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

Petition for Panel Rehearing or Rehearing En Banc
of Appellant Rachel Threatt

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Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of FRAP 26.1, Rachel Threatt declares that she is an individual and, as such, is not a subsidiary or affiliate of a publicly owned corporation and there is no publicly held corporation that owns ten percent or more of any stock issued by her.

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FRAP 35(b)(1) Statement

As documented by the dissent in this case, panel rehearing or rehearing *en banc* is merited because the panel decision conflicts with the decisions of this Court in *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir 2003); *In re Bluetooth Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011); *Roes v. SFBSC Management*, 935 F.3d 1035 (9th Cir. 2019); and *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922 (9th Cir. 2020). In addition, the panel decision conflicts with the decisions of this Court in *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012) and *Powers v. Eichen*, 229 F.3d 1249 (9th Cir. 2000).

In the alternative, if the district court's factual findings on valuation stand, then panel rehearing or rehearing *en banc* is merited. The decision affirming class certification contradicts Supreme Court precedent and Fed. R. Civ. Proc. 23(a)(4) and creates a circuit split, because, according to the affirmed findings of the district court, the settlement impermissibly provides wildly different relief to class members with identical claims simply based on whether their accounts with Bank of America are open or closed. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Dewey v. Volkswagen A.G.*, 681 F.3d 170 (3d Cir. 2012); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011).

Panel rehearing and rehearing *en banc* is merited because the panel opinion misapprehended the precedents of *Campbell v. Facebook, Inc.*, 951 F.3d 1106 (9th Cir. 2020); and *In re Hyundai & Fuel Econ. Litig.*, 926 F.3d 539, 571 (9th Cir. 2019) (en banc). The panel further misapprehended the facts in finding that the "larger" recovery for former Bank of America customers was based on "higher-value claims" when there was no record support that any claim in the single settlement class was worth thirty times the other.

Background

Bank of America charged customers in the class $35 for each instance of writing a check against insufficient funds, and—in the event that Bank of America advanced the customer funds to honor the check—charged another $35 if the customer did not pay back the advance within five days. The second $35 fee, referred to as an "Extended Overdrawn Balance Charge" or an "EOBC," is all that the settlement in this case addressed. The initial overdraft fee was unchallenged. Plaintiffs' counsel claimed that the EOBC constituted usurious interest under the National Bank Act, 12 U.S.C. §§ 85-86. Dissent 1-2.

The parties quickly settled after the district court denied a motion to dismiss but granted a motion for an interlocutory appeal. As part of their settlement, plaintiffs' lawyers and Bank of America agreed to class certification if the court approved the settlement. No class had yet been certified. The class would consist of around seven million people who, between February 25, 2014, and December 30, 2017, had been assessed at least one EOBC that had not been refunded. Bank of America agreed to a "clear sailing" attorneys' fees provision, that is, that it would not oppose any application for attorneys' fees not exceeding 25% of the purported settlement value plus reimbursement for costs and expenses. ER137; Dissent 2. Bank of America agreed to pay $37.5 million into a settlement fund that would cover cash payments to the attorneys, settlement administrator, class representatives, and class members.

Dissent 2-3. After those other items are deducted, the amount of cash left to pay class members is approximately $22.8 million, approximately $1.07 for each $35 charged those class members. ER22; Dissent 3.

As the settling parties admitted, as a throw-in *after* the cash settlement fund was negotiated, Bank of America also agreed to forgive $29.1 million in debt—a single $35 EOBC charge—for class members whose accounts were closed because they never paid their overdraft. Dkt. 128 at 4-5. Bank of America never disclosed, and the district court never inquired despite objectors pointing out the issue, how much of that outstanding debt was valued on its books as recoverable or had otherwise been written off already, and thus was mostly illusory.

Bank of America agreed not to implement or assess EOBCs with respect to consumer checking accounts for a period of five years. ER131. A Bank of America executive testified that eliminating EOBCs will decrease its monthly revenue by approximately $20 million, or $1.2 billion over the life of the injunction. ER22. The settlement does not forbid Bank of America from charging account holders other fees to make up for any such loss in revenue from EOBCs, and Bank of America did not suggest that it would abstain from doing so. The change in policy applies to both class members and non-class members and opt-outs.

The attorneys requested and the district court awarded $14.5 million of the $37.5 million settlement fund.

Rachel Threatt, among other class members, objected to the fee request and argued that the fee award should be reduced to augment class recovery. Threatt argued that class counsel's lodestar was overstated because it included non-compensable hours such as pre-*Farrell* time for work on other litigation, anticipated future time that had not yet been expended, and time spent on class counsel's fee application. ER91-94. Once those hours were removed, class counsel's fee request was more than sixteen times their lodestar, equaling fees of more than $11,000 per hour; even when those hours were included, the fee request was still over ten times the lodestar. ER94-97. Threatt further argued that the percentage of recovery requested by class counsel was excessive because (i) the $66.6 million used in the denominator of the calculation was not all cash and should not be valued as such in the fee calculation; and (ii) the change in Bank of America's business practices will not benefit class members uniquely and therefore does not support a higher percentage of recovery. ER98-103. Threatt argued that the two-stage settlement process described by the parties led to one of only two possible conclusions. Either: (1) class counsel negotiated inadequately and left significant value on the table during the first "cash negotiation" stage; or (2) the debt portion of the relief truly is a "throw in" that is worth little to Bank of America or class members. Dkt. 129 at 2. It was implausible, Threatt argued, that Bank of America would agree to a settlement for a small fraction of the value of the complaint, in cash, which plaintiffs claimed "maximized" cash relief (Dkt. 128 at 5), and then agreed to more than double the value it was willing to surrender. Dkt. 129 at 2.

