NO. 19-56297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

M. TODD HENDERSON,
Objector-Appellant,

v.

CONAGRA FOODS, INC.,
Defendant-Appellee.

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

Appellant M. Todd Henderson's Reply Brief

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
1629 K Street NW, Suite 300
Washington, D.C. 20006
(703) 203-3848
ted.frank@hlli.org
Attorneys for Objector-Appellant
M. Todd Henderson

Table of Contents

Table of Contents i

Table of Authorities ii

Introduction 1

I. Plaintiffs' argument improperly conflates contested attorneys' fees after a litigated judgment with a Rule 23(e) inquiry over settlement fairness where both the fees and the class recovery are the product of compromise........ 3

II. Plaintiffs' argument that *Erie* requires this Court to allow California fee-shifting law to dictate the federal procedure of settlement fairness is frivolous on its face. 7

III. Class certification does not grant class counsel *carte blanche* to self-deal. *Bluetooth* standards for self-dealing settlements apply before *and after* class certification. In any event, this Settlement flunks fairness under any level of scrutiny. 9

A. The *Staton* factors do not protect against self-dealing, nor do they even satisfy the additions in the amended Rule 23(e)(2). 11

B. In economic reality, this settlement, like every settlement, necessarily allocates benefits between the class and counsel. 13

C. Consumer class actions need not be disproportionate. 16

IV. Plaintiffs' distinctions of binding precedents are immaterial to their applicability in this case. 17

V. Plaintiffs' public-policy arguments are flawed. 21

VI. The district court applied the wrong legal standard. 24

Conclusion 25

Certificate of Compliance Pursuant to Cir. Rule 32-1 26

Proof of Service 27

Table of Authorities

Cases

Allen v. Bedolla,
787 F.3d 1218 (9th Cir. 2015) 3-4, 6, 10, 12, 14-15

In re Baby Products Antitrust Litig.,
708 F.3d 163 (3d Cir. 2013) 6, 19, 21

In re Bluetooth Headset Prod. Liab. Litig.,
654 F.3d 935 (9th Cir. 2011) ("*Bluetooth*") 4, 6, 9-11, 13, 20

Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources,
532 U.S. 598 (2001) 23

Campbell v. Facebook, Inc.,
951 F.3d 1106 (9th Cir. 2020) 11-12

City of Riverside v. Rivera,
477 U.S. 561 (1986) 4-7, 23

Clem v. Lomeli,
566 F.3d 1177 (9th Cir. 2009) 1

Close v. Sotheby's,
909 F.3d 1204 (9th Cir. 2018) 4-5

Crawford v. Equifax Payment Servs.,
201 F.3d 877 (7th Cir. 2000) 5

Cummings v. Connell,
316 F.3d 886 (9th Cir. 2003) 10

Dennis v. Kellogg Co.,
697 F.3d 858 (9th Cir. 2012) 6, 20-21

District of Columbia v. Wesby,
138 S. Ct. 577 (2018) 23

In re Dry Max Pampers Litig.,
724 F.3d 713 (6th Cir. 2013) ("*Pampers*") 4, 6, 18-19

Eubank v. Pella Corp.,
753 F.3d 718 (7th Cir. 2014) 12-14, 18-19

Evon v. Law Offices of Sidney McKeil,
688 F.3d 1015 (9th Cir. 2012) 5

Farrar v. Hobby,
506 U.S. 103 (1992) 22-23

In re Ferrero Litig.,
583 F. App'x 665 (9th Cir. 2014) 11

In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) 15

Hanna v. Plumer,
380 U.S. 460 (1965) 8

Hensley v. Eckerhart,
461 U.S. 424 (1983) 23

Hewitt v. Helms,
482 U.S. 755 (1987) 23

Holtzman v. Turza,
828 F.3d 606 (7th Cir. 2016) 15

Johnston v. Comerica Mortg. Corp.,
83 F.3d 241 (8th Cir. 1996) 15

Koby v. ARS Nat'l Servs.,
846 F.3d 1071 (9th Cir. 2017) 5

Lafitte v. Robert Half Int'l, Inc.,
376 P.3d 672 (Cal. 2016) 8

McDonough v. Toys'R'Us,
80 F. Supp. 2d 626 (E.D. Pa. 2015) 21

Pearson v. NBTY, Inc.,
772 F.3d 778 (7th Cir. 2014) 2-4, 6, 12, 15-16, 19-21

Pearson v. Target Corp.,
968 F.3d 827,
2020 U.S. App. LEXIS 24797 (7th Cir. 2020) 21

Pella Corp. v. Saltzman,
606 F.3d 391 (7th Cir. 2010), *cert. denied*, 562 U.S. 1178 (2011) 18

Perdue v. Kenny A.,
559 U.S. 542 (2010) 23

Roes v. SFBSC Mgmt., LLC,
944 F.3d 1035 (9th Cir. 2019) 2-4, 6, 8-9, 14-15, 18, 23-25

Shady Grove Orthopedic Associates v. Allstate Ins.,
559 U.S. 393 (2010) 8

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003) 11-12

Strawn v. Farmers Ins. Co.,
297 P.3d 439 (Ore. 2013) 8

In re Subway Footlong Mktg. Litig.,
869 F.3d 551 (7th Cir. 2017) 22

In re Target Customer Data Sec. Breach Litig.,
847 F.3d 608 (8th Cir. 2017) 10

Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship.,
874 F.3d 692 (11th Cir. 2017) 10-11

