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 *Amicus* Hamilton Lincoln Law Institute Center for Class Action Fairness to Participate in Oral Argument

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As Federal Rule of Appellate Procedure 29(a)(8) permits, *amicus curiae* Hamilton Lincoln Law Institute ("HLLI") through its Center for Class Action Fairness ("CCAF") move for leave to participate in oral argument in this case. HLLI filed a contested motion to submit a brief *amicus curiae*, which has been referred to the panel. The Court has not yet determined whether an oral argument would be appropriate in this case.

Prior to filing this motion, HLLI sought parties' position on it. Plaintiff-appellant does not consent to the motion, and defendant-appellee does not object.

Argument

If there is oral argument, and HLLI does not participate, no party will advocate important arguments in support of district court's fee opinion—namely, that the district court properly exercised its discretion in awarding class attorneys' fees as a percentage of likely settlement benefits.

Defendant Progressive took no position on the fee request below and expressly takes no position on the fees before this Court. DB1; 2-ER-125.[1] HLLI *has* taken a position: that the district court correctly considered class benefits under the settlement as Rules 23(e)(2)(C) and 23(h) require. AB15-17. The district court properly declined to award requested fees of nearly $5 million when the underlying settlement provides at most $2.5 million to the class (less, after the *pro rata* deduction of attorneys' fees).[2] AB3.

[1] "ER," "OB," "DB," "AB," and "RB" refer to the excerpts of record, Appellants' opening brief, defendant Progressive Direct's brief, HLLI's proposed *amicus* brief, and Appellants' reply brief, respectively.

[2] The district court generously estimated $4.26 million as the maximum class benefit, but later proceedings suggest valid claims total only $2,544,218.65. 2-ER-24.

Worse, class counsel's position directly conflicts with the interests of their putative clients because of the settlement's "*pro rata* deduction" provision, which allows the defendant to withhold a portion of the fee award from every class claimant. AB10. By class counsel's own estimation, if this Court requires a nearly $5 million attorney fee award as they request, this will reduce class members' recovery by $514,998 collectively. OB27. While the defendant has an interest in a swift resolution, neither of the parties champion the interests of absent class members, who would see their recoveries slashed nearly 20% if class counsel prevails.

HLLI's expertise and history make it well-suited to advocate for the absent class. As a non-profit public interest law firm familiar with the facts of the appeal, HLLI is uniquely situated and experienced in providing such advocacy. As detailed below, HLLI has over a decade's experience and has won numerous appeals protecting the interests of absent class members, including key cases relied on by the district court such as *Bluetooth*, *Briseño*, and *Online DVD*. The First Circuit granted a motion for HLLI to participate as an *amicus* in oral argument in precisely this situation: where a plaintiffs' firm appealed a district court's fee award without party opposition. The First Circuit agreed with HLLI in that case, permitted *amicus* argument, and affirmed in what otherwise would have been an *ex parte* appeal, preserving millions of dollars for class recovery. *Ark. Teacher Ret. Sys. v. State Street Corp.*, 25 F.4th 55, 60, 67 (1st Cir. 2022).

The misrepresentations in class counsel's reply brief preview the problem with hearing a substantially uncontested oral argument. Because the defendant declined to push back on fee-related mischaracterizations, class counsel may be tempted to elide

the district court's actual rationale, as the reply brief does. HLLI's involvement would sharpen oral argument and ensure a fully adversarial argument.

HLLI seeks narrow relief: it does not seek additional briefing, or any change to the oral argument schedule.[3] HLLI merely requests that an opportunity to respond at any oral argument in support of its previously-filed *amicus* brief. HLLI requests its own allotment of time because its arguments stand apart from those of the parties.

I. No party represents the interests of absent class members in this appeal.

As class counsel explains in its reply brief, the defendant largely does not contest the appeal because it takes no positions on the underlying fee award. "Progressive does not contest the findings of the settlement's fairness, nor disagree with the four controlling legal principles summarized above." RB2. Among other supposed principles, the defendant "does not dispute" the district court questioning the precedential value of *Williams v. MGM-Pathe*. RB19. Progressive further "takes no position on appeal regarding the district court's award of attorney's fees." DB1.

