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

Corrected Reply Brief of Appellants David R. Watkins and Theodore H. Frank

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Certificate of Interested Persons

Pursuant to Cir. R. 28-1(b) and Cir. R. 26.1-2, Theodore H. Frank and David R. Watkins declare that the Certificate of Interested Persons in their opening brief is correct, with the following additions:

3812. Andrews, Ryan, counsel for *amicus curiae*

3813. Edelson, Jay, *amicus curiae*

3814. Edelson PC, counsel for *amicus curiae*

3815. Lawson, Aaron, counsel for *amicus curiae*

Dated: October 9, 2020

Respectfully submitted,

/s/ Theodore H. Frank

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Introduction

The settlement creates a single national class with uniform relief based solely on Georgia law even though many class members from other states have unique causes of action with superior statutory-damages provisions that survived a motion to dismiss. The district court erred as a matter of law in holding that this was not a fundamental conflict precluding certification of a single settlement class, and thus failing to protect the absent class members' rights under Rules 23(a)(4) and (e)(2)(D). Section I below. The court committed other errors of law in part because class counsel failed to present the class's best case for recovery with unique statutory-damages claims that have real settlement value. Section I.A below.

Appellees conflate appellate cases rejecting subclassing involving different *amounts* of damages with Frank's argument about different *theories* of damages. Then plaintiffs falsely attribute to Frank the argument that "separate counsel are required every time any two class members potentially have different amounts of damage" (PB35),[1] when Frank expressly disclaimed that argument and instead proposed principled means of limited subclassing. FB39-42; Section I.C below. Appellees never reconcile or defend the court's inconsistent statements

[1] FB, PB, and DB refer to Frank's Opening, Plaintiffs', and Defendants' Briefs respectively.

on Georgia law on which the court premised all of its erroneous 23(a)(4) and (e)(2)(D) findings. Nor do they defend multiple other reversible errors where the district court applied incorrect standards for adjudicating 23(a)(4) or (e)(2)(D) arguments.

This appeal also presents multiple factually-undisputed violations of Canon 3A(4) of the Code of Judicial Conduct. Section II below. Plaintiffs admit (PB14) that the 122-page order approving the settlement was drafted by class counsel and secretly communicated *ex parte* to the district judge by email without notice to adverse parties. Despite multiple motions, the district judge repeatedly refused to put those communications on the record for reasons that are transparently wrong. At no time did the court either disclose those communications or accord Frank an opportunity to respond, as Canon 3A(4) expressly requires. But because of this, there is no evidence of the independent judgment required to affirm settlement approval.

The *ex parte* communications of class counsel and the ensuing Canon 3A(4) violations effectively denied Frank an opportunity to respond to false "findings" about Frank alleged for the first time in the court's opinion and that the district judge improperly used to impose an appeal bond on Frank. This Court should vacate the settlement approval and class certification (as well the appeal bond order and the refusal of the trial court to correct the record) and order reassignment on remand.

I. The district court erred as a matter of law in certifying a single settlement class without separate representation and in approving the settlement.

The settlement has uniform relief, but the class members have materially different kinds of claims because their states have provided different causes of action with different duties and different remedies. These distinct subgroups' competition for allocation of a single settlement fund is a fundamental conflict that, under Supreme Court and Eleventh Circuit precedent, requires structural protections such as subclassing and separate representation under Rule 23(a)(4).

A. The subgroups had valuable statutory-damages claims materially different in kind from the Georgia state-law claims.

As Frank noted, the statutory-damages claims were colorable with material and unique settlement value and the district court erred in holding otherwise. FB28-32; *see also* Edelson *Amicus* 11-22. Appellees fail to refute Frank's and Edelson's demonstration that the statutory-damages claims have material settlement value different in kind from the Georgia state-law claims; the Edelson *amicus* and *Department of Labor v. McConnell* each show that plaintiffs did not press their most compelling case. 828 S.E.2d 352, 358 (Ga. 2019). Defendants admit (DB17) courts must create subclasses when a subgroup has unique claims whose merits "differed significantly." Here, some class members have colorable statutory-damages claims; others must rely on their rights to

what defendants correctly call (DB15) the "low-value" Georgia claims. As a matter of law, class members with statutory-damages claims have rights that differ substantially from those that do not.

Neither appellee supports the district court's statement (Doc1029 at 63) that the Georgia state-law claims "could yield more than the statutory damages." (Appellees simply repeat the district court's error. PB36; DB24.) The district court elsewhere acknowledged that was not so because Georgia law imposed no duty on defendants. FB28-29; Doc1029 at 18, 93. Neither appellee attempts to reconcile or defend the district court's contradictory assertions. Neither appellee denies that *McConnell* precludes the national class from even a nominal-damages recovery. FB28. Neither even mentions *McConnell*. That nominal-damages might hypothetically be sizable (PB35-36; DB24) is irrelevant when they're not available at all. Because the district court premised its analysis on this undisputed error of law, it must be reversed. Appellees "failure to respond" must be treated "as a concession." *In re D/B Ocean King*, 758 F.2d 1063, 1071 n.9 (5th Cir. 1985); *accord, e.g., Thompson v. Barr*, 959 F.3d 476, 490 n.11 (1st Cir. 2020); *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009).

Defendants (incorrectly) assert that the Utah statute only bars statutory damages within class actions, and thus governs a "*substantive* right, not a procedural one." DB21. This defense of the district court's error (FB29-31) does not hold. The inquiry does not turn on whether the

state statute is "procedural" or "substantive": "the substantive nature of New York's law, or its substantive purpose, *makes no difference*." *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 409 (2010) (emphasis in original). "[I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule." *Id.* at 410. When defendants made the identical argument below unsuccessfully in their motion to dismiss, they forthrightly acknowledged that Eleventh Circuit law precludes their argument. Doc425-1 at 55-56 & nn.13-14; *cf. also* Doc374 at 517 (¶1253).

Defendants make several mistakes discussing D.C. law. Frank discussed the statutory damages remedy for a failure to safeguard consumer-fraud claim as it existed in 2017. FB7 (citing Doc374 at 270); *see also* Edelson *Amicus* 12, 15, 20 (observing favorable features of D.C. law). Defendants assert (DB23) §28-3905(k)(2)(A)(ii) limits Frank to actual damages, but that subsection took effect in June 2020, and is not retroactive. D.C. Law 23-98, D.C. Act 23-268, 67 DCR 3923.[2] Contrary to defendants' assertions (DB22), statutory damages were available under §28-3905(k)(2)(A) in 2017 before the 2020 data breach statute was passed, because the consumer-fraud statute §28-3904's "enumeration is

[2] Frank's original addendum incorrectly included the 2020 amendments; the 2017 version is a supplemental addendum to this brief.

not exclusive." *Dist. Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 723 (D.C. 2003); Doc374 at 266-70 (Count 24). Frank never contended statutory damages for failure to notify in D.C. (Count 23), so defendants' arguments about that statute are irrelevant.

