Theodore H. Frank (SBN 196332)
HAMILTON LINCOLN LAW INSTITUTE
1629 K Street NW, Suite 300
Washington, DC 20006
Voice: 703-203-3848
Email: ted.frank@hlli.org

M. Frank Bednarz (*pro hac vice* application to be filed shortly)
HAMILTON LINCOLN LAW INSTITUTE
1440 W. Taylor St. #1487
Chicago, IL 60607
Voice: (801) 706-2690
Email: frank.bednarz@hlli.org

Attorneys for Intervenors

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TERESA MACCLELLAND, et al.,
for Themselves, as Private Attorneys General, and on Behalf of All Others Similarly Situated,
Plaintiffs,

v.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS; and VERIZON COMMUNICATIONS INC.,
Defendants.

ALLISON HAYWARD, PETER HEINECKE, LAWRENCE PRINCE, and WILL YEATMAN,

Intervenors.

Case No. 3:21-cv-08592-EMC
Hon. Edward M. Chen, Courtroom 5 (17th Floor)

INTERVENORS' MOTION FOR AND MEMORANDUM IN SUPPORT OF EQUITABLE REDISTRIBUTION OF ATTORNEYS' FEES TO THE CLASS

DATE: May 9, 2024
TIME: 1:30 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

ARGUMENT

Class Counsel's opposition to Intervenors' Motion for Equitable Redistribution of Attorneys' Fees to the Class (Dkt. 90, the "Equitable Motion" or "Mot.") refutes straw man arguments that Intervenors never advanced, while steadfastly avoiding the authority that Intervenors rely on.

Intervenors contend that Class Counsel "'breached their fiduciary duty to the class' by 'agree[ing] to accept excessive fees and costs to the detriment of class plaintiffs'" and seek to redress this breach "by allocating to [the class] a portion of that award." Mot. 2 (quoting *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000)). Class Counsel never address this argument, but instead oddly proclaim that Intervenors "allege that the conduct of the plaintiffs and Class Counsel breach two fiduciary duties that do not actually exist," purported fiduciary duties not to settle claims in new proceedings or request 33.3% fee awards. Dkt. 99 (Pl. Opp. to Mot., "Opp.") at 1. But Intervenors do not mention "two fiduciary duties." The Equitable Motion arises from the singular duty that all fiduciaries owe their principals. Plaintiffs' attorneys undertake this duty when they file a putative class complaint on behalf of others, a "fiduciary duty to safeguard the interests of the absent and putative class members." Mot. 3. Class Counsel breached this duty by moving for excessive attorneys' fees after first maneuvering the settlement of putative class claims pending before this and other courts into a new action first filed in the Middlesex County Superior Court on November 10, 2023. This tactic (1) shielded the fee request from courts knowledgeable about the underlying litigation, including this Court, the site of Class Counsel's first-filed complaint and the only court to have permitted substantive discovery; and (2) sabotaged the class interests in having attorneys' fees set by a Court bound by a presumptive 25% benchmark for attorneys' fees, likely costing the class $8.3 million or more. The forum-shopping prioritized Class Counsel's interests in their own fees "to the detriment of the persons on whose behalf the lead lawyer is empowered to act." Mot. 5-6 (internal quotation omitted).

Contrary to Class Counsel, Intervenors do not argue that a settlement in state court necessarily imperils the interests of class members. This is why Class Counsel's breach was not apparent until January 31, when they first filed for attorneys' fees more than what equity and the case law of this Circuit allows. Mot. 1.[1] And

[1] It is thus ironic that Class Counsel argues that Intervenors should have known of the breach on November 15. Dkt. 98 at 16.

as discussed in Section III of this reply, plaintiffs' attorneys are sometimes equitably entitled to 33% fee awards for exceptional settlements—but not the *Esposito* megafund, which recovers less than a penny on the dollar of class member damages. Neither re-filing in state court nor a 33.3% fee request necessarily breaches attorneys' duty to those they represent. But the combination of the two actions without excuse—calculated to shield their outsized fee award from this Court's scrutiny—suggests a breach of the singular duty to act as faithful fiduciaries, which counsel undertook when filing the *MacClelland* complaint.

The Court should remedy the breach through disgorgement of some or all fees as a constructive trust on behalf of class members, to be distributed to the class through whatever means are feasible and prudent.

I. The facts underpinning Intervenor's complaint are undisputed.

Intervenor's motion (and accompanying complaint) is based on uncontroverted facts showing that Class Counsel breached their fiduciary duty to the class. They forum shopped a nationwide settlement into a new state court with a new complaint in November 2023, enabling a fee request that would be outsized in the first-filed complaint at the expense of the classes they committed to represent. Class Counsel cannot deny that they owe a fiduciary duty to class members (Mot. 4-6), so they instead argue against straw men.

