2020 WL 835433 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

Lisa KIM, individually and on behalf of all others similarly situated, Plaintiff-Appellee,
v.
Rich ALLISON and Steve Frye, Objectors-Appellants,
v.
TINDER, INC., a Delaware corporation; et al., Defendants-Appellees.

No. 19-55807.
February 3, 2020.

On Appeal from the Judgment of the United States District
Court for the Central District of California, Hon. John F. Walter
No. 2:18-cv-30393-JFW

Appellants' Opening Brief

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*1 *INTRODUCTION AND SUMMARY OF ARGUMENT*

Appellants Rich Allison and Steve Frye, members of the plaintiff class in this age-based pricing discrimination class action under California's Unruh Civil Rights Act, Cal. Civ. Code §51, against the dating application Tinder, timely objected to the unfair, inadequate, and seemingly collusive class settlement by Appellee-Defendant Tinder and Appellee-Plaintiff Lisa Kim and their respective counsel.

The district court (Walter, J.) overruled Appellants' objections, applying the wrong standard under Federal Rule of Civil Procedure 23 and ignoring a half-dozen red-flag factors requiring rejection of Tinder's settlement in which (1) the class received almost nothing of value in exchange for overbroad releases while plaintiff's counsel walked away with a windfall fee of $1.2 million, and (2) defendant Tinder, by settling for next to nothing, was able to "reverse auction" a parallel state court action - now in its fifth year of litigation, which resulted in a California Court of Appeal ruling, *Candelore v. Tinder, Inc.*, 19 Cal. App. 5th 1138 (2018), *review denied*, No. S247527 (May 9, 2018), that virtually assures the *2 imposition of substantial classwide damages against Tinder under the Unruh Act's *mandatory* minimum of $4,000 per offense. Cal. Civ. Code §52(a). [1]

The parties to the challenged classwide settlement, Appellees Kim and Tinder, negotiated that settlement before any class was certified and shortly after the district court had issued an order compelling Kim to arbitrate her claims on an individual basis.

Under these circumstances and this Court's well-established precedent, the district court should have subjected the proposed classwide settlement to heightened scrutiny. *See Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035 (9th Cir. 2019); *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Instead, the court rubber-stamped the settlement, applying an improper "presumption" of fairness and disregarding the extensive indicia of collusion. Excerpts of Record ("ER") 18-35.

This Court should reverse the order granting settlement approval under Rule 23(e). Even if Tinder's settlement were not a nakedly transparent ploy to reverse-auction *Candelore*, no pre-certification class action settlement can pass muster ***3** under Rule 23(e) in which 240,000 class members are required to release valuable claims in exchange for benefits worth at most $44,825, *see infra* at Section I(A)(1), while the plaintiff receives a $5,000 "incentive" payment and her lawyers get $1.2 million in attorneys' fees - particularly in the circumstances here, where the strength and value of the class members' Unruh Act claims have been established by a precedent-setting California Court of Appeal opinion that controls the class members' claims, as law of the case. *Candelore*, 19 Cal. App. 5th at 1143.

The underlying claims against Tinder involve a classwide scheme of unlawful age-based pricing. ER 373-87. Tinder, a popular, free dating mobile software application ("app") that has reported more than one *billion* customer "swipes" per day, rolled out a new premium service in 2015 called Tinder Plus, for which it charged customers for a bundle of additional features. ER 60. Tinder did not charge all customers the same amount for Tinder Plus. *Id*. Instead, it created two pricing tiers for its new premium service, with a higher rate for customers 29 years of age and older. *Id*. That age-based pricing differential violates California's principal anti-discrimination law, the 1959 Unruh Act. *See Candelore*, 19 Cal. App. 5th at 1144-56.

Shortly after Tinder rolled out Tinder Plus and its unlawful pricing scheme in 2015, Alan Candelore filed a class action complaint in Los Angeles County Superior Court alleging violations of the Unruh Act and California's Unfair ***4** Competition Law (UCL), Cal. Bus. & Prof. Code §17200 *et seq*., on behalf of California consumers who paid the higher price for Tinder Plus beginning in March 2015. ER 161; Case No. BC583162 (Cal. Super. Ct., Los Angeles). [2] Tinder successfully demurred, persuading the trial court that age-based pricing did not violate the Unruh Act, and that Tinder's age-based pricing was justified because younger people earn less money than those over 30. *Candelore*, 19 Cal.App.5th at 1144. The California Court of Appeal unanimously reversed on January 29, 2018, rejecting Tinder's arguments that it did not unlawfully discriminate against California customers, and holding: "A blanket, class-based pricing model such as [Tinder's], when based upon a personal characteristic like age, constitutes prohibited arbitrary discrimination under the [Unruh] Act." *Id.* at 1148. The Court of Appeal further concluded that it was "*inconceivable* that an antidiscrimination law like the Act would ... countenance" age-based pricing for consumer goods, like Tinder imposed. *Id*. at 1152 (emphasis added); *see also id.* at 1155-56 (Tinder's pricing practices also violate the UCL prohibition against unlawful and unfair business practices).

***5** Mr. Candelore's class action remains pending, and was being actively litigated in state court until Judge Walter granted final approval to the settlement at issue in this appeal. ER 170, 177-78.

Plaintiff Lisa Kim filed the present copycat class action in 2018, *after* the *Candelore* decision a few months earlier, in federal district court (thus avoiding the risk of an abatement order or coordination under state law). ER 373-87. By late 2018, the considerable post-appeal litigation activity in *Candelore* had included class and merits discovery leading toward a stipulated class certification schedule. ER 170, 177-78. Kim had not taken *any* discovery in her case before settling. ER 338, 345, 352. More troubling still, Kim had been ordered to individual arbitration (because, the court concluded, she had agreed to an arbitration agreement with Tinder that prohibited class claims) and her court case had been stayed. ER 338. (By contrast, Alan Candelore and a sizeable portion of the putative class in *Candelore* had purchased Tinder Plus in 2015 before Tinder began asking customers to submit to its Terms of Use to access the app, *see* ER 162, 189, and Tinder has never moved to compel arbitration in the state class action, ER 168). Only after Kim realized she was facing *at best* a recovery of $4,000 per offense for her individual Unruh Act claims in arbitration, did she strike a deal with Tinder. ER 283-330.

***6** Not only did Kim settle her own claims, but she reached a deal to settle the very class claims the district court had held she was precluded from pursuing. ER 286, 288 at §§2.6, 2.21. To make matters worse, Kim not only settled the Unruh Act and UCL claims of every customer she had sought to represent in her federal court class action, but she and Tinder also agreed to settle the additional Unruh Act claims of tens of thousands of Tinder customers whose claims arose before her statute of limitations began and were therefore not even potentially part of her case (although these are covered by *Candelore*, filed in 2015). *Id*.

The sweetheart deal struck between Tinder and Kim raised numerous red flags. In addition to the concerns mentioned above (e.g., a pre-certification settlement with no discovery; a plaintiff who was not an adequate class representative, *see Hesse v. Sprint Corp*., 598 F.3d 581, 588 (9th Cir. 2010); and a reverse-auction situation where the parallel case had already received the imprimatur of the state Court of Appeal, resulting in huge potential recovery for the class), the district court ignored - rather than applied the required heightened scrutiny - to each of the following facts:

• Plaintiff's counsels' $1.2 million fee and Kim's $5,000 incentive award were subject to a "clear sailing" provision (ER 296-97 at §§7.1, 7.2), meaning that Tinder promised not to dispute the fairness of those amounts, and those payments were also subject to a reversion (ER 297 at §7.4), i.e., if the district court awarded ***7** less than the amounts Tinder had agreed to pay, the difference would be returned to Tinder instead of the class.

• No monetary fund was established (ER 288-90 at §§3.1-3.4), to pay the 240,000 class members to release claims for which California law imposed at least $960,000,000 in mandatory statutory damages. Civ. Code §52(a); *see infra*, Section I(A)(1). The only monetary benefits to the class were subject to an unnecessary claims procedure (and thus paid only to individuals who took the initiative to actually file a claim - even though Tinder's records showed who was eligible for relief), which, along with the meager relief provided, explains why *less than three-quarters of one percent of the class* actually filed claims. ER 66, 70. The resulting monetary value to the class was only $44,825 (*see infra*, at n.9), in exchange for which Tinder obtained complete releases from approximately 240,000 of its current and former customers. There was no justification (and no explanation other than Kim's lack of leverage) for the settlement not to include a substantial agreed-upon fund that could be distributed on a pro rata or other basis to all class members (which could have been easily accomplished without any claims procedure at all).

