No. 18-15054

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION,

SHAWNE ALSTON; MARTIN JENKINS; JOHNATHAN MOORE; KEVIN PERRY; WILLIAM TYNDALL; ALEX LAURICELLA; SHARRIF FLOYD; KYLE THERET; DUANE BENNETT; CHRIS STONE; JOHN BOHANNON; ASHLEY HOLLIDAY; CHRIS DAVENPORT; NICHOLAS KINDLER; KENDALL GREGORY-MCGHEE; INDIA CHANEY; MICHEL'LE THOMAS; DON BANKS, "DJ"; KENDALL TIMMONS; DAX DELLENBACH; NIGEL HAYES; ANFORNEE STEWART; KENYATA JOHNSON; BARRY BRUNETTI; DALENTA JAMERAL STEPHENS, "D.J."; JUSTINE HARTMAN; AFURE JEMERIGBE; ALEC JAMES,
Plaintiffs-Appellees
v.

DARRIN DUNCAN,
Objector-Appellant,
v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, The NCAA; PACIFIC 12 CONFERENCE; CONFERENCE USA; THE BIG TEN CONFERENCE, INC.; ATLANTIC SUN CONFERENCE, INC.; SOUTHEASTERN CONFERENCE; MID-AMERICAN CONFERENCE; ATLANTIC COAST CONFERENCE; MOUNTAIN WEST CONFERENCE; THE BIG TWELVE CONFERENCE, INC.; SUN BELT CONFERENCE; WESTERN ATHLETIC CONFERENCE; AMERICAN ATHLETIC CONFERENCE,
Defendants-Appellees.

On Appeal from the United States District Court for North California
4:14-md-02541-CW

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337 (commerce and antitrust regulation), as this action arises under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d), because this is a class action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and in which some members of the proposed Class are citizens of a state different from any Defendant. This Court also has supplemental subject matter jurisdiction with respect to the pendent state law claims pursuant to 28 U.S.C. § 1367.

The district court issued its Order Granting Plaintiffs' and Class Counsel's Motion for Attorneys' Fees, Expenses and Service Awards and its Order Granting Plaintiffs' Motion for Final Approval of Class Action Settlement and Final Judgment as to Damages Claims on December 6, 2017. ER 113 and 133. Objector-Appellant, Darrin Duncan, is a class member who objected to the settlement on September 20, 2017. ER 104. He filed a notice of appeal on January 3, 2018. ER 1. The notice was timely under Fed. R. App. P. 4(a)(2). This Court has appellate jurisdiction because this is a timely filed appeal from final decisions of the district court, under 28 U.S.C. §1291.

Duncan is a class member and objector to the settlement. ER 104. He has standing to appeal a final approval of the class action settlement. *See Devlin v. Scardeletti*, 536 U.S. 1, 14 (2002) (holding that unnamed class member who objects to settlement approval at the fairness hearing has "the power to bring an appeal without first intervening.")

STATEMENT OF ISSUES ON APPEAL

1. Whether the district court abused its discretion when it failed to reduce the excessive fee request.

2. Whether the district court erred when it failed to properly do a lodestar crosscheck of attorney's fees.

STANDARD OF REVIEW

A district court's decision to approve a class action settlement is reviewed for abuse of discretion. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011).

STATEMENT OF THE CASE

The underlying class action litigation involves claims by student-athletes who have received a scholarship package, referred to as a grant-in-aid, or GIA, since March 5, 2010. Dkt. 560-1, p. 57. Plaintiffs alleged that Defendants conspired to suppress competition by agreeing to and enforcing restrictive NCAA bylaws that cap the amount of athletically related aid and other benefits to student-athletes. ER 93. The class members are people who fall into one of the following groups: a class of Division I football student-athletes, a class of Division I men's basketball student-athletes, and a class of Division I women's basketball student-athletes. ER 95. These student athletes must have received from an NCAA member institution for at least one academic term (such as a semester or quarter) (1) a full athletics grant-in-aid required by NCAA rules to be set at a level below the cost of attendance, and/or (2) an otherwise full athletics grant-in-aid. ER 95.