Thorogood v. Sears, Roebuck & Co.,
595 F.3d 750 (7th Cir. 2010) 5

Vargas v. Lott,
787 Fed. Appx. 372 (9th Cir. 2019) 3, 14-15

Williams v. MGM-Pathe Commc'ns Co.,
129 F.3d 1026 (9th Cir. 1997) 14-15

Rules and Statutes

15 U.S.C. § 1692k 5

28 U.S.C. § 2072 8

42 U.S.C. § 1983 23-24

42 U.S.C. § 1988 .... 4, 23-24

Fed. R. Civ. Proc. 23 .... 3, 5-6, 23-24

Fed. R. Civ. Proc. 23(a)(4) 10

Fed. R. Civ. Proc. 23(c)(1)(C) 10

Fed. R. Civ. Proc. 23(e) 2-8, 11, 15, 18, 24

Fed. R. Civ. Proc. 23(e)(2) 11, 13

Fed. R. Civ. Proc. 23(e)(2)(C) 1, 3-4, 6-8, 15, 21, 25

Fed. R. Civ. Proc. 23(e)(2)(C)(iii) 11

Fed. R. Civ. Proc. 23(e)(2)(D) 11

Fed. R. Civ. Proc. 23(g)(4) 10

Fed. R. Civ. Proc. 23(h) 7, 11

Fed. R. Civ. Proc. 68 5

Other Authorities

American Law Institute,
Principles of the Law of Aggregate Litig., § 1.05, cmt. f (2010) 10

American Law Institute,
Restatement (Third) of Restitution and Unjust Enrichment § 29 comment c (2011) 1-2, 5

Federal Judicial Center,
Manual for Complex Litig. § 21.62 (4th ed. 2008) 12-13

Federal Judicial Center,
Manual for Complex Litig. § 21.75 (4th ed. 2008) 14

Federal Rules Committee,
Notes of Advisory Committee on 2018 Amendments to Rule 23 .... 11-12, 15

4 *Newberg on Class Actions* § 13.54 (5th ed. 2016) 12-13

Stigler, George J.,
"The Optimum Enforcement of Laws,"
Essays in the Economics of Crime and Punishment 55 (1974) 22

Introduction

Yes, the facts matter in this case. And Plaintiffs concede (PB16-17, PB44-45)[1] the critical facts: the only relief to the class is $993,919 in cash in a settlement that pays the attorneys $6.85 million, and that the district court erred in attributing "some value" to the settlement's worthless injunction. OB39-52. Plaintiffs write (PB2): "Appellant posits that, because the fee award exceeded the amounts ultimately claimed by class members, the settlement 'unfairly afford[ed] preferential treatment to class counsel.'" True, but this is not just Henderson's argument, but binding Ninth Circuit precedent, as well as what is required by all courts after the 2018 amendment to Rule 23 created Rule 23(e)(2)(C). OB24-39.

Henderson argued (OB24-39) that Rule 23(e)(2)(C) precludes, as a matter of law, approval of a settlement with such a disproportionate ratio and no meaningful nonpecuniary benefit. Plaintiffs never mention Rule 23(e)(2)(C) once, much less propose an alternative reading of the language of the Rule. By "declining to advance any argument" on Rule 23(e)(2)(C), they have forfeited the issue, and reversal of settlement approval for the district court's error of law is required for this reason alone. *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009).

Plaintiffs construct much of their argument from the false premise that fee-shifting justifies attorneys' 7-to-1 advantage over the class. A "proposed settlement transforms the action, so far as fees are concerned, from a 'fee-shifting case' to what is

[1] "PB" and "OB" refers to Plaintiffs' Brief and Henderson's Opening Brief respectively.

called a 'common-fund case.' The fee award is no longer statutory, because statutory fee-shifting provisions impose a liability only upon judgment." American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* § 29 comment c (2011). This settlement creates a constructive common fund. With a constructive common fund in a class-action settlement, Rule 23(e) demands allocational fairness.

Another example of Plaintiffs' surprising refusal to engage Henderson's arguments comes with his discussion of claims-made settlements. OB27-34. Henderson noted that settling parties can use "claims-made" settlements where no money is distributed without a claim to create a "mirage" of relief, and that the Ninth Circuit soundly rejects these illusions to require courts to look at "economic reality" and what class members actually receive. *Id.* If courts do not impose these rules, class counsel has the perverse incentive to structure the settlement to throttle the amount the class actually receives. *E.g.*, *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1058-59 (9th Cir. 2019) (discussing this problem); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781-83 (7th Cir. 2014) (same). Plaintiffs do not mention the words "economic reality" once, or dispute the perverse incentives of failing to measure settlement value by actual recovery. Instead, plaintiffs have the *chutzpah* to make the very argument Henderson demonstrated deceptive: plaintiffs argue (PB32) that the settlement "made available" $67.5 million without ever mentioning that (1) 100% of the class would have to make claims for that amount to be paid, which has never ever happened in a claims-made settlement much less one without direct notice; or (2) that there is no record evidence that the parties had any expectation that even 1% of the class would make claims. *See* OB27-28. Plaintiffs "don't claim to have been surprised by the low rate." *Pearson*, 772

F.3d at 782. The Ninth Circuit absolutely rejects the idea that the completely fictional number of what is made available has any relevance to the Rule 23(e) inquiry, rather than the economic reality of what the class receives. *Allen v. Bedolla*, 787 F.3d 1218, 1224 n.4 (9th Cir. 2015); *see also Roes*, 944 F.3d at 1060; *Vargas v. Lott*, 787 Fed. Appx. 372, 374 (9th Cir. 2019).

Instead of addressing Henderson's Rule 23(e)(2)(C) arguments, plaintiffs make oblique attacks attempting to change the subject, but all are bogus. As Section I discusses, *Riverside* has nothing to do with a district court's approval of a settlement of compromised class recovery under Rule 23(e). Section II shows that plaintiffs' argument that state law dictates federal procedure under *Erie* is frivolous. Section III demonstrates that class certification does not give class counsel a blank check to self-deal at the class's expense. Sections IV and V address plaintiffs' futile efforts to distinguish the binding and persuasive precedents that require reversal here and plaintiffs' public-policy arguments. Section VI renews Henderson's argument that the district court reversibly erred under the text of Rule 23 by improperly shifting the burden and standard of proof to objectors, yet another argument plaintiffs waive by "declining to advance any argument" that the text of Rule 23 permits such burden-shifting or standards.

