Case No. 20-10249-RR
Case No. 20-10609

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHIYANG HUANG, *et al.*,
Objectors-Appellants,

v.

BRIAN SPECTOR, *et al.*,
Plaintiffs-Appellees,

EQUIFAX INC., *et al.*,
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Georgia - No. 1:17-md-02800-TWT

Opening Brief of Appellants David R. Watkins and Theodore H. Frank

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
Melissa A. Holyoak
1629 K Street NW, Suite 300
Washington, D.C. 20006
(703) 203-3848

Attorneys for Objector-Appellants Theodore H. Frank and David R. Watkins

Statement in Support of Oral Argument

As Cir. R. 28-1(c) permits, Appellants Theodore H. Frank and David R. Watkins ("Frank") respectfully request that the Court hear oral argument in this case because it presents significant issues concerning class certification and settlement. These issues, regarding the requirements of Rule 23 and the scope of existing Eleventh Circuit precedent, are meritorious, and pit the district court's decision against those of this and other Circuits.

This appeal raises complex but recurring questions of civil procedure; their exploration at oral argument would aid this Court's decisional process and benefit the judicial system. Frank's firm has previously argued and won landmark appellate rulings improving the fairness of class-action settlement procedure and class certification. *E.g., In re Lithium Ion Batteries Antitrust Litig.*, 777 Fed. Appx. 221 (9th Cir. 2019) (Rule 23(a)(4)); *Dewey v. Volkswagen AG*, 681 F.3d 170 (3d Cir. 2012) (same); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *see also* Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013 (calling Frank "[t]he leading critic of abusive class action settlements"). Though Frank is *pro se* here, he is an experienced appellate advocate and a member of the American Law Institute; he has

argued before the Supreme Court. A favorable resolution in this case would do much to protect absent class members and important principles of federalism.

Table of Contents

Table of Citations

Cases

Rules and Statutes

Other Authorities

Statement of Subject Matter and Appellate Jurisdiction

The district court had subject matter jurisdiction under 28 U.S.C. §1332(d)(2) because plaintiffs' consolidated class-action complaint alleges claims that exceed $5,000,000 exclusive of interest and costs, there are over 100 members in each of the proposed classes, and defendant Equifax Inc. is a citizen of a State different from that of at least one class member. Doc957 at 4; Doc374 at 21. For example, named plaintiff Thomas W. Hannon is an Arizona citizen, while defendant Equifax Inc. is a Georgia corporation with its principal place of business in Georgia. Doc957 at 4; Doc374 at 25, 86. The district court also had federal-question jurisdiction under 28 U.S.C. §1331 because the complaint alleges a violation of federal law. Doc957 at 4; Doc374 at 21.

The district court did not make explicit findings under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 578 U.S. – (2016), that there was an Article III case or controversy. *Cf. Frank v. Gaos*, 139 S. Ct. 1041, 586 U.S. – (2019). But complaints over data breaches like the one in this case likely satisfy Article III standards because the imminent risk of identity theft and the cost of mitigation of that risk is a sufficiently concrete injury-in-fact when the stolen data includes the entire social security number. *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625-29 (D.C. Cir. 2017); *In re Horizon Healthcare Svcs. Inc. Data Breach Litig.*, 846 F.3d 625, 638-41 (3d Cir. 2017); *see also Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 692-

94 (7th Cir. 2015) (pre-*Spokeo*); *compare Beck v. McDonald*, 848 F.3d 262, 273-76 (4th Cir. 2017) (last four digits of social security number).

This court has appellate jurisdiction under 28 U.S.C. §1291. The district court issued final judgment under Rule 54(b) on January 13, 2020, and modified its final approval order under Rule 59 on March 17, 2020. Doc957; Doc1029. Objectors Theodore H. Frank and David R. Watkins filed a notice of appeal on February 10, 2020, and amended it March 30, 2020. Doc977; Doc1041. These notices of appeal are timely under FRAP 4(a)(1)(A) and FRAP 4(a)(4)(B)(i).

The district court issued additional collateral orders on an appeal bond and FRAP Rule 10(e) motions on May 11, May 15, and August 7, 2020. Doc1094; Doc1106; Doc1153. Watkins and Frank filed timely amended notices of appeal to include these collateral orders on May 29 and August 14, 2020. Doc1126; Doc1154. These collateral orders are each final decisions, providing 28 U.S.C. §1291 appellate jurisdiction.

Watkins and Frank timely objected to the settlement through counsel on November 19, 2019. Doc876 (objection); Doc742 at 15 (order setting objection deadline of November 19); Doc926-1 at 9, 20 (declaration of settlement administrator acknowledging that Frank and Watkins filed timely, valid objections). Watkins and Frank appeared at the fairness hearing through counsel. Doc943 at 2, 76. As unnamed class members who timely objected to approval of the settlement and appeared at the fairness hearing under Rule 23(e), Watkins and Frank have standing to

appeal without formally intervening as parties. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Watkins and Frank are each members of the class, and filed claims under the settlement claims process. Doc876-1 at ¶5; Doc876-2 at ¶5. They are thus bound by and aggrieved by the final order and judgment (Doc957 at ¶¶18-19), and have standing to appeal. *E.g.*, *In re Navigant Consulting, Inc., Sec. Litig.*, 275 F.3d 616, 620 (7th Cir. 2001) (Easterbrook, J.).

Statement of the Issues

1. Supreme Court precedent requires separate representation under Rule 23(a)(4) where subgroups of class members have fundamental intra-class conflicts because they have materially different claims. Did the district court err as a matter of law when it certified a single nationwide settlement class (and approved a settlement notwithstanding Rule 23(e)(2)(D)) with uniform relief, though many class members have materially different causes of actions with materially different legal remedies, such as state statutory-damages claims that survived a motion to dismiss?

(Raised at Doc876 at 4-12; ruled on at Doc1029 at 31-32 and Doc943 at 121.)

2. Did the district court's class-certification decision impermissibly rely upon inadmissible expert evidence and class counsel's proposed opinion instead of providing the scrutiny and independent judgment required by Rule 23 and the Supreme Court?

(Raised at Doc909; ruled on at Doc1029 at 115-119 and Doc943 at 116-117.)

3. In *Chudasama v. Mazda Motors Corp.*, this Court reassigned a case on remand because the court's "delegating the task of drafting sensitive, dispositive orders to plaintiffs' counsel, and then uncritically adopting the proposed orders nearly verbatim, would belie the

appearance of justice to the average observer." 123 F.3d 1353, 1373 (11th Cir. 1997). Here, the district court adopted virtually verbatim an *ex parte* proposed opinion that was materially different from and tens of thousands of words longer than the court's largely conclusory oral opinion, without giving parties an opportunity to review the *ex parte* proposed opinion and excluding it from the record.

(a) Should this Court reverse and reassign the case on remand?

(Raised on appeal for first time.)

(b) In the alternative, did the district court err in withholding the *ex parte* communication from the record, and should the Court order supplementation of the record under FRAP 10(e) and additional briefing on the complete record?

(Raised under FRAP 10(e) at Doc961 and Doc1134; ruled on at Doc1084, Doc1106, and Doc1153.)

4. Should the district court's order imposing an appeal bond on Frank and Watkins, premised on the clearly erroneous finding that they were extortionists, be vacated?

(Raised at Doc1057 and Doc1057-2; ruled on at Doc1094.)

Statement of the Case

The consolidated complaint alleged 99 causes of action on behalf of a nationwide class and 55 subclasses, but the settlement-only certification joined all class members into a single settlement class with uniform relief. Frank and Watkins objected that Plaintiffs' complaint was correct that at least some subclassing was required because there are fundamental conflicts between class members from states with valuable statutory-damages claims and other class members from states without any additional legal remedies, that Rule 23(a)(4) requires subclassing with separate legal representation for the class members with these separate legal remedies, and that Rule 23(e)(2)(D) requires a settlement that reflects the stronger claims of such class members. They appeal the district court's class certification and approval of a settlement that zeroed out these statutory-damages claims, and seek reassignment on remand.

A. Equifax is hacked.

This century, there have been numerous data breaches exposing private information about millions of consumers and businesses. Doc374 at 101. In response, dozens of states have passed statutes bolstering consumer rights of recovery for data breaches or failures to timely disclose data breaches, some including statutory damages. *See generally* Doc374 at 199-553.

The Equifax defendants collect and maintain data on millions of Americans and sell that data as credit reports. Doc374 at 96. From May

to July 2017, Equifax suffered a data breach accessing the sensitive personal information of 147.9 million American consumers. *Id.* at 123. Equifax learned of the breach in July 2017, but did not publicly announce it until September 7, 2017. *Id.* at 135. Class-action litigation followed, consolidated in a multidistrict litigation. *Id.* at 20.

B. 28 data-breach statute claims and 35 consumer-protection statute claims survive dismissal.

The consolidated complaint alleged 99 counts on behalf of a national class, two national subclasses and 53 state subclasses. Doc374. Equifax moved to dismiss, and the district court dismissed 30 counts. Doc540. The surviving counts included: (1) negligence claims for a nationwide class, governed by Georgia law (*id.* at 29-43); (2) unjust enrichment claims for "Contract Plaintiffs"—those who alleged they formed a contract with Equifax (*id.* at 49); (3) data-breach claims from 28 jurisdictions, *compare* Doc374 *with* Doc540 at 63-76; and (4) consumer-protection statutes from 35 jurisdictions (*id.*).

Of the surviving state statutory claims, 30 statutes permit (and plaintiffs sought) recovery of actual damages.[1]

---

[1] Doc374 (Counts 11, 14, 15, 18, 21, 23, 25, 28, 30, 32-34, 36, 38, 40-42, 44, 46, 50, 54, 73, 78, 80, 82, 88, 91, 93, 96-98); Alaska Stat. §45.48.080(b)(2); Ark. Code Ann. §4-88-113; Cal. Civ. Code §1798.80; Colo. Rev. Stat. §6-1-716; 6 Del. Code Ann. §12B-104; D.C. Code §28-3853(a); Fla. Stat. §501.211(2); Haw. Rev. Stat. §487N-3(b); Haw. Rev. Stat. §481A-3; 815 Ill. Comp. Stat. 505/10a; Iowa Code §714.16(7); Kan.

