NO. 22-35524

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMEENJOHN STANIKZY,
Plaintiff-Appellant,
v.
PROGRESSIVE DIRECT INSURANCE COMPANY,
Defendant-Appellee.

On Appeal from the
United States District Court for the Western District of Washington,
No. 2:20-cv-00118-BJR, Hon. Barbara Jacobs Rothstein

Motion of Hamilton Lincoln Law Institute to File *Amicus* Brief in Support of Affirmance

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As Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-3 permits, the Hamilton Lincoln Law Institute ("HLLI") and its Center for Class Action Fairness ("CCAF") seeks leave of this Court to file an *amicus* brief in support of affirmance. CCAF's proposed brief is attached to this motion. Prior to filing this motion, CCAF sought consent from all parties. Defendant-Appellee consented, but Plaintiff-Appellant did not consent.

The Hamilton Lincoln Law Institute, which hosts CCAF, is a 501(c)(3) non-profit public-interest law firm based in Washington, DC. CCAF's mission is to litigate on behalf of class members against unfair class action procedures and settlements. CCAF represents class members *pro bono* where class counsel employ unfair procedures to benefit themselves at the expense of the class. CCAF has a long track record of successfully litigating the fairness of class-action settlements on behalf of class members who have objected to settlements and has been recognized by courts for its work, even in cases where CCAF has not appeared. *See, e.g.*, *In re Stericycle Sec. Litig.*, 35 F.4th 555, 572 & n.11 (7th Cir. 2022) (citing cases and praising CCAF "track record"); *Pearson v. NBTY, Inc.,* 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); *Shah v. Zimmer Biomet Holdings*, 2020 WL 5627171, 2020 U.S. Dist. LEXIS 171925 (N.D. Ind. Sept. 18, 2020) (praising CCAF work even though CCAF was not a participant); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013).

While CCAF has not been successful in all cases, it has won several noteworthy appellate decisions that advanced class-action settlement jurisprudence. Several of these cases support the principles that settlement fairness requires that the primary beneficiary of a class-action settlement should be the class, rather than the attorneys or

third parties, and that courts scrutinizing settlements should value them based on what the class actually receives, rather than illusory measures of relief. *E.g., Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Redman v. Radioshack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

CCAF's interest lies in ensuring approval of a fee award that compensates class counsel based on the actual economic benefit achieved for class members, and in aiding the development of sound jurisprudence that safeguards the interests of absent class members. CCAF has previously been appointed *amicus* in appellate court proceedings to defend district court decisions where full adversary presentation is lacking. *E.g., Arkansas Teacher Retirement Sys., v. State Street Corp.*, 25 F.4th 55 (1st Cir. 2022); *Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017). A district court in this Circuit *sua sponte* solicited CCAF's *amicus* input in evaluating a novel Rule 23(e)(5) question. *McKnight v. Uber Techs.*, No. 14-cv-5615-JST Dkt. No. 256 (N.D. Cal. Mar. 21, 2022) CCAF is willing to present live argument if this Court believes that it would aid in rendering its decision.

CCAF's brief would not duplicate the brief of Defendant-Appellee. Rather, CCAF's experience—deriving from involvement in dozens of class settlement cases—can provide an illuminating background to supplement the legal issues before the Court. *Amicus* can explain the endemic conflict of interest underlying class action settlements and the necessity of zealous judicial oversight to protect absent class members against overreaching of their own class counsel.

Thus CCAF respectfully moves this Court for leave to file the brief attached to this motion.

Dated: February 17, 2023

Respectfully submitted,

/s/ Theodore H. Frank

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Proof of Service

I hereby certify that on February 17, 2023, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/Theodore H. Frank
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for the Western District of Washington
Honorable Barbara Jacobs Rothstein, District Judge

**Brief of *Amicus Curiae* Hamilton Lincoln Law Institute
in Support of Affirmance of the District Court's Judgment**

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Rule 26.1 Corporate Disclosure Statement

Hamilton Lincoln Law Institute ("HLLI") is an IRS § 501(c)(3) non-profit corporation incorporated under the laws of Washington, D.C. HLLI does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. HLLI is operated by a volunteer board of directors.

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Interest of Amicus Curiae

The Center for Class Action Fairness ("CCAF") is currently a project of the Hamilton Lincoln Law Institute, a 501(c)(3) public interest law firm. CCAF represents class members *pro bono* where class counsel employs unfair procedures to benefit themselves at the expense of the class. Since its 2009 founding, CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 55-57 & n.37 (2018). Over that time CCAF has recouped over $200 million for consumer and shareholder class members by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. *E.g., In re Stericycle Sec. Litig.*, 35 F.4th 555, 572 & n.11 (7th Cir. 2022) (citing cases and praising CCAF "track record"); *In re Wells Fargo & Co. Shareholder Deriv. Litig.*, 445 F. Supp. 3d 508 (N.D. Cal. 2020) (reducing fees by more than $15 million and proportionally increasing shareholder recovery); *see also* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016).