• The settlement's purported benefits to the class were primarily "in-kind" rather than economic (ER 288-90, §§3.1-3.4). These "Super Likes" were made available to class members only who still had an active Tinder account, providing ***8** no benefit at all to the nearly one-half of the class that no longer had an account at the time of settlement. ER 218. And, these in-kind benefits were essentially useless to current app users, because the provided "benefits" were an additional amount of free "Super Likes," even though premium users were already entitled to 150 Super Likes per month. ER 288 at §3.2.

• Plaintiff Kim represented to the district court that the settlement was worth $24 million to class members. ER 112-13. The record shows that number to be grossly inflated and unsupported by any evidence. Tinder was in fact only required to pay $44,825 out of pocket (to 1,793 of the 240,000 class members), and the largely valueless in-kind "Super Likes" were made available only to the half of the class who still use the Tinder app. *See Koby v. ARS Nat'l Servs., Inc*., 846 F.3d 1071, 1079 (9th Cir. 2017) (approval of class settlement an abuse of discretion where "[t]here is no evidence that the relief afforded by the settlement has any value to the class members, yet to obtain it they had to relinquish their right to seek damages in any other class action.").

• Tinder also agreed to an injunctive relief component that permits it to *continue* to discriminate in California, including against class members, on the basis of age. ER 290 at §3.4. Tinder promised only to adjust its pricing for *new* customers. *Id*. Nothing in the settlement precludes Tinder from continuing to impose its old, discriminatory pricing tiers on existing customers, including all ***9** class members who continued to be Tinder Plus users. This change in practice is completely without value or benefit to any class member.

As discussed in detail below, Rule 23(e) as recently amended, and this Court's well-established case law require very close scrutiny of pre-certification class settlements. A court certainly cannot apply the "presumption" of fairness used by the district

court here to approve the deal reached by Kim and Tinder at the expense of this class. ER 28-29; *e.g.*, *SFBSC Mgmt.* 944 F.3d at 1049 ("such a presumption of fairness is not supported by our precedent").

The district court plainly erred in granting approval to the parties' seemingly collusive, self-dealing settlement. It failed to apply the correct legal standard under Rule 23(e), either at the preliminary approval hearing (when it should have stopped this settlement in its tracks) or at final approval. And it failed to give appropriate weight to the compelling evidence that Kim's sweetheart deal benefitted her, her counsel, and Tinder, but not the 240,000 class members whose interests the district court had a fiduciary obligation to protect.

For these reasons, and those further stated below, reversal is required.

STATEMENT OF JURISDICTION

Plaintiff Kim asserted claims pursuant to California's Unruh Act and UCL, and the district court exercised jurisdiction under the Class Action Fairness Act, 28 U.S.C. §1332(d)(2)(A). ER 19, 374-75.

***10** The district court granted final approval of Kim's proposed class settlement on June 19, 2019. ER 11-17, 18-35. The district court entered final judgment on June 21, 2019. ER 1-8. Appellants filed their timely notice of appeal on July 11, 2019. Fed. R. App. P. 4(a)(1)(A), 26(a)(1)(C); ER 54-58. This Court has appellate jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Did the district court err as a matter of law by applying a lenient standard, inconsistent with Federal Rule of Civil Procedure 23(e), to approve the pre-certification class settlement proposed by Appellees Kim and Tinder, including by ignoring multiple indicia of collusion, by employing an improper "presumption" of fairness, and by failing to adequately analyze and address the proper Rule 23(e) factors before entering final approval?

2. Did the district court abuse its discretion by granting approval to a collusive class settlement that was neither fair, adequate, nor reasonable and otherwise failed to meet the requirements of Rule 23(e) and due process, including because it provided *de minimis* actual relief to class members in exchange for an overbroad release of valuable claims, while guaranteeing excessive fees to plaintiff's counsel?

3. Did the district court err as a matter of law and abuse its discretion in granting certification of a settlement class and approving a settlement for which ***11** neither plaintiff Kim nor her counsel were adequate representatives, in violation of the due process rights of absent class members?

4. Did the district court err as a matter of law and abuse its discretion in awarding plaintiff's counsel $1.2 million in fees?

5. Did the district court err as a matter of law and abuse its discretion in granting preliminary approval to a proposed settlement without applying the newly-enhanced Rule 23(e) standard?

PERTINENT STATUTES

An addendum setting forth the pertinent statutes is attached.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

1. Tinder's Age-Based Pricing

Tinder is a mobile software dating app. ER 19, 60; *Candelore*, 19 Cal. App. 5th at 1142. Tinder released Tinder Plus in March 2015. ER 60; *Candelore*, 19 Cal. App. 5th at 1142. From the start, Tinder charged older users a higher price than it charged younger users for Tinder Plus: $19.99 per month for individuals 30 and older, compared to $9.99 or $14.99 for younger users. ER 19, 60, 379. In 2016, Tinder added 29-year-old users to the higher-priced, $19.99 per month tier. ER 60. In 2017, Tinder launched an additional premium product, Tinder Gold, for which it also imposed discriminatory age-based pricing. *Id.*

***12 2. Legal Challenges to Tinder's Age Discrimination**

a. *Governing California law.* The 1959 Unruh Act has long prohibited businesses in California from discriminating on the basis of personal characteristics. Cal. Civ. Code §51; *see, e.g.*, *White v. Square, Inc.*, 7 Cal. 5th 1019, 1025 (2019). The purpose of the Act "is to create and preserve a nondiscriminatory environment in California business establishments by banishing or eradicating arbitrary, invidious discrimination by such establishments." *White*, 7 Cal. 5th at 1025 (quotation omitted); *id.* ("the Act stands as a bulwark protecting each person's inherent right to full and equal access to all business establishments") (quotation omitted). The California Supreme Court instructs: "[i]n enforcing the Act, courts must consider its broad remedial purpose and overarching goal of deterring discriminatory practices by businesses," and the Act therefore "must be construed liberally in order to carry out its purpose." *Id.* (citations omitted).

While the Unruh Act contains a list of enumerated personal characteristics, the list is "illustrative, rather than restrictive," and the Act's proscription against arbitrary discrimination extends beyond these enumerated classes. *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1160 (1991); *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 730, 732 (1982); *In re Cox*, 3 Cal. 3d 205, 211-12 (1970). To achieve the Act's broad remedial purposes, the California Legislature provided ***13** a private cause of action and a very strong remedy: in addition to actual damages, the statute provides for *mandatory* statutory damages for "each and every offense" of "up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000)." Cal. Civ. Code §52(a); *White*, 7 Cal. 5th at 1025.

b. *Candelore v. Tinder.* In May 2015, Alan Candelore sued Tinder for violating the Unruh Act and the UCL. *Candelore*, 19 Cal. App. 5th at 1142; ER 161. On behalf of himself and a proposed class of California consumers who paid the higher price for Tinder Plus, Mr. Candelore sought full mandatory Unruh Act statutory damages of $4,000 for each and every discriminatory offense, as well as the restitution and injunctive relief available under the UCL, and statutory attorneys' fees. *Id.* at 1142; ER 161-62.

Candelore successfully obtained an appellate reversal of the Los Angeles Superior Court's demurrer, *id.* at 1143, and the California Supreme Court unanimously denied review. ER 168-69; No. S247527 (Cal.). The case was then remanded to the trial court, where a previously-imposed discovery stay was lifted, and the parties proceeded to engage in merits and class certification-related discovery. ER 170. At the time of the *Kim* settlement (in late 2018), the *Candelore* case was in active litigation, heading towards a stipulated class ***14** certification schedule. *Id.* The Los Angeles Superior Court subsequently stayed *Candelore* pending resolution of this appeal.

c. *Kim v. Tinder*. On April 12, 2018, nearly three years after Mr. Candelore filed his lawsuit, and after the 2018 Court of Appeal decision, Lisa Kim filed this copycat class action alleging the identical Unruh Act claims as were pleaded in *Candelore* (and found to have stated a valid claim for relief by the Court of Appeal). ER 373-387. [3]

Plaintiff Kim had signed up for the free Tinder app in 2015, and then purchased Tinder Plus in 2017. ER 336. Before Kim purchased Tinder Plus (which was well after Mr. Candelore, ER 161), Tinder had implemented a 'sign-in wrap' procedure referencing Tinder's Terms of Use, which included an arbitration provision that banned all class claims. ER 336. Despite a rather obvious arbitration defense looming, Kim's counsel conducted no discovery. ER 337, 345.

