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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, for themselves and on behalf of all others similarly situated,
Intervenors/Cross-Plaintiffs,
v.

HATTIS LAW PLLC D/B/A HATTIS & LUKACS, *et al.*,
Cross-Defendants.

Case No. 3:21-cv-08592-EMC
Hon. Edward M. Chen, Courtroom 5

INTERVENORS' MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT

DATE: April 4, 2024
TIME: 1:30 p.m.

**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on April 4, 2024 at 1:30 p.m., or as soon after as counsel may be heard, intervenors Allison Hayward, Peter Heinecke, Lawrence Prince, and Will Yeatman ("Intervenors"), by and through their attorneys and under Rule 24 of the Federal Rules of Civil Procedure, respectfully move to intervene in the above captioned proceeding as a matter of right, or, in the alternative, by permission of the Court.

This motion is supported by the following memorandum of points and authorities, the Declaration of M. Frank Bednarz ("Bednarz Decl.") and its exhibits, the pleadings and records on file herein, on such other and further argument and evidence as may be presented at the time of the hearing, and all matters of which this Court may take judicial notice.

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## INTRODUCTION

The American legal system entrusts and empowers class attorneys to vindicate class rights for systemic wrongs, so it is a betrayal and breach when class attorneys exploit that authority and trust to enrich themselves at the expense of absent class members who had no say over the attorneys' appointment.

That happened here: After winning the right to bring their clients' claims in this Court rather than arbitrate, *MacClelland* class counsel refiled their suit as a nationwide class action in New Jersey state court on November 10, 2023, without complying with N.D. Cal. LOC. R. 3-13 and promptly informing this Court. New Jersey state courts lack this district's caselaw and Procedural Guidance designed to prevent excessive attorneys' fees. The award *MacClelland* class counsel now seeks is 33.3% of a $100 million-dollar settlement, an unsupportable award in this Circuit. *E.g., Lowery v. Rhapsody Int'l, Inc.*, 69 F.4th 994, 1002 (9th Cir. 2023). That money comes directly from the common fund reserved for the class.

A law firm settling a federal class action in state court to increase attorneys' fees at the expense of the class's recovery improperly "subordinates the interests of the class to its own interests." *Arkin v. Pressman, Inc.*, 38 F.4th 1001, 1011 (11th Cir. 2022) (finding unclean hands and inequitable conduct). Intervenors are concerned class members—including original putative class members in this litigation—who believe such an award coming from the breach of fiduciary duty to the class is inequitable and want this Court, pursuant to its equitable and case management authority, to equitably reallocate counsel's unjust enrichment. Class counsel availed themselves of this Court's jurisdiction by filing their first action here and obtaining the discovery they claim to be instrumental to reaching the settlement. Any fee award in excess of what class counsel would have won had they presented their settlement in this Court should be equitably reallocated for the benefit of the class. The Intervenors move for intervention as a matter of right and for permissive intervention, and they satisfy both legal standards.

The Intervenors satisfy all four elements for intervention as of right. They have an interest in this case as class members whose legal rights are putatively impacted by the settlement of this litigation, and they also have a pecuniary interest in the fee award because it comes straight from the common fund of the settlement. These interests are at risk without intervention because the parties colluded to hide this fee award from this Court and to evade federal scrutiny. Intervenors seek a fair redistribution of any excess attorneys' fees awarded in view of the Ninth Circuit law that this class action was brought. The traditional means of contesting excess

attorneys' fees—like objection and independent court scrutiny—are inadequate when the parties agree to judge-shop a new action in a different forum with procedural rules and precedent more favorable to a fee award excessive under the forum law that made the settlement possible. Of course, class counsel cannot adequately represent Intervenors, who seek equitable reduction in class counsel's attorneys' fees, because class counsel directly opposes their position; and the defendant has no interest in the distribution of the common fund between class counsel and the class and is party to the decision to evade federal scrutiny that Intervenors complain of. Finally, the Intervenors' Motion is timely because they file it weeks after class counsel filed their New Jersey state court fee motion on January 31, the earliest time Intervenors could have been aware that class counsel would subvert their interest in a Ninth Circuit-conforming fee award. The parties also suffer no unfair prejudice from intervention.