The central issue in the case is that the Defendants violated the antitrust laws by agreeing to and enforcing restrictive NCAA bylaws that cap the amount of athletically related financial aid and other benefits to student-athletes, including by

capping athletic scholarships at a defined GIA amount that was lower than the full COA. ER 96. The allegation is that absent the Defendants' agreement to those NCAA bylaws, schools would have provided at least the full COA. ER 96.

The total Settlement amount provides for Defendants to pay $208,664,445.00. ER 97. Prior to the distribution of any funds, the attorney's fees, expenses, and service awards will be paid. ER 58. Class counsel will receive $41,732,889 in attorney's fees, expenses of $3,184,274.38, and the class representatives will each get $20,000. ER 113. The range of average distribution for Class Members who played his or her sport for four years is currently estimated to be approximately $6,000. ER 114.

On September 20, 2017, prior to the final approval of the settlement, Duncan filed an objection complaining of excessive attorney's fees, excessive service awards, and possible collusion between the parties. ER 104.

Attorney's Fees and Class Representative Fee

In his objection, Duncan complained to the court about the following related to attorney's fees:

> In this settlement, the requested attorney's fees are unreasonable. Even though class counsel is requesting 20% instead of the noticed 25% of the total settlement, this is still too high with a settlement value at $208,664,445.00. This equates to $41,732,889 for work done over a 3 year period. This is truly an exorbitant amount to award Class Counsel in light of the mega fund rule.
> Specifically, the 20% attorney's fee request here is excessive because attorney's fees calculated as a percentage of the class fund should

decline from the 25% benchmark when the case involves a mega-fund - over $100,000,000 - and settlement is reached before class certification, trial or appeal. The proposed order does not properly evaluate the reasonableness of the fee for many reasons. The percentage of the fund is the more appropriate method of evaluation for this case unless the court is willing to spend months evaluating the lodestar. The court should evaluate the fees based upon a percentage of the fund analysis and apply the mega-fund rule.

This case was settled in less than three years, no class certification, limited dispositive motion practice, no trial and no appeal. Class counsel should be acknowledged for their admiral effort and rewarded with generous fees, but extensive discovery over a three-year period does not warrant $41 + million in fees in light of the mega fund rule. This is exactly the fact pattern where the percentage of fund and the mega fund rule are appropriate based on the amount of effort class counsel had to do relative to the results achieved. One of the underlying principles of the common fund doctrine is to "compensate the attorneys in proportion to the benefit they have obtained for the entire class ... " 4 *Newberg on Class Actions* 14:6 (4th ed.) at 1.

Although district courts have discretion as to what is reasonable, "the fund itself represents the benchmark from which reasonableness is measured." *Id.* The benchmark for reasonableness may be between 20% and 30% in common fund cases, but this does not apply to "extraordinarily large class recoveries." *In re Domestic Air Transportation Antitrust Litigation* 148 F.R.D 297, 350-351. (N.D. Ga. March 22, 1993). Class action settlement funds over $100,000,000 are considered mega funds. *See Carlson* v. *Zerox Corp.,* 596 F.Supp.2d 400, 406 (D. Conn. January 14,2009); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 122 (2d Cir. 2005).

The purpose of the mega fund rule is to shift the benefit to the class when the settlement is relatively large to cost of litigation, which is largely attorney fees. "The percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement. Otherwise, those law firms who obtain huge settlements, whether by happenstance or skill, will be over-compensated to the detriment of the class members they represent." *Energy Holdings PLC,* 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003).

In confirming the district court's reduction of class counsel 's percentage of fund from 18% to 6.5%, the Wal-Mart Stores, Inc. v. Visa U.S.A.,

Inc., the Second Circuit reasoned: "Recognizing that economies of scale could cause windfalls in common fund cases, courts have traditionally awarded fees for common fund cases in the lower range of what is reasonable." *Walmart,* 396 F.3d at 122, citing *Goldberger,* 209 F.3d at 52; see also *In re Indep. Energy Holdings PLC,* 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003).