In contrast, HLLI contends the settlement was unfair and should not have been approved (AB22-23), and that class counsel's purported "controlling legal principles" include a baseless, false, and corrosive proposition that an attorneys' fees must be awarded based on the size of an utterly fictional "virtual common fund." AB2, AB12-7. HLLI's amicus extensively discusses *Bluetooth* and *Briseño*—cases that the district court relied on—while distinguishing *Boeing* and *Williams*—cases that plaintiff contends

[3] Counsel for HLLI is available all of the Seattle sitting dates in June and the two subsequent months, so no accommodation for time is necessary.

require courts to ignore economic reality in favor of stipulations of "virtual" settlement value. The defendant's brief doesn't substantively discuss any of these four key authorities, only quoting *Bluetooth* only for the standard of review and mentioning *Boeing* as a case that plaintiff had cited below. DB15, DB27.

Courts sensibly rely on adversarial argument to assist them in reaching decisions. "[W]hen faced with a complete lack of adversariness" it is common practice for federal courts to "appoint[] an amicus to argue the unrepresented side." *Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 104 (1993) (Scalia, J., concurring) (listing Supreme Court cases). Because defendant does not defend the district court's fee award *per se*, this court should permit HLLI to do so. *Cf. Warren v. Comm'r*, 282 F.3d 1119, 1122 (9th Cir. 2002) (Reinhardt, J., concurring); *Zucker v. Westinghouse Elec.*, 374 F.3d 221, 224 & n.3 (3d Cir. 2004) (expressing appreciation for amicus who defended the district court's fee denial). *See also Massachusetts Food Ass'n v. Massachusetts Alcoholic Bevs. Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999) ("oral argument is at the court's discretion. But a court is usually delighted to hear additional arguments from able amici").

Argument is especially important here because courts recognize that "negotiated attorneys' fees in plaintiffs' class actions can be a potential source of abuse." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 n.8 (1st Cir. 1991) (granting participation of *amicus*). Nowhere is the conflict between class counsel and putative class members more direct than when counsel moves for attorneys' fees. As in this case, "the interests of class members and class counsel nearly always diverge" because counsel can recommend a settlement on "less-than-optimal basis in exchange for red-carpet treatment on fees." *In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1178 (9th Cir. 2013)

(quoting *Weinberger*, 925 F.2d at 524). *See also Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) ("acute conflict of interest") (Posner, J.). The conflict is especially difficult to scrutinize because in most class action settlements, as in this one, no objector appears to challenge class counsel's effectively *ex parte* representations in support of their fee award.

This conflict manifested prior to execution of the settlement, when class counsel negotiated a $5 million fee award for themselves with full knowledge that class members would receive only a fraction of this amount. 2-ER-44 (class counsel describing 20% claims rate as consistent with experience with similar settlements).

The conflict continues to manifest 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. By plaintiff's own estimation, class members would see their recovery reduced by $514,998 as their "*pro rata* reduction" toward attorneys' fees if appellant prevails. OB27.[4]

II. HLLI is experienced in advocating for unrepresented class members.

HLLI's CCAF was founded in 2009 as a non-profit to litigate *pro bono* on behalf of the protection of rights of absent class members against unfair class-action settlements and procedures. In its history, CCAF has won hundreds of millions of dollars for class members. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2016) (then $100 million).

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

HLLI seeks to defend the district court's decision because it appropriately awards attorneys' fees based on its best estimate of relief obtained. *See* AB10-AB19. Class counsel argues that the district court must credit a stipulation defining the size of a "virtual settlement fund" in setting attorneys' fees. RB4. The mechanical rule that plaintiff advocates will inevitably lead to lopsided settlements like the one here—deals that earmark disproportionate fees for attorneys while inexcusably requiring claimants to jump through hoops to obtain relief. Rule 23(e)(2)(C) requires courts to consider fees in view of "the effectiveness of any proposed method of distributing relief." Class members in future cases will be best served by counsel who know they will be compensated based on actual results, not meaningless stipulations.

CCAF attorneys have won numerous landmark decisions in support of the principle that 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 Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed and substantive"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013).

CCAF has a particularly strong record of appellate advocacy. It has won reversal or remand in over twenty federal appeals, which have help reshape the law governing class action settlements, ensuring class members secure real recovery with reasonable fees. Several of these appeals centered around excessive fee awards. *E.g., Briseño*; *Bluetooth*; *Redman*; *Pearson.*

CCAF has won national acclaim for its work. *E.g.,* The Editorial Board, *The Anthem Class-Action Con*, WALL ST. J., Feb. 11, 2018 (opining "[t]he U.S. could use more Ted Franks" while covering CCAF's role in exposing "legal looting" in data breach MDL); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013) (identifying Frank as "the leading critic of abusive class action settlements"); Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, FORTUNE, Dec. 15, 2015 (calling Frank "the nation's most relentless warrior against class-action fee abuse"). CCAF's senior attorney Theodore H. Frank is an experienced appellate litigator and an elected member of the American Law Institute, and he oversees attorneys who have ably argued many of its victories.