HLLI files this amicus brief in support of affirming of the district court's decision.

Federal Rule of Appellate Procedure 29 Statement

As Federal Rule of Appellate Procedure 29(a)(4)(E) requires, HLLI affirms that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no

person other than amicus or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Summary of Argument

The settlement in this case paid the class about $4.1 million. The district court properly considered economic realities in awarding attorneys $1,107,199.60, which represents 26% of maximum class benefits under the claims-made settlement; under a lodestar crosscheck, this would be about triple class counsel's ordinary rates. This is not just within the district court's discretion, but it was required under Rule 23 and this Circuit's precedent as well as common sense and public policy. Class counsel contends that the district court committed reversible error failing to award attorneys' fees of nearly $5 million ($4,999,460.96), an amount exceeding actual class benefits. Class counsel argues that the district court should have based fees on a "virtual common fund" of $19.2 million, even though this is a hypothetical number that defendant will never pay and that the class will never receive. This is wrong, and this Court should affirm as a matter of law.

Class counsel's suggestion to reverse the award would exalt self-dealing settlement provisions over economic reality, and, under the settlement's terms, would cost class members a half million dollars (nearly half of what they are currently slated to receive), to pay class counsel more than their putative clients.

Rule 23 requires the district court to investigate the "economic reality" of the settlement relief provided in a class-action settlement. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). Class counsel admits that courts evaluating a settlement for

fairness under Rule 23(e) should reject settlement that provide outsized fees in relation to the value of the actual class benefit. OB36.[1] Such settlements unfairly afford "preferential treatment" to class counsel. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) ("*Bluetooth*"); *accord Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013); *In re Subway Footlong Sandwich Mkt'g and Sales Practices Litig.*, 869 F.3d 551, 556-57 (7th Cir. 2017).

The district court below did something necessary (if sadly uncommon): it scrutinized an unopposed attorneys' fee request. It peered behind the fictional value that class counsel negotiated for its own benefit and determined that class members would receive at most perhaps $4.1 million—not the $19.2 million putatively made available. In fact, the district court almost certainly still *over*-estimates class benefit, because it did not consider that many of the received claims will be invalid or otherwise ineligible for payment under the settlement. DB23-DB24. But from its rough estimate, the district court applied well-established Ninth Circuit law and awarded 26% of the economically realistic settlement value to the class instead of over 100% of class benefits. As a result of awarding less than $5 million, class members will be paid $514,998 more from the settlement, which otherwise authorizes the defendant to retain a "*pro rata* contribution" from settlement checks to pay fees. OB29.

Class counsel argues that this fee award somehow violates the settlement agreement, but the agreement itself contains no terms dictating any particular fee award, as the defendant points out. DB28-29. Even if the settlement had purported to tie the

[1] "ER," "OB," and "DB" refer to the excerpts of record, Appellants' opening brief, and defendant Progressive Direct's brief, respectively.

district court's hand, such an agreement would violate Rule 23 and Ninth Circuit law, which require courts to independently scrutinize a fee award in a class-action settlement. District courts have a non-delegable responsibility to independently scrutinize class action fee requests. These rules are not mere technicalities, but provide an important safeguard against class counsel settling claims for largely illusory relief in exchange for obtaining greater attorneys' fees.

The district court exercised its discretion soundly. Fictional settlement valuations deserve no deference from a district court judge, as such valuations provide no relief to class members. Settling parties insert such terms to prop up otherwise indefensible fee requests such as class counsel did here: seeking $5 million in attorneys fees on the basis of only at most $4.2 million in class recovery.

The fee award should be affirmed.

Argument

I. Courts awarding fee awards in connection with class-action settlements have a non-delegable duty under Rule 23 to exercise independent judgment in valuing the settlement and setting reasonable fees.

Plaintiffs repeatedly, incorrectly, assert that the district court "modif[ied]" or "rewr[ote]" the settlement agreement by awarding less than $5 million in attorneys' fees. OB30, OB31, OB36. The defendant observes this to be false as a matter of contract interpretation. DB13-14. But more categorically, settling parties cannot dictate fee awards attending class-action settlements even if their agreement purports otherwise. District courts have a non-delegable "duty" to independently ensure fair attorneys' fees rather than defer to "the judgment of the parties regarding the reasonableness of fees."

Kim v. Allison, 8 F.4th 1170, 1180 (9th Cir. 2021). This independent review safeguards against parties striking partially illusory settlements that provide attorneys more benefit than class members—as class counsel's fee request here would have done.

"While attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement, Fed. R. Civ. P. 23(h), courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Bluetooth*, 654 F.3d at 941. *See generally Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1327-28 (9th Cir. 1999); *Lobatz v. U.S. West Cellular*, 222 F.3d 1142, 1148 (9th Cir. 2000). "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23.