The court reasoned that " [w]hile courts in mega-fund cases often award higher percentages of class funds as fees than the district court awarded in this instance…, the sheer size of the instant fund [$3.383 billion] makes a smaller percentage appropriate." *Walmart,* 396 F.3d at 123. The court confirmed the award in spite of the fact lead plaintiffs consented to the 18% fee. *ld.* In following the philosophy of the mega fund rule, the appellate court stated, "Asserting its jealous regard for absent class members, the court sought to compensate plaintiffs' counsel handsomely and at the same time limit the percentage of the award so that plaintiffs' counsel would not receive a windfall detrimental to the class." *Id.* at 122.

Although the Ninth Circuit has not required the mega fund rule be strictly applied, *Vizcaino* v. *Microsoft Corp.,* 290 F .3d 1043, 1047 (9th Cir. 2002), the court has concluded the size of the fund is a factor to be considered in evaluating fee requests in class actions. Comparatively, Vizcaino involved a fund of $97 million where here we are more than double at $208M+ further warranting application of the mega fund rule. The fee award sought by counsel in this case is inconsistent with previous mega fund settlements and is misaligned from the foundational reasoning of such settlements. The $41 + million fee sought in this case is not consistent with the majority rule because it is well above the generally accepted standards set for this type of litigation, i.e., a putative class action settled before significant litigation or trial and before class certification.

Indeed, the $208+ million mega fund settlement here factors against a percentage more than the 25% benchmark under the size-of-fund factor and demands a lesser amount with respect to the size of the fund factor. But the preliminary order approving $41+ million in fees does not consider in the size of the fund factor, which is the principal factor in evaluating the reasonableness of a fee under mega fund philosophy.

There is a generally-accepted benchmark of 25% of the common fund in determining a reasonable fee award in a class action. However, district courts should look to the mega fund rule and adjust in

extraordinary circumstances increasing or lowering a fee award as the facts dictate.

Courts consider a fund approaching or exceeding $100 million as an extraordinarily large fund creating a downward pressure on the percentage of fund allowed for fees - fees in the range of 6-1 0% are more common in mega-fund cases. *See* 1 *Attorney Fee Awards* § 2:9 (3d ed.).

Courts will deviate up or down from the benchmark when extraordinary circumstances are present. For example, the court awarded $19.5 million in fees, or 13% of the $150 million fund, where class counsel expedited litigation, certified the class, completed discovery, and finished 42 days of trial that dealt with complex medical and scientific issues of causation. *See In re Copley Pharmaceutical, Inc.* (1 F.Supp. 2d 1407 (D. Wyo. 1998); 1 *Attorney Fee Awards* § 2:9 (3d ed.).

In *Walmart*, the district court found the fee petition of plaintiffs' counsel "excessive [and] fundamentally unreasonable" where counsel sought a fee of $609,012,000 representing 18% of the settlement's compensatory relief under the percentage of fund method on a $3.05 billion dollar settlement. *Walmart*, 396 F.3d at 103, 106. The appellate court affirmed the lower court's award of $220,290,160.44 representing 6.5% of the settlement's compensatory relief under the percentage of fund method. *Id.* at 106. The court awarded counsel an additional $18,716,511.44 in costs and expenses for a case taking "seven years of hard-fought litigation." *Id.* at 103, 106.

One can hardly imagine a $41 + million dollar fee on a $208+ million dollar settlement after less than three years and not achieving class certification, much less no trial or appeal, compared to seven years of "hard-fought litigation" and a $220 million dollar fee on a settlement of $3.05 billion. "[I]n mega-fund cases with class recoveries of $75-$200 million, courts are even more stringent, and fees in the 6-10 percent range and lower are common." *In re Domestic Air Transp:*,148 F.R.D. at 351. A 20% award of fees in the amount of $41 + million dollars on the $208+ million award represents an award more than the generally awarded range of 6-1 0% in mega fund cases, especially relative to the minimal amount of time expended on this case to settlement. Moreover, with $3+ million in expenses, it seems reasonable to conclude that the attorney litigation was significantly supported such that the attorney effort was further minimized relative to the fee award.