The First and Eighth Circuits have heard argument from CCAF as *amicus* to resolve the lack of adversary presentation. *E.g., State Street*, 25 F.4th at 60, 67 (affirming district court's fee award based in part on HLLI's argument); *Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017) (defending district court's imposition of sanctions for plaintiffs' forum shopping by dismissing complaints and refiling settlement in state court with less scrutiny). HLLI's oral argument in *State Street* helped the panel affirm an otherwise uncontested fee decision by a district court that found "CCAF's work was not only helpful to the court, it also contributed to a decision by the court that provided an additional almost $15,000,000 for the benefit of the class." *Ark. Teacher Ret. Sys. v. State Street Bank & Tr. Co.*, 513 F. Supp. 3d 202, 208 (D. Mass. 2021). 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's experience as a *pro bono* advocate and prior experience arguing as an *amicus* qualify it to adversarially test class counsel's live arguments.

III. Class counsel's mischaracterizations merit rebuttal.

Class counsel makes several gross mischaracterizations of CCAF's *amicus* brief, and these show that the Court would be assisted by a live advocacy. Any panel hearing this case would find adversarial argument especially useful here because it ensures all parties squarely address the central issues on appeal rather than distractions.

For example, class counsel falsely asserts that affirming the district court "confer[s] no benefit upon the consumers." RB17. This is false because class members are partially on the hook for fees due to the "*pro rata* reduction," a settlement feature class counsel does not mention in its reply, but admitted in its opening brief that reversal would cost the class $514,998 if appellant prevails. OB27.

As another example, class counsel claims that "HLLI does not contend … that the District Court failed to properly evaluate the parties' settlement" nor "findings concerning the settlement's fairness/reasonableness." RB24. In fact, HLLI argued plainly—in a heading no less!—that "[t]he 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. The district court granted final approval and 30 days elapsed without appeal, causing the settlement to become final. The sole issue before this Court is whether the district court abused its discretion in awarding attorneys' fees as a percentage of actual rather than "virtual" recovery.

Similarly, class counsel claims that HLLI contends "without authority" that the district court was right to question the precedential value of *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997). In fact, HLLI discussed several opinions that defy *Williams* by reversing approval of settlements involving fictional common funds like the one here. AP15 (*citing*, *e.g.*, *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"); *Vargas v. Lott*, 787 Fed. Appx. 372, 374-75 (9th Cir. 2019) (reversing decision that premised settlement valuation on hypothetical 100% claims rate).

After baselessly calling HLLI a "paid shill," class counsel cites a string of 25% fee awards for the supposed continuing vitality of *Williams*, but this misstates the record. RB19-20. As HLLI observed, the district court awarded a 26% attorneys' fee. AB19-20.

Class counsel purports to distinguish precedents as merely claims-made settlements unlike the settlement below because the parties didn't stipulate to valuation, but again this misstates the precedent. RB22. *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 826, 832 (7th Cir. 2018) (rejecting settling parties' "characterization of the settlement here as creating a common fund").

Plaintiffs misquote HLLI's argument as "vague platitudes about 'greedy lawyers'" (RB17), but HLLI's filings never use the word "greedy," much less the phrase "greedy lawyers." It should not matter whether attorneys are greedy or saintly. Rule 23 should be interpreted so that attorneys have an incentive to maximize class recovery, so that greedy lawyers act the same as saintly ones; courts achieve this by benchmarking attorneys' fees to actual class relief.

Class counsel's mischaracterizations merit rebuttal at oral argument, and argument will help the panel identify the core disagreements appellant has with the order below.

Conclusion

HLLI believes the Court can affirm without oral argument. But if the Court holds oral argument, it should grant additional time and permit HLLI counsel to argue. HLLI's participation will not delay proceedings and will not unfairly prejudice appellant, who has no right to enjoy a substantively *ex parte* appeal. Instead, HLLI's participation will make the panel's job easier by providing adversarial presentation; challenging otherwise unrebutted arguments; and safeguarding the interests of unrepresented 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.

Dated: March 24, 2023

Respectfully submitted,

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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 2,648 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 24, 2023

/s/Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on March 24, 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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