NO. 18-56371
CONSOLIDATED WITH NOS. 18-56272 and 18-56273

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOANNE FARRELL; RONALD ANTHONY DINKINS; LARICE ADDAMO,
On behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

RACHEL THREATT,
Objector-Appellant,

v.

BANK OF AMERICA, N.A.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California, No. 3:16-cv-00492-L-WVG

Reply Brief of Appellant Rachel Threatt

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Table of Contents

Table of Authorities

Cases

Introduction

In the case below, the district court approved fees for plaintiffs' counsel equal to over $11,000 per hour and eighteen times their lodestar. The district court never considered these figures, however, because it simply decided not to. The court gave no explanation for this decision, despite having the attorney time records and objectors' arguments on the issue before it. Instead, the court relied exclusively on an infirm percentage basis for plaintiffs' fee award. The result was an unreasonable fee award and corresponding diminution of class members' recovery.

Plaintiffs don't mention the $11,000 per hour figure in their opposition, much less defend it as reasonable. Plaintiffs instead focus on why the district court *might* have declined to apply the lodestar crosscheck and considered only the percentage approach. Because neither the record nor precedent supports their speculation, however, they cannot salvage the fee order. While plaintiffs don't address the reasonableness of their fees based on the lodestar analysis, they lay the groundwork for a hefty fee award on remand by arguing that the Supreme Court's holding that lodestar is presumptively reasonable applies only in statutory fee shifting cases. The problem with their argument is that *Perdue v. Kenny A.*, 559 U.S. 542 (2010), is not so limited, and this Court has applied the case in non-statutory fee cases. *See* Section III.

Plaintiffs also fail to provide legal justification for the district court's independently flawed percentage-based analysis. Namely, the court erred by applying plaintiffs' requested 21% rate to the face value of relief that plaintiffs admit was actually worth less than that amount. Plaintiffs point to no analysis or quantification by the court of the economic reality of the debt relief or even the forward-looking injunction that they have now decided to rely on. Instead, they point to conditional language by the court speculating about how class members could potentially benefit. Under *Staton v. Boeing*, 327 F.3d 938 (9th Cir. 2003), it was impermissible for the court to apply the percentage approach to the debt relief because its value was not sufficiently measurable. Plaintiffs also fall back on the generic argument that the court found the fees "reasonable in light of all the circumstances." PB31.[1] But there are no circumstances that can make the fee award reasonable under Rule 23(h) when the court credited without scrutiny the proffered value of relief that was actually illusory. *See* Section I.

If the debt relief, contrary to available evidence, was actually worth nearly $30 million to the class, then the parties fail to provide a legal basis for not decertifying the class due to a conflict between, and inadequate representation of, the cash subgroup and the debt subgroup. Defendant's brief, which focuses exclusively on this issue, mistakes Threatt's argument to be about the difference in the form of relief provided to the two subgroups. Threatt, however, did not argue that the cash and debt forms of relief were inappropriate or that the relief had to be exactly equivalent in value. Rather, the problem is one of structure: the cash subgroup did not have separate counsel to advocate for its interests. The shared counsel it did have stopped negotiating to obtain relief for those class members after the first stage of negotiations, and then allowed their already smaller recovery to be reduced further by attorneys' fees and costs. The

[1] OB, PB, and DB refer to the opening brief, plaintiffs' merits brief, and defendant's merits brief respectively. As in the opening brief, ER refers to the Excerpts of Record, and "Dkt." refers to the district court docket in this case.

debt subgroup, in contrast, fully recovered for their loss and did not contribute to those fees and costs. This result is impermissible under *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). Separate counsel, not just representatives from their subgroup, is required under Rule 23(a)(4). *See* Section II.

Argument

I. Plaintiffs don't rebut the district court's failure to scrutinize the actual value of the settlement relief; the court erred as a matter of law by awarding fees based on relief that offered no quantified value to the class.

Plaintiffs contend the district court's percentage-based fee award was proper, yet their discussion shows the court's analysis was nothing more than speculation about ways in which the debt relief could potentially provide class members value. The court lacked evidence for this speculation, and it ran contrary to reality, which—as plaintiffs admit (PB39)—shows the debt relief is worth far less than its face value. Although plaintiffs argue that the fee award does not depend on any particular valuation, so long as the court found the relief had *some* value, this argument makes no sense in the context of a percentage-based fee award. The court's decision makes clear that it "calculate[d] Class Counsel's prayer at 21.1% of the common fund." ER15. This determination reveals the court's uncritical acceptance of the value of the debt portion of the settlement relief. *See* Section I.A. But how can a court possibly determine that a supposed 21% fee award is reasonable when it doesn't know what amount the fee is 21% of?