> The mega fund rule plays an important role in placing a check and balance on the cost benefit analysis between legal fees and class benefit. To whatever extent the mega fund class action rule does not apply within the Ninth Circuit, it is time for the Ninth Circuit to follow the majority rule of this Country especially considering the fact the class member's size and that they come from many States and Circuits of America.
>
> The mega-fund rule requires the percentage of a fee award to be inversely related to the size of the settlement fund. This case settled without class certification, before an extensive and expensive trial or appeal. The risks and requirements of class counsel were thereby reduced substantially. For the reasons stated above, the recommended percentage fee of 20% is excessive. A mega fund analysis of the fee award warrants a downward departure from the benchmark and such savings should go back into the hands of the class members.

ER 105-109.

The court held a fairness hearing on November 17, 2017 and entered an order granting final approval of the settlement and granting attorney's fees on December 6, 2017. ER 113 & 133.

While the district court analyzed the stated lodestar of a 3.65 multiplier by class counsel, the district court did not and could not evaluate whether the actual rates and tasks performed by class counsel wee reasonable. ER 113. Class counsel only provided the following information regarding the work performed: name of the attorney, the hours, and the historical hourly rate. See Dkt. 688, 690, 691, 692, 693. Very little detail was provided about how each timekeeper spent their time.

While the fee motion indicated that about 5,000 hours were expended on document review, no information was obtained about who expended these hours.

ER 142. If the document review was outsourced, no attorney rates reflected the actual hourly rates of the document review. ER 113. If the document review was not outsourced, then this low-level job was performed by attorneys with rates ranging from $950 per hour to $350 per hour. ER 126. Despite these tell-tale signs that the actual lodestar was significantly less than claimed, the court still approved the exact amount of attorney fees requested. ER 113.

This appeal follows.

SUMMARY OF ARGUMENT

"Fed.R.Civ.P. 23(e) requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). The district court has a fiduciary duty to look after the interests of those absent class members." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002. (at the settlement phase, the district judge is "a fiduciary of the class," subject "to the high duty of care that the law requires of fiduciaries").

The district court abused its discretion when it awarded attorney's fees. "When awarding attorneys' fees in a class action, the district court has an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Hyundai and*

Kia Fuel Econ. Litig., 881 F.3d 679, 705 (9th Cir. 2018) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 941). Here, the court failed in its obligations to ensure that the award was reasonable when it awarded class counsel $41,732,889.00 in attorney fees.

While the fee award was valued at 20 percent of the gross fund, this amount is excessive when considering that the total settlement fund was more than $200 million. The district court failed to consider that a reasonable fee award should utilize sliding scale percentage to prevent a windfall for plaintiffs' attorneys at the expense of the class. *See, e.g., Silverman v. Motorola*, 739 F.3d 956, 959 (7th Cir. 2013). A more reasonable percentage of the settlement is 10-15%.

Additionally, though the district court, at least in theory, compared the percentage to the lodestar, the district court failed to request enough information about the lodestar amount to make a reasonable analysis. The court did not request a breakdown of how much time was spent on various litigation tasks such as depositions, document review, drafting, etc. Without this information, it was impossible to compare the lodestar to the requested percentage for attorney fees.

"When a district court fails to conduct a comparison between the settlement's attorneys' fees award and the benefit to the class or degree of success in the litigation or a comparison between the lodestar amount and a reasonable percentage award, we may remand the case to the district court for further consideration." *In re Hyundai*

and Kia Fuel Econ. Litig., 881 F.3d 679, 706 (9th Cir. 2018). Here, the court failed to consider the reasonableness of the fee award when viewing it as megafund, and instead used the 25-percentage award as a basis. Furthermore, the court did not adequately compare the lodestar amount and a reasonable percentage award. Thus, this Court must reverse or remand the case to the district court.

ARGUMENT

I. The fee award is grossly excessive for a megafund case and the district court abused its discretion in failing to reduce the fee request.

"While attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement, Fed. R. Civ. Proc. 23(h), courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth*, 654 F.3d at 941. The attorney fees awarded was $41,732,889, which was determined to be 20% of the $208,664,445 million settlement fund. This award is excessive because (1) a reasonable fee award should not exceed 10-15% of a megafund this size and (2) their percentage omits $3,184,274.38 million in litigation expenses.