If, on the other hand, the district court was to adopt the settling parties' proposed valuation of the debt relief, then the settlement violated Rule 23(a)(4), because of the intraclass conflict between current and former Bank of America customers in the class: if the debt relief were valued at face value, then former customers would receive more than thirty times as much as current customers for the identical claim. Threatt noted that the court could readily determine the truth of the matter by requiring Bank of America to disclose how it accounted for the debt forgiveness component of the settlement relief on its books. Dkt. 129 at 6-7, 9.

The district court entered an order granting class counsel's motions for final approval for the settlement and for the full $14.5 million in fees. ER2. The district court rejected the objectors' argument that the debt relief is largely illusory and overstated, holding that "[w]hile it may be true that it will cost [Bank of America] very little to provide the Debt Portion relief, it does not follow that the relief is meaningless to Debt Portion recipients." ER13. The court did not address Threatt's specific objections to the valuation, or require Bank of America to make any disclosures about how it internally had accounted for the debt relief or how much of the debt it had already written off, or explain why it was accepting the parties' *ipse dixit* characterization of the debt relief as being worth face value rather than requiring Bank of America to disclose its accounting value.

The district court granted class counsel's entire $14.5 million request for fees and expenses. ER16. The district court held that it has discretion to "not apply the lodestar cross check," and therefore did not apply a cross check at all or even reference class counsel's lodestar, but did not explain why it was exercising its discretion so. *Id.* Instead, the court based its fee award on its determination that "the requested 21.1% [of the $66.6 million combined cash and debt relief] is significantly below the benchmark rate of 25%." *Id.* It further held that even if the debt relief was illusory, the fee award was nevertheless justified because Bank of America's cessation of EOBCs for five years was worth "substantially more" than the $29.1 million cash relief.

On appeal, a divided panel affirmed. The court dismissed the Rule 23(a)(4) argument with a conclusory "No conflict of interest arose when the differences between members of [the] class did not bear on the allocation of limited settlement funds and when the structure of the settlement appropriately protected higher-value claims . . . from class members with much weaker ones." Slip op. 3 (cleaned up). It held there was no abuse of discretion for refusing to conduct a lodestar crosscheck, asserting that the argument was foreclosed by circuit precedent, but did not address the district court's failure to explain any reasoning for refusing to do so. *Id.* at 3-4. The court found the injunctive relief to non-class members justified the percentage-of-recovery award. *Id.* at 5-6.

Judge Kleinfeld dissented. He noted that *Roes* required more scrutiny than the district court provided here, and that the economic reality of the debt relief was "nowhere near $29.1 million." Dissent 4-6. The panel's and district court's attribution of value of injunctive relief contradicted *Staton* and *Roes*. *Id.* at 7-9. The "difficulty" of the case did not merit fees higher than 25% of the cash settlement fund. *Id.* at 10-11. The district court's failure to crosscheck lodestar without reasoned justification and award of fees contradicted *Bluetooth* and *Optical Disk*. *Id.* at 11-14. Judge Kleinfeld further called for this Court to explicitly require a lodestar crosscheck, as the amicus state attorneys general requested. *Id.* at 14-16.

Argument

The class-action settlement at issue in this appeal resulted in a fee award to class counsel more than ten times their purported lodestar; in reality, is a multiplier of more than *sixteen*, once hours spent litigating other cases before this one, and hours spent on the fee motion itself, and future hours are excluded—over $11,000/hour. Meanwhile, current customers of Bank of America receive about $1.07 for each allegedly usurious $35 overdraft fee. Dissent 3. While the settlement requires current Bank of America customer class members to release 97% of their potential damages, class counsel received everything they asked for: a fee award more than ***ten times*** their professed and exaggerated lodestar, or $6,700/hour. This is unreasonable under Rule 23(h) as a matter of law, and the Ninth Circuit has expressly said so:

> Though courts have discretion to choose which calculation method they use, ***their discretion must be exercised so as to achieve a reasonable result***. Thus, for example, where awarding 25% of a "megafund" would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead.

Bluetooth, 654 F.3d at 942 (citations omitted, emphasis added). If $6,700 to $11,000/hour for a settlement of less than five cents on the dollar to the class is not a windfall, nothing is. The panel misread Circuit precedent to affirm.

I. Panel rehearing or rehearing *en banc* is required because the panel misapprehended Circuit precedent in multiple particulars.

The panel misapprehended Circuit precedent. Citing several cases, the panel majority asserts that this Court "has consistently refused to adopt a crosscheck requirement." Slip Op. 3 (citing cases). Most of these cases did not even address the question of a crosscheck. *See, e.g. Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

Only two of these cases addressed whether a crosscheck was required, and both addressed only whether a ***percentage-of-recovery*** crosscheck was necessary after "employing the lodestar method." *In re Hyundai & Fuel Econ Litig.*, 926 F.3d 539, 571 (9th Cir. 2019) (en banc). For example, *Campbell v. Facebook*, 951 F.3d 1106, 1126 (9th Cir. 2020), held "[W]here the benefit to the class is not easily quantified, district courts have discretion to award fees based on how much time counsel spent and the value of that time (a lodestar calculation) without needing to perform a crosscheck in which they attempt to estimate how this compares to the recovery for the class." Requiring a percentage crosscheck "would make 'little logical sense because the lodestar method yields a fee that is presumptively reasonable.'" *Hyundai*, 926 F.3d at 571 (cleaned up).