Under either the lodestar or percentage method, the Court's independent role in setting a reasonable fee award invokes its role as a fiduciary for absent class members. At the settlement and fee-setting stage, the relationship between class counsel and the class turns directly and unmistakably adversarial because counsel's "interest in getting paid the most for its work representing the class [is] at odds with the class's interest in securing the largest possible recovery for its members." *In re Mercury Interactive Corp.*, 618 F.3d 988, 994-95 (9th Cir. 2010).

This review poses a problem for district courts because "the adversarial process is 'diluted' or entirely 'suspended' during fee proceedings, and fee requests often go unchallenged." *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 168 (3d Cir. 2006) (ultimately quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000)). "[I]n most common-fund cases, defendants have little interest in challenging class counsel's

timesheets." *Gutierrez v. Wells Fargo, NA*, No. 07-cv-05923 WHA, 2015 WL 2438274, at *6, 2015 U.S. Dist. LEXIS 67298, at *16 (N.D. Cal. May 21, 2015). No individual class member has the financial incentive to object to an exorbitant fee request either; an individual's "gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992).

When, as partially true here, the settlement segregates the fee fund from class recovery, and the defendant independently agrees not to contest the fee request, that impairs the adversarial process even further. *See Briseño v. Henderson*, 998 F.3d 1014, 1023-27 (9th Cir. 2021); *Roes 1-2 v. SFBSC Management, LLC,* 944 F.3d 1035, 1050-55 (9th Cir. 2019). This Court has repeatedly emphasized that a segregated fee structure "does not detract from the need carefully to scrutinize the fee award." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) (cleaned up) (citing cases); *Bluetooth*, 654 F.3d at 948.

District courts serve as the last line of defense against overreaching fee requests. At the same time, they are "unaccustomed to inquisitorial judging." Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 869 (2016). And so they must overcome the "natural temptation to approve a settlement, bless a fee award, sign a proposed order submitted by plaintiffs' counsel, and be done with the matter." *Marshall v. Deutsche Post DHL & DHL Express (USA) Inc.*, 2015 WL 5560541, 2015 U.S. Dist. LEXIS 125869, *2 (E.D.N.Y. Sept. 21, 2015); *see generally* Brian Wolfman, *Judges! Stop Deferring to Class Action Lawyers*, 2 U. MICH. J. L. REFORM 80, 82 (2013). When district courts faithfully discharge their duty, as the court below did, their orders are

then often subject to quasi or fully *ex parte* appeals. *Cf.*, *e.g.*, *Ark. Tchr. Ret. Sys. v. State St. Corp.*, 25 F.4th 55 (1st Cir. 2022).

Class counsel fundamentally errs in suggesting that the district court exceeded its authority by "re-valu[ing]" the settlement. OB54-55. Quite the contrary, had the district court used class counsel's fee request as an anchor for the fee award, that would have been an error of law. *See, e.g., Kim,* 8 F.4th at 1180-82. "[T]he court's task is to make its own determination of what fee to award" not "one in which the request for fees was presumptively to be granted." *Health Republic Ins. Co. v. United States*, __F.4th__, 2023 U.S. App. LEXIS 2404 (Fed. Cir. Jan. 31, 2023). "Judicial deference to the results of private negotiations is undoubtedly appropriate for many settlements but not for class action settlements, including their attorney fee terms." *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 713 (7th Cir. 2015). Courts must come to their "own independent valuation." *Malchman v. Davis*, 706 F.2d 426, 436 (2d Cir. 1983). Properly discharging its obligation to realistically value the settlement is by no means "re-writ[ing]" the agreement (Contra OB55); under Rule 23 the district court always retains "inherent authority" over attorneys' fees, not the settling parties. *Briseño*, 998 F.3d at 1023 (quoting *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999)).

Class counsel appears to suggest that a court's fiduciary duty to absent class members ends at the point of approving the settlement under Rule 23(e). OB52-53. And there's certainly a valid question here whether the court should have approved a settlement that disallowed class members from accessing millions of dollars in negotiated attorneys' fees for "no plausible reason." *See*, *e.g.*, *Briseño*, 998 F.3d at 1027. But class counsel fails to recognize that the court's "fiduciary obligation" extends

beyond Rule 23(e) to all fee awards accompanying class settlements under Rule 23(h). *E.g.*, *Mercury Interactive*, 618 F.3d at 994. Two wrongs don't make a right. Though the district court should have rejected the settlement (*see* section III, below), it does not mean its zealous scrutiny under Rule 23(h)—scrutiny that did ultimately redound to a $514,998 benefit to class member claimants through the reduction of the *pro rata* share of fees they owed under the settlement—was in error.

At bottom, "[p]ublic confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 688-92 (Cal. 2016) (Liu, J., concurring). Exorbitant fees erode public confidence in the class action device. To prevent that erosion, it is "it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." *Piambino v. Bailey*, 757 F.2d 1112, 1144 (11th Cir. 1985); *see also In re Washington Pub. Power Supply Sys. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994) (differentiating "reasonable" from "windfall" fees).