A. Class should have been awarded no more than 10-15% of the $208.6 million class recovery.

The fee award is excessive because of its status of a megafund settlement. Because of economies of scale, a reasonable fee award should utilize sliding scale

percentage to prevent a windfall for plaintiffs' attorneys at the expense of the class. *See, e.g.*, *Silverman v. Motorola,* 739 F.3d 956, 959 (7th Cir. 2013). "It is generally not 150 times more difficult to prepare, try and settle a $150 million case than it is to try a $1 million case." *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 486 (S.D.N.Y. 1998). "There is considerable merit to reducing the percentage as the size of the fund increases. In many instances the increase is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *Id.* at 486 (quoting *In re First Fidelity Secs. Litig*., 750 F. Supp. 160, 164 n.1 (D.N.J. 1990)). Thus, "In cases with exceptionally large common funds, courts often account for these economies of scale by awarding fees in the lower range." *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 374 (S.D.N.Y. 2013) (cleaned up). "The existence of a scaling effect—the fee percent decreases as class recovery increases—is central to justifying aggregate litigation such as class actions. Plaintiffs' ability to aggregate into classes that reduce the percentage of recovery devoted to fees should be a hallmark of a well-functioning class action system." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 263 (2010).

Empirical research shows that in class actions "fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent." Brian Fitzpatrick,

An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. EMPIRICAL L. STUD. 811 (2010). In class actions in which the settlement equaled $100 to $250 million, the median fee award was 16.9% and the mean was 17.9%. *Id*. at 839. Other surveys support this analysis. *E.g.*, Logan, Stuart, et al., *Attorney Fee Awards in Common Fund Class Actions* 24 Class Action Reports (March-April 2003) (empirical survey showed average recovery of 15.1% where recovery exceeded $100 million). A reasonable award for class counsel in this case is between 10-15%. The gross settlement fund here is $208,664,445.00.

The case is instead a classic instance of leveraging of a large class size rather than achieving a good value. Here, the class will receive approximately 50% of their single damages. ER 113. This is not an extraordinary result by any stretch of the imagination.

Nor can class counsel justify an excessive percentage based on the time spent on this action. Here the lodestar amounts to $11,398,158.30, a whopping 3.66 multiplier to what was awarded. Furthermore, class counsel grossly overstated their lodestar in this case, *see below*, but even if it were accurate, the lodestar cannot justify the grossly excessive fee percentage.

The award to class counsel should have been 10-15% of the total settlement amount. The district court abused its discretion when it failed to reduce the attorney's fee request proportionally to the size of the fund.

B. The litigation expenses should have been included in calculating the percentage award.

Class counsel sought and was awarded $41,732,889 in attorney fees and $3,184,274.38 in expenses, or a total of $44,917,163.38. Dkt. 745. Class counsel's 20% calculation fails to include the $3.184 million class counsel is seeking for litigation expenses. In a number of cases, the Ninth Circuit and other courts include litigation "expenses" with the attorneys' fees in the numerator when calculating the percentage of recovery. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 863 (9th Cir. 2012) (calculating percentage versus benchmark based on "$2 million in fees and costs"); *In re Imax Sec. Litig*., 283 F.R.D. 178, 193 (S.D.N.Y. 2012) (refusing to award 25% fee recovery because fees plus expenses totaled 39% of the settlement amount); *Kmiec v. Powerwave Tech*., 8:12-cv-00222-CJC-JPR, 2016 WL 5938709 (C.D. Cal. Jul. 11, 2016) (similar).

If litigation expenses are not included in the numerator, class counsel is incentivized to treat resources as a litigation expense (because they will be reimbursed) and to increase those expenses (inflating the common fund value), knowing that such reimbursable litigation expenses will not be counted against the 25% benchmark. For example, included in just one declaration of class counsel's expenses is $1,728,944.78 for experts. *See* Dkt. 689. But every dollar class counsel spent on their experts was not just a dollar taken from the settlement fund, but, under class counsel's calculation, effectively allows class counsel to earn a *commission* of

an additional 20.0 cents/dollar in attorneys' fees ($345,788.95 commission on the $1,728,944.78 expert fees). Indeed, the danger of such commissions is compounded by the fact that class counsel has full control over litigation expenditures. If those litigation expenses are included in the numerator when calculating the fee percentage, the litigation expenses are counted against the percentage benchmark and class counsel have incentives to increase such expenses. *See In re Oracle Securities Litig.*, 136 F.R.D. 639, 644 (N.D. Cal. 1991) ("If the costs of attorney substitutes are reimbursable . . . a law firm paid by a percentage of recovery will find it in its interest to substitute non-attorney inputs for attorney effort. Allowing unlimited reimbursement of non-attorney inputs encourages greater such substitution.").