Separately, the Intervenors meet the standard for permissive intervention. The intervenors bring, in the alternative, a cross-complaint related to this case that would ultimately be consolidated with this action if filed independently. N.D. Cal. Loc. R. 3-12(a)(1). This Court has independent jurisdiction over that case under the Class Action Fairness Act. As with intervention as of right, this motion does not unfairly prejudice the parties given Intervenors' narrow focus on enforcing rights under the Class Action Fairness Act, and Intervenors' timing in filing is explainable and not unreasonable under the circumstances. Finally, Intervenors share "common questions of law and fact" with the parties: they rely on the same nucleus of facts (albeit with a dissimilar legal claim based on Class Counsel's entitlement to attorneys' fees); they are entitled as class members to the same claims as Named Plaintiffs; and they seek resolution of a legal issue—breach of fiduciary duty and attorneys' fees. The Motion to Intervene should be granted.

## ARGUMENT

Class counsel in this case has moved for attorneys' fees of 33.3% of the gross common fund in a proposed nationwide class settlement of this action that would terminate 58 million class members' claims in a new action filed in Middlesex County Court, New Jersey, on November 10, 2023. *Esposito v. Cellco P'ship*, MID-L-6360-23 (Middlesex Cnty. Sup. Ct. of N.J.) ("*Esposito*").

However, the Plaintiffs—most of whom are also named plaintiffs in *Esposito*—began their suit two years earlier in this Court, which delivered a diligent and significant procedural victory. The Court denied Verizon's motion to compel arbitration, detailing a batch of unconscionable provisions. Dkt. 53; *MacClelland*

*v. Cellco P'ship*, 609 F. Supp. 3d 1024 (N.D. Cal. 2022). Among other things, the arbitration agreement purports to bar class resolution and required similar claims to be batched and heard only ten at a time. *Id.* at 1040. Verizon argued that questions on unconscionability could only be resolved by an arbitrator (*id.* at 1030) and that the Court should only consider the twenty-seven Plaintiffs before it rather than thousands of putative class members represented by class counsel. *Id.* at 1040. The Court rejected both arguments. "[C]ourts may consider the chilling effect of an arbitration clause on individuals to whom it would apply but are not currently plaintiffs." *Id.* at 1041. Reading the provisions together, it would take thousands of customers decades to have their arbitration cases heard, and with no opt-out safety valve. *Id.* at 1043. "Delaying the ability of one to vindicate a legal claim by years, possibly *156 years*, conflict[s] with one of the basic principles of our legal system—justice delayed is justice denied." *Id.* at 1042 (internal quotation and citation deleted).

Commentators immediately recognized the importance of this Court's decision. *E.g.*, Alison Frankel, *Verizon appeal will be early test of corporate strategy to combat mass arbitration*, REUTERS (Nov. 22, 2022).[1] Several organizations filed *amicus* briefs on both sides in the appeal. Meanwhile, denying Verizon's motion to stay, the Court ordered that targeted discovery could proceed during pendency of the appeal. Dkt. 74 at 3. Days before the November 14, 2023 oral argument, on November 9, the parties filed a joint motion to hold the appeal in abeyance due to settlement. On November 10, class counsel filed a new complaint for a putative nationwide class in Middlesex County, New Jersey. Declaration of M. Frank Bednarz ("Bednarz Decl.") ¶ 5 & Ex. 2 (*Esposito* complaint). The new complaint lists Cellco Partnership d/b/a Verizon Wireless as defendant, one of the two defendants in *McClelland*, describes the same alleged misconduct, and the vast majority of the 27 Plaintiffs in this case are also named plaintiffs in the New Jersey complaint. *Id.* ¶ 5. While N.D. Cal. Loc. R. 3-13 requires parties to "promptly" inform the Court when class actions "involve overlapping claims," none of the parties informed the Court for 42 days—waiting until the New Jersey state court issued a preliminary approval order purporting to enjoin class members from litigating actions against Verizon.[2] Courts in this