Defendants assert (DB18) that they *could* have raised other devastating arguments against statutory damages below but didn't. The only ones defendants raise on appeal are those the district court already rejected. *Compare* DB20 & DB24 n.6 (no consumer transaction, nor knowing or intentional violation as required by Utah law) *with* Doc425-1 at 74-78 (same) *and* Doc540 at 61-63 (rejecting such arguments); DB24 n.6 ("ascertainable loss" requirement) *with* Doc425-1 at 75 (same) *and* Doc540 at 62 (rejecting arguments).

Appellees' and the district court's *ipse dixit* assertion that Georgia law is more favorable for class members than other states is wrong as a matter of law. Because the district court's Rule 23(a)(4) and (e)(2)(D) rulings were premised on these errors, the single settlement class certification cannot hold. At a minimum, remand is required for a consistent analysis of the relevant laws.

B. The allocation of remedies among class members with materially different *kinds* of claims is a fundamental conflict.

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. FB19-25. "If [conflicts] concern 'specific issues in controversy,' they are called 'fundamental.'" *Dewey v. Volkswagen AG*, 681 F.3d 170, 184 (3d Cir. 2012) (cleaned up). Plaintiffs admit the principle, but deny fundamental conflicts exist. PB29, 37. That denial fails.

A fundamental conflict exists when class member subgroups have "competing interests in the distribution of a settlement whose terms reflected 'essential allocation decisions designed to confine compensation and to limit defendants' liability.'" *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 250 (2d Cir. 2011) (quoting *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 627 (1997)); *see also Dewey*, 681 F.3d at 184 (a "conflict concerning the allocation of remedies amongst class members with competing interests can be fundamental" (citing *Amchem* and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999))). Class members with various statutory-damages claims and class members *without* these kinds of claims all compete to divide a single settlement pot. If class counsel chooses to release all of the unique statutory-damages claims without separate compensation to avoid subclassing, that prejudices residents of states who have those additional causes of action for the unfair benefit of class counsel and class members without such claims. "The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the

results that those with [stronger claims] would have chosen." *Ortiz*, 527 U.S. at 857.

Thus, contrary to plaintiffs' assertion (PB36-37), *3M* is analogous here. *3M* noted that "if the settlement had limited its breadth to providing that injunctive relief in exchange solely for release of the Class's claims for *that relief*, the district court might have been within its discretion to determine the Class's interests were sufficiently aligned for purposes of the settlement. The settlement …, however, extended significantly further." *W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co.*, 737 Fed. App'x 457, 464 (11th Cir. 2018). So too here many class members had an interest in pursuing not just their common Georgia claim but also their statutory-damages claims. Class members without such damages claims had an interest in maximizing their recovery at the expense of the other subgroup. *Cf. id.* (Water Authority had interest in maximizing injunctive relief while minimizing individual damages claims). Two or more sets of class members with materially different types of claims fighting over the allocation of a single settlement pot absolutely interposes a fundamental conflict. *E.g., Lyons v. Georgia-Pacific Corp.*, 221 F.3d 1235, 1253 (11th Cir. 2000); *Dewey*, 681 F.3d at 189. *Lyons* demonstrates that a fundamental 23(a)(4) conflict can occur because of "indifference as well as antagonism." Thus, the district court misread *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181 (11th Cir. 2003), as limiting fundamental conflicts to the latter scenario.

FB32-33. Appellees simply repeat (PB29-30; DB16) the district court's misapplication of *Valley Drug* and never mention *Lyons*; plaintiffs never address Frank's argument (FB32-35) that the district court erred.

As *Literary Works* recognizes, each named plaintiff represents the entire class. Without subclasses, the named plaintiffs are obligated to advance the collective class interests rather than the subset of class members whose claims mirror their own. 654 F.3d at 252. The resulting cookie-cutter treatment of class members with materially different claims invariably disadvantages class members with stronger-in-kind claims—a fundamental conflict.

Appellees' arguments to the contrary conflate cases involving different *amounts* of damages with those addressing different *theories* of damages. For example, the different *kinds* of Copyright Act claims in *Literary Works* merited subclassing; the different *amounts* of damages for class members with the same federal cause of action in *Insurance Brokerage Antitrust Litigation*, 579 F.3d 241 (3d Cir. 2009) (cited at PB38 n.11), did not. *Accord Central States Fund v. Merck-Medco Managed Care, L.L.C.,* 504 F.3d 229, 245-46 (2d Cir. 2007). Similarly, the availability of punitive damages in Tennessee was, *inter alia*, grounds for defeating a national class (and proposed settlement) in *Sprint v. Smith Communications Co.,* 387 F.3d 612, 614 (7th Cir. 2004).

Frank has never argued "separate counsel are required every time any two class members potentially have different amounts of damage."

PB35. There is no need for subclassing where differences are *de minimis* or immaterial; one may permit efficiency concerns to override "fine lines." *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) (Easterbrook, J.).

But this case presents the diametrically opposite scenario, where "recovery depends on law that varies materially from state to state" and "differ[s] in ways that could prevent class treatment if they supplied the principal theories of recovery." *Mexico Money*, 267 F.3d at 746-47. In other words, where the underlying theories of recovery are different—because of differing affirmative defenses (*Ortiz*) or differing rights to statutory damages (*Literary Works*) or different types of relief (*3M*) or materially different strengths in state-law or federal claims (*Sprint* and *Central States* and *Dewey*)—separate representation is needed because of the conflicting interest in allocation of a settlement fund among class members with such different interests. *That* is the argument that Frank makes and the appellees' refusal to address it head on is telling.[3]

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[3] *In re Target Corp. Customer Data Security Breach Litig.*, makes the same error appellees do (PB31, DB25) of conflating "non-identical" damages (a difference in degree) with the fundamental conflict of having unique remedies (a difference in kind). 2017 U.S. Dist. LEXIS 75455 (D. Minn. May 17, 2017). The Eighth Circuit never addressed this holding, because it held that the appellant lacked standing to argue the issue. 892 F.3d 968, 973 n.4 (8th Cir. 2018). The district court erred in relying on *Target*.

Other cases plaintiffs cite to argue for affirmance satisfied 23(a)(4) because the subgroups *had* the structural protections of subclassing and/or separate representation—the very thing Frank seeks here. For example, in *In re NFL Players Concussion Injury Litigation* (PB37), class counsel "took *Amchem* into account by using the subclass structure to protect the sometimes divergent interests." 821 F.3d 410, 432 (3d Cir. 2016). No one argued for state-law subclasses in *NFL Concussion*; the claim of conflict was about *degree* of damage, rather than different causes of action. *Id.* at 433-34. Separate counsel similarly satisfied 23(a)(4) in *In re Warfarin Sodium Antitrust Litigation* because it provided structural protection against the conflict. 391 F.3d 516, 532-33 (3d Cir. 2004). (Plaintiffs misrepresent *Warfarin* (PB41): the court did not "reject[] objections like Frank's." Rather, the objection on the state-law differences was to Rule 23(b)(3) *predominance*, which Frank does not challenge, not to (a)(4) adequacy. *Id.* at 528-30.[4] The same is true in *Anthem* (PB32), where no objector asked for 23(a)(4) subclassing on state-law grounds. *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 314-15 (N.D. Cal.