Campbell relieves district courts from the obligation to conduct a percentage-based crosscheck "given the difficulty of measuring the value of the injunctive relief." 951 F.3d at 1126. That is sensible, because percentage-of-recovery calculations are "easily manipulable by overreaching lawyers" when non-monetary injunctive relief is involved. *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003). But it is not sensible at all to relieve district courts of the obligation to conduct a lodestar-based crosscheck when difficult-to-measure injunctive relief is present. Slip Op. 6. That is precisely when the objective grounding of a lodestar calculation is indispensable. *See Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1124 & n.8 (9th Cir. 2002) (holding that a purely percentage-based award was unreasonable in light of the lodestar multiplier and fact that benefit conferred could not be accurately quantified). *Hyundai* affirmatively echoes Threatt's position here: using the percentage method as a full replacement for lodestar is appropriate "only if 'the benefit of the benefit to the class is easily quantified.'" *Compare* 926 F.3d at 571 (quoting *Bluetooth*, 654 F.3d at 942), *with* Threatt Opening Br. 30-36 *and* Threatt Reply Br. 16-22. The panel majority erred by reading *Hyundai* and *Campbell* to foreclose Threatt's appeal, when both cases are consistent with Threatt's arguments for a lodestar crosscheck.

The panel essentially holds that a district court can choose whatever method it wants, but this contradicts *Bluetooth*. *Bluetooth* expressly requires a court to apply a lodestar crosscheck when the failure to do so will not lead to a "reasonable result." 654 F.3d at 942. If "25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead." *Id.* If $6,700 to $11,000/hour—a multiplier of more than ten to sixteen—does not constitute an unreasonable "windfall" when current bank customers like Threatt are required to surrender over 95% of their claims in a case that was not litigated beyond a motion to dismiss, what does? *Accord* Dissent 12-14.

As the dissent noted,

> Our cases holding that a cross check is not necessarily required do not open the door to mechanical application of a percentage award to putative common funds that include speculative and uncalculated value in the form of debt reduction. We noted in *Bluetooth* that "even though a district court has discretion to choose how it calculates fees, we have said many times that it 'abuses that "discretion when it uses a mechanical or formulaic approach that results in an unreasonable award."'" [654 F.3d at 944.] The attorneys' fee award in this case does not satisfy *Bluetooth*.

Dissent 14 (cleaned up). "Because so little litigation occurred before the settlement, and the percentage fee was so high, it was an abuse of discretion not to accept the 'encourage[ment]' in *Bluetooth* and *In re Optical Disk Drive Products Antitrust Litigation* to perform a lodestar cross check, even though cross checks are not absolutely required." *Id.* at 16 (footnote and citations omitted).

The panel opinion further contradicted *Staton* and *Roes* in using the injunctive relief, which provided no marginal benefit to class members who were releasing their claims over class members who opted out (or the public at large), to justify a percentage-of-recovery award. "[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." *Staton*, 327 F.3d at 974; *accord Roes*, 944 F.3d at 1055; Dissent 8-9. As the dissent notes, "under *Staton* and *Roes*, the district court abused its discretion by attributing *any* value to the class of the injunctive relief, much less the face value claimed." Dissent 9 (emphasis in original). The panel committed the same error of law. "Even without a lodestar cross check, the attorneys' fee award violated Ninth Circuit law because it overvalued the amount gained for the class." *Id.* at 16. The district court's calculations ignored the "economic reality" of the settlement. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015); Dissent 10.

Finally, affirmance contradicted circuit precedent for an independent reason. To survive appellate review, "the district court must show it has explored comprehensively all factors, and must give a reasoned response to all non-frivolous objections." *Dennis*, 697 F.3d at 864 (cleaned up). Similarly, a fee award requires due explanation. *Powers*, 229 F.3d at 1256-58. The district court gave no explanation why it rejected several Threatt objections; its only justification for refusing to consider lodestar was that "it was not required" (Dissent 16); this, by itself, required reversal. Threatt Opening Br. 38-43. As the dissent notes, nor did the district court apply the scrutiny and "exacting review" required by *Roes*. Dissent 4-5. The panel opinion did not address either issue or reconcile its decision with *Dennis* or *Powers*.

II. If the district court's valuation of the debt relief is to be affirmed, then the panel misapprehended the facts, and created a circuit split on the Rule 23(a)(4) issue.

The district court valued the debt relief at the full face value of $29.1 million because former Bank of America customers who owe the defendant money will receive $35 in debt relief each. If $35 of debt relief for uncollectible debts is worth $35, then this subclass is receiving more than thirty times as much as current bank customers in the settlement. This would create an impermissible intraclass conflict under Rule 23(a)(4) for treating identically situated class members differently. *See Dewey*, 681 F.3d at 183; *see also* Fed. R. Civ. Proc. 23(e)(2)(D). The district court overruled the objections to the adequacy of representation because "the fact that the least represented [debt relief] group appears to have received more favorable treatment would seem to suggest a lack of self-dealing on the part of the named representatives," all of whom were in the cash relief group, but gave no explanation why a 30:1 ratio of more favorable treatment was permissible for identical claims. ER10. But *Dewey* rejected the idea that a single class could provide materially different relief to class members with identical claims.

