "selfish" when it was possible to use lists of class members to mail checks to absent class members. 772 F.3d at 784, 787. All the more so here where class counsel is taking nearly seven times as much for itself as it allocated to its clients.

To argue for the extraordinary relief of summary affirmance, plaintiffs point (Mot. xxx) to a 42 U.S.C. § 1988 case involving a successful ***jury verdict***. *Riverside v. Rivera*, 477 U.S. 561, 564-65 (1986). But the *Riverside* attorneys did not ***compromise*** their clients' claims, and there was thus no risk of self-dealing when attorneys then ***litigated for*** and won a fee award greater than their clients' recovery, and no Rule 23(e) analysis needed. (Here, class counsel used the "red flag" of a clear-sailing agreement to ensure Conagra would not challenge their attorneys' fees, and then the "red flag" of a kicker provision to prevent class members from having standing to challenge attorneys' fees. *See* discussion in Opening Br. 29-30, 37-39. The words "clear sailing" and "kicker" or "reversion" or "red flags" never appear in plaintiffs' motion, though the *Bluetooth* "red flag" problem is in Henderson's statement of issues. Opening Br. 3. Plaintiffs' argument (Mot. 18-19) that the district court "addressed" *Bluetooth* does not refute Henderson's argument that the district court committed reversible error in applying *Bluetooth*; the plaintiffs simply repeat what the district court argued without acknowledging Henderson's refutation or the Ninth Circuit law expressly noting the question is open. Opening Br. 34-36.)

Similarly, *Evon v. Law Offices of Sidney McKeil*, 688 F.3d 1015 (9th Cir. 2012), is not a Rule 23(e) compromise of class claims, but a contested fee-shifting dispute between a plaintiff and defendant after a plaintiff accepted a Rule 68 offer of *judgment*. There is again no risk of Rule 23(e) self-dealing when there are no absent class members' rights

affected and attorneys attempt to litigate for and win a fee award greater than their individual clients' recovery in judgment. There was no *Bluetooth* "red flag" of clear sailing, and the defendant's liability to absent class members was not reduced an iota. The *Riverside/Elon* scenarios have absolutely no bearing whether attorneys can breach their fiduciary duty to class members and self-deal by ***settling*** and extracting the majority of settlement benefit for themselves at the expense of their clients by getting the defendant to agree to clear sailing in exchange for lower payments to the class. There was no reason for Henderson to mention these cases in his opening brief.

Even before amendments to Rule 23 made it explicit, this Court repeatedly held that Rule 23(e) did not permit attorneys to structure settlements to provide them a disproportionate share of the benefits. *E.g., Roes*, 944 F.3d at 1051 (fee award of 45% of gross cash fund is "disproportionate" for Rule 23(e) settlement-approval purposes); *Allen*, 787 F.3d at 1224 n.4; *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (class counsel receiving even 38.9% of settlement benefit is "clearly excessive"); *Bluetooth*, 654 F.3d at 947-49 (disproportionate fee award is a "red flag" of an unfair settlement). Not once did the Ninth Circuit (or appellees) ever refer to *Riverside* in these cases, and for good reason: *Riverside* is entirely irrelevant to the Rule 23(e) inquiry. And even if *Riverside* and *Elon*, cases about fee-shifting after a victory, rather than a case about attorneys' duties when settling, somehow even arguably applied to class-action ***settlements***, the 2018 amendments superseded these cases when it created Rule 23(e)(2)(c)(iii) and required courts to consider the relief actually delivered to the class relative to the attorneys' fees in evaluating settlements. Plaintiffs' motion never mentions Rule 23(e)(2)(c)(iii).

Plaintiffs repeatedly argue that the settlement isn't "collusive." But so what? Henderson never mentions collusion or argues collusion. *Contra* Mot. 12 (falsely accusing Henderson of arguing "that the that the parties have orchestrated collusive settlements"). That a settlement is non-collusive is necessary, not sufficient, to satisfy Rule 23(e). *E.g. Roes*, 944 F.3d at 1050 n.13. The problem is the class attorneys pursuing their own interests at the expense of the class. No collusion is required for this, because, as this Court has previously recognized, "Ordinarily, a defendant is interested only in disposing of the total claim asserted against it, and the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Bluetooth*, 654 F.3d at 949 (cleaned up). Thus, while class counsel and defendants have proper incentives to bargain effectively over the ***size*** of a settlement, they have no such constraints on ***allocating*** it between the payments to class members and the fees for class counsel—unless courts police that allocation. *Id.*; *see also Pampers*, 724 F.3d at 717. *See generally* Opening Br. 24-30. That plaintiffs have litigated for eight years is irrelevant: the fiduciary duty not to self-deal at the expense of one's clients does not expire after a certain amount of litigation, and plaintiffs cite no authority for their implicit proposition.