Class Counsel cannot and does not dispute they owe a fiduciary duty to those they undertook to represent by filing putative class actions. They instead claim there is no fiduciary duty to "file or settle those claims in the 'first-filed' California court." Opp. 12. But that's not the duty Intervenors seek to vindicate. Class Counsel may not inequitably prioritize their own financial interests over the class. And that's what they did on January 31, alongside their efforts to prevent this Court from hearing the settlement, when they filed a fee request that asked for the application of New Jersey law instead of Ninth Circuit law. A settlement in state court does not *necessarily* prejudice class members, but Class Counsel's conduct here did.

A. Class Counsel undertook a fiduciary duty the moment they filed putative complaints on behalf of the classes.

Class Counsel cannot and do not challenge the black letter law that when attorneys seek to represent a class they owe putative class members a duty not to prejudice those claims for personal benefit. Mot. 3-4; *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011); *Jacobson v. Persolve, LLC*, 2014 WL 4090809 (N.D. Cal. Aug. 19, 2014) (Koh, J.) (duty exists "[e]ven in a putative class action").

Instead, devoting three pages, Class Counsel carefully argue against the existence of a fiduciary duty that specifically requires "settlement only in the 'first-filed' court." Opp. 12. Again, the problem is not filing their settlement in state court or even filing a wholly new complaint in state court *per se*—the breach occurred when Class Counsel chose "their own pockets over the class they purport to represent." Dkt. 89-1 (proposed complaint), ¶ 94. The breach of duty occurred because Class Counsel sacrificed class recovery for "red-carpet treatment on fees." Mot. 6 (citing *Briseño v. Henderson*, 998 F.3d 1014, 1027 (9th Cir. 2021)).

Plaintiffs' attorneys are only entitled to attorneys' fees at all owing to the equitable common fund doctrine. Mot. 8-9. Thus, inequitable conduct can forfeit an attorneys' entitlement to fees. *See, e.g.*, *Arkin v. Pressman*, 38 F.4th 1001 (11th Cir. 2022). *Arkin* affirmed denial of fees to the Wanca law firm. The Eleventh Circuit conceded it had provided "substantial and independent benefit to the class," but still forfeited its entitlement to attorneys' fees by prioritizing its own pecuniary interests though an attempted Illinois state-court settlement that would have secured handsome fees for attorneys to the detriment of the class. *Id.* at 1012.

Plaintiffs do not challenge the underlying equitable principles of *Arkin*. While *Arkin* affirmed denial of a fee motion, it turns on the principle that class attorneys act inequitably by forum-shopping for their own benefit at the expense of the class, and that courts should equitably remedy such breach of fiduciary duty. All common fund fees in fact derive from the equitable doctrines of *quantum meruit* and quasi-contract. *See Arkin*, 38 F.4th at 1012; *see also Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012). *Arkin* simply applied the ancient principle that "he who comes into equity must come with clean hands, and a party (or law firm) tainted with inequitableness or bad faith closes the doors of a court of equity with its misconduct." 38 F.4th at 1012 (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). Class Counsel does not even mention, let alone attempt to refute, Intervenors' discussion of the law of inequitable conduct or unclean hands. Mot. 10. These doctrines are universal, so Class Counsel exaggerate when they call *Arkin* an "out-of-circuit decision…has no application to the facts before this Court." Opp. 13. The Court should not refuse to reason from fundamental equitable principles simply because no intervenor has sought relief like this before. For example, *Pearson III* applied equitable first principles to apply precedent relating to a bankruptcy appeal to the context of class-action objectors' appeals. *Pearson v. Target Corp.*, 968 F.3d 827, 832-37 (7th Cir. 2020) (applying *Young v. Higbee Co.*, 324 U.S. 204 (1945)).

When Class Counsel argues (Opp. 14) that *Arkin* attorneys were worse than what they did because

those attorneys subordinated class interests "throughout" their purported representation, they make a distinction that is one of degree and not kind. Perhaps that means that the *Disner* remedy of zeroing out of fees is too extreme here. 688 F.3d at 658. If so, disgorgement in an amount equal to Cross-Defendants' unjust enrichment, likely an amount equal to or above about $8.3 million, would be a reasonable half measure in accord with this Court's sound exercise of its equitable discretion. But, just as the substantive *Arkin* breach was worse than the substantive one here, the technical *Disner* breach was considerably less severe.

B. Class Counsel cannot explain the newly filed *Esposito* action but **for judge shopping.**

The settling parties argue that the newly filed *Esposito* complaint does not represent forum-shopping, but they identify no credible alternative reason for filing a *new* complaint. Much less do they explain why they would do this without providing the required notice in any pending action until after the Middlesex County court granted their proposed preliminary approval order on December 15.

The parties point out there were two actions in the District of New Jersey and one in New Jersey state court rather than the single first-filed action before this Court. Dkt. 96 at 1; Opp. 1. But this observation does not explain why the settlement was not filed or even announced in *any* of these pending actions until after preliminary approval. If settlements should be filed in the venue with the most actions (instead of the first-filed and only venue to have allowed substantive discovery), this would favor the District of New Jersey. Even if settlement within the geographical boundaries of New Jersey were more convenient to Verizon and Class Counsel (rather than class members as *Arkin* insists), why not put it before Judge Quraishi, who presides over both of the D.N.J. actions, covering putative classes from 48 states? If *Achey* was the "center of gravity" for litigation, why not amend that complaint rather than multiply proceedings by filing a new case before a judge with no experience with the lawsuit? And if it were a question of physical convenience, this Court's Zoom hearings should prevail over travel from Seattle to New Brunswick, 90 minutes from JFK Airport.