Tinder moved to compel arbitration. ER 336. Kim's arguments in opposition were limited to a single issue, whether Tinder's agreement impermissibly required Kim to forfeit her right to seek a public injunction. ER 346-63. Kim made no effort to

challenge the many procedurally and substantively ***15** unconscionable aspects of Tinder's arbitration agreements, which purported to eliminate statutory Unruh Act damages and shorten the Act's two-year statute of limitations (making those agreements unenforceable under California law). ER 367-68, 371-72. [4]

On July 12, 2018, the district court compelled Kim to individual arbitration and stayed all further proceedings in her federal case. ER 338, 341. Rather than proceed to arbitration, Kim filed a notice of appeal to this Court - notwithstanding Section 16 of the Federal Arbitration Act, 9 U.S.C. §16, which makes an order compelling arbitration and staying the case non-appealable. ER 398 (ECF 46); *Kim v. Tinder, Inc.*, No. 18-55960 (9th Cir.).

***16** Despite Kim's inability to prosecute class claims or take discovery - or perhaps because of that inability - within months of Judge Walter's order compelling individual arbitration and staying her case, Kim and Tinder had agreed to settle her claims on a classwide basis with an extremely broad release of the absent class members' claims. ER 283-330.

3. Plaintiff Kim's Settlement

Kim and Tinder settled on terms that afforded little to no relief for anyone other than to her counsel and herself ($1.2 million in fees; $5,000 incentive award) - and of course, Tinder. ER 283-330. [5] Neither Kim nor Tinder invited Mr. Candelore or his counsel to participate in these settlement discussions. ER 174-75. Nor did Tinder inform Candelore's counsel or the state court that it was engaged in talks with Kim's counsel that would extinguish Mr. Candelore's and his putative class members' pending claims. *Id.*; *see also* Case No. BC583162 (Cal. Super. Ct., Los Angeles).

***17** The deal between Kim and Tinder, finalized on December 31, 2018, included the following:

a. *Overbroad Settlement Class.* The putative class included every California consumer 29 years old or older who purchased Tinder Plus or Tinder Gold in or after March 2015. ER 286, 288 at §§2.6, 2.21. This class reached back further than the two-year statute of limitations in Kim's Unruh Act claim, filed in 2018. *See Estate of Stern v. Tuscan Retreat, Inc.*, 725 Fed. App'x. 518, 525 (9th Cir. 2018). By extending the classwide releases so far back in time, Tinder was able to obtain releases from thousands of California consumers, like Candelore (although he later opted out) and Appellant Allison, who purchased Tinder Plus before Tinder implemented the arbitration agreement procedures that Judge Walter enforced against Kim. ER 161, 188-89. In addition, although Kim had purchased only Tinder Plus, the settlement class also included all California purchasers of Tinder Gold. *Compare* ER 288 at §2.21 *with* ER 378-80. The parties agreed this class comprises over 240,000 California consumers. ER 61, 284. [6]

***18** b. *Purported "Benefits" to Class Members*. In exchange for a broad release of "any and all claims" relating to age discrimination, (ER 297-98 at §8.1)), the 240,000 settlement class members will receive little to nothing in return. Tinder did not agree to create any monetary fund, but agreed to only in-kind features for current app users, some claims-made benefits, and injunctive relief with no value to the class. ER 288-90 at §§3.2-3.4.

(1) *In-Kind Component*. Tinder agreed to provide class members with current Tinder accounts as of the Effective Date a "deposit" of "50 free Super Likes" into their accounts. ER 286-88 at §§2.2, 2.9, 686-87 at §3.2. As of December 31, 2018, Tinder estimated that 44% of the class members (105,600 persons) no longer had active accounts - an attrition rate of 13% per year since 2015. ER 218.

***19** The agreement "valued" the "Super Likes" at their "selling price of $1" each. ER 289. The record evidence did not support the assertion that $1 is an accurate statement of the value of those additional "Super Likes" for the class members.

Tinder treats all "Super Likes" as "non-transferable" "virtual" "license[s]" with no cash "value." ER 369. Tinder already provided premium service customers 150 Super Likes per month, and provided regular customers one free Super Like per day (roughly 30 per month). ER 64. Even using the higher monthly price Tinder actually charged older users for the Tinder Plus premium service ($19.99) and ignoring all the other features provided for this price, [7] the 150 Super Likes are sold by Tinder to class members for less than 13 cents each - and they cost Tinder nothing.

Although Kim submitted no evidence to support the $1 valuation (ER 112-13, 121-33), Tinder later submitted a declaration stating that the "usual price" for a la carte purchases of Super Likes was $1 (ER 64), a statement that appears to ***20** include all users of the Tinder app everywhere (including free users, and not just premium users in California), and ignores the far lower price actually charged to class members for this feature as part of this premium service. [8]

(2) *Claims-Made Component*. The agreement provides an option of cash or additional in-kind features payable only to class members who submit a timely, valid claim form. ER 289 at §3.3; 328-29. Class members with active Tinder accounts could file a claim to receive either $25 or 25 more "Super Likes." ER 289 at §3.3(a), (b). Class members without a current Tinder account could choose between $25 and a free month of Tinder Plus (or Gold), valued at either $19.99 or ***21** $29.99. *Id*. at §3.3(a), (c). As of final approval, fewer than three-quarters of 1% of the settlement class submitted claims. ER 66, 70. [9]

(3) *Injunctive Component*. Tinder agreed to change its age-based pricing practices only for "new subscriptions," and thus did not eliminate its discriminatory pricing as it affected existing customers. ER 290 at §3.4. For new subscriptions, Tinder raised the price for younger people who purchased Tinder Plus to match the price charged older customers. ER 60-61. This change in practice thus provides nothing of value to the existing, older customers who comprise this class.

c. *Monetary Benefits to Kim and Her Counsel*. Unlike the class members, Kim and her counsel were handsomely rewarded by the settlement. Tinder agreed to pay up to $1.2 million in attorneys' fees, reimburse costs and expenses, and to pay Kim a service payment of $5,000. ER 296-97 at §§7.1-7.4. Moreover, any sums not approved by the court would revert to Tinder, not to the class. *Id.*

4. Additional Background to Settlement

The settlement of this case was not the first effort by Tinder to release these class claims. Earlier in 2018, Tinder settled another consumer class action, ***22** *Hansen v. Tinder*, Case No. 15-CVP-01522 (Cal. Super. Ct., San Luis Obispo), involving unrelated violations of the California Dating Services Contract Act (Cal. Civ. Code §1694), in which it negotiated a broad release purporting to encompass any claims "arising out of, relating to, or in connection with the facts alleged" which included factual allegations that class members purchased Tinder Plus. ER 171. Tinder's counsel admitted that Tinder was "going to try to use the release in *Hansen*" to eliminate the claims in *Candelore*. ER 172.

Mr. Candelore and his counsel successfully worked to protect the class by alerting the court in that case, objecting, and participating at the approval hearing. ER 171-72. The *Hansen* court ultimately ruled that Tinder's overly broad release would not be construed to extinguish the claims in *Candelore*. ER 172. Kim's counsel, who were aware of the *Hanson* proceedings, took no action to protect the class. *Id*.

One day after the *Hansen* hearing, Tinder's counsel emailed Kim's counsel to discuss settlement. *Id*. [10]

***23 5. Approval of the *Kim* Settlement Over Substantial Objection**

After cutting her deal with Tinder, Kim returned to the district court to seek an order lifting the stay of litigation the Court had entered upon compelling arbitration. ER 399 (ECF 49, 50). Kim then moved for preliminary approval of her settlement on January 20, 2019 - without making any mention of the *Candelore* case or the favorable Court of Appeal decision applicable to the class members she was purporting to represent. ER 245-46. In support of an asserted $23 million valuation of her new settlement, Kim relied on supporting declarations from her lawyers, rather than evidence. ER 270-82; 331-33.

After being alerted to the pending class settlement, Candelore (as a putative class member in the *Kim* action) filed an opposition to preliminary approval, invoking the newly amended standard under Rule 23(e) which requires rigorous analysis by a district court before sending class notice of the proposed settlement. ER 220-244. The district court acknowledged but chose not to address the substance of Candelore's objections, failed to apply the heightened standard required by Rule 23(e), and granted preliminary approval. ER 41-53. [11]

***24** Plaintiff Kim moved for approval of the $1.2 million in fees to her counsel and $5,000 incentive payment to herself. ER 400 (ECF 64-1). While Candelore exercised his right to opt out of the proposed settlement, ER 161, Appellants Rich Allison and Steven Frye stepped forward to object to the settlement, along with several other class members. ER 134-59, 181-84, 187-190.

Plaintiff Kim then moved for final approval, relying on the same unsupported valuation from her lawyer. ER 111-15. [12] Appellants submitted additional expanded objections, based on an evidentiary analysis demonstrating why the proposed settlement was unfair, inadequate and unreasonable and inconsistent with the due process rights of absent class members. ER 89-110. [13]

The district court overruled those objections, granted final approval, and on June 21, 2019, entered judgment. ER 1-8, 18-35. This timely appeal followed. ER 54.