[1] *Available online at*: https://www.reuters.com/legal/government/verizon-appeal-will-be-early-test-corporate-strategy-combat-mass-arbitration-2022-11-22/, *archived at* https://archive.ph/ap9hR.

[2] The parties did previously disclose to this Court additional actions filed by class counsel: a putative class of New Jersey consumers (*Achey v. Cellco P'ship*, MID-L-000160-22 (Middlesex Cnty. Sup. Ct. of N.J. January 11, 2022)), an action claiming putative classes for consumers in all states *except* for California and New Jersey (*Corsi v. Cellco P'ship*, No. 22-cv-4621 (D.N.J. July 18, 2022)), and finally an action claiming a putative

district have looked askance at such tactics. *See Frontera Res. Corp. v. Hope*, No. 19-cv-01996-RS, 2019 WL 2410513, 2019 U.S. Dist. LEXIS 96360, at *8 (N.D. Cal. Jun. 7, 2019) (finding "unclean hands" militated against party who failed to disclose Cayman Island action); *Doe v. GoodRx Holdings, Inc.*, No. 23-cv-501-AMO Dkt. 152 (N.D. Cal. Nov. 2, 2023) (issuing order to show cause for failing to comply with N.D. Cal. Civ. Loc. R. 3-13 and notify court of Florida action where nationwide settlement negotiated) (attached as Bednarz Decl. Ex. 22). In combination with a settlement provision barring the settling parties from press releases or press communication about the settlement (Bednarz Decl. Ex. 1 at 38), it seems the parties wished their settlement to be secret from the world and this Court until the New Jersey court acted.

The parties finally apprised the Court on December 22 (Dkt. 84) after their avoidance of federal scrutiny appeared *fait acompli*. The New Jersey court signed the parties' proposed preliminary approval order, which bars all Class Members from pursuing actions against Verizon related to the administrative charge. Bednarz Decl. Ex. 4 at 11. Courts in this district would be unlikely to issue such a preliminary approval order. In *Arena v. Intuit Inc.*, Judge Breyer denied preliminary approval to a proposed settlement that similarly frustrated opt-out of thousands of class members with pending arbitration cases by requiring "wet signatures," burdens that "appear[ed] designed to suppress opt outs." No. 19-cv-02546-CRB, 2021 WL 834253, 2021 U.S. Dist. LEXIS 41994, at *38 (N.D. Cal. Mar. 5, 2021). As in *Esposito*, the *Arena* settlement further purported to enjoin all pending arbitrations which "would be an extraordinary measure best reserved for extraordinary circumstances." *Id.* at *39.[3] These questionable features exist in the New Jersey settlement, but the judge did

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nationwide class (excluding California, New Jersey, Florida, Hawaii, New York, New Mexico, Oregon, and Washington and individuals as part of class counsel's Multiple Case arbitration), along with subclasses of consumers in 15 other states (*Allen v. Cellco P'ship*, 3:23-cv-01138 (February 27, 2023)).

The parties did *not* disclose declaratory judgment actions brought by Verizon against consumers who were attempting to arbitrate class claims. While Verizon represented to this Court that only arbitrators should be permitted to weigh in on the unconscionability of the provisions of its arbitration agreement, after a process arbitrator found in February 2023 that the batching process was indeed unconscionable (Bednarz Decl. ¶ 20 & Ex. 13), Verizon filed actions in federal courts to prevent consumers represented by an independent attorney from asserting class claims in arbitration. *See Cellco P'ship v. Holschen*, No. 4-23-cv-00823 (E.D. Mo. June 26, 2023); *Cellco P'ship v. Lasher*, No. 8:23-cv-1242 (M.D. Fla. June 2, 2023). Bednarz Decl. Exhs. 16-17.

