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

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

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
1629 K Street NW, Suite 300
Washington, DC 20006
(703) 203-3848
ted.frank@hlli.org

Plaintiff opposes the Hamilton Lincoln Law Institute's motion for leave to file an *amicus* brief by misrepresenting the standards for accepting such a brief, the nature of HLLI, and the plain text of the *amicus* brief itself. In doing so, plaintiffs demonstrate precisely why this Court would be assisted by the *amicus*. Without HLLI's brief, plaintiff-appellant's slanted arguments would remain substantially unanswered.

Argument

Without HLLI's participation, no party contests plaintiffs' $5 million fee request for a settlement that could provide at most $2.5 million to class members (less, given the overestimate of claims and the mandatory contribution to attorneys' fees). AB21.[1] While Defendant-Appellee submitted a 6,224-word brief in response to plaintiff's 13,919-word brief, it does not express an opinion concerning the heart of the appeal. Progressive "takes no position on appeal regarding the district court's award of attorney's fees to Plaintiff-Appellant Ameenjohn Stanikzy's counsel." DB1. This is because the defendant agreed to not contest attorneys' fees as part of the Settlement. 2-ER-125, -180. Such clear-sailing provisions "by their nature deprive the court of the advantages of the adversary process in resolving fee determinations and are therefore disfavored." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) (cleaned up). As such, no party to this appeal defends the district court's fee award.

[1] "ER," "OB," "DB," and "AB" refer to the excerpts of record, appellants' opening brief, defendant brief, and HLLI's *amicus* brief, respectively. "Mot." and "Opp." refer to HLLI's motion to file *amicus* and Plaintiffs' opposition, respectively. (Appeal Dkts. 35-1 and 40).

The district court estimated $4.26 million as maximum class benefit in its fee order, but later proceedings suggest valid claims total $2,544,218.65. 2-ER-24.

Allowing HLLI to participate as an *amicus* reintroduces helpful adversarial presentation. If class counsel gets their way, class members will pay more for their representation in a case where their putative attorneys earmarked twice as much for themselves than the class will recover. The harm occurs because the settlement's "*pro rata* reduction" provision entitles the defendant to reduce class payments to partially offset the expense of attorneys' fees. 2-ER-175, -177. Contrary to class counsel's repeated assertion, success on appeal would make the class worse off, not just the defendant. By plaintiff's own estimate, class members would see their recovery reduced by $514,998 as their "*pro rata* reduction" toward attorneys' fees. OB27.[2]

HLLI's *amicus* makes the panel's job easier by challenging otherwise unrebutted arguments. It also safeguards the interests of class members by assisting with the Court's "duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class," to "avoid awarding 'unreasonably high' fees simply because they are uncontested." *Bluetooth*, 654 F.3d at 948.

I. HLLI's *amicus* brief easily satisfies Fed. R. App. P. 29.

Class counsel does not cite any Ninth Circuit authority concerning *amicus* participation, presumably because HLLI's *amicus* easily satisfies all requirements. Nor

[2] While class counsel attempted to bargain for the defendant to effectively remove the effect of this provision (OB28), the defendant declined the offer to amend the underlying Settlement without class notice. DB21-22.

Due to the unusual nature of this "*pro rata* reduction," HLLI made an error in its *amicus* brief when it suggested that the $514,998 reduction would cost class members "nearly half" what they're slated to receive. AB2. In fact, the increased fee award would reduce class member payments about 20%.

could class counsel dispute that courts have specifically called on HLLI's attorneys for *amicus* assistance when the parties would otherwise not provide fully adversarial argument. Mot. 2; *McKnight v. Uber Techs.*, No. 14-cv-5615-JST Dkt. No. 256 (N.D. Cal. Mar. 21, 2022); *Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, 513 F. Supp. 3d 202, 207 (D. Mass. 2021).

The rule requires only that an *amici* must state their "interest" in the case—along with "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3). HLLI did so, and class counsel does not deny this; they simply complain that HLLI's interest is "ideological." Opp. 11. But FRAP 29 does not forbid ideological interests. "[I]t is not easy to envisage an amicus who is 'disinterested' but still has an 'interest' in the case…." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.).

Most courts follow the *Neonatology* approach and allow *amicus* briefs as long as the movant can demonstrate an (a) an adequate interest, (b) desirability, and (c) relevance. *Id. Neonatology* concluded that, for a number of reasons, "it is preferable to err on the side of granting leave." *Id.* at 133. First, there is the "eminently practical" reason that "if denied, the court may be deprived of the advantage of a good brief, but if granted, the court can readily decide for itself whether the brief is beneficial. If beneficial, the court will be edified; if not, the brief will be disregarded." Second, "[a] restrictive policy with respect to granting leave to file may also create at least the perception of viewpoint discrimination" unless the court follows a blanket policy of denying any amicus." *Id.* Third, "[a] restrictive policy may also convey an unfortunate message about the openness of the court." *Id.*

Plaintiff advocates for an idiosyncratic restrictive standard for *amicus* briefs not adopted by any circuit outside of the Seventh and rejected by judges in other circuits. *Neonatology*, 293 F.3d at 130; *Lefebure v. D'Aquilla*, 15 F.4th 670, 675 (5th Cir. 2021). Judge Posner articulated a standard that would only permit an *amicus* filing "when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case…, or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997); *accord NOW, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). Judge Posner worried that *amicus* participation too often imposes unnecessary costs upon the court. *Id.* This view was not universal even in the Seventh Circuit. *See Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988) (Easterbrook, J.) ("Participation as amicus curiae will alert the court to the legal contentions of concerned bystanders, and because it leaves the parties free to run their own case is the strongly preferred option.").