That the court commented that the \$1.2 billion in injunctive relief was worth substantially more than \$29.1 million, assuming *arguendo* that the debt relief was illusory, does not salvage the decision. ER14-15; *see* Section I.B. Under Circuit precedent, the district court erred as a matter of law by failing to investigate the "economic reality" of the relief upon which it based its fee award. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015).

A. Plaintiffs make the dispositive admission that the district court did not scrutinize the actual economic value of the debt relief.

Plaintiffs admit that the court did not "attribut[e] a specific value to the relief." PB31. This admission is dispositive: Because the actual value of the debt relief was neither measured nor readily ascertained, that relief should not have been included in the denominator of the fee award. The district court nevertheless used the $29.1 million face value of the debt relief to calculate attorneys' fees. "[O]nly in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees." *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003). The district court therefore reached the fee award based on an error of law.

Plaintiffs' post-hoc justifications cannot excuse the district court's analytical failure. Plaintiffs try to fill the many holes in the district court's reasoning, but to little avail. As plaintiffs note, the relevant metric is the actual value of the relief to class members. PB44. While the district court offered various scenarios in which the relief *could* potentially be of some value to class members, it conducted no inquiry into whether it did in fact provide any value and if so, how much. Nor did the district court explain why it refused to inquire into the actual value by, at the least, requiring Bank of America to disclose how it accounted for the debt forgiveness component.

The need for such scrutiny is underscored by plaintiffs' plain admission that the value of the debt relief is far less than its face value. PB39. They admit that Threatt is correct that "Bank of America could never have hoped to recover the full value of class members' unpaid fees." *Id.* They—and the district court—nevertheless ignore that the reason the cost is low for Bank of America is exactly why the benefit to class members is so small. OB25.

For example, the district court noted that Bank of America "*could* initiate proceedings to collect," but had no reason to believe that it *would* initiate proceedings and made no inquiry in that regard. ER13 (emphasis added). Because the Extended Overdrawn Balance Charge ("EOBC") debts are so small, and have now been outstanding for up to 5.5 years, Bank of America almost certainly will not collect them. Similarly, the district court noted that Bank of America "*could* sell the debt at a discount to another entity that might be more willing to undertake collection efforts." *Id.* But again, the court had no reason to believe that the bank *would* do so now after more than five years, made no inquiry, and did not value the reduced recovery value. *Id.* The reality is that even if the debt was sold at a substantial discount, third parties similarly would have little financial incentive to initiate collection proceedings. The $35 charges were too small for any cost-effective collection efforts and Bank of America almost certainly accounts for them as worth pennies on the dollar at most. Finally, not only did the district court fail to scrutinize the actual value to class members of any small improvement of credit scores from the debt relief, it didn't even inquire whether Bank of America had reported any of the EOBC debt to credit agencies to begin with. *Id.* If the debt was never reported, as suggested by the absence of any evidence to the contrary, then there will be no updated report that could potentially improve class members' credit scores. Even if the debt had been reported, the district court made no inquiry into whether a small reduction in outstanding debt would improve the scores at all, much less at a value to the class of $29.1 million. Nor did the district court consider that Bank of America already would have an obligation to update the credit reports for accuracy, such that the settlement term provided no incremental value to class members. In short, consumers with EOBC debt have little to nothing to gain from relief of that debt.

The court's musings on potential class benefits weren't "reasoned analysis." PB45. They were vague, unsupported theories of how class members *could* have benefited from the debt relief, with no scrutiny or valuation of the actual benefit to the class. As such, it was error for the district court to rely on the unsupported $29.1 million in debt relief in awarding attorneys' fees.

B. The forward-looking injunctive relief does not salvage the district court's decision because the court similarly did not scrutinize its value and its value is illusory to the class.

Plaintiffs make a last-ditch effort to save their multi-million dollar fee award by citing the very relief they did not ground their fee request upon—Bank of America's agreement to stop charging EOBCs for five years. PB31. But their claim that the district court relied on the injunction to support the fee award is belied by the court's order itself. The district court expressly stated that it "calculates Class Counsel's prayer at

21.1% of the common fund," *i.e.*, the sum of $29.1 million of debt relief and $37.5 million of cash. PB14-15. This raises the question of why plaintiffs repeatedly refer to the fee as 1% of the settlement value. *E.g.*, PB2; PB17.