[3] Intervenors do not violate the purported injunction by the *Esposito* court because they seek equitable recovery from class counsel's unjust enrichment—not claims against Verizon directly or indirectly. In any event, the purported pre-notice injunction falls far short of the due process necessary to bind 58 million

not remark on them even though an independent attorney representing thousands of clients seeking arbitration against Verizon flagged these issues. Bednarz Decl. ¶ 7. The New Jersey judge merely wrote a few lines at the bottom of the otherwise-unaltered proposed order that "[c]ounsel may seek to intervene and otherwise object in accordance with the terms of this Order." Bednarz Decl. Ex. 4 at 12.

While Verizon might have preferred filing in state court in order to steamroll potential opt-outs, class counsel made clear in their January 31 Fee Motion that they did so in order to benefit themselves at the expense of their clients, in breach of their fiduciary duty to the class. As set forth in Intervenors proposed complaint and their contemporaneously-filed Motion to Equitably Reallocate Excess Fees, class counsel's 33.3% fee request exceeds what this Court could or would award under controlling precedents. The award exceeds this Circuit's 25% benchmark without cause, especially when normal awards would deviate *downward* from the benchmark in the context of a $100 million megafund settlement. *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 933 (9th Cir. 2020) (directing that courts "must refer" to "fund size" "in determining the fee award."). In fact, given the dismal recovery, representing less than 1% of $15 billion in claimed damages and about $1 per class member, a downward departure is doubly warranted. Class counsel's pending fee motion falls far short of this district's Procedural Guidance for Class Action Settlements, and prevents Intervenors from accurately assessing a fair fee award. That said, the available details raise eyebrows: The fee request lists only 14 timekeepers who worked on the case, but claims almost 31,000 hours in work over this roughly two year litigation—including five partners who billed more than 3,200 hours apiece. Bednarz Decl. Ex. 6 at 20-21. The nonmonetary terms of the settlement further militate against class counsel's outsized fee. The settlement blesses Verizon's conduct, and in fact provides them with a "covenant" preventing class members from raising

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Americans, the vast majority of which are situated like the intervenors: outside the jurisdiction of the New Jersey state court. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (due process requires that absent class members "must receive notice plus an opportunity to be heard and participate in the litigation" prior to time a state court can exercise jurisdiction over out-of-state class members); *see also Epstein v. MCA, Inc.*, 179 F.3d 641, 645 (9th Cir. 1999) (federal courts cannot accord full faith and credit to constitutionally infirm state court judgments). In this case, originally filed in this Court, the parties must further comply with 28 U.S.C. §§ 1715(b) & (d) or else a "class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action." 28 U.S.C. § 1715(e)(1). The parties failed to provide such notice (Bednarz Decl. ¶ 13) and for this independent reason Intervenors decline to bind themselves to the purported decrees issued to non-parties by the New Jersey court.

future claims over administrative fees in arbitration or *any* venue.[4] Additionally, although the New Jersey settlement intends to resolve the putative class actions filed first in this district, the Parties did not provide notice to state regulators or attorneys' general as required by 28 U.S.C. § 1715. These defects—excess fees, overbroad settlement release, and deficient notice—are the precise reasons that Congress passed CAFA. *See* S. Rep. No. 109-14, at 4 (2005). Finally, the settlement precluded publicity about its existence. Bednarz Decl. Ex. 1 at 38. The Court can draw its own inferences why that term exists.