I. Plaintiffs' argument improperly conflates contested attorneys' fees after a litigated judgment with a Rule 23(e) inquiry over settlement fairness where both the fees and the class recovery are the product of compromise.

Objector Henderson is challenging a ***settlement approval*** under Rules 23(e) and (e)(2)(C) because class counsel impermissibly self-dealt to favor themselves by

compromising the class's claims and taking $6.85 million in fees out of a $7.8 million settlement. Ninth Circuit law under Rule 23(e) thus requires reversal, even before the 2018 amendment creating Rule 23(e)(2)(C) enshrined Ninth Circuit precedent into the Federal Rules. *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035 (9th Cir. 2019); *Allen v. Bedolla*, 737 F.3d 1218 (9th Cir. 2015); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944-45 (9th Cir. 2011); *accord In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). *See* Opening Br. 24-39. *Pearson* called a settlement where class counsel received twice as much as the class impermissibly "selfish" when it was possible to use lists of class members to mail checks to absent class members. 772 F.3d at 784, 787. All the more so here where class counsel is taking nearly seven times as much for itself as it allocated to its clients.

Plaintiffs attempt to change the subject by pointing to (PB26) a 42 U.S.C. § 1988 case involving a successful ***jury verdict***. *City of Riverside v. Rivera*, 477 U.S. 561, 564-65 (1986). Rule 23(e), on its face, does not apply to non-settlements. The *Riverside* attorneys did not ***compromise*** their clients' claims, and there was thus no risk of self-dealing when attorneys then ***litigated for*** and won a fee award greater than their clients' recovery, and no Rule 23(e) analysis needed. Here, class counsel used the "red flag" of a clear-sailing agreement to ensure Conagra would not challenge their attorneys' fees, and then the "red flag" of a kicker provision to prevent class members from having standing to challenge attorneys' fees. *See* discussion in OB29-30, 37-39.

The other cases plaintiffs cite (PB25-27) are similarly cases about fee disputes in cases without clear-sailing agreements, not Rule 23(e) cases about settlement fairness. For example, *Close v. Sotheby's* involved a ***defense victory*** and defendants' entitlement

to fees under California law, rather than any sort of Rule 23 inquiry of allocation. 909 F.3d 1204, 1208 (9th Cir. 2018). *Evon v. Law Offices of Sidney McKeil*, 688 F.3d 1015 (9th Cir. 2012), did not compromise class claims under Rule 23(e): it decided a *contested* fee-shifting dispute between a plaintiff and defendant after plaintiff accepted a Rule 68 offer of *judgment*.

This is because, as the Restatement recognizes, a "proposed settlement transforms the action, so far as fees are concerned, from a 'fee-shifting case' to what is called a 'common-fund case.' The fee award is no longer statutory, because statutory fee-shifting provisions impose a liability only upon judgment." American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* § 29 cmt c (2011). Thus, the *Riverside* argument for fees in excess of a plaintiffs' relief does not apply unless it is "relief ordered by a court rather than relief provided by a settlement." *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750, 752 (7th Cir. 2010) (citing *Riverside*). *E.g.*, *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1081 (9th Cir. 2017) (protecting class members from attorney-driven settlement of FDCPA litigation though FDCPA provides for fee-shifting under 15 U.S.C. § 1692k); *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 882 (7th Cir. 2000) (same).

Plaintiffs say (PB24) it makes "no sense" for there to be a distinction between the evaluation of fees in settlements and judgments, but of course there is. Class counsel themselves strike agreements for settlements and fee terms, and courts must adjudicate approval of them under Rule 23(e). Post-judgment fee awards require no such scrutiny. No risk of Rule 23(e) self-dealing exists in a judgment, because plaintiffs' counsel does not settle absent class members' rights while negotiating protection for their own fees,

and the defendant's liability to absent class members is not compromised an iota post-judgment. *Riverside* says nothing about whether a settlement is fair and certainly does not endorse self-dealing.

Even before amendments to Rule 23 made it explicit, this Court repeatedly held that Rule 23(e) did not permit attorneys to structure settlements to provide them a disproportionate share of the benefits. OB31 (citing cases).[2] Not once did the Ninth Circuit ever refer to *Riverside* in these cases, and for good reason: *Riverside* is entirely irrelevant to the Rule 23(e) inquiry. Other circuits similarly ignore *Riverside* when finding settlements' disproportionality problematic under Rule 23(e). *E.g.*, *Pearson*; *Pampers*; *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013). Plaintiffs make no effort to reconcile *Riverside* with *Roes* or *Allen* or *Dennis* or *Bluetooth* or *Pearson*. *Riverside* has absolutely no bearing on whether attorneys can breach their fiduciary duty to class members and self-deal by ***settling*** and extracting the majority of settlement benefit for themselves at the expense of their clients by getting the defendant to agree to clear sailing in exchange for lower payments to the class. *Riverside* and its progeny are entirely

[2] Plaintiffs claim (PB19) "Appellant has cited no case … holding that a class settlement must be invalidated as a matter of law if fees exceed ultimate class recovery." Not so. With an exception only for "unforeseeable developments," this is exactly the rule *Pearson* established. 772 F.3d at 782. Plaintiffs make no claim that the entirely predictable low claims rate (*see generally* OB27-28) was "unforeseeable."

In any event, Henderson proposes a rule of decision under Rule 23(e)(2)(C), which went into effect only in December 2018, and has not yet been interpreted by this Court. Plaintiffs do not offer any alternative interpretation of the rule.

irrelevant, and there was no reason for Henderson—or any appellate court adjudicating the appropriateness of settlement approval under Rule 23(e)—to mention these cases.