Plaintiffs ultimately admit that the district court's reliance on this relief was only as "additional support for its fee award." PB43. But this Court's precedent doesn't allow even that level of reliance to justify the award here. The district court "assum[ed] *arguendo*" that the debt relief was illusory and noted that the injunction was worth more than $29.1 million (the proffered value of the debt relief). ER14-15. The district court doesn't give any indication as to how it could possibly determine that the injunctive relief had *any* value, much less more than $29.1 million. It utterly failed to scrutinize the injunction and the value it actually provided to the class. Even plaintiffs do not contend that the court made any such determination or scrutinized the injunction's purported value.

Under *Staton v. Boeing*, the court's failure—and inability—to "accurately ascertain[]" the value of the injunction to the class members means that the relief cannot be included in the value of a fund for purposes of applying the percentage method of determining fees. 327 F.3d at 974. Contrary to plaintiffs' suggestion in a truncated quotation from the case, *Allen v. Bedolla* does not support the district court's use of the injunctive relief to provide "more justification" for the reasonableness of the fee award or limit the scope of *Staton*. PB43. Rather, the court reaffirmed its holding in *Staton*. In discussing its decision to remand in *Allen*, the Court observed that *if* the district court had made "*express findings* about the value of the injunctive relief," then those findings "might have given more justification for the reasonableness of class counsel's fee award." 787 F.3d 1218, 1225 (9th Cir. 2015) (emphasis added). In other words, injunctive relief for which the district court has not made express valuation findings cannot be used to justify a fee award.

That Bank of America "calculated the $1.2 billion figure," PB3, does not relieve the district court of its fiduciary and legal obligation to examine the economic reality of the settlement relief. There are obvious reasons that close scrutiny was necessary to determine the actual value, if any, to class members. Like the plaintiffs, the defendant has an incentive to inflate the perceived value of the settlement to ensure approval. *See* OB22.

Neither party disputes the reality that Bank of America has a strong incentive, in fact a duty to its shareholders, to protect its revenue and make up any amounts that will be lost from ending its practice of charging EOBCs. The most likely way Bank of America will do that is to charge account holders new, "nonequivalent" fees or increase existing fees, leaving account holders no better off than if EOBCs were undisturbed. *See* PB42. The declaration submitted by Bank of America says only that the bank "projects to earn approximately $20,000,000 less in fee revenue each month." SER21. It doesn't say the bank won't attempt to mitigate those losses by increasing other fees or modes of generating revenue from account holders.

The effect of the Durbin Amendment to the Dodd-Frank financial reform legislation is illustrative. That amendment capped debit card interchange fees for large banks. The cap cut the average interchange fee for covered banks by about 50% per transaction, reducing annual revenues from these fees by $6-$8 billion. The banks nevertheless found ways to recover these lost revenues. For example, they reduced the availability of free accounts, tripled the minimum holding for free accounts, and doubled the monthly fee on non-free accounts, contributing to many with lower incomes leaving the banking system. Todd J. Zywicki, *et al.*, *Price Controls on Payment Card Interchange Fees: The U.S. Experience*, George Mason Law & Economics Research Paper No. 14-18 (2014). Account holders who may be at risk of extended overdrawn balances will not suddenly receive a free benefit from Bank of America. Many of them may get frozen out of the banking system, or they will incur higher monthly account fees.

The district court again utterly failed to examine this economic reality. Accordingly, it was improper for the court to use the injunction as stand-in value that could offset illusory debt relief and justify counsel's fee.

C. Plaintiffs' argument regarding "collusion" is a red herring.

Plaintiffs deny at length any alleged collusion between Bank of America and class counsel. The problem for them is that Threatt never alleged such collusion. To the extent plaintiffs take issue with Threatt pointing out the inherent conflicts in class action settlements, they don't deny the existence of such conflicts. Nor could they. These conflicts are the very reason this Court requires district courts to act as fiduciaries for the class members and exercise heightened scrutiny on their behalf. *See* OB20-23.

Class action settlements are ripe for self-dealing even without any explicit collusion. Courts have expressly found that "arms-length" negotiation such as that cited by plaintiffs (PB45) is insufficient to protect the class. *See Redman v. RadioShack*, 768 F.3d 622, 628 (7th Cir. 2014) (calling that view "naïve"). Simply as a matter of economic reality, a "defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). "From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Id.* No collusion is required to reach this result.