The Court should not tolerate parties gaming the system. *E.g.*, *Freeman v. Blue Ridge Paper Prods.*, 551 F.3d 405, 409 (6th Cir. 2008) (vacating district court's remand of several putative class actions each limited to $4.9 million because "[p]laintiffs put forth no colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction"); *Rahman v. Gate Gourmet, Inc.*, 2021 U.S. Dist. LEXIS 225310; 2021 WL 5973046 (N.D. Cal. Nov. 22, 2021). To be clear, the Intervenors do not claim that class counsel did not negotiate the largest settlement fund they could (though the Court may have questions about the scope of the release). But they breached their fiduciary duty to the class in agreeing to judge-shop in a manner so that they could request an outsized fee award to the detriment of the class they purport to represent. And, as the proposed cross-complaint in intervention details, it is not even the first time class counsel has done this with a class action filed *in this Court*. Complaint in Intervention ¶¶ 73-76.

Intervenors seek to join this litigation for the limited purpose of seeking an equitable distribution of class counsel's requested 33.3% fee award, and this Court is the appropriate venue to do so. *Cf. Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992) (allowing intervention solely to modify a protective order). Class counsel filed their first suit in this Court because of experience and the state of California's favorable contract law. This Court empowered Plaintiffs to seek judicial remedies over arbitration in a prompt and well-reasoned order, and this Court permitted discovery—which class counsel averred was instrumental in reaching an adequate settlement—but the parties then conspired to avoid this Court so that Plaintiffs to enrich their counsel at the class's expense. At least two other district courts, affirmed by the Ninth and Eleventh Circuits, have zeroed out fees entirely for similarly—or even less egregious and purely technical—inequitable

[4] The settlement purports to include "valuable injunctive relief," but this merely requires Verizon to alter a few words in the middle of its 6700-word Customer Agreement without altering the meaning of the disclosure. *See* Bednarz Decl. ¶ 12.

conduct. *Rodriguez v. Disner*, 688 F.3d 645, 652 (9th Cir. 2012) (technical ethical violation ultimately immaterial to fairness of settlement); *Arkin*, 38 F.4th at 1011 (forum shopping from federal to state court).

In the Ninth Circuit, "the requirements for intervention are [to be] broadly interpreted in favor of intervention." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). This "liberal policy" serves to ensure both "efficient resolution of issues and broadened access to the courts." *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (*en banc*). The Intervenors will all be bound by this action, including California residents who were Verizon Wireless customers during the relevant timeframe. Thus, some of the Intervenors fell within the putative class pleaded by Plaintiffs in this Court, who alleged consumer fraud by Verizon assessing an "Administrative Charge" on their post-paid wireless accounts. Dkt. 1 at 29; Dkt. 58 (current complaint) at 102. Because Intervenors satisfy the legal standard for both intervention as of right and permissive intervention, this Court should grant the motion to intervene and allow them to challenge the settlement's fee award here.

## I. Intervenors are entitled to intervene as a matter of right.

To warrant intervention as of right under Rule 24(a), an applicant "must show that: (1) it has a significant protectable interest relating to [] the subject of the action; (2) the disposition of the action may … impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Because Intervenors satisfy all four of these elements, this Court should grant their motion to intervene as a matter of right.

### A. Intervenors have an interest in this case that is at risk of impairment without intervention.

Generally, the first two requirements for intervention as of right—interest in the litigation and risk that interest is impaired absent intervention—are "satisfied by the very nature of [] representative litigation." *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 314 (3d Cir. 2005); *see also Miller v. Ghirardelli Chocolate Co.*, 2013 U.S. Dist. LEXIS 179926, *24 (N.D. Cal. 2013). This is because class members possess a legal right "protectable under some law" which the named plaintiffs are entrusted to remedy through their class claims, *Nw. Forest Resource v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996), and any disagreement in legal strategy between the intervening class

members and the named plaintiffs impairs the intervenors' ability to protect that interest. Here the parties impaired Intervenors' interests by agreeing to file their settlement in a state court receptive to fee awards that the first-filed case's court would deem excessive. But for this tactic, class members would have received millions of dollars more pecuniary recovery under similar settlement terms and this Court's oversight. (While *Esposito* has not yet awarded attorneys' fees, New Jersey state courts have previously rubber-stamped a 33.3% fee request in an earlier judge-shopped settlement to avoid this Court's scrutiny. Complaint in Intervention ¶¶ 73-76.) Non-party class members have no control over these decisions, thus implicating these two prongs as a matter of law.

