**Nos. 18-56272, 18-56273, and 18-56371**

In the United States Court of Appeals
for the Ninth Circuit

JOANNE FARRELL, ET AL.,
*Plaintiffs–Appellees,*

v.

ESTAFANIA OSORIO SANCHEZ, ET AL.,
*Objector- Appellants,*

v.

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

Appeal from the United States District Court for the Southern District of California, No. 3:16-CV-00492

# BRIEF OF THE ATTORNEYS GENERAL OF ARIZONA, ARKANSAS, IDAHO, INDIANA, LOUISIANA, MISSOURI, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF NO PARTY

Mark Brnovich
*Attorney General*
Oramel H. (O.H.) Skinner
*Solicitor General*
*Counsel of Record*
Dana R. Vogel
Anthony R. Napolitano
*Assistant Attorneys General*
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, Arizona 85004
(602) 542-5025
o.h.skinner@azag.gov

April 1, 2019

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES**



**OTHER AUTHORITIES**

## STATEMENT OF *AMICI CURIAE*

The Attorneys General of Arizona, Arkansas, Idaho, Indiana, Louisiana, Missouri, and Texas are their respective States' chief law enforcement or legal officers. Their interest here arises from two responsibilities. *First*, the Attorneys General have an overarching responsibility to protect their States' consumers. *Second*, the undersigned have a responsibility to protect consumer class members under CAFA, which envisions a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 5 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 35 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

The Attorneys General make this submission to further these interests, speaking on behalf of consumers who are put at increased risk when courts fail to adequately police and cross-check proposed class action settlements.[1]

[1] The Attorneys General certify that no parties' counsel authored this brief, and no person or party other than named *amici* or their offices made a monetary

## SUMMARY OF ARGUMENT

The Attorneys General urge the Court to ensure that the importance of a cross-check to the class action settlement approval process factors heavily into the resolution of this appeal. The Supreme Court in *Hensley* put forth a reasonableness standard awarding reasonable fees when compared to actual "results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). The Ninth Circuit in *In re Bluetooth* then unpacked this reasonableness standard, discussing common fund and lodestar analysis, and urging district courts to "cross-check[] their calculations against a second method" "to guard against an unreasonable result." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011). The district court's failure to heed this precedent and enlist a cross-check here using a second calculation method was error. In addressing this error, the Court should affirm the need for a cross-check and either carry it out now, on appeal, or else remand to ensure proper checks based on a fulsome record.

---

contribution to the brief's preparation or submission. The Attorneys General submit this brief as *amici curiae* only, taking no position on the merits of the underlying claims, and without prejudice to any State's ability to enforce or otherwise investigate claims related to this dispute.

## ARGUMENT

### I. PERFORMING A CROSS-CHECK BETWEEN TWO FEE CALCULATION METHODS IS THE ONLY WAY TO ENSURE A SETTLEMENT IS FAIR AND REASONABLE TO CLASS MEMBERS UNDER RULE 23

"[T]he level of a plaintiff's success is relevant to the amount of fees to be awarded." *Hensley*, 461 U.S. at 430. The importance of this axiom as it applies to class action settlements cannot be overstated "because the interests of class members and class counsel nearly always diverge." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). Especially where the relief obtained is not always of obvious or direct value to all class members (e.g., coupons, debt forgiveness, injunctive relief), it is critical that courts heed this Court's edict to "remain alert to the possibility that some class counsel may 'urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.'" *Id.* (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)).

#### A. Consumers Face Disadvantages In The Class Action Settlement Process, So It Is The Responsibility Of Courts To Ensure That Fee Awards Are Properly Analyzed And Cross-Checked

In dividing the proceeds of class action settlements, the interests of class counsel and class members can sharply diverge. *In re HP Inkjet*, 716 F.3d at 1178. Class counsel has an incentive to obtain the maximum possible fee award, but that fee almost invariably comes directly out of the class members' pockets.

Ultimately, "[a]lthough under the terms of each settlement agreement, attorney fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source." *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996).

Defendants are no help. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 820 (2003). To a defendant, the fee award and the class award "represent a package deal," *Johnston*, 83 F.3d at 245, with the defendant "interested only in the bottom line: how much the settlement will cost him," *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015).

And consumers are virtually powerless to monitor a class action settlement negotiation and effect meaningful change on their own, as each person on an individual basis has "such a small stake in the outcome of the class action that they have no incentive to monitor the settlement negotiations or challenge the terms agreed upon by class counsel and the defendant." *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014).