Plaintiffs' denial focuses on certain signs of self-dealing that relate to fairness under Rule 23(e) and that Threatt, again, doesn't raise as grounds for reversal. Yet they ignore the relevant concern with the fee award here: It is based on the purported value of relief that both parties have an incentive to inflate and whose actual value is difficult to accurately ascertain. *See* PB45-46 (focusing on reversion, separate negotiation of fees, and express collusion); *contra* OB21-23 (describing structural conflicts inherent in class action settlements and particular use of injunctive relief to inflate overall settlement value).

The point of Threatt's discussion of the incentives inherent to class action settlements was to underscore the reason this Court requires district courts to scrutinize the actual value provided to the class. Plaintiffs don't deny that the court had such a duty, nor do they show that the court discharged such duty.

Plaintiffs also discuss at length the report of Professor Brian T. Fitzpatrick, perhaps hoping this Court will affirm based on his legal conclusions given the deficiencies in the district court's reasoning. *See* PB17-21. But the district court did not credit or cite the Fitzpatrick report in its fee award, and Threatt asked the court to disregard or strike the report on the ground that it contains inadmissible legal conclusions and other legal arguments regarding the calculation of attorneys' fees.

ER103-05. The court did not expressly rule on that request, perhaps because it became moot when the court did not rely on the report.[2]

II. If the debt relief was in fact worth its purported face value, neither party provides grounds for rejecting the only alternative explanation: inadequate representation under Rule 23(a)(4).

If the debt relief was in fact worth the full face value credited by the district court, then the cash subgroup was not adequately represented as required by Rule 23(a)(4), and the class should be de-certified.

Neither party offers a legally valid rebuttal for the (a)(4) adequacy problem. Plaintiffs' argument confuses (a)(2) commonality with (a)(4) adequacy of representation.[3] They claim there is no conflict between the subgroups because they all suffered the same sort of monetary injury. PB34-36. But conflicts can manifest themselves based upon the type of remedy that each group would prefer. *E.g.*, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011) (conflict between current and

[2] Plaintiffs also lodge *ad hominem* attacks against Threatt's counsel that are irrelevant to the merits of the appeal. PB21. The only "ideology" of the Center for Class Action Fairness's objections is the correct application of Rule 23 to ensure the fair treatment of class members. *See* Declaration of Theodore H. Frank, Dkt. 85-2 ¶ 17. The baselessness of plaintiffs' attacks is further underscored by the fact that they cite a single case to purportedly discredit Threatt's counsel. In that case, while the court did criticize CCAF's client's objection (after mischaracterizing the nature of the objection), it ultimately agreed with CCAF's client that class counsel's fee request was too high, and reduced it by several million dollars to the benefit of shareholder class members. *Id.* ¶ 14 (addressing *City of Livonia Employees' Ret. Sys. v. Wyeth*, No.07 Civ. 10329, 2013 WL 4399015 (S.D.N.Y. 2013)).

[3] Plaintiffs also oddly claim that Threatt's "only basis" for pointing out the conflict is "her dissatisfaction with receiving less than a full cash reimbursement." PB30. In fact, however, Threatt brought her objection in good faith to protect the interests of the class. Dkt. 85 at 3.

former employees who sought different relief); *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 131 n.34 (3d Cir. 2012) (conflict between current and former subscribers). Such a conflict exists here.

The subgroup that paid EOBCs had an interest in maximizing their cash recovery, while the debt subgroup wanted full forgiveness of the EOBCs they had been charged. The terms of the settlement evince a fundamental conflict between the two groups, arising from the inequitable treatment of the cash group. The settlement fully forgave the debt subgroup's EOBC debt, but it fell short of fully reimbursing the cash subgroup, and their recovery was reduced even further because attorneys' fees and costs were taken out of their already short settlement pot.

This is a structural problem and exists notwithstanding Bank of America's argument that there couldn't have been a conflict because the class representatives (from the cash subgroup) would have been disadvantaging their own subgroup. DB22-23. Rule 23(a) imposes a double-layer of representation because of the conflicts inherent in the nature of representational litigation, particularly at the settlement phase. Class representatives have a reduced incentive to object to disfavored treatment once their incentive award is in sight. *See, e.g.*, *In re Dry Max Pampers*, 724 F.3d 713, 722 (6th Cir. 2013). Rule 23 thus also requires separate *counsel* for conflicting subgroups. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). It was an error of law for the court to rely on the fact that the class representatives are members of the disfavored group as a reason to ignore the substantial conflict between debt-relief class members recovering their losses in full and cash-relief class members recovering a fractional share of their damages.