Plaintiffs allege Equifax failed "to implement and maintain reasonable security and privacy measures" under 17 statutes that provide statutory damages[2] and nine statutes that provide treble damages.[3]

Stat. Ann. § 50-7a02(g); Ky. Rev. Stat. Ann. §446.070; Ky. Rev. Stat. §367.220; La. Rev. Stat. Ann. §51:3075; 5 Me. Rev. Stat. §213; Md. Comm. Code §13-408; Mich. Comp. Laws Ann. §445.72(13); Miss. Code §75-24-11; Ohio Rev. Code §4165.03; P.R. Laws Ann. 10, §4055; S.C. Code Ann. § 39-1-90 (G)(1); S.D. Codified Laws §37-24-31; V.I. Code tit. 14 §2211; Va. Code. Ann. §18.2-186.6(I); Wash. Rev. Code §19.255.010(13); Wis. Stat. §134.98(4); Wis. Stat. §100.18(11)(b)(2); Wyo. Stat. Ann. §40-12-502(f).

[2] Doc374 (Counts 10, 12, 19, 24, 35, 57-58, 62, 67, 72, 76-77, 79, 86, 90, 92, 95); Ala. Code §8-19-10(a); Alaska Stat. §45.50.531; Colo. Rev. Stat. §6-1-113(2); D.C. Code §28-3905(k)(2); Ind. Code §24-5-0.5-4; Mont. Code Ann. §30-14-133; Neb. Rev. Stat. §59-1609; N.H. Rev. Stat. Ann. §358-A:10; N.Y. Gen. Bus. Law §349(h); Ohio Rev. Code §1345.09(B); Or. Rev. Stat. §646.638(1); 73 Pa. Cons. Stat. 201-9.2(a); R.I. Gen. Laws §6-13.1-5.2(a); Utah Code §13-11-19(2); V.I. Code tit. 12A, §108(b); Va. Code Ann. §59.1-204(A); W. Va. Code §46A-6-106(a).

[3] Doc374 (Counts 37, 49, 64, 69, 71, 81, 84, 87, 89); Iowa Code §714H.5(4); Mass. Gen. Laws Ann. Ch. 93A, §11; N.J. Stat. Ann. §56:8-19; N.C. Gen. Stat. §75-16; N.D. Cent. Code §51-15-09; S.C. Code Ann. §39-5-140(a); Tenn. Code Ann. §47-18-109(a)(3); V.I. Code tit. 12A, §331.

Plaintiffs also allege that Equifax failed to disclose the data breach in a timely and accurate manner under two statutes that provide statutory damages[4] and five statutes that provide treble damages.[5]

C. The parties settle.

Although the complaint proposed 55 subclasses, the settlement was solely on behalf of a nationwide class, treating citizens of states with no statutory-damages claims identically to citizens of states with statutory-damages claims. Doc739-2 at 10. What is relevant to this appeal is that, notwithstanding these differences, the settlement relief consisted of monetary and injunctive relief available to all class members uniformly. *Id.* at 12-23.

D. Watkins and Frank object.

Theodore Frank and David Watkins (together "Frank") objected to the settlement and fee request. Doc876.

Frank is the founder of the Center for Class Action Fairness ("CCAF"), now part of the non-profit Hamilton Lincoln Law Institute. CCAF has won dozens of objections, national acclaim, and more than

---

[4] Doc374 (Counts 56, 75); Mont. Code Ann. §30-14-133(1); Or. Rev. Stat. §646.638(1).

[5] Doc374 (Counts 61, 63, 68, 70, 80, 83); N.H. Rev. Stat. Ann. §359-C:21(I); N.J. Stat. Ann. §56:8-19; N.C. Gen. Stat. §75-16; N.D. Cent. Code §51-15-09; Tenn. Code Ann. §47-18-2104(d).

$200 million for class members. Doc876-1 at 6-8. Among CCAF's wins is *In re Lithium Ion Batteries Antitrust Litig.*, 777 Fed. Appx. 221 (9th Cir. 2019), a successful appeal of a denial of a Rule 23(a)(4) objection similar to the one brought here; on remand, the previously-disfavored subclass was allocated an additional $10 million of the settlement fund. Doc1057-2 at 11. Frank was represented by CCAF attorney Melissa Holyoak, who will be appointed Utah Solicitor General next week.

Frank is a class member who was a citizen of the District of Columbia at the time of the data breach. Doc876-1 at 4. D.C. provides for $1,500 in statutory damages to citizens victimized by data breaches. Doc374 at 270 (requesting $1,500 under D.C. Code §§28-3904, *et seq.*). Watkins is a class member who was a citizen of Utah at the time of the data breach. Doc876-2 at 4. Utah provides for $2,000 in statutory damages to citizens victimized by data breaches. Doc374 at 517 (requesting $2,000 under Utah Code §§13-11-1, *et seq.*). Frank objected that the settlement treated the statutory-damages claims of D.C., Utah, and other states as worthless, and that the lack of subclassing and separate representation meant that class counsel failed to adequately represent the class members with statutory damages claims. Doc876 at 4-12.

Frank's Objection also mirrored Senator Elizabeth Warren's criticisms of "the flaws in the FTC [sic] settlement that first resulted in misleading consumers about their potential award, and then added

complicated new steps that appear to be clearly designed to weed out deserving claimants." Doc1057-2 at 21; Doc876 at 16-17 (also quoting Doc1057-2 at 16-18 (*New York Times*)).

E. Frank moves to strike Klonoff's declarations.

The court limited plaintiffs to 75 pages of responses to objections. Doc892. Class counsel submitted a 72-page brief written by Robert Klonoff making legal arguments about objections, class certification, and other legal issues. Doc900-2. Frank moved to strike the expert declaration as inappropriate under FRE 702 and as a violation of the district court's order setting page limits. Doc909-1.

F. Court holds a fairness hearing.

The evening before the December 19 fairness hearing, class counsel filed hundreds of pages of declarations and exhibits making a variety of accusations against a variety of objectors. Doc939-1 through Doc939-10. At the fairness hearing, Frank asked to strike the belated filings, or for an opportunity to respond in writing if the court was going to consider them. Doc943 at 79-80.

At the fairness hearing, the court heard from objectors without asking Frank's counsel a single question. *Id.* at 76-80.

After objectors spoke, class counsel announced for the first time, without notice, that they were seeking a ruling from the district court that "serial objectors" were objecting for "improper purposes," which is

"why we filed the declaration last night." *Id.* at 86-88. Class counsel then made a variety of false allegations against Frank. *Compare id.* at 90-95 *with* Doc1057-2. (Class counsel's timely written response to objections did accuse several other objectors of being "serial objectors" engaging in extortion, but did not assert Frank was a "serial objector" until the fairness hearing. Doc902 at 40-42.) Frank's counsel was not given another chance to speak, and the court refused requests from objectors to respond. Doc943 at 113.

While the district court found that the objections were "without merit" and overruled them, the district court made no specific factual findings at the fairness hearing about Frank or his counsel, made no findings of "improper purpose" for any of the objectors, and made no findings that anyone was a "serial objector." *Id.* at 113-21. The court's discussion of its reasons for rejecting objections to settlement approval took up six pages of the transcript and were mostly conclusory. *Id.* at 116-21. The court concluded that the objections "did not take into consideration the best interest of the Class itself." *Id.* at 117.

The court found that under Rule 23(e)(2), "the proposal treats Class members equitably relative to each other." *Id.* at 119. The court rejected Frank's subclassing arguments, finding:

> It's highly unlikely that any individuals would have benefited in any way from state statutory remedies that might be available, and if they thought they would, they could opt out. So for the same reasons given in *Target*

> and others, I don't think that is a valid objection to the proposed settlement.

Id. at 121.

The district court's oral opinion did not acknowledge Frank's motion to strike the Klonoff expert report, stating it found Klonoff's report "meritorious and appropriate." *Id.* at 116. It then repeatedly cited Klonoff in rejecting objections. *Id.* at 116-17.

G. Plaintiffs provide a proposed opinion *ex parte* without notice; the district court issues a 122-page opinion several times longer than the oral opinion.

The Court directed class counsel to "summarize[] the Court's findings" in a written order. Doc945; Doc943 at 122-24. N.D. Ga. Civ. Loc. R. 5.1(A)(1) and 7.3 requires all papers, including any proposed order, to be filed on the docket; and copies of proposed orders to be provided to parties. Class counsel later admitted it had submitted the proposed opinion to the court without putting it on the docket. Doc971 at 2-3. On January 13, 2020, without any notice or opportunity for the objectors to review the proposed opinion, the Court entered a 122-page order granting final approval. Doc956.[6]

---

[6] Another objector, West, moved for Rule 59 reconsideration to strike a false statement about one of his attorneys. Doc969. The court granted the motion and issued an amended opinion that struck a single sentence. Doc1027; Doc1029.

The issued opinion was tens of thousands of words longer than the court's often-conclusory oral ruling of under 2000 words. *Id.* It repeated class counsel's false claims about Frank that had been made for the first time at the fairness hearing that Frank had no notice of, no opportunity to rebut, and no reason to believe would be in the opinion once they were omitted from the oral ruling. *Id.* From those claims came findings that Frank was a "serial objector" who objected "merely to benefit the objector or attorney" and a variety of other criticisms. Doc1029 at 110, 113-14.

The oral opinion did not address Frank's motion to strike Klonoff's expert report, but the written opinion denied it. *Id.* at 115-19. Though the court repeatedly relied upon Klonoff's expert report at the fairness hearing, the written opinion stated "the Court's decisions regarding the objections are not dependent upon [Klonoff's] declaration." *Id.* at 38-39.

The opinion rejected Frank's Rule 23(a)(4) arguments for several reasons. First, the court held that creating subclasses was not in the "interests of the entire class" because "numerous subclasses represented by competing teams of lawyers would have decreased the overall leverage of the class in settlement discussions and rendered productive negotiations difficult if not impossible." Doc1029 at 54. The court held that additional subclasses would have made "the litigation process, particularly discovery and trial, much harder to manage and caused needless duplication of effort, inefficiency, and jury confusion." *Id.* at 54-55.