It is in light of these disadvantages that courts are meant to serve the interests of consumer class members in the class action settlement process. *See*

*Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003) (it is the district court's duty to police "the inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees."). This entails fulfilling a fiduciary-like duty. *See, e.g. Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 319 (3d Cir. 2011) ("'trial judges bear the important responsibility of protecting absent class members,' and must be 'assur[ed] that the settlement represents adequate compensation for the release of the class claims'"); *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"). This duty is critical, even in large cash fund cases, because the real value provided by class counsel can fall far short of the customary fee percentage; "in many instances the increase in recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 339 (3d Cir. 1998); *see also Bluetooth*, 654 F.3d at 942 ("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.").

### B. Circuit Courts Are In Agreement That The Focus In Evaluating Fee Awards Must Be On The Success Obtained For The Class

The *Hensley* standard of tying the fee award to success obtained has been applied to class action settlements regularly by this Court and other circuit courts. *See, e.g.*, *Bluetooth*, 654 F.3d at 942 ("Foremost among these considerations, however, is the benefit obtained for the class."); *Galloway v. Kansas City Landsmen, LLC*, 833 F.3d 969, 975 (8th Cir. 2016) (quoting *Hensley*, 461 U.S. at 436) ("'the most critical factor is the degree of success obtained'"; "any award greater than $17,438.45 would be unreasonable in light of class counsel's limited success in obtaining value for the class."); *Redman*, 768 F.3d at 633 ("But the reasonableness of a fee cannot be assessed in isolation from what it buys.").

### C. *In Re Bluetooth* Sets Forth The Standard For Cross-Checks In Common Fund Settlements, Regardless Of Which Calculation Method Was First Used

This Court sets the standard for ensuring "fair, reasonable, and adequate" settlements by instructing district courts to "guard against an unreasonable result by cross-checking their calculations against a second method," regardless of whether the initial method chosen was percentage-of-recovery or lodestar. *Bluetooth*, 654 F.3d at 944. Only by doing this may a court protect the class from the deficiencies of either type of calculation: "Just as the lodestar method can 'confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate,' the percentage-of-recovery method can likewise 'be used to

assure that counsel's fee does not dwarf class recovery.'" *Id.* at 945 (quoting *In re Gen. Motors Corp.*, 55 F.3d 768, 821 n.40 (3d Cir. 1995)).

While "courts have discretion to employ either the lodestar method or the percentage-of-recovery method … their discretion must be exercised so as to achieve a reasonable result." *Bluetooth*, 654 at 942. Either method may result in an unreasonable result, depending on the facts and circumstances leading up to the settlement. *Compare id.* ("Thus, where the plaintiff has achieved 'only limited success,' counting *all* hours expended on the litigation—even those reasonably spent—may produce an 'excessive amount'…") *with* Six *(6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (stating a lodestar should be used instead of a 25% percentage of recovery in a case with a large fund to prevent greatly overcompensating counsel in light of hours actually spent on the case). Therefore, concerns of fundamental fairness (consistent with the Court's guidance) require that a court examine both methods against one another through a cross-check before approving a settlement agreement and award of attorneys' fees.

## II. THIS CASE PROVIDES AN EXCELLENT EXAMPLE OF THE DIFFICULT CLASS ACTION CALCULATIONS AND RELIEF VALUATIONS THAT MAKE CROSS-CHECKS IMPORTANT

This case provides a prime example of why a cross-check should always be applied. Here, the cash fund totals $37.5 million, yet counsel estimates the total value of the settlement at ~$66.6 million, counting the supposed value of the debt

forgiveness offered by Defendant, which has real risk of being of only illusory value. ER17 (noting objections that "(1) forgiving the debt may cost [Defendant] very little considering it likely did not expect to recover most if not all of this debt and (2) Debt Portion recipients will benefit little from forgiveness of debt that they did not intend to pay."). The district court bolstered its acceptance of Class Counsel's valuation by looking to the injunctive relief, which the district court valued at $1.2 billion. ER18. This, in turn, could be tenuous because the benefits of the prospective injunctive relief may fall on new customers rather than the class members, depending on whether class members maintain accounts with Bank of America. As this Court recognized in *Bluetooth*, "the standard [under Rule 23(e)] is not how much money a company spends on purported benefits, but the value of those benefits to the class." 654 F.3d at 944.

Regardless of what the correct valuation of these non-cash benefits may be, the mixed nature of relief involved and the debate over the value of certain inchoate settlement benefits here underscore the importance of performing a cross-check.