And even if *Riverside* somehow even arguably applied to class-action ***settlements***, the 2018 amendments superseded these cases. Rule 23(e)(2)(C) requires courts to consider the relief actually delivered to the class relative to the attorneys' fees in evaluating settlements. OB30. Again, Plaintiffs' brief never mentions Rule 23(e)(2)(C) or provides any reason to contest Henderson's interpretation of the amendment.

II. Plaintiffs' argument that *Erie* requires this Court to allow California fee-shifting law to dictate the federal procedure of settlement fairness is frivolous on its face.

Henderson's case is about Rule 23(e)(2)(C) and the ***allocation*** of the settlement. Instead, plaintiffs tendentiously pretend this is entirely a dispute about attorneys' fees and lodestar, even though Henderson expressly noted he was not making (and could not make, because of self-dealing settlement clauses) a Rule 23(h) challenge. OB37-39, 47. Maybe a $6.85 million fee award would be appropriate under lodestar considerations if plaintiffs had won a ***jury verdict*** or summary judgment that paid the class only $1 million. But what class counsel cannot legally do is settle a case for a constructive common fund of $7.9 million, and then breach their fiduciary duty to their clients by ***allocating*** less than $1 million of the settlement to their clients so they can collect $6.85 million, and the district court committed an error of law in approving such an illegal settlement. The word "fiduciary" never appears in plaintiffs' brief.

Thus, plaintiffs' argument (PB27-28) about what *Erie* and state law permit in an award of attorneys' fees is not just irrelevant, but dead wrong. Henderson's argument

is about what ***federal procedure*** permits under Rule 23(e)(2)(C), again a rule that plaintiffs' brief never mentions. It should go without saying to note the black-letter-law principle that, under the Rules Enabling Act, 28 U.S.C. § 2072, state law does not get to override federal procedure in federal court, but the Supreme Court has said it multiple times. *E.g., Shady Grove Orthopedic Associates v. Allstate Ins.*, 559 U.S. 393 (2010); *Hanna v. Plumer*, 380 U.S. 460 (1965).

For example, in *Shady Grove*, plaintiffs brought a federal class action to enforce a New York state insurance law that precluded a suit to recover penalties in class actions. 559 U.S. at 397. No matter: in federal court, federal procedure applies, and it is Rule 23 that establishes the rules of whether a class action can be brought, rather than New York law. "A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes)." *Id.* at 409. So too, here, where plaintiffs are asking for California fee-shifting law to govern the law of settlement approval under Rule 23(e).

A putative California state-law principle[3] does not govern the Rule 23(e) fairness of a federal settlement binding the Illinois class-member appellant. Indeed, the *Roes*

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[3] Plaintiffs get California law wrong anyway. *Lafitte v. Robert Half Int'l, Inc.*, reserved the question of whether lodestar is appropriate when a settlement creates a constructive common fund. 376 P.3d 672, 686 (Cal. 2016). Plaintiffs also cite (PB22) cases from several other states, but none of these cases involve the award of negotiated fees in the context of class settlement approval. Oregon, for example, finds a blended combination of percentage method with a lodestar crosscheck, even when a case is "initiated under a statute with a fee-shifting provision." *Strawn v. Farmers Ins. Co.*, 297 P.3d 439, 446 (Ore. 2013).

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

III. Class certification does not grant class counsel *carte blanche* to self-deal. *Bluetooth* standards for self-dealing settlements apply before *and after* class certification. In any event, this Settlement flunks fairness under any level of scrutiny.

Bluetooth holds that courts must review *all* class action settlements for "signs that class counsel have allowed pursuit of their own self-interests" including disproportionate fee awards, clear-sailing agreements, and fee reversion agreements or "kickers." *Bluetooth*, 654 F.3d at 947. Here, the district court ignored *Bluetooth* entirely except for finding that the certification of a class supposedly lessoned the need for scrutiny (ER15) and finding in conclusory fashion that fees were "not unreasonably excessive" and that the record "dispel[s] the possibility that class counsel bargained away a benefit to the class in exchange for their own interests." ER15-16.

This Court has not limited *Bluetooth* to pre-certification settlements. *Contra* PB29. It shouldn't, either. *Bluetooth*'s self-dealing rules apply to all settlements and *Bluetooth* creates a separate, higher standard for pre-certification settlements. *Id.* at 946-47. Nothing about the self-dealing signs (disproportionate fees, clear-sailing, reversion) turn on a class certification earlier in the litigation. Those offending provisions do not

become proper because there exists a cohesive, numerous, certifiable class or because the attorneys had, at the time of certification, demonstrated adequate representation. Indeed, under plaintiffs' reading of Ninth Circuit law, class certification gives class counsel *carte blanche* to engage in self-dealing post-certification. Courts must scrutinize for self-dealing in all settlements, and then probe even further when there has not been class certification. *Allen*, 787 F.3d at 1224. Indeed, courts have a continuing obligation to ensure that class certification is proper, and to decertify a class if it isn't. Fed. R. Civ. Proc. 23(c)(1)(C); *In re Target Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612-13 (8th Cir. 2017); *see also Cummings v. Connell,* 316 F.3d 886, 896 (9th Cir. 2003) (district court was correctly willing to "reconsider and decertify the class if a conflict should develop"). Thus, certification can't possibly preclude scrutiny of counsel's self-dealing, because a sufficiently severe breach of fiduciary duty would require decertification under Rules 23(g)(4) or (a)(4).