II. The district court properly exercised its discretion in awarding attorneys' fees representing 26% of actual class benefit, and would have committed reversible error had it applied class counsel's methodology.

Class counsel cavalierly accuses the district courts of rewriting the settlement agreement, or of secretly using lodestar concerns to dictate an allegedly impermissible fee award. The fee order evinces nothing of the sort; the court calculated an award as 26% of estimated benefits to the penny—the precise percentage class counsel sought. 1-ER-14. Only after calculating this percentage award, does the court perform a lodestar crosscheck, finding that the $1,107,199.60 fee award represents a multiplier of about

triple class counsel's ordinary rates. 1-ER-16. Class counsel does not dispute the likely size of the settlement benefits, nor the lodestar calculation, but instead demands this Court impose a different answer than the district court as to "whether fees should be based on a 'virtual common fund' or actual recovery." 1-ER-8. But the Ninth Circuit has already answered this question against class counsel's theory.

The district court sensibly opted to base the fee award on actual class recovery, explaining that the "'Settlement Fund' is not really a 'fund' at all" because "'[a]ny portion of the Settlement Fund that is not paid … will remain the property of Defendant and will not be subject to the applicable escheat laws, not be considered as residual funds, and not otherwise [be] subject to the doctrine of *cy pres* or its equivalent." *Id.* (quoting settlement). The district court found that this was unlike a common fund, where "parties settle for the total amount of the common fund and shift the fund to the court's supervision." 1-ER-8-9 (quoting *Staton*, 327 F.3d at 964). "In this case, $19.2 million is simply a theoretical figure, chosen by the parties as an estimate of the extreme upper limits of Progressive's exposure in this lawsuit. Calling this number a 'fund' does not make it one." 1-ER-9. *Accord Briseño*, 998 F.3d at 1026 (rejecting appellees' contention that a $95 million potential maximum award was the appropriate valuation when class members received only 1% of that amount). Viewed this way, the district court rightly found the fee disproportionate. "If the Court were to approve the entire amount the Plaintiffs request, the resulting award of $ 5 million would surpass the net payment to the class by nearly two million dollars, and be more than 60% of the total amount for which Defendant will ultimately be liable, a 'disproportionate distribution of the settlement' by most measures." 1-ER-13 (quoting *Roes 1-2,* 944 F.3d at 1051).

The district court did not abuse its discretion in crediting fact over fiction; Ninth Circuit law demands precisely that.

Class counsel repeatedly claims that the settlement created a $19.2 million common fund, but cannot deny that only at most $4.26 million—plus a portion of awarded attorneys' fees—will ever leave the defendant's pocket. No fund exists, and the $19.2 million figure agreed by the settling parties represents a hypothetical recovery if 100% of eligible class members claimed in the three-month claims period. "Spoiler alert: that never happens—not even close." *Briseño*, 998 F.3d at 1024.

The district court faithfully protected the interests of class members in refusing to place determinative weight on a term in the settlement agreement that costs defendant nothing and provides class members with no benefit. Thanks to the district court's scrutiny, class members need only pay fees on the benefits they actually receive, which increases their recovery by about $514,998 due to the "*pro rata* reduction" that defendant can withhold from class members based on the fee award. OB27. Unconscionably, class counsel seeks to reverse the fee order, which would make class members worse off.[2] This appeal vividly illustrates how the "the relationship between

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[2] Class counsel makes much (OB28) of defendants refusing to stipulate to a modification of the settlement agreement to protect the $514,998 that the district court's order preserves for the class. The settlement itself does not demand modification, and the defendant rejected it. 2-ER-26; DB21-22. (Of course, as discussed in Section III, settlement provision is problematic—but the problem rests with class counsel for agreeing to it.) Class counsel persist in a selfish appeal that could only hurt the class members to whom they owe a fiduciary duty. Given that neither party seeks to protect absent class members' interests, if any argument is scheduled, the panel may wish to ask amicus to participate. Fed. R. App. Proc. 29(a)(8).

plaintiffs and their attorneys turns adversarial at the fee-setting stage," which is why "the district court must assume the role of fiduciary for the class plaintiffs." *Mercury*, 618 F.3d at 994.

Class counsel offers two primary arguments for reversal, but, as discussed below, neither demonstrates error, let alone abuse of discretion.

First, class counsel argues that *Williams*, requires crediting a "virtual" common fund, no matter how preposterous, as long as the parties stipulated to the fund size. OB45 (citing *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). The case, which resolved a fee dispute between settling parties, does not sweep so broadly, and in any event more recent Ninth Circuit jurisprudence and amendments to Rule 23 require courts to consider economic reality rather than stipulated fiction when evaluating a class-action settlement and fee award.

