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.
and
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

Time-Sensitive Motion to Reconsider Denial of Rule 10(e)(2)(C) Motion by Appellants Watkins and Frank

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Introduction

On April 20, appellants Watkins and Frank ("Frank") moved for Rule 10(e)(2)(C) relief: the production of *ex parte* communications between class counsel and the district court of a proposed opinion. *See* Exhibit 1 ("Mot."). Frank's Rule 27(a)(4) reply brief in support of that motion was due May 7, but before he could file it, the Eleventh Circuit denied the motion without explanation. Under 11th Cir. R. 27-2, Frank timely moves to reconsider this order, which is manifestly erroneous and unfairly deprives him of a complete record for making his appeal.[1]

If this Court denied Frank's motion because the district court had not yet decided Frank's Rule 10(e)(2)(B) motion, new evidence merits reconsideration of Frank's motion: the district court has since explicitly denied relief to Frank, under extraordinary circumstances that demonstrate the relief Frank seeks is particularly appropriate. Indeed, class counsel's opposition expressly distinguished one of Frank's leading cases, *Edgar v. K.L.*, on the grounds that the district court had not yet denied his motion. Pl. Resp. 19.

If, on the other hand, the Eleventh Circuit denied Frank's motion because of appellees' argument that the *ex parte* proposed opinion is not material to Frank's appeal, that reason is manifestly factually and legally erroneous, and the Court should reconsider its decision. Appellees' arguments were based on a superseded March 12 civil appeal statement filed before the district court first appeared to deny Frank's

[1] Plaintiffs-appellees oppose the motion. Appellants Davis, Cochran, and West support the motion. No other appellee or appellant stated their position.

motion in its March 18 amended order. Frank has since amended his appeal twice (including once in response to two orders of the district court since May 7) and his civil appeal statement once, but was unable to argue this to the Eleventh Circuit, because it ruled on his motion before his reply brief was due. The *ex parte* basis for the district court's 122-page opinion is absolutely material to the appeal even under Frank's original civil appeal statement, as his reply brief would have pointed out.

Either way, Rule 10(e)(2)(C) relief is required. No appellate court has ever permitted a district court to withhold oral, much less written, *ex parte* communications from a record on appeal without consequence.

Background

Frank recounted the facts through April 20 in his initial motion, and summarizes them briefly here, along with developments since April 20.

Ex parte communications between class counsel and the district court—which no one disputes exists—were never placed on the docket, and were not on the record on appeal. Frank and Watkins (collectively "Frank") made an unopposed motion on January 17 under Fed. R. App. Proc. 10(e)(2)(B) for the district court to correct the record by placing the *ex parte* communications on the docket. Dkt. 961. On March 18, the district court issued an amended final opinion making an ambiguous statement that all pending motions were denied. Dkt. 1029 at 122. Frank amended his notice of appeal (Dkt. 1041) and amended his March 12 civil appeal statement on May 4 to reflect the new issues raised by the amended opinion and the amended notice of appeal. On

April 20, Frank made a Rule 10(e)(2)(C) motion in this Court to add the documents to the record. As an outside commentator noted,

> Judge Thrash's oral approval order was relatively brief, occupying fewer than 10 pages of the hearing transcript—and much of that was devoted to the fee issue. The judge did not opine from the bench on class counsel's arguments at the hearing that many objectors to the settlement were "serial objectors," motivated not by sincere qualms about the Equifax deal but by "hope of personal gain." [Dkt. 943 ("Tr.") at 113-22.]
>
> After delivering his approval from the bench, Judge Thrash directed [class counsel] to "prepare a written order that summarizes my rulings on the motions and my adoption basically of the arguments that have been made by the plaintiffs and by Equifax in the hearing today." [Dkt. 945; Tr. 123-24.]
>
> [Class counsel] drafted a "proposed order implementing the rulings made at the final approval hearing," as they described the document in a brief in January. [Dkt. 971.] They submitted the draft document, along with a proposed consent order and proposed judgment, to Judge Thrash. The draft documents were not filed in the case's electronic docket …
>
> Judge Thrash's [122-page] written opinion in January was much more extensive than his oral opinion at the end of the fairness hearing. It was also much more critical of objectors to the settlement, including Frank. As I wrote at the time, the judge lumped Frank in with objectors' counsel who have faced court criticism for filing objections only to extract payouts from class counsel, accusing Frank of promoting "false and misleading information" about the Equifax deal to gin up opposition to the settlement. [Dkt. 1029 at 110, 113-14.] (For what it's worth, I've been covering Frank and his class action objections for long enough to be convinced that he is not motivated by personal gain