[4] Frank also cited (FB18, FB38) a (b)(3) case, but for general federalism principles: *Bridgestone*'s holding that "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" equally applies here. *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002). Neither appellee mentions federalism.

2018).[5] *Sullivan v. DB Investments, Inc.* (PB32) was also about (b)(3) predominance; the court did not decide (a)(4) questions. 667 F.3d 273 (3d Cir. 2011); *id.* at 342 n.4 (Jordan, J., dissenting) (parties did not "press" (a)(4), which was probably violated).

Plaintiffs' and the district court's argument (PB28-30; Doc1029 at 64) that the statutory damages are "speculative" misuses the word. When most courts discount "speculative" theories of recovery or conflicts, they are not talking about the possibility that a subclass plaintiff could conceivably fail to recover for a colorable claim: such a test is worthless as a rule of decision, because *any* plaintiff *might* lose their case. Rather, such courts are addressing cases in which objectors speculate without evidence that a materially different cause of action conceivably exists. For example, the 23(a)(4) challenge in *Gunnells v. Healthplan Services, Inc.* failed because the objector failed to show that any class member wished to sue for unpaid health bills, making the putative conflict "speculative or hypothetical." 348 F.3d 417, 430 (4th Cir. 2003). *Dickens v. GC Servs. Ltd. P'ship*, similarly distinguishes between claims a class member might "possibly" seek "as opposed to probably." 706 Fed. App'x. 529, 535-36 (11th Cir. 2017). There is nothing "speculative" about the statutory-damages claims Frank raises because *they exist in the*

[5] The 23(a)(4) claim an objector raised in *Anthem* was about the *amount* of damages, rather than about individual causes of action. 327 F.R.D. at 310.

complaint (along with subclass allegations!) and *survived a motion to dismiss*. FB4-6. They have unique settlement value. *Accord* Edelson *Amicus* 11-22. The district court erred as a matter of law in concluding otherwise.

That every class member also has a common Georgia state-law claim (PB31) may permit a national class *in addition to* subclasses, but does not by itself change the need to create subclasses. For example, every class member shared a common claim in *Ortiz*, but some faced material legal differences others didn't because of indemnification issues unique to the subgroup. 527 U.S. at 857. *Literary Works* also repudiated the idea that an overlapping "Category C" claim could prevent a fundamental conflict. 654 F.3d at 251. Indeed, plaintiffs themselves proposed not just subclasses in the alternative (PB5), but *additional* subclasses based on individual causes of action that not every national class member held. Doc374 at 169-71. It was thus legal error for the district court to deem it dispositive that all class members "share at least one common claim." *Compare* Doc1029 at 24, 62-63 *with* FB27-29. A common claim is necessary, but not sufficient, to satisfy 23(a)(4).

Frank explained (FB35-36) that the district court erred as a matter of law in holding that 23(a)(4) violations were not a concern because class members had opt-out rights. Appellees never address this reversible error and plaintiffs simply repeat (PB37-38) the district court's error arguing that Frank could have opted out.

C. Frank does not ask for anything like 34 subclasses.

Frank showed (FB36-42) that the district court committed reversible error both in holding the interests in settlement trumped the interests of subgroup class members and in imagining Frank's objection required dozens of subclasses. Frank proposed a principled workable structure of a national class with three subclasses, and additional subclasses to the extent a party could show material differences in law within a subclass. FB39-41. Appellees do not defend the first error (effectively conceding the district court applied the wrong standard), but they repeat the district court's error about subclassing workability.

The claim (PB39; Doc1029 at 55 n.26) that Frank's objection requires 34 subclasses is based on the same muddling of the distinction between (1) different *amounts* of damages (perhaps a material economic difference, but not a fundamental conflict) and (2) different *theories* of damages (fundamental, because class members have unique claims others do not). For example, plaintiffs quote *Cendant* (PB39), but *Cendant* merely held that subclassing was not required "for each material legal or economic difference that distinguishes class members." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 202 (3d Cir. 2005). Frank doesn't claim otherwise. Frank contends that the mutual interest in maximizing recovery by all class members on one claim does not itself satisfy 23(a)(4) where *differently situated* class members conflict over the

allocation of funds for *substantively different* claims. *Literary Works*, 654 F.3d at 251; Section I.B above.

Certification must cleave D.C. and Utah from Texas because the former have a *cause of action* for statutory damages, while the latter does not. But if the subclass satisfies Rule 23(a)(2) commonality, then D.C. and Utah need not be cleaved from one another, because there is no material difference between Utah and D.C. law that precludes common answers to the same set of facts. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (discussing need for "common answers" in certification). The difference between $1,500 (D.C.) and $2,000 (Utah) statutory damages does not require another subclass; an allocation where a D.C. class member's share is 75% (1500/2000) of a Utah class member's share of the settlement pot for statutory damages remedies the difference. And if there is a material legal difference between Utah and D.C. law—and appellees identify none—then combining the two states in one class flunks 23(a)(2) commonality under *Wal-Mart*, which precludes certification independently of Frank's (a)(4) argument. Frank has carried his burden by showing a principled and plausible subclassing structure, as well as a principled and plausible alternative. FB40-41. Ironically, it is the appellees who assert speculative and hypothetical conflicts within Frank's proposed subclasses without identifying any specific fundamental conflicts.

Thus, it is only by ignoring Frank's actual argument and conflating the distinction between different *amounts* of damages and different *causes of action* that plaintiffs can falsely assert (PB39-40) Frank does not have a principled means of creating subclasses. There is no "backtrack[ing]" (PB39): Frank never argued for dozens of subclasses below, and none of appellees' record cites support their assertions otherwise. The district court passed judgment on a strawman. Frank's proposal of three subclasses would not create "enormous obstacles" or increase administrative expenses and fees at the expense of the class. FB39-42.

And even if Frank's approach created "enormous obstacles," negotiation problems cannot be grounds to ignore the fundamental conflict here. FB36-39. Frank noted (FB43-44) that the district court applied the wrong legal standard when it held it should reject subclassing because of the effect on the "class as a whole." Plaintiffs' only response (PB41 n.13) is to mischaracterize Frank's argument as a challenge to the court's finding of the effect on the class as a whole, but neither appellee contests Frank's argument that the district court used the wrong legal standard. Instead, plaintiffs repeat the legal error (PB38) as a premise for their arguments—even though plaintiffs admit one page earlier (PB37) that "subclassing cannot be ignored to simplify settlement negotiations."