Plaintiffs point to other Rule 23(e) reversals Henderson quotes for principles of law, and argue (Mot. 18-20) that those settlements were even more abusive than the settlement here and thus distinguishable. We could haggle about some of their characterizations,[1] but the more appropriate answer is again "so what"? A bank robber

[1] For example, plaintiffs claim (Mot. 19) "*Baby Products* has nothing to do with a lodestar fee award" because the court was concerned with excessive *cy pres*, but the

isn't innocent because he stole less than Bernie Madoff; a wife-beater isn't innocent just because he isn't as murderous as O.J. Simpson. Henderson cited these cases for their statements of overarching principles of law. Those principles are true in all class-action settlements, and are not nullified because plaintiffs litigated for eight years or because the class received just under a million dollars. Nothing in *Pearson* turned on the fact that class counsel litigated the case for only eight months instead of eight years. *Compare* 772 F.3d 778 with Mot. 20 n.5; *cf. also Eubank v. Pella Corp.*, 753 F.3d 718, 721, 727 (7th Cir. 2014) (rejecting approval of disproportionate settlement in litigation that began "almost eight years ago" even though plaintiffs defeated interlocutory appellate review and a petition for *certiorari* on class-certification issue while providing millions of dollars of relief for the class).[2] The settlement here does not meet the standards this Court established in *Roes*, *Allen*, or *Dennis*, cases plaintiffs never mention.

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decision expressly rejected an argument by appellees that an award of less than lodestar was "outcome determinative." *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 179-80 & n.14 (3d Cir. 2013). Of course, the reason the *Baby Products* court reversed was because of the "troubling" allocation of recovery by attorneys ($14 million) versus the class ($3 million)—a ratio less troubling than the 7:1 allocation here. 708 F.3d at 169. Class counsel made no showing here that it was infeasible to subpoena third parties to learn class-member identities. *Compare Pearson*, 772 F.3d at 784 (distributing direct notice to millions of class members learned through "pharmacy loyalty programs and the like").

[2]*Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010), *cert. denied*, 562 U.S. 1178 (2011). The *Eubank* settlement provided much more substantial relief to claiming class members than the settlement here, but the disproportion between the estimated $8.5 million in actual class recovery and the $11 million in fees, among other problems (such as the kicker clause Henderson challenges (Opening Br. 29-30, 38-39) in this appeal and plaintiffs never mention), made the settlement untenable. *Eubank*, 753 F.3d at 727. On

Henderson's case is about Rule 23(e) and the ***allocation*** of the settlement. Plaintiffs never once mention Rule 23(e). Instead, plaintiffs tendentiously pretend this is entirely a dispute about attorneys' fees, even though Henderson expressly noted he was not making (and could not make, because of self-dealing settlement clauses) a Rule 23(h) challenge. Opening Br. 37-39, 47. Maybe a $6.85 million fee award would be appropriate under lodestar considerations if plaintiffs had won a ***jury verdict*** or summary judgment that paid the class only $1 million. But what class counsel cannot legally do is settle a case for $7.9 million, and then breach their fiduciary duty to their clients by ***allocating*** less than $1 million of the settlement to their clients so they can collect $6.85 million, and a district court committed an error of law in approving such an illegal settlement. The word "fiduciary" never appear in plaintiffs' motion.