In this Circuit, a "member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court." *Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1405 & n.1 (9th Cir. 1989). Some recent in-circuit district court cases have tested this rule and refused intervention by citing other class action mechanisms—such as objection and the court's independent scrutiny of a settlement—as adequate means for class members to vindicate their interests when they diverge from the named parties. *See*, *e.g.*, *Woodard v. Boeing Emps. Credit Union*, 2023 U.S. Dist. LEXIS 131128, *5 (W.D. Wash. 2023); *Vallejo v. Sterigenics U.S. LLC*, 2023 U.S. Dist. LEXIS 65825, *15-17 (S.D. Cal. 2023) (listing cases). But these cases do not control. The Intervenors seek only to equitably redistribute any excess fees obtained by class counsel's breach of fiduciary duty. This squares with decisions where the settling parties coordinated at the expense of absent class members. *See*, *e.g.*, *Tech. Training Assocs. v. Buccaneers Ltd. P'shp.*, 874 F.3d 692 (11th Cir. 2017) (reversing denial of intervention of class members who wished to challenge 'reverse auction' settlement); *Smith v. Seeco, Inc.*, 865 F.3d 1021 (8th Cir. 2017) (vacating denial of intervention of class member who alleged party collusion and finding "flawed" the rationale that intervenors could merely opt out); *Gomes v. Eventbrite, Inc.*, 2020 U.S. Dist. LEXIS 203108, *3 (N.D. Cal. 2020) (collusion by parties); *Hilsley v. General Mills, Inc.*, 2021 WL 2290782, 2021 U.S. Dist. LEXIS 105648, *20-21 (S.D. Cal. 2021) (unfairness of settlement); *Ross v. Convergent Outsourcing, Inc.*, 332 F.R.D. 656, 662 (D. Colo. 2018) (allowing intervention to fight settlement that "significantly dilute[d] original Colorado class members' potential recovery) (citing *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 881 (7th Cir. 2000) (Easterbrook, J.)); *cf. also Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996). The parties in this case forum shopped their settlement proposal for no material benefit to class members—only greater fees for class counsel and,

apparently, to attempt to delay public scrutiny. Moreover, Intervenors' interest in this case in a fair fee award *cannot* be resolved through the objection or approval process in New Jersey, because that court applies New Jersey law, not this Court's—exactly why the parties judge-shopped their settlement away from this Court, the first-filed venue. The parties have conspired to keep a "case[] of national importance out of Federal courts," which CAFA was intended to prevent. Pub. L. 109-2, § 2(a)(4), 119 Stat. 5 (2005).

Finally, and most importantly, any reduction in attorneys' fees which Intervenors obtain should revert to the common fund, and thus the class members' pockets. This demonstrates a direct pecuniary interest in the outcome of the fee motion that conflicts with the parties and their counsel. Accordingly, Intervenors demonstrate that they have both an interest in this litigation and that this interest is impaired absent intervention before this Court.