One side note: appellees claim (PB39; DB17 n.5) Frank waived his subclassing argument, but this is wrong. Frank's objection has been and continues to be that a unitary class doesn't satisfy Rule 23(a)(4). Doc876 at 4-12. The onus is on the plaintiffs to formulate subclasses to comply with the rule. Frank's proposal for resolving the problem (FB39-41) is but a response to an erroneous holding of the district court. Frank "can now 'make any argument in support of' the position [that the settlement class fails Rule 23(a)(4)]; he is 'not limited to the precise arguments he made below.'" *Bourtzakis v. United States AG*, 940 F.3d 616, 621 (11th Cir. 2019) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). Frank's description of the conflict remains consistent. Without separate counsel for subgroups with valuable statutory damages claims, such subgroups could not hope to maximize the litigation value of their unique claims. *E.g.*, Doc876 at 11.

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

Frank noted that 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." FB43-45. Because the district court premised its conclusion that the claims were not "materially different" (DB26) based on its undisputed legal errors interpreting state law (Section I.A above), its Rule 23(e)(2)(D) analysis cannot stand.

Indeed, the Georgia state-law claim's weakness shows the flaw of a nationwide class and of the Rule 23(e)(2)(D) analysis. Had the litigation progressed, Equifax would have won summary judgment on the national-class Georgia-state-law claims after *McConnell*, and plaintiffs would have resorted to recovery under the individual state-law causes of action that make up hundreds of pages of their complaint. Appellees do not dispute that different state laws provide different grounds and chances of recovery; that's implicitly evident from the face of the complaint (Doc374), and defendants explicitly argue as much. DB19-24; Doc425-1; Doc425-3.

E. Appellees' other arguments fail.

The 23(a)(4) analysis in *Literary Works* (FB45-46) applies here, and every attempt by plaintiffs to distinguish it only reinforces that conclusion.

Plaintiffs argue (PB33) that a "single event like the data breach" distinguishes this case from *Literary Works*. But *all Literary Works* class members were united by the publication of their written works in electronic databases. Regardless of that commonality, neither that harm nor the "wide value gap" between Category A and B claims and Category C claims drove the *Literary Works* decision.

Specifically, in *Literary Works*, Category A claims were eligible for statutory penalties while Category C claims were eligible only for actual

damages. Nearly every class member held Category C claims, just as all class members here have Georgia-law claims. And just as in *Literary Works*, this presents a "fundamental conflict" when it comes to allocation of the settlement relief. While plaintiffs argue the interests of these subgroups are not pitted against each other, it's undeniable that *Equifax* class members with statutory damages claims obtain no premium for their claims and had no dedicated counsel advocating for their interest. The class members without statutory damages claims, on the other hand, had an irreconcilable interest to exaggerate the relative merits of the national-class claims at the expense of the superior unique statutory-damages class members. So too in *Literary Works*. 654 F.3d at 252. The same "fundamental conflict" exists here because of the "different settlement value" of the different claims for relief. *Id.* at 252, 254. The conflict here is *worse* than *Literary Works* because of the unique weakness of the Georgia claims under *McConnell*. Section I.A.

The appellees' further distinction of *Literary Works* and *Dewey* turns on the Court's acceptance of appellees' unsupported claim that the statutory damages claims are no more valuable than the precluded Georgia-law claims. *See* Section I.A; *accord* Edelson *Amicus*. In *Literary Works* there was no dispute that the Category A (statutory damages) claims were worth more than the actual damages claims because it is unambiguously true that those claims have more value—particularly after surviving a motion to dismiss as they did here. The specific

settlement value of the claims should be tested through arms-length negotiation by separate counsel in a settlement process. *Literary Works*, 654 F.3d at 253. Without separate counsel, the class counsel and class representatives have the incentive to structure the settlement to overlook the interests of the statutory-damages class members in favor of the class as a whole. *Id.* at 250 (quoting *Amchem*, 527 U.S. at 627). The district court using the interests of the class as a whole as a *reason* to reject the objection was exactly backwards.

Appellees' efforts to distinguish *Amchem* and *Ortiz* are equally unavailing. As decades of precedent show, these cases are not limited to the asbestos context or to conflicts between the currently injured and the uninjured with potential future injury. PB30-31. That the settlement provides the same relief despite certain class members' eligibility for a greater, different type of relief is, per *Ortiz*, "itself an allocation decision with results almost certainly different form the results that those with [statutory damages claims] would have chosen." 527 U.S. at 857.

F. Appellees fudge the standard of review.

The standard of review here is *de novo* because whether there are fundamental intraclass conflicts and whether they require subclassing are legal questions. Plaintiffs are thus wrong (PB40) when they assert deference is needed on the legal questions because of the district court's knowledge of the "claims and evidence." And there is hardly "detailed

knowledge" where there's been no substantive litigation beyond a single motion to dismiss, and the district court has so badly erred in its analysis of state law (Section I.A) and in applying incorrect legal standards (Sections I.B-E). Plaintiffs cite no authority for the implication (PB37-38) that an appellate court defers to the district court's analysis of state law. *De novo* means *de novo*. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231, 238 (1991). Too, "[i]nterpreting the Federal Rules of Civil Procedure presents a question of law subject to *de novo* review." *Johnson v. NPAS Solutions, LLC*, -- F.3d --, 2020 WL 5553312, *4 n.3 (11th Cir. Sept. 17, 2020).

Plaintiffs misread *Ortiz* when they argue (PB31 n.6) that subclassing is merely "a line-drawing exercise undertaken by the courts in their considered discretion." *Ortiz* requires structural protections absent here. It dovetails with Frank's position, which never disputes there must be an end to reclassification and proposes principled rules of decision. FB39-42; Section I.C above.

Plaintiffs are similarly wrong when they implicitly ask for deference (PB38) to "renowned mediator" Layn Phillips. A mediator's presence might be evidence of non-collusiveness, but not of satisfaction of Rule 23 standards. *In re Payment Card Antitrust Litig.*, 827 F.3d 223, 234-35 (2d Cir. 2016); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011); *Literary Works*, 654 F.3d at 252-53. It was error for the district court to hold otherwise. Doc1029 at 65; Doc943 at 116.

After all, arm's-length negotiations' protections "extend[] only to the amount the defendant will pay, not the manner in which that amount is allocated" among class members. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717-18 (6th Cir. 2013).[6] Indeed, *Pampers* reversed approval of a settlement mediated by Phillips because of the facially unfair allocation. A mediator's presence cannot cure a flawed settlement.

II. The district court failed to exercise "independent judgment," and violated Canon 3A(4) with respect to class counsel's *ex parte* communications.