While plaintiffs insist that their two-stage settlement process actually protected the cash-relief subgroup, there can be no dispute that the cash group's interests would have been better protected with counsel dedicated solely to their interests. Counsel effectively admit that they stopped trying to get any relief for the cash subgroup once they began discussing the debt relief. *See* PB39; DB19. Again, however, if the debt relief had any actual value, that value could have been fairly allocated between the debt and cash subgroups due to a defendant's general indifference to the allocation beyond its all-in payment. *See Eubank*, 753 F.3d at 720. Bank of America admits the parties never addressed that possibility. DB19.

Bank of America's response relies on a distorted version of Threatt's argument. Threatt does not argue that debt and cash relief needed to be awarded on a dollar-for-dollar matching basis or that the relief needed by be exactly equivalent or in the same form. *See* DB19-22. The parties heavily on *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 895 F.3d 597 (9th Cir. 2018). There, however, the court found that the supposedly slighted seller subgroup in fact "gained enormously" from being in the *same* class as the owner subgroup, which had far more leverage against the defendant, and recovered an amount that "accounted for the loss realized" by sellers. *Id.* at 609. Here, the contrasts are clear: the cash subgroup recovered less than the loss they realized, and, as the subgroup exclusively billed for attorneys' fees and costs, did not benefit from any leverage held by the debt class. The other cases cited in support of their argument are also inapplicable. For example, in *Fleury v. Richemont North America, Inc.*, 2008 WL 4680033 (N.D. Cal. Oct. 21, 2008), the court did not address any claim that the different benefits were negotiated inadequately or were awarded disproportionately. *See also Messineo v. Ocwen Loan Servicing, LLC*, 2017 WL 733219 (N.D. Cal. Feb. 24, 2017) (no 23(a)(4) challenge to settlement that allowed all class members who filed claims to recover actual damages and distributed pro rata share of settlement fund to all class members); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136 (E.D. Pa. 2000) (no 23(a)(4) challenge). And, in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices & Products Liability Litigation*, MDL No. 2672, 2016 WL 6248426, at *21 (N.D. Cal. Oct. 25, 2016), the court found the "additional benefit" of loan forgiveness actually resulted in "the same benefit for all Class Members" because it allowed them to return their vehicles without an ongoing financial obligation associated with ownership.

Both parties attempt to incorrectly alter the standard of review that applies here. No deference is due to the district court's finding of adequate representation, and it certainly is not subject to "clear error" review. PB3; PB38; DB18. The case plaintiffs cite in support of the "clear error" standard of review applied that standard of review only to findings of fact upon which the district court relied for its certification order—not to the question of whether the court correctly applied the proper legal standard. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1132 (9th Cir. 2016) (cited at PB3). Threatt's appeal doesn't present a factbound question about the structure of the negotiations. It raises, in relevant part, legal question of whether court properly applied the Rule 23(a)(4) adequacy requirement given the conflict apparent from the settlement's different treatment of debtor and non-debtor class members. *See* OB3-4 (addressing the standard of review). Neither *Hanlon* nor *Staton*, which plaintiffs cite to support their argument that deference is due on appeal, supports that position here or changes the standard of review. PB37, PB38. The court stated in *Hanlon* that a district court is generally entitled to deference *if* the court exercises the closer judicial scrutiny to ensure "a higher standard of fairness" under Rule 23(e) where settlement takes place prior to formal class certification. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). And *Staton* held that the court did not abuse its discretion where, unlike here, the failure to subclass did not compromise the interests of the subgroups. 327 F.3d at 956.

That class members have opt-out rights is not sufficient grounds for approving a deficient settlement. *See* PB40. "Regardless of whether class members are given opt-out rights, the court is still required to ensure that representation is adequate and that the settlement is fair to class members." *Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996). *See also Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1179 (9th Cir. 1977) (Kennedy, J., concurring) ("I do not believe that a provision for opting out of the class provides an entirely satisfactory answer to the claim that a lead attorney failed to discharge that duty of representation. Particularly where the settlement could be easily modified to resolve the class conflicts, the dissident members should not be required to take the settlement or leave it.").

III. The district court's fee award cannot stand because, after neglecting a lodestar crosscheck, the court awarded fees equal to nearly 18 times class counsel's lodestar.