> but by a genuine belief that some settlements are not in the best interest of class members.)

Alison Frankel, *Ted Frank wants to see class counsel's ex parte draft opinion in Equifax case*, Reuters (April 23, 2020) (attached as Exhibit 2).

Class counsel opposed Frank's motion in the Eleventh Circuit, making a variety of false *ad hominem* attacks on Frank, but also arguing that the district court had not yet actually ruled on Frank's Rule 10(e) motion. Class counsel then filed a "notice" in the district court reminding the court that it may not have ruled on the pending motion. Dkt. 1077.

Appellees further argued that the requested Rule 10(e)(2)(C) relief was immaterial to the appeal based on Frank's March 12 civil appeal statement, filed before Frank amended his appeal.

Though Rule 27(a)(4) would have permitted Frank a reply, before the deadline, this Court on May 7 denied his pending Rule 10(e) motion without explanation. Minutes later, the district court granted the Rule 10(e) motion, ordering class counsel to produce the *ex parte* proposed opinion "as soon as reasonably possible." Dkt. 1084 (attached as Exhibit 3). *See discussion in* Alison Frankel, *Equifax judge orders disclosure of class counsel's draft 'opinion'*, Reuters (May 7, 2020) (attached as Exhibit 7).

Class counsel did not move to stay, nor to reconsider the district court's order. Instead, on May 11, class counsel filed a self-styled "motion to clarify." Dkt. 1093 (attached as Exhibit 4). The requested clarification was for the district court to reconsider its May 7 order. *Id.* at 5. Class counsel falsely represented to the district court that this Court's May 7 order had made an affirmative finding that the *ex parte*

communication was not material to the appeal. *Id.* Frank opposed the motion one day later on May 12, noting that there is nothing to clarify about the order because plaintiffs did not contend that they did not understand the order or cannot comply. Dkt. 1101 (attached as Exhibit 5). And reconsideration was not available relief for plaintiffs because they never opposed the initial motion that the court granted. *Id.*

Nevertheless, on May 15, the district court construed the motion as a motion to reconsider, and, without once mentioning the standards for motions to reconsider, it vacated its own May 7 order. It adopted class counsel's reasoning was that this Court's denial of Frank's Rule 10(e)(2)(C) motion "necessarily found that the proposed orders were not material to the appeal." Dkt. 1106 (attached as Exhibit 8).

Meanwhile, on May 11, the district court imposed a punitive appeal bond on Frank and Watkins on the basis of its earlier erroneous written finding that Frank and Watkins were "serial objectors" meriting sanctions. Dkt. 1094. As Frank noted in his original Rule 10(e)(2)(C) motion, and no one disputes, class counsel never argued that Frank was a serial objector in any written briefing. Mot. 5 (citing Dkt. 902 at 40-42). Class counsel did not raise the argument until the day of the fairness hearing after all objectors spoke. Mot. 5. The district court denied requests from two other objectors to speak against class counsel's new arguments (Tr. 113); then it made oral findings, which included no specific findings that Frank was a "serial objector." Mot. 5-7; Tr. 113-21. Nevertheless, after receiving the *ex parte* proposed opinion, the written opinion included baseless attacks on Frank and another objector's counsel. Mot. 8-9.

On May 18, Frank amended his appeal to include appeals of the May 11 and May 15 orders. Dkt. 1108. He will amend his civil appeal statement again later this month.