Second, class counsel insists that Washington state law, using some sort of upside-down federalism, controls Rule 23(h) fee awards. OB37. In fact, the Washington case appellants rely on does not impose a rigid obligation for courts to credit it a fictional stipulated "virtual common fund," and actually affirmed a trial court that exercised its discretion in reckoning the true settlement value. *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wash. 2d 52, 74, 847 P.2d 440, 451 (1993). But even if Washington state law mechanically favors fee awards based on hypothetical negotiated "virtual settlement funds," this does not control matters of federal procedural law, including appropriate fee awards under Rule 23(h).[3]

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[3] Class counsel claims an "additional abuse of discretion" owing to a supposed "mathematical error" the district court made in determining that $1.107 million

A. ***Williams* does not control this case; this Court requires district courts to consider "economic reality" rather than stipulations when evaluating class-action settlements.**

Appellants claim that *Williams* requires courts to credit hypothetical claims funds as a matter of law, and a 1999 Eleventh Circuit case that allowed class counsel to be awarded a percentage of amounts that either revert to the defendant or revert to *cy pres*. OB45 (citing *Williams*, 129 F.3d at 1027);[4] OB50 (citing *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1296-97 (11th Cir. 1999)).

Both *Williams* and *Waters* purported to follow *Boeing Co. v. Van Gemert*, as does appellant (OB46), but *Boeing* has no relevance to adjudicating a settlement allocation that is unfairly slanted toward class counsel. *Boeing* involved not a settlement, but a litigated judgment that ordered Boeing to deposit a sum total in escrow at a commercial

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constitutes 26% of the benefit likely paid under the settlement. OB25, n.7, OB55. Class counsel urges that the district court should have instead used $7.65 million as the denominator—the total amount defendant would owe if the full fee request were granted. But in that counterfactual world, class counsel would receive a shocking 61% of all actual settlement benefits. The district court's supposed "mathematical error" is simply algebra, and the court correctly determined that a fee award of $1.107 million would equal 26% of total settlement benefits (about $3.15 million paid to class members after their "*pro rata* contribution" plus the fee award itself). A greater award would result in an larger percentage to class counsel, while actually *reducing* class recovery due to the "*pro rate* reduction." The district court did not err, much less abuse its discretion in calculating 26%.

[4] As class counsel admits, *Williams* does not describe the exact nature of the fund in that case—whether it was an actual fund deposited by the defendant as the district court inferred, nor what would happen to the residual funds. OB46, n.17. *Williams* thus provides no clear support for crediting a wholly fictional "virtual common fund." *Cf.* 1-ER-12.

bank. 444 U.S. 472 (1980). After an extensive notice and search program, 47% of the class's potential claims had been accounted for. 444 U.S. at 476 n.4. Because there was no settlement compromising the class's claims, there was no inherent risk of class counsel self-dealing at the class's expense. For this reason, courts have refused to extend *Boeing* outside of its context. It simply makes no sense to pay attorneys for imaginary results. *See Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (distinguishing *Boeing* as a case in which the "harvest created by class counsel was an actual, existing judgment fund"); *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 831-32 (7th Cir. 2018); *Strong v. Bellsouth Tel. Inc.*, 137 F.3d 844, 852 (5th Cir. 1998).[5]

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[5] Quoting another case, class counsel attempts to distinguish *Strong* because *Strong* never established a "'common fund' from which money would be drawn." OB50. In this respect *Strong* resembles the settlement below. In *Strong*, "counsel calculated that if every class member were eligible for and elected to receive the credit, BellSouth's liability would amount to approximately $ 64 million – a sum which plaintiffs' counsel refers to as a $ 64 million 'common fund.'" *Strong*, 137 F.3d at 847. Plaintiffs in *Strong* urged the panel to credit this hypothetical maximum recovery, analogizing *Boeing*, but the panel rejected the argument because "no fund was established at all in this case." *Id.* at 852. Class counsel might try to distinguish *Strong* because there "the Agreement neither established nor even estimated BellSouth's total liability" (*id.*), but this distinction does not drive to the heart of the opinion: "the district court did not abuse its discretion in considering the actual results of the settlement." *Id.* at 253.

Class counsel purports to distinguish a case the district court cited on similar specious grounds. *Ferrer v. CareFirst, Inc.*, is argued to be a "claims made" settlement because "no common fund was agreed to." OB53 (citing No. 16-cv-02162, 2019 WL 11320974 (D.D.C. Sept. 30, 2019)). Bur *Ferrer* never suggests that an agreement by the parties would create a virtual "common fund." *Ferrer* found the settlement to be claims made because "'the defendant's liability is never greater than the precise amount the class claims.' 4 Newberg § 13.7; *see also* 5 Newberg on Class Actions § 15.56 (5th ed.) ('Claims-made settlements do not create a common fund.')." 2019 WL 11320974.

The reason is simple: unlike a judgment, a settlement is a *compromise*. And part of that compromise is a negotiation over the claims process. Will there be a direct payment to class members, or must they affirmatively make claims? How aggressive will the notice process be? Will the claims process take a single minute on-line with a prepopulated claim form, or must a class member write out pages of claims forms by hand and physically mail it? Do class members have sixty days or 180 days to respond? How many reminders will class members get? Will claiming class members have the right to appeal rejected claims? All of these variables can be manipulated with actuarial certainty[6] to throttle the claims rate—and if legal rules on attorneys' fees make class counsels indifferent to the results, they will happily cede the playing field to defendants seeking to minimize payments. *Pearson*, 772 F.3d at 782-84.