Plaintiffs steadfastly refuse to acknowledge the elephant in the room: They were awarded fees equal to nearly 18 times their lodestar, or over $11,000 per hour once facially excessive hours (which plaintiffs also fail to rebut) were removed from their records (and 11 times their lodestar if one includes those hours). They don't attempt to explain to this Court how that result can possibly meet the reasonableness requirement of Rule 23(h). Instead, they argue that in *common fund* cases, a lodestar crosscheck is not required, and the district court's willful blindness to the result of a crosscheck was perfectly acceptable. PB47.

Unfortunately for plaintiffs, this is not a classic common fund case. *See* Section I. A lodestar crosscheck should be required here particularly because the value of the debt and other injunctive relief to the class is not readily ascertainable. Any precedent that has allowed straight percentage-based awards in common fund cases without a crosscheck thus does not apply. Here, a lodestar crosscheck was necessary to protect the class against an excessive fee request. Plaintiffs fail to show any valid legal basis for this Court to affirm the district court's *ipse dixit* in the face of the objectors' argument that a crosscheck would reveal the unreasonableness of the fee request.

A. Plaintiffs misrepresent Threatt's argument and fail to undercut the legal basis for requiring a lodestar crosscheck, particularly when there are non-cash relief components in a class-action settlement.

Plaintiffs misrepresent Threatt's argument by claiming that "[t]he only authority" Threatt identified to support the need for a lodestar crosscheck here is *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011). PB32; *accord* PB47. This assertion is flat wrong. *See* OB31-33, OB42. Plaintiffs also attempt to confuse the issue by arguing that in *common fund* cases a lodestar crosscheck is not required, when this settlement involves non-cash relief that is difficult to value—a problem exacerbated by the district court's failure to examine the economic reality of the relief. *See* Section I; *see* PB47 (discussing and citing common fund cases). They fail to establish that it is legally permissible for a court to award a percentage-based fee with no crosscheck where a class action settlement includes hard-to-value relief and an objector points out the unreasonableness of the result.

Just as in the district court, and as Threatt predicted, plaintiffs again cite out-of-context language from *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536 (9th Cir. 2016), to try to undercut *Bluetooth* and claim that the lodestar crosscheck is entirely discretionary. *See* PB32. *Yamada* addresses percentage crosschecks of a base lodestar award; it is irrelevant here, except to the extent it confirms the unreliability of a percentage award where benefits are not easily monetized. The Court did not demand a percentage-based crosscheck of the lodestar award in *Yamada* because the "classwide benefits [were] not easily monetized." It was in those circumstances that the court found a percentage-based cross-check discretionary. *Id.* at 547. This Court reaffirmed that position in *Hyundai*, where it specifically stated that "[t]he percentage method is merely a shortcut to be used 'in lieu of the often more time-consuming task of calculating the lodestar', but only if 'the benefit to the class is easily quantified.'" *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 571 (9th Cir. 2019) (quoting *Bluetooth*, 654 F.3d at 942)). In other words, a percentage-based approach is not fully reliable where a settlement includes non-cash relief.

Because the debt relief was "not easily monetized," a lodestar crosscheck was needed to "adjust the benchmark percentage" or as a substitute fee methodology because a percentage-based fee "would yield windfall profits." *Bluetooth*, 654 F.3d at

942.[4] As in *Bluetooth*, this Court should reverse the fee award because the district court applied insufficient lodestar crosscheck scrutiny, leading to an unreasonable percentage-based fee.

The "[n]umerous decisions" that plaintiffs rely on that supposedly have "squarely h[eld]" crosschecks are a matter of discretion don't withstand scrutiny. PB48. For example, in *Online DVD-Rental*, the court upheld a fee award where the district court compared the benchmark percentage award to the lodestar, which was three times the benchmark award, provided "a reasoned explanation" "both in her order and oral ruling," "addressed many of Objectors' arguments, summarized her lodestar cross-check," and discussed the factors supporting the fee award. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 955 (9th Cir. 2015). This analysis was discussed approvingly because "the benchmark is not per se valid, [though] it is a helpful 'starting point.'" *Id. Fischel*, like *Yamada*, addressed a percentage-based crosscheck of a lodestar-based award. The court found that the early settlement in the case supported the district court's reduced lodestar-based fee award, as "the 25 percent benchmark of the percentage-of-the-fund approach might very well have been a 'windfall.'" *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997 (9th Cir. 2002). So, too, here. *Fischel* therefore confirms that a crosscheck is necessary to protect against windfall fees. Rounding out their support, plaintiffs cite dicta from a case that has been vacated. PB48 (citing *In re*

[4] Plaintiffs suggest that *Yamada* changed the holding of *Bluetooth* for the facts of the case in *Bluetooth*, but it did not such thing. As a basic principle of judicial precedent, and with no express overruling of *Bluetooth*, the *Yamada* holding applies to the facts of *Yamada*, and the holding of *Bluetooth* continues to apply to the facts of *Bluetooth*. *See* PB48 n.14.