Argument

Frank and Watkins ("Frank") asked for one thing in their April 20 motion: to correct an omission in the record: an *ex parte* written communication from class counsel to the district court that both class counsel and the district court refuse to place on the docket. There is no dispute that the *ex parte* communication exists. The appellees insist that the communication is harmless and immaterial, and wouldn't result in the disqualification of the district-court judge. If the communication is so harmless, then disclosure should be immaterial, and either appellee could present the proposed opinion as an exhibit to their response. Instead, they demand that the *ex parte* communication be entirely hidden from appellate review. The parties provided no reason and no precedent why the *ex parte* communication should not be part of the record.

Unfortunately, the Eleventh Circuit did not present any reasoning in its summary one-sentence denial of Frank's motion. Frank was never given an opportunity to reply to class counsel's arguments because the Eleventh Circuit ruled before his reply brief, due May 7, was filed. And Frank does not know which of the erroneous arguments of appellees this Court found persuasive.

Frank thus moves for reconsideration under 11th Cir. R. 27-2. "Manifest errors of law or fact" merit reconsideration, as does "manifest injustice." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007); *Douglas Asphalt Co. v. QORE, Inc.*, 657 F.3d 1146,

1151-52 (11th Cir. 2011). (The Eleventh Circuit has not stated a standard for 11th Cir. R. 27-2 motions to reconsider, but has elsewhere applied the Fed. R. Civ. Proc. 59 standard. *In re Davis*, No. 17-13086-J, 2018 U.S. App. LEXIS 20772, at *3 (11th Cir. July 25, 2018).)

There are numerous changed circumstances since Frank filed his motion April 20, and even since this Court ruled May 7. "[N]ewly-discovered evidence" (*Arthur*, 500 F.3d at 1343), here the district court's improper and highly irregular decision to withhold *ex parte* communications from the record, as well as its improper punitive appeal bond, and Frank's amended appeal from these post-May 7 orders is also a meritorious ground for reconsideration. This Court should order the placement of the *ex parte* proposed opinion on the record.

No appellate court has ever permitted a district court to hide written *ex parte* communications from appellate review, and appellees identified none. The resulting manifest injustice is an independent reason for reconsideration.

I. Reconsideration is required because class counsel previously argued the Rule 10(e)(2)(C) motion was not yet ripe, and is judicially estopped from arguing that changed circumstances merit reconsideration. And the extraordinary changed circumstances since May 7 by themselves merit granting the Rule 10(e)(2)(C) relief.

New evidence meriting reconsideration includes "developments in" related litigation. *Ray Capital, Inc. v. M/V Newlead Castellano*, 688 F. App'x 829, 829 (11th Cir. 2017). Reconsideration is thus appropriate here.

On March 18, the district court issued an amended final opinion that contained a single sentence without further explanation: "Any other motions and requests for

specific relief asserted by objectors are also denied." Dkt. 1029 at 122. Frank's April 20 Rule 10(e)(2)(C) motion assumed that this was a denial of his unopposed Rule 10(e)(2)(B) motion.

In response, class counsel argued that the "district court never expressly ruled on Frank's motion to supplement," and that it was still live in the district court. Pl. Resp. 12-13, 19. They filed a "notice" in the district court asking the district court to rule upon the unopposed motion if it had not done so already. Dkt. 1077.

The Eleventh Circuit denied Frank's motion without explanation on May 7 before he could file his reply brief that evening.

Minutes later, the district court granted the unopposed motion for Rule 10(e)(2)(B) relief, ordering class counsel to produce the *ex parte* proposed opinion "as soon as reasonably possible," thus implicitly endorsing class counsel's argument that the district court's March 18 ruling did not rule on Frank's motion. Exh. 3; Exh. 7. Class counsel did not comply, instead moving to "clarify." Exh. 4. The motion was frivolous: there was nothing to clarify, and class counsel had no standing to request reconsideration of a motion it had not originally opposed. Exh. 5. But class counsel argued that the Eleventh Circuit, by denying Frank's motion, had found that the *ex parte* communications were irrelevant to the appeal.