Plaintiffs assert *ipse dixit* (PB36) that certification "dispels concerns" about self-dealing, but this is a *non sequitur*. Class counsel's fiduciary duty "forbids a lead lawyer from advancing his or her own interests by acting to the detriment of the persons on whose behalf the lead lawyer is empowered to act." American Law Institute, *Principles of the Law of Aggregate Litig.*, § 1.05, cmt. f (2010). When class counsel is "motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violate[s] its ethical duty to the class." *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship.*, 874 F.3d 692, 694 (11th Cir. 2017). Class certification changes none of this, and plaintiffs cite no appellate authority that certification reduces their

fiduciary duty—and never mention the word "fiduciary." (The unpublished *Ferrero* is not to the contrary, as it never mentions self-dealing or issues of fiduciary breach.)

Whatever level of scrutiny is applied, however, there is no hiding the self-dealing in this Settlement.

A. The *Staton* factors do not protect against self-dealing, nor do they even satisfy the additions in the amended Rule 23(e)(2).

Plaintiffs assert that the district court "rigorously applied" Rule 23(e), 23(h), *Roes*, and *Staton v. Boeing*. OB28-29. In fact, the final approval order does not mention *Roes* or Rule 23(h) at all, and incorrectly finds concerning Rule 23(e): "There is substantial overlap between these factors and the *Staton* factors, so the Court does not repeat itself here." ER16.

In particular, the district court ignored Rule 23(e)(2)(C)(iii), which does not resemble any of the *Staton* factors. That rule requires consideration of whether "relief provided for the class is adequate, taking into account … the terms of any proposed award of attorney's fees." OB30-39. This is because the Advisory Committee recognized—as this Court did in *Bluetooth*—that procedural protections, like making sure the named plaintiff didn't collusively settle on the cheap, cannot substitute for "what might be called a 'substantive' review of the terms of the proposed settlement." Notes of Advisory Committee on 2018 Amendments to Rule 23 (referring to Rule 23(e)(2)(C) & (D)) ("2018 Committee Notes").

Much of plaintiffs' argument pretends as if *Bluetooth* doesn't apply a to pre-certification settlements, but this Court recently "assum[ed] without deciding that courts must look for these warning signs in a post-certification settlement." *Campbell v.*

Facebook, Inc., 951 F.3d 1106, 1126 (9th Cir. 2020). For good reason. A class certification doesn't make deliberate disproportion and self-serving settlement terms for protecting class counsel from scrutiny at the expense of class members any more fair whether a settlement is struck before or after certification. *See Pearson,* 772 F.3d at 787 (quoting *Eubank*, 753 F.3d 718, 720 (7th Cir. 2014)). (*Eubank*, of course, was post-certification in a case where certification was highly contested.) When settlement fairness is assessed based on economic realities, it properly aligns class counsel's incentives—class counsel will work very hard to deliver relief to their clients when their own payday is at stake. Thus, the Seventh Circuit in *Pearson* and this Circuit in *Allen* have adopted doctrinal tests that align the incentives of class counsel with the "economic reality" faced by vulnerable, absent class members whose claims they settle away. OB32.

Similarly, fiercely contested litigation demonstrates at most that the defendant has not gotten off too lightly, but it does not prove that plaintiffs' counsel *fairly divided* the spoils of settlement. Plaintiffs give no reason that "contentious litigation" disproves that the Settlement overwhelmingly favors class counsel. PB33. The fact remains that counsel assigned themselves seven times as much benefit as absent class members (OB33), and the district court should have evaluated "the attorney-fee provisions" in view of the "proposed claims process" and "relief actually delivered to the class." 2018 Committee Notes.

None of the *Staton* factors that plaintiffs recount prove the settlement allocation fair. Contrary to plaintiffs, the low number of objections did not demonstrate class support. PB29. Federal courts have long recognized that where "the recovery for each class member is small, the paucity of objections may reflect apathy rather than

satisfaction." 4 *Newberg on Class Actions* § 13.54 n.7 (5th ed. 2016) (quoting *Manual for Complex Litigation* § 21.62). The claims rate of less than 1% certainly confirms "apathy" rather than support.

Neither the risk of proceeding with the case (PB29), nor does the low lodestar multiplier (PB31) prove fairness either. *Bluetooth* itself involved claims that were barred by statute and a claimed lodestar that "substantially exceed[ed]" the fee request. 654 F.3d at 943. While weak claims may justify a small settlement, they cannot excuse disproportion between class and counsel. *Bluetooth* explains that lodestar may be an appropriate method for injunctive relief not easily monetized, *but,* "the Supreme Court has instructed district courts to [] 'award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 942 (cleaned up).

Nor should it seem impressive that Conagra agreed to a claims process (PB29, PB33) that the parties knew with certainty would lead to a tiny fraction of class members filing claims. *See* OB27.

The district court erred in refusing to consider the disproportion between attorneys' fees and settlement benefits required by both *Bluetooth* and Rule 23(e)(2).

B. In economic reality, this settlement, like every settlement, necessarily allocates benefits between the class and counsel.

When class counsel and defendants negotiate class action settlements, a defendant cares only about the bottom line, preferring any deal that drives it down. Meanwhile, class counsel have a financial incentive to seek the largest possible portion for themselves, preferring bargains that are worse for the class if their share is sufficiently increased. "From the selfish standpoint of class counsel and the defendant,

…the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank*, 753 F.3d at 720. No collusion is necessary to reach this result: just two parties acting in self-interest without regard for absent class members.