The panel held this was no issue because "the structure of the settlement appropriately protected higher-value claims . . . from class members with much weaker ones." Slip op. 3 (cleaned up). But ***there was no record evidence*** that current Bank customers have ***different*** claims than former customers, much less "much weaker" claims. The district court did not make such a finding, and appellees never even asserted this argument. (Instead, the district court made the legally irrelevant argument (ER10) that the disparity was justified because the class representatives were part of the "disfavored class," so could claim less than $35—on top of their $20,000 in incentive awards (ER16), which greatly dwarf the EOBC refunds waived for current bank customer-class members!) The panel's conclusion is thus based on a premise that misapprehends the facts of the case. It further creates a circuit split with *Dewey*, and contradicts the Supreme Court's Rule 23(a)(4) jurisprudence in *Amchem* and *Ortiz*. If the "interests of those within the single class are not aligned," and the named parties and class attorneys seek "to act on behalf of a … class rather than on behalf of discrete subclasses," then those representatives cannot possibly represent the entire class, and the class as structured fails the adequacy requirement. *Amchem*, 521 U.S. at 625-26.

Even if there were any basis for the 30:1 ratio in pecuniary benefit that the district court found, the alleged fairness of the resulting settlement is not a cure for the fatal Rule 23(a)(4) flaw, because Rule 23(e) is "an additional requirement, not a superseding direction." *Amchem*, 521 U.S. at 621. Federal courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper." *Id.* at 622; *Ortiz*, 527 U.S. at 858-59; *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 253-54 (2d Cir. 2011) (noting no dispute over fairness over allocation but decertifying class anyway). The panel's reasoning was not only based on a false premise, but contravened Supreme Court precedent and creates a circuit split. Class counsel can't have it both ways. If the district court's factual findings on settlement value stand, then the wildly disparate recovery for debtors and current customers with identical legal claims for "usury" mean that the settlement and class certification fail as a matter of law.

III. In the alternative, rehearing *en banc* should be granted to affirmatively require lodestar cross-checks to prevent unreasonable windfalls where plaintiffs have not achieved a majority of the relief sought, as the existing precedent does not provide clear guidelines to district courts.

Wininger reversed a fee award where "awarding a fee based on a percentage of the monetary fund would be inappropriate." 301 F.3d at 1124. *Bluetooth* held that the choice between percentage-of-the-fund and lodestar had to be "reasonable." 654 F.3d at 942. *Campbell* and *Hyundai* held that a court using the lodestar method need not perform a percentage-of-recovery crosscheck where the recovery was difficult to calculate, because the lodestar was presumptively reasonable. *See* Section I above. No Ninth Circuit court until now has ruled out a lodestar crosscheck, much less the failure to perform a crosscheck without explanation, much less a crosscheck for an award of a multiplier of ten to sixteen times lodestar for such meager results.

The ambiguity in the Court's precedents shows why, as the dissent suggests, a bright-line rule is needed. "Though circuit law does not necessarily require a cross check, it probably should." Dissent 14.

> We said in *Bluetooth* and in *In re Optical Disk Drive Products Antitrust Litigation* that we have "encouraged" a cross check. But at least in this case, the district court chose to follow the negative pregnant—that we do not require the cross check—rather than accept the encouragement. This is understandable. In the rare instance of a class action going to trial, the effect on the district court's docket—combined

> with the difficulty of trying criminal cases within the 18 U.S.C. § 3161 statutory deadline and the press of other civil litigation—is a devastating year in the courtroom. But skipping this step breaches the district court's fiduciary duty to the class.
>
> The amicus brief in this case, by the Attorneys General of seven states—Arizona, Arkansas, Idaho, Indiana, Louisiana, Missouri, and Texas—urges that instead of merely encouraging a cross check, we ought generally to require it. Now-Justice Gorsuch has recommended reversing the trend toward percentage fees without cross checks, and scholarly literature has developed urging the necessity of a lodestar cross check, including an article co-authored by experienced district judge Vaughn Walker. In this case, the district court gave no reason—such as undue complexity or difficulty of calculation—for not using a lodestar cross check. The only justification the district court gave for not performing a lodestar cross check was that it was not required.

Dissent at 14-16 (footnotes and citations omitted). That the Ninth Circuit "encourages" lodestar cross-checks and requires the use of a percentage methodology to be "reasonable" does no good if a district court can simply disregard the Ninth Circuit's recommendation without explanation because it's not "required." Clearer guidelines are needed to avoid untethered collateral litigation.

Conclusion

The Court should grant rehearing or rehearing *en banc* and reverse the fee award. If the erroneous factual findings underpinning the fee award stand, then the class certification fails as a matter of law.

Dated: September 16, 2020

Respectfully submitted,

/s/Theodore H. Frank

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Certificate of Compliance
Pursuant to 9th Circuit Rule 35-4 and 40-1
Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

I certify that:

I am the attorney.

This brief complies with the length limits permitted by Ninth Circuit Rule 40-1(a) for a petition for a panel rehearing *and* petition for rehearing *en banc*. The brief is 4,094 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 16, 2020.