Even if *Williams* ever required that district courts credit fictional common funds, the 2003 and 2018 amendments to Federal Rule of Civil Procedure 23, and the passage of the Class Action Fairness Act in 2005, supersede it. Rule 23(h), first added with the 2003 amendments, re-centered the inquiry on "the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members." Notes of Advisory Committee on 2003

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[6] "Actuarial certainty" is not hyperbole—there exist third-party services that sell "settlement insurance" guaranteeing a cap on defendants' payments in a claims-made process precisely because everyone involved can accurately estimate what a particular settlement structure will actually pay out. Theodore H. Frank, *Settlement Insurance Shows Need for Court Skepticism in Class Actions*, OpenMarket blog (Aug. 31, 2016), *available at* https://cei.org/blog/settlement-insurance-shows-need-court-skepticism-class-actions (last accessed Feb. 17, 2023).

Amendments to Rule 23. "For a percentage approach to fee measurement, results achieved is the basic starting point." *Id.* The 2018 Amendments make explicit the need to consider the "effectiveness" of the claims process and the negotiated fees based on the relief actually provided to the class. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iii). All said, *Boeing* marks an "older line of cases" that eventually "prompted legislative rejection of compensating lawyers on the face value of the settlement, regardless of the take-up rate of the benefits by class members." Samuel Isaacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM. L. REV 3165, 3171-72 (2013).

The new rules reflect common-sense intuitions. Attorneys' fees should be tied directly to what clients receive, and permitting a class member to fill out a claim form in order to receive a check simply is not equivalent to getting money to that class member directly. In the last decade, and especially since the 2018 Amendments, this Court has repeatedly recognized that unclaimed amounts do not constitute real settlement value. *See Briseño*, 998 F.3d at 1026 (repudiating hypothetical $95 million valuation of claims-made settlement when class members "ended up receiving only about 1% of that touted amount"); *Kim*, 8 F.4th at 1181; *Vargas v. Lott*, 787 Fed. Appx. 372, 374-75 (9th Cir. 2019) (reversing decision that premised settlement valuation on hypothetical 100% claims rate); *Allen*, 787 F.3d at 1224 n.4. This Circuit follows the realistic approach even in pure Rule 23(h) fee appeals. *See Chambers v. Whirlpool*, 980 F.3d 645, 664 (9th Cir. 2020) (disavowing projected annual claims valuation that contradicted a decade of prior experience). The Eleventh Circuit appears to have moved in the same direction. *See In re Home Depot Inc., Customer Data Sec. Breach Litig.*, 931 F.3d

1065, 1092 (11th Cir. 2019) (requiring consideration of "the payment to the class plus the expected payment to counsel (together, the class benefit).").

To whatever extent *Boeing* remains valid and applies to settlement proceedings at all, it applies only to cases with actual common funds, not hypothetical claims-made funds like this one. *Pearson* is directly on point, reversing a district court that premised its calculation of settlement value on the fiction that $3/class member was "made available" to the 4.7 million class members who received direct notice of the settlement. *Pearson*, 772 F.3d at 781. There was no actual fund, no litigated judgment, and no "reasonable expectation…that more members of the class would submit claims than did," and thus *Boeing* was inapplicable. *Id.* at 782; *accord Strong*, 137 F.3d at 852 (*Boeing* only applies to "traditional common fund" not a claims-made settlement where "no fund was established at all"); *Camp Drug Store*, 897 F.3d at 832 (*Boeing* doesn't apply to claims-made settlement that "did not establish, definitively, an amount for the benefit of the class members"). *Boeing* itself recognizes this distinction. 444 U.S. at 479 n.5 (expressly reserving decision on whether its common-fund analysis applies to claims-made scenarios).

Unlike in *Boeing*, in this case, there's no "determinate fund" with each class member possessing "an undisputed and mathematically ascertainable claim to part of a lump-sum judgment" "upon proof of their identity." *Boeing*, 444 U.S. at 479-80. The supposed $19.2 million fund is an artifact of appellant's expert extrapolating a sample of claims to estimate total liability, which was subsequently stipulated by the Settlement agreement. 2-ER-37; 2-ER-162. Given a different sample, the parties might have stipulated to different "virtual common fund." *Cf. Briseño*, 998 F.3d at 1020, 1028

(settling parties stipulate a worthless illusory injunction worth $27 million). The figure does not impact what defendant will actually pay at all, except as a signal of what attorneys' fees class counsel would likely request. If the parties stipulated to estimate the settlement at $30 million instead, would they have by fiat generated an additional $11 million in class value? Bosh and nonsense! Actual class-member participation determines the real value of the settlement, not the "phantom" value assigned by class counsel. *Strong*, 137 F.3d at 852.