At a minimum, however, if the court is to exclude litigation "expenses" from the numerator when calculating an attorney award under the percentage-of-the-fund approach, the court should also exclude those same expenses from the denominator (*i.e*. the value of the fund). In *In re Transpacific Passenger Air Transportation Antitrust Litigation,* 2015 WL 3396829, at *2 (N.D. Cal. May 26, 2015) ("*Transpacific*"), the court excluded both administration expenses *and* litigation expenses before calculating attorneys' fees.. The district court observed that there was no authority requiring attorneys' fees to be calculated based on the gross fund and instead employed its "longstanding preference for using the net" fund, noting

the multiple authorities that endorse that approach. *Id*. at *1 (citing *Redman v. RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) ("the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation"); *In re Wells Fargo Secs. Litig.*, 157 F.R.D. 467, 471 (N.D. Cal. 1994) ("If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses"). In *Transpacific*, the court concluded that when expenses were deducted, the requested fees actually totaled 42% of the class benefit rather than the 33% argued by class counsel. 2015 WL 3396829, at *2. The district court reduced fees from the requested $13.1 million to $9 million. *Id*.

Accordingly, the $3,184,274.38 litigation expenses should have been included in the numerator (added to the fees) when calculating class counsel's fee request or, at a minimum, be deducted from the gross fund prior to calculating attorneys' fees.

II. The district court failed to properly do a lodestar crosscheck.

The lodestar cross-check should "confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate." *Bluetooth*, 654 F.3d at 945. In megafund cases, the lodestar cross-check assumes particular importance. S*ee In re Wash. Pub. Power Supply Sys. Sec. Litig*., 19 F.3d 1291, 1298 (9th Cir. 1994) (describing how percentage-based awards become particularly arbitrary in a megafund context). The crosscheck helps uncover the "disparity between the

percentage-based award and the fees the lodestar method would support." *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1124 n.8 (9th Cir. 2002); Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About Reasonable Fees in Common Fund Cases*, 18 GEO J. LEGAL ETHICS 1453, 1454 (2005) ("[C]ourts making common fund fee awards are ethically bound to perform a lodestar cross-check."). The lodestar here is overstated by millions of dollars because (1) the document review was both inefficiently assigned to higher-priced attorneys and performed by contract attorneys that charged exorbitant billing rates and (2) the actual extent of the overstatement is likely much greater but cannot be determined based on the insufficient billing summaries submitted by class counsel.

The lodestar materially overstates the value of counsel's services. The lodestar is calculated by multiplying the "number of hours reasonably expended on the litigation by a reasonable hourly rate." *Lewis v. Silvertree Mohave Homeowners' Ass'n, Inc.*, No. C 16-03581 WHA, 2017 WL 5495816, at *3 (N.D. Cal. Nov. 16, 2017). "The reasonableness of an hourly rate should be determined based on the rates prevailing in the community for 'lawyers of reasonably comparable skill, experience and reputation.'" *Id.* (quoting *Blum v. Stenson*, 465 U.S. 886, n.11 (1984)). Given the 2.8 million of pages of documents that plaintiffs reviewed, plaintiffs probably did utilize both (1) billed contract attorneys at hourly rates

exorbitantly higher than market rates and (2) inefficiently assigned the task to higher-priced associates.

A. The lodestar is likely overstated even more than estimated because class counsel has failed to include sufficient billing summaries.