But HLLI's *amicus* meets this stringent out-of-circuit standard. Indeed, the Seventh Circuit permitted HLLI to file an *amicus* in similar *ex parte* circumstances in the pending *House v. Akorn*, Appeal Nos. 19-2401 and 19-2408. All conditions of the disjunctive *Scheidler* test exist: (1) an unrepresented or incompletely represented party, namely absent class members, (2) an interest that may be affected by the decision, and (3) unique information not offered by the parties.

In this appeal, while class counsel formally represents the class, the appeal threatens to saddle the class with an additional half-million dollar contribution to

attorneys' fees. OB27. As often occurs, the relationship between class counsel and the class "turns adversarial," necessitating the Court's "jealous regard to the rights of those who are interested in the fund." *In re Mercury Interactive Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). The defendant does not oppose the fee request, and has no interest in protecting class members. Judge Posner himself recognized the "lack of adversary procedure" in this circumstance, where neither the defendant nor any individual absent class members have the incentive to resist class counsel's fee incursions. *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). As *amicus*, CCAF provides proper support for this class-centric view. *See Ryan*, 125 F.3d at 1063; *see also Neonatology*, 293 F.3d at 132.

CCAF also possesses a special interest in virtue of representing class members across the nation, for whom an equitable attorneys' fee jurisprudence matters. *See*, *e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013). 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. CCAF currently represents clients in pending litigation where plaintiffs sought fees premised on illusory "common funds," including in *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021), now on remand, which HLLI cited extensively. AB15-AB18. If class counsel prevails in counting fictional funds "made available" as equivalent to cash for the purpose of awarding attorneys' fees, it would undermine *Briseño* and harm class members everywhere. Future class counsels would have strong incentives to agree to reversionary settlements that artificially limit defendants' liability by not establishing a true common fund in exchange for disproportionate attorneys' fees. Eliminating this perverse incentive matters to

CCAF's constituency, and has animated much of its work, including successful appeals in *Bluetooth*, *Inkjet*, and *Briseño*.

Finally, CCAF's extensive experience and familiarity with complex class action fee issues would aid this Court. As the Federal Judicial Center notes, "[i]nstitutional 'public interest' objectors may bring a different perspective…Generally, government bodies such as the FTC and state attorneys general, as well as nonprofit entities, have the class-oriented goal of ensuring that class members receive fair, reasonable and adequate compensation for any injuries suffered. They tend to pursue that objective by policing abuses in class action litigation." *Managing Class Action Litigation: A Pocket Guide for Judges*, 17 (3d ed. 2010). As an example of HLLI's experience, Judge Posner reversed approval of an unfavorable settlement while crediting arguments advanced by an objector represented by HLLI's counsel Theodore Frank in *Redman v. RadioShack Corp.*., 768 F.3d 722 (7th Cir. 2014). In another case, Judge Posner remarked "Frank and the other objectors flagged fatal weaknesses in the proposed settlement." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014).

Anyhow, a Seventh Circuit judge recently clarified *Scheidler*'s policy on *amicus* briefs: "copycat" briefs should be rejected, but not those that "offer something different, new, and important" "not found in the briefs of the parties." *See Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020). HLLI's brief easily meets this standard. Class counsel complains the *amicus* contains arguments "*Progressive's counsel was not willing to advance*." Opp. 5. In fact the defendant couldn't argue the underlying fee award because it *cannot* under the settlement. DB1; 2-ER-125, 2-ER-180.

Even under a restrictive view of *amicus* briefs never adopted by this Court, HLLI's brief should be permitted. Under the more common *Neonatology* standard, this isn't a close question. The view of an *amicus* as an impartial individual who advocates for no particular cause or view "became outdated long ago." *Neonatology*, 293 F.3d at 131. "[T]he fundamental assumption of our adversary system [is] that strong (but fair) advocacy on behalf of opposing views promotes sound decision making. Thus, an *amicus* who makes a strong but responsible presentation in support of a party can truly serve as the court's friend." *Id.* "Parties with pecuniary, as well as policy, interests also appear as amici in our court." *Id.* at 132.

II. Plaintiff's misrepresentations provide no reason to deviate from FRAP 29.

Class counsel advances a number of misrepresentations about HLLI and its brief in hopes that these will strike the *amicus*, but instead they demonstrate why the Court would benefit from adversarial presentation.