This was wrong on its face. The Eleventh Circuit had stated no basis for its ruling. A party, having obtained the benefit of a factual argument to win a motion, is judicially estopped from taking an inconsistent position in a different proceeding. *New Hampshire v. Maine*, 532 U.S. 742 (2001). Thus, class counsel was judicially estopped from arguing that the Eleventh Circuit had not adopted its argument that Frank's

appellate motion was not yet ripe. Nevertheless, the district court adopted class counsel's erroneous reasoning and procedurally improper motion as grounds to hide the *ex parte* communications from class counsel from appellate scrutiny. Exh. 8. Even more extraordinarily, it chose to construe class counsel's motion as a motion to reconsider (Exh. 8), though class counsel had neither made such a motion, supported such a motion, nor had standing to make the motion because it had not opposed the initial motion.

No appellate court has ever permitted a district court to manipulate an appeal like this. In *Edgar v. K.L.*, the Seventh Circuit found a district court's refusal to disclose the *nature* of *oral ex parte* communications with a *third party* were grounds for reversal and removal of the judge from the case for cause. 93 F.3d 256 (7th Cir. 1996) (Easterbrook, J.). As in that case, the district court here did not "attempt[] to reconcile his decision with Canon 3A(4)." *Id.* at 259.[2] (Class counsel's only attempt to distinguish *Edgar* was to argue that the district court here had not refused to disclose the opinion. Pl. Resp. 19.) Frank is not yet seeking such relief. After all, it is possible (though increasingly unlikely if one draws the adverse inference from class counsel's actions) that the proposed written opinion was only a few pages long, and the district court "performed its own independent legal research and analysis and made up its own mind" (Dkt. 1029 at 119), and that the district court independently expanded upon its conclusory oral

[2] Class counsel argues that Frank did not object to the procedure. Pl. Resp. 18. But how could he? Frank only discovered that class counsel had provided the proposed opinion on an *ex parte* basis when the district court issued its opinion; nothing in the orders suggested that class counsel would be permitted to act surreptitiously.

findings to 122 detailed pages. But if class counsel and the district court did nothing unethical, disclosing the communications will resolve the issue.

II. The undisclosed *ex parte* communications are material to the amended appeal, and this Court never gave Frank an opportunity to reply to appellees' manifestly incorrect arguments.

Frank amended his notice of appeal on March 30, and timely filed an amended civil appeal statement in this Court on May 4 with the issue "Was the district court's delegation of the drafting of the final approval order fundamentally unfair where the proposed order reflects substantially *verbatim* duplication of class counsel's proposed opinion--submitted *ex parte* and then hidden by the district court and class counsel--that overreaches the court's findings from the fairness hearing, and abused the process to make factually unsupported findings against opposing counsel? And if so, is reassignment of the case required?" Exh. 6.

But Appellees relied on Frank's March 12 civil appeal statement, arguing that it fails to mention the possible issue of the district court's materially *verbatim* adoption of a proposed 122-page opinion. There was no reason for the March 12 civil appeal statement to be controlling, as it was before the amended notice of appeal and before the district court seemingly denied Frank's Rule 10(e) motion for the first time March 18.

Maybe the *ex parte* proposed opinion supports this ground for reversal; maybe it does not. But the contents of the proposed opinion are surely material and belong in the record as soon as possible so that Frank can have an opportunity to prepare an argument should it be an appropriate appellate issue. It seems that class counsel wrote

their own preferred opinion that differed from the oral opinion in material ways, then the district court improperly adopted it largely verbatim. (Appellees do not deny that Judge Thrash has previously rubber-stamped proposed opinions without reviewing for accuracy. For example, in a recent class-action settlement approval, his opinion read "The Court has considered any submitted objections to the Settlement and hereby overrules them"—but there were no objections. *Compare In re The Home Depot Inc. Shareholder Derivative Litig.*, No. 15-cv-02999-TWT, Dkt. 84 at 3 (N.D. Ga. Oct. 2, 2017) *with id.* Dkt. 74-5.)

The cases that appellees cite or attempt to distinguish do not support appellees' contention that a substantially *verbatim* duplication of a proposed opinion is *never* material, merely find a particular set of facts might not demonstrate wrongdoing.