The district court failed to require plaintiffs' attorneys to provide sufficient detail in their billing summaries. The lodestar "serves little purpose as a cross-check if it is accepted at face value." *Citigroup Secs. Litig*., 965 F. Supp. 2d at 389. *See generally* N.D. Cal. Procedural Guidance for Class Action Settlements, available at http://cand.uscourts.gov/ClassActionSettlementGuidance ("All requests for approval of attorneys' fees awards must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund."). Lack of detailed billing statements, however, make it impossible to precisely identify the duplication and inefficiencies. *See Intel Corp. v. Terabyte Int'l, Inc*., 6 F.3d 614, 623 (9th Cir. 1993) (time records should demonstrate "whether the time devoted to particular tasks was reasonable and whether there was improper overlapping of hours"). Without detailed submissions, the court lacked critical information regarding the work performed.

B. The lodestar is overstated because contract attorneys billed at exorbitant rates.

Class counsel seeks hourly rates for contract attorneys that are multiple times their market cost to the firm. *See* Dkt. 689-1 (billing contract attorneys at hourly

rates between $300-350). These contract attorneys likely performed document review, which is relatively unskilled document review work that discerning paying clients refuse to pay a premium for and certainly cannot charge rates of $350/hour, which is what class counsel request from the settlement fund. Indeed, across the country, paying clients refuse to pay even as much as $150/hour for document review (even if law-firm attorneys conduct it)—and then only if the temporary attorneys are not billed directly to the client as a direct cost.

"[T]here is absolutely no excuse for paying these temporary, low-overhead employees $40 or $50 an hour and then marking up their pay ten times for billing purposes." *In re Beacon Assocs. Litig*., No. 09 Civ. 777, 2013 WL 2450960, at *18 (S.D.N.Y. May 9, 2013). *See also Lola v. Skadden, Arps, Slate, Meagher & Flom*, 620 Fed. Appx. 37, 40 (2d Cir. 2015) (observing that plaintiff contract attorney was paid $25 per hour, and holding that the work described was so devoid of legal judgment it may not even constitute the practice of law); *Pa. Pub. Sch. Employees Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 26 (S.D.N.Y. 2016) (holding that charging the class $362/hr for temporary attorney work "is unreasonable and warrants a reduction in the attorneys' fees").

The best practice is to bill the contract attorneys at cost. In *Dial Corp. v. News Corp*. 317 F.R.D. 426, 430 n.2 & 438 (S.D.N.Y. 2016), the district court commended class counsel for treating contract attorney work as an expense, charging the 25,000

hours at $39/hour with no mark-up applied.; *see also Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 980 (N.D. Cal. 2014) (awarding contract attorney time as "costs" at billing rate of $47 to $59 per hour). Indeed, it is likely unethical to charge more than cost. The ABA Standing Committee on Ethics ruled that "In the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individuals under contract." ABA Formal Opinion 08-451. The ABA concluded:

The analysis is no different for other outsourced legal services, except that the overhead costs associated with the provision of such services may be minimal or nonexistent if and to the extent that the outsourced work is performed off-site without the need for infrastructural support. If that is true, the outsourced services should be billed at cost, plus a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services. *Id*. Similarly, much of the nearly 2.8 million document review here was likely conducted offsite, and under the supervision performed by attorneys who are already being billed separately. *See also generally, e.g.*, Lester Brickman, *Lawyer Barons* 378-87 (Cambridge U. Press 2011). The district court failed to consider that if thousands of hours were billed at cost, e.g., a generous rate of $50/hour, the contract

attorney lodestar would be significantly lower. The 5,000 hours devoted to document review would have been closer to $250,000 - $400,000 (5,000 hours billed at $50-75 per hour), instead of the likely $2,500,000 (5,000 hours billed at $500 per hour) that was used as a lodestar.

