Nos. 21-15120, 21-15138, 21-15200

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: LITHIUM ION BATTERIES ANTITRUST LITIGATION,

INDIRECT PURCHASER PLAINTIFFS,
Plaintiffs-Appellees/Cross-Appellees/Cross-Appellants,
v.
STEVEN FRANKLYN HELFAND,
Objector-Appellant/Cross-Appellee,
v.
MICHAEL FRANK BEDNARZ,
Objector-Appellee/Cross-Appellant/Cross-Appellee,
v.
CHRISTOPHER ANDREWS,
Objector-Appellant,
v.
PANASONIC CORPORATION, *et alia*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California, No. 4:13-md-02420-YGR

M. Frank Bednarz's Rule 28.1(c)(3) Response and Reply Brief

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Plaintiffs identify no case in which the Ninth Circuit affirmed a district court's refusal to consider the most relevant evidence of a market rate—a competitive bid filed in the same case. Their attempts to distinguish precedents like *Optical Disk* do not address Bednarz's public policy arguments why the distinctions are immaterial. The district court's errors mean that attorneys are receiving over twice as much—$40.6 million of a $113.45 million fund—as proposed in a bid, tens of millions of dollars that would otherwise benefit class members like objector Bednarz.

The problem is worse because the district court committed several errors and disregarded this Court's mandate in holding that class counsel did not have a conflict of interest and breach its fiduciary duty to repealer-state class members. Such a finding, if made, would under this Court's precedent, justify additional reductions in the fee and additional recovery for class members. Surely there must be consequences when class counsel uses a Ninth Circuit briefing and argument to argue against the recovery of millions of class members for the benefit of other class members whose claims were "worthless." 2-ER-263-65.

I. Hagens Berman's fee bid was the "starting point for determining a reasonable fee," and the district court erred by refusing to consider it relevant.

Ironically, Plaintiffs introduce their argument (PB18)[1] by quoting *Fox v. Vice*, 563 U.S. 826, 838 (2011), to bristle—incorrectly—that Bednarz is asking for "appellate micromanagement" beneath this Court's consideration. Of course, *Fox* itself granted *certiorari* on a petition seeking review of a fee award, and vacated and remanded a lower court's affirmance of a fee award. That is because "the trial court must apply the correct standard, and the appeals court must make sure that has occurred." *Id.* "A trial court has wide discretion when, but only when, it calls the game by the right rules." *Id.* at 839.

And here the trial court used the wrong rules. The Ninth Circuit asks courts to look at the *ex ante* competitive bids of class counsel firms not for reasons of estoppel, but because *that is presumptive evidence of an ascertainable market rate*. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049-50 (9th Cir. 2002). When that evidence exists, it supersedes the rough guess of a 25% benchmark to be "the starting point for determining a reasonable fee." *In re Optical Disk Drive Antitrust Litig.*, 959 F.3d 922, 934 (9th Cir. 2020); OB29-30. Plaintiffs fail to identify a single case when the Ninth Circuit has held it appropriate to ignore entirely a bid one of the lead counsel submitted.

[1] "OB" is Bednarz's Rule 28.1(c)(1) opening brief in No. 21-15120 and "PB" is plaintiffs' Rule 28.1(c)(2) principal and response brief in Nos. 21-15200 and 21-15120 .

Plaintiffs try to distinguish cases like *Optical Disk* by arguing (PB21) that the district court ultimately chose to ignore the competitive bid to select class counsel. But this misunderstands *Optical Disk* and Bednarz's argument. Neither *Optical Disk* nor Bednarz base their argument on estoppel. OB31. (*Optical Disk* implicitly rejected estoppel by holding that a district court is not "bound" by a bid. 959 F.3d at 933.) While *Optical Disk* expressed its rule as for the accepted bid in that case, nothing about its reasoning made the acceptance the dispositive fact. It is the "*proposed fee*" *itself* that constitutes evidence of the appropriate reasonable fee. *Id.* (emphasis added). A district court's failure to accept a proposal therefore does not make the proposal less relevant.

Thus, whether some counsel was "aware" of the size of the bid (PB6) is relevant only if the bid is a mechanism for estoppel, rather than the best evidence of a reasonable market fee. Similarly, Bednarz is not challenging the appointment order; the appointment order has nothing to do with Bednarz's argument about the bid's relevance, and plaintiffs' references to the appointment order (PB9) are a red herring. This is all the more so because Hagens Berman's proposed three-firm PSC and work allocation and commitments to work efficiently are not materially different from the district court's established guidelines. *Compare* 2-ER-100-108 *with* SER-60-63. If class counsel operated with equal efficiency under the approved co-lead structure, as Ms. Cabraser assured the district court they would (3-ER-361), then the different structure would simply result in a different distribution of

hours across more firms. But the total hours that the team would require to achieve the same result should remain identical. Anything more would be redundant waste that a court acting as a fiduciary should not charge to the class's expense.

Plaintiffs' argument (PB21-22) that a one-lead/three-firm plaintiffs' steering committee like Hagens Berman's proposal would result in materially different fees from a three-firm co-lead-counsel structure/seven-firm PSC (Dkt. 229) would perhaps be an argument for *departure* from the bid. But it is not an argument for *ignoring* the bid as a starting point. But the record shows it is not even a reason for departure: plaintiffs never explain how doubling the fee is the equal efficiency they promised at the hearing. 3-ER-361; OB35.[2]

Wells Fargo, as an unpublished opinion, is not dispositive, but it is more support for Bednarz's position. OB30-31 (citing 845 Fed. Appx. 563 (9th Cir. 2021)). Contrary to plaintiffs' claim (PB25-26), the discussion of bids was not dicta. *Wells Fargo* held that a lower benchmark did not apply because "there were no fee structures *proposed*" there. 845 Fed. Appx. 563, 565 (9th Cir. 2021) (emphasis added). *Wells Fargo* could have said that the decisive fact was that

[2] The "68 supporting counsel declarations" (PB12 n.6) is not so much evidence of "copious" "documentation" (PB11) supporting fees as it is evidence of extraordinary waste and duplication from unnecessary use of dozens of firms. No paying client would tolerate this, and consumer class members shouldn't be worse off as clients than a wealthy corporation. All the more reason for a court to use an *ex ante* bid anticipating efficiency when determining the appropriate percentage of the fund as a starting point.

the district court did not *accept* a bid; it did not. Tying *Optical Disk*'s rule to the *proposal* in that case was necessary to *Wells Fargo*'s holding and so "cannot be dicta." *United States v. Rivera-Corona*, 618 F.3d 976, 986 (9th Cir. 2010) (Fisher, J., concurring); *see also Seminole Tribe v. Fla.*, 517 U.S. 44, 66-67 (1996).