In *Johnson*, this Court reversed an opinion that simply approved a settlement with conclusory reasoning. "A district court must support its conclusions by memorandum opinion or otherwise in the record because appellate courts must have a basis for judging the exercise of the trial judge's discretion." *Johnson*, 2020 WL 5553312 at *13 (cleaned up). While there's nothing wrong with accepting a ministerial proposed order from parties, copying mostly verbatim a 122-page opinion purporting to be the court's reasoning in resolving the claims of over 140 million class members and hundreds of objections must be unacceptable. Otherwise,

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[6] Defendants' reliance (DB19) on *Cotton v. Hinton*'s discussion, 559 F.2d 1326, 1330 (5th Cir. 1977), of arm's-length negotiation is inapposite for the same reason. *Pampers*, 724 F.3d at 717-18; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). A court has a "continuing duty" to ensure adequate representation. *Piambino v. Bailey*, 757 F.2d 1112, 1145 n.88 (11th Cir. 1985).

the *Johnson* district court could issue the same unacceptable conclusory opinion in open court, and then delegate the required written opinion to class counsel. *Bright*, which forbids ghostwriting *opinions*, is a natural extension of *Johnson*. Now add the *ex parte* communications and the district court's attempt to foreclose appellate review by refusing to put those communications onto the record. As Frank showed (FB46-57), *Chudasama v. Mazda Mortg. Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997), *Bright v. Westmoreland County*, 380 F.3d 729, 731-32 (3d Cir. 2004), and *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996), require reversal and, regrettably, reassignment here.

A. Class counsel and the district judge disregard Canon 3A(4) through their *ex parte* communications.

There is no dispute that *ex parte* communications took place between class counsel and the district court with respect to the court's 122-page opinion. Doc1029. Appellees do not dispute that these *ex parte* communications constitute a direct violation of the Code of Judicial Conduct. To this day, objectors have not received a copy of these *ex parte* communications as the district court has refused to provide or place these communications on the record. In their briefs, appellees neither deny these facts nor address the Judicial Canons.

At the fairness hearing, the district court ordered class counsel to prepare a proposed order that "summarizes the Court's findings" made at the fairness hearing. Doc945. The district court did *not* order counsel

to submit the proposed order *ex parte*. Yet plaintiffs "emailed the proposed orders to the court in Word format" after the fairness hearing. PB14. Counsel has never said when this email occurred or set forth its content. The district court issued its final order and opinion approving the settlement without ever acknowledging these *ex parte* communications.

Frank deduced that such communications had taken place only because he received the district court's 122-page opinion on January 13, without ever receiving the proposed order, which plaintiffs never placed on the docket as N.D. Ga. Civ. Loc. R. 5.1(A)(1) and 7.3 require.[7] Class counsel assert that they merely submitted the proposed order in accordance with the court's direction to "summarize" the court's oral remarks at the fairness hearing. PB14. Nothing in the court's direction contemplated *ex parte* submissions in violation of the local rules. The court's conclusory rulings at the fairness hearing are set forth in a mere ten pages of transcript (Doc943 at 113-122), a far cry from the 122-page opinion authored by class counsel.

The district court refused to disclose the *ex parte* communication after initially granting an unopposed motion to supplement the record. FB15-16. When plaintiffs signaled their disapproval, in *volte-face* the

[7] Neither appellee mentions Local Rule 5.1. Rule 7.3 (PB14; DB32) does not override 5.1 and requires notice to adverse counsel.

court rescinded the order on plainly incorrect grounds (Doc1106) and subsequently denied Frank's second motion because "the record truly discloses what occurred in the district court," while accusing Frank, without basis, of acting to "obstruct and delay." Doc1153.[8] The district court never addressed Canon 3A, which Frank raised in his motion papers. Doc1149.

1. The violations are factually indisputable.

The *ex parte* communications between class counsel and the judge indisputably violate Canon 3A(4) of the Code of Conduct for United States Judges. That subsection provides that, with specific exceptions not applicable here, "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." Plaintiffs admit that class counsel submitted the proposed

[8] Plaintiffs' "delay and obstruct" allegations (PB50) contradict the record. Doc1149 at 14-15. Frank made his Rule 10(e) motion January 15. Doc961-1. The district court took four months to issue three contradictory rulings on an unopposed motion. Doc1029 at 122; Doc1084; Doc1106. This Court acknowledged Doc1106 was erroneous in a June 8 order holding Frank should move under FRAP 10(e)(1) and (3) instead of 10(e)(2); Frank so moved June 9 (Doc1134-1); the court ruled on August 7. This Court ordered on August 26 that Frank raise his 10(e)(3) request in his September 4 opening brief. FB16; FB47-49.

"orders" *ex parte*. PB14. Plaintiffs do not dispute their *ex parte* email with the proposed opinion was "considered" by the court.

It gets worse. Canon 3A(4) further provides that "[i]f 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." The *ex parte* communications, including the email and the 122-page opinion at issue here, were submitted sometime between the fairness hearing on December 19, 2019, and January 13, 2020, when the district court issued its order. Yet, at no time did the judge "notify the parties" of these *ex parte* communications. Thus, at no time did the court "allow the parties an opportunity to respond, if requested."

These violations were intentional. The rule against *ex parte* communications is well-known. Yet the *ex parte* communications were surreptitious. Frank filed an unopposed FRAP 10(e)(2) request to correct the record two days after the court's order issued January 13; he assumed a good-faith mistake in the proposed opinion's omission from the docket. But the district court entered a final judgment denying all pending motions in March. Doc1029 at 122. This forced Frank to file a Rule 10(e)(2)(C) motion with this Court and only then did the district court direct plaintiffs to put the proposed orders on the public record. FB15.

Rather than comply, plaintiffs asked the district court to reconsider its order and, thus prompted, the district court denied the Rule 10(e) motion on the transparently wrong rationale that this Court had held, in its May 7 order, that these *ex parte* communications were immaterial to the appeal. FB15; Doc1106. When this Court rejected that contention in its June order (and held 10(e)(2)(C) relief was not available because the omission was intentional), the district judge justified its refusal to supplement the record on the obviously wrong ground that the existing record "truly discloses what occurred in the district court." Doc1153. The undisputed reality that these *ex parte* communications did in fact "occur" in district court and that they do not appear in the record.[9] The district court's rulings are inexplicable.

Frank's opening brief stressed Canon 3A(4). FB48, FB53, FB62. But appellees never even cite Canon 3A(4), thus conceding any argument about it. *D/B Ocean King,* 758 F.2d at 1071 n.9; *Thompson*, 959 F.3d at 490 n.11.