Contrary to plaintiffs, an allocation does not require a "fixed fund," because the settling parties are well-informed by prior settlements that the range of outcomes in a claims-made settlement is likely to be less than 1% in a settlement with no direct notice. Thus, the defendant knew with mathematical certainty they would not pay anything close to "approximately $67.5 million under the settlement" as plaintiffs misleadingly assert. PB30. Similar settlements without direct notice uniformly yield less than 1% as both parties knew. OB27. The "economic reality" is the amount claimed, not the hypothetical amount made available. *Allen*, 787 F.3d at 1224 n.4; *see also Roes*, 944 F.3d at 1055; *Vargas*, 787 Fed. Appx. at 374 (reversing decision adopting an expert's valuation premised on an unrealistic 100% claims rate).[4]

Williams v. MGM-Pathe Commc'ns Co., 129 F.3d 1026, 1027 (9th Cir. 1997), which plaintiffs cite (PB32), is not to the contrary. Again, plaintiffs cite a case about a fee

[4] Plaintiffs falsely accuse (PB30) Henderson of misrepresenting the settlement as a "fixed fund." Henderson did no such thing, expressly stating it was not a "pure common fund." OB31. He correctly called the settlement here a "constructive common fund," which is what this and other appellate courts consistently call it. *Id.* (citing cases). Thus, "private agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995). "[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal." *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996). *Accord Manual for Complex Litig.* § 21.75 (4th ed. 2008).

dispute between plaintiffs and defendants that has nothing to do with a case about settlement fairness under Rule 23(e). *See also Pearson*, 772 F.3d at 781 (rejecting identical argument). And even if *Williams*, a case without objections, somehow affected Rule 23(e) disputes, it was superseded by the new Rule 23(e)(2)(C). 2018 Committee Notes (requiring consideration of "the attorney-fee provisions" in view of the "proposed claims process" and "relief ***actually delivered*** to the class" (emphasis added)). If *Williams* stood for the broader proposition that hypothetical recovery dictates settlement fairness, then *Allen, Roes*, and *Vargas* would have come out differently.

Contrary to plaintiffs, this result of this settlement is vastly different from a litigated judgement. Had this case won at trial, Conagra would have needed to actually deposit tens of millions of dollars of compensation for the 15 million class members (rather than under $1M for less than 1% of them), and then plaintiffs' counsel would have no incentive to preclude recovery. For such a non-illusory *judgment*, it may be appropriate to pay attorneys based on the fund they've actually created,[5] but plaintiffs' precedents do not suggest that attorneys can be similarly credited for an unsuccessful claims process without direct notice when there is no evidence the parties expected even as few as 1% of class members to make a claim.

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[5] *But see Holtzman v. Turza*, 828 F.3d 606 (7th Cir. 2016) (Easterbrook, J.) (even after judgment, class counsel cannot be paid for funds made available to class members who suffered discrete injuries who were not actually compensated).

C. Consumer class actions need not be disproportionate.

Oddly, class counsel claims that fee-shifting statutes exist to encourage consumer litigation with "low claims rates." PB31. But other consumer lawsuits prove this to be false. When class counsel and plaintiffs care about getting money to the class, they do—which is why courts that care about encouraging *meritorious* consumer litigation should insist that the settlement allocation is fairly weighted between the class and counsel.

There are lots of ways the settling parties could have done this here. The easiest method is to provide a *pro rata* distribution process, where Conagra actually deposits a claim fund, which can be equitably paid to claimants without arbitrary caps. Plaintiffs could have also engaged in supplemental outreach to generate more claims; or even, as has been used in other consumer cases a process of subpoenaing a few big-box retailers that maintain customer purchase records. *See, e.g.* OB28 (citing *Bayer* revised settlement where 600,000 class members were identified simply from subpoenaing the records of third parties); *Pearson*, 772 F.3d at 784 ("pharmacy loyalty programs" identified 4.72 million class members). Plaintiffs assert (PB31 n.12) that Henderson "cannot explain how the district court could have had the necessary information to provide individual notice to *most* of the 15 million class members," (emphasis added) but what Henderson argued is that plaintiffs could have provided individual notice to *many* of the 15 million class members. As *Pearson* predicts (772 F.3d at 781-83), class counsel preferred to throttle claims because they did not think they'd be held accountable for creating the illusion of relief—and the district court rewarded them for it by applying the wrong standard.

Any insinuation that a fairly allocated settlement was impossible or impracticable reflects poorly on the agreed settlement's terms, not consumers or consumer protection laws. This is especially true here, where class counsel agreed to serve as Conagra's insurer, promising to pay excess documented claims over a minimal amount precisely because neither plaintiffs nor Conagra expected a material number of documented claims. *See* OB27 (citing ER214-15). (Plaintiffs mention (PB9) this settlement clause, but provide no excuse or explanation for it.)

IV. Plaintiffs' distinctions of binding precedents are immaterial to their applicability in this case.

Plaintiffs attempt to distinguish the binding precedents Henderson cites on two sweeping grounds, but both arguments are immaterial to their applicability to this case.

First, plaintiffs argue that Henderson's precedents are pre-certification settlements, and the act of class certification cures all of his complaints with this settlement. As explained in Section III above, this is a *non sequitur*: class certification doesn't change the perverse incentive to abuse claims-made processes to exaggerate class relief and throttle class recovery to maximize fees at the expense of the class. Class certification may reduce the odds of collusion, but Henderson argued that the problem with this settlement was self-dealing, rather than collusion. (Thus, plaintiffs' repeated claim (PB2) that the "entire appeal rests on the claim that this is nothing but collusion" is false. Henderson's brief does not mention collusion. Henderson does not allege (PB1) that "class counsel gets fees for no work"; he points out, correctly, that class counsel improperly used self-dealing settlement clauses to extract an abusive percentage of settlement benefit for themselves at the expense of their clients.)

That a settlement is non-collusive is necessary, not sufficient, to satisfy Rule 23(e). *E.g. Roes*, 944 F.3d at 1050 n.13. The problem is the class attorneys pursuing their own interests at the expense of the class. No collusion is required for this, because, as this Court has previously recognized, "Ordinarily, a defendant is interested only in disposing of the total claim asserted against it, and the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Bluetooth*, 654 F.3d at 949 (cleaned up). Thus, while class counsel and defendants have proper incentives to bargain effectively over the ***size*** of a settlement, they have no such constraints on ***allocating*** it between the payments to class members and the fees for class counsel—unless courts police that allocation. *Id.*; *see also Pampers*, 724 F.3d at 717. *See generally* OB24-30.