**B. Class counsel cannot adequately represent class members who are adverse to their own fee request.**

The burden to meet this element of Rule 24 is "minimal" and is satisfied when Intervenors can show that "representation of [their] interests *may* be inadequate," which they do easily here. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (emphasis added); *accord Berger v. N.C. State Conf of the NAACP*, 142 S. Ct. 2191, 2203-04 (2022) (following *Trbovich v. Mine Workers*, 404 U.S. 528 (1972)). By the very nature of this Motion, which seeks intervention for the limited basis of challenging attorneys' fees, Plaintiffs' counsel cannot adequately represent the Intervenors' divergent interest in lower fees. *See*, *e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 964-965, 970-71 (9th Cir. 2003) (observing discordant interests between class counsel and class regarding fees). When petitioning for fees, 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. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). Here, the conflict manifests because counsel, of course, is responsible for filing the settlement in a new New Jersey state court action to avoid this circuit's precedent on Rule 23(h) fees and secure a greater fee award. Class representatives are not upholding their "fiduciary duty not to 'throw away what could be a major component of the class's recovery.'" *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 594 (2013) (artificially limiting damages sought to evade CAFA amount-in-controversy requirement) (quoting *Back Doctors Ltd. v. Metropolitan Property & Cas. Ins. Co.*, 637 F.3d 827, 830-831 (7th

Cir. 2011) (Easterbrook, J.)). They have "agreed to take excessive fees … to the detriment of class plaintiffs." *Lobatz v. U.S. West Cellular of Cal. Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000). Here, the difference between a fee request consistent with the Ninth Circuit benchmark and the $33.3 million requested by counsel exceeds at least $8.3 million, a "major component of the class's recovery," and so the Court may permit Intervenors to "intervene with an amended complaint." *Standard Fire*, 568 U.S. at 594. Thus, this element is satisfied.

**C. Intervenors timely file their Motion.**

The Intervenors must show that this Motion is timely to merit intervention as of right. Courts balance three factors to adjudicate timeliness: (1) "the stage of the proceeding at which an applicant seeks to intervene"; (2) "the reason for and length of the delay"; and, (3) "the prejudice to" the parties from intervention. *Alisal Water Corp.*, 370 F.3d at 921. On balance and using these factors, the Motion is timely.

Ninth Circuit law requires attorneys' fees to be addressed after the settlement proposal is submitted and briefed to the Court. *See Mercury Interactive Corp.* 618 F.3d at 990. The settlement in New Jersey followed the same sequence, with the settlement preceding the fee motion. So by necessity, Intervenors had to wait until the parties submitted their settlement and class counsel filed their fee motion because they "had no means of knowing" the fees were "contrary to their interests" until after class counsel submitted the fee motion January 31. *Alisal Water Corp.*, 370 F.3d at 922. Thus, both the stage and timing of Intervenors' Motion merit intervention under Ninth Circuit law and the circumstances of this case.

Further, the "crucial date" for assessing timeliness is when the proposed intervenors "should have been aware that their interests would not be adequately protected by the existing parties." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Since Intervenors submit this Motion to challenge the breach of fiduciary duty implicated by the 33.3% attorney fee request in New Jersey state court, the relevant date is January 31, 2024—when the attorney fee request was made public and the earliest point at which Intervenors could become aware that the parties were not "adequately protect[ing]" their interests as it came to fees. *Id.* Only when the fee award motion was made were Intervenors "reasonably on notice that their interests were not being adequately represented." *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 860 (9th Cir. 2016) (reversing denial of class member's intervention). And this Motion is filed less than a month after the Intervenors got this notice—analogous to delays in other actions for intervention blessed by this Circuit. *Kalbers v. United States DOJ*, 22

F.4th 816, 825 (9th Cir. 2021); *Callahan v. Brookdale Senior Living Cmtys.*, 2020 U.S. Dist. LEXIS 153378, *13 (C.D. Cal. 2020); *see also Sage Electrochromics, Inc. v. View, Inc.*, 2013 U.S. Dist. LEXIS 166637, *9 (N.D. Cal. 2013) (timeliness satisfied despite seven-month delay).