1. Plaintiffs mention *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 (11th Cir. 1997) only once, arguing that it is distinguishable because it involved the "utter lack of appearance of impartiality." Pl. Resp. 19. But Frank alleges "an utter lack of appearance of impartiality"! Equifax similarly argues that *Chudasama* is distinguished as a case where the court "failed to make its own findings." Def. Resp. 2. But the *Chudasama* district court advised the parties in writing that it intended to rule for plaintiffs. 123 F.3d at 1364. The judge in *Chudasama* might have provided fewer "findings" or direction to plaintiffs than here, but that is a difference in degree rather than kind. The district court's oral findings are considerably less detailed than its written findings (and inconsistent in many ways, *e.g.,* Mot. 12), and include arguments that Frank was never permitted to respond to.

2. Plaintiffs rely on *Anderson v. Bessemer City*, 470 U.S. 564 (1985). But *Anderson* notes it has "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, *particularly when those findings have taken the form of conclusory statements unsupported by citation to the record*." *Id.* at 572. Again, the plaintiffs' legal arguments track exactly Frank's complaints rather than contradicting them. Mot. 14. The written decision's conclusory statement limits Frank's ability to appeal because the court does not indicate what "false or misleading statements" it believes Frank made. Plaintiffs are therefore at liberty to assume any statements Frank made anywhere in the voluminous record were ruled "false and misleading." In*Anderson*, "*respondent was provided and availed itself of the opportunity to respond at length to the proposed findings*." *Id.* (emphasis added). Here, Frank did not have that opportunity. "Nor did the [*Anderson*] District Court simply adopt petitioner's proposed findings: the findings it ultimately issued … vary considerably in organization and content from those submitted by petitioner's counsel." *Id.* There is no evidence that the District Court here "vary considerably" from those submitted by petitioner's counsel. *Anderson* supports Frank's arguments that class counsel and the district court acted improperly.

3. In *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 657 (1964), the majority said that a verbatim order is not to be "rejected out of hand," but it found that such order does "not reveal the discerning line for decision of the basic issue in the case" and had little trouble rejecting it. Likewise, a verbatim final approval order would not reflect the probing inquiry that the Supreme Court requires under Rule 23. "Because we are not convinced that the District Court exercised 'independent judgment' in adopting the proposed findings of the settling parties, we conclude that the settlement-

only class was never properly certified." *In re Community Bank of Northern Virginia*, 418 F.3d 277, 301 (3rd Cir. 2005).[3] *Ammons v. Dade City*, 783 F.2d 982, 984 n.4 (11th Cir. 1986), a pre-*Amchem* decision, is thus not applicable, because the *Ammons* appellant was not challenging class certification on behalf of absent class members.

4. *Hoover v. Blue Cross & Blue Shield*, 855 F.2d 1538, 1543 n.5 (11th Cir. 1988) refused to supplement the record for a document that was not actually filed and before the district court. Here it's undisputed the judge received the proposed order *ex parte*.

5. In *First Ala. Bank, N.A. v. Parsons Steel, Inc.*, 825 F.2d 1475, 1487 (11th Cir. 1987), the panel noted that it had discretion "to supplement the record on appeal, even to include evidence not reviewed by the court below." But it declined to exercise that discretion because the material sought were proceedings before a state court that examined a *res judicata* issue, and the results of these proceedings were already in the record. Here, the proposed order was actually delivered to the judge in these proceedings, and the record does not show whether it was adopted without significant revision.

6. Similarly, *CSX Transp. Inc. v. City of Garden City*, 235 F.3d 1325, 1330 (11th Cir. 2000) concerned a motion to "enlarge the record on appeal to include material not before the district court which has labored without the benefit of the proffered material." Here, the district court received the material *ex parte*, so supplementing the

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[3] Thus, even if Frank's March 12 civil appeal statement were the operative civil appeal statement, the district court's materially *verbatim* adoption of a 122-page *ex parte* proposed opinion materially different than the oral findings would be material to his challenge of the class certification decision, as it would show an impermissible delegation of "independent judgment."

record should not be "rare" nor require the heightened standard of "establish[ing] beyond any doubt the proper resolution of the pending issues." Moreover, *CSX allowed* the record to be supplemented to include a party's insurance agreement, which was a "pivotal" issue not before the district court, and caused a reversal.