Thus, plaintiffs' argument (Mot. 3, 14-15) about what *Erie* and state law permit in an award of attorneys' fees is not just irrelevant, but dead wrong. Henderson's argument is about what ***federal procedure*** permits under Rule 23(e), again a rule that plaintiffs' motion never mentions. It should go without saying to note the black-letter-law principle that, under the Rules Enabling Act, 28 U.S.C. § 2072, state law does not get to override federal procedure in federal court, but the Supreme Court has said it multiple times. *E.g., Shady Grove Orthopedic Associates v. Allstate Ins.*, 559 U.S. 393 (2010); *Hanna v. Plumer*, 380 U.S. 460 (1965). A putative California state-law principle does not govern the Rule 23(e) fairness of a federal settlement binding the Illinois class-member appellant. (Indeed, the *Roes* district court based its fee award on California state fee-

remand, the *Eubank* class received more than three times as much after the parties created two funds totaling $25.75 million. No. 06-cv-4481, Dkt. 770 (N.D. Ill. 2019).

shifting law, but that did not preclude the Ninth Circuit from reversing settlement approval on Rule 23(e) grounds for disproportionality. *Roes*, 944 F.3d at 1051. This case's settlement is unambiguously worse than *Roes*, where, unlike here, the attorneys received less than the class.) Plaintiffs' *Erie* argument is thus frivolous because it makes a basic error of civil procedure.

Plaintiffs' *Riverside* and *Erie* arguments would be frivolous if they were in a merits brief as an argument for conventional affirmance without acknowledging the binding precedents like *Roes* that they contradict. It is frivolous stacked on frivolous as a grounds for ***summary*** affirmance, where the rigorous standard is that "Motions to affirm should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief." *U.S. v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (*per curiam*). Plaintiffs do not address—or even mention—the controlling Ninth Circuit precedents that Henderson relies upon.[3] Opening Brief 31 (citing, *inter alia*, *Dennis*, 697 F.3d at 868; *Roes*, 944 F.3d at 1051 (fee award of 45% of gross cash fund is "disproportionate" for Rule 23(e) settlement-approval purposes); *Allen*, 787 F.3d at 1224 n.4 (fee award that exceeds class recovery by a factor of three is disproportionate for Rule 23(e) settlement-approval purposes). This case, where the fee award exceeds class recovery by a ratio of about seven to one, is even worse than *Dennis*, *Roes*, and *Allen*.

[3] Yet, ironically, class counsel cites (Mot. 3) ABA Model Rule 3.3(a)(2)'s requirement of disclosure of adverse controlling authority, thus accusing Henderson's counsel of acting unethically—part of an unfortunate pattern and practice of class counsel in this case and others of abusive false accusations of unethical conduct. *See, e.g., discussion and citations in* Opening Br. 14 n. 6.

Even if plaintiffs could make a non-frivolous argument that the Ninth Circuit has repeatedly erred by ignoring *Riverside* in deciding *Roes*, *Allen*, and *Dennis*, that is not an argument for summary affirmance, but instead an argument for *en banc* or *certiorari* review of the alleged conflict. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (*en banc*). That argument is the opposite of the "obviously controlled by precedent" that *Hooton* requires before summary affirmance is available. 693 F.2d at 858. And plaintiffs have forfeited any such argument in this motion by failing to acknowledge the adverse controlling precedent in their moving papers.

II. Plaintiffs' motion is further meritless because it is premised on a misrepresentation of Henderson's arguments.

Henderson throughout his opening brief noted that class counsel allowed the settlement to throttle the number of claims and reduce the payout to the class, resulting in an unlawful disproportion between the class's actual recovery and the fees achieved in clear sailing. Yet Plaintiffs argue (Mot. 17) "Neither Appellant nor his amicus claims that the monetary payments are small in relation to what class members could have recovered at trial." This is false, no matter how often plaintiffs repeat (Mot. 19, 21) variants of it. Henderson expressly noted that class counsel used a claims process that meant that over 99% of the class received nothing:

> Under the claims-made structure, class members recover—and a defendant pays—much less than when a defendant disburses funds directly to the class in a common fund. At the same time, class counsel can, as they did here, boast about the amount purportedly "made available" and seek to justify a large fee award, even though class members will receive a small fraction of that amount. E.g., ER25 (class

> counsel claims class got "136% of what they would have gotten at trial," though over 99% of the class received nothing).