Class Counsel proposes several answers, but none withstand scrutiny. They argue that neither this Court nor *Achey* could hear the settlement because "all parties wanted to stay the two appeals and retain their right to revive the appeals in the event the settlement agreement was not approved." Opp. 7. But as this Court knows, the rules easily accommodate requests to stay appeal for settlement. For example, *O'Connor v. Uber Techs., Inc*,. denied preliminary approval to a settlement where parties stayed defendants' interlocutory appeal

after briefing but before argument—the same posture as the *MacClelland* appeal. 201 F. Supp. 3d 1110, 1135 (N.D. Cal. 2016). Following denial, the appeal resumed, and the Ninth Circuit decided it. *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087 (9th Cir. 2018). And the Ninth Circuit appeal in this case is *currently* stayed

Plaintiffs implausibly argue that they could not file a settlement in the *Corsi* or *Allen* actions before Judge Quraishi because "dozens of named plaintiffs would have to be amended into either case and then, if the settlement was not approved, amended out of the cases and returned to their original cases." Opp. 7. Amended complaints upon settlement are bog-common. The effort to file an unopposed amended complaint in an open docket cannot be greater than the effort required for filing a wholly new complaint, enter new appearances, pay additional fees, and begin to track a fifth case docket.

Class Counsel concludes that "[t]he optimal way to proceed with the nationwide settlement was to file a clean, new, standalone civil action as a settlement vehicle," but even if this were so, it does not explain filing the suit in a new state court with no experience with the case. Much less does it explain filing a settlement resolving CAFA claims in two districts, while failing to provide notice under 28 U.S.C. § 1715, or failing to inform the court of *any* pending action of their new filing until after preliminary approval. It appears the parties wanted the settlement heard by a judge unfamiliar with any of the substantive litigation, and Class Counsel admits as much in recounting how the *Achey* trial judge granted Verizon's motion for arbitration. Opp. 17. By filing a new complaint, Class Counsel could have their fee motion heard by a different unacquainted judge.

1. The existence of other complaints does not explain the parties' filing a *new* complaint, much less why the new complaint would benefit the class rather than the settling attorneys.

Even if Class Counsel's excuses for filing a new action were internally consistent, they do not explain how this contrivance, combined with their 33.3% fee request, benefits *class members*. Any imagined convenience to attorneys does not preclude finding a breach of fiduciary duty. As the *Arkin* panel explained when confronting similar excuses: "let's assume for the sake of the argument that Wanca really did refile in Illinois only out of convenience, and that the Arkin Settlement's provisions providing for the refiling and the one-third attorneys' fees award (by happenstance, the apparent benchmark award under Illinois law) really were a happy coincidence. Even still, Wanca's stated reasons for the refiling establish that the refiling was undertaken

for the benefit of Wanca (and [defendant]), not for the benefit of the class." *Arkin*, 38 F.4th at 1011-12.[2]

The natural inference from Class Counsel's conduct is that they filed in a venue more favorable to a large fee award. They do not dispute that this Court would be unlikely to approve their fee request. *See* Section III, below. New Jersey state courts are simply less experienced in administering nationwide class action settlements than the Northern District of California, with less procedural guidance and less developed case law for protecting absent class members. Class Counsel says this assertion is "bordering on a conspiracy theory," because their previous fee requests were filed before three different state judges. Hardly: class counsel affirmatively argues to the *Esposito* court that it should disregard Ninth Circuit precedent. Decl. of Theodore H. Frank, Ex. THF-2 at 35. Intervenors do not suggest some sort of underhanded relationship with state judges, simply that New Jersey state courts—with less experience and no binding case law for scrutinizing fees—are more likely to approve stipulations put in front of them, including stipulations this Court would never assent to. Intervenors will not "apologize" for suggesting that New Jersey state courts provide "much less judicial oversight" than this Court (Opp. 17).[3] Congress agreed when they passed CAFA. *See* 28 U.S.C. § 1711, note § 2(a)(3), (4); S. Rep. 109-14 at 4, 14 (2005) (expressing concerns about lawyers who "'game' the procedural rules and keep nationwide or multistate class actions in state courts whose judges have reputations

[2] Class Counsel argues (Opp. 18) that Seventh Circuit law would have permitted the fee requested in state court in *Arkin*, and Wanca's only fault was not filing in federal court or transferring the case. This is false: like the Ninth Circuit, the Seventh Circuit does not permit Rule 23(e) approval of settlements where attorneys' fees dramatically outstrip actual class recovery in a claims-made settlement. *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) ("*Pearson I*"); *Briseño*, 998 F.3d 1014. An Illinois federal court faithfully applying that precedent would have rejected the proposed *Arkin* state-court settlement and awarded no fees.