7. Plaintiffs argue that *Bright v. Westmoreland County* concerns adopting an order before there was a chance to respond. This is true, but this fact was only an "additional reason" why reversal and remand was appropriate. 380 F.3d 729, 732 (3d Cir. 2004). And it is not a distinction here, where Frank never had an opportunity to respond to the proposed opinion, which differed materially from the oral opinion. As *Bright* noted, the critical distinction with *Anderson* was "a District Court *opinion* that is essentially a verbatim copy of the appellees' proposed opinion." *Id.* (emphasis in original). "When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions." *Id.*

8. Plaintiffs cite *Brownlee v. Haley*, and three cases that rely on *Brownlee*, which was the appeal of a *habeas* denial where defendant argued that the *state court's* adoption of a proposed order suggested unfairness, but the panel found that "the extensive record from the Rule 32 proceedings [in state court] in this case "eliminates any doubt about the [trial] judge's involvement in the matter and careful analysis of . . . [the] evidence." 306 F.3d 1043, 1067 n.19 (11th Cir. 2002). But Frank is seeking direct review of the order in question, rather than making a collateral *habeas* attack. The differences between the oral opinion and written opinion absolutely create doubt about the district court's involvement and careful analysis.

9. The district court in *King v. Sec'y, Dep't of Corr.*, 793 F. App'x 834, 841 (11th Cir. 2019), adopted only portions of one party's brief, not an entire 122-page opinion wholesale affecting tens of millions of absent class members.

Moreover, the district court has since the May 7 order engaged in a procedurally irregular adoption of class counsel's "motion to clarify" as a procedurally improper "motion to reconsider" to withdraw its approval of an unopposed motion to correct the record. This action further supports a finding that the district court's procedures are fundamentally unfair, demonstrate an "utter lack of appearance of impartiality," and "belie the appearance of justice to the average observer." *Chudasama*, 123 F.3d at 1373 & n. 46.

The *ex parte* proposed opinion is material to the appeal; if it is harmless as appellees claim, the disclosure is harmless. But there is no legal basis to assume without evidence that the *ex parte* proposed opinion is harmless and short-circuit Frank's right to appellate review of that question. And if it were that harmless, appellees would have simply placed the opinion in the record in January, rather than deprive this Court of appellate review.

III. Reconsideration is also appropriate because of the changed circumstances of the district court's punitive appeal bond.

A. The propriety of the "serial objector" findings of the district court if they were based on class counsel's improper *ex parte* proposed opinion is relevant to Frank's appeal, but additionally relevant for the changed circumstances of Frank's appeal of the May 11 punitive appeal bond bootstrapped on those originally faulty findings.

Again, new evidence meriting reconsideration includes "developments in" related litigation. *Ray Capital*, 688 F. App'x 829, 829 (11th Cir. 2017).

"Serial objector" has a definition: a bad-faith objector who objects repeatedly "for [the] improper purpose[]" "merely to enrich the objector or her attorney." Dkt. 1029 at 109-10 (quoting *Manual for Complex Litig.* § 21.643); *see also generally Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018) (Wood, J.) (describing problem with bad-faith objectors engaging in extortion to hold up settlements). Class counsel admits (Pl. Resp. 17) that Frank is not objecting to "enrich" himself; nor can they contend otherwise as Frank has never acted as an extortionist and no dispute that Frank's non-profit law firm's objections have won hundreds of millions of dollars for class members. Dkt. 876-1; Dkt. 1057-2. Indeed, Frank's non-profit prosecuted the leading appellate decision against bad-faith "objector blackmail." *Pearson*, 893 F.3d 980.