In any event, *Eubank*—a case plaintiffs never mention—puts the lie to the issue. 753 F.3d 718. *Eubank* adjudicated settlement of a case where class certification was granted and strenuously contested all the way to the Supreme Court. *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010), *cert. denied*, 562 U.S. 1178 (2011). The *Eubank* settlement provided much more substantial relief to claiming class members than the settlement here, but the disproportion between the estimated $8.5 million in actual class recovery and the $11 million in fees, among other problems (such as the kicker clause Henderson challenges (OB29-30, 38-39) in this appeal), made the settlement untenable. *Eubank*, 753 F.3d at 727. On remand, the *Eubank* class received more than three times as much after the parties created two funds totaling $25.75 million. No. 06-cv-4481, Dkt. 770 (N.D. Ill. 2019).

Second, in other cases that Henderson cites and quotes for general principles of law, plaintiffs argue that those settlements were more abusive than the settlement here and thus distinguishable. We could haggle about some of their characterizations,[6] but the more appropriate answer is again "so what"? An embezzler isn't innocent because she stole less than Bernie Madoff; a wife-beater isn't innocent just because he isn't as murderous as O.J. Simpson. Henderson cited these cases for their statements of overarching principles of law and *rules of decision*. Those rules of decision apply to all class-action settlements, and are not nullified because plaintiffs litigated for eight years or because the class received just under a million dollars. Yes, in *Pampers*, there was no evidence the class received anything (though the parties "made available" tens of millions of dollars); but nothing in *Pampers* suggests that throwing the class 12% of the total settlement benefit instead of 0% would cure an abusive settlement that unfairly prioritized class counsel's interests over the class. It is the *rule of decision* that matters.

A number of the cases, like *Eubank*, involve settlements unquestionably superior to the one here, with more relief to the class, and lesser disproportions. And a consumer-protection case like *Pearson* is especially on point. In *Pearson*, direct postcard notice was provided to 4.72 million class members. 772 F.3d at 784. As here, and we

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[6] For example, plaintiffs claim (PB41) "*Baby Products* has nothing to do with a lodestar fee award," but the decision expressly rejected an argument by appellees that an award of less than lodestar was "outcome determinative." 708 F.3d at 179-80 & n.14. (Plaintiffs have already been corrected on this misrepresentation in previous motion briefing in this Court, but repeated the false statement.) Of course, one reason the *Baby Products* court reversed was because of the "troubling" allocation of recovery by attorneys ($14 million) versus the class ($3 million)—a 5:1 ratio less troubling than the 7:1 allocation here. *Id.* at 169.

quote plaintiffs, "every class member … who submitted a claim was entitled—without proof of purchase but merely by submitting a claim" to $3 a bottle for up to four bottles. *Compare* 772 F.3d at 783 *with* PB30 (up to $4.50 total). As here, class counsel argued that the settlement should be valued at the "maximum potential payment that class members could receive" of $20.2 million, which would have justified the requested $4.5 million fee, as well as $1.93 million the court actually awarded class counsel. 772 F.3d at 780-81. But the class received only $865,284. *Id.* at 781. That 2:1 ratio compares favorably to the 7:1 ratio in this case—and the attorneys did much more to notify the class. No matter: approval of the "selfish" settlement was reversed as a matter of law, though Pearson made many of the same arguments plaintiffs made here. *Pearson* expressly recognized that if class counsel is compensated on anything other than what the class actually receives, it will have perverse incentives to throttle class recovery. Class certification does not change these perverse incentives (which plaintiffs here never contest or mention) or the reasoning of *Pearson*.

Plaintiffs argue (PB40) that Henderson's citations of *Bluetooth* are irrelevant because the district court "squarely addressed" it. But Henderson demonstrated (OB34-39) that the district court committed reversible error in applying *Bluetooth*; the plaintiffs simply repeat what the district court argued without acknowledging or addressing Henderson's refutation. Once again, plaintiffs' refusal to engage with what Henderson actually argues is forfeiture.

Plaintiffs attempt to distinguish *Dennis v. Kellogg Co.* (PB40) because the *cy pres* in that case was flawed. 697 F.3d 858 (9th Cir. 2012). But *Dennis* held that class counsel receiving 38.9% of the total benefit—even including *cy pres*—was "clearly excessive."

697 F.3d at 868. This (along with the definition of "constructive common fund," another term absent from plaintiffs' brief) is the holding that Henderson relies upon (OB26; OB31-32) and plaintiffs never contest. In this Settlement, the percentage is more than twice the number *Dennis* held "clearly excessive." So, yes, *Dennis* requires reversal, even in a case without an additional problematic *cy pres* component.

Plaintiffs' futile attempt to distinguish these precedents by pretending Henderson used them to argue other issues demonstrates only why these precedents require reversal here.

V. Plaintiffs' public-policy arguments are flawed.

Plaintiffs present (PB20-22) a parade of horrors that applying Henderson's proposed rule of decision will destroy consumer-fraud class actions. The argument is baseless. Rejecting settlement approval here will do nothing to deter *meritorious* class actions, because attorneys will fully recover lucrative amounts in cases where they win real money or valuable injunctive relief for clients—as happened on remand in *Pearson* and in *Baby Products*, cases that demonstrate that attorneys respond to the incentives created by appellate courts. *See Pearson v. Target Corp.*, 968 F.3d 827, 2020 U.S. App. LEXIS 24797, *4 (7th Cir. 2020) (improved settlement created $7.5 million common fund, compared to the $865,000 actual recovery in original settlement); *McDonough v. Toys'R'Us*, 80 F. Supp. 2d 626, 660 (E.D. Pa. 2015) ("improvement in direct class benefit of approximately $15 million"). It is only when attorneys bring what plaintiffs here admit (PB12) is "weak[]" litigation that leaves over 99% of the class without any compensation at all that attorneys might not realize their lodestar. But what good

public-policy grounds exist for courts to encourage weak claims? Plaintiffs identify none. Weak cases are counterproductive in every aspect: they divert court and attorney resources away from meritorious claims that can compensate injured consumers. Weak cases reduce deterrence, because they increase costs to innocent defendants, reducing the marginal burden to actual wrongdoers. *Cf.* George J. Stigler, "The Optimum Enforcement of Laws," *Essays in the Economics of Crime and Punishment* 55, 57 (1974).