[3] The quote "much less judicial oversight" comes from an HLLI webpage (Hattis Decl. (Dkt. 100) Ex. J). The full sentence reads: "The attorneys previously litigated their claims in the federal courts, but, on November 10, 2023, after settling the federal class actions, they filed a new complaint in state court because they know they can likely get a 33.3% fee award approved out of the $100 million settlement fund with much less judicial oversight." Class Counsel misrepresents the quote as follows: "Moreover, Proposed Intervenors are simply out of line in baselessly accusing these three New Jersey judges of engaging in 'much less judicial oversight' or of favoritism toward Class Counsel." Opp. 17. But Intervenors never suggested any sort of favoritism toward Class Counsel on their counsel's website or elsewhere, and certainly not by any or all the judges Class Counsel has practiced before. The likelihood of receiving "less judicial oversight" means just what it says. Stipulations filed in state court are less likely to receive the sort of review that the Ninth Circuit demands, if for no other reason that this Court's developed case law is not binding on New Jersey courts, as Class Counsel recently reminded the *Esposito* court. Frank Decl. Ex. THF-2 at 35.

for readily certifying classes and approving settlements without regard to class member interests"; and about "state court judges…unable to give class action cases and settlements the attention they need").

More importantly, it's borne out by the previous settlement approvals and fee awards in New Jersey. Both settlements identified by Intervenors as part of Class Counsel's pattern and practice of settling nationwide classes in New Jersey state court employed a "claims made" structure. Mot. 14. *Vasquez v. Altice USA, Inc.*, the case then pending before this Court settled with a reversionary "fund" capped at $15 million, which was not exhausted by the settlement. Bednarz Decl. (Dkt. 99), Ex. 18 at 1. Given that claims under the settlement would be paid between $10 and $27.50 (*id.*), this means that the 200,000 or so claimants to the *Vasquez* settlement likely received less than was awarded by Class Counsel's "33%" $4,999,500 fee request. The New Jersey court did not even inquire into actual class recovery in approving the settlement and fee award. Bednarz Decl. Ex. 19; *contra Lowery v. Rhapsody Int'l, Inc.*, 75 F.4th 985, 992 (9th Cir. 2023). The *Vasquez* settlement probably could not have won final approval, let alone such a generous fee award, from this Court. *See Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 U.S. Dist. LEXIS 117927, at *22 (N.D. Cal. Oct. 12, 2011) (denying final approval under *Bluetooth* where $4 million fee request with clear sailing exceeded class recovery); *accord Briseño*. The *Grillo* settlement was similar, providing an illusory "fund" of $11.5 million, and attracting only 100,000 claims. Bednarz Decl. Ex. 21 at 4. It is therefore intriguing that Class Counsel distinguishes *Arkin* in part because the inequitable Illinois settlement engineered by the *Arkin* attorneys had the identical reversionary structure they themselves have previously successfully forum-shopped to New Jersey state court. "The $21 million number was therefore never anything more than a legal fiction created to maximize Wanca's attorneys' fees." Opp. 14 (quoting *Arkin*, 38 F.4th at 1012). That is, the settlement was only for "claims made," and the number of claims ensured that attorneys' fee award would exceed likely class recovery—just like the rubber-stamped *Vasquez* settlement in New Jersey.[4]

The fee awards are not the only evidence of more lenient review. As discussed in Intervenor's motion, the *Esposito* settlement's opt-out procedures (not to mention subsequent litigation with would-be counsel for

[4] Of course, the *Vasquez* class is no longer before this Court. But Class Counsel's discussion of *Arkin* shows that they know that fees may motivate counsel to file an "illusory" claims-made nationwide settlement in state court to avoid federal scrutiny. It supports the inference that Class Counsel selected the venue for nationwide settlement precisely to avoid Ninth Circuit law as they already have at least twice before. If Class Counsel prevails, the repeat offenders will continue to repeat their offense, costing their future clients millions.

opt-our plaintiffs) reflect an effort to deter opt-outs, which this district frowns upon. *See Mot.* 10-11 (citing cases). Would-be opt-out counsel cited this case in opposing preliminary approval, but the New Jersey court did not even discuss it, allowing the opt-out burdens to stand without analysis. Bednarz Decl. Ex. 5 at 12. *Esposito* also granted preliminary approval to a settlement release that has no end date, so appears to waive all future claims over Verizon's administrative charges. Mot. 11. *Vasquez* attracted two thoughtful *pro se* objections flagging the fee award's size, one suggesting that cap on claims be removed or attorneys' fees award pegged to actual class recovery (as *Briseño* would require), but the New Jersey court simply rubber-stamped the proposed final approval order, which dealt with all objections in one line: "Any and all objections to the proposed Class Settlement have been considered and are hereby OVERRULED." Bednarz Decl. Ex. 19 at 2. That lack of a "reasoned response" to objections is also impermissible in this Circuit. *Dennis v. Kellogg Corp.*, 697 F.3d 858, 864 (9th Cir. 2012).[5]

While many judges are inclined to sign stipulations put in front of them, the Intervenors do not think it a close question whether this Court—situated in one of the most experienced districts for resolving class litigation, with nation-leading Guidance for Class Action Settlements—more thoroughly evaluates nationwide settlements to protect class members than the Middlesex County Superior Court does. To be clear, Intervenors do not contend that state judges are less intelligent or ethical, much less engage in "favoritism toward Class Counsel" (contra Opp. 17), but they certainly have less experience, and have less case law (and often less resources and clerk support) to draw upon, when confronted with national class actions. This is why Class Counsel continually elects to file settlements and fee awards before New Jersey state courts.