But most importantly, there is no prejudice in this case because intervention will not "unnecessarily prolong the litigation [nor] threaten the parties' settlement." *Cal. Dept. of Toxic Substances Control v. Com. Realty Projects*, 309 F.3d 1113, 1119 (9th Cir. 2002). Intervenors do not wish to disturb the settlement or its finality, which does not depend on the particular amount of the fee award, much less any equitable remedy raised by the fee award. Fee adjudication is severable—and frequently is severed—from review of the underlying settlement. *See In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 445 (3d Cir. 2016). Prejudice is determined by the consequences to the parties from any delay associated with intervention, not other inconveniences from Intervenors' participation. "[E]very motion to intervene will complicate or delay a case to some degree—three parties are more than two. That is not a sufficient reason to deny intervention." *Kalbers*, 22 F.4th at 825. Any complication here is attributable to the settling parties' decision to forum shop their settlement and class counsel's fee request into New Jersey state court, rather than proceeding in the first filed federal action. On this factor alone the Intervenors demonstrate timeliness, because there is no prejudice—the "most important factor" in the timeliness analysis and a prerequisite for concluding an intervention motion is untimely. *See United States v. Oregon*, 745 F.2d 550, 552-53 (9th Cir. 1984) (reversing finding of untimeliness where there was no prejudice).

## II. In the alternative, this Court should permit intervention under Rule 24(b).

Under Ninth Circuit caselaw and Rule 24(b), this Court may grant permissive intervention when the Intervenors can demonstrate (1) "an independent ground for jurisdiction"; (2) "a timely motion"; and, (3) "a common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011). Because Intervenors do so here, this Court should grant their Motion.

First, the Court has jurisdiction over this case under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), because there are more than 100 class members, the Intervenors are diverse from Cross-

Defendants' State of citizenship, and the amount in controversy exceeds $5,000,000. *E.g.*, *Woodard*, 2023 U.S. Dist. LEXIS 131128 at *7.

Second, Intervenors' Motion is timely for the same reasons that it is timely in analyzing intervention as a matter of right. *See* Section I.C above; *cf. also League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997) (noting elements of timeliness are same but permissive intervention is analyzed "more strictly" than intervention as of right). Because Intervenors solely move to challenge class counsel's breach of fiduciary duty and do not threaten the underlying settlement, there is no prejudice from their participation in the case. That alone makes this Motion timely. *See Oregon*, 745 F.2d at 552-53. Further, the timing of Intervenor's application is justified since they could not know their interest in fair attorneys' fees was threatened until the fee motion was submitted this past January—and they now move to intervene less than a month later (and, indeed, even before we know the New Jersey court's ruling on the fee request). *Cf. Sage Electrochromics*, 2013 U.S. Dist. LEXIS 166637 at *9 (noting "the seven-month delay at issue here is not extraordinary" and finding timeliness satisfied). Accordingly, this element is satisfied, too.

Finally, the Intervenors have a "common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion*, 644 F.3d at 843. For one, as class members in both the New Jersey case and this litigation, Intervenors rely on "an identical nucleus of facts" as the parties, though a different legal issue. *Woodard*, 2023 U.S. Dist. LEXIS 131128 at *8. Further, Intervenors move to address a legal issue still unresolved in this case—attorneys' fees—that is integral to the parties' "main action" in moving for settlement. *Freedom from Religion*, 644 F.3d at 843. Finally, as class members the Intervenors have the same underlying legal claims as those which Named Plaintiffs used to initiate this litigation. *See*, *e.g.*, *Subbaiah v. Geico Gen. Ins. Co.*, 2019 U.S. Dist. LEXIS 233036, *9 (C.D. Cal. 2019).

Because Intervenors satisfy all three elements of permissive intervention, this Court should—in the alternative—grant their Motion to Intervene under this standard. *See Hilsley*, 2021 WL 2290782 (granting class member permissive intervention to contest preliminary approval of a reverse auction settlement).

## CONCLUSION

Intervenors thus request that this Court grant their Motion to Intervene as a matter of right. In the alternative, Intervenors request that this Court grant their permissive Motion to Intervene.

Dated: February 23, 2024

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this day I electronically filed this 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 23rd of February, 2024.

*/s/ Theodore H. Frank*
Theodore H. Frank