2. The only proper remedy is reversal and reassignment.

The remedy for these extraordinary violations of Canon 3A(4) is a reversal of the district court's order refusing to supplement the record,

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[9] *Hoover v. Blue Cross & Blue Shield*, 855 F.2d 1538 (11th Cir. 1988) (cited at PB48) declined to supplement the record with a document *the judge never saw*. There's no dispute that this Court has authority under Rule 10(e)(3) to order the record supplemented.

vacation of Doc1029, and a remand with instructions to reassign the case to a new district court judge under *Chudasama*.[10] *K.L.* is on point. There, on a petition for mandamus, the Seventh Circuit ordered disqualification of a district judge for meeting, *ex parte*, with a panel of experts appointed by the court. Addressing an earlier version of Canon 3A(4),[11] the court refused to entertain the argument that the meetings did not discuss the merits, holding that "[w]e cannot know" whether such discussion took place because the district judge refused to allow discovery into the meetings and refused to elaborate on the meetings. *K.L.* applied the "natural" inference that the meetings were on the merits. 93 F.3d at 258.

Plaintiffs dismiss (PB53-54) *K.L.* as involving facts "more egregious" than those here. Exactly the opposite. After *K.L.* was decided, Canon 3A(4) was amended in 2009 to bar *all ex parte* communications (with limited exceptions irrelevant here), not merely communications related to the merits. That ban on "considering" *ex parte* communications

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[10] Frank does not seek reassignment for adverse orders as plaintiffs falsely suggest (PB57), but due to the fundamentally unfair process of adopting *ex parte* communications as a ghostwritten 122-page opinion. *Liteky v. United States*, 510 U.S. 540, 554 (1994), involved *recusal*, which is irrelevant to the broader "as may be just" standard for reassignment under 28 U.S.C. §2106 sought by Frank here.

[11] Canon 3A(4) was strengthened to its current language in March 2009. *See* https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

is unambiguous. So too is the court's duty, newly imposed in 2009, to notify the parties of any such *ex parte* communications and give them a chance to respond.

Everyone agrees that the judge must exercise "independent judgment" in approving a settlement agreement. Yet the district judge never explained his consideration of the *ex parte* submission of class counsel or failure to disclose, even though the court was given every opportunity to do so. Class counsel have been equally silent regarding the actual content of the *ex parte* communications. The Canon 3A(4) concerns have been stonewalled.

Defendants incorrectly argue (DB37-38 & n.10) that *K.L.* is inapposite because the court's adoption of class counsel's *ex parte* communications here were "harmless error" or mere "*dicta*." Plaintiffs do not join in that argument, and for good reason. Such violations of Canon 3A(4) cannot be "harmless error" because they pose fundamental fairness issues. *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809-10 (1987) (plurality opinion) (ethics concern presented there was not subject to harmless error analysis because it "undermines confidence" in the fairness of the proceeding); *see also EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 357 (7th Cir. 1988) (applying *Young* to a civil case). This Court should exercise its supervisory authority to enforce Canon 3A(4) in all cases.

In any event, there is nothing "harmless" or *dicta* about the errors adopted below. *First*, class counsel repeatedly asked the court to rely on inadmissible Klonoff opinions on legal issues. Doc887 at 1; Doc902 at 3; Doc932 at 1. Following class counsel's request, the district court's oral opinion erroneously heavily relied on the Klonoff opinion, which plaintiffs improperly styled as an expert report. Doc943 at 116-17; FB49-50. This further unfairly prejudiced Frank, because the "expert report" was a brief that effectively evaded the court's page limits over Frank's objection. Doc909-1; FB56. The written opinion repeatedly quotes Klonoff verbatim. FB49-50. Yet the written opinion states "the Court's decisions regarding the objections are not dependent upon [Klonoff's] declaration." Doc1029 at 38-39. That language written by class counsel was simply an attempt to retroactively appeal-proof the court's error, to Frank's prejudice.

Second, the findings about Frank have denigrated his good name and professional reputation; they purport to provide a basis for the rejection of all of Frank's objections. Doc1029 at 109-10, 113-14. (The disclaimer of relevance for the finding (Doc1029 at 109) is another attempt at appeal-proofing.) Plaintiffs relied on these supposedly harmless errors in urging an appeal bond, as did the district judge in granting it. Doc1094 at 7. The attack unfairly forced Frank to defend himself on appeal against "conclusory statements unsupported by citation to the record." *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985).

The *ex parte* communications should not be simply ignored, as defendants suggest. DB33-35. The district judge may not dismiss these concerns just because it feels that litigation over these obligations "is not in the best interests of the class or the efficient disposition of the appeal." Doc1153. "A district judge ought not try to insulate his decisions from appellate review." *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012) (Easterbrook, J.). The best interest of the class, as in any litigation, lies in full compliance with Canon 3A(4). "As a general rule, ex parte communications by an adversary party to a decision-maker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process." *Thompson v. Greene*, 427 F.3d 263, 269 n.7 (4th Cir. 2005) (cleaned up); *accord In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir. 1986).

These obligations are paramount in class actions because "the district court must assume the role of fiduciary for the class plaintiffs and ensure that the class is afforded the opportunity to represent its own best interests." *Johnson,* 2020 WL 5553312 at *5 (cleaned up). Violations of Canon 3A(4) are incompatible with the court's fiduciary duties. Here, Frank seeks only reversal and reassignment under 28 U.S.C. §2106. At the very minimum, the district court has so abused any discretion it may have in managing the *ex parte* communications and the Rule 10(e) proceedings as to require reassignment. *Chudasama*, 123 F.3d at 1373-74.

Appellees' attempt to distinguish *Chudasama* fails. The district court's reconsideration of the Rule 10(e) order evinces both partiality and "abdicat[ion of] its responsibility to manage." *Id.* at 1356; *contra* PB53; DB34-35. The lack of bias as between defendants and plaintiffs in deciding a motion to dismiss (DB35) is irrelevant to whether there is partiality regarding objectors. Moreover, the court's use of "strong language" against Frank (*Chudasama*, 123 F.3d at 1373)—without allowing an "opportunity to respond" (*In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987)) or even providing specific record citations to alleged misrepresentation—resembles a sanctions order, especially in light of the court's equation of "serial objectors" with extortionists. Doc1029 at 109-10; Doc1094 at 7-9; *contra* PB57; DB34. *Chudasama* does not limit fairness to discovery disputes, and it demands reassignment here.

3. Appellees' cited cases are inapposite.

Plaintiffs assert that the Supreme Court and this Court have repeatedly held that "the adoption of a proposed order, even verbatim, is not fundamentally unfair." PB48-49. Yet, save one, none of the cases cited by plaintiffs involved *ex parte* communications, none involve a district court considering the proposed order without the appellant having an opportunity to respond, and, as far we can tell, none involve anything like a *122-page opinion* resolving a class action. As noted (FB52-53), *Anderson*

involved proposed findings of fact, not a judicial opinion, and the parties had the opportunity to review and challenge the proposed findings. The proposed order in *Brownlee v. Haley* was adopted by a state court in a *habeas* proceeding and the Court found that state record reviewed by the district court "eliminates any doubt about the [trial] judge's involvement in the matter." 306 F.3d 1043, 1067 n.19 (11th Cir. 2019) (cleaned up). No such review is present here. *Fields v. City of Tarpon Springs*, 721 F.2d 318, 320-21 (11th Cir. 1983), decided before *Chudasama,* merely involved Rule 52 "factual findings," and this Court found on the facts that the judge there did not "abdicate his adjudicative role." There is no record evidence that would support such a finding here.