2. Class counsel's opposition inadvertently admits why they elected to file a wholly new complaint before a new judge.

The only portion of Class Counsel's opposition that partially explains their decision to file a wholly new complaint is when they argue against the notion of favoritism toward Class Counsel. (Again, Intervenors do not argue such favoritism exists.) "Any notion of a 'cozy relationship' is forcefully denied by the fact that, in *Achey*, the New Jersey trial judge granted Verizon's motion to compel arbitration, and Class Counsel had to

[5] New Jersey courts may be more cavalier in summarily overruling objections because *Devlin v. Scardelletti*, which accords federal objectors standing to appeal without first intervening, has not been adopted by New Jersey courts to date. 536 U.S. 1 (2002). *Cf. Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 409 P.3d 281 (2018) (rejecting *Devlin* and dismissing objector's appeal).

visit the Appellate Division to reverse his order." Opp. 17. Unlike the other rationalizations, this statement *does* provide a reason that Class Counsel might preferred to file a new complaint rather than amend the *Achey* complaint: to get assigned a different judge.

3. This Court would have jurisdiction to hear a nationwide class action.

Having comprehensively failed to properly characterize the breach of fiduciary duty alleged by Intervenors, Class Counsel alternatively asserts that settlement before this Court would be "impossible" because the "Court would lack specific personal jurisdiction over Verizon." Opp. 12. This curious argument neglects that a settlement is a *settlement*. By similar reasoning Intervenors could argue that settlement in New Jersey state court is "impossible" because defendants have the right of CAFA removal. Yet Class Counsel managed to lodge their fee request beyond the scrutiny of this or any other federal court. How? Because defendants can waive defenses for the purpose of settlement. This is what a settlement *is*.

If Class Counsel suggests that Verizon refused to settle anywhere but Middlesex County, New Jersey, they provide no evidence in support of this premise, and in fact disclaim knowledge about whether Verizon would have contested filing the settlement here. Opp. 13. Even if Verizon had refused to stipulate to a settlement before this Court, Class Counsel does not attempt to explain how this benefits class members given that it waives the protections of this Court provided by Rule 23 precedents, Guidance, and appellate rights. Given Class Counsel's fee request and briefing telling the *Esposito* court not to follow Ninth Circuit precedent, it does not—it likely cost the class at least $8.3 million.

C. Class Counsel does not deny the Court has equitable and inherent authority.

Class Counsel not dispute or even mention Intervenors' argument that this Court has inherent and equitable authority to grant Intervenors' request for disgorgement. Mot. 15. An abuse of this Court's processes—such as collusive forum-shopping to enrich counsel at the expense of the class—enables the Court to craft an equitable remedy. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). It should do so here: Disgorgement is a well-established cure to an attorney's breach of fiduciary duty, *Estakhrian v. Obenstine*, 2019 U.S. Dist. LEXIS 50828 (C.D. Cal. 2019), and the greed of counsel justifies a robust sanction to prevent the same misjudgment again. *Rodriguez v. Disner*, 688 F.3d 645, 688 (9th Cir. 2012). The existence of this authority favors intervention and is consistent with both public policy and the Class Action Fairness Act. *See* Mot. 16; *cf.*

Standard Fire Ins. Co. v. Knowles, 568 U.S. 588 (2013).

D. Class Counsel challenges Intervenor's equitable argument only by misrepresenting it.

Class Counsel complains that Intervenors "take issue with" elements of the settlement that disfavor the class, and falsely accuse Intervenors of seeking to relitigate *Esposito*. Opp. 8. But Intervenors do not seek to upset the *Esposito* settlement's finality. The unfavorable terms of the agreement are considerations that this Court would account for in setting a fee award under Ninth Circuit law. They are terms that militate against Class Counsel's fee request, had they acted as a faithful fiduciary to the *MacClelland* class and filed it in this Court. They are relevant not because Intervenors oppose the settlement, but because they show Class Counsel's motive for filing in state court away from more exacting scrutiny.

Notably, Class Counsel does not dispute or defend a single one of these features. They do not dispute that the "wet ink" opt-out requirement, apparently intended to undercut efforts by an independent attorney, has been rejected by another court in this district. Mot. 10-11. Class Counsel cannot deny that the settlement recovers less than 1% of pleaded damages. Mot. 11. They do not deny the terms of release purport to bar all future claims over Verizon's administrative charges. Mot. 11-12. Nor that the meaningless revisions in the middle of Verizon's 5700-word customer agreement cannot reasonably count as "significant injunctive relief" despite their representation as such to the *Esposito* court. Mot. 12. These features suggest that an equitable fee award would be less than this Circuit's 25% benchmark, and thus that unjust enrichment exceeds $8.3 million if the *Esposito* fee request is granted in full.