The district court correctly recounted legal developments since *Williams*, a case decided in 1997 before Rule 23(h) even existed. "Given these recent amendments to Federal Rule 23 and the concerns expressed in Ninth Circuit cases" like *Briseño*, it is appropriate to treat *Williams* as "an outlier" whose "holding should be carefully and narrowly construed." 1-ER-13, n.3. The district court did not abuse its discretion in doing so; it would have been legal error to follow *Williams* in this context.[7]

B. Awarding attorneys based on actual recovery mitigates the perverse incentives of class-action settlements that priorities fees.

Public policy demands that fee awards be attuned to the result actually achieved for the class. Crediting counsel for imaginary benefits would "undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing

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[7] *Williams* also found that the district court abused its discretion "by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund **or on the lodestar**." 129 F.3d at 1027 (emphasis added). It further added that lodestar has been applied "in some cases." *Id.* Thus, even if *Williams* applied and the district court had secretly based its decision on an unwritten lodestar analysis as class counsel insists, it would not compel reversal of the fee award here.

class counsel to settle lawsuits in a manner detrimental to the class" and "could encourage the filing of needless lawsuits." *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000) (O'Connor, J) (respecting denial of certiorari). Class counsel asks this Court to split with *Pearson* and *Strong* and depart from its precedent; they endorse a proposed rule that equates a settlement that awards cash directly to class members with a settlement employing a restrictive claims process. If that happens, settling parties will always be inclined to agree to the more burdensome claims process that ensures class counsel extracts the maximum amount of fees and defendants pay the minimum amount of money to settle the case, because a defendant:

> cares only about the total payout, not the division of funds between class and class counsel. After all, a defendant, no matter if a class has been certified, has "no reason to care about the allocation of its cost of settlement between class counsel and class members." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014) (Posner, J.). Instead, "all it cares about as a rational maximizer of its net worth is the bottom line — how much the settlement is likely to cost it." *Id.*

Briseño, 998 F.3d at 1025.

The defendant could automatically pay every class member because they have possession of the relevant records, but class counsel agreed to a settlement that left at least 80% of the class with nothing. The settling parties knew that this would happen, so paying class counsel as if they actually created a $19.2 million common fund creates a perverse incentive for plaintiffs' attorneys and defendants to prefer ticky-tacky claims-made processes over solid class relief. Before the district court, plaintiffs' counsel complained that "if you simply say we're going to calculate fees based upon who actually

makes a claim, then lawyers are going to be very reluctant to ever resolve cases, other than on a direct payout." 2-ER-45. But this is a feature, not a bug. If class counsel only gets paid to the extent their clients get paid, they have an incentive to insist on settlement structures that actually pay class members, rather than illusory ones. Under class counsel's proposed rule, this settlement, which extinguishes 80% of class member claims for $0, is just as valuable as one where every class member receives direct payment. It costs defendants less to agree to a fictional value, and pays class counsel more in attorneys' fees than to actually pay class members, which leads to 80% fictitious settlements structured to deliver outsized attorneys' fees. This Court should continue to require district courts to examine the economic reality of Rule 23(h) attorneys' fees as it also requires for Rule 23(e) settlement approval. *Chambers v. Whirlpool*, 980 F.3d 645, 664 (9th Cir. 2020) (Rule 23(h)); *Allen*, 787 F.3d at 1224 & n.4 (Rule 23(e)); *see also In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995).

C. Rule 23(h) fee awards are a matter of federal law.

Class counsel argues that Washington law requires a percentage fee award except in "special circumstances" the district court allegedly did not articulate. OB39. In the first place, the fee order *does* grant a percentage fee award—it simply chooses to credit actual class recovery rather than the fictional figure in the settlement agreement. Class counsel's psychoanalysis of the district court's "*de facto*…primary concern" (OB43) does not square with the order itself. The district court expressed admirable concern that the fictional $19.2 million fund did not accurately represent class recovery. "Fees calculated based on the percentage-of-recovery method should fairly reflect the performance of

the attorneys, as measured by the actual benefit conferred on the class." 1-ER-9 (citing *Bluetooth*, 654 F.3d at 942). Class counsel doesn't engage with the district court's actual reasoning, much less explain why it would be contrary to Washington law, which does not apply in any event.