Colony Square, the *only* case cited by appellees (PB49, DB39) defending *ex parte* communications is readily distinguishable, as Frank previously noted (FB52). 819 F.2d 272. *Colony Square*'s *ex parte* communications were with a bankruptcy judge. On review, the district court permitted "expedited discovery" on these communications, including "written interrogatories." *Id*. at 274. The district judge then ruled that the party had a full opportunity to present its arguments to the district court on *de novo* review, where it determined that the orders were correct "as a matter of law." *Id*. On these facts, this Court declined to set aside the *district court's* order, reasoning that the party "has had ample opportunity to present its arguments" and that "[t]he independent

consideration" by the district court "serves to correct any errors in the procedure used by the bankruptcy judge." *Id.* at 277.

No such facts, procedures, or independent consideration are present here. *Colony Square* featured independent *de novo* review of a judge's verbatim adoption of an order, and an appeal from that intermediate review; this is the appeal from the nearly verbatim adoption. The district court's 122-page opinion contains the exercise of discretion and thus cannot be affirmed as a "matter of law." As explained in Section II.B below, Frank never had a full and fair opportunity to respond. And Frank has not had the disclosure *Colony Square* required.[12]

Moreover, *Colony Square* was decided in 1987, before *Chudasama*, and before Canon 3A(4) was amended in 2009 to bar *all ex parte* communications (with exceptions not relevant here) and to impose an affirmative duty on judges to disclose any *ex parte* communications and afford an opportunity to respond. Yet, even in 1987, *Colony Square* condemned ghostwriting judicial orders. 819 F.2d at 274-75. Given *Johnson* and the changes to Canon 3A(4), this Court should now hold that it will not countenance *ex parte* ghostwriting of opinions.

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[12] Similarly, *In re Dixie Broad., Inc.*, 871 F.2d 1023, 1030 (11th Cir. 1989) (cited at PB49), was also a bankruptcy case where the bankruptcy judge's adoption of a verbatim order was cured by the subsequent district court review.

B. Frank never had notice or an opportunity to respond to the adverse findings against him.

Plaintiffs repeatedly and falsely argue that "Frank offered no opposition" and "failed to respond" to the accusations against him. PB15; PB50; PB57. But plaintiffs never accused Frank of being a serial objector before their reply argument in the fairness hearing, and plaintiffs cannot dispute this chronology. FB54. Instead, plaintiffs deflect, asserting that class counsel's declaration, Doc900-1, shows Frank knew "the evidence" for plaintiffs later-leveled allegations. PB50. Not so. While the declaration (Doc900-1) contained inchoate complaints about Frank's criticism of the settlement (which is consistent with criticism by politicians (Doc1057-2 at 20-22) and plaintiffs' attorneys (Edelson *Amicus* 5-11)), neither it nor the accompanying memorandum (Doc902) labelled Frank an extortionist "serial objector" or accused him of improper motive, much less requested that the court make findings against him because of any of his statements.

Frank had already documented his objection was a good-faith attempt to improve the settlement. Doc876-1; *id.* at 42-43, 45-49. Plaintiffs never disputed or addressed those facts in briefing, nor did they seek to depose him. In fact, Klonoff identified several ***other objectors*** as "serial" (Doc900-2 ¶¶81-84), as did plaintiffs' memorandum (Doc902 at 40-42)—***but not Frank***. (Likely because Klonoff defines "serial objectors" as extortionists. Doc900-2 ¶84 (singling out amendment

creating Rule 23(e)(5)(B)'s restriction on payments to objectors).) Doc900-1 never accuses Frank of saying anything "false and misleading," just of criticizing the settlement. Only at the fairness hearing in reply did class counsel falsely attribute statements made by others to Frank.[13] When the district court's oral ruling did not credit the *ad hominems* against Frank, Frank had no reason to believe the written opinion would do so, and every reason to believe, under the Local Rules, that he would see the proposed opinion before the court adopted it.

Indeed, the procedural schedule did not *allow* objectors a reply. Below, plaintiffs argued that objectors' filings after the November 19 deadline were untimely under the court's order and must be disregarded. Doc932 at 3-4 (citing Doc742). Yet now plaintiffs fault Frank for not violating a court order to respond to what were idle mischaracterization of Frank's public statements unmentioned in the briefing. *See* Doc902.

Frank simply never had a genuine opportunity to respond to plaintiffs' later-sprung allegations. Plaintiffs did not request findings against Frank even in their 520 pages worth of exhibits filed just hours before the fairness hearing. FB8. Plaintiffs cannot deny that they first requested findings against Frank at the fairness hearing *after* Frank's

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[13] *Compare*, *e.g.*, Doc943 at 91 ("$31 million") *and* PB54 (same) *with* Doc900-1 ¶45 (*New York Times* reporter, not Frank, made the "$31 million" statement (full article at Doc1057-2 at 16-18)) *and* Doc900-1 ¶47 (admitting Frank correctly described "other pots of money").

counsel spoke. FB8-9. When the court's oral opinion omitted those findings, class counsel secretly authored an opinion to provide them. In short, Frank was sandbagged.

C. Class counsel impermissibly wrote the court's opinion and have failed to produce any evidence that the court exercised independent judgment in any finding.

The district court's refusal to correct the record means there is no evidence of the required independent judgment. FB47-49. At a minimum, *Anderson*, 470 U.S. at 563, requires that the record demonstrate that the factual findings "represent the judge's own considered conclusions." As stated in *Bright*, this means that "the findings of fact adopted by the court must be the result of the trial judge's independent judgment." 380 F.3d at 731-32 (collecting cases). *Accord In re Cmty. Bank of N. Va.*, 418 F.3d 277, 301 (3d Cir. 2005) ("a court must set forth persuasive reasons, stated with objectivity, why the submissions of counsel totally reflect the independent judgment of the court.").[14]

Moreover, courts have drawn a sharp distinction between the adoption of proposed *findings of fact,* such as those at issue in *Anderson,* for which there must be evidence that the court exercised "independent judgment," and the wholesale adoption of an entire *opinion,* which is

[14] Plaintiffs distinguish (PB53) this case as one involving a deficiently reasoned "*one sentence*" opinion, but *Bright* shows the result would be identical if the prevailing party ghostwrote a 122-page opinion.

completely impermissible. "[T]here is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side. *That practice involves the failure of the trial judge to perform his judicial function*." *Bright*, 380 F.3d at 732 (*quoting Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 725 (4th Cir. 1961), emphasis by *Bright*).