II. Litigation privilege does not extend to breach of fiduciary duty.

Class Counsel contradicts Ninth Circuit precedent when they claim their conduct is protected by statutory "litigation privilege," which they argue bars any action "based upon Class Counsel's statements in court or their pre-filing non-communicative activity." Opp. 9. Litigation privilege, as interpreted by Class Counsel, would bar claims of attorney malpractice. Fortunately, Class Counsel is wrong.

"California courts of appeal have concluded that the litigation privilege does not protect an attorney from a suit by a former client because if it did, 'no malpractice suit could be brought.'" *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 600 (9th Cir. 2010) (citing *Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal. App. 4th 1532 (2006) and *Mattco Forge, Inc. v. Arthur Young & Co.*, 5 Cal. App. 4th 392, 407 (1992)); *see also Buchanan v.*

Leonard, 52 A.3d 1064, 1070 (N.J. Super. Ct. App. Div. 2012) (reversing and remanding erroneous application of litigation privilege under California law to bar claims against a plaintiffs' attorney).

This privilege exists to "promote[] the effectiveness of judicial proceedings by encouraging attorneys to zealously protect their clients' interests." *Silberg v. Anderson*, 50 Cal. 3d 205, 214 (Cal. 1990). Courts apply "the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings." *Id.* But while the privilege "is called 'absolute,'" the rationale for it unravels when the cause of action is against a parties' own representatives. *Mattco Forge, Inc*, 5 Cal. App. 4th at 407.

The privilege thus does not shield attorneys from malpractice or breaches of fiduciary duty.[6] No cases hold that "the litigation privilege bars malpractice actions based on an attorney's litigation-related acts or omissions." *Kolar*, 145 Cal. App. 4th at 1538-39. This is because such an immunity would likewise disserve the purpose of litigation privilege: encouraging zealous advocacy. *Id.* at 1538. Not one of Class Counsel's citations found that litigation privilege shields fiduciaries against claims by those wronged.

The litigation privilege argument is especially unsuited to bar claims on behalf of absent class members such as the *MacClelland* class of Verizon customers given the court's "special duty to protect the interests of the class … with a jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is." *Estakhrian v. Obenstine*, 233 F. Supp. 3d 824, 843 (C.D. Cal. 2017) (quoting *Disner*). *Estakhrian* is on point: there plaintiffs sued attorneys who filed suit and quickly moved for settlement approval in Nevada state court, which was allegedly tainted with undisclosed kickbacks and unfavorable terms. Plaintiffs pleaded "professional malpractice, breach of fiduciary duty, and fraud." *Estakhrian*, 233 F. Supp. 3d at 828. The *Estakhrian* defendants asserted litigation privilege as an affirmative defense, which the court found unpersuasive for the reasons above. *Id.* at 840. One of the *Estakhrian* defendants—who was retained by hundreds of class members for the Nevada litigation—also argued that damages could not be established by class members who did not retain him, but the court found that this did not matter for assessing an equitable remedy, "i.e., plaintiffs may seek an order divesting Obenstine of the fees he obtained and restoring the fees

[6] New Jersey's litigation privilege likewise "does not protect an attorney from a claim" "where . . . it is alleged that the attorney breached his duty to the client by failing to adhere to accepted standards of legal practice." *Buchanan*, 52 A.3d at 1069; *see also Begelman & Orlow, P.C. v. Ferara*, 2016 U.S. Dist. LEXIS 169788, *31 (D.N.J. 2016); *cf. Hawkins v. Harris*, 141 N.J. 207, 215 (1995) (professional discipline).

to the class members for whose benefit they were paid." *Id.* at 842 (citing California cases).

Even if all these courts were mistaken in interpreting the privilege, it would not apply here because Intervenors challenge the breach of fiduciary duty itself, which is conduct, rather than speech. Summarizing a prior decision, *Kolar* explained it this way: the "claim is not based on filing a petition for arbitration on behalf of one client against another, but rather, for failing to maintain loyalty to, and the confidences of, a client." 145 Cal. App. 4th at 1538-39 (cleaned up). Intervenors do not seek disgorgement based on the particularities of any *Esposito* filing, but their entire conduct in applying for fees in such a way to financially harm class members. The filings are merely evidence of how Class Counsel put their own interests above the class.[7]

Because the litigation privilege does not apply to a breach of fiduciary duty—under either California or New Jersey law—and independently because Intervenors challenge Class Counsel's conduct, not their speech, litigation privilege does not apply.