The court found that Frank's approach "would require at least 34 separate teams of lawyers" which require a "time consuming" appointment process and "duplication of effort." Doc1029 at 55 n.26. The court reasoned that Frank argued for separate counsel for "each jurisdiction with statutory claims." *Id.* (citing the fairness hearing at 78-79). At the fairness hearing, however, counsel for Frank argued that "those statutory claims that survived the motion to dismiss here, they deserve independent counsel to represent them at the negotiating table" and that "an experienced mediator is not going to solve the problem with subgroups with conflicting claims." Doc943 at 78-79. Frank did not argue that *each* jurisdiction required separate counsel.

The district court held that there was no fundamental conflict under *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) because "[n]o class members were made better off by the data breach such that their interests in the outcome of the litigation are adverse to other class members" and because "all class members benefit from the proposed settlement, while none are harmed by it." Doc1029 at 55.

The court further held that Frank did not "demonstrate[] how separate representation for state-specific subclasses would benefit anyone, let alone the class as a whole, or that the state statutes as a practical matter provide any class members with a substantial remedy under the facts presented." *Id.* at 59. The district court quoted *In re*

Target Corp. Customer Data Security Breach Litigation, 2017 U.S. Dist. LEXIS 75455, *20, 2017 WL 2178306, at *6 (D. Minn. May 17, 2017), that the objector's intraclass conflict argument "ignores the substantial barriers to any individual class member actually recovering statutory damages" which instead "demonstrates the cohesiveness of the class and the excellent result." *Id.* at 59-60.

The district court distinguished *W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co.*, 737 F. App'x 457 (11th Cir. 2018). It argued that "[b]ecause the water authority had an interest in maximizing the injunctive relief obtained from the alleged polluters while *minimizing* the value of (if not undermining entirely) consumers' claims for compensatory damages, a fundamental intra-class conflict plainly existed." Doc1029 at 60-61. The district court concluded: "No such fundamental conflict exists here." *Id.* at 61.

The district court also distinguished *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011). The court reasoned that the settlement there "'sold out' one category of claims." Doc1029 at 61. The court found that the *Literary Works* claims were "different in kind given the statutory scheme under which they arose" because Category A provided statutory penalties while Category B had actual damages. *Id.* at 61-62. The district court distinguished that this settlement was "carefully calibrated" to provide all class members with

benefits. *Id.* at 62. (And for that reason, the settlement also satisfied Rule 23(e)(2)(D). *Id.* at 62 n.30.)

The district court further reasoned that unlike *Literary Works*, the "same common law claim for negligence … binds the interests of all class members" and "and overcomes any theoretical differences that arise from potential state statutory remedies." *Id.* at 62-63. The court doubted that plaintiffs could prove liability under the state statutes including that Utah's statute requires "a 'loss' and may not even be available in a class action." *Id.* at 63. The court did not discuss the D.C. statute.

The court found that the "implication" that recovery would be more than a trial award had no merit because the settlement was "at the high end of the range of likely recoveries." *Id.* at 63. Finally, the court reasoned that Frank does "not identify any authority holding that a class settlement cannot release individual claims arising from the same transaction or occurrence that are not held by all class members." *Id.* at 64. Frank never argued as much.

H. Post-judgment proceedings.

Frank timely appealed the final judgment and the amended opinion. Doc977; Doc1041. Seven weeks after Frank's notice of appeal, plaintiffs moved for a punitive $40,000 appeal bond against Frank and Watkins based on the district court's putative finding of Frank's status as a "serial objector" and extortionist; Frank opposed, noting that the

extortionist holding was false. Doc1040-1 at 8; Doc1057; Doc1057-2 at 12-13. The court granted an appeal bond of $4,000 against Frank and Watkins based on its earlier extortionist finding without acknowledging or addressing Frank's rebuttal. Doc1094 at 7-10.

On January 15, Frank moved to correct the record under FRAP 10(e) to include the proposed opinion submitted to the court. Doc961. The motion was unopposed, though plaintiffs hinted that the court could deny the motion. Doc971 at 4; Doc974. When the district court appeared to deny all pending motions (Doc1029 at 122), Frank moved in this Court on April 20 and on May 19 for relief under FRAP 10(e)(2)(C), which the Court ultimately denied on June 8 because plaintiffs' opposition showed that the omission was not "inadvertent" as that particular subsection requires. The district court, meanwhile, granted the unopposed FRAP 10(e) motion on May 7. Doc1084. However, instead of complying, on May 11, plaintiffs moved the district court for a "clarification" of the order. Doc1093 at 5. The district court treated this request as a motion for reconsideration of its grant of the unopposed order, and reversed itself on the grounds that this Court's May 7 ruling on Frank's motion showed the *ex parte* communication was not material to the appeal. Doc1106.

On June 9, Frank moved the district court again for Rule 10(e) disclosure, pointing out that its premise for denying relief directly contradicted what the Eleventh Circuit ruled June 8. Doc1134-1 at 4-5.

Plaintiffs opposed (Doc1148), and the court denied Frank's motion August 7, because "the record truly discloses what occurred in the district court" and accusing Frank, without basis, of acting to "obstruct and delay." Doc1153.

Frank timely appealed these orders and the bond order. Doc1126; Doc1154.

Frank filed a time-sensitive motion for FRAP 10(e)(3) relief in this Court August 14 so he could include the still-undisclosed proposed order in this September 4 brief. Appellees opposed after 11 p.m. on August 24, with plaintiffs arguing that the district court could legally copy the proposed opinion verbatim so its inclusion in the record would be irrelevant. Frank replied a few hours later, and this Court ordered on August 26 for Frank to address the issue in his merits brief.

Standard of Review

This Court applies "an abuse of discretion standard in reviewing the district court's class certification rulings." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1251 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). "However, with great power comes great responsibility; the awesome power of a district court [to certify] must be exercised within the framework of rule 23." *Id.* (cleaned up). Thus, a "district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in

making the determination, or makes findings of fact that are clearly erroneous"; or "by applying the law in an unreasonable or incorrect manner"; or "imposes some harm, disadvantage, or restriction upon someone that is unnecessarily broad or does not result in any offsetting gain to anyone else or society at large." *Id.* (cleaned up).

The district court's factual determinations are reviewed "for clear error" and legal holdings reviewed "de novo." *Id.* But "in the context of class actions, review for abuse of discretion often does not differ greatly from review for error." *Brown v. Electrolux Home Prods.*, 817 F.3d 1225, 1233 (11th Cir. 2016) (cleaned up).

Finally, "a court of appeals should review *de novo* a district court's determination of state law." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991). "When *de novo* review is compelled, no form of appellate deference is acceptable." *Id.* at 238.

Summary of Argument

In the laboratory of democracy, the "diverse policy judgments of lawmakers in 50 States" have provided materially different remedies to their citizens for data breaches. But the settlement here sweeps all of that away with a single national class and uniform relief. It provides identical relief to a D.C. resident with a $2,000 statutory-damages claim that survived a motion to dismiss and to a Texas resident with no such claim. The district court approved such a settlement while denying

separate representation for the class members surrendering their statutory-damages claims for no additional compensation. Rules 23(a)(4) and 23(e)(2)(D) prohibit such Procrustean treatment, which does "violence not only to Rule 23 but also to principles of federalism." *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.). The court contradicted Supreme Court precedent and erred as a matter of law when it held efficiency and the interests of the class as a whole overrode the rights of unrepresented subclasses. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

That ruling alone requires reversal, but the extraordinary irregularities getting to that result also merit attention. The court rejected objections by impermissibly relying on an "expert opinion" that was really a 72-page legal brief. It then delegated the writing of the opinion to plaintiffs—who, in violation of the local rules and the Code of Conduct for United States Judges, submitted the proposed opinion to the court *ex parte* without opportunity for class members to review.

It appears that the court adopted that 122-page *ex parte* opinion "nearly verbatim" even though it was tens of thousands of words longer than its largely conclusory oral opinion. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997).[7] Yet, inexplicably, even

[7] This is not the only case pending in this Court with this judge and this class counsel and this fact pattern. *See In re Home Depot Inc.*, Opening Br. 7, No. 20-10667 (Apr. 27, 2020) (26-page opinion).

though it is undisputed that these written *ex parte* communications took place, the district court has refused to place them on the record. As in *Edgar v. K.L.*, "[w]e cannot know" the contents for sure because of the court's actions in hiding them, but those actions alone are grounds for both a presumption of wrongdoing and reassignment on remand. 93 F.3d 256, 258 (7th Cir. 1996) (Easterbrook, J.) (mandamus). So, too, in *Chudasama*, in less egregious circumstances. And in the class-action context, the lack of evidence of "independent judgment" by itself requires reversal. *In re Community Bank of N. Va*, 418 F.3d 277, 300-01 (3rd Cir. 2005).

As part of that reliance on plaintiffs, the district court repeatedly made entirely baseless findings calling Frank an extortionist, premising an appeal bond on them. These should be vacated.

Argument

I. The district court erred as a matter of law in certifying the single settlement class where fundamental conflicts between subgroups of class members preclude adequate representation under Rule 23(a)(4).

The Settlement here has a single nationwide settlement class of 147,000,000 consumers affected by the 2017 Equifax data breach. Doc1029 at 4. But there are subgroups of class members within the class—uncertified and unrepresented—that waive valuable statutory-damages claims for no compensation above what class members without

claims receive. Doc739-2 at 12-23. There are fundamental conflicts of interest between these unrepresented subclasses, who have an interest in pursuing these separate legal remedies, and the other members of the certified class who lack such claims.

"Recognizing the awesome power of a district court in controlling the availability of the class action mechanism, the Eleventh Circuit requires that decisions to certify a class rest on a rigorous analysis of the requirements of Rule 23." *Sacred Heart Health Sys. v. Humana Military Healthcare Servs.*, 601 F.3d 1159, 1169 (11th Cir. 2010) (cleaned up). Certifying a single settlement class was improper here because the uncertified subgroups require separate subclassing and legal representation.

A. Rule 23(a)(4) requires adequate representation to protect class members' due process rights—with heightened scrutiny in the settlement context.