***25 STANDARD OF REVIEW**

This Court reviews orders approving class action settlements for an abuse of discretion. *Allen*, 787 F.3d at 1222. "A court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011).

Rule 23(e) sets forth the factors the district courts must evaluate in assessing a proposed class settlement. Fed. R. Civ. Pro. 23(e)(2). [14] Class settlements entered prior to class certification are subject to a "heightened" standard, "'requir[ing] a higher standard of fairness' and 'a more probing inquiry than may normally be required under Rule 23(e).'" *SFBSC Mgmt., LLC*, 944 F.3d at 1048 (quoting *Dennis v. Kellogg Co*., 697 F.3d 858, 864 (9th Cir. 2012), and *Hanlon*, 150 F.3d at 1026)); *Koby*, 846 F.3d at 1079; *Allen*, 787 F.3d at 1223-24; *In re Bluetooth,* 654 F.3d at 946. This more "exacting review" is required "to ensure ***26** that class representatives and their counsel do not secure a disproportionate benefit 'at the expense of the unnamed plaintiffs who class counsel had a duty to represent.'" *Lane v. Facebook, Inc*., 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1027). [15]

When reviewing pre-certification settlements, this Court will "not affirm if it appears that the district court did not evaluate the settlement sufficiently to account for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit." *Id*. Under this heightened scrutiny, this Court reviews "pre-certification settlement approval not only for whether the district court has 'explored comprehensively all factors, ... given a reasoned response to all non-frivolous objections,' and 'adequately ... develop[ed] the record to support its final approval decision,' but also for whether the district court has looked for and scrutinized any 'subtle signs that class counsel have allowed pursuit of their own self-interests ... to infect the negotiations.'" *SFBSC Mgmt.,* 944 F.3d at 1043 (quoting *Allen*, 787 F.3d at 1223-24, ***27** *Dennis*, 697 F.3d at 864, and *In re Bluetooth*, 654 F.3d at 947)); *see also Vargas v. Lott*, 787 Fed. App'x. 372, 374 (9th Cir. 2019). Among the indicia of collusion that this Court has identified, and requires district courts to analyze, are:

(1) when counsel receive a disproportionate distribution of the settlement; (2) when the parties negotiate a 'clear sailing' arrangement (i.e., an arrangement where defendant will not object to a certain fee request by class counsel); and (3) when the parties create a reverter that returns unclaimed fees to the defendant.

In re Bluetooth, 654 F.3d at 947 (quotations omitted) *see also SFBSC Mgmt.,* 944 F.3d at 1049.

In addition to the heightened procedural requirements, this Court will reverse class settlement approval as an abuse of discretion when "the terms of the agreement contain convincing indications that ... self-interest rather than the class's interests in fact influenced the outcome of the negotiations." *Staton*, 327 F.3d at 960; *accord Allen*, 787 F.3d at 1223. This Court will also reverse as an abuse of discretion where: "There is no evidence that the relief afforded by the settlement has any value to the class members, yet to obtain it they had to relinquish their right to seek damages in any other class action." *Koby*, 846 F.3d at 1079.

The Court also reviews for abuse of discretion decisions to grant preliminary approval under Rule 23(e); to certify a class for settlement purposes; and awards of attorney's fees and costs. *In re Hyundai & Kia Fuel Econ. Litig*., 926 F.3d 539,

***28** 556 (9th Cir. 2019) (en banc). The factual findings underlying these decisions are reviewed for clear error. *Id.*

ARGUMENT

I. The District Court Erred by Failing to Apply the Heightened Standard Required for Approval of this Pre-Certification Class Settlement

The district court failed to conduct the "searching inquiry" required to approve this pre-certification settlement, including by: failing to investigate or analyze the many indicia of collusion here; applying an improper "presumption" of fairness; and failing to properly investigate or apply the required Rule 23(e) factors. *SFBSC Mgmt.,* 944 F.3d at 1043; *Allen*, 787 F.3d at 1223-24; *In re Bluetooth*, 654 F.3d at 946; *Hanlon*, 150 F.3d at 1026.

All of the "subtle signs" of collusion previously identified by this Court exist here (along with some not-so-subtle signs), and the district court either ignored or dismissed these concerns: actual value to class members eclipsed by fees to counsel; a clear sailing fees provision; and a reversionary fees deal. *In re Bluetooth*, 654 F.3d at 947. In addition, the context of the reverse auction, as well as the overbreadth of the released claims (raising serious due process concerns) are additional indicia that should have been considered by the district court.

The only discussion of collusion was the court's conclusionary statement that the mediation "process" indicated no collusion. ER 28 & n.10. But as this ***29** Court explained long ago, a court's duty is not to simply review for express quid pro quo collusion and stop there:

> [W]e do not mean to indicate concern only with overt misconduct by the negotiators. The incentives for the negotiators to pursue their own self-interest and that of certain class members are implicit in the circumstances and can influence the result of the negotiations without any explicit expression or secret cabals.

Staton, 327 F.3d at 960.

The district court chose to ignore all of the many warning signs. Instead it applied a patently improper *presumption* of fairness. *SFBSC Mgmt.,* 944 F.3d at 1049. While the district court acknowledged that pre-class certification settlements "require[] a higher standard of fairness" (ER 25), in no way did it actually apply that standard to this agreement. *E.g.*, *SFBSC Mgmt.,* 944 F.3d at 1048; *Allen*, 787 F.3d at 1222; *In re Bluetooth*, 654 F.3d at 948-49.

A. The District Court Ignored at Least Five Serious Indicia of Collusion

1. Actual Settlement Value as Compared to Attorneys' Fees

Pre-class certification settlements where "counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded" indicate the potential for collusion. *In re Bluetooth,* 654 F.3d at 947 (quoting *Hanlon*, 150 F.3d at 1021). The district court did not analyze "with great care" the actual value of the settlement to class ***30** members as compared to the value to counsel. *Dennis*, 697 F.3d at 868; *see also Vargas*, 787 Fed. App'x at 374. That rigorous review was all the more important here, where the value of the settlement is not evident on the face of the agreement, because the parties did not agree to any monetary fund. ER 288-90 at §§3.1-3.4.

a. This deal provides little to no value to the class

The district court erroneously accepted, without scrutiny, an unsupported valuation of this deal of $24 million to the class, based on $12 million for in-kind features; $6 million for claims; and $6 million for injunctive relief. ER 28. The deal is worth far, far less.

In-Kind Component. The court valued the 50 Super Likes at $12 million, or $50 for one hundred percent of the 240,000 class members. *Id*. Even assuming those Super Likes had any monetary value to the class (which is doubtful, as addressed below), this benefit was only offered to class members with *current* Tinder accounts (thus likely providing even more benefit to Tinder than those class members). ER 288 at §3.2. The Court ignored the uncontroverted evidence that nearly half of the class (44%, or at least 105,600 persons) did not have a current account as of December 2018. ER 218. That number would inevitably be higher as of the Effective Date given the established attrition rate of 13% annually.

The $12 million valuation cannot be justified based on the entirely unreasonable and unsupported assumption that each of Tinder's 105,600 former ***31** customers in the class would reactivate their Tinder accounts in the future in order to use this feature. ER 31 ("receiving the free Super Likes simply requires these Class Members to reactivate their Tinder accounts"). There are many reasons those class members "might not want to conduct more business" with Tinder, including because Tinder discriminated against them, because they married or formed relationships or otherwise no longer require Tinder's "services," because they have moved on to a different dating app, or for any of a multitude of other reasons. *In re Easysaver Rewards Litig.*, 906 F.3d 747, 755 (9th Cir. 2018). And of course, any "benefit" that induces a former customer to reactivate use of the app provides a *real* benefit to Tinder.

Because the record supported only the conclusion that *at most* 56 percent of class members (roughly 134,400) would even have access to these Super Likes, it was clear error for the district court to accept the $12 million valuation. *See SFBSC Mgmt.,* 944 F.3d at 1054-55 (rejecting approval where the court did not adequately scrutinize $1 million valuation of benefits provided only to exotic dancers who were current employees, when the record showed that many class members had moved on from that work).

The court also erred in accepting the parties' valuation of the Super Like in-kind benefit at $50 per class member ($1 each for the 50 additional Super Likes). The Court credited without any scrutiny a declaration stating that Tinder ***32** sometimes sells Super Likes on an a la carte basis for $1 each (to everyone, including free members), ignoring the compelling evidence they are worth far less, if anything. ER 64.