III. Class counsel forfeits arguments for any fee award above the 25% benchmark.

Once again, Class Counsel mischaracterizes Intervenors' argument that the January 31 fee request exceeds "the 'benchmark' 25% fee award typical in this Circuit." Mot. 11. Yes, courts sometimes vary from the benchmark based on the size of the proposed settlement, value of class relief, number of hours worked, risk taken, stage of the proceedings, and so forth. It's not that exceeding 25% is *never* appropriate; Intervenors favorably cite for comparison this court's decision granting a 27% fee award where plaintiffs recovered over half of the value claims for the class. *Id.* at 13 (citing case). Intervenors' argument is that this Court would not award more than 25%—and likely less—given the dismal relief less than 1% of claimed damages, the dubious lodestar consisting mostly of client acquisition and arbitration, and astonishingly unfavorable settlement terms including waiving all future claims based on Verizon's administrative charges. *Id.* at 11-14.

A. Class Counsel fails to show their entitlement to an above-benchmark fee award under Ninth Circuit law.

Class Counsel cannot deny that courts in this Circuit—unlike New Jersey—consider 25% a benchmark

[7] Moreover, the privileged communications in Class Counsel's cited cases (Opp. 9-10) arose during adversarial and contested moments, either during trial or in anticipation of it. But here, the relevant acts are the settling parties' *unopposed* filings. The privilege's rationale of promotion of zealous representation does not apply to a joint class action settlement.

for reasonable attorneys' fees. *Bluetooth*, 654 F.3d at 942. They are more candid on this point in their filings with the *Esposito* court, where they urge the judge to discount objectors' citations to Ninth Circuit authority because "California law is not controlling here." Frank Decl. Ex. THF-2 at 35.

Instead, Class Counsel cite a grab-bag of fee awards in mostly small or truly exceptional settlements as proof that fees above 25% are sometimes awarded—which Intervenors never deny. But these citations highlight how a $100 million common fund with less than 1% recovery, questionable lodestar, and overbroad release is *not* one where this Court would grant the $33.3 million fee motion filed in *Esposito*. For example, Class Counsel's first-cited case is *In re Lidoderm Antitrust Litig.*, where it appears Judge Orrick granted a proposed order calculating the award as on the basis of lodestar—a 1.37 multiplier—in a case in which the "End-Payor Class will recover 46% of the highest single damages estimate EPPs were prepared to seek at trial." No. 14-md-02521-WHO, 2018 WL 4620695, 2018 U.S. Dist. LEXIS 162425, at *34 (N.D. Cal. Sep. 20, 2018). Attorneys' significant lodestar in *Lidoderm* was credible given nearly five years of active litigation, including expert discovery that resulted in successful class certification for the plaintiffs. *In re Lidoderm Antitrust Litig.*, 2017 WL 679367, 2017 U.S. Dist. LEXIS 24097 (N.D. Cal. Feb. 21, 2017). Judge Orrick considered all of these factors—the risk plaintiffs bore by litigating class certification, the time spent on discovery in a complex antitrust MDL, and the excellent 46% recovery before consciously assenting to an award above the Ninth Circuit's 25% benchmark. 2018 U.S. Dist. LEXIS 162425, at *36-37. None of these things are true here.

Similarly stellar results occurred in *In re TFT-LCD [Indirect Purchaser] Antitrust Litig.*, where the court granted a 28.6% fee award after six years of litigation because plaintiffs achieved "approximately 50% of the potential recovery" and had won certification. Nos. 07-md-1827 SI, 2013 WL 1365900, 1827, 2013 U.S. Dist. LEXIS 49885, at *69 (N.D. Cal. Apr. 3, 2013). The 33% fee award in *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995), reflected the complexity of the issues and risks of the derivative suit there. The attorneys there achieved significant nonmonetary benefits for the class including resumption of dividend payments, which the court noted were not reflected in the $12 million settlement fund. *Id.* The 33% fee award for an $8 million settlement in *McMorrow v. Mondelez Int'l, Inc.*, was justified by the all-cash settlement fund and strong claims rate. No. 17-CV-02327-BAS-JLB, 2022 WL 1056098, *8, *11-*12 (S.D. Cal. Apr. 8, 2022).

In reviewing the smaller settlements plaintiffs cite, one should keep in mind the economics of litigating such cases as the final settlement relates to the underlying harm. Smaller harms will beget smaller settlements

for a given class size. But the actual work—the lodestar—for a given settlement may not actually differ depending on the size of the individual monetary claims at stake. For that reason, fee requests in smaller settlements often reflect fractional (sometimes mislabeled "negative") multipliers, so above benchmark fee awards occur more often to compensate for class counsel's effort and results. *See Thieriot v. Celtic Ins.,* No. C 10-04462 LB, 2011 U.S. Dist. LEXIS 44852, *17 (N.D. Cal. 2011) (noting "common practice to award attorneys' fees at a higher percentage than the 25% benchmark in cases that involve a relatively small—i.e., under $10 million—settlement fund"). Several cases Class Counsel cite have fractional lodestar multipliers.[8]

The remaining citations are fee awards in settlements of less than $3 million in wage and hour cases brought under California's Private Attorney General Act ("PAGA").[9] These percentages simply mirror awards for settlements entitled to PAGA fees in California courts, which "usually award attorneys' fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under $10 million." *Cicero v. DirecTV, Inc.*, No. EDCV 07-1182, 2010 U.S. Dist. LEXIS 86920, *17-*18 (C.D. Cal. 2010).