A court cannot certify a class action unless the class representatives "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The class representatives "must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (cleaned up). "Due process of law would be violated for the judgment in a class suit to be res judicata to the absent members of a class unless the court applying res judicata can conclude that the class was adequately represented in the

first suit." *Juris v. Inamed Corp.*, 685 F.3d 1294, 1322 (11th Cir. 2012) (internal quotation omitted). Rule 23(a)(4) ensures that the absent class members' interests are represented in the litigation so it is fair to bind them to decisions of the class representatives. *Amchem*, 521 U.S. at 621.

The district court's duty to assure adequacy of representation does not end when the parties head to the settlement table. Even after the initial determination that the class representatives fairly and adequately represent the class, the court has a "continuing duty" to ensure that the Rule 23(a)(4) adequacy is satisfied. *Piambino v. Bailey*, 757 F.2d 1112, 1145 n.88 (11th Cir. 1985). In fact, because Rule 23(a)(4) is "designed to protect absentees by blocking unwarranted or overbroad class definitions," adequacy of representation "demand[s] undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620. *Amchem* emphasized that heightened scrutiny of a settlement class's adequacy of representation is of "vital importance" because unlike a case proceeding through litigation where a court can adjust the class, the absent class members are bound by their representatives' decisions in the settlement negotiations. *Id.*

B. Fundamental conflicts exist between the class and subgroups with materially valuable statutory-damages claims.

The single-settlement class here deprives subgroups (including Frank) of their due-process rights and Rule 23(a)(4) protections because

there are conflicts of interest between the class and the subgroups that have unique statutory-damages claims. With absent class members' due process rights at stake, the safeguards of Rule 23(a)(4) are not "impractical impediments—checks shorn of utility—in the settlement-class context." *Amchem*, 521 U.S. at 621. The heightened analysis "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (cleaned up); *Amchem*, 521 U.S. at 625. When that inquiry exposes substantial conflicts of interest among the class, certification is inappropriate.

The Supreme Court confronted such conflicts in *Amchem* and *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999). In *Amchem*, the Court held that certification of an asbestos class settlement was unlawful because the class combined (i) class members exposed to but not injured by asbestos, and (ii) class members already suffering from asbestos-related injuries. 521 U.S. at 597. The two groups' interests were not aligned: while the currently-injured members wanted immediate payment, the exposure-only members sought funds for future compensation. *Id.* at 626-27. Despite these competing interests and incentives, the named representatives had a duty to represent the whole class and therefore could not adequately serve their "separate constituency." *Id.* at 627.

Two years later, *Ortiz* resolved a similar problem. The Supreme Court repeated what should have been "obvious after *Amchem*": "a class divided between holders of present and future claims … requires division into homogeneous subclasses … with separate representation to eliminate conflicting interests of counsel." 527 U.S. at 856. But the Court also recognized a second conflict between class members who suffered exposure while the defendant was insured and class members who were exposed after the insurance had expired. *Id.* at 853. Because class members who were exposed before insurance expired had "more valuable claims" than the other class members, the groups had "disparate interests" requiring subclassing with separate counsel. *Id.* at 857.

The Second Circuit's decision in *In re Literary Works* demonstrates why subgroups with different statutory claims create intraclass conflicts requiring separate representation. 654 F.3d 242 (2d Cir. 2011). The settlement there provided compensation from Google for three separate "categories" of class members (labeled A, B, and C) in a single settlement class: claims in Category A were eligible for statutory damages, and the others were not. *Id.* at 246. Many class members held claims in more than one category. *Id.*

The *Literary Works* settlement created a damages formula for each category, with Category A recovering the most pro rata. *Id.* The problem was that the class representatives were generally representing *all* subgroups—class representatives had claims in categories A, B, and C—

but were incentivized to favor their more exclusive category A and B claims. *Id.* at 251, 252 (citing *Amchem*, 521 U.S. at 627).

The Second Circuit had little difficulty in ruling that "the interests of class members who hold only Category C claims ***fundamentally conflict*** with those of class members who hold Category A and B claims." *Id.* at 254 (emphasis added).

While "all class members shared an interest in maximizing the collective recovery, their interests diverged as to the distribution of that recovery because each category of claim is of different strength and therefore commands a ***different settlement value***." *Id.* (cleaned up and emphasis added). *Literary Works* struck the settlement on Rule 23(a)(4) grounds: the class representatives "cannot have had an interest in maximizing compensation for *every* category." *Id.* at 252 (emphasis in original). See also *Ortiz*, 527 U.S. at 857 (discrediting "common interest in securing contested insurance funds for the payment of claims"); *Dewey v. Volkswagen AG*, 681 F.3d 170, 188 (3d Cir. 2012) (representative plaintiffs' "interest in excluding other plaintiffs from the reimbursement group" was "precisely the type of allocative conflict of interest that exacerbated the misalignment of interests in *Amchem*").

This case has the same representational defects—with the added flaw that, unlike *Literary Works*, there was no attempt to provide additional value to those with more valuable statutory damages claims. The district court resolved a motion to dismiss against defendants and

found that plaintiffs could proceed with data breach claims from 28 jurisdictions and general consumer-protection statutes from 35 jurisdictions. Doc540 at 63-75. Like *Literary Works,* the surviving claims include statutory claims that only permit recovery of actual damages, as well as more valuable statutory claims that permit recovery of statutory liquidated damages. While the single settlement class had an interest in maximizing the total recovery, there was no representation to maximize recovery of the subgroups holding claims with much higher settlement values where statutory damages are available.

For example, in the complaint, plaintiffs sought $2,000 in statutory damages for class members from Utah like Watkins, and $1,500 in statutory damages for class members from Washington, D.C. like Frank. Doc374 at 270, 517. But having been lumped together with class members from states without statutory-damages claims, Watkins and Frank (and the other millions of class members with statutory-damages claims) had no one representing them at the negotiating table pressing their more valuable claims. Instead, all class members were treated as if their claims had the *same* settlement value and were provided the *same* relief, effectively releasing the more valuable statutory-damages claims for no additional consideration.

Frank objected that these fundamental intraclass conflicts precluded adequate representation under Rule 23(a)(4). Doc876 at 4-12. But the district court certified the class notwithstanding these conflicts.

In finding no fundamental conflicts, the district court erred as a matter of law in several respects.

1. The district court erred in distinguishing *Literary Works* and *Amchem*.

The district court's claimed distinctions with *Literary Works* are either inaccurate or irrelevant. *First*, the district court held that the "three claims categories in *Literary Works* were different in kind given the statutory scheme under which they arose" because in *Literary Works* Category A claims were stronger and "uniquely valuable" because Category A claims were "eligible for statutory penalties" while Category C were only eligible for "actual damages." Doc1029 at 61-62. But this is exactly the scenario here: D.C. and Utah residents are eligible for statutory penalties, and thus have claims that are stronger and more valuable than, say, Texas residents who are not.

Second, the district court reasoned that *Literary Works* merely required separate representation because Category C claims were "sold out"—that Category A could not "take all the settlement's benefits, at least not without independent representation for the Category C claimants." *Id.* at 61-62. The district court concluded: "In contrast, the proposed settlement in this case provides all class members with benefits and, unlike in the proposed settlement in *Literary Works*, is 'carefully calibrated' to do so." *Id.* This is "no answer." *Ortiz*, 527 U.S. at 857. The district court got both the facts and the law wrong.

The *Literary Works* settlement provided that Category C compensation would reduce pro rata to zero if claims reached $18 million. 654 F.3d at 246. But that's not why the Second Circuit found inadequate representation. In fact, the Second Circuit held that Category C's inferior treatment under the settlement was not "determinative evidence of inadequate representation." *Id.* at 253. The real problem was that even though the Category C claims were "indisputably worth less" than the other claims, without independent representation, there was "no basis for assessing whether the discount applied to Category C's recovery appropriately reflects that weakness." *Id.*

Indeed, if the *Literary Works* settlement had *not* accounted for Category C's weakness, "the 'very decision to treat [claims] all the same [would] itself [have been] an allocation decision' unfair to the interests of those who had authored registered works." *Id.* at 253 (quoting *Ortiz*, 527 U.S. at 857 with alterations). The settlement here likewise treats all class members equally without regard for the strengths or weakness of the competing claims. This equivalent treatment is itself dispositive evidence of inadequate representation and contradicts the district court's rationale that this settlement was carefully calibrated for class members.

Third, the district court erred in distinguishing *Literary Works* because the class here was united in pursuing a common-law negligence claim under Georgia law. Doc1029 at 62. Yet in *Literary Works*, class members were similarly united by Category C claims which comprised

"more than 99% of authors' total claims." 654 F.3d at 246. But the Second Circuit held that "[a]lthough named plaintiffs collectively hold all three categories of claim, 'each served generally as representative for the whole, not for a ***separate constituency***.'" *Id.* at 251 (emphasis added) (quoting *Amchem*, 521 U.S. at 627). That all class members had an interest in *one* claim does not mean that their *unique* claims were adequately represented. *Cf. also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 235 (2d Cir. 2016) ("[N]amed plaintiffs with claims in multiple subgroups cannot adequately represent the interests of any one subgroup because their incentive is to maximize their own total recovery, rather than the recovery for any single subgroup.").

2. The district court's flawed comparison of the Georgia, D.C., and Utah statutes only underscores the need for separate representation.

The district court wrongly justified "differences" among the state statutory remedies based on the purported strength of the Georgia negligence claim compared to the D.C. and Utah claims. Doc1029 at 62-63. Its reasoning is belied by the district court's own "considerable doubt whether Equifax under Georgia law even had a legal duty to protect anyone's personal information." Doc943 at 14. Indeed, there is no duty under Georgia negligence law to safeguard another person's information. *Dep't of Labor v. McConnell*, 828 S.E.2d 352, 358 (Ga. 2019). With no

duty, the court's reasoning (Doc1029 at 63) that nominal damages for the negligence claims could yield more than the state statutory-damages claims also fails.