For example, *Bowles* concerned a settlement providing automatic pension benefits with "a present value of $ 18.8 million." *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wash. 2d 52, 56, 847 P.2d 440, 443 (1993). Class counsel does not explain why its reasoning would require a percentage award from an illusory fund never paid by the defendant.[8] In fact, *Bowles* found that a disagreement over the size of the *actual benefit* under the settlement militated in favor of affirming the trial court. "Given that the class recovery can only be estimated at this time, either method of calculating attorney fees will place the Department at risk of not receiving full reimbursement. In light of the deference we extend to trial court rulings in this area, we decline to overturn the amount

[8] Class counsel mentions uncontested and largely unreported approvals of similarly flawed settlements (OB10, OB41-42), but these do not evince Washington law so much as judicial over-reliance on adversarial presentation. Each order appears to be a proposed order adopted verbatim by courts. "By submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to... No wonder that 'caselaw' is so generous to Class attorneys." *Sakiko Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014). In practice, courts rarely scrutinize stipulated fee requests. The district court here did the right thing in protecting the class's interests. This practice is lamentably uncommon, and the district court should be celebrated rather than reversed. If anything, class counsel should be grateful that the district court didn't sanction them for their lack of candor in failing to cite adverse precedent in what was effectively an *ex parte* fee request. *Cf. Ark. Tchr. Ret. Sys.*, 25 F.4th at 65.

of the fees awarded below." 121 Wash. 2d at 74, 847 P.2d at 451. Here, the district court made exactly the same sort factual determination, and plaintiffs cannot contend the district court *underestimated* the class benefit. In fact, the defendant strongly suggests that class counsel *over*-estimates class benefits it by incorrectly assuming all "20%" of received claims are eligible for payment. DB23-DB24.

All this said, even if the fee award were inconsistent with Washington law, this case concerns ***federal procedure*** under Rule 23(h). It should go without saying to note the black-letter-law principle that, under the Rules Enabling Act, 28 U.S.C. § 2072, state law does not get to override federal procedure in federal court, but the Supreme Court has said it multiple times. *E.g., Shady Grove Orthopedic Associates v. Allstate Ins.*, 559 U.S. 393 (2010); *Hanna v. Plumer*, 380 U.S. 460 (1965).

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

A putative Washington state-law principle does not govern the Rule 23. Indeed, the *Roes* district court based its fee award on California state fee-shifting law, but that did not preclude the Ninth Circuit from reversing settlement approval on Rule 23(e)

grounds for disproportionality. *Roes 1-2*, 944 F.3d at 1051. This case's settlement is unambiguously worse than the one in *Roes*, where, unlike here, the attorneys sought to be paid less than the class. Plaintiffs' *Bowles* argument is thus mistaken because it makes a basic error of civil procedure.

III. The district court should have rejected the settlement for self-dealing, but this Court cannot remedy that now-final error by mandating a selfish fee.

CCAF agrees with class counsel's repeated suggestion (OB30, OB36, OB44, OB51-53) that the district court might have reasonably rejected the underlying settlement. Class counsel plainly structured an agreement it hoped to deliver $5 million to the attorneys—much more than class members were likely to claim, and much more than class counsel *actually expected* class members to receive. 2-ER-55-56; 2-ER-45 ("you're not going to get a hundred percent claims rate in a claims made settlement.").

Class counsel turns the lesson of *Bluetooth* on its head. They correctly observe there was "no apparent reason" for money to revert to the defendant. OB26, n.7 (quoting *Bluetooth* at 654 F.3d at 949). But *Bluetooth* remarked this as *criticism of the segregated fee structure*—the structure that class counsel employed here. There *is* an apparent reason that attorneys draft such earmarked fee awards; it's to shield disproportionate fees from judicial review with the rhetorical ploy that reducing fees results "in a substantial rebate of moneys to the defendant." OB54. Indeed, "Progressive agreed to pay roughly $8 Million to settle the dispute." OB44. But as a gimmick to seize most of it, class counsel structured substantially-separate fees from class recovery in hopes the district court would not reduce fees. Unfortunately, the fee award leaves millions of dollars on the table that the defendant was willing to pay, but this is a tragedy of class

counsel's own making. This money could have and *should have* been available to class members. Plaintiffs' attorneys understand how to create an actual non-reversionary common fund, and class counsel could have instead negotiated an $8 million fund and sought fees from this fund. Any reduction in attorneys' fees from a true common fund benefits the class entirely. Why didn't class counsel do this? Probably because $5 million is more than $2 million (the likely fee earned from the 25% benchmark of a true $8 million common fund).

Settlements that selfishly earmark recovery for attorneys *should* be rejected by district courts. But the underlying settlement became final June 22, 2022 when the time for appealing final approval elapsed. 2-ER-57 (final approval order); 2-ER-168 (settlement agreement defining finality from the date of entering final approval). The failure of the district court to reject a manifestly self-dealing deal by class counsel does not imply that class counsel should be rewarded for their cynical settlement terms.

The only issue before this Court is whether the district court should affirm the proportional 26% fee award, or reverse and exacerbate the perverse incentives for attorneys to seek fees based on illusory recovery to the detriment of class members. Increasing the attorneys' fee award would not benefit class members—in fact, it would cost them over a half million dollars—but it would create perverse incentives for other attorneys to earmark their fee requests to the detriment of absent class members.

Conclusion

This Court should reaffirm its precedent and affirm the fee award.

Dated: February 17, 2023

Respectfully submitted,

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Executed on February 17, 2023.

/s/ Theodore H. Frank

Proof of Service

I hereby certify that on February 17, 2023, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/ Theodore H. Frank
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