"Super Likes" are "not transferable" and "cannot be used in anywhere near the same way as cash." *In re Easysaver*, 906 F.3d at 755, 757 (citing *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 706 (7th Cir. 2015)); *see In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1179 (9th Cir. 2013) ("non-transferable" coupons are "likely to provide less value to class members"). Tinder itself treats them as non-transferable "virtual" "license[s]" with no cash value. ER 369.

Further, there was substantial record evidence that Tinder already gives many of these Super Likes away for free or at a greatly discounted price, and that because class members already receive a substantial number of these Super Likes per month, they are unlikely to find value in still more Super Likes. *Supra* at p.19. [16] As discussed, every Tinder Plus premium user already receives up to 150 Super Likes per month. ER 64. The court never asked (and no evidence was presented) how many *class members* had actually ever purchased even a single ***33** additional a la carte Super Like from Tinder (although Tinder certainly had that data). Tinder's evidence falls far short of establishing that *these class members* would consider this in-kind feature to have any monetary value, let alone $1 each for all 50.

In sum, the Super Likes provide no value to at least the 44 percent of the class (and growing) without an active account, and whatever the value to class members with active Tinder accounts (if any), it is far less than the $12 million accepted by the court without scrutiny - this figure reflects a significant failure of the district court to employ the proper level of scrutiny.

Claims-Made Component. The court valued the claims-made component at an additional $6 million based on an entirely unreasonable assumption of a one hundred percent claims-rate ($25 x 240,000). ER 28. [17] In fact, only 1,793 class members - 0.745% of the total - made a claim by the date of final approval. ER 66, 70. Even assuming all claimants chose the $25 cash option, this "benefit" was worth $44,825, not $6 million.

***34** The court erred as a matter of law by assigning the "claims-made" component a value that ignored the actual claims rate and assumed a wildly unrealistic one-hundred percent redemption rate. The district court never acknowledged the claims rate at all. ER 18-35. As this Court held in *Vargas*:

> The district court did not undertake the comprehensive review required by our precedent.[] For example, the court adopted the estimate of class counsel's expert that the cash payments were worth around $35 million. As the Lott Objectors noted, however, that calculation was based on the total payments available to every eligible vehicle. Because the actual claims rate is likely to be very much less than 100%, the actual value of the settlement is almost certainly much lower.

787 Fed. App'x at 374*; see also In re Hyundai* 926 F.3d at 571 n.13 (en banc); *id.* at 580 n.8; *Allen*, 787 F.3d at 1224 n.4. In *SFBSC Mgmt.,* this Court described a valuation of $1 million where the actual claims totaled only $370,000 as "wildly inflated," 944 F.3d at 1054 - the court's $6 million valuation here of claims worth only $44,825 is far worse.

Injunctive Component. The district court also erred by accepting without any scrutiny the valuation of the injunctive component of the settlement as $6 million, based on plaintiff's counsel's unsupported calculation that all 240,000 class members would benefit by $25 each. ER 28. First, 105,600 class members no longer had active Tinder accounts (ER 66, 70), so no change in practice could benefit them at all. This created "an obvious mismatch between the injunctive relief provided and the definition of the proposed class." *Koby,* 846 F.3d at 1079. ***35** Second, the settlement provisions applying only to new accounts provide no benefit to class members because they permit Tinder to continue to maintain discriminatory age-based pricing for those existing class member accounts. ER 290 at §3.4. Class members who are still Tinder Plus customers are therefore still paying $10 more per month for their subscriptions than the younger customers who subscribed before implementation of the settlement.

There was also no record evidence to support the $25 per class member valuation, which appears to be counsel's invention. ER 127, 278. [18] Indeed, Tinder complied with the settlement terms by raising prices for new younger customers, rather than lowering its prices. ER 60-61.

Total Monetary Value. The actual monetary value provided to class members to be paid out of Tinder's pockets to release these valuable claims is $44,850. That number rises only modestly if the court credits some value for the in-kind component provided to current Tinder users only (leaving out at least 44 percent of the class). To accept the wildly-inflated $24 million number provided by the parties, the district court applied no scrutiny at all.

***36 b. Compensation to counsel dwarfs the value to the class**

The true monetary value to the class is far less than the value negotiated by plaintiff's counsel for themselves: $1.2 million. ER 296 at §7.1. District courts must compare fees to the "economic reality" of a settlement, meaning the benefits that will actually be provided to the class. *Allen*, 787 F.3d at 1225. The disparity in this case between actual compensation to the class ($44,825) and compensation to counsel ($1.2 million for minimal work including: for filing a complaint; unsuccessfully opposing a motion to compel arbitration; filing a notice of appeal; and negotiating a settlement) makes plain the "likelihood ... that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have been obtained." *In re Bluetooth*, 654 F.3d at 947 (quotation omitted).

As this Court explained in *In re Bluetooth*, the fact that counsel represented that the fees were separately negotiated does not eliminate the likelihood of collusion. *Id.* at 948-49 ("Even when technically funded separately, the class recovery and the agreement on attorneys' fees should be viewed as a 'package deal.'") (quoting *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 244, 245-46 (9th Cir. 1996)). The "package deal" negotiated by plaintiff's counsel here was for ***37** their own benefit at the expense of the class and is a very clear indication of improper collusion.

2. Clear Sailing Fees Provision

This Agreement contains a clear sailing fees provision, in which Tinder agreed not to oppose the requested $1.2 million in fees. ER 296 at §7.1. Such provisions "carr[y] the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class." *In re Bluetooth*, 654 F.3d at 947 (quotation omitted). This Court has therefore repeatedly explained that "'clear sailing' agreements on attorneys' fees are important warning signs of collusion," *Lane*, 696 F.3d at 832, because "[t]he very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class," *In re Bluetooth*, 654 F.3d at 948 (quotation omitted); *SFBSC Mgmt.,* 944 F.3d at 1051.

The district court did not address this issue at all, and, having failed to recognize the import of such a provision, did not comply with its "heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class." *In re Bluetooth*, 654 F.3d at 948.

3. Reversionary Provisions

The fees provision was also reversionary, requiring any amounts not approved by the court to revert to Tinder, not the class. ER 297 at §7.4. This ***38** Court has explained: "a kicker arrangement reverting unpaid attorneys' fees to the defendant rather than to the class amplifies the danger of collusion already suggested by a clear sailing provision." *In re Bluetooth*, 654 F.3d at 949; *see also id.* ("The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees.").

In addition to the fees and expenses reversion, because the monetary component of this settlement is entirely claims-made and otherwise entirely dependent on class members maintaining current accounts, any relief to the class is also effectively "reversionary." ER 288-90 at §§3.2-3.3. This deal permits Tinder to acquire the release of valuable claims for pennies (or here, less than a penny) on the dollar, while inflating the value presented to the court - amplifying the danger of collusion. *In re Bluetooth*, 654 F.3d at 949.

4. Reverse Auction Context

The district court should have considered the reverse auction context in which this settlement arose as an additional indicia of collusion requiring increased scrutiny. Tinder blatantly "pick[ed] the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement ***39** that will preclude other claims against the defendant" *Negrete*, 523 F.3d at 1099; *Reynolds,* 288 F.3d at 282. [19]

The district court concluded there was no "evidence" of a reverse auction - but that is plainly wrong. ER 31. The court was well aware of Kim's lack of leverage with respect to class claims, having ordered her to individual arbitration after her counsel took no discovery, and then staying her case. ER 334, 341, 342. [20] The posture of the two respective cases, including Kim's lack of leverage, the first-filed and better-positioned *Candelore* (with the binding law of the case Court of Appeal decision), the failure of counsel for Kim or Tinder to give notice to ***40** Candelore's counsel or the state court of their attempt to settle the overlapping claims at issue, and Tinder's continuing campaign to avoid the substantial liability it faced in state court - all is evidence that Tinder took advantage of the opportunity to negotiate with the weakest plaintiff. While this Court has recognized that the mere fact of multiple pending class actions alone is not sufficient to trigger a conclusion that a reverse auction has occurred (*see Gallucci v. Gonzales*, 603 Fed. App'x 533, 535 (9th Cir. 2015)), the significant disparity in bargaining leverage evidenced here should have been considered as a warning flag by the district court. *Reynolds*, 288 F.3d at 283.

5. Breadth of Class and Due Process Concerns

Appellees Kim and Tinder also overreached in defining the scope of the settlement class in a number of ways, and by so doing, were able to inflate their already wildly exaggerated valuation. [21]

First, this never should have been a class settlement at all, given Kim's inability to litigate, let alone vigorously litigate, the class members' claims. *See Hesse*, 598 F.3d at 589 ("Class representation is inadequate if the named plaintiff fails to prosecute the action vigorously on behalf of the entire class"). Her failure ***41** to take any discovery prior to entering into this settlement is a factor this Court has long considered to be a concern in the approval of class settlements. *In re Bluetooth*, 654 F.3d at 946.