/s/Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on September 16, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/Theodore H. Frank
Theodore H. Frank

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

JOANNE FARRELL; et al., Plaintiffs-Appellees, ESTAFANIA OSORIO SANCHEZ, Objector-Appellant, v. BANK OF AMERICA CORPORATION, N.A., Defendant-Appellee.	No. 18-56272 D.C. No. 3:16-cv-00492-L-WVG MEMORANDUM*
JOANNE FARRELL; et al., Plaintiffs-Appellees, AMY COLLINS, Objector-Appellant, v. BANK OF AMERICA CORPORATION, N.A., Defendant-Appellee.	No. 18-56273 D.C. No. 3:16-cv-00492-L-WVG

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

JOANNE FARRELL; et al., Plaintiffs-Appellees, v. RACHEL THREATT, Objector-Appellant, v. BANK OF AMERICA, N.A., Defendant-Appellee.	No. 18-56371 D.C. No. 3:16-cv-00492-L-WVG

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Argued and Submitted March 2, 2020
Pasadena, California

Before: KLEINFELD and CALLAHAN, Circuit Judges, and CHRISTENSEN,**
District Judge.
Dissent by Judge KLEINFELD

Objectors-Appellants appeal from the district court's: (1) approval of a class action settlement between Defendant-Appellee Bank of America and Plaintiffs-Appellees, Bank of America accountholders; and (2) $14.5 million fee award to

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** The Honorable Dana L. Christensen, United States District Judge for the District of Montana, sitting by designation.

class counsel. We review for abuse of discretion. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011). We affirm both the settlement approval and the fee award.

The district court did not err in approving the settlement over objections to the failure to create subclasses. The named plaintiffs "fairly and adequately protect[ed] the interests of the class." Fed. R. Civ. P. 23(a)(4). No conflict of interest arose when the differences between members of class did not bear on "the allocation of limited settlement funds" and when the structure of the settlement appropriately protected "higher-value claims . . . from class members with much weaker ones." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 605 (9th Cir. 2018).

Nor did the district court abuse its discretion in using the percentage-of-recovery method to calculate fees and refusing to conduct a lodestar crosscheck. This Court has consistently refused to adopt a crosscheck requirement, and we do so once more. *See Campbell v. Facebook*, 951 F.3d 1106, 1126 (9th Cir. 2020); *In re Hyundai & Fuel Econ. Litig.*, 926 F.3d 539, 571 (9th Cir. 2019) (en banc); *Bluetooth*, 654 F.3d at 944; *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738–39 (9th Cir. 2016); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th

Cir. 1990). The district court acted within its "discretion to choose how [to] calculate[] fees." *Bluetooth*, 654 F.3d at 944.

The district court considered the most pertinent factors influencing reasonableness, and it did not err in finding the fee award reasonable under Federal Rule of Civil Procedure 23(h). *See Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954–55 (9th Cir. 2015). The court appropriately considered: (1) "the extent to which counsel 'achieved exceptional results for the class'"; (2) "whether the case was risky for class counsel"; (3) "whether counsel's performance 'generated benefits beyond the cash settlement fund'"; and (4) "the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work)." *Id.* (quoting *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002)).

Most significantly, the district court concluded that class counsel demonstrated "tenacity and great skill," achieving a "remarkable" result in a "hard fought battle" despite an "adverse legal landscape" and the "substantial risk of non-payment." Indeed, excepting the district court in this particular matter, no court has ever ruled for bank accountholders on the controlling legal issue. *Compare Farrell v. Bank of Am., N.A.*, 224 F. Supp. 3d 1016 (S.D. Cal. 2016) *with Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133 (1st Cir. 2019); *Walker v. BOKF, N.A.*, No. 1:18-cv-810-JCH-JHR, 2019 WL 3082496 (D.N.M. July 15, 2019); *Johnson v. BOKF, Nat'l Ass'n*, 341 F. Supp 675 (N.D. Tex. 2018); *Moore v. MB Fin. Bank,* *N.A.*, 280 F. Supp. 3d 1069 (N.D. Ill. 2017); *Dorsey v. T.D. Bank, N.A.*, No. 6:17-cv-01432, 2018 WL 1101360 (D.S.C. Feb. 28, 2018); *McGee v. Bank of Am., N.A.*, No. 15-60480-CIV-COHN/SELTZER, 2015 WL 4594582 (S.D. Fla. July 30, 2015), *aff'd* 674 F. App'x 958 (11th Cir. 2017); *Shaw v. BOKF, Nat'l Ass'n*, No. 15-CV-0173-CVE-FHM, 2015 WL 6142903 (N.D. Okla. Oct. 19, 2015); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 150 F. Supp. 3d 593, 641–42 (D.S.C. 2015). This was a "risky" case, and the result negotiated for the class was "exceptional." *Online DVD-Rental*, 779 F.3d at 954–55.

We agree with the dissent that the individual cash distributions were small, but we take a different view of the value of the injunctive relief. While it can be difficult to value nonmonetary relief, we have no trouble finding that the value here exceeds the $29.1 million assigned to it by the parties. Even more valuable than the debt forgiveness is Defendant-Appellee's agreement to refrain from assessing the fees challenged in this lawsuit—over the five-year moratorium imposed under the settlement agreement, Defendant-Appellee will forgo assessing $1.2 billion in fees. We do not struggle to conclude, as the district court did, that counsel "generated benefits" far "beyond the cash settlement fund." *Id.* at 955.

Applying the abuse of discretion standard, as we must, we find that the district court reasonably determined that the relevant factors justified a fee award equivalent to 21.1% of the common fund. It was reasonable "not to perform a crosscheck of the lodestar in this case, given the difficulty of measuring the value of the injunctive relief." *Campbell*, 951 F.3d at 1126. What is more, the award fell under the 25% benchmark that we have encouraged district courts to use as a yardstick. *Stanger*, 812 F.3d at 738; *Online DVD-Rental*, 779 F.3d at 955. Even if we were inclined to question the district court's motive in approving the settlement and awarding fees, we note that the district court's prior order denying Defendant-Appellee's motion to dismiss is inconsistent with the dissent's suggestion that the district court streamlined its docket at the expense of faithful adherence to the law.