Bednarz explained at length why it makes no sense as a question of law or public policy for courts to treat a legitimate but rejected bid differently from an accepted bid. OB31-36. Plaintiffs' assertion to the contrary (PB21) cites no appellate authority. "[D]eparture from a bid based on circumstances that were known at the time the bid was filed may be an abuse of discretion given the court's fiduciary duty to members of the class." *Optical Disk*, 959 F.3d at 935. If this Court accepts plaintiffs' invitation to treat unaccepted bids differently than accepted bids, then it creates a perverse incentive for competing firms to collude at the expense of the class—as happened here. OB35-36. Plaintiffs simply ignore all of this: they do not mention collusion, price-fixing, the Sherman Act; nor "incentives" in the context of lead-counsel competition and selection. They have forfeited any claim that public policy does not demand the result Bednarz seeks. Because Ninth Circuit law does not bar that result, the Court should so interpret its precedent.

At most, plaintiffs assert (without reasoning) that competitive bidding is "unworkable." They rely on a paper by Brian Fitzpatrick, who makes "six figures" providing attorneys $950/hour opinions supporting large fee requests. Roy Strom, *Meet the Professor Big Law Hires to Collect Nine-Figure Fees*,

BLOOMBERG LAW (June 3, 2021). Regrettably, plaintiffs overstate Fitzpatrick's position:[3]

> [W]hen it comes to attorneys' fees, absent class members acting as their best, most rational selves would want to pay class counsel at the end of the case the amount they would have paid class counsel to take the case to begin with—what we often call "ex ante." As good fiduciaries, then, that is exactly what judges should do as well.

Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1155 (2021). To do so, judges should focus on "data" and "empirical evidence" of what actual fee agreements look like—such as the proposed bid Hagens Berman submitted here. *Id.* at 1159-62. This is precisely Bednarz's argument. OB31-34. So too Ninth Circuit law: evidence of *ex ante* prices is "probative of the fee award's reasonableness." *Vizcaino*, 290 F.3d at 1050. Regardless of whether courts ought to use a competitive bidding process as a normative matter,[4] when competitive bids exist,

[3] And not for the first time for at least one of the lead class counsel firms. *Ark. Teachers Ret. Sys. v. State St. Bank & Trust Co.*, 512 F. Supp. 3d 196, 214-15, 217 (D. Mass. 2020) (criticizing Lieff and two other firms for "a misleading description of a prominent study by Brian Fitzpatrick") (appeal by Lieff pending, No. 21-1069 (1st Cir.)).

[4] *Compare* OB31-34 *with* PB19 (citing Fitzpatrick). Fitzpatrick's paper fails to cite *Optical Disk*, and asserts that marginally declining bids like the ones here and in *Optical Disk* rarely happen. 89 FORDHAM L. REV. at 1170. It's not the only striking omission in his paper. There are two well-known reasons that courts rarely use competitive bidding in class actions. *First*, 15 U.S.C. § 78u-4(a)(3)(B)(v) mandates a procedure for how courts should appoint

Fitzpatrick—and, more importantly, *Vizcaino*—call for courts to use that "ex ante" evidence.

Plaintiffs provide no record evidence and no argument that the Hagens Berman bid for a four-firm structure (2-ER-99-121) was anything but a legitimate bid or a competitive market rate.[5] There is nothing "manifestly unfair" (PB22) about awarding class counsel a market rate, which is by definition reasonable. That should conclude the matter as a matter of Ninth

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lead counsel in federal securities class actions, and thus forbids auctions in the type of class action most likely to have competing bids. *In re Cendant Corp. Litig.*, 264 F.3d 201, 273-77 (3d Cir. 2001).

Second, lead-counsel selection in other cases is a process subject to logrolling and "cartel-like" behavior to deter competitive bids—as happened here. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 73 (2017); *see also* OB8-10; OB35-36; Joseph Ostoyich and William Lavery, *Looks Like Price-Fixing Among Class Action Plaintiffs Firms*, LAW360 (Feb. 12, 2014).

Fitzpatrick does not cite *Cendant*, 15 U.S.C. § 78u-4(a)(3)(B)(v), or Burch when he uses the lack of bidding to claim that it is "unworkable." When courts do use bidding, it works just fine. Michael Perino, *Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions* (Jan. 2006) (pre-*Cendant* auctions reduced fees; not cited by Fitzpatrick); OB32-34 (citing several cases, none of which Fitzpatrick cites). That district courts generally fail or cannot police problems that auctions would solve is no reason to disregard the evidence that a bid provides when class counsel makes one.

[5] Nor is there any evidence that Hagens Berman did not have the "proven ability" to handle the lead counsel responsibility by itself. 2-ER-108.

Circuit precedent and public policy. The district court ignored the most important evidence for "the starting point for determining a reasonable fee." Class members' interests demand objective yardsticks that can anchor the award to something beyond the after-the-fact *ipse dixit* of self-interested counsel—thus the 25% benchmark in this Circuit. *Optical Disk* recognizes that a competitive bid is another such yardstick. Such a bid does not conclusively bind a district court, but a court must explain departure from it, rather than incorrectly waving it away as irrelevant. 1-ER-38.

Bednarz, contrary to plaintiffs' claim (PB23), does not argue that a bid is the one single factor relevant to a fee request. A bid is not the "be-all and end-all" (PB24), but a bid *is* a relevant factor and the starting point for determining a fee award. The failure to consider a relevant factor is an abuse of discretion. OB4; OB27 (citing *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009)).