Second, to define the class as broadly as possible, Kim and Tinder reached back beyond Kim's two-year statute of limitation on the Unruh Act claim (which began in April 2016) to encompass Unruh Act claims going back to March 2015. [22] ER 286, 288 at §§2.6, 2.21. Kim thus released very valuable Unruh Act claims for from an earlier time period that she had no right to pursue herself.

Third, this earlier group of class members includes thousands of individuals, including Appellant Allison and Mr. Candelore, who purchased Tinder Plus in 2015 *before* the implementation of any sign-in procedure whereby Tinder attempted to bind users to an arbitration agreement (the precise sign-in wrap mechanism and number of impacted class members was never investigated given the lack of discovery below), who are therefore not subject to the arbitration defense brought against Kim. ER 160, 187. Plaintiff Kim overreached by settling and releasing these claims as well.

***42** Finally, while wrapping multiple products into a class settlement is not necessarily problematic, Kim purchased only Tinder Plus, not Tinder Gold. ER 373. This is a concern here because she settled the claims of tens of thousands of class members who purchased Tinder Gold without taking any discovery whatsoever regarding that product. ER 288 at §2.21. That, at the very least, is a warning flag that the Court should have heeded, but did not.

B. The Court Applied an Improper "Presumption" of Fairness Rather Than Investigate and Analyze Collusion

Instead of analyzing the indicia of collusion and applying heightened scrutiny required by this Court, the district court erred as a matter of law by expressly applying an improper "presumption" of fairness to this settlement. ER 28-29; *SFBSC Mgmt*, 944 F.3d at 1049. As this Court recently explained:

> Particularly in light of the fact that we not only have never endorsed applying a broad presumption of fairness, but have actually required that courts do the opposite - by employing extra caution and more rigorous scrutiny - when it comes to settlements negotiated prior to class certification, the district court's declaration that a presumption of fairness applied was erroneous, a misstatement of the applicable legal standard which governs analysis of the fairness of the settlement.

Id. This analysis applies with full force to this case and requires reversal.

The district court justified its improper presumption on two simplistic grounds: 1) the settlement involved a professional mediator; and 2) plaintiff's counsel vouched for the settlement. ER 28 (citing ***43** *In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008), for the proposition that "settlements that follow 'genuine arms-length negotiation are presumed fair'"); ER 28-29 (citing *Boyd v. Bechtel Corp*., 485 F. Supp. 610, 622 (N.D. Cal. 1979), for the proposition that "[t]he recommendations of plaintiff's counsel should be given a presumption of reasonableness."); ER 29 ("Given the judgment of these experienced counsel, this factor weighs in favor of the Court's conclusion that the Settlement is fair, reasonable, and adequate.").

That the settlement involved a mediator cannot substitute for the court's heightened scrutiny. *See SFBSC Mgmt.*, 944 F.3d at 1050 n.13 ("The court's conclusory statement, without any further analysis, that 'the settlement is the product of serious, non-collusive, arm's length negotiations and was reached after mediation with an experienced mediator at the Ninth Circuit' is insufficient."); *In re Bluetooth*, 654 F.3d at 948 ("the mere presence of a neutral mediator ... is not on its own dispositive of whether the end product is a fair, adequate, and reasonable settlement agreement."). Nor should a court defer to a professional mediator's assessment of the deal. [23] A mediator's job is to get the parties to settlement. A ***44** district court judge, by contrast, is required to act as fiduciary for the class and to ensure that any settlement is fair, adequate and reasonable.

Plaintiff's counsel's self-interested attestations of "value" of the settlement cannot substitute either for actual evidence or for the proper analysis and scrutiny. *SFBSC Mgmt.*, 944 F.3d at 1049-50. [24] There is no way to reconcile this Court's precedent

requiring heightened scrutiny of pre-certification class settlements - going back to *Hanlon* and *Bluetooth* and continuing to date - with the district court's approach here that *defers* to plaintiff's counsel's self-interested endorsement of the deal. [25]

C. The Court Failed to Analyze or Address the Requisite Rule 23(e) Factors Under Any Level of Heightened Scrutiny

The heightened scrutiny required by this Court for pre-certification class settlements includes not only the duty to investigate and analyze the signs of collusion discussed above, but also to "explore comprehensively all factors [required by Rule 23(e)], "give[] a reasoned response to all non-frivolous objections," and "adequately ... develop the record to support its final approval ***45** decision." *SFBSC Mgmt*., 944 F.3d at 1043 (quoting *Allen*, 787 F.3d at 1223-24 and *Dennis*, 697 F.3d at 864); *In re Bluetooth*, 654 F.3d at 947. As will be further shown below, the district court failed with respect to all three of these requirements: its analysis of the applicable Rule 23(e) factors was either non-existent or inadequate; it did not provide a reasoned response to all of the non-frivolous objections; and it failed to adequately (or accurately) develop the record to support approval of this deal.

For all of these reasons, Judge Walter failed to apply the exacting scrutiny this Court requires of pre-certification class settlements, and therefore abused his discretion in approving this settlement.

II. The District Court Erred in Approving This Inadequate, Collusive Settlement

As a direct result of the district court's reversible failure to apply exacting scrutiny, it approved a woefully inadequate settlement that provides no real value to class members at all, in exchange for a release of demonstrably high-value Unruh Act claims under *Candelore*, while providing substantial compensation to plaintiff and her counsel at the expense of the class. Even if the district court had applied the proper level of scrutiny to that deal, there are no circumstances under which settlement approval would be a proper exercise of that court's discretion.

***46** For the reasons set forth above, the terms of this inadequate settlement "contain convincing indications that ... self-interest rather than the class's interests in fact influenced the outcome of the negotiations." *Staton*, 327 F.3d at 960. This settlement falls into the category of deals so overwhelmingly inadequate as compared to the value of the claims that the Court must reverse approval definitively rather than simply reverse and remand for application of the proper standard to this settlement -- which would serve no purpose. This Court should conclude, as a matter of law, as it did in *Koby*, 846 F.3d at 1079, that this is not a fair or adequate resolution of absent class members' claims.

A. Value of the Settlement

Rule 23(e) requires the Court to carefully scrutinize whether "the relief provided for the class is adequate" in light of the "costs, risks, and delay of trial and appeal." Fed. R. Civ. Pro. 23(e)(2)(C). As discussed in the previous section, the district court accepted without any real scrutiny a $24 million valuation that was not supported by admissible evidence and that was wildly inflated. Almost half the class will get *nothing* and the rest will get in-kind features with no established value. The change in practices do not benefit class members at all. The total sum that Tinder will pay out of its pocket to release the claims of 240,000 class members is $44,825, not $24 million.

***47** B. Value of the Claims

The district court compounded its extreme over-valuation of the settlement by imposing a steep discount for the value of the class member claims that reflects several errors of law.

The Unruh Act's mandatory statutory damages are $4,000 for "each and every offense" (Cal. Civ. Code §52(a)) - which, in light of the scope of Tinder's price discrimination in California against at least 240,000 individuals, creates very substantial exposure (at least $960,000,000). The district court did not engage in any calculation of Tinder's potential exposure at all. ER 18-35.

To avoid evaluating exposure, the district court rejected the holding of the California Court of Appeal in *Candelore* that Tinder's practices constituted unlawful age discrimination under the Unruh Act. ER 26-27. But that decision was *law of the case* with respect to class members' claims in the pending state court litigation.[26] Rather than applying that governing precedent, the district court announced that "there is a split of authority regarding whether an age-based price discount, such as the one offered by Defendants, is unlawful under the Unruh Act." ER 26. There is no "split" of authority with respect to *Tinder's* unlawful aged-based pricing for these class members' claims. The case cited by the district court, ***48** *Javorsky v. Western Athletic Clubs, Inc.*, 242 Cal.App.4th 1386 (2015), was properly characterized by the Court of Appeal in *Candelore* as an "outlier," inconsistent with long-established California Supreme Court precedent, because by allowing an age-based pricing plan at a health club, the court in *Javorsky* substituted its own policy preferences for the California Legislature's clearly stated anti-discrimination policies in the Unruh Act. 19 Cal.App.5th at 1150-51 ("we find that reasoning to be inconsistent with the 'individual nature' of the right secured by the Act, which protects individuals from unequal treatment based on generalizations about 'a group' to which they belong.) (citing *Marina Point*, 30 Cal.3d at 739-40 and *Koire*, 40 Cal.3d at 35-36).