Indeed, while the district court touted the *strength* of the Georgia claim in relation to the Utah and D.C. claims to explain away Rule 23(a)(4) intraclass conflicts, it used the *weakness* of the Georgia claim to both justify class counsel's fee award, Doc1029 at 93, and to justify the adequacy of the settlement relief, *id.* at 18. In any event, the weaknesses of Georgia common-law claims cannot justify the court's failure to recognize that the other state-law *statutory* claims do not suffer the same weaknesses. *See Sharp Farms v. Speaks*, 917 F.3d 276, 301-02 (4th Cir. 2019).

The district court's disregard of the Utah and D.C. statutes fare no better. To begin, the district court questioned plaintiffs' ability to prove liability under the state statutes. Doc1029 at 63. But the Final Approval Order includes *no discussion* of the D.C. statute and *no explanation* why the Georgia negligence statute that permits only actual damages (and likely no recovery under *McConnell*) would have a higher settlement value than the D.C. statute providing $1,500 in statutory damages. So too for the dozens of other state statutes the opinion ignores.

For Utah, the district court questioned plaintiffs' ability to prove liability because the statute "requires each plaintiff to establish a 'loss.'" Doc1029 at 63 (citing Utah Code Ann. §13-11-19). Under Utah law,

however, "it is apparent that the Legislature has opted to create a broader category of 'loss,' i.e., 'damage, damages, deprivation, detriment, injury, [and] privation,' for which a consumer may seek redress under the statute." *Andreason v. Felsted*, 137 P.3d 1, 4 (Utah App. 2006). Utah does not require actual damages for recovery. *Id.* But even if it did, the district court had already recognized that plaintiffs had adequately pled financial losses, "alleg[ing] that they have already incurred significant costs in response to the Data Breach." Doc540 at 20. Yet, the court ignored those losses.

The district court also questioned whether the Utah statute could proceed as a class action. Doc1029 at 63. But Equifax unsuccessfully attempted to dismiss fifteen of the state putative classes (including Utah) because the statutes purportedly restricted class actions. Doc425-1 at 41. Having allowed those claims to proceed, the court could not then discard such claims in the resulting settlement as valueless.

Indeed, as plaintiffs argued in opposing Equifax's motion to dismiss (Doc452 at 46-47), this Court has already held that federal procedure permits class actions for violations of state statutes like Utah's that have state procedural bars.

In *Lisk v. Lumber One Wood Preserving, LLC*, the defendant moved to dismiss a class action brought under an Alabama statute that did not permit class actions. 792 F.3d 1331, 1334 (11th Cir. 2015). *Lisk* held that Rule 23 controlled in federal court. *Id.* at 1334-35 (following *Shady Grove*

Orthopedic Associates, P.A. v. Allstate Insurance Co., 559 U.S. 393 (2010) (same result for New York statute)). *Lisk* found that, like *Shady Grove*, permitting a class action would not enlarge a substantive right because the Alabama statute permitted an individual redress. *Lisk*, 792 F.3d at 1335-36. The same is true for the Utah claims where plaintiffs seek recovery for deceptive acts and practices. Doc374 at 510-517. Accordingly, those claims may proceed as a federal class action and the district court should not have discounted the claim's value on that basis.

The district court erroneously relies on *Target*, where a district court rejected a similar argument regarding intraclass conflicts based on competing state statutory-damages claims because of unspecified "substantial barriers" to recovery of supposedly "uncertain" statutory damages under those statutes. Doc1029 at 59-60. That holding is simply wrong. By definition, statutory damages are far more "certain" because they eliminate the need to prove the *amount* of harm. On appeal in *Target*, the Eighth Circuit did not address this holding, ruling that the objector-appellant lacked standing to raise this conflict because he was not a resident of a state that accorded statutory damages. 892 F.3d 968, 973 n.4 (8th Cir. 2018). No such standing issues exist here, as Frank and Watkins **are** residents of such states.

Moreover, the district court's faulty analysis of the strengths and weaknesses of the Georgia, Utah and D.C. claims is contradicted by the district court's own findings and applicable law demonstrates the need

for Rule 23(a)(4) protections. Separate counsel for the subgroups would have pressed these arguments (and others) to vie for their respective clients' share of the settlement pie, rather than attempt to denigrate them to cram down a settlement quickly. *See* Section I.C below. Class counsel's incorrect arguments before the district court undermining the strength of the subclass's claims (*e.g.*, Doc943 at 97) by themselves show the conflict of interest and inadequate representation. "The rationale [for separate representation] is simple: how can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?" *Literary Works*, 654 F.3d at 253.

3. The district court's holding wrongly limits the definition of Rule 23(a)(4) fundamental conflicts.

The district court wrongly held that no fundamental conflict existed based on *Valley Drug Co.*, 350 F.3d at 1189. Doc1029 at 55. In *Valley Drug*, plaintiffs (drug wholesalers) challenged a drug company's monopoly that was keeping less-expensive generic products off the market. *Id.* at 1184. Some of the wholesalers, however, actually benefitted from the lack of generic competition because generic sales often bypassed wholesalers. *Id.* at 1191. This Court reversed class certification: "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." *Id.* at 1189.

Relying on *Valley Drug*, the district court here concluded that there was no conflict because "[n]o class members were made better off by the data breach such that their interests in the outcome of the litigation are adverse to other class members. Similarly, all class members benefit from the proposed settlement, while none are harmed by it." Doc1029 at 55. But *Valley Drug* does not limit conflicts to such fact patterns. *Valley Drug*'s *disjunctive* statement—that "a class cannot be certified ***when its members have opposing interests or*** when it consists of members who benefit from the same acts alleged to be harmful to other members of the class"—indicates that class certification is improper under *either* scenario. 350 F.3d at 1189 (emphasis added).

Moreover, *Valley Drug* speaks broadly about conflicts that defeat class certification: "where the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of unnamed class members." *Id.* at 1190. The *Valley Drug* conflict is merely *one type* of intraclass conflict and does not foreclose the possibility of other types of conflicts that may preclude class certification. If fundamental conflicts were limited to the district court's interpretation, *Amchem* and *Ortiz* (where none of the plaintiff-asbestos victims benefitted from defendants' conduct) would have turned out differently.

Similarly, the district court incorrectly held there was no conflict of interest based on *W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M*

Co., 737 F. App'x 457 (11th Cir. 2018). There, the class included both the water authority and consumers against the polluting companies even though consumers had also filed injury claims against the water authority. *Id.* at 464. The district court explained that in *3M* "[b]ecause the water authority had an interest in maximizing the injunctive relief obtained from the alleged polluters while *minimizing* the value of (if not undermining entirely) consumers' claims for compensatory damages, a fundamental intra-class conflict plainly existed." Doc1029 at 61. The district court concluded: "No such fundamental conflict exists here." *Id.* Again, fundamental conflicts are not limited to that fact pattern.

Instead, *3M*'s broader principles demonstrate that a conflict exists here precluding Rule 23(a)(4) adequacy. While the water authority and the consumers had a *shared* interest in seeking injunctive relief, the consumers had monetary claims for individualized harms "not shared" by the water authority. 737 Fed. App'x at 464. The question is whether a representative will "assert with 'forthrightness and vigor' those interests of other class members that he does not share and in which he has no stake." *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000). "Conflicts of interest may arise when one group within a larger class possesses a claim that is neither typical of the rest of the class nor shared by the class representative." *Hesse v. Sprint Corp.,* 598 F.3d 581, 589 (9th Cir. 2010).

The district court cited (Doc1029 at 60 n.29) *Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 536 (11th Cir. 2017), which found only a "minor conflict" where the class representative sought statutory damages although other class members may have suffered hypothetical actual damages. Representatives are not inadequate because they do not seek "every remedy that *possibly*—as opposed to probably—would be sought by absent class members." *Id.* Here, the statutory damages claims were more than "possible," or even "probable," but were actually pled in subclasses and survived a motion to dismiss. Doc540. *Dickens* demonstrates that the conflict is not "minor."

As *Lyons* explains: "Indifference as well as antagonism can undermine the adequacy of representation." 221 F.3d at 1253. Thus, class members need not have directly adverse claims (as in *Valley Drug* or *3M*) for a fundamental conflict to exist. Rule 23(a)(4) adequacy is deficient when representatives do not have an interest in vigorously pursuing a subgroup's unique claims.

4. The district court erred in finding that class members' ability to opt out cures Rule 23(a)(4) conflicts.

The district court wrongly rejected the need for subclassing because class members had the ability to opt out. Doc943 at 121. An opt-out right is not a panacea. (Indeed, *Amchem* involved an opt-out class.) Opt-out "does not relieve the court of its duty to safeguard the interests of the class and to withhold approval from any settlement that creates conflicts

among the class." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 809 (3d Cir. 1995).

Nor can a class member's failure to object or opt-out, particularly in a large-scale consumer class action, be interpreted as agreement with the settlement terms or provide any indication of the settlement's fairness. *See Redman v. Radioshack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) ("naïve" to infer assent from silence). If opt-out ability could cure Rule 23(a)(4) conflicts, *Amchem* would have turned out differently and Rule 23(b)(3) settlements could proceed regardless of intraclass conflicts, effectively abrogating 23(a)(4).

C. Separate subclassing and representation cannot be ignored to simplify negotiations.

Resolving the intraclass conflict "requires division into homogeneous subclasses under Rule 23(c)(4)(B) [recodified as Rule 23(c)(5) after amendments], with separate representation to eliminate conflicting interests of counsel." *Ortiz*, 527 U.S. at 856. Separate subclassing and independent counsel ensures "structural assurance" of fair and adequate representation. *See Amchem*, 521 U.S. at 627. This Court thus stressed the importance of independent counsel for "structural protection" of Rule 23(a)(4) adequacy in *Juris*, 685 F.3d at 1323. Plaintiff Juris challenged the settlement, arguing that the district court should have created subclasses for those with current injuries and those with only potential, future injuries. *Id.* at 1322. The Court held that

while there were no formal subclasses, there was sufficient structural protection because the district court had appointed representatives with varying injuries or no injuries who understood their representative roles and "served as the functional equivalents of formal subclasses." *Id.* at 1326.