Class counsel repeatedly claims that HLLI's participation would "not benefit Settlement Class members," simply by ignoring the *pro rata* reduction that directly harms class members. Opp. 2. Appellant repeats its assertion several times, but as discussed above and in the *amicus* (AB3, AB9-AB10, AB12), an increased fee award costs class members about a half million dollars.

Class counsel's brazen and inexplicable misrepresentations of the *amicus* brief illustrate the utility of an *amicus* brief to flag poor arguments.

What class counsel claims about HLLI's *amicus* brief.	**What the *amicus* brief actually says.**
"HLLI notably does not argue that the Settlement itself was unfair or should have been rejected." Opp. 4	"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." AB22
"HLLI has not shown how Progressive saving the $3,377,263.17 it agreed to pay to Class Counsel would somehow benefit Class Members" Opp. 4	"the district court's scrutiny… increases their recovery by about $514,998 due to the '*pro rata* reduction' … Unconscionably, class counsel seeks to reverse the fee order, which would make class members worse off." AB10
"HLLI has not demonstrated … that this Court's disposition will have some effect beyond the interests of the parties herein." Opp. 6	"Increasing the attorneys' fee award would … create perverse incentives for other attorneys to earmark their fee requests to the detriment of absent class members." AB23
"if HLLI is … advocating on behalf of Progressive Direct Insurance Company, then it should have disclosed as such, and any financial links…" Opp. 4	"no party or party's counsel contributed money that was intended to fund preparing or submitting the brief." AB1

To be clear, HLLI has not received any contribution from the defendant or *any* insurance company, for that matter. Ever. For anything.

Appellant's cavalier suggestion that HLLI's attorneys misled this Court does not make the *amicus* unhelpful. A fishing expedition like appellant proposes is not only unnecessary—it would be sanctionable. *See In re Classmates.com Consol. Litig.,* No. C09-45RAJ, 2012 U.S. Dist. LEXIS 83480, at *34 (W.D. Wash. June 15, 2012) (assessing $100,000 penalty where class counsel sought harassing discovery from CCAF and objector it represented).

Class counsel impugns HLLI by misrepresenting its history and purpose. The Center For Class Action Fairness (CCAF) was founded in 2009, years before it became

part of the Competitive Enterprise Institute in 2015. *Contra* Opp. 2 n.1. In January 2019, CCAF became part of HLLI, a new 501(c)(3) non-profit public-interest law firm. When CCAF was part of CEI, it negotiated a commitment that CEI would not permit donors to interfere with CCAF's case selection or case management. In fact, while CCAF was part of CEI, it was adverse to CEI donors in several cases. *E.g.*, *Frank v. Gaos*, 139 S. Ct. 1041 (2019) (argued 2018); *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316 (3d Cir. 2019) (argued 2017).

As an independent organization, neither CCAF nor HLLI received or solicited money from corporate donors other than court-awarded attorneys' fees.

Class counsel's unelaborated attack on Mr. Frank's "history" (Opp. 2) similarly flops. "At this point, Frank's track record—which now includes his success in this case—speaks for itself." *In re Stericycle Sec. Litig.*, 35 F.4th 555, 572 (7th Cir. 2022) (citing five earlier CCAF victories). Class counsel's "ad hominem attack on Frank [is] not professional and serve[s] only to emphasize the weakness of lead counsel's own arguments." *Id.*

Neither class counsel's flatly mistaken misrepresentations about the *amicus* brief, nor its false claims about HLLI support denying leave.

III. Class counsel's other arguments pertain to the merits.

The "Argument" section of class counsel's opposition does not once cite FRAP 29, but instead argues against the substance of HLLI's *amicus*. This material belongs in appellant's reply brief.

Class counsel may prefer that the panel not appreciate the difference between a percentage fee award (which the district court granted) and a purported percentage award based on a fictional "virtual common fund." *Compare* Opp. 9-11 *with* AB16-17. But Fed. R. App. P. 29 doesn't preclude briefs a party doesn't like.

Conclusion

The Court should grant leave for HLLI to file its *amicus* brief.

Dated: March 5, 2023

Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
(703) 203-3848
ted.frank@hlli.org

Certificate of Compliance Pursuant to Cir. Rule 32-1

As Circuit Rule 32-1 requires, counsel certifies that this brief complies with the type-volume limitation of Rule 27(d)(2)(A) because this motion contains 2,600 words, excluding the parts of the brief exempted by Rule 27(a)(2)(B) and Rule 32(f). Counsel's approximation is based on the "Word Count" function of Microsoft Word. Counsel further certifies that this brief complies with the typeface and style requirements of Rule 27(d)(1)(E) because this brief has been prepared in a proportionally spaced typeface using 14-point Garamond font in Microsoft Word.

Executed on March 5, 2023

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on March 5, 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
Theodore H. Frank