While the district court found "the holding of *Javorsky* to be more compelling ... than the holding in *Candelore,*" ER 26 n.4, *Candelore* was directly on point, involving the identical Tinder pricing policy at issue in *Kim*, and it applied by its terms to *all* class members in *Candelore* and *Kim.* Whatever the district court might have believed California law *should* be, its refusal to recognize the controlling California law that governs the very class claims before it (and therefore contributes to their value) was a serious legal error. *See In re Watts*, 298 F.3d 1077, 1083 (9th Cir. 2002) ("In the absence of a pronouncement by the highest court of a state, the federal courts must follow the decision of the intermediate appellate courts of the state unless there is convincing evidence that ***49** the highest court of the state would decide differently") (*quoting Owen ex rel. Owen v. United States*, 713 F.2d 1461, 1464-65 (9th Cir. 1983) (emphasis omitted)). A prior decision in a different case is not such convincing evidence, nor is the district court's determination that it may have decided *Candelore* differently (and in a manner inconsistent with applicable California Supreme Court precedent like *Marina Point*, 30 Cal.3d at 739-40 and *Koire*, 40 Cal.3d at 35-36).

As a result of the *Candelore* decision, class members will be able to prove that Tinder violated the Unruh Act by proving that Tinder engaged in age-based pricing. The district court discounted *Candelore* as merely a ruling on a pleadings motion. ER 26 n.4. But that ignores the substance of that very significant appellate decision: the Court of Appeal concluded that facts as pled, which included Tinder's purported business justification defenses, would establish Tinder's violation as a matter of law, as long as those allegations were factually accurate - as they are, because Tinder has never denied the facts concerning what services it provided, at what price, to which customers.

Candelore was the decision that induced Kim to file this copycat lawsuit in the first place. The district court significantly erred by dismissing the value that decision creates for the 240,000 class members whose claims Kim wants to release.

***50** The district court further discounted the value of the class members' claims based upon its assertion that "no Class Member suffered any monetary harm or damages as a result of Defendants' pricing model." ER 28. This is another clear factual error: every class member was required to pay more each month than younger Tinder users as a result of this discriminatory pricing. Moreover, California law, as the Legislature intended, requires that each class member be entitled to recover at least $4,000 per offense, regardless of ability to prove actual damages. Cal. Civ. Code §52(a); *White*, 7 Cal. 5th at 1030-31 (rejecting argument that Unruh Act plaintiffs must prove "actual or personal injury"); *supra* at n.6. It was error for the district court to reject the controlling California law that mandates statutory damages as the means for stamping out unlawful discrimination, even absent a showing of individual harm.[27]

A proper comparison of the actual monetary value to the class ($44,825) with the potential exposure to this class (at least $960 million) reveals that this deal ***51** pays class members less than one percent (.45%) of the value of their claims - an astronomical and completely unjustifiable discount.

C. Assessment of Litigation Risk

The district court also erred by giving Tinder's asserted defenses outsized value in any risk reduction analysis. ER 25-29.

The court apparently discounted the class members' claims because *Kim* had been compelled to individual arbitration and because Tinder had asserted, without discovery or challenge, that 95 percent of the class was subject to the same terms. ER 26. The court's analysis does not begin to explain why it would be fair to require even the five percent of class Tinder admitted was not subject to arbitration (12,000 individuals) to release their valuable claims in exchange for no value at all. *See infra*, Section III (discussing adequacy and intra-class conflict). But that is only one problem among many.

The threat that some class members might be compelled to arbitration cannot, as a matter of law, support the steep discount applied by the court here. Under California law, an arbitration agreement that limits otherwise available substantive statutory rights - including the right to damages, and to the full statute of limitations - is unenforceable. *Supra*, at n.4. The district court thus erred by accepting Kim's representation that class members would not be entitled to the full measure of Unruh Act damages because "Tinder's Terms of Use include a ***52** limitation of liability provision that would bar Class Members from recovering statutory damages under the Unruh Act." ER 26 n.5. [28]

While the Court suggested that arbitration agreements waiving class claims can be a bar to class certification (ER 26), it did not analyze whether this arbitration agreement would present difficulties for certifying this class, whose claims presented the same common, predominating issues concerning the enforceability and effects of Tinder's agreements, and whose members included many thousands who purchased Tinder Plus before Tinder adopted the sign-in procedure enforced by the district court against Kim.

All of this demonstrates that Tinder's arbitration defense could not have been worth anywhere close to the more-than-99-percent discount for risk that the district court applied to the value of these claims, which was an error of law and an abuse of discretion.

The district court also seems to have been swayed by Tinder's threat to aggressively oppose class certification (even though its undisputed aged-based ***53** pricing applied uniformly to every class member). ER 27. Simply repeating a defendant's statement that it would oppose class certification is no substitute for the exacting scrutiny of the risks of litigation that this Court requires. And the fact that the court certified a Rule 23(b)(3) class for settlement purposes casts substantial doubt on the strength of Tinder's opposition to certification.

D. Assessment of the Package Deal

All told, the district court imposed a 100-percent risk discount for the almost half the class that will receive nothing under this agreement. The risk discount for the class as a whole was well over 99 percent (Tinder will pay less than one penny on the dollar for these claims). This settlement must be reversed "[b]ecause the settlement gave the absent class members nothing of value, [and] they could not fairly or reasonably be required to give up anything in return." *Koby*, 846 F.3d at 1080.

Moreover, this Court requires heightened scrutiny of the whole "package deal," including fees. *Supra* at Section I(A)(1). The combination of the dramatically limited value to class members and a guaranteed $1.2 million pay out to counsel are "convincing indications that ... self-interest rather than the class's interests in fact influenced the outcome of the negotiations." *Staton*, 327 F.3d at 960; *accord Allen*, 787 F.3d at 1223-24. This settlement cannot satisfy Rule 23(e)(2), and the district court abused its discretion to approve it.

***54 III. The District Court Erred and Abused its Discretion in Approving an Inadequate Class Representative**

Approval of this settlement and certification of the settlement class must both be reversed because plaintiff Kim is not an adequate representative, and allowing her to release absent class member claims therefore violates due process. Fed. R. Civ. Pro. 23(e)(2) (requiring adequacy of representation for class settlement approval); 23(a)(4) (requiring adequacy for class certification); *Hesse*, 598 F.3d at 588. As this Court explained in *Hesse*, "without adequate representation, a court order approving a claim-preclusive class action settlement agreement cannot satisfy due process as to all members of the class." 598 F.3d at 588; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause ... requires that the named plaintiff at all times adequately represent the interests of the absent class members."); *Hanlon*, 150 F.3d at 1020 ("To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them."). This disqualifying problem defeats any claim that the court below can simply reconsider this same deal again under a different standard: this plaintiff cannot adequately represent this class and should be left to pursue her individual claims alone, for several reasons.

***55** 1. Kim and her counsel did not prosecute class claims before settling this case, including taking no class discovery at all. Plaintiff and her counsel had neither leverage nor ability to negotiate on behalf of the class, nor the information and documents sufficient to test Tinder's various representations (including the number of class members, the arbitration agreement allegations, the value of Super Likes, etc.). They accepted *everything* at face value. Adequacy requires "the named plaintiffs and their counsel" to "prosecute the action vigorously on behalf of the class." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000); *see also Hesse*, 598 F.3d at 588-89. Plaintiff Kim's failure to do so is disqualifying.

2. Kim sought to release by way of a class settlement claims that she "did not share...or even pretend to prosecute." *Hesse*, 598 F.3d at 588. Such a release of absent class member claims reflects "an insurmountable conflict of interest with other class members." 598 F.3d at 588. Courts applying *Hesse* have recognized than an overly-broad class definition that seeks to release claims a plaintiff has not or could not prosecute raises serious questions regarding the incentive of counsel to inflate the settlement value at the expense of class members. *See, e.g.*, *Amador v. Logistics Express, Inc.*, 2011 WL 13272489, *3 (C.D. Cal. April 21, 2011) ("As *Hesse* correctly notes, there is an incentive for a plaintiff in such circumstances to ***56** waive claims that he or she does not possess, either out of a disregard for those claims or as a means to a larger settlement."). [29]

As previously explained, the class definition over-reached to include those whose claims preceded Kim's statute of limitations, those who were not subject to the same arbitration defense, and those who purchased a different product. *See*, *supra*, at Section I(A)(5). The district court erred and abused its discretion by ignoring these serious due process concerns and concluding that Kim was an adequate representative for this class for purposes of both settlement approval and certification of the settlement class.