Frank contended that such *ex parte*-communications-inspired findings of wrongdoing demonstrate improper bias and merit reversal. Mot. 10-15. Thus, class counsel's claim (Pl. Resp. 13, 15) that the "serial objector" findings in the 122-page opinion are irrelevant to the merits of the appeal (an argument belied by the emphasis they place on *ad hominem* attacks on Frank on that basis) is false. Purported misconduct

findings against Frank *are* relevant to any appeal by him. And these are exactly the findings where plaintiffs appear to have improperly used the *ex parte* proposed opinion to expand one ambiguous extemporaneous sentence into pages of misconduct findings. Indeed, *Chudasama* explicitly singles out such tactical attacks in proposed opinions as evidence of misconduct meriting reassignment. 123 F.3d at 1373 & n. 46.

But since this Court decided Frank's motion, the district court issued a punitive appeal bond against Frank based on "serial objector" status, though class counsel still presented no evidence that Frank had ever engaged in the extortion required to tar him as a serial objector. Dkt. 1094. Frank has appealed this order. Dkt. 1108. This new evidence provides further demonstration that the false accusations of wrongdoing are material to Frank's appeal.

B. Contrary to plaintiffs' arguments, there is no record basis for calling Frank a "serial objector."

Nothing in the record supports the application of the term "serial objector" to Frank. Nevertheless, class counsel repeatedly defames Frank as a "serial objector" multiple times in the brief. Class counsel argues that the "serial objector" appellation is appropriate because "the objection was not in the best interest of the class." Pl. Resp. 17. (Even this is a misstatement of what happened at the fairness hearing: the district court merely stated that "most of the objections that were voiced here today did not take into consideration the best interest of the Class itself" without making any specific findings about Frank, "serial objectors," or bad faith. Tr. 117.)

Neither plaintiffs nor the district court provide any legal basis for this expansive definition, which is circular. If a district court finds that an objection is objectively in

the best interest of the class, then it will grant the objection. It's not the case that every unsuccessful objection by someone who objects more than once is a bad-faith objection by a "serial objector" whose objections should therefore be devalued and should be faced with a punitive appeal bond.

Even if it were true that Frank's objection was "not in the best interests of the class," it neither shows bad faith, nor reflects on the merits of the objection. 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 meritorious and in the best interests of the subclass disfavored by the settlement. *Manual* § 21.643 at 327. Indeed, one of the reversible errors by the district court was a class certification decision that incorrectly suborned the interests of the subclass to the interests of the class as a whole. 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 v. Inamed Corp.*, 685 F.3d 1294, 1323 (11th Cir. 2012). The district court's and class counsel's repeated criticism of objectors for supporting legally-required subclassing because of speculation that it might injure the interests of the class as a whole just demonstrates the reversible error in the class-certification decision below.

Contrary to class counsel's implicit claim (Pl. Resp. 13), Frank had no obligation to make a Rule 59 motion to correct this factually and legally erroneous finding that was never briefed before the district court, and only argued for the first time in class counsel's oral reply in the fairness hearing. (Class counsel never disputes Frank's timeline. Mot. 15.) The district court went on to refuse two objectors' requests to

respond to these belated attacks. Tr. 113. Frank's counsel had no obligation to make a futile third request to speak after the district court made clear it was not hearing any more argument and had no reason to believe that the class counsel and the district court would engage in *ex parte* communication to adopt a surprise attack on Frank with no opportunity to respond.

The district court's "serial objector" finding was entirely baseless. If an unethical *ex parte* submission by class counsel after a fundamentally unfair procedure was what caused the error, it is grounds for replacement under *Chudasama*.

Conclusion

This Court should grant the motion to reconsider and issue an order under Rule 10(e)(2)(C) for the district court to add the *ex parte* proposed opinion to the record.

Dated: May 19, 2020

Respectfully submitted,

/s/ Theodore H. Frank

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Dated: May 19, 2020

/s/ Theodore H. Frank
Theodore H. Frank

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I hereby certify that on this the 19th day of May, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system and that as a result electronic notice of the filing was served upon all attorneys of record.

I further caused notice to be sent by email to:

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/s/ Theodore H. Frank
Theodore H. Frank