Plaintiffs admit (PB23) that under *Optical Disk*, 959 F.3d at 930, a court must consider "all relevant circumstances." The district court held that "the Court does not consider the bid to be relevant to the present motion to determine the reasonableness of the request for attorneys' fees now before it." 1-ER-38. The opinion never mentions the size of the bid. It is thus wrong for plaintiffs to argue (PB23-24) that the district court "considered" the bid when that consideration consists of holding it to be not "relevant" for reasons that mistake *Optical Disk*'s holding to be based on estoppel rather than the strongest evidence of reasonableness. It is similarly untenable for plaintiffs to

say (PB25) that there was no "competitive fee-based bidding process" here when there is a competitive fee-based bid in the record.

Unlike *Fox* and the other cases that plaintiffs cite (PB1) involving bilateral disputes, this is a *class action* affecting absent third parties. A district court acts as a fiduciary for the class and must "act with a jealous regard to the rights of those who are interest in the fund in determining what a proper fee award is." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994) (cleaned up); *accord Optical Disk*, 959 F.3d at 934-35; *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). Appellate courts' disdain for collateral litigation over bilateral disputes is irrelevant to the class-action scenario, where this Court has not hesitated to intervene when a district court ignores its fiduciary duty and gives the absent class's interests short shrift. *See also Zucker v. Petroleum Corp.*, 192 F.3d 1323, 1329 (9th Cir. 1999) (courts have duty to supervise class action fees "independently of whether there [is] objection"). That duty means review of Rule 23(h) awards in objector appeals is not micromanagement as plaintiffs complain, but important "appellate correction of a district court's errors [that] is a benefit to the class." *Crawford v. Equifax Payment Svcs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000) (Easterbrook, J.).

In *Optical Disk*, the disparity between the fee award and the bid was $21 million: "the size of the variance…requires more explanation." 959 F.3d at 937. Here, the disparity is a similar $20.6 million. OB23. The district court's

only explanation was its legally erroneous holding that the bid was irrelevant. 1-ER-38. As in *Optical Disk*, this was reversible error.

II. The district court erred when it ignored the law of the case and held there was no conflict by denying the existence and effectiveness of class counsel's advocacy for a *pro rata* distribution plan.

Bednarz maintains that the district court should have reduced the fee award because class counsel had a conflict of interest when class counsel argued against the interests of repealer-state class members that Bednarz had raised in his successful 2017 appeal. In deciding that appeal, this Court correctly noted that class counsel advocated for and the district court ordered a *pro rata* distribution for the second settlement tranche. 2-ER-210. Class counsel admitted this as well. 2-ER-75-76. The district court held that class counsel did not have the conflict of interest Bednarz alleged because the court had not "entertained or decided the details of such a proposal" and that Bednarz's successful 2017 appeal was thus "premature." 1-ER-39. Because the district court lacks the authority to overrule the Ninth Circuit or disregard its mandate, this decision is an abuse of discretion (even if it weren't also a clearly erroneous reading of the history of the case). The district court's holding that there was no intra-class conflict because class counsel advocated on behalf of the entire class is also legal error because it contradicts Supreme Court precedent and is a *non sequitur*.

In asking this Court to disregard Bednarz's arguments and affirm:

- Class counsel does not dispute that the district court's reasoning for finding a lack of a breach of fiduciary duty contradicted the law of the case and the Ninth Circuit's mandate. OB40-46. Plaintiffs do not even mention either legal concept. Plaintiffs do not dispute that the district court's August 2020 order was, as they originally argued, *ultra vires*. OB45. They do not dispute that that order put them in the position of either having to disregard the rights of non-repealer-state class members by (as they did) letting the order stand without appeal or by appealing and arguing against the interests of repealer-state class members. OB45-46. Instead, they bald-facedly argue (PB30) "Bednarz does not explain why the proper classification of a now superseded plan of distribution should matter now." One's jaw drops, but we refer the Court to Bednarz's opening brief: one finds the answer in the titles of Sections II, II.B, and II.D. OB37 *ff.*; OB40 *ff.*; OB51. And Bednarz spelled it out again: "What concerns Bednarz is that the district court repeated its factual and legal error when it held it had not 'entertained or decided the details of [a *pro rata*] proposal' (1-ER-39-40), and rejected Bednarz's objection as a result. This Court's decision says otherwise, and the district court committed reversible error in contradicting the mandate." OB46. Plaintiffs simply ignore this argument, ignore the precedents Bednarz cites, and have forfeited any response defending the district court's indefensible finding.

- Plaintiffs do not dispute that they argued for a *pro rata* distribution in the first two tranches of the settlement at the expense of repealer-state class members, including at the Ninth Circuit. Nor do they dispute that, had they succeeded in defeating Bednarz's first appeal, they would have ultimately cost repealer-state class members tens of millions of dollars. OB51-52. Plaintiffs do not dispute that their attempt to treat unlike class members identically was a Rule 23(a)(4) violation under Supreme Court precedent. OB50 (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999)). They do not even mention *Ortiz*, much less attempt to distinguish it.
- A neutral found that the non-repealer-state class members' claims were worthless under Supreme Court precedent. OB15, OB51. Plaintiffs dispute this by misrepresenting the record. *Compare* PB28 *with* 2-ER-263-71.
- Plaintiffs do not dispute that each dollar non-repealer-state class members gets comes at the expense of repealer-state class members. Nor do they dispute that arguing for the benefit of non-repealer-state class members necessarily requires arguing against the interests of repealer-state class members. OB47. They simply assert, without reasoning or precedent, that this facial conflict is not a conflict.
- Plaintiffs do not dispute that the "representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete

denial of fees." *Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012) ("*Rodriguez II*"). OB38-39.

- Plaintiffs do not dispute that the district court held their proposed unitary nationwide class untenable because of the *Illinois Brick* problem Bednarz complained of. OB11-12; OB47.
- Plaintiffs do not dispute that the Supreme Court requires that courts not dilute Rule 23(a)(4) class certification standards in the settlement context. OB47-48 (quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 621 (1997)). They do not even mention *Amchem*, much less attempt to distinguish it, and have thus forfeited any contention that the district court erred as a matter of law.

Plaintiffs simply deny the existence of a conflict of interest, ignoring the evidence and arguments and binding precedents Bednarz amassed.

Plaintiffs assert (PB27) "[n]othing comparable" to *Rodriguez II* "occurred in this case"—but if this is so, it is only because the actions here were far worse. Class counsel *argued in this Court* against the interests of repealer-state class members, and plaintiffs don't dispute the district court's finding that Bednarz's success against the plaintiffs' efforts benefited repealer-state class members by $10 million. OB51.

An unpublished opinion deciding the incoherent appeal of a *pro se* on a similar but different issue (PB28-29, PB34-35) does not change these undisputed facts that demonstrate the conflict. Bednarz was not a party to the *Andrews* appeal, No. 19-16803 (2-ER-60), that plaintiffs repeatedly rely on.

Andrews's jumbled *pro se* briefs in Appeal No. 19-16803, which raised at least seven appellate issues, did not mention that class counsel had argued for a *pro rata* distribution for over half of the settlement fund at the expense of repealer-state class members. Nor did Andrews raise the Neutral's 100/0 finding and class counsel's failure to apply it. A *pro se* appellant's unsuccessful appeal of class certification does not decide Bednarz's different argument about ethical conflicts of interest under *Rodriguez II*.

Bednarz is not challenging class certification under Rule 23(a)(4), but is merely using Rule 23(a)(4) precedents to demonstrate the sort of conflict *Rodriguez II* forbids. Furthermore, this Court did not hold that class counsel did not have a conflict. Just the opposite: the Court held that there was a "potential conflict of interest" that the court "mitigated" by "differential allocation." 2-ER-62. That expressly leaves open whether there was a conflict of interest when class counsel proposes a *pro rata* allocation that doesn't mitigate the potential conflict, or whether a mitigation sufficient to satisfy Rule 23(a)(4) is still a breach of class counsel's fiduciary duty.

Andrews (No. 19-16803) did not resolve the questions Bednarz raises; thus, law of the case should not apply and Cir. R. 36-3 does. *Cf. also Smith v. Bayer Corp.*, 564 U.S. 299 (2011) (the Anti-Injunction Act's relitigation exception does not apply where the "issue presented in the state court was not identical to the one decided in the federal tribunal"). The alternative would be multiplicative chaos in this Court: if a single delusional *pro se* files an appeal, a competent public-interest objector would be required to file a protective

appeal in every intermediate Rule 54(b) judgment to protect against the chance that the *pro se*'s kitchen-sink arguments might touch upon a similar issue that the public-interest objector might wish to raise in a later timely appeal in anticipation of an error that the district court might not even make in the future.

As discussed a couple of pages ago, plaintiffs don't dispute that *Illinois Brick* entirely bars the claims of non-repealer-state class members (OB6-7), which is why the Neutral found those claims "worthless." OB15. Yet, plaintiffs argue (PB29) that *Literary Works* does not apply here because "there is no unusual combination in this case of differing claim values and differing incentives to maximize each category of claims." *Compare* OB48-50 (discussing *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011)). The combination isn't unusual—the phrase describes this case to a T. Non-repealer-state and repealer-state class members have the largest possible difference in claim values, because non-repealer-state class members have no claims. And as in *Literary Works*, class counsel "cannot have had an interest in maximizing compensation for *every* category" simultaneously. 654 F.3d at 252 (emphasis in original). *Equifax* (PB29 n.36) does not help plaintiffs, because the Eleventh Circuit distinguished *Literary Works* by holding that the *Equifax* claim values *weren't* different. *In re Equifax Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1277 (11th Cir. 2021). But we know the claim values between repealer-state claims and non-repealer-state claims are different here, because even plaintiffs have retreated

from the untenable claim that a *pro rata* distribution was justifiable and because the Neutral held the non-repealer-state claims "worthless." 2-ER-263-71. Plaintiffs can't simultaneously defend a 90/10 allocation and argue that the claim values are identical across the class. Once plaintiffs have acknowledged that different class members have different claim values, separate representation is needed to avoid the untenable conflict of interest—as plaintiffs attempted in the third tranche. OB48-50.

Plaintiffs' conflict of interest in Appeal No. 17-17367 (and again on remand and in this appeal in arguing for a 90-10 distribution against the Neutral's 100-0 recommendation) breached their fiduciary duty to repealer-state class members. Plaintiffs are fortunate that no non-repealer-state class member is suing them for their breach of fiduciary duty over the district court's *ultra vires* redistribution of the first tranche.[6] OB45-46. The district court committed multiple reversible errors in holding otherwise.

[6] Plaintiffs think it meaningful that there are only two appeals. PB4. Bednarz's counsel asked other repealer-state objectors to stand down to make it easier for this Court to focus on the most salient issues, and only Andrews refused. In any event, it is "naïve" to draw any inference from a small number of objections. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). Bednarz was the sole appellant in his successful appeal earlier here.

III. Because the district court found that Bednarz created a $10 million benefit for repealer-state class members, it erred when it held it could not quantify the benefit of Bednarz's appeal and could not award a percentage of the common benefit.

Bednarz created a $10 million *common benefit* to repealer-state class members. OB52-53. Repealer-state class members have $10 million more than they would have but for Bednarz's objection and appeal. This is a common fund.

Class counsel tries to elide this by arguing (PB30) that Bednarz failed to "increase the settlement recovery" or to "increase *the* common fund" (emphasis added). But these are irrelevant *non sequiturs*. Because (1) the class of beneficiaries is sufficiently identifiable, (2) a court can accurately trace the benefits, and (3) the court could shift the fee with exactitude, it is error for the district court to hold it *cannot* use a percentage of the benefit. *Indep. Living Ctr. of S. Cal., Inc. v. Kent*, 909 F.3d 272, 285 (9th Cir. 2018); OB53. Bednarz has "recovered a determinate fund for the benefit of every member" of the class from repealer states. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980). Plaintiffs never contest these tests, or even mention *Independent Living* or *Boeing*. They've forfeited any argument against the district court erring under these binding precedents.

To see why plaintiffs' argument is nonsense, imagine a district-court-approved settlement the parties structured so that class counsel receives $7 million and class members receive only $1 million. *E.g., Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021). An objector appeals and wins reversal and, on

remand, the settling parties conform to Ninth Circuit law and renegotiate so the class gets $6 million and the attorneys $2 million. The objector has created a $5 million *common fund* for the class members under *Independent Living Center*—but the gross settlement recovery is still $8 million and hasn't budged a dime. According to plaintiffs, the objector has accomplished nothing and can't receive a percentage of the $5 million. That contradicts common sense and just isn't the law. *Indep. Living Ctr.*, 909 F.3d at 285.

There's no reason for this rule to be any different for correcting an unfair allocation between class members. Fed. R. Civ. Proc. 23(e)(2)(D) expressly contemplates objectors arguing for a redistribution. If a settlement unfairly treats some class members relative to others, and an objector successfully wins additional recovery for the prejudiced subgroup or subclass, *of course* the objector is entitled to a percentage of that common benefit. For example, Bednarz's counsel won a Third Circuit appeal over Rule 23(a)(4) and the allocation of an $8 million settlement fund that provided no cash to several types of car owners. *Dewey v. Volkswagen A.G.*, 681 F.3d 170 (3d Cir. 2012) (requiring separate representation of the adversely affected car owners in such a circumstance). On remand, the parties remedied the failing in a "new settlement," and the previously unfairly prejudiced car owners could make an additional $782,283.87 in claims. *Dewey v. Volkswagen of Amer.*, 909 F. Supp. 373, 376, 396 (D.N.J. 2012). The successful West objectors sought and received 10.5% of this "benefit conferred"—even though the common fund and settlement recovery for the class as a whole was identical. *Id.* at 396-97.

Contrary to plaintiffs' claims (PB30-31), *Rodriguez II* doesn't contradict this, and it is what plaintiffs omit in the ellipses that shows this. "The standard is not as narrow as [class counsel] suggests. The Ninth Circuit in *Rodriguez v. Disner* made clear that the standard is *either* increase the fund *or* otherwise substantially benefit it." *Harvey v. Morgan Stanley Smith Barney LLC,* 2020 WL 1031801, 2020 U.S. Dist. LEXIS 37580, *59 (N.D. Cal. Mar. 3, 2020) (citing *Rodriguez II*, 688 F.3d at 652). The $325,000 benefit the *Rodriguez II* objectors created came at the expense of other class members and did not increase the gross settlement fund.

Nor does *Campbell v. Facebook* help the plaintiffs. PB32-33. *Campbell* involved unquantifiable injunctive relief, so is beside the point. 951 F.3d 1106, 1126 (9th Cir. 2020). Here, there was a quantifiable $10 million benefit. Plaintiffs' claim that "the benefit is not easily quantifiable" fails because *the district court quantified the benefit*. 1-ER-50; OB28. The district court may or may not have had the discretion to award lodestar had it evaluated the benefit correctly. But the lower court based its decision to award lodestar on the incorrect premise that it *could not* calculate a percentage of the recovery. The district court incorrectly believed that the benefit Bednarz created on behalf of repealer-state class members was not quantifiable because it did not benefit the entire class. But Bednarz's original objection expressly argued that *pro rata* distribution unfairly prejudiced repealer-state class members. OB12.

This Court should reverse the district court order and remand with instructions to grant Bednarz's modest 9% fee request in full.

Bednarz Response to Cross-Appeal No. 21-15200

Bednarz does not say this lightly, but Cross-Appeal No. 21-15200, whether "contingent" or otherwise, is wholly frivolous and vexatious and fails on four independent grounds.

First, plaintiffs' cross-appeal brief flouts Fed. R. App. Proc. 28.1(c)(2), 28(a)(4)(B), and 28(a)(4)(C); or Cir. R. 28-2.2(c). Plaintiffs simply state (PB4) that they "do not contest" Bednarz's Statement of Jurisdiction, but they are not just appellees, but cross-appellants with their own affirmative obligations. Bednarz's Statement (OB1-2) had no reason to discuss the cross-appeal's jurisdiction and did not. Plaintiffs, seeking to invoke this Court's jurisdiction, had "the burden of establishing that jurisdiction exists" and the timeliness of their cross-appeal. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). They failed to do so. (Perhaps plaintiffs will argue that they purported to incorporate the arguments of an April 19 motions brief. PB34. Of course, Cir. R. 28-1(b) forbids this. *United States v. Zepeda*, 792 F.3d 1103, 1116 (9th Cir. 2015).)

Plaintiffs have "exhibited complete disregard for the requirements" of the Rules of Appellate Procedure. *Han v. Stanford University*, 210 F.3d 1038, 1040 (9th Cir. 2000). "This ground alone would justify dismissal of the [cross-appeal]." *Id.* (citing *Stevens v. Security Pac. Nat'l Bank*, 538 F.2d 1387, 1389 (9th Cir. 1976)). If this Court enforces the Rules against a solo practitioner in *Han* and an *in pro per.* attorney in *Stevens*, what standard should apply to

sophisticated law firms appointed lead counsel in an MDL seeking to justify a $40 million fee award?

Second, the reason plaintiffs don't try to demonstrate timeliness as Cir. R. 28-2.2(c) requires is that it is impossible for them to do so. Plaintiffs "do not contest" (PB4) that (1) the fee order they cross-appeal issued December 10, 2020 or that (2) the "first notice of appeal" was December 31, 2020. OB1-2. Fed. R. App. Proc. 4(a)(3) requires cross-appeals to be filed within fourteen days of the first notice of appeal. Plaintiffs filed their cross-appeal on January 27, 2021. 3-ER-367. As Bednarz noted (OB57), this is 27 days after the first notice of appeal, thirteen days late, and, under Supreme Court precedent, is a claims-processing rule that requires dismissal when the cross-appellee requests it in his response brief. *See* Section IV below.

Finally, binding precedent that plaintiffs fail to cite forecloses the sole argument they make on the cross-appeal. *Fischer v. SJB-P.D. Inc.,* 214 F.3d 1115, 1121 (9th Cir. 2000). Even if it did not, the argument is factually baseless, because plaintiffs do not dispute that Bednarz's attorneys' claimed lodestar—which already reflected substantial reductions (OB20)—was eminently reasonable even before the district court in its discretion cut it further rather than compare it to the undisclosed lodestar plaintiffs spent on the same appeal. *See* Section V below. (The Court should ask plaintiffs to disclose this figure: Bednarz litigated his appeal extraordinarily efficiently, and plaintiffs *know* that the lodestar figure is much lower than their own internal numbers. If it weren't, they would have volunteered their figures instead of hiding it.)

Bednarz will separately file a Rule 38 motion if plaintiffs do not confess error in their Cir. R. 28.1-1(d) brief or improperly try to use that cross-appeal reply brief as a surreply in Appeal No. 21-15120.

IV. The Court must dismiss Appeal No. 21-15200 as untimely filed.

Plaintiffs violate Cir. R. 28-2.2(c), and do not document the timeliness of their appeal in their opening brief, or even appellate jurisdiction over their appeal. Because the cross-appellants have the burden of proving the timeliness of their cross-appeal, they have forfeited the question by simply asserting timeliness *ipse dixit* without complying with Cir. R. 28-2.2(c).

Plaintiffs strangely argue (PB34) that Bednarz had the obligation to brief arguments responding to a cross-appeal in his principal brief filed before the principal brief of the cross-appeal. "This argument is specious." *Cf. Yamada v. Nobel Biocare Holding Ag*, 825 F.3d 536, 544 (9th Cir. 2016) (district court proceedings). Bednarz's argument on untimeliness is a response argument he had no obligation to raise until his opposition to plaintiffs' cross appeal. In any event, the burden was plaintiffs' and they did not meet it. This is enough by itself to dismiss the cross-appeal, but there would have been nothing plaintiffs could have honestly said in a Cir. R. 28-2.2(c) statement that would have shown timeliness.

A. The notice of Appeal No. 21-15200 is untimely because the word "first" in Rule 4(a)(3) means "first."

A motions panel declined to decide Bednarz's April 2 motion to dismiss Appeal No. 21-15200 without prejudice to his raising the question in his merits briefs. He does so here in this response to the cross-appeal.

Fed. R. App. Proc. 4(a)(1)(A) reads

> In a civil case, [with exceptions not relevant here,] the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

Fed. R. App. Proc. 4(a)(3) reads

> *Multiple Appeals*. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

As discussed in Bednarz's Statement of Jurisdiction (OB1-2), the district court issued its order on Bednarz's motion for fees on December 10, 2020. 1-ER-49.

Pro se Steven Helfand timely filed the first notice of appeal of that order on December 31, 2020. 3-ER-383.

Bednarz filed a timely cross-appeal of Helfand's appeal under Fed. R. App. Proc. 4(a)(3) on January 14, 2021. 3-ER-375.

Plaintiffs "do not contest" any of this. PB4.

There is no dispute that plaintiffs filed their notice of appeal of the December 10 order on January 27, 48 days after December 10 and 27 days after December 31. 3-ER-367. Fed. R. App. Proc. 4(a)(3) refers to "the date when the first notice was filed" and imposes a 14-day time limit. Thus, January 14 was the last day for a cross-appeal. The Rule does not say "the second notice." It does not say "the date when any notice is filed." It does not say "the first notice of an appeal that the appellant decides to proceed with." In this context, "first" means "preceding all others in time."

Helfand filed the first notice of appeal on December 31, 2020. No one filed a notice of appeal before Helfand. Any notice of appeal filed after Helfand's December 31 notice was not "first." No matter what Helfand chose to do with his appeal, his notice of appeal was the first one filed, and triggered the outside limit of when to file a notice of appeal under Rule 4(a)(3). Plaintiffs' main argument against dismissal requires the Court to find that the word "first" in Rule 4 means something other than "first." They have no Supreme Court or Ninth Circuit or dictionary authority for that proposition. First means first.

In earlier briefing, plaintiffs cited *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361 (9th Cir. 1987), but *Crystal Palace* says nothing to the contrary. In *Crystal Palace*, a party not an appellee sought the benefit of Rule 4(a)(3), and appellees argued that Rule 4(a)(3) applied only to cross-appeals and made the second group of appellants' appeal untimely. The Ninth Circuit correctly disagreed: *Crystal Palace* followed the plain language of Rule 4 and

permits "any party" the benefit of Rule 4(a)(3)'s 14-day extension. *Id.* at 1364. Bednarz never claims otherwise, and *Crystal Palace* never claims that the second or third or fourth notice of appeal can serve as the first notice of appeal for purposes of Rule 4(a)(3).

Plaintiffs also relied on a 1991 Fifth Circuit case, *Lee v. Coahoma Cnty.*, 937 F.2d 220 (5th Cir. 1991). No federal appellate court has cited *Lee*'s purposivist interpretation of Rule 4(a)(3) in the thirty years since. *Lee* does not mention Fed. R. App. Proc. 26(b)(1), which forbids the result it reached. *See* Section IV.B below.

But even if *Lee* were good law, it does not apply here. *Lee* reasoned that parties must have "an opportunity to see and respond to the actions of their adversaries." 937 F.3d at 223. In *Lee*, the first notice of appeal was not by an "adversary" to the late appellant plaintiff, but by a co-plaintiff; *Lee* held the Rule 4(a)(3) clock started for the other plaintiffs after the first notice of appeal by an adversary. But plaintiffs' adversary, Helfand, appealed on December 31, providing notice that Docket No. 2681 and Docket No. 2682 would be the subject of appeal, and that other parties may wish to weigh in on those orders. Bednarz's decision to cross-appeal does not affect *any* of the merits arguments plaintiffs putatively wish to make: they were known to plaintiffs on December 10, on December 31, and on January 14, the last day to timely appeal under Rule 4(a)(3). Plaintiffs have never claimed otherwise, nor explain how Bednarz's appeal makes the arguments more relevant on January 15 than they were on January 13.

Any other reading of *Lee* simply contradicts the federal rules. Rule 4(a)(3) says "the *first* notice of appeal" (emphasis added). *Lee* extended that to mean the first notice of appeal *by an adversary*. This atextual interpretation is already exceptionally broad, and it does not appear that any other federal court of appeals follows it. Plaintiffs ask this Court to go further and interpret *Lee* to write the word "first" entirely out of Rule 4 and translate it into "*any* notice of appeal." Neither *Lee* nor the rule nor any federal appellate court hold any such thing.

If plaintiffs believed they were unfairly prejudiced by Bednarz cross-appealing on January 14 without an opportunity to respond, the rules *already* provided them a remedy. Plaintiffs could have made a motion under Fed. R. App. Proc. 4(a)(5) to extend the time to appeal, arguing that Bednarz's January 14 cross-appeal provided "good cause" for plaintiffs to make a late appeal. (Bednarz would have opposed this motion, but that is beside the point.) Plaintiffs chose not to do so within the time permitted by law. If the Court holds plaintiffs' appeal timely, the Court is effectively granting a Rule 4(a)(5) motion *after* the jurisdictional deadline established by Rule 4(a)(5)(A)(i), which forbids such a motion more than thirty days after the Rule 4(a) time expires.

Appeal No. 21-15200 is untimely.

B. Supreme Court and Ninth Circuit precedent and Rule 26(b) each make enforcement of a properly invoked claims-processing rule mandatory and require dismissal of plaintiffs' untimely appeal.

Plaintiffs elsewhere argue that Rule 4(a)(3) isn't jurisdictional. But this is beside the point. The appeal must be dismissed because, as plaintiffs admit elsewhere, Rule 4(a)(3) is a claims-processsing rule; so long as Bednarz properly raises the issue, as he is doing in this response brief, he has a right to enforce that rule and the Supreme Court requires that enforcement.

In *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019), the Supreme Court rejected an equitable tolling exception that this Court had created for a Rule 23(f) petition:

> Because Rule 23(f)'s time limitation is found in a procedural rule, not a statute, it is properly classified as a nonjurisdictional claim-processing rule. *See Hamer v. Neighborhood Housing Servs. of Chicago*, 583 U. S. ___, ___, 138 S. Ct. 13, 199 L. Ed. 2d 249, 258 (2017). It therefore can be waived or forfeited by an opposing party. *See Kontrick v. Ryan*, 540 U. S. 443, 456, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004). The mere fact that a time limit lacks jurisdictional force, however, does not render it malleable in every respect. Though subject to waiver and forfeiture, some claim-processing rules are "mandatory"—that is, they are "'unalterable'" if properly raised by an opposing party. *Manrique v. United States*, 581 U. S. ___, ___, 137 S. Ct. 1266, 197 L. Ed. 2d 599, 606 (2017) (*quoting Eberhart v. United States*, 546 U. S. 12, 15, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005) (per curiam)); *see also Kontrick*, 540 U. S., at 456. Rules in this mandatory camp are not susceptible of the equitable approach that the Court of Appeals applied here. *Cf. Manrique*, 581 U.

> S., at ___, 137 S. Ct. 1266, 197 L. Ed. 2d 599, at 608 ("By definition, mandatory claim-processing rules … are not subject to harmless-error analysis").

Id. at 714. Equitable tolling is unavailable here for the same reason it was unavailable in *Nutraceutical*. Fed. R. App. Proc. 26(b)(1) expressly states "the court may not extend the time to file … a notice of appeal (except as authorized in Rule 4)" and Fed. R. App. Proc. 2 expressly forbids a court from using equitable grounds to contravene Fed. R. App. Proc. 26(b). 139 S. Ct. at 715. These principles apply to civil cross-appeals. *Greenlaw v. United States*, 554 U.S. 237, 252-53 (2008). Bednarz is neither waiving nor forfeiting his rights to a timely notice of appeal, and wishes to enforce dismissal of plaintiffs' untimely appeal. This Court therefore must apply the time limits imposed by Fed. R. App. Proc. 4(a)(3) and dismiss Appeal No. 21-15200.

Nothing in the Supreme Court's repeated discussions of the right to enforce claims-processing rules distinguishes between claims-processing rules under Rule 23 and claims-processing rules under Rule 4, and plaintiffs have not yet identified any.

Neutraceutical and other Supreme Court precedents requiring enforcement of properly raised claims-processing rules bind this Court. *E.g.*, *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019); *Hamer*, 138 S. Ct. at 18; *Manrique v. United States*, 581 U.S. ___, 137 S. Ct. 1266, 197 L. Ed. 2d 599, 606 (2017); *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam). These decisions expressly foreclose the "equitable approach" of *Mendocino Envt'l. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1298 (9th Cir. 1999).

Nutraceutical, 139 S. Ct. at 714 (citing *Manrique*). This Court has already resolved whether *Nutraceutical* requires the mandatory application of properly invoked claims-processing objections. It does: "Even if the timeliness issue were not jurisdictional, [appellee] did not waive or forfeit its timeliness objection. We would therefore still be required to treat the appeal as untimely." *Nutrition Distrib. LLC v. IronMag Labs, LLC*, 978 F.3d 1068, 1081 n.4 (9th Cir. 2020) (citing *Nutraceutical*); *cf. also United States v. Marsh*, 944 F.3d 524, 529 (4th Cir. 2019) ("it is clear" after *Nutraceutical* that Fed. R. App. P. 4(b), if properly invoked, does not admit of equitable exceptions). *Mendocino County* has been abrogated.

Even if this Court were to disregard *Neutraceutical* and *Nutrition Distrib. LLC* and Fed. R. App. Proc. 26(b), equitable tolling for an untimely Rule 4(a)(3) filing is still unavailable here under Ninth Circuit precedent. A late filing of even a single day is not eligible for waiver of the Rule 4(a)(3) time limits without reason. *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1043 (9th Cir. 2002); *accord Clubside, Inc. v. Valentin*, 468 F.3d 144, 162 (2d Cir. 2006). Here, every ground plaintiffs raise on their cross-appeal they already knew on December 10, 2020. They did not appeal within thirty days; they did not even exploit the Rule 4(a)(3) bulge to appeal as late as January 14, 2021; they did not make a timely Rule 4(a)(5) motion. That Bednarz appealed on January 14 changed no legal questions.

For these two reasons, the Court must follow the properly invoked claims-processing rule and dismiss plaintiffs' cross-appeal No. 21-15200.

V. Binding Ninth Circuit precedent already rejects plaintiffs' sole cross-appellate argument.

Bednarz obtained $10 million for repealer-state class members, and sought a percentage of the recovery. His lodestar cross-check was less well documented; two of the attorneys relied on reconstructing time from records. The reconstruction was intentionally conservative and underestimated time spent on a complex objection and appeal that involved extensive motions practice and a blizzard of Rule 28(j) letters from class counsel. 2-ER-182. Bednarz argued that his asserted $297,439 lodestar—which conservatively excluded dozens of hours of time by senior attorneys and by Georgetown Law students and their instructor—was particularly efficient, and requested that the district court compare it to the undisclosed time class counsel spent on the appeal. 2-ER-152-90. Class counsel never disclosed what portion of their lodestar they incurred on the unsuccessful attempt to oppose Bednarz's objection and deprive repealer-state class members of over $10 million. Bednarz is quite confident that it was well over $300,000 given that eleven different attorneys appear on the briefs in No. 17-17367 and a name partner argued the appeal. Yet the district court, without cross-checking against opposing counsel's lodestar, and with no evidence that Bednarz's lodestar figure was at all inflated, reduced the number of hours, awarding only 83% of a claimed lodestar that already excluded substantial time.

Plaintiffs in their retaliatory late filed appeal make a single argument: the district court erred by failing to strike the fee request because two

attorneys reconstructed their hours, though there was no dispute that those two attorneys, experienced appellate attorneys who have each argued in the Supreme Court, ably briefed and argued the appeal in the Ninth Circuit against a name partner who is a member of the Federal Rules Committee, and no evidence that their claimed hours were exaggerated.

Alas for plaintiffs, this cross-appeal argument is frivolous. Plaintiffs fail to cite the Ninth Circuit's controlling case on this question.

> [W]e have stated that fee requests can be based on "reconstructed records developed by reference to litigation files." [citations omitted] Based on this holding, the lack of "contemporaneous records" is not a basis for denying Fischer's fee request in its entirety.

Fischer v. SJB-P.D. Inc., 214 F.3d 1115, 1121 (9th Cir. 2000). It would have been reversible error for the district court to deny fees on plaintiffs' argument. *Id.* at 1122. Class counsel has no excuse for not bringing this case to this Court's attention, because it's in the district court opinion. 1-ER-51. This is just another independent reason why Bednarz will be bringing a Fed. R. App. Proc. 38 motion. *See* Cal. R. Prof. Cond. 3.3(a)(2); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1539 (9th Cir. 1986) (*en banc*).

The cross-appeal must be dismissed as untimely, but it's meritless and foreclosed by adverse precedent cited by the district court and omitted by plaintiffs' brief.

Bednarz Statement on Appeal No. 21-15138

Appellant Andrews in Appeal No. 21-15138 is adverse to Bednarz because Andrews seeks to vacate settlement approval.

Andrews filed a principal brief in 21-15138 on July 16. No. 21-15138 Dkt. 32. Bednarz's July 19 opening brief referred to Andrews's July 16 brief in several places. OB1; OB25; OB51. But Andrews filed a motion on July 19 to replace the Andrews July 16 brief with a completely different brief raising different issues. No. 21-15138 Dkt. 36 & 37. This Court granted the motion, so Bednarz's opening brief now has references to a brief that no longer exists. As Andrews admits on page 2 of his superseding brief, most of the new brief is simply a cut and paste from parts of the opening brief Bednarz filed in Appeal No. 17-17367, involving a different approval order of a different distribution and settlement. Andrews changed the word "Bednarz" to "Andrews," and then repeated many of Bednarz's arguments and factual representations and citations without regard to the Ninth Circuit law of the case in later appeals, different facts, different procedural posture, different judicial holdings, different objections, different excerpts of record, and different issues raised by the new settlement distribution and new rulings, making the new Andrews brief incoherent. (Page 47 of Andrews's new brief falsely implies that Georgetown Law School's appellate clinic had something to do with it.)

Andrews's incorrect arguments about "Article III standing" are still incorrect (OB1 n.1), but they are now in a different place in his brief than Bednarz cited. Andrews mentions, but fails to brief correctly by failing to

mention the court's new ruling, a real and problematic Rule 23(a)(4) issue (*see* Section II above), but one that a court can cure in the manner Bednarz identified in his principal brief without striking the settlement or class certification as Andrews requests. OB46-51.

Though this court consolidated the three appeals here, plaintiffs violated this Court's order of May 11 and filed two separate response briefs with a combined total of 17,001 words, over the word limits of Cir. R. 28.1-1(c). To avoid delay, Bednarz will not move to strike the briefs, but this abuse of the rules is another independent reason the Court should grant Bednarz's forthcoming motion for damages and costs for the cross-appeal.

Conclusion

This Court should vacate the award of attorneys' fees to class counsel and remand for an award that recognizes the Hagens Berman bid as a "starting point" and that considers class counsel's conflict of interest in litigating against the interests of repealer-state class members. The reduction of the award should compensate repealer-state class members prejudiced by class counsel's breach of fiduciary duty in arguing for a 90/10 split instead of the 100/0 split the Neutral recommended, curing the conflict of interest that would otherwise require class decertification under Rule 23(a)(4).

The Court should reverse the partial denial of Bednarz's fee request, and remand with instructions to award the full $900,000 he requested, a fraction of what Ninth Circuit law entitles him.

The Court should dismiss Appeal No. 21-15200, or otherwise reject its arguments on the merits.

Dated: November 17, 2021

Respectfully submitted,

/s/Theodore H. Frank

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Ninth Circuit Rule 32-1 Certificate of Compliance

I certify that: This brief, an "appellant's response and reply brief" under Fed. R. App. Proc. 28.1(c)(3) complies with the length limits permitted by Ninth Circuit Rule 28.1-1(b). The brief is 8,471 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on November 17, 2021.

/s/Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on November 17, 2021, 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 this filing to all who are ECF-registered filers.

/s/Theodore H. Frank
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