In short, neither the settlement nor the fee award raises an eyebrow. We have settled the issue of whether a lodestar crosscheck is required, and we would not unsettle our precedent, even if we had the authority to do so.

AFFIRMED.

FILED

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U.S. COURT OF APPEALS

Farrell v. Bank of America Corp., N.A., No. 18-56272+

KLEINFELD, Senior Circuit Judge, dissenting:

I respectfully dissent.

The district court abused its discretion regarding attorneys' fees in two respects: by overvaluing the settlement in applying the percentage method, and by failing to weigh the percentage method against the lodestar method. The consequence is an unreasonable attorneys' fee award. "Because the relationship between class counsel and class members turns adversarial at the fee-setting stage, district courts assume a fiduciary role that requires close scrutiny of class counsel's requests for fees and expenses from the common fund."[1]

Bank of America charged customers in the class $35 for each instance of writing a check against insufficient funds, and—in the event that Bank of America advanced the customer funds to honor the check—charged another $35 if the

[1] *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 930 (9th Cir. 2020).

customer did not pay back the advance within five days. The second $35 fee, referred to as an "Extended Overdrawn Balance Charge" or an "EOBC," is all that the settlement in this case addressed. The initial overdraft fee was unchallenged. Plaintiffs' counsel claimed that the EOBC constituted usurious interest under the National Bank Act.[2] The district court, though acknowledging that every other court to rule on the question had decided that it was not, nevertheless ruled that the EOBC did indeed constitute usurious interest under the National Banking Act. Bank of America appealed, but before any appellate decision came down, the parties settled.

As part of their settlement, plaintiffs' lawyers and Bank of America agreed to class certification if the court approved the settlement. No class had yet been certified. The class would consist of around seven million people who, between February 25, 2014, and December 30, 2017, had been assessed at least one EOBC that had not been refunded. Bank of America agreed to a "clear sailing" attorneys' fees provision, that is, that it would not oppose any application for attorneys' fees not exceeding 25% of the settlement value plus costs and expenses. Bank of

[2] 12 U.S.C. §§ 85–86.

America agreed to pay $37.5 million in cash into a settlement fund, to forgive uncollected EOBCs on its books in the amount of at least $29.1 million, and to quit assessing EOBCs for five years beginning December 31, 2017, after which point it could resume the EOBCs as before. Class members who had actually paid the $35 EOBC would not get their $35 back. They would get only the $37.5 million—less attorneys' fees, costs, named plaintiff additional awards, and settlement administrator hourly charges—divided by the number of class members who had been assessed at least one EOBC which had not been refunded or charged off, and issued pro rata based on how many EOBCs each of those class members paid. At oral argument, objectors' counsel represented that this distribution worked out to be $1.07 per EOBC for qualifying class members paid. Each of these class members would thus get a little over a dollar back for each purportedly usurious $35 charge that they had paid. For class members who closed their accounts with an outstanding balance due to one or more unpaid EOBCs, Bank of America would reduce class members' indebtedness, but only by $35. This held true even if the debt exceeded that amount, as when Bank of America had assessed multiple $35 EOBCs.

For this result, the district court awarded attorneys' fees of $14.5 million. The district court's rationale for granting this attorneys' fee award was that it was 21.1% of the cash payments plus the reduction in the amount of uncollected debt. The district court did not make a lodestar calculation and did not cross check the $14.5 million against a lodestar calculation, even though class counsel submitted they had put only 2,158 hours into the case, about what a new associate at a major firm bills in a year. The $14.5 million fee amounted to a rate of over $6,700 per hour, as compared with the $250–$800 rate class counsel submitted as its rate for attorneys.

We held in *Roes v. SFBSC Management*,[3] following earlier decisions, that where a settlement is negotiated before a class has been certified, "settlement approval 'requires a higher standard of fairness' and 'a more probing inquiry,'" looking for "''subtle signs' of collusion" such as a disproportionate distribution to counsel and a clear sailing agreement for attorneys' fees,[4] both of which we have in

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[3] 944 F.3d 1035 (9th Cir. 2019).

[4] *Id.* at 1048–49 (quoting *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015); *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012)).

the case before us. The district court abused its discretion by not applying this "more 'exacting review.'"[5]

In their settlement, plaintiffs' counsel and the Bank agreed that the "debt reduction"—that is, the amount of uncollected EOBCs that the Bank agreed not to collect—amounted to $29.1 million. The objectors argued that the $29.1 million in purported debt forgiveness was greatly exaggerated or illusory. There was no evidence that the Bank was suing anyone for or actively attempting to collect these putative debts, and the objectors pointed out that the bank was highly unlikely to try to collect the $35 "debts." Indeed, the whole benefit of a class action is that it is not worth it to most entities to sue for such small amounts, so it makes no sense to suppose that even though the Bank's account holders need a class action to make collection economically practical, the Bank does not. As the objectors suggest, the Bank's filing and service fees alone would likely exceed the amounts of the debts in each instance of attempted collection.

[5] *Id.* at 1049 (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)).

The district court suggested that account holders, even if they were never going to pay the $35, might benefit from improvement in their credit scores. But this was never quantified. And because the settlement limits debt forgiveness to only one $35 reduction per class member even if more than one such fee was charged, the benefit of the purported credit score improvement is especially dubious or at least highly speculative. It is worth, if anything, nowhere near $29.1 million.