For all the cases Class Counsel stuffed in their fee motion, *none* support their excessive fee request. To recount, the $100 million settlement amounted to a nuisance payment of 1% of the damages estimate, Class Counsel's lodestar in support of their fee request appears bloated and unreliable, and the settlement's

[8] *Smith v. Keurig Green Mountain, Inc.*, No. 18-CV-06690-HSG, 2023 WL 2250264, 2023 U.S. Dist. LEXIS 32327 (N.D. Cal. Feb. 27, 2023) (33% fee award of $3 million represented a large discount on the 6,000 reasonable hours spent prosecuting the case); *Testone v. Barlean's Organic Oils, LLC*, No. 319CV00169RBMBGS, 2023 WL 2375246, *7 (S.D. Cal. Mar. 6, 2023) (33% fee award of $537,500 represented a 45% discount on lodestar); *Foster v. Adams & Assocs., Inc.*, No. 18-CV-02723-JSC, 2022 WL 425559, *9 (N.D. Cal. Feb. 11, 2022) (over $2 million lodestar for case settled on eve of trial justified 33% $1 million fee award); *Clayborne v. Newtron, LLC*, No. 19-CV-07624-JSW, 2023 WL 5748773, *6 (N.D. Cal. Sept. 6, 2023) (35% fee award of $673,750 represented only 39% of the total lodestar amount).

[9] *Thompson v. NSC Techs., LLC*, No. 3:20-CV-00371-JO-MSB, 2023 WL 2756980, *6 (S.D. Cal. Mar. 30, 2023) (33.3% of $2.75 million settlement); *Bell v. Redfin Corp.*, No. 20-CV-02264-AJB-SBC, 2023 WL 8241534, *4 (S.D. Cal. Nov. 28, 2023) (33.3% of $1 million settlement); *Vallejo v. Sterigenics U.S., LLC*, No. 20-CV-01788-AJB-AHG, 2023 WL 8439560, *6 (S.D. Cal. Dec. 5, 2023) (30% of around $1 million settlement).

Each of these decisions also appear to be lawyer-authored boilerplate rather than reasoned judicial decision making. The *Thompson* fee order simply has "[proposed]" struck from the caption. "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 plaintiffs' attorneys." *Sakiko Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014).

overbroad release unnecessarily bargains away class members' prospective rights of action for essentially nothing. Class Counsel does not even try to argue *Esposito* possesses any characteristics that would support an above-benchmark award in this Circuit.

B. Class Counsel does not dispute that the Court scrutinizes similar fee requests and grants *less* than the 25% benchmark, suggesting that unjust enrichment exceeds $8.3 million.

Class Counsel also fails to respond to Intervenors arguments that the *Esposito* settlement would more likely deserve a fee award *below* benchmark. Mot. 9-13. Intervenor's motion cited, among other cases, a decision of this Court reducing a fee request to below benchmark levels based on factors present here like a meagre recovery in light of estimated damages and inflated and inadequately explained lodestar. Mot. 13 (citing *Viceral v. Mistras Grp., Inc.*, 2017 WL 661352, 2017 U.S. Dist. LEXIS 23220, at *11-*14 (N.D. Cal. Feb. 17, 2017)). Yet Class Counsel provides no response. Intervenor and the Court can only assume their failure to do so implies their inability to do so.

IV. *Pearson III* requires equitable redistribution of the unjust enrichment as a constructive trust.

Finally, Class Counsel objects that Intervenors' "requests for remedy are a mess" and do not "provide Plaintiffs and Class Counsel with meaningful notice as to what exactly Proposed Intervenors want the Court to do." Opp. 21. To be clear, Intervenors propose only one remedy: following *Pearson III*, 968 F.3d 827m the reallocation of unjust enrichment into a constructive trust for the benefit of class members. The various possibilities for how this trust should be administered will depend on timing and practical realities currently unknown. The *Pearson III* court itself discussed several of the possibilities before settling on the *cy pres* distribution recommended by the settlement agreement in that case. As Intervenors explained, the best distribution would be direct payments to class member claimants through the *Esposito* settlement administrator, but should this prove infeasible other options exist. Mot. 21-22.

CONCLUSION

Intervenors request that this Court grant their Motion and order the redistribution of any attorneys' fees obtaining by Class Counsel that constitutes unjust enrichment as a constructive trust. The Court has the discretion to order disgorgement of all fees.

Dated: March 15, 2024

Respectfully submitted,

/s/ Theodore H. Frank
Theodore H. Frank (SBN 196332)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Voice: 703-203-3848
Email: ted.frank@hlli.org

M. Frank Bednarz (*pro hac vice* application to be filed shortly)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1440 W. Taylor St. #1487
Chicago, IL 60607
Voice: 801-706-2690
Email: frank.bednarz@hlli.org

Attorneys for Intervenors

PROOF OF SERVICE

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

DATED this 15th of March, 2024.

/s/ Theodore H. Frank
Theodore H. Frank