Opening Br. 27-28. Only 97,880 class members out of over fifteen million will receive any cash. *Id.* at 33. That's far less than class members could have received at a successful trial—or in a settlement that satisfied Rule 23(e)—had class counsel taken "readily available steps to identify class members and ensure the class recovered a proportional $6 million." *Id.* at 18. Henderson expressly noted that a settlement would deliver more relief to the class if the district court had not committed errors of law, and cited multiple cases his counsel won where that was precisely the result upon a revised settlement. *Id.* at 33-34. If a settlement can deliver more relief to the class by increasing the claims rate above the feeble 0.66% here, so can a judgment at trial. Class counsel does not get to sell out over 99% of the class to collect nearly 90% of the settlement proceeds, even if 0.66% of class members are reasonably compensated.

To the extent the plaintiffs are instead claiming that the settlement is fair because they brought a meritless lawsuit that could not have possibly recovered $1 million for fifteen million class members at trial, this ignores Henderson's argument in the alternative. As Henderson argued, "Perhaps the entire lawsuit is meritless, and a single peppercorn would have been adequate compensation for all of the claims against Conagra. But Conagra chose to settle for $7.9 million in cash, and that amount should be proportionally allocated between the class and the attorneys, rather than selfishly swept up by the attorneys." Opening Br. 35. This is what Rule 23(e) requires: not just adequacy of total relief, but fairness and reasonableness in allocation between class counsel and the class. *Id.* (discussing multiple appellate cases rejecting disproportionate

settlements of entirely meritless litigation, though a settlement would be better than nothing, and thus more than what the class could receive at trial). Plaintiffs submit no authority—much less "obviously" controlling authority—for the proposition that the meritlessness of a case rationalizes self-dealing by class counsel.

Plaintiffs abusively resort to a strawman in their motion because they have no valid argument against the argument Henderson actually made, much less an "obvious[]" argument for summary affirmance.

III. Plaintiffs' motion is further frivolous because it entirely ignores other errors committed by the district court raised by Henderson that would be grounds for reversal.

Henderson argued that the district court committed reversible error by impermissibly applying the wrong legal standard and shifting the burden to objectors. Opening Br. 52-53 (citing *Roes* and Rule 23(e)). Plaintiffs' motion does not mention this argument; it does not mention Rule 23(e); it does not mention *Roes*. Because this was reversible error by the district court, and plaintiffs never contend otherwise, summary affirmance cannot be granted.

IV. Class counsel's motion vexatiously multiplies proceedings and merits sanctions under 28 U.S.C. § 1927.

It is ironic that class counsel simultaneously complains (Mot. 21) that an appeal will delay the resolution of the case, and then makes an entirely meritless motion that can only delay resolution of the appeal by staying the briefing schedule (Mot. 1 n.1).

This motion is not just substantively frivolous, but procedurally abusive as well. The motion seems to be timed to harass Henderson's non-profit attorneys, who are

facing a pending motion for an expedited briefing schedule in *In re Equifax Data Breach Litigation*, No. 20-10249 (11th Cir.), where DiCello Levitt Gutzler, the same class counsel who litigated in the district court, is defending an abusive class certification and due-process violations. *See generally*, Alison Frankel, *Ted Frank wants to see class counsel's ex parte draft opinion in Equifax case*, Reuters, Apr. 23, 2020. Because class counsel filed a motion for summary affirmance:

- Henderson is "unduly burden[ed]" (*Hooton,* 693 F.3d at 858) to file in ten days an opposition substantively defending the merits of his appeal;
- class counsel, by making their merits argument in a FRAP 27 motion instead of a FRAP 28 merits brief, will get a *de facto* 2600-word surreply that they would not normally be permitted;
- class counsel gets two bites at the apple: both a three-judge motions panel and a three-judge merits panel will decide whether the decision will be affirmed; and
- because class counsel gets two bites at the apple, they can abuse the FRAP 27 motion to float an argument as a trial balloon, see how the appellant and the Court respond, and then use that information to either refine the argument for their FRAP 28 merits brief or use their 14,000-word limit on different arguments, thus effectively evading FRAP 32's word limits.

This is wrong, and should not be tolerated.

> Motions for summary affirmance generally should be confined to certain limited circumstances. Summary disposition is appropriate in an emergency, when time is of the essence and the court cannot wait for full briefing and must decide a matter on motion papers alone. Summary affirmance may also be in order when the arguments in the opening brief are incomprehensible or completely

> insubstantial. Finally, summary affirmance may be appropriate when a recent appellate decision directly resolves the appeal.