The district court also suggested that even though the Bank might never attempt to collect what it had not yet collected, it might sell the debt. But as the objectors argue, the sale value of this debt would more than likely be steeply discounted from its face value because of the impracticality of collecting it. It is hard to believe that the $29.1 million in “debt reduction” is anything more than a way to puff the value of the settlement by plaintiffs’ counsel and the Bank, in order to get the attorneys’ fees approved. A debt that is as a practical matter uncollectible, even if multiplied by a large number of purported debtors, has negligible or no value. It was an abuse of discretion to take this pile of worthless debt at face value for purposes of assessing attorneys’ fees.

The other number the district court used to justify the attorneys' fee award was the estimated value of the Bank's agreement to an injunction requiring it to stop charging the EOBCs for a five-year period, to end in 2022. The district court attributed a value of $1.2 billion to this injunctive relief based on the claimed cost to the Bank of ceasing the practice. In dismissing an objection to giving the debt relief face value, it stated that even "assuming *arguendo* that [the value of the debt relief] was illusory, the Court finds that the staggering $1.2 billion dollars in injunctive relief is worth substantially more than $29.1 million to the denominator."

In *In re Bluetooth Headset Products Liability Litigation*, we noted the importance of comparing "the settlement's attorneys' fees award and the *benefit to the class* or degree of success in the litigation . . . ."[6] Here, no calculation was made of how many, if any, class members might benefit from this prospective relief, as opposed to non-class members. Any account holder against whom no EOBC had been charged during the class period was not in the defined class, but

[6] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011) (emphasis added).

they would receive some of the benefit from this injunctive relief. This much of the benefit of the injunction is to persons not in the class, commensurately reducing any value to class members. For class members who no longer maintained accounts, the forward-looking injunction would have no value, since the Bank could not impose late-payment charges on people who no longer had accounts. The benefit to class members of the injunctive relief here is speculative, uncalculated, and likely to be a negligible fraction of the valuation the district court accepted.

We explained in *Staton v. Boeing Co.*[7] that "[p]recisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund."[8] Therefore, we held, "only 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

[7] *Staton v Boeing Co.*, 327 F3d 938 (9th Cir 2003).

[8] *Id.* at 974.

for purposes of applying the percentage method of determining fees."[9] Similarly, we held in *Roes v. SFBSC* that "because of the danger that parties will overestimate the value of injunctive relief in order to inflate fees, courts must be particularly careful when ascribing value to injunctive relief for purposes of determining attorneys' fees, and avoid doing so altogether if the value of the injunctive relief is not easily measurable."[10] Under *Staton*, the district court erred in valuing the benefit of the injunctive relief to the class at $1.2 billion based on its cost to Bank of America rather than its value to the class. Because this valuation of $1.2 billion is in error, the district court committed legal error to the extent it determined that "the staggering $1.2 billion in injunctive relief" justified the $14.5 million attorneys' fee award. Moreover, under *Staton* and *Roes*, the district court abused its discretion by attributing *any* value to the class of the injunctive relief, much less the face value claimed.

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[9] *Id.*

[10] *Roes*, 944 F.3d at 1055.

Considering the value of the settlement to the class—$37.5 million in cash plus some indeterminate and uncalculated amount in debt reduction—the attorneys' fees of $14.5 million constituted perhaps slightly less (but probably not much less) than 39% percent of the putative common fund. Our controlling authority generally sets a 25% "benchmark" for attorneys' fees calculated using the percentage method.[11] Thus the award here, even without considering the lodestar, ought to be reversed as an abuse of discretion once the economic reality of the amount is considered.

The district court, and the panel majority, justify the fee in part by the "difficulty" of the case. There are different kinds of difficult cases. One is when there is great legal complexity, or a vast amount of discovery, or coordination of many parties, or extremely complex damages. Another kind of difficulty is when it is just a bad case, perhaps a negligence case where duty and breach of the duty of care are pretty clear, but there are plainly no damages. Suppose, for example, the driver with the right of way sues the driver who ran a stop sign and almost hit him but did not, for negligence. That case would be difficult because it is meritless and

[11] *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019) (en banc).

should not be brought at all. It would earn a costs award against the plaintiff, not an award in favor of plaintiff's attorneys. The district court explanation, accepted by the majority, of why this case was difficult, that all the other courts to consider the question had gone the other way, sounds more like the no-damages negligence case than the massive and complex but meritorious case. This case involved no difficulty at all, in the sense of how much work was needed from counsel. There was nothing to it but a legal question, whether the second fee could be considered usurious, all the established precedent said no, and plaintiff's attorney obtained a ruling from the district court, never tested on appeal, and contrary to all the established precedent. To treat that sort of case as justifying an extraordinarily high fee because of "difficulty" would reward attorneys for bringing meritless cases. Difficulty of that sort cannot justify a discretionary award of extraordinarily high attorney's fees.

The district court also erred by not considering a lodestar calculation. Its only stated justification for avoiding this cross check was that controlling law did not require cross checking against the lodestar; it did not claim that the lodestar cross check would be uninformative or unhelpful. In *Bluetooth*, we noted that the first of the twelve *Kerr* factors for evaluating the reasonableness of attorneys' fees is "the time and labor required,"[12] and we held that the district court's discretion in choosing its method of awarding attorneys' fees "must be exercised so as to achieve a reasonable result."[13] Interpreting reasonableness, we held that, "for example, where awarding 25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead."[14] In *Bluetooth*, in part because the district court did not precisely calculate what the lodestar amount would be—despite stating that it was applying the lodestar method—we vacated and remanded.[15] We faulted the district court's exercise of discretion not only because of "the absence of explicit calculation or explanation of the district court's result," but also because "the district court declined to reduce the award because the injunctive relief and *cy pres* payment provided 'at least minimal benefit'" to the

[12] *Bluetooth*, 654 F.3d at 942 n.7 (quoting *Kerr v Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)).