Google Referrer Header Privacy Litig., 869 F.3d 737 (9th Cir. 2017), *vacated and remanded sub nom. Frank v. Gaos*, 139 S. Ct. 1041 (2019)).

Threatt's appeal will not undermine district courts' discretion to choose the best methodology for determining fees, or require courts to "slog through years of time records." PB49. The district court can elect its preferred primary method, and it only gets to the question of applying a crosscheck if the fees seem *prima facie* reasonable under the first method.[5] An objector raised the issue of unreasonable fees, the relief was not a pure common fund, and the lodestar documentation was already before the district court. It would not have been burdensome for the court to take an extra step of evaluating the information already before it, based on the arguments presented to it, to ensure the class was protected from unreasonable fees. At the very least, the court was required to provide a valid reason for refusing to examine a lodestar crosscheck. The district court's blinkered approach to fees simply is not permissible.

The parade of horribles plaintiffs envision does not warrant rejecting the lodestar crosscheck. PB4. It is widely acknowledged that there are drawbacks both to a lodestar-only approach as well as to a pure percentage-based fee award—which is why the lodestar crosscheck was necessary to ensure a reasonable fee here. "Particularly where the common benefits are in the form of discounts, coupons, options, or declaratory or

[5] Plaintiffs also overstate the burden of a lodestar crosscheck. Here, the court already had the time records. More generally, the level of detail required for the lodestar accounting will vary depending on the circumstances of the case. *See, e.g., In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.,* 768 Fed. Appx. 651, 654 (9th Cir. 2019) (allowing reliance on billing summaries for crosscheck); *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) (same).

injunctive relief, estimates of the value or even the existence of a common fund may be unreliable, rendering application of any percentage-of-recovery approach inappropriate." Manual of Complex Litigation at 190.

The benefits of the percentage-based approach (PB51) are not diminished by using a secondary lodestar crosscheck. Attorneys still only get compensated in so far as their clients do and so are incentivized to obtain maximum class benefit. A lodestar crosscheck would not "forc[e] [courts] to apply a fee methodology that instead encourages prolonged litigation." PB32. Again, the point of the crosscheck is to ensure reasonableness under Rule 23(h). A crosscheck would have informed the court with exactly what plaintiffs try to brush over: A fee award equal to over $11,000 per hour. While plaintiffs contend this case involved risk and a favorable result which support their fee, nothing prevented the district court from considering whether those risks could possibly justify a stated multiplier of 11, or any multiplier at all during the crosscheck.

Plaintiffs' primary rebuttal to Threatt's argument that a "reasonable" fee under Rule 23(h) is equivalent to a "reasonable" fee under fee-shifting statutes, where fees are presumptively determined by counsel's lodestar, is flawed. The only "different consideration[]" plaintiffs identify is that in statutory fee-shifting cases, the fees are paid by the losing party, while in private class actions the fees are paid out of the injured class members' recovery. PB50. They offer no principled reason why a wrongdoer should somehow be responsible for paying less than the injured party when "reasonableness" is the same standard for both. *Blum v. Stenson* did not address this common standard under Rule 23; instead, the footnote cited by plaintiffs addressed the generic differences between fee-shifting statutes and the common-fund doctrine. 465 U.S. 886, 900 n.16 (1984) (cited at PB50). The "risk" of achieving no recovery exists whether the case is brought under a fee-shifting statute or as a Rule 23 class action and therefore cannot justify any difference in treatment.

That many private compensation arrangements choose the contingent percentage fee offers limited insight into what is "reasonable" under Rule 23. Many private compensation arrangements, particularly those negotiated by sophisticated clients, also include lodestar moorings. And the fact that some arrangements are pure contingency certainly does not undercut the need to anchor attorneys' fees to the lodestar that the Supreme Court has held is a presumptively "reasonable" fee. *Perdue v. Kenny A.*, 559 U.S. 542, 546 (2010). In *Hyundai*, this Circuit itself cited *Kenny A.*'s limitation on lodestar multipliers in discussing the insufficiency of the district court's reasoning for its fee award. 926 F.3d at 581. If this Court did not intend for the standards from *Kenny A.* to apply in the class action settlement fund context, it would not have cited it in an *en banc* decision.