IV. The District Court Erred and Abused its Discretion by Approving a $1.2 Million Fee Award to Plaintiff's Counsel

As explained above, the $1.2 million dollar fee award is extremely disproportionate to the value to the class. The court's approval of this fee amount was predicated on the wildly inflated $24 million valuation. ER 33. These fees are 2,677 percent of the $44,825 Tinder will actually pay to class members out of its pocket. Because the settlement approval should be reversed for all the reasons stated above, so too should the Court reverse the award of fees as an abuse of ***57** discretion. *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1167 (9th Cir. 2013); *In re Bluetooth*, 654 F.3d at 940. [30]

V. The District Court Erred and Abused its Discretion by Ignoring the Enhanced Rule 23(e) Requirements for Preliminary Approval

The district court could have avoided the problems presented by this appeal by properly applying the new Rule 23(e) standard at the preliminary approval stage. This standard provides that the settling parties "must provide the court" with information sufficient to establish that "the court will *likely* be able to" grant final approval and class certification. Fed. R. Civ. Pro. 23(e)(1) (emphasis added); *see also* 2018 Advisory Cmte. Notes to Rule 23(e)(1) (preliminary approval should be granted only "based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval ....").

The court here ignored new Rule 23(e)(1) entirely and applied an outdated and improperly lenient standard. ER 50 (requiring only an outdated "less searching" and "'cursory' analysis" of the likelihood of final approval, and seeking only any "glaring deficiencies" in the proposed settlement). This Court should also ***58** therefore reverse the preliminary approval order so district courts in the future are not encouraged to rubber-stamp collusive deals and ignore serious objections, rather than apply the scrutiny pre-certification classes warrant to protect the due process rights of absent class members.

CONCLUSION

For the reasons discussed above, the judgment, final approval, the attorneys' fee, costs and incentive award, and preliminary approval should be reversed.

Respectfully submitted,

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Appendix not available.

Footnotes

1 "A reverse auction is said to occur when 'the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant.' It has an odor of mendacity about it." *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1099 (9th Cir. 2008) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002)).

2 Alan Candelore is not a party to this appeal because he opted out of the settlement at issue to protect his ability to pursue the state court class action. ER 161. The undersigned Appellants' counsel also represent Mr. Candelore in that case. ER 166, 177; *Candelore*, 19 Cal. App. 5th at 1142

3 Time records submitted in this case later revealed that Kim's counsel began searching for a plaintiff within two days after the highly-publicized *Candelore* decision. ER 194, 203 (entries dated 1/31/18, 2/1/18). Kim initially neglected to assert any UCL claim, but later moved to add it. ER 336.

4 California treats contracts of adhesion (which Tinder's Terms of Use certainly are) as procedurally unconscionable for purposes of determining whether standard contract law principles preclude enforcement of arbitration agreements. *E.g.*, *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000); *see also Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1260-61 (9th Cir. 2017). California law also invalidates arbitration agreements that waive rights guaranteed by law, including damages and unreasonably shortened statutes of limitations, as substantively unconscionable and unenforceable. *E.g.*, *Armendariz*, 24 Cal. 4th at 103 ("arbitration agreement may not limit statutorily imposed remedies"); *id.* at 101 (("[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights"); *see also Blair v. Rent-a-Center, Inc.* 928 F.3d 819, 827-28 (9th Cir. 2019) ("California courts have repeatedly invoked California Civil Code §3513 to invalidate waivers [of rights by arbitration agreement] unrelated to arbitration," and recognizing such state law rules are not preempted by federal law).

5 The record was clear there was no formal discovery prior to this settlement. ER 342. Kim's counsel later claimed they engaged in "informal discovery" and "exchange[d] documents" with Tinder before the mediation. ER 121, 272. But counsel's billing records (submitted in support of the fees motion) reflect no time entries revealing that any "discovery" or "documents" were ever received or reviewed. ER 195-96, 197-98, 204-11 (entries dated 9/26/18 to 11/29/18). The district court's statement that, at the time of settlement, "the parties had also conducted extensive informal and formal discovery surrounding Plaintiff's claims and Defendants' defenses prior to engaging in the settlement talks" was unsupported by any record evidence. ER 33.

6 The parties' original agreement that the class comprised 230,000 individuals was subsequently revised upward by Tinder to over 240,000. ER 61, 284. The value of the aggregate Unruh Act mandatory statutory damages for these individuals, assessed for one "offense" per individual alone, is over $960 million. Cal. Civ. Code §52(a); *see also e.g.*, *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 33-34 (1985) (Unruh Act violations are "per se injurious" and require statutory damages even if "an injury-free victim" seeks to recover them (citation omitted)); *accord White*, 7 Cal. 5th at 1030-31 (2019).

The actual value of the mandatory statutory damages for individuals who paid Tinder's discriminatory pricing every month for months or even years is likely far higher under California law: *e.g.*, *Lentini v. California Center for the Arts*, 370 F.3d 837, 847-48 (9th Cir. 2004) (affirming statutory damages for each of 7 offenses against same plaintiff); *Lemmon v. Ace Hardware Corp.*, 2014 WL 3107842, *13 (N.D. Cal. Jul. 3, 2014) ("courts in California consider each particular occasion ... that involved a discriminatory [act] to be a separate actionable Unruh Act violation"; defendant "will be liable" for "13 incidents" of discrimination against the same plaintiff).

7 The additional Tinder Plus features sold for this monthly price in addition to the 150 Super Likes include: "unlimited Likes"; the ability to "rewind" your last swipe; one "Boost" per month (a feature that permits your profile to be highlighted for 30 minutes in your geographic area), a "Passport" to "swipe around the world," and the removal of advertising from your app. *See* Tinder's "Guide to Premium Features" available at: https://www.help.tinder.com/hc/enus/articles/115004487406-Tinder-Plus-and-Tinder-Gold-.

8 Tinder's evidence defending the valuation was submitted after the deadline for class members to opt out, object, or oppose the motion for final approval. ER 59; *see also* ER 39-40. With respect to whether any class member who already receives 150 Super Likes per month would ever purchase any more, Tinder submitted only the following statement at preliminary approval:

Data for the most recent month, January 2019, confirm that in California, active paid members (i.e., subscribers) who purchased additional Super Likes purchased on average 34 additional Super Likes.

ER 217-18. Significantly, this statement does not identify the number of class members, if any, who actually *did* purchase any additional Super Likes - the number of "active paid members" reported above could be one person, for all the district court knew, and it may not have necessarily included any class members at all - even for Tinder's hand-picked month.

9 Of the 240,611 class members, only 1,793 (0.745%), submitted claims. ER 66, 70. The record did not reveal whether these individuals elected cash or in-kind features. Even assuming that all opted to claim the $25, the total monetary value of these claims to be paid by Tinder would be $44,825.

10 Tinder also attempted to achieve a release of the age discrimination class claims by purporting to unilaterally impose a retroactive release of claims through its Terms of Use. After the 2018 *Candelore* decision, Tinder amended its Terms of Use to demand that existing users retroactively release pending claims in *Candelore* as a condition of using the product. ER 169; *see also* ER 162-63. The *Candelore* court will resolve the legality of any attempt by Tinder to use this move as a defense to Unruh Act claims.

11 The Court approved the class notice that described the claims at issue by reference to the Dating Service Contract Act rather than the Unruh Act (a description which was obviously copied from the *Hanson* case, discussed *supra*), and which failed to alert class members to the Unruh Act statutory provisions that provide $4,000 in damages per violation, the favorable *Candelore* decision or pending state court action in which their claims could be adjudicated pursuant to that binding decision. ER 212.

12 The initial $23 million figure from preliminary approval adjusted upwards to $24 million at final approval after Tinder calculated approximately 240,000 class members. ER 61, 124.

13 Plaintiff's counsel sought to dissuade Allison and Rich by seeking their depositions on two-days notice. ER 86. The magistrate judge rejected this discovery as improper. *Id.* Appellees also attempted to dissuade the Appellant objectors by challenging their motivations and status as class members, but ultimately did not refute the evidence that they were class members who purchased Tinder Plus in California at the higher price for older users. *See* ER 30, 181, 187.

14 The Rule 23(e)(2) requirements, codified in 2018 and which apply to this case, are similar to this Court's prior multi-factored test, requiring courts to balance a number of factors: "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon,* 150 F.3d at 1026. The district court here incorrectly ignored the applicable Rule 23(e)(2) list. ER 25. As explained further below, the court failed to properly investigate or apply the factors from either the old or new standard.

15 *See also Evans v. Jeff D.*, 475 U.S. 717, 733 (1986) (recognizing that "the possibility of a tradeoff between merits relief and attorneys' fees" is often implicit in class action settