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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BYRON MCKNIGHT,

Plaintiff,

v.

UBER TECHNOLOGIES, INC, et al.,

Defendants.

Case No. 14-cv-05615-JST

BRIEF OF AMICUS CURIAE CENTER FOR CLASS ACTION FAIRNESS

Judge: Hon. Jon S. Tigar
Courtroom: 6, 2nd Floor
Date:
Time:

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Courts should equitably account and disgorge ill-gotten gains appropriated by appellants that purport to represent class interests, but then settle for private gain 2

II. Rule 23(e)(5)(B)(ii) requires approval of the side settlements at issue here because the final judgment incorporates what could have been the collateral Rule 23(h) order and, under Fed. R. App. Proc. 4, the appellants are thus appealing "from a judgment approving the [class settlement] proposal." 8

III. This Court has the authority to appoint a *guardian ad litem* for the class. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Brennan v. Opus Bank,
796 F.3d 1125 (9th Cir. 2015) 7

Budinich v. Becton Dickinson & Co.,
486 U.S. 196 (1988) 9

In re Cendant Corp. Secs. Litig.,
454 F.3d 235 (3d Cir. 2006) 9

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 7

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

Fourth Estate Pub. Benefit Corp. v. Wall-Street.com.,
139 S. Ct. 881 (2019) 8

Fla. Bar v. Adorno.,
60 So.3d 1016 (Fla. 2011) 7

In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) 5-6

Gottlieb v. Barry,
43 F.3d 474 (10th Cir. 1994) 10

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) 2

Griggs v. Provident Consumer Discount Co.,
459 U.S. 56 (1982) 7

Haas v. Pittsburgh Nat'l Bank,
77 F.R.D. 382 (W.D. Pa. 1977) 11

Hall v. N. Am. Van Lines, Inc.,
476 F.3d 683 (9th Cir. 2007) 9

Hateley v. SEC,
8 F.3d 653 (9th Cir. 1993) 2

Kokkonen v. Guardian Life Ins. Co. of Am.,
511 U.S. 375 (1994) 3

Laffitte v. Robert Half Int'l,
376 P.3d 672 (Cal. 2016) 10, 11

Lane v. Facebook,
696 F.3d 811 (9th Cir. 2012) 1

Le v. Astrue,
558 F.3d 1019 (9th Cir. 2009) 9

In re Lithium Ion Batteries Antitrust Litig.,
No. 13-md-02420, Dkt. 2728 (N.D. Cal. Mar. 24, 2022) 5

Lobatz v. U.S. West Cellular of Cal., Inc.,
222 F.3d 1142 (9th Cir. 2002) 6

Marshall v. United States,
No. 18-cv-21810, 2019 U.S. Dist. LEXIS 76094 (S.D. Fla. May 3, 2019) 11

Miller v. Mackey Int'l, Inc.,
70 F.R.D. 533 (S.D. Fla. 1976) 10-11

N.L. v. Credit One Bank, N.A.,
960 F.3d 1164 (9th Cir. 2020) 8

Nutrition Distrib. LLC v. IronMag Labs, LLC,
978 F.3d 1068 (9th Cir. 2020) 8

Pearson v. NBTY, Inc.,
772 F.3d 778 (7th Cir. 2014) 2

Pearson v. Target Corp..,
893 F.3d 980 (7th Cir. 2018) 3

Pearson v. Target Corp.,
968 F.3d 827 (7th Cir. 2020) ..... *passim*

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 2

Reiffin v. Microsoft Corp., No. 00-cv-2221
2001 U.S. Dist. LEXIS 7485 (N.D. Cal. May 23, 2001) 10

Richie v. Wharton County Sheriff Dep't STAR Team,
No. 09-cv-0464, 2012, U.S. Dist. LEXIS 100115 (S.D. Tex. Mar. 30, 2012) 11

Ritzen Grp., Inc. v. Jackson Masonry, LLC,
140 S. Ct. 582 (2020) 9

Rodriguez v. Disner,
688 F.3d 645 (9th Cir. 2012) 7

Sierra Forest Legacy v. Sherman,
646 F.3d 1161 (9th Cir. 2011) 9

In re Silberkraus,
336 F.3d 864 (9th Cir. 2003) 10

In re Wash. Pub. Power Supply Sys. Sec. Litig.,
19 F.3d 1291 (9th Cir. 1994) 10

Wininger v. SI Mgmt. L.P.,
244 Fed. Appx. 156 (9th Cir. 2007) 6

In re Wells Fargo & Co. S'holder Derivative Litig.,
523 F. Supp. 3d 1108 (N.D. Cal. 2021) 1, 7

Young v. Higbee,
324 U.S. 204 (1945) 4, 5, 7

Rules

Fed. R. App. P. 3(c)(5) 9

Fed. R. App. P. 4(a)(2) 8, 9

Fed. R. App. P. 4(a)(4)(A) 9-10

Fed. R. App. P. 4(a)(7)(A)(ii) 9

Fed. R. Civ. P. 23(e) 8, 11

Fed. R. Civ. P. 23(e)(1)(A) 8

Fed. R. Civ. P. 23(e)(1)(B) 8

Fed. R. Civ. P. 23(e)(1)(B)(i) 8

Fed. R. Civ. P. 23(e)(1)(B)(ii) 8

Fed. R. Civ. P. 23(e)(2) 8

Fed. R. Civ. P. 23(e)(2)(B) 8

Fed. R. Civ. P. 23(e)(2)(D) 8

Fed. R. Civ. P. 23(e)(3) 8

Fed. R. Civ. P. 23(e)(5) 1, 5

Fed. R. Civ. P. 23(e)(5)(A) 8

Fed. R. Civ. P. 23(e)(5)(B)(ii) ..... *passim*

Fed. R. Civ. P. 23(e)(5)(C) 7

Fed. R. Civ. P. 23(h) 2, 6, 7

Fed. R. Civ. P. 23(h)(1) 6

Fed. R. Civ. P. 54 ..... 6, 9

Fed. R. Civ. P. 58(e) 8

Fed. R. Civ. P. 60 3

Fed. R. Civ. P. 62.1 7

Other Authorities

Advisory Committee Notes to 2003 Amendments to Rule 23 6

Advisory Committee Notes to 2018 Amendments to Rule 23 ..... 1, 6

American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.09 (2010) 11

Fitzpatrick, Brian T.,
The End of Objector Blackmail?,
62 VAND L. REV. 1623 (2009) 1

Henderson, William D.,
Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements,
77 TUL. L. REV. 813 (2003) 10

Leary, Marie,
FJC Report on Class Action Objector Appeals in Three Circuit Courts of Appeals (2013) 1

Order re Amendments to Federal Rules of Appellate Procedure (Apr. 14, 2021),
available at https://www.supremecourt.gov/orders/courtorders/frap21_9p6b.pdf. 9

Restatement (Third) of the Law Governing Lawyers § 37 7

Restatement (Third) of Restitution and Unjust Enrichment § 51(4) 2

INTRODUCTION

The Court's Order Requesting Amicus Briefing (Dkt. 256) requested the Center for Class Action Fairness to submit this *amicus* brief to address the Court's authority to inspect, review, and act on side settlements reached between certain objectors and the settling parties on appeal of an order overruling objections to class counsel's fee motion.

Bad-faith, rent-seeking, extortionate objectors—those who object not to improve the settlement on behalf of the class, but to extract a payment for themselves and their attorneys at the expense of the class—are a persistent wart on class action litigation. Legal academics have criticized "objector blackmail" as nothing more than levying a tax on the entire class action system, a tax from which "[l]iterally nothing is gained." Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1635 (2009). Objector blackmail doesn't just increase the costs of class actions for plaintiffs, defendants, class members and courts. It doesn't just trammel the egalitarian ideal of treating similarly situated class members equally. It does perhaps the greatest disservice to good-faith objectors by undermining well-intentioned—indeed, meritorious—objections, and allowing settling parties to brand every objection as suspect. If bad-faith objectors can profit nearly as much as (or even more than) successful good-faith objectors with much less work, it creates a perverse incentive to bring bad-faith objections and appeals that waste judicial resources instead of meritorious objections that benefit the system. This is not hypothetical. A Federal Judicial Center study covering objector appeals in the Seventh Circuit found that 27 out of 27 objector appeals between 2008 and 2013 "were voluntarily dismissed pursuant to Rule 42(b)." Marie Leary, *FJC Report on Class Action Objector Appeals in Three Circuit Courts of Appeals*, Federal Judicial Center 11 (2013). The entire report is edifying. And this Court has seen such disproportion firsthand. *In re Wells Fargo & Co. S'holder Derivative Litig.*, 523 F. Supp. 3d 1108 (N.D. Cal. 2021).

If courts eradicate "objector blackmail," good-faith objectors can better realize their "critically valuable service of providing knowledge from a different point of view." *Lane v. Facebook*, 696 F.3d 811, 830 (9th Cir. 2012) (Kleinfeld, J. dissenting), *rehearing en banc den'd*, 709 F.3d 791 (2013), *cert. den'd sub. nom Marek v. Lane* 134 S. Ct. 8 (2013). The 2018 Amendments to Rule 23 constitute the Rules Committee's latest effort to dismantle "a system that can encourage objections advanced for improper purposes." Advisory Committee Notes to 2018 Amendments to Rule 23.

Here there are two sources of authority for this Court to order an accounting, and, if appropriate, disgorgement of the side settlements reached by Objector-Appellants Hinojosa and Hudson on appeal. **First**, independent of Rule 23(e)(5), the Court possesses the inherent authority to conduct an accounting of the personal payments obtained from relinquishment of an appeal that equitably belongs to the entire class. *Pearson v. Target Corp.*, 968 F.3d 827, 831-34 (7th Cir. 2020) ("*Pearson III*"); *cf. Wells Fargo*, 523 F. Supp. 3d at 1117 (N.D. Cal. 2021) (crediting *Pearson* as an "elegant, well-reasoned contribution to the class-action jurisprudence"). *See* Section I, *infra*. **Second**, while Hinojosa and Hudson may have identified a textual loophole for appeals of a collateral fee order, the same sort of formalistic textual reading of Rule 23(e)(5)(B)(ii) requires court approval here because the objector-appellants are indeed "dismissing … an appeal from a judgment approving the [class settlement] proposal." *See* Section II, *infra*.

I. Courts should equitably account and disgorge ill-gotten gains appropriated by appellants that purport to represent class interests, but then settle for private gain.

Disgorgement and accounting of profits are equitable restitutionary remedies that rest within the inherent authority of federal courts. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946) ("[U]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available …."); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (restitution is an equitable remedy where "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."); *Pearson III*, 968 F.3d at 837. "The purpose of disgorgement is to deprive a person of 'ill-gotten gains' and prevent unjust enrichment." *Hateley v. SEC*, 8 F.3d 653, 655 (9th Cir. 1993). Here, the Court ought to exercise its equitable power to disgorge the profit that would otherwise result if objector-appellants have cynically misused a Rule 23(h) objection to extract private gain. "The object of restitution [in the disgorgement context] … is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty." Restatement (Third) of Restitution and Unjust Enrichment § 51(4).

Pearson III demonstrates why courts have authority to impose this equitable remedy against class objector-appellants even absent explicit authority in Rule 23. *Pearson* had a tortuous procedural history. Plaintiffs there brought a consumer fraud class action against manufacturers and sellers of glucosamine products alleging exaggerated representations of the products' effectiveness. *Pearson v. NBTY, Inc.*, 772 F.3d

778, 779 (7th Cir. 2014) ("*Pearson I*"). After a brief period of litigation, plaintiffs proposed a classwide settlement, an arrangement to which an absent class member, Theodore H. Frank,[1] objected as unduly favoring class counsel. *Id.* at 780. Reducing the fee, the district court approved the settlement, and Frank appealed. *Id.* The Seventh Circuit reversed settlement approval: even as modified, the settlement was unfairly and "selfish[ly]" tilted toward class counsel and toward third-party *cy pres* recipients. *Id.* at 781-87.

On remand, the parties renegotiated the settlement to provide class members at least $4 million more in cash than the $865,000 that they had originally negotiated. Settlement ¶¶7-8, No. 11-cv-07972, Dkt. 213-1 (N.D. Ill. May 14, 2015). This time, other class members objected and, after a second final approval order, appealed. *Pearson v. Target Corp.*, 893 F.3d 980, 983 (7th Cir. 2018) ("*Pearson II*"). When they dismissed their appeals, Frank moved to intervene and disgorge any proceeds from side settlements for dropping the appeals. *Id.* The district court denied Frank's motion reasoning that it lacked jurisdiction after a dismissal with prejudice, and then also denied Frank's motion to reopen the judgment under Fed. R. Civ. P. 60. *Id.*[2] Again, Frank appealed. *Id.* at 984.

On appeal, the Seventh Circuit first held that it was unnecessary for Frank to intervene to move to reopen the judgment for purposes of disgorging the proceeds of objector side-settlements. *Id.* "Through his objection to the initial settlement and litigation of a prior appeal, Frank has brought himself within the bounds of Rule 60(b). To hold otherwise would risk 'depriving nonnamed class members of the power to preserve their own interests in a settlement.'" *Id.* (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002)).

Second, and more substantively, *Pearson II* held that it was error to refuse to reopen the judgment and entertain the motion for disgorgement under Rule 60(b)(6)'s allowance for "any other reason that justifies relief." *Id.* at 985-86. "[T]rial judges presiding over class actions may not always 'assume the passive role that is appropriate when there is genuine adverseness between the parties." *Id.* at 985 (quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014)). Observing the "real risk" that objectors dropped the appeals "at the

[1] Frank is the undersigned attorney, and the founder and Litigation Director for the Center for Class Action Fairness, which has been part of the Hamilton Lincoln Law Institute since 2019.

[2] Arguably, no Rule 60 reopening is required here because the Court has, in its final judgment, retained broad jurisdiction relating to enforcement, interpretation, or consummation of the Final Approval Orders. Dkt. 249 at 5-6; *see generally Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994); *compare O'Connor v. Colvin*, 70 F.3d 530 (9th Cir. 1995) (distinguishing case in which order of dismissal with prejudice does not retain jurisdiction); *cf. Pearson II*, 893 F.3d at 986.

expense of the class," *Pearson II* found the small-value consumer class action context significant. It meant that "[t]o justify even the filing fee, each objector must have been advancing claims on behalf of the class as a whole." *Id.* Reopening was necessary to inquire into the circumstances of the side-settlements and to "ensure that no class sellout had occurred." *Id.* at 986.

On this second remand, discovery revealed that indeed the three objectors had all received side payments in exchange for dismissing their appeals. *Pearson III*, 968 F.3d at 831. But the district court still declined to disgorge those sums because the record did not confirm suspicions of "blackmail or other wrongdoing" and because the side settlements were not paid from funds earmarked for the class. *Id.* Again, the Seventh Circuit reversed, this time affirmatively holding that the objector-appellants had inequitably leveraged appeals, whose value "belonged in equity and good conscience … to the class" "for their own, strictly private, advantage." *Id.* at 829, 834. *Pearson III* concluded that "the best remedy for the objectors' private appropriation of value that belonged to the class would be to pay those sums into a common fund for direct distribution to all class members." *Id.* at 837. But because the facts of that case made such a distribution practically impossible, *Pearson III* instead imposed a constructive trust as the appropriate remedy. *Id.* at 837.

Pearson adopted the reasoning of a 1945 Supreme Court decision, *Young v. Higbee.* 324 U..S. 204 (1945), which articulated the good-faith duty owed to the class by parties that litigate on behalf of their interests. *Young* arose out of the proposed bankruptcy reorganization plan of a golden age Cleveland department store,[3] when two preferred shareholders (Potts and Boag) objected to the confirmation of the plan, contending that it allocated junior debt too great a share of the plan's proposed distribution. *Id.* at 206. After the district court overruled their objections and confirmed the plan, Potts and Boag appealed to have the confirmation set aside based on the unfair treatment of preferred shareholders like themselves. *Id.* at 206-07. But rather than proceed on that argument, they "sold" their appeal to the junior debt holders (*i.e.*, they settled and dismissed their appeal) for a personal payoff. *Id.* at 207. Another preferred shareholder (Young) intervened to compel the initial appellants to account and disgorge the proceeds of the sale of their appeal. *Id.* at 208. A special master, the trial court, and the circuit court of appeals all thought that because Potts and Boag "had not acted as representatives of a class" there was no justification for disgorgement. *Id.* at 208.

[3] Wikipedia, *Higbee's*, https://en.wikipedia.org/wiki/Higbee%27s.

The Supreme Court reversed. Even though "Potts and Boag did not expressly specify that they appealed in the interest of the whole class of preferred stockholders," the Court noted that the basis of that appeal "was that every other preferred stockholder, as well as themselves, would be injured by confirmation." *Id* at 209. Simply put, their rights were "inseparable." *Id.* Because Potts and Boag appealed from a judgment that affected "a whole class of stockholders," the Court held that, "at the very least," they owed a "duty of good faith to all other stockholders whose interests they temporarily control[led] because they [we]re necessarily involved in the appeal." *Id.* at 210-12.

To the extent that these appeals had merit, the objector settlements (which seem to provide no modification to the settlement or fee award) are losses to the class because "appellate correction of a district court's errors is a benefit to the class." *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000). Even if they had no merit, the settlements are still losses to the class because the "the money [objectors] received in excess of their own interest as [class members] was not paid for anything they owned." *Young*, 324 U.S. at 213. The fruit of the appeal "properly belongs to all [class members]." *Id.* at 214. That appellants exacted the value of the appeal through settlement rather than through a litigated conclusion does not change this fact. *Id.* at 213-14.

Because the parties consummated the side-settlements in *Pearson* before the 2018 Amendments were operative, *Pearson III* predicated the district court's authority to review the side deals that had occurred on inherent judicial authority, not on Rule 23. Before those Amendments, Rule 23(e)(5) only required court approval when an objection itself was being "withdrawn," not when an appeal from an objection was being dismissed (as had occurred in *Pearson*).

If the objector-appellants here have settled without benefit to the class, there is no daylight between this case and *Pearson III*. Indeed, one of the three settling objectors in *Pearson III* had brought a "fee-only objection" that "would not have increased defendants' liability even if it had been successful." 968 F.3d at 836. Fee-objectors' "responsibility to the class depend[s] not on whether the defendants would [be] required to pay more but on whether the class would have been entitled to receive more." *Id.*; *contra In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420, Dkt. 2728 (N.D. Cal. Mar. 24, 2022) (Rogers, J.) (putting stock in the fact that the side settlement "is being paid by Class Counsel separate and apart from the settlement fund and any fee award that Class Counsel may obtain."). Because money is fungible, it's unclear how *Lithium* contemplates

class counsel paying the deal "separate and apart" from their fee award. In any event, the more important point is that the source of the side-settlement does not control whether objectors have acted inequitably or been unjustly enriched by leveraging the class's rights. *Pearson III*, 968 F.3d at 836. As Judge Becker succinctly stated the general principle in *GMC Pick-Up Truck*: "private agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee-shifting case." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995). Just as it is "patently meritless" to suggest class members have no interest in sums paid to class counsel outside the settlement fund, *id.* at 820, it is also incorrect to suggest that they have no interest in sums paid to appealing objectors outside the settlement fund. While the class's claims are being resolved, "for practical purposes" all payments related to the case are simply aspects of the "constructive common fund." *Id.*; *see also Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1146-47 (9th Cir. 2002) (following *GMC Pick-Up Truck*); *Pearson I*, 772 F.3d at 786.

Both Objectors Hinojosa and Hudson have already acknowledged in their papers that their fee objections stood to benefit the class by asserting the class's right to pay no more than a reasonable attorneys' fee. In his objection, Mr. Hudson maintained that "[t]he class should not be penalized because the first settlement negotiated by Class Counsel failed to match the settlement benefits to each class member's damages and therefore earned this Court's rejection." Dkt. 152 at 5. And in her own motion for attorneys' fees, Ms. Hinojosa explicitly professed that her fee objections had not only "substantially enhanced benefits to the class" but were filed "with the understanding" that their work could benefit the class. Dkt. 237 at 7-8.

In fact, Ms. Hinojosa's fee motion, denied but not appealed, is itself effectively a recognition of the proper path for seeking an objector's fee. "If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees." Advisory Committee Notes to 2018 Amendment of Rule 23. If objectors sought a payment for their counsel's work, they had to use the Rule 23(h) process. Rule 23(h) has governed all fee awards in class actions—including those by objectors—since 2003 and only permits fees by court order awarding after a duly-noticed "motion under Rule 54(d)(2)." Fed. R. Civ. P. 23(h)(1). As the committee notes observe, "any claim for an award of attorney fees must be sought by motion." Advisory Committee Notes to 2003 Amendments to Rule 23. This includes both awards to class counsel and to objectors' counsel. *Id.* (contemplating "an award to other counsel whose work produced a

beneficial result for the class, such as … attorneys who represented objectors to a proposed settlement under Rule 23).[4] An accounting is warranted to remedy objector-appellants' flouting of Rule 23(h).

Objectors "cannot avail themselves of the statutory privilege of litigating for the interest of a class and then shake off their self-assumed responsibilities to others by a simple announcement that henceforth they will trade in the rights of others for their own aggrandizement." *Young*, 324 U.S. at 213. "This representative responsibility is emphasized by the fact that they might have been awarded compensation for their services had they succeeded [on appeal] to the advantage of all the [absent class members]." *Id.*; *Wells Fargo*, 523 F. Supp. 3d at 1112-13 (awarding objector fees for making arguments in aid of Court's conclusions reducing attorneys' fees and thus reciprocally saving the derivative shareholders those sums). When ethical improprieties occur to the detriment of absent class members, a "court has broad equitable power to deny attorneys' fees (or to require an attorney to disgorge fees already received)." *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012); *see also* Restatement (Third) of the Law Governing Lawyers § 37; *cf. also The Fla. Bar v. Adorno*, 60 So.3d 1016 (Fla. 2011) (imposing three-year disciplinary suspension on attorney who had sold out putative class to reach a secret private settlement of individual plaintiffs).

Objector-appellants may argue that their appeals divested this Court of jurisdiction to consider disgorgement of their side payoffs. But the appeals only divested the Court of jurisdiction relating to "those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). After appeals are filed, district courts still retain jurisdiction over matters "ancillary to the appeal" from the decision being appealed. *Brennan v. Opus Bank*, 796 F.3d 1125, 1134 (9th Cir. 2015). Examples include motions to seal, requests for attorneys' fees, and motions for Rule 11 sanctions. *Id*; *see also Cooter & Gell. v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990). A request for disgorgement to vindicate the Court's inherent authority and the interests of absent class members is one such collateral matter. If there is jurisdictional doubt, Rule 62.1 provides an alternative procedure allowing for an indicative ruling. *See* Rule 23(e)(5)(C).

In accordance with *Young* and *Pearson*, this Court should order accounting, and if applicable, disgorgement to the class of any monies unjustly paid to objectors and their counsel.

[4] Note that not all of Rule 23(h)'s requirements apply equally to objectors. *See* Fed. R. Civ. P. 23(h)(1) (only requiring class counsel's motion be "directed to class members"); *Wininger v. SI Mgmt. L.P.*, 244 Fed. Appx. 156, 158 (9th Cir. 2007) (same).

II. Rule 23(e)(5)(B)(ii) requires approval of the side settlements here because the final judgment incorporates what could have been the collateral Rule 23(h) order and, under Fed. R. App. Proc. 4, the appellants are thus appealing "from a judgment approving the [class settlement] proposal."

Rule 23(e)(5)(B)(ii) requires court approval of any payments made "in connection with" "forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal." CCAF agrees that the "proposal" referenced in this subsection is best read to designate the same "proposal" to approve the class action settlement referred to in the other subsections of Rule 23(e). Fed. R. Civ. Proc. 23(e)(1)(A), (1)(B), (1)(B)(i), (1)(B)(ii), (2), (2)(B), (2)(D), (3), and (5)(A). "We generally presume that a statute uses a single phrase consistently, at least over so short a span." *N.L v. Credit One Bank, N.A.*, 960 F.3d 1164, 1168 (9th Cir. 2020) (internal quotations omitted); *accord Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881, 889 (2019) (rejecting interpretation that "requires the implausible assumption that Congress gave 'registration' different meanings in consecutive, related sentences within a single statutory provision.").

Objectors Hinojosa and Hudson go astray, however, when they argue that their appeals do not encompass the "judgment approving the proposal" because in their view the fees are "independent from the underlying settlement proposal." Dkt. 253 at 2. Although the Court issued final approval of the settlement in August 2019, it expressly declared its intention to reserve the entry of judgment until "after the Court has determined an appropriate fee award." Dkt. 189 at 13.[5] Federal Rule of Civil Procedure 58(e) permits this exercise of the Court's decision "to delay the finality of the judgment for appellate purposes under revised Fed. R. App. P. 4(a) until the fee dispute is decided." *Nutrition Distrib. LLC. v. IronMag Labs, LLC*, 978 F.3d 1068, 1073 (9th Cir. 2020) (quoting Advisory Committee Notes to 1993 Amendments to Rule 58). Only after it issued its fee order (Dkt. 236) did the Court then enter judgment on the settlement approval. Dkt. 249. And

[5] To be clear, at the same time that the Court approved the settlement, it offered the settling parties the option to "submit a jointly proposed form of judgment if they wish[ed] to have judgment entered" before the fee determination. *Id*; *see also* Dkt. 226 (one year later, again ordering the parties to provide a proposal in writing). Though the parties did ultimately submit a proposed form of judgment as to just the settlement approval, (Dkt. 229), the Court did not enter it.

indeed, this approach does not appear inadvertent; the Court's judgment addresses both the final settlement approval and the accompanying fee award. *See* Dkt. 249 at 5.[6]

One may still wonder how Objectors Hudson and Hinojosa could be appealing from a judgment the Court entered two weeks after they filed their notices of appeal (Dkts. 239, 241). The answer is that by operation of Federal Rule of Appellate Procedure 4(a)(2), when a court enters final judgment after a notice of appeal from an earlier order, that appeal runs "from the judgment" codifying the earlier order. *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1174 (9th Cir. 2011).

Newly added just last year, Federal Rule of Appellate Procedure 3(c)(5) confirms this: "In a civil case, a notice of appeal encompasses the final judgment, whether or not that is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates: (A) An order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or (B) an order described in Rule 4(a)(4)(A)." Objector Hinojosa and Hudson's notices of appeal both designate the order on class counsel's fee (Dkt. 236). Dkts. 239, 241. That order qualifies both as an "order that adjudicates all remaining claims and the rights and liabilities of all remaining parties" and as "an order described in Rule 4(a)(4)(A)." It is a final adjudication that "leaves nothing for the court to do but execute the judgment" (*Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020)) as evidenced because the Court ordered the plaintiffs to "submit a revised proposed judgment, approved as to form by Uber." Dkt. 236 at 14. And it is an order described in Rule 4(a)(4)(A) because it disposes of class counsel's motion for attorney's fees under Rule 54 after the Court had earlier delayed the entry of final judgment under Rule 58. Fed. R. App. Proc. 4(a)(4)(A)(iii). (Although Hinojosa and Hudson's appeals preceded the December 1, 2021 effective date of amended Fed. R. App. P. 3(c)(5), that amendment still governs "insofar as just and practicable, all proceedings then pending." Order re: Amendments to Federal

[6] Even if this Court had intended to enter final judgment in August 2019, the final approval order (Dkt. 189) was not a satisfactory form of judgment, as it contains procedural background, facts and legal reasoning that do not belong in a Rule 58 separate judgment. *In re Cendant Corp. Secs. Litig.*, 454 F.3d 235, 245 (3d Cir. 2006). Normally, the finality of merits judgment will not be delayed for "collateral" fee proceedings. *E.g. Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). So, if not for the Court's explicit reservation, Fed. R. App. P. 4(a)(7)(A)(ii) would have considered judgment on the class settlement entered 150 days after the August 2019 order.

Rules of Appellate Procedure (Apr. 14, 2021). Even under the old Rule 3, this Circuit construed the rule's designation requirements "liberally." *Le v. Astrue,* 558 F.3d 1019, 1021-24 (9th Cir. 2009) (discussing cases).

Objector-appellants may argue that the Court their previous notice of appeal divested the court of jurisdiction to enter judgment; that would "misstate[] the law." *Reiffin v. Microsoft Corp.*, No. 00-cv-2221, 2001 U.S. Dist. LEXIS 7485, *2 (N.D. Cal. May 23, 2001) (Walker, J.). This Court retained jurisdiction to enter judgment notwithstanding the appeal because it was in aid of Ninth Circuit's review. *See In re Silberkraus*, 336 F.3d 864, 869 (9th Cir. 2003); Fed. R. App. P. 4(a)(2) (contemplating post-appeal entries of judgment).

All said, notwithstanding the possibility that Objectors Hinojosa and Hudson may only wish to appeal the fee aspect of the Court's judgment, that judgment on appeal also encompasses the settlement approval decision; it explicitly addresses both "Final Approval Orders." Dkt. 249 at 3. As a result, whether or not Hinojosa and Hudson have identified a loophole that would apply to appeals of collateral post-judgment fee orders, and whether or not they intended to do so, the objector-appellants are appealing "from a judgment approving the proposal." Rule 23(e)(5)(B)(ii) applies.

III. This Court has the authority to appoint a *guardian ad litem* for the class.

Finally, the Court should be aware of its discretion to appoint a guardian to represent the interests of the class in the fee appeal proceedings. "Because the common fund doctrine places the plaintiff's counsel in a position that is directly adverse to the class, a court can use its supervisory authority under Rule 23 to appoint a guardian ad litem to represent the class on the issue of attorneys' fees." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 817 (2003). Consistent with the Court's obligation to "act with a jealous regard of the rights of those who are interested in the fund," a trial court has discretion to make a limited purpose appointment on behalf of the class. *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994) (internal quotations omitted); *see also Gottlieb v. Barry*, 43 F.3d 474, 490 (10th Cir. 1994) (endorsing possibility of *guardian ad litem*, though holding it not required); *Miller v. Mackey Int'l, Inc.*, 70 F.R.D. 533, 535 (S.D. Fla. 1976) (appointing *guardian ad litem* to act on behalf of class members in conjunction with class counsel's fee motion); *Haas v. Pittsburgh Nat'l Bank*, 77 F.R.D. 382, 383 (W.D. Pa. 1977) (same). A guardian enables a "genuinely adversarial process" and "serve[s] to enhance the accuracy and legitimacy of fee awards." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J.,

concurring).[7] At base, the guardian "is to monitor the conduct of class counsel with the goal of identifying circumstances in which class counsel are not adequately representing the class, including possible collusion"—here between the fee objectors and the settling parties. American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.09 cmt. a. (2010). Although CCAF does not necessarily recommend appointing a guardian here, the Court should be aware of that tool in its arsenal to protect the class's interest if it believes more adversary presentation is needed than provided by invited *amici*.[8]

CONCLUSION

For these reasons, this Court has the power, under both Rule 23(e) and its inherent authority, to review and conduct an accounting of the objector-appellants' side settlements.

Dated: April 29, 2022

Respectfully submitted,

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[7] Again, there would be no jurisdictional issue since the appointment would be "in aid of the appeal." District courts have found that such orders include "jurisdiction over the motion for court appointed appellate counsel" because "[r]esolving it would act in aid of the appeal." *Marshall v. United States*, No. 18-cv-21810, 2019 U.S. Dist. LEXIS 76094, *15 (S.D. Fla. May 3, 2019) (granting prisoner appellant's motion for court-appointed counsel); *Richie v. Wharton County Sheriff Dep't STAR Team*, No. 09-cv-0464, 2012 U.S. Dist. LEXIS 100115, *6 (S.D. Tex. Mar. 30, 2012) (same). Alternatively, the Ninth Circuit might consider such an order as an indicative ruling stating that it would appoint a guardian.

[8] A court considering an appointment "should balance the likely cost and delay of the appointment against the anticipated benefits of the appointment." American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.09(d) (2010). In many "high-value cases" the costs of a guardian would "'pale in comparison to the significant amounts of money' to be divided between plaintiffs and counsel." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring) (quoting William Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1455 (2006)). But that may not be the case here where the guardian would in effect simply be there to monitor the monitors (the fee objectors).

PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Brief using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 29th day of April, 2022.

/s/ Theodore H. Frank
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