NO. 24-4095

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BAERBEL MCKINNEY-DROBNIS, JOSEPH B. PICCOLA, CAMILLE BERLESE, individually and on behalf of all other similarly situated,
Plaintiffs-Appellants,
v.
MASSAGE ENVY FRANCHISING, LLC,
Defendant-Appellee,

KURT ORESHACK,
Objector-Intervenor.

On Appeal from the
United States District Court for the Northern District of California,
No. 3:16-cv-06450-MMC, Hon. Maxime M. Chesney

Motion of Class Member Kurt Oreshack to Intervene for Limited Purpose of Seeking Compliance with Federal Rules

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Individual class member and former objector Kurt Oreshack moves to intervene in this appeal for the limited purpose of seeking compliance with Federal Rule of Civil Procedure 23(h) and Federal Rule Appellate Procedure 42(c).

For background, Oreshack is an individual member of the settlement class in the underlying litigation, who objected to the first proposed settlement in this action and successfully appealed from its approval, leading this Court to vacate the district court's settlement approval. *McKinney-Drobnis v. Oreshack*, 16 F.4th 594 (9th Cir. 2021). Among other things, this Court criticized the settlement's use of a "clear sailing" clause to insulate class counsel's fee request from challenge. *Id.* at 610-11. On remand, the settling parties proposed an amended settlement that did not include an express clear-sailing provision; the district court approved it. *McKinney-Drobnis v. Massage Envy Franchising*, LLC, 2022 WL 2183287, 2022 U.S Dist. LEXIS 93100 (N.D. Cal. May 24, 2022). The court awarded class counsel $938,026.22 as a lodestar-based award attributable to the injunctive relief portion of the settlement. *Id.*; *see* 28 U.S.C. § 1712(c)(2). After the completion of the settlement administration process, class counsel moved for an additional award of attorneys' fees based on the value of settlement coupons redeemed by class members. *McKinney Drobnis v. Massage Envy Franchising, LLC*, 2024 WL 2808647, 2024 U.S. Dist. LEXIS 97314 (N.D. Cal. May 31, 2024); *see* 28 U.S.C. § 1712(c)(1). Massage Envy objected—as they were permitted to do absent a formal clear-sailing provision—and the district court denied the fee request. *Id.*

This case is plaintiffs' appeal from the denial of that fee request. Oreshack's present concern is that the settling parties have, under the auspices of this Court's mediation program, seem to have agreed to an additional payment of attorneys' fees to

class counsel from Massage Envy. All payments of attorneys' fees to class counsel, however, require district court approval after a finding of reasonableness, a motion, notice to class members, and an opportunity to object. Fed. R. Civ. P. 23(h); *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010); *see also Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999) ("In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper.").

Thus, Oreshack moves to intervene for the limited purpose of seeking compliance with the Federal Rules by requiring the settling parties to disclose the terms of their dismissal agreement, and, if the agreement contemplates a payment of fees to class counsel, by ensuring that the parties follow the compulsory procedures of Fed. R. Civ. P. 23(h). *Cf. also* Fed. R. Civ. P. 23(e)(3).

"Intervention at the appellate stage is, of course, unusual"[1] but the limited-purpose intervention that Oreshack seeks is justified by the unusual posture in this case where it appears that the named plaintiffs and defendants have reached a mediated settlement that would evade the requirements of Fed. R. Civ. P. 23(h) and Fed. R. App. 42(c).

Oreshack satisfies the criteria of Fed. R. Civ. P. 24(a) regarding intervention as of right. *First*, this motion is timely, filed only five calendar days after the Mediation Order notifying Oreshack that Rule 42 dismissal and impairment of his interests is

[1] *E. Bay Sanctuary Covenant v. Biden*, 102 F.4th 996, 1000 (9th Cir. 2024) (quoting *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997)).

imminent. *See Kalbers v. U.S. Dep't of Justice*, 22 F.4th 816, 822-25 (9th Cir. 2021). *Second*, as a class member in the underlying action, Oreshack "has an interest in [class counsel's] attorneys' fees, even outside the common fund situation." *Zucker*, 192 F.3d at 1326-27; *accord Lobatz v. U.S. West Cellular*, 222 F.3d 1142, 1147 (9th Cir. 2000). *Third*, if the settling parties intend to issue class counsel an additional payment of fees without going through the proper Rule 23(h) process in district court, that would impair Oreshack's ability to protect against an excessive award of fees that may "breach[] [class counsel's] fiduciary duty to the class." *Lobatz*, 222 F.3d at 1147. *Finally*, Oreshack's interests in compliance with Rule 23(h) are no longer protected by the settling parties who apparently wish to dismiss this action in exchange for a payment of fees to class counsel. This is the same posture as when class counsel and defense counsel negotiate a "clear sailing" agreement; it prompts a "heightened duty" on courts to protect class members and "avoid awarding 'unreasonably high' fees simply because they are uncontested." *Briseño v. Henderson*, 998 F.3d 1014, 1027 (9th Cir. 2021) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011)). "Because the relationship between [the class] and their attorneys turns adversarial at the fee-setting stage," the class too must be "afforded the opportunity to represent its own best interests." *Mercury Interactive*, 618 F.3d at 994 (internal quotation omitted).

Oreshack is represented by public interest counsel at the Center for Class Action Fairness ("CCAF"). While CCAF has not been successful in all cases, it has won several noteworthy appellate decisions that advanced class-action settlement jurisprudence. These cases support the principles that settlement fairness requires that the primary beneficiary of a class-action settlement should be the class, rather than the attorneys or

third parties, and that courts scrutinizing settlements should value them based on what the class actually receives, rather than illusory measures of relief. *E.g., McKinney-Drobnis*; *Briseño*; *Bluetooth*.

CCAF's interest lies in ensuring approval of a fee award that compensates class counsel based on the actual economic benefit achieved for class members, and in aiding the development of sound jurisprudence that safeguards the interests of absent class members. CCAF has previously been appointed *amicus* in appellate court proceedings to defend district court decisions where full adversary presentation is lacking. *E.g., Arkansas Teacher Retirement Sys., v. State Street Corp.*, 25 F.4th 55 (1st Cir. 2022); *Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017). A district court in this Circuit *sua sponte* solicited CCAF's *amicus* input in evaluating a novel Rule 23(e)(5) question. *McKnight v. Uber Techs.*, No. 14-cv-5615-JST Dkt. No. 256 (N.D. Cal. Mar. 21, 2022) CCAF is willing to present live argument if this Court believes that it would aid in rendering its decision.

Thus, Oreshack respectfully moves this Court to intervene for the limited purpose of ensuring compliance with Fed. R. Civ. P. 23(h) and Fed. R. Civ. P. 42(c)

Dated: August 15, 2024

Respectfully submitted,

/s/ Theodore H. Frank

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Proof of Service

I hereby certify that on August 15, 2024, 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
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