"Most significantly, and anticipating an *Amchem* problem," *Juris* emphasized, the district court had appointed independent counsel for these subgroups. *Id.* at 1324. "[T]he interests of those claimants with unmanifested injuries were represented and given a ***separate seat at the negotiation table*** through qualified and independent counsel." *Id.* (emphasis added); *see also Piambino*, 757 F.2d at 1145 n.88 (requiring designation of a separate subclass "with the right to have separate counsel unbeholden to Lead Counsel").

Here, in contrast, the subgroups with statutory-damages claims have different *settlement* values but they did not have separate counsel to maximize those values. They did not have a seat at the negotiation table. Although Frank raised *Juris* at length (Doc876 at 10-11), the district court did not discuss it.

Instead, the district court found that creating numerous subclasses with competing teams of lawyers would have "rendered productive negotiations difficult" and cause "needless duplication of effort, inefficiency, and jury confusion." Doc1029 at 54-55.

That analysis is reversible error by itself for several reasons. *First*, the due process protections provided by Rule 23(a)(4) adequacy cannot be sacrificed for efficiency nor "shorn of utility." *Amchem*, 521 U.S. at 621. "Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.) (citing *Amchem*, 521 U.S. at 613).

The rights of disparate class members cannot be sacrificed for the convenience of settlement negotiations. As *Bridgestone/Firestone* noted, "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." 288 F.3d at 1020. To do otherwise does "violence not only to Rule 23 but also to principles of federalism." *Id.*

The conflicts here present the same federalism concerns. The varying data breach and consumer protection statutes reflect judgment decisions by legislators from each of the jurisdictions where class members reside. Doc374; *cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570 (1996) (discussing "diverse policy judgments of lawmakers in 50 States"). Ignoring the intraclass conflicts because it might make negotiations "difficult" undermines those legislative judgments and principles of sovereignty and comity, and the due process rights of absentees. Simply put, neither the settlement proponents nor the court

may "rewrite Rule 23" to further the "common interest in securing" "a global settlement." *Ortiz*, 527 U.S. at 857-859 & n.33. What is true for "the elephantine mass of asbestos cases" (*id.* at 821) is more so for this considerably less sprawling case.

Second, the district court's reasoning is based on the flawed assumption that 34 subclasses are needed. Doc1029 at 55 n.26. While Frank argued that independent counsel was necessary, he never argued that each *jurisdiction* required separate counsel. Doc943 at 78-79. This case could likely proceed with a nationwide class and just three subclasses. When "the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate." *Klay*, 382 F.3d at 1262; *see also Sacred Heart*, 601 F.3d at 1180 (plaintiffs bear burden of grouping subclasses with "states that have similar legal doctrines" (internal quotation omitted)). Likewise, it is possible for plaintiffs here to satisfy their burden of proving adequacy by grouping class members with materially similar legal remedies.

"Post-*Amchem* courts have emphasized that a settlement class must be cohesive" with "a common nucleus of facts and potential legal remedies." *Manual Complex Litigation* §21.132, at 251 (4th ed. 2004) ("*Manual*"); *cf. Drayton v. Western Auto Supply Co.*, 2002 U.S. App. LEXIS 28211, at *21-22 (11th Cir. 2002) (no 23(a)(4) adequacy where

representatives were "pursuing remedies for themselves they are not seeking for the class"). The district court's order dismissed all but the negligence and injunctive claims on behalf of the nationwide class, Doc540 at 13-14, 46, 48, for which plaintiffs sought compensatory, punitive and nominal damages, Doc374 at 189, 192. Of the surviving state statutory claims, 30 statutes permit recovery of only actual damages, *see* n.1 above, and would therefore not provide any additional remedies beyond the relief sought for the nationwide class.

The remaining claims, however, provide materially-different *additional* legal remedies, and should be grouped into at least three subclasses:

- Contract subclass. Unjust enrichment claims remain solely for the "Contract Plaintiffs"—those who alleged they formed a contract with Equifax. Doc540 at 48-49. The unjust enrichment claim seeks the "benefit conferred on Equifax," *i.e.*, profits from the sale of consumers' information, Doc374 at 204, a separate measure of damages.

- Duty-to-safeguard subclass. Plaintiffs seek statutory damages under 26 state statutes for Equifax's failure "to implement and maintain reasonable security and privacy measures." *See* nn.2-3 above.

- Duty-to-disclose subclass. Plaintiffs seek statutory damages under eight state statutes for Equifax's failure to disclose the data breach in a timely manner. *See* nn.4-5 above.

The statutory-damages subclasses are grouped based on the alleged duty because a class member could potentially recover statutory damages separately under both theories. *E.g.,* Doc374 at 390-396 (Montana subclass's Counts 56 and 57 for these two claims). (This list also demonstrates the false premise in the district court's argument that *Amchem* did not apply here because "all class members allege the same injury." Doc1029 at 57. Not so: many allege unique causes of action and recovery not applicable to the class as a whole.)

While the specific amount of statutory damages available under the state statutes vary within the subclass, those differences should not affect predominance and a proportional administrative formula can allocate relief within the subclass. *Cf. In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 219 (5th Cir. 1981). If there were material differences in law within the statutory-damages subclasses, plaintiffs could make appropriate adjustments and create additional subclasses as needed. The burden to propose necessary subclasses that comply with Rule 23(a)(4) rests squarely with plaintiffs. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 408 (1980).

The district court complained of the inefficiency of having independent counsel for the litigation process, as well as the time-consuming appointment process. Doc1029 at 55 n.26. But the district court had already appointed ***thirteen firms*** to serve as counsel for the consumer plaintiffs. Doc232 at 2-4. That metastasized to sixty firms

seeking fees. Doc876 at 24. The court can appoint a new smaller leadership group, and three new firms as independent counsel "unbeholden to Lead Counsel" (*Piambino*, 757 F.2d at 1145 n.88) for the statutory-damages subclasses, and end up with a more efficient structure than the status quo.

Finally, the district court wrongly reasoned that competing subclasses would "decrease[] the overall leverage" of the class in settlement negotiations. Doc1029 at 54. There is no evidence for that purely speculative assertion. As *Piambino* observed, a defendant is concerned only with the bottom line and not how the settlement proceeds are allocated, 757 F.2d at 1143, *i.e.*, how the competing subclasses divide the settlement pie.

The district court also gets it backwards. If Rule 23(a)(4) requirements are relaxed to avoid subclassing, the class actually *loses* leverage. In *Amchem*, the Supreme Court explained that eclipsing the requirements of Rule 23(a)(4) to settle a case (that would be impossible to litigate) only "disarm[s]" class counsel in negotiations because they cannot "use the threat of litigation to press for a better offer." 521 U.S. at 621 (citing academic and judicial authority). "[S]ettlement pressures have already been taken into account in the structure of Rule 23." *Klay*, 382 F.3d at 1275. Simply put, it is legal error to consider the effect of subclasses on negotiations in assessing Rule 23(a)(4) inadequacy.

D. The district court's finding that the "class as a whole" was better off without subclassing and independent counsel is independent legal error requiring reversal.

The district court's finding (Doc1029 at 59) that separate subclassing and independent representation was unnecessary because it would not benefit "the class as a whole" is independent error because it is the wrong standard. An objection that a settlement is inequitable because it treats inadequately represented subclasses unfairly may not be in the best interests of the class as a whole, but it is meritorious and in the best interests of the subclass disfavored by the settlement. *Manual* §21.643 at 327. While class members with no statutory-damages claims may prefer a settlement that provides the same relief for everyone, such class members should not be allowed to dilute the recovery for class members *with* statutory-damages claims, especially where the value of the release of these viable state claims undoubtedly fueled the class recovery.

Even if representatives thought a settlement served "the aggregate interests of the entire class," the representative must understand "their role is to represent solely the members of their respective subgroups." *Amchem*, 521 U.S. at 627 (internal quotations omitted). Rule 23(a)(4) "protections must ensure that class representatives understand that their role is representing solely members of their respective constituency, not the whole class." *Juris*, 685 F.3d at 1323.

The *Amchem* Court gave no weight to petitioners' argument that "achieving a global settlement" could "discount the comparable failure in that case to provide separate representatives for subclasses with conflicting interests." *Ortiz*, 527 U.S. at 858. Rule 23(a)(4) requires protections at the *certification* stage, while 23(e) settlement fairness is *postcertification* review. *Id.* Settlement fairness cannot "swallow" the preceding 23(a)(4) protections. *Id.* Here, the district court committed reversible error by incorrectly suborning the interests of the subclass to the interests of the class as a whole.

E. The district court's Rule 23(e)(2)(D) analysis was similar error.

Relatedly, the district court also erred in holding (Doc1029 at 62 n.30) that that the inequitable treatment of class members with statutory-damages claims was permissible because "it could disadvantage the entire class" by leading to "no recovery." Rule 23(e)(2)(D) requires the court to look beyond the class as a whole and ensure that the settlement "treats class members equitably relative *to each other*." (emphasis added). This recent amendment to Rule 23 addresses concerns whether "the apportionment of relief among class members takes appropriate account of differences among their claims." Advisory Committee Notes on 2018 Amendments to Rule 23. Like the millions of other class members with statutory-damages claims, Frank

should not be subject to a settlement that does not account for his separate legal remedies.

F. The district court contravened *Amchem* and *Ortiz* by using the purported fairness of the settlement to excuse the fundamental conflict.

The district court erred by excusing the conflict based on the supposed fairness of the settlement. Doc1029 at 63-64; *id.* at 59-60 (relying on *Target*, 2017 WL 2178306, at *6). But the ends (settlement) cannot justify the means (inadequate representation). Rule 23(e) is "an additional requirement, not a superseding direction" and so the district court cannot ignore intraclass conflicts based on an assessment of the fairness of the settlement relief (23(e)) rather than the adequacy of representation (23(a)(4)). *Amchem*, 521 U.S. at 621. Federal courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper." *Id.* at 622; *Ortiz*, 527 U.S. at 858-59; *see also 3M*, 737 Fed. App'x at 465 (adequacy cannot be assessed "by looking simply at whether the result of the negotiations seemed fair"); *Literary Works*, 654 F.3d at 253-54 (noting no dispute over fairness over allocation but decertifying class anyway). "[I]t is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623.