Even if there is discretion to charge a markup, class counsel provides no evidence of the market rate for contract attorneys. The best measure of the market rate is to review what *paying clients* are willing to pay. *See In re Telik, Inc. Sec. Litig*., 576 F. Supp. 2d 570, 589 (S.D.N.Y. 2008). In today's legal market, clients refuse to tolerate law firms treating gigantic document review projects as a profit center, or in other words "a trough where herds of lawyers try to muscle their way to the front to quench their thirst without explanation and with no appreciation of moderation." *United States ex rel. Palmer v. C&D Techs., Inc.*, 2017 WL 1477123, at *6 (E.D. Pa. Apr. 25, 2017). A reasonable market rate that a *paying client* would pay for contract attorneys after the financial crisis and the glut in unemployed attorneys able to do the fungible work would be between cost and $75/hour. Even in the last decade, paying clients were not paying more than $125/hour for document review. *E.g., SEC v. Kirkland,* No. 6:06-cv-183, 2008 U.S. Dist. LEXIS 123308, at *5 (M.D. Fla. June 30, 2008). The could should have required that class counsel disclose what it paid for document review to illuminate the market rates.

C. The lodestar is also overstated because it assigned low-level document review to higher-priced associates.

The district court also failed to recognize that the document review lodestar is also overstated because much of it was tasked to high-priced associates. As one court observed, "[t]here is little excuse in this day and age for delegating document review (particularly primary review or first pass review) to anyone other than extremely low-cost, low-overhead temporary employees." *Beacon Assocs.*, 2013 WL 2450960, at *18. "Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn." *In re Citigroup Inc Secs. Litig.*, 965 F. Supp. 2d 369, 398 (S.D.N.Y. 2013) (quoting *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983) and refusing to award $330-$550/hr for document review work); *City of Pontiac Gen. Emples. Ret. Sys. v. Lockheed Martin Corp.*, 954 F. Supp. 2d 276, 280 (S.D.N.Y. 2013) (similar); *MacDougal v. Catalyst Nightclub*, 58 F. Supp. 2d 1101, 1106-07 (N.D. Cal. 1999) (inappropriate for a senior attorney to bill $325 per hour for routine and clerical tasks).

Paying clients pay much less for project attorneys than for full-time law-firm attorneys for document review, even when the temporary "lawyers are experienced, highly qualified attorneys." Nicole Bradick, *Freelance Law: Providing Solutions to Modern Day Practice Dilemmas*, 27 MAINE BAR J. 23, 24 (2012); *accord* Heather Timmons, *Outsourcing to India Draws Western Lawyers*, N.Y. TIMES B1 (Aug. 4, 2010) (clients "don't need a $500-an-hour associate to do things like document

review and basic due diligence"). Courts and clients widely recognize that document review and contract-attorney work do not merit full-scale rates. *See, e.g., IL Fornaio,* 2015 WL 2406966, at *5 (N.D. Cal. May 20, 2015) ("It would be unjustified to charge the class senior-associate or partner-level rates for routine tasks like document review, returning a hard drive, vetting stipulations, preparing copies of exhibits, checking citations, and so forth.").

Even if the review of documents was assigned to full-time firm attorneys, many courts refuse to permit full lodestar rates to be charged, given that large-scale document review can be performed by non-professionals. *E.g., City of Pontiac Gen. Emples. Ret. Sys.*, 954 F. Supp. 2d at 280 ("a sophisticated client, knowing these contract attorneys cost plaintiff's counsel considerably less than what the firm's associates cost (in terms of both salaries and benefits) would have negotiated a substantial discount in the hourly rates charged the client for these services"); *Planned Parenthood of Cent. N.J. v. Attorney Gen. of N.J.*, 297 F.3d 253, 266 (3d Cir. 2002) (remanding award because appeals court was "unable to make a determination" whether plaintiff's attorney had improperly "billed hours for … such tasks as document review").

The district court failed to determine the exact breakdown for the hours spent on document review performed by non-contract attorneys or attorneys. Because the

district court failed to properly analyze the fee request, it abused its discretion in approving the class action settlement.

CONCLUSION

For the foregoing reasons, this Court should reverse and/or remand the case back to the district court.

Dated: May 21, 2018

Respectfully submitted,

/s Caroline V. Tucker
Caroline V. Tucker

STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28-2.6

No other appeals that have been consolidated with this appeal.

Executed on May 21, 2018.

/s Caroline V. Tucker
Caroline V. Tucker

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

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PROOF OF SERVICE

I hereby certify that on May 21, 2018, 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 counsel of record.

/s Caroline V. Tucker
Caroline V. Tucker