## III. IT WAS ERROR FOR THE DISTRICT COURT TO FAIL TO CROSS-CHECK, EVEN IF THE AMOUNT OF ATTORNEYS' FEES AWARDED WOULD HAVE PASSED MUSTER

It was error to fail to cross-check here, given the nature of this proposed settlement. As detailed above and in Appellant's brief, this case involves a mixture

of relief of inchoate value—cash, debt relief, and prospective injunctive relief. And yet the district court relied on only one way of valuing the relief, treating it as having a definite cash value for a percentage of recovery award of attorneys' fees without a cross-check. In doing this, the district court ignored the guidance repeatedly followed by other courts to diligently police these types of settlements. *See, e.g.*, *Weeks v. Kellogg Co.*, No. 09-08102, 2013 WL 6531177, at *25 (C.D. Cal. Nov. 23, 2013) (Courts "should use a rough calculation of the lodestar as a cross-check to assess the reasonableness of the percentage award"); *Destefano v. Zynga, Inc.*, No. 12-04007, 2016 WL 537946, at *16 (N.D. Cal. Feb. 11, 2016) (Court used percentage of fund and cross-checked with lodestar "to ensure the reasonableness of the award."); *Munoz v. UPS Ground Freight, Inc.*, No. 07-00970, 2009 WL 1626376 at *2 (N.D. Cal. June 9, 2009) ("Courts usually apply the percentage method [in common fund cases] but then use the lodestar method to cross-check the reasonableness of the percentage to be awarded.")

And there is real risk that the failure to cross-check here led to an improper fee approval. This fee award represents more than 10 times the estimated lodestar, where typical lodestar multipliers range from below 1 times lodestar to 4 times lodestar. *See also Hopkins v. Stryker Sales Corp.*, No. 11-02786, 2013 WL 496358, at *4 (N.D. Cal. Feb. 6, 2013) ("Multipliers of 1 to 4 are commonly found to be appropriate in complex class action cases"); *Vizcaino v. Microsoft Corp.*, 290

F.3d 1043, 1051 n.6 (9th Cir. 2002) (in 83% of cases surveyed by court, lodestar multiplier fell between 1 and 4). Class Counsel's award amounts to over 38% of the cash common fund, and the noncash portions, despite being of uncertain value, must be added at full face value to reduce that amount to the 21% the district court cites to justify the award.

The procedural failure here should be called out, even if the Court determines through its own analysis that the error was harmless. Even if the settlement approval as a whole was not an abuse of discretion, the district court's procedural failings in arriving at this fee award without an appropriate comparison to the lodestar amount is an error warranting comment by this Court in order that future courts not replicate the same error. And if the Court cannot determine harmlessness on this record, the Court should emphasize the important consumer protection function a cross-check plays and remand for further analysis consistent with the Court's guidance here and in *Bluetooth*.

## CONCLUSION

For the forgoing reasons, the undersigned Attorneys General request that in resolving this appeal the Court affirm the need for a cross-check and correct the error below, even if that requires remand.

April 1, 2019

Respectfully Submitted,

*/s/ Oramel H. Skinner*

Mark Brnovich
*Attorney General*
Oramel H. (O.H.) Skinner
*Solicitor General*
*Counsel of Record*
Dana R. Vogel
Anthony R. Napolitano
*Assistant Attorneys General*
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, Arizona 85004
(602) 542-5025
o.h.skinner@azag.gov

*Counsel for Amicus Arizona Attorney General's Office*

**ALSO SUPPORTED BY:**

**LESLIE RUTLEDGE**
**ATTORNEY GENERAL OF ARKANSAS**
323 Center St., Ste 200
Little Rock, AR 72201

**LAWRENCE G. WASDEN**
**IDAHO ATTORNEY GENERAL**
P.O. Box 83720
Boise, ID 83720-0010

**CURTIS T. HILL**
**INDIANA ATTORNEY GENERAL**
200 W. Washington St.
Rm 219
Indianapolis, IN 46204

**JEFF LANDRY**
**LOUISIANA ATTORNEY GENERAL**
P.O. Box 94005
Baton Rouge, LA 70804

**ERIC S. SCHMITT**
**MISSOURI ATTORNEY GENERAL**
207 W. High St., P.O. Box 899
Jefferson City, MO 65102

**KEN PAXTON**
**ATTORNEY GENERAL OF TEXAS**
P.O. Box 12548 (MC 059)
Austin, TX 78711

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. This brief is 2,372 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type, which complies with Fed. R. App. P. 32 (a)(5) and (6).

*/s/ Oramel H. Skinner*

Oramel H. (O.H.) Skinner
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, Arizona 85004
(602) 542-5025

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of April, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

*/s/ Oramel H. Skinner*

Oramel H. (O.H.) Skinner
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, Arizona 85004
(602) 542-5025