[13] *Bluetooth*, 654 F.3d at 942.

[14] *Id.*

[15] *Id.* at 943, 945.

class.[16] In other words, because the injunctive relief and *cy pres* payment were not calculated, "[w]ith neither a lodestar figure nor a sense of what degree of success this settlement agreement achieved, we ha[d] no basis for affirming the fee award as unreasonable under the lodestar approach."[17]

While not requiring a cross check, *Bluetooth* notes that "we have also encouraged courts to guard against an unreasonable result by cross-checking their calculations against a second method."[18] We have held that "[t]he 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases,"[19] and that it "must be supported by findings that take into account all of the circumstances of the case."[20]

[16] *Id.* at 943–44.

[17] *Id.* at 944.

[18] *Id.*

[19] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002).

[20] *Id.*

Our cases holding that a cross check is not necessarily required do not open the door to mechanical application of a percentage award to putative common funds that include speculative and uncalculated value in the form of debt reduction. We noted in *Bluetooth* that "even though a district court has discretion to choose how it calculates fees, we have said many times that it 'abuses that "discretion when it uses a mechanical or formulaic approach that results in an unreasonable award."'"[21] The attorneys' fee award in this case does not satisfy *Bluetooth*.

Though circuit law does not necessarily require a cross check, it probably should. We said in *Bluetooth* and in *In re Optical Disk Drive Products Antitrust Litigation* that we have "encouraged" a cross check.[22] But at least in this case, the district court chose to follow the negative pregnant—that we do not r*equire* the cross check—rather than accept the encouragement. This is understandable. In the rare instance of a class action going to trial, the effect on the district court's docket—combined with the difficulty of trying criminal cases within the 18 U.S.C. § 3161 statutory deadline and the press of other civil litigation—is a devastating

[21] *Bluetooth*, 654 F.3d at 944 (quoting *In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010)).

[22] *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d at 930; *Bluetooth*, 654 F.3d at 944.

year in the courtroom. But skipping this step breaches the district court's fiduciary duty to the class.[23]

The amicus brief in this case, by the Attorneys General of seven states—Arizona, Arkansas, Idaho, Indiana, Louisiana, Missouri, and Texas—urges that instead of merely encouraging a cross check, we ought generally to require it. Now-Justice Gorsuch has recommended reversing the trend toward percentage fees without cross checks,[24] and scholarly literature has developed urging the necessity of a lodestar cross check, including an article co-authored by experienced district judge Vaughn Walker.[25] In this case, the district court gave no reason—such as undue complexity or difficulty of calculation—for not using a lodestar cross check. The only justification the district court gave for not performing a lodestar cross

[23] *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d at 930.

[24] Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection* 22–23 (Wash. Legal Found., Critical Legal Issues Working Paper No. 128, 2005).

[25] *See* Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 GEO. J.L. ETHICS 1453, 1454 (2005); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 503 (1996).

check was that it was not required. A lodestar calculated using class counsel's own submitted numbers—2,158 hours multiplied by hourly rates from $250 to $800 for attorneys and from $180 to $200 for paralegals—amounted to $1,428,047.50. That amount of money is not an insubstantial incentive to bring claims that settle before discovery, yet the district court awarded about ten times that much to class counsel.

In conclusion, the district court abused its discretion, and we ought to reverse, as we did in *Staton*, *Bluetooth*, and *Roes*. Even without a lodestar cross check, the attorneys' fee award violated Ninth Circuit law because it overvalued the amount gained for the class. Once the economic reality of the situation is considered, the percentage fee greatly exceeded even our 25% benchmark. Because so little litigation occurred before the settlement, and the percentage fee was so high, it was an abuse of discretion not to accept the "encourage[ment]"[26] in *Bluetooth* and *In re Optical Disk Drive Products Antitrust Litigation* to perform a lodestar cross check, even though cross checks are not absolutely required.

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[26] *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d at 930; *Bluetooth*, 654 F.3d at 944.

Bank of America and class counsel did much better than the class in this case. Bank of America got much more than settlement of the claim made against them in this case. It bought, for $37.5 million in cash, a release and covenant not to sue for usury relating to overdraft fees by anyone anywhere (who did not opt out within the allowed time period) who had been charged an EOBC between February 25, 2014, and December 30, 2017. The settlement, once approved, barred the entire class from suit, even though the class was not certified when the agreement was made.

The reason why this had considerable value to the Bank was that other class action plaintiffs' attorneys were barred from bringing class actions for the putatively usurious fees. Creating a class as part of the settlement, where none was certified before, vastly expands the value of a release. In this case, "each Class Member who has not opted out . . . releases . . . [the bank] from any and all claims . . . against [the bank] with respect to the assessment of EOBCs as well as . . . any claim . . . which was or could have been brought relating to EOBCs . . . and . . . any claim that any other overdraft charge imposed by [the bank] during the Class

Period, including but not limited to EOBCs and initial overdraft fees, constitutes usurious interest." That broad release, extending to a nationwide class that had not previously been certified in order to bar such claims across the country, was indeed worth paying plaintiff's lawyers considerable money, but the case was not worth much to the class, just to the defendant and plaintiff's counsel.