The court in *Bright* thus reversed the district court's opinion in that case because it was "essentially a verbatim copy of the appellees' proposed opinion." 380 F.3d at 732. As the court explained, "[w]hen a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions." *Id*. *Cf. U.S. v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964) (allowing counsel to ghostwrite Rule 52 findings "is an abandonment of the duty and the trust that has been placed in the judge by these rules" (cleaned up));[15] *Chudasama*, 123 F.3d at 1373.

Bright's holding is that verbatim adopting proposed *opinions* (as opposed to Rule 52 findings of fact) is never acceptable. Appellees' claimed distinctions (PB53; DB40) simply refuse to address this holding. Here, however styled, the district court's 122-page decision is an "opinion" of the court. Opinions "are much more than findings of fact and

[15] Contrary to plaintiffs' characterization (PB47), *El Paso* found that the "mechanically adopted" findings at issue "do not reveal the discerning line for decision of the basic issue in the case." 376 U.S. at 657.

conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision." *Bright*, 380 F.3d at 732. If a court can issue a largely conclusory oral ruling (Doc943 at 113-22) and have class counsel expand it into a 122-page opinion with reasoning that the district court never expressed and the parties never briefed, it completely undoes *Johnson*'s requirement that "the law requires more than a rubber-stamp signoff." 2020 WL 5553312 at *14.

Plaintiffs confess that they *ex parte* "emailed the proposed orders to the court" but they are careful not to describe the "orders" thus submitted. PB14. As detailed above, with plaintiffs' encouragement, the court repeatedly refused to put the "proposed orders" and other *ex parte* communications on the record. The Court can safely infer from appellees' lack of denials and refusal to place the proposed opinion on the record that the court copied the proposed opinion nearly verbatim—including apparently ironic language about exercising independent judgment. Doc1029 at 38-39, 115, 119. *See also* FB47-49.

There is no evidence that the district court's holdings "totally reflect[ed] the independent judgment of the court." *Community Bank*, 418 F.3d at 301. The repeated refusals of class counsel and of the district court to put the *ex parte* communications on the record cannot survive scrutiny under *K.L.*, *Bright*, and *Johnson*.

D. The district court's extortionist "serial objector" finding is error.

Plaintiffs confirm the district court's findings against Frank were authored by class counsel, not the court. Plaintiffs concede (PB52) that the district court never mentioned Frank by name, but argue that it was "readily apparent" that the court must have included him. But the district judge said only that "*most* of the objections that were voiced here today did not take into consideration the best interest of the Class itself." Doc943 at 117 (emphasis added). Class counsel was ordered to "summarize[]" the court's oral rulings (Doc945), not invent rulings that the court never articulated. Class counsel is the sole author of an opinion that says that Frank is a "serial objector" extortionist and that he disseminated "false and misleading information" about the settlement. Doc1029 at 109-10, 113-14.

Appellees now suggest that "serial objector" might refer benignly to ideological motivations (PB55) or one who is experienced with objections (DB37; PB55), and doesn't even imply acting unethically (PB56). Appellees' looser definition implies that even *successful* good-faith objections and appeals are legally indistinguishable from one-page generic objections meant to extract an extortionate payoff (Doc1094 at 8-9), and thus equally qualify one as a "serial objector" whose objections courts should discount (Doc1029 at 109-10) and "condemn[]" (PB44). That is absurd and directly contradicts the *Manual*; no appellate

opinion supports this. *E.g.*, *Pearson v. Target Corp.*, 968 F.3d 827, 831 n.1 (7th Cir. 2020).

More importantly, that's not what the plaintiffs told the district court it found in pressing for the imposition of a $40,000 appeal bond on Frank and Watkins. Plaintiffs stated: "Objectors have already been identified by this Court as professional, serial objectors (Doc. 1029 at 110-114), who have extorted money." Doc1040 1 at 8. (The only objector mentioned on page 114 is Frank.) Plaintiffs ***now*** acknowledge (PB55) that Frank is not an extortionist, after falsely accusing him of this in district court. That should be enough to dispose of appellees' baseless redefinition.

Plaintiffs' false accusation against Frank found its way into the final opinion. The class-counsel-drafted opinion mentions Frank specifically as a "serial objector" (Doc.1029 at 109-114) to be treated like an extortionist, and, in the bond order, the court relies on that "finding" (at class counsel's urging) to equate serial objectors to professional objectors "who seek out class actions to extract a fee by lodging generic, unhelpful protests." (Doc1094 at 8-9). In this way, class counsel bootstrapped the false accusation in the tainted 122-page opinion into an egregiously wrong ruling in the bond order. That error not only requires reversal of the bond order, but such "partiality of the practices" and "strong language" is the very type of an abuse that requires reassignment under *Chudasama*. (123 F.3d at 1373).

The other class-counsel-authored "findings" about Frank that he was unable to respond to are also false. Plaintiffs do not contest that Frank's Ninth Circuit victory (FB7) mirrors his Rule 23(a)(4) objection here and benefited the class, and demonstrates his good faith. Doc1057-2 at 11-12. Frank never made "false and misleading" statements. FB55 n.8.[16] His non-profit has won over $200 million for class members, and often consults with the Department of Justice and state attorneys general. Doc876-1 at 7-8, 40. The district court never discusses *any* of this evidence submitted in opposition to plaintiffs' demand for an appeal bond. Doc1057-2. The Edelson *amicus* demonstrates that a successful appeal by Frank will benefit the class. Frank should not be tarred as a bad-faith extortionist for his successful public-interest work.

Conclusion

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

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[16] Plaintiffs make new allegations (PB54-55) they did not make below. Their record cite (Doc900-1 ¶47) shows that Frank accurately communicated settlement terms by including a screenshot of the settlement notice. The only record evidence is that Frank represented a *Target* objector to improve the settlement for absent class members. Doc1057-2 ¶¶18-21; Doc876-1 ¶¶30-31. Similarly, plaintiffs misrepresent Frank's description of *Target*. PB55 (misrepresenting accuracy of Doc876-1 ¶16 at 28).

The Court should mandate reassignment. If the Court is unwilling to do this before seeing the *ex parte* proposed opinion (and any other undisclosed *ex parte* communications), it should order the record corrected under FRAP 10(e)(3) and order additional briefing.

Dated: October 9, 2020

Respectfully submitted,

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Supplemental Addendum of Statutes

2017 version of 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) Treble damages, or $1,500 per violation, whichever is greater, payable to the consumer;

(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.

…

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

On September 30, 2020, this Court granted Frank and Watkins's September 21 motion to exceed type-volume limitations, enlarging the type-volume limitation to 9,750 words.

This brief thus complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 9,740 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 October 9, 2020.

/s/Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on October 9, 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