The reason is simple. While the negotiations and result may *seem* fair, the district court can *never* know whether the result actually reflects the weakness or strength of those claims that would have been revealed if they had been adequately represented. *Literary Works*, 654 F.3d at 252. The district court's finding ignores Supreme Court precedent and improperly puts the cart before the horse by rationalizing adequacy of representation based on the purported fairness of the settlement relief.

II. Reversal and reassignment is required for the independent reason that the district court failed to exercise "independent judgment."

While a district court's verbatim adoption of a party's proposed findings of fact and conclusions of law, although highly disapproved of, is not *per se* grounds for reversal (*Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985)), "there must be evidence in the record demonstrating that the district court exercised 'independent judgment' in adopting a party's proposed findings." *In re Community Bank of N. Va.*, 418 F.3d 277, 300 (3rd Cir. 2005) (vacating class certification). The district court did more than just adopt findings of fact, though: it adopted the *proposed opinion* verbatim or nearly verbatim. "This fact, even standing alone, would be enough for us to distinguish the holdings in *Anderson*." *Bright v. Westmoreland County,* 380 F.3d 729, 732 (3d Cir. 2004).

"When a court adopts a party's proposed opinion as its own" without providing opposing counsel an "opportunity to object or even respond to

the submitted opinion," "the court vitiates the vital purposes served by judicial opinions." *Bright*, 380 F.3d at 732. Every indication is that this happened here (it is undisputed that appellants never saw or had any opportunity to respond to the *ex parte* proposed opinion before entry), and the lack of "independent judgment" requires reversal.

This is especially true in a class action. It is "essential" that the court exercise "careful scrutiny" when approving settlements without acting as a "rubber stamp[]" or "captive" of the class attorneys. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1150 (11th Cir. 1983); *accord Community Bank*.

It also requires reassignment on remand: "delegating the task of drafting sensitive, dispositive orders to plaintiffs' counsel, and then uncritically adopting his proposed orders nearly verbatim, would belie the appearance of justice to the average observer." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997).

A. This Court should presume that the district court uncritically adopted the 122-page opinion nearly verbatim from the proposed opinion.

The district court ordered class counsel to prepare a proposed opinion that was to reflect the court's oral decision. Doc945; Doc943 at 122-24. Though N.D. Ga. Civ. Loc. R. 5.1(A)(1) and 7.3 require proposed opinions to be placed on the docket and shared with parties, there is no dispute it was instead submitted *ex parte* without notice to

objectors. The *ex parte* submission to the district court, and the district court's reliance on it, contravened Canon 3A(4) of the Code of Conduct for United States Judges and the local rules. Frank only learned the proposed opinion was submitted to the court when the court entered a final opinion on January 13 that was tens of thousands of words and an order of magnitude longer than the largely conclusory oral opinion. Doc956. As noted above, the district court has refused to include the *ex parte* proposed opinion in the record.

The burden is on appellees to show that the final opinion is not a nearly verbatim copy of the *ex parte* proposed opinion. "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *U.S. v. N.Y.N.H.&H. R.R. Co.*, 355 U.S. 253, 256 n.5 (1957); *accord Concrete Pipe & Prods. v. Constr. Laborers Pension Trust,* 508 U.S. 602, 626 (1993); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1362 (11th Cir. 2002), *overruled in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge*, 424 F.2d 684, 694 (5th Cir. 1970).

In the alternative, if this Court is unwilling to presume that the final decision is a nearly verbatim copy of the proposed opinion, then the district court's denials of the FRAP 10(e) motions (Doc1106; Doc1153) are each clearly erroneous, and should be reversed. *See e.g., U.S. v. Greco*, 938 F.3d 891, 896 (7th Cir. 2019) ("we have authority to independently

correct the record" and review district court's decision under FRAP 10(e)(1)). Due process requires that Frank be given an opportunity to submit supplemental briefing in this Court on the complete record before this Court reaches the merits of his appeal.

B. The district court committed independent reversible error by abdicating its independent judgment and relying on the inadmissible Klonoff expert report for legal conclusions.

The district court limited objectors to 25 pages for objections and class counsel to 75 pages for responses. Doc742 at 9; Doc892. Class counsel evaded these limits by submitting an additional 72-page brief from Robert Klonoff and calling it an "expert declaration"—though all of the expert opinions were legal opinions and argument. Doc900-2. The report was thus inadmissible under FRE 702. *Commodores Entm't Corp. v. McClary*, 879 F.3d 1114, 1129 (11th Cir. 2018); *Freund v. Butterworth*, 165 F.3d 839, 863 n.34 (11th Cir. 1999); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 144 (2d Cir. 2016). A question of law or mixed question of law and fact such as class certification "is not a matter subject to expert testimony." *Freund*, 165 F.3d at 863 n.34. Frank objected on these grounds. Doc909-1.

At the fairness hearing, the court held Klonoff's responses "meritorious and appropriate," and did not address Frank's objection to them. Doc943 at 116-17. The court repeatedly relied on Klonoff's report at the fairness hearing. *Id.* The final opinion repeatedly mirrors Klonoff,

sometimes verbatim, on questions of law. *Compare, e.g.*, Doc1029 at 54, 64, and 65 *with* Doc900-2 at 58, 62, and 62 respectively. It was reversible error to use the "expert declaration" to justify class certification and reject objections.

The district court made two arguments for overruling Frank's objection to Klonoff, for the first time in the written opinion apparently drafted by plaintiffs: (1) *Daubert* does not apply to fairness hearings; and (2) the declaration met *Daubert* because of Klonoff's experience. Doc1029 at 115-19. The first is wrong; the Federal Rules of Evidence apply to all civil proceedings. FRE 1101(b). The second is beside the point, as Frank objected to Klonoff opining on legal questions (Doc909-1), a question the court never addressed.

The district court's putative disclaimers of its reliance on the Klonoff report (Doc1029 at 38-39, 119) do not cure the reversible error. For example, *Community Bank* refused to credit a similar claim that the court conducted independent review. 418 F.3d at 301.

C. Nearly verbatim adoption of a proposed opinion materially different from the court's oral rulings in a fundamentally unfair process requires reversal and reassignment. The resulting errors also require vacating the appeal bond.

In *Chudasama*, the district court advised the parties in writing that it intended to rule for plaintiffs, and requested counsel to draft the opinion and order. 123 F.3d at 1364. Counsel submitted an 86-page

proposed order; defendant Mazda submitted objections; the court struck sixteen pages and entered a seventy-page order. *Id.* This Court reversed and reassigned, applying the three-factor test from *U.S. v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989):

> (1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; (3) whether reassignment would entail waste and duplication out of proportion to the gains realized from reassignment.

123 F.3d at 1373-74. The facts here are far worse than in *Chudasama*, and require reversal and reassignment.

The court's approval at the fairness hearing was relatively cursory; the Court's discussion of its reasons for rejecting objections to settlement approval took up less than ten pages of the 125-page transcript. Doc943 at 113-22. And the court never addressed Frank's objection to Klonoff. But the final opinion expanded the court's rationale to 122 written pages, and included self-serving statements apparently drafted by class counsel attempting to nullify the district court's erroneous reliance on the Klonoff expert report at the fairness hearing. This abdication in a dispositive order affecting tens of millions of people requires reversal under *Holmes* and *Community Bank*; *Chudasama* also requires reassignment for "delegating drafting sensitive, dispositive orders to plaintiffs' counsel, and then uncritically adopting [their] proposed orders nearly verbatim."

The "cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion." *Chudasama*, 123 F.3d at 1373 n.46 (cleaned up) (citing cases). No decision of this Court has permitted a district court to delegate the drafting of a judicial opinion to prevailing counsel without giving opposing counsel an opportunity to see and object to the proposed opinion, as happened here. Such a procedure is fundamentally unfair.

Cases cited by appellees are not to the contrary. For example, *In re Colony Square Co.*, which predates *Chudasama*, accepted a bankruptcy judge's verbatim adoption of an attorney's proposed opinion on a purely legal question because the appellant had already had the opportunity of district-court review by a judge that gave the decision independent *de novo* consideration. 819 F.2d 272, 277 (11th Cir. 1987).

Anderson is also distinguishable: the "respondent was provided and availed itself of the opportunity to respond at length to the proposed findings." 470 U.S. at 572. And *Anderson* concerned proposed findings of fact, rather than a court's *reasoning* in an opinion. *Bright,* 380 F.3d at 732. Furthermore, the *Anderson* findings "var[ied] considerably in organization and content from those submitted by [class] counsel" and the *Anderson* court provided "the framework for the proposed findings when it issued its preliminary memorandum." 470 U.S. at 572-73. Again, none of that happened here, where the district court's 122-page opinion was copied nearly verbatim from the proposed opinion, and went well

beyond the cursory guidance the district court provided (Doc943 at 113-22) in the fairness hearing.

There are additional elements of fundamental unfairness here. *First*, the district court withheld the proposed opinion from the appellate record. Doc1106; Doc1153. Frank can find only one instance where an appellate court has addressed the situation where a district-court judge has admittedly received *ex parte* communications on the merits and then denied a motion to disclose the communications on the record for an appellate court to evaluate. The Seventh Circuit disqualified the judge on *mandamus*. *K.L.*, 93 F.3d at 258. And this case is worse in some ways than *K.L.*, because the communications in question were *written*, rather than oral, and the district court here, unlike the *K.L.* court, gave no credible explanation for excluding the materials in a motion to supplement the record. As in *K.L.*, the district did not "attempt[] to reconcile [his decision] with Canon 3A(4)." *Id.* at 259; *compare* Doc1106 and Doc1153. *K.L.* found the combination of the judge's *ex parte* communications and refusal to disclose them for appellate review required recusal on mandamus. If the district court had simply denied Frank's Rule 10(e) motion, it would have been extraordinary. But doing so after granting the original unopposed Rule 10(e) motion because of plaintiffs' motion for "clarification" warning of the danger of judicial embarrassment (Doc1093) is even more extraordinary. No appellate

court has ever permitted a district court to attempt to manipulate an appeal in this manner.