United States v. Fortner, 455 F.3d 752, 754 (7th Cir. 2006) (Easterbrook, J.). This case meets none of these standards. *Fortner* continues:

> [The] submission in this case is fifteen pages long, and but for the formal requirements of Federal Rule of Appellate Procedure 28, it is essentially a brief on the merits. But by filing it the [appellee] has wasted the resources of this court. (Six judges will ultimately consider this appeal: three on the motions panel and three on the merits panel.) The [appellee] could have made these same arguments in a brief and moved to waive oral argument if it felt that argument would be unhelpful.

Id. Class counsel has unnecessarily multiplied proceedings with this summary affirmance motion, wasting both the Court's and Henderson's counsel's time in violation of 28 U.S.C. § 1927. *See Top Entm't, Inc. v. Torrejon*, 351 F.3d 531, 534 (1st Cir. 2003).

Custom Vehicles, Inc. v. Forest River, Inc., 464 F.3d 725 (7th Cir. 2006) (Easterbrook, J.), suggests a remedy that creates the appropriate incentives. *Custom Vehicles* found that an appellant used a 1200-word motion brief to make an argument that should have been made in a FRAP 28 reply brief. It responded by holding that when a party makes an "absurd, time-wasting motion," the Seventh Circuit would deduct "double the number of words" from the maximum in the merits brief: thus, Custom Vehicles' 7000-word maximum for a reply brief was reduced 2400 words to a 4600-word maximum. 464 F.3d at 728.

Good-faith objector-appellants repeatedly face frivolous FRAP 27 motions designed to run up class counsel's lodestar and punish objectors by vexatiously multiplying appellate proceedings. *E.g., Eubank*, 753 F.3d at 729 (agreeing motion to dismiss appeal was frivolous but denying cross-motion for sanctions because, *inter alia*, "Saltzman's removal as lead plaintiff and his lawyers' removal as class counsel are sanction enough"). Henderson's counsel is a thinly-staffed non-profit public-interest law firm, and being required to drop everything to defend the propriety of an appeal against a meritless shot-in-the-dark motion is extraordinarily burdensome. We do not ask the Court go as far as *Eubank* and remove plaintiffs' lawyers as class counsel; we do not even ask the Court to go as far as *Custom Vehicles*. But if appellate courts do not want to be overwhelmed with these sorts of evasions of the FRAP 32 briefing limits, they must deter such procedural abuses, which are becoming increasingly standard practice by class counsels in attempts to defend against meritorious appeals.

Here, plaintiffs have used 5,177 words in their "absurd, time-wasting motion" that evades the Fed. R. App. Proc. 32 word limits and seeks an abusive two bites at the apple. Another several thousand words are likely to come in a reply brief on their motion as plaintiffs make excuses for failing to mention binding precedent why their argument cannot prevail. As *Custom Vehicles* suggests, this Court should issue an order reducing class counsel's merits-brief word limits from 14,000 words to 8,000 words as it has the authority to do under Fed. R. App. Proc. 2. Such relief would be less punitive than the remedy *Custom Vehicles* imposed, but would adequately deter class counsel here and in the future from wasting the Court's time.

Conclusion

Summary affirmance cannot be granted; indeed, the Ninth Circuit would have to disregard several binding precedents unmentioned by plaintiffs' brief to affirm after full merits briefing. Plaintiffs' motion is substantively frivolous and procedurally abusive, and sanctions are appropriate. Accordingly, plaintiff's motion should be denied, and the Court should sanction plaintiffs for their attempt to evade Fed. R. App. Proc. 32 word limits by reducing the word limit of their merits brief to 8,000 words.

Dated: May 22, 2020

Respectfully submitted,

/s/ Theodore H. Frank

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Certificate of Compliance Pursuant to Cir. Rule 32-1

As Circuit Rule 32-1 requires, counsel certifies that this brief complies with the type-volume limitation of Rule 27(d)(2)(A) because this brief contains 3,918 words, excluding the parts of the brief exempted by Rule 27(a)(2)(B) and Rule 32(f). Counsel's approximation is based on the "Word Count" function of Microsoft Word. Counsel further certifies that this brief complies with the typeface and style requirements of Rule 27(d)(1)(E) because this brief has been prepared in a proportionally spaced typeface using 14-point Garamond font in Microsoft Word.

Executed on May 22, 2020.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on May 22, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/ Theodore H. Frank
Theodore H. Frank