Finally, Threatt rejects the cynical view of our judiciary advanced by plaintiffs. Remand with an instruction to conduct a lodestar crosscheck to ensure a reasonable fee certainly would do more than just allow "the court [to] add a few words stating that it considered class counsel's lodestar" PB33. Threatt trusts the district court to scrutinize the proffered lodestar, remove unnecessary and unreasonable hours, examine the actual hourly fee and multiplier, and, consistent with this Court's instructions and earlier precedent, reject the unseemly award here in favor of a reasonable fee award. In appropriate circumstances, this Court has affirmed the "limited of use of multipliers."

Hyundai, 926 F.3d at 572 (citing multipliers between 1 and 3.65). Plaintiffs don't cite authority from this Court stating that a multiplier of 18 is ever appropriate. The district court would confront the same dearth of authority and presumably reduce the fee award to conform to the law.

B. Plaintiffs cannot provide their own post-hoc explanations to make up for the district court's failure to explain why it declined to crosscheck the fee award after Threatt raised the issue.

On appeal, plaintiffs try to substitute their own reasoning for the district court's. Nothing in the order even plausibly explains the court's refusal to apply a lodestar crosscheck or gives a reasoned response to class member objections identifying the need for such. As a result, plaintiffs are forced to claim that the court's justification is somehow "bound up in and inseparable from," its determination that the percentage-based attorneys' fees were reasonable. PB32. They contend that the court's finding that the percentage-based attorneys' fees were reasonable without a lodestar crosscheck somehow is itself an explanation for not applying the crosscheck. PB50-51. This makes no sense. The point of the lodestar crosscheck is to check that a percentage-based award that may seem *prima facie* reasonable is in fact reasonable. Threatt's objection specifically argued that a lodestar crosscheck showed that the fee was not reasonable. Circuit precedent required the court to give a reasoned response. *Dennis v. Kellogg*, 697 F.3d 858, 864 (9th Cir. 2012). The court's *ipse dixit* that it could, therefore it would, does not meet that standard.

Even if the district court was right that the results of the litigation were remarkable, PB51, it still was obligated to explain why it refused to apply the crosscheck as Threatt urged. Plaintiffs are eager to advance the position that the percentage-based fee award is the better of the two methods; however, the district court offered no view on this subject and did not suggest that it chose the percentage-based award because it better aligned the interests of counsel and the class in this case. PB51. And again, even if it had, the benefits of the percentage method are not defeated by the application of a lodestar crosscheck. That the district court explained why it applied the 21% rate proposed by plaintiffs likewise offers no insight into why the court refused to check the reasonableness against the lodestar. *See* PB51-54.

Plaintiffs' further unsupported speculation that the court actually did examine the lodestar is nonsense. The district court could not have been more clear: "The Court therefore finds it proper to exercise this discretion and not apply the lodestar cross check." ER15. The district court expressly cited the 25% benchmark, the results of the litigation, and counsel's skill as the reasons the 21.1% fee was reasonable. *Id.* It completely disregarded the lodestar crosscheck. If the court had based the fee award on other factors, it would have said so. Plaintiffs cannot substitute their desired rationales now to get the result they want on appeal. If anything, the fact that the district court had the lodestar information available and still expressly declined to consider it suggests that the lodestar revealed the unreasonableness of the fee award.

Conclusion

The fee award should be vacated, and the case remanded for calculation of fees based on class counsel's lodestar, after hours incurred unreasonably or with no benefit to the class are removed. In the alternative, if the debt relief was worth the $29.1 million upon which the district court awarded fees, class certification should be reversed and the case remanded for the district court to create subclasses with separate counsel and representatives for the class members eligible for debt relief and those eligible for cash relief to renegotiate the settlement. At the very least, the case should be remanded for the district court to provide reasons for its failure to apply a lodestar crosscheck to the fee award.

Dated: September 11, 2019

Respectfully submitted,

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Certificate of Compliance
Pursuant to 9th Circuit Rule 32-1 for Case Number 18-56371

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,904 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on September 11, 2019.

/s/Anna St. John
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Proof of Service

I hereby certify that on September 11, 2019, 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/ Anna St. John
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