Objections brought by Henderson's nonprofit attorneys over the last decade have won over $200 million for class members. ER152. The landmark appellate wins established by those attorneys (ER153 (citing cases, five of which plaintiffs also cite)) have surely affected settlements in dozens of other cases. Plaintiffs cannot identify a single meritorious consumer class action deterred by *Pearson* or *Baby Products* or *Pampers*, cases decided years ago. And if they deter a weak case that only imposes costs on courts and innocent defendants or has no chance of compensating injured consumers, that's a social good. *Cf. In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017).

This case may be "weak[]" (ER12), but Conagra was willing to pay $8 million in cash to settle it. Rule 23 entitles the class to a proportional share of those proceeds; it's perverse to say attorneys should be better rewarded for bringing weak cases than strong ones. OB31-32.

Of course, we can imagine a fair settlement where valuable class injunctive relief justifies class counsel obtaining more than the amounts claimed by class members. Those cases typically will involve civil rights and discrimination cases where "vindication of important [civil] rights" proceed "under a private attorney general theory" "even when large sums of money are not at stake." *Farrar v. Hobby*, 506 U.S.

103, 121-22 (1992) (O'Connor, J., concurring). In contrast, private-law class actions for consumer injury or statutory damages *do* reflect rights that are pecuniary in nature, and Rule 23 decisions in those cases should reflect that fees—and settlements designed to provide fees—"depend on obtaining substantial monetary relief." *Riverside*, 477 U.S. at 575 (plurality opinion of Brennan, J.). (And even in private-law class actions, generally valuable "non-cash" relief can be "used to justify the requested attorneys' fees." *Roes*, 944 F.3d at 1051. But, by abandoning any defense of their earlier conceit (ER138-39) the injunctive relief is worth millions, the plaintiffs have now conceded Henderson's and the *amici*'s point that the injunctive relief is valueless. PB16-17, 44-45; OB39-45.)

Supreme Court fee-shifting jurisprudence imposes a number of protections against abusive civil-rights litigation generally not present in private-law class actions today. For example, while multipliers of lodestar are common in fee awards in private-law class action settlements, they are available in federal fee-shifting statutes providing for "reasonable" fees only in extraordinary circumstances. *Perdue v. Kenny A.*, 559 U.S. 542 (2010). In 42 U.S.C. § 1988 claims, there must be some private relief before the public benefit to non-parties can justify an award of fees. *E.g.*, *Farrar*, 506 U.S. at 114; *Hewitt v. Helms*, 482 U.S. 755 (1987). And, § 1988 fee applicants cannot obtain compensation for work related to unsuccessful claims in the litigation, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983), or for actions voluntarily undertaken by defendants, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 532 U.S. 598 (2001). In 42 U.S.C. § 1983 suits, qualified immunity protects defendants from litigation against all but clearly established violations of law. *E.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). That jurisprudence gives § 1983 defendants leverage to

protect themselves from damages against meritless litigation that private-law defendants do not have. The district court's failure to apply Rule 23(e) properly, if affirmed, means that it is more lucrative—and often less risky—to bring and quickly settle a low-merit private-law class action that returns little or nothing to the class than it is to litigate a fully meritorious civil rights claim. The proper application of Rule 23(e) advocated by Henderson would begin to restore the balance.

Class counsel's argument that low-dollar consumer class actions will not be brought if they cannot allocate the lion's share of settlement value to themselves is also mistaken. Statutory fee shifting is available in individual, non-class actions such that attorneys will find it worth their time to bring suit even for small claims, and defendants will be deterred by the prospect of fee liability. It is because of the principal-agent problem of class actions, OB24-25, that Rule 23 imposes additional safeguards that prohibit the misallocation of benefit here.

VI. The district court applied the wrong legal standard.

Henderson argued that the district court committed reversible error by impermissibly applying the wrong legal standard of presuming the settlement adequate and shifting the burden to objectors to prove it "*clearly* inadequate." OB52-53 (citing *Roes* and Rule 23(e)). Plaintiffs respond in a footnote (PB28-29 n.9) that *Roes* is distinguishable because there the district court "said that the settlement was presumptively fair." Seems like the exact same error of an improper presumption to us. Again, plaintiffs fail to respond to Henderson's argument that the district court's shift of the burden and intensification of the standard of proof violated Rule 23's text. A

"searching inquiry," even if it happened here, does not excuse presuming settlement approval or demanding an atextual standard of "clearly inadequate" to reject a settlement. This alone remains reversible error.

Conclusion

Allen and *Roes* and Rule 23(e)(2)(C) preclude settlement approval here as a matter of law. Settlement approval must be reversed, and the parties must renegotiate a settlement that does not pay class counsel nearly 90% of the settlement benefits. At a minimum, remand is required for the district court to apply the correct standard of law.

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Respectfully submitted,

/s/Theodore H. Frank
Theodore H. Frank
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

Attorneys for Appellant M. Todd Henderson

Certificate of Compliance Pursuant to Cir. Rule 32-1

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,991 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. Counsel's approximation is based on the "Word Count" function of Microsoft Word 2013. Counsel further certifies that this brief complies with the typeface and style requirements of Rule 32(a)(5) and (6).

Executed on September 14, 2020.

/s/Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on September 14, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

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Theodore H. Frank