Second, the district court's nearly-verbatim copying of the proposed opinion found Frank to be an unethical "serial objector" advancing objections for the "improper purpose" of "benefit[ing] only the objectors and their attorneys." Doc1029 at 109 (quoting *Manual* §21.643). (The court elsewhere repeated this accusation against Frank, defining "serial objector" as one who "extorted money from counsel in prior class actions." Doc1094 at 7; *accord id.* at 8-9. This is consistent with class counsel's definition of the term in their briefing. Doc902 at 40.) But plaintiffs never accused Frank of being a "serial objector" in their briefing. Doc902 at 40-42. At the fairness hearing, in *reply* to objectors, without notice, plaintiffs accused Frank for the first time. Doc943 at 88, 93-94. Objectors received no opportunity to respond to the new arguments plaintiffs made in reply; indeed, the district court forbade two objectors from responding to the new arguments (*id.* at 113) and ignored Frank's request for additional briefing (*id.* at 79-80) if it was going to consider belated arguments.

The district court's oral findings at the fairness hearing did not mention Frank or the term "serial objector." Doc943 at 113-22. But the final opinion sprung on Frank assertions of unethical conduct that were never mentioned in the oral opinion. The accusation of extortion is unsupported and utterly meritless: Frank has never settled an objection

for *quid pro quo* payment (Doc1057-2 at 12-13), foreswore receiving payment in this case that was not court-approved (*id.* at 13), and has been the leading activist against extortionist objectors, recently winning a landmark appellate case requiring disgorgement in one such case. *Pearson v. Target Corp.*, 968 F.3d 827 (7th Cir. 2020).[8] And the criticism, irrelevant to the decision (class certification doesn't become more or less appropriate for 147 million people no matter how sinister or saintly a particular objector is), is entirely gratuitous and punitive. The baseless extortionist finding was a premise of the appeal bond order, Doc1094 at 7-9, and requires that order be vacated as to Frank as well.

Frank has won millions of dollars for unfairly disfavored class members in previous successful appeals of identical Rule 23(a)(4) issues. Doc1057-2 at 11-12 (citing *Lithium*). There is no basis to hold that

---

[8] The written opinion's other accusations against Frank, again unmentioned in the oral opinion, are similarly false. *Compare, e.g.*, Doc1029 at 113 (finding bad faith because this Court had supposedly found a Frank argument "improper") *with Poertner v. Gillette Co.*, 618 F. App'x 624 (11th Cir. 2015) (making no such finding) *with Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (adopting Frank's arguments that *Poertner* rejected). *See generally* Doc1057-2. Frank never made "false and misleading" statements (*compare* Doc1029 at 113-14 *with* Doc1057-2 at 4-10), but it is impossible to fully respond to these assertions because "those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson*, 470 U.S. at 572.

Frank's objection and appeal has "improper purpose" or is in bad faith or is meant "to obstruct and delay." Doc1029 at 109; Doc1094 at 7-9; Doc1153. After all, "appellate correction of a district court's errors is a benefit to the class." *Crawford v. Equifax Payment Svcs.*, 201 F.3d 877, 881 (7th Cir. 2000) (Easterbrook, J.).

This "strong language" that the court readily signed onto more than "suggest[s] that the district judge may have trouble putting aside his previous views." *Chudasma*, 123 F.3d at 1373. And the "strong language" here was made through a false last-minute allegation that Frank had no notice of, and then adopted through nearly verbatim copying of a proposed opinion. Such conduct demonstrates an "utter lack of appearance of impartiality," and "belie[s] the appearance of justice to the average observer." *Id.* at 1373 & n. 46.

This procedural unfairness compounded the other irregular procedural unfairness where (1) objectors were limited to 25-page objections, but class counsel was allowed to evade page limits to submit what became dispositive legal argument through a lengthy inadmissible 72-page brief masquerading as expert opinion; (2) class counsel then was permitted to submit without leave of court additional factual arguments the night before and at the fairness hearing, weeks after a court-ordered deadline (Doc742 at 15); and (3) the court then ignored Frank's request (Doc943 at 79) for an opportunity to respond.

The third *Torkington* factor, "waste and duplication," does not weigh against replacement. This case has had minimal litigation that has not progressed beyond resolution of a motion to dismiss and an answer. Doc900-1 at 8. There is far less waste and duplication here than in *Chudasama*, and, as there, the extent of the demonstration of bias means that the "gains to be realized from reassignment will far outweigh the costs." 123 F.3d at 1374.

As in *Chudasama*, "[t]he extent of the judge's abuse of discretion—and the partiality of the practices constituting that abuse—would have a significant effect on the appearance of justice should he remain assigned to this case." 123 F.3d at 1373. Reassignment is regrettably necessary.

Conclusion

Class certification and settlement approval must be reversed. The appeal bond order (Doc1094) and its baseless accusations of extortion must be vacated against Frank and Watkins.

The Court should mandate the district court request the Judicial Panel for reassignment. R. Proc. U.S. Panel on Multidistrict Litig. 2.1(e). If the Court is unwilling to do this without seeing the *ex parte* proposed opinion first, it should order the record corrected under FRAP 10(e)(3) and order additional briefing.

Dated: September 4, 2020

Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank
Melissa A. Holyoak
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Telephone: (703) 203-3848
Email: ted.frank@hlli.org
Email: melissa.holyoak@hlli.org

Attorneys for Appellants Theodore H. Frank and David Watkins

Addendum of Statutes and Rules

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites.

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

…

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

…

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

…

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

…

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

…

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

…

(D) the proposal treats class members equitably relative to each other.

…

(5) *Class-Member Objections*.

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). …

Federal Rule of Evidence 702. Testimony by Expert Witness.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Federal Rule of Evidence 1101. Applicability of the Rules.

…

(b) To Cases and Proceedings. These rules apply in:

- civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;
- criminal cases and proceedings; and
- contempt proceedings, except those in which the court may act summarily.

…

Federal Rule of Appellate Procedure 10. The Record on Appeal.

…

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

Code of Conduct for United States Judges
Canon 3. A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently.

The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:

(A) *Adjudicative Responsibilities*.

…

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

> (a) initiate, permit, or consider ex parte communications as authorized by law;
>
> (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; …

…

D.C. Code § 28-3905. Complaint procedures.

…

(k)

…

(2) Any claim under this chapter shall be brought in the Superior Court of the District of Columbia and may recover or obtain the following remedies:

(A)

(i) Treble damages, or $1,500 per violation, whichever is greater, payable to the consumer;

(ii) Notwithstanding sub-subparagraph (i) of this subparagraph, for a violation of § 28-3904(kk) a consumer may recover or obtain actual damages. Actual damages shall not include dignitary damages, including pain and suffering.

(B) Reasonable attorney's fees;

(C) Punitive damages;

(D) An injunction against the use of the unlawful trade practice;

(E) In representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or

(F) Any other relief which the court determines proper.

Utah Code Ann. § 13-11-19. Actions by Consumer.

…

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $2,000, whichever is greater, plus court costs. …

Northern District of Georgia Civil Local Rule 5.1. Electronic and Paper Documents; Format; Legibility.

(A) Electronic.

(1) Documents in civil and criminal cases will be filed, signed, and verified by electronic means to the extent and in the manner authorized by the Court's Standing Order, In Re: Electronic Case Filing and Procedures, as contained in Appendix H of these Local Rules. Documents filed electronically shall substantially conform to the requirements of these Local Rules. …

…

Appendix H (Standing Order No. 19-01). Revised Electronic Case Filing Standing Order and Administrative Procedures.

Definitions

…

7. "Proposed Order" is a draft document submitted by an attorney for a judge's signature. A proposed order shall accompany a motion or other request for relief as an electronic attachment to the document.

…

II. ELECTRONIC FILING AND SERVICE OF DOCUMENTS

A. FILING GENERALLY

…

2. All motions, pleadings, applications, briefs, memoranda of law, deposition transcripts, transcripts of proceedings, or other documents in a case to include attachments to the extent feasible

shall be electronically filed on ECF except as otherwise provided by these administrative procedures.

3. Emailing a document to the Clerk's Office or to the assigned judge shall not constitute "filing" of the document. A document shall not be considered filed for purposes of the Federal Rules of Civil Procedure until the filing party receives an ECF-generated "Notice of Electronic Filing" described in II(B)(1) of these procedures.

…

Northern District of Georgia Civil Local Rule 7.3. ORAL RULINGS ON MOTIONS.

Unless the Court directs otherwise, all orders, including findings of fact and conclusions of law, orally announced by the district judge in Court shall be prepared in writing by the attorney for the prevailing party. The original order shall be submitted to the district judge within seven (7) days from the date of pronouncement. Copies shall also be provided each party.

Statement of Related Cases
Under Circuit Rule 28-2.6

Appeal Nos. 20-10249, 20-10610, 20-10611, 20-10612, 20-10613, and 20-11470 have been consolidated with Frank's appeal 20-10609, and appeal the same final judgment.

Appeal No. 20-10667 is an appeal from the decision resulting from this Court's remand in *In re Home Depot Inc.*, 931 F.3d 1065 (11th Cir. 2019), a case involving the same district court and the same lead class counsel Doffermyre Shields Canfield & Knowles, LLC. In *Home Depot*, an appeal and cross-appeal from a fee decision, this Court reversed an attorney-fee order with explicit instructions how to proceed; on remand, the district court ignored the mandate and awarded fees based on a new methodology inconsistent with the law of the case. According to the appellants in No. 20-10667,

> The District Court then instructed Class Counsel to prepare a proposed order. Class Counsel prepared a 26-page proposed order to which Home Depot objected as improper and exceeding the minimal reasoning provided by the District Court at the hearing. The District Court adopted Class Counsel's proposed order with only minor typographical edits, overruling Home Depot's objections.

Opening Brief at 7.

Executed on September 4, 2020 */s/Theodore H. Frank*
Theodore H. Frank

Certificate of Compliance with Circuit Rule 28-1(m)

This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 12,992 words, excluding the parts of the brief exempted by 11th Cir. R. 32-4, as counted by Microsoft Word 2013.

This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook font.

Executed on September 4, 2020.

/s/Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on September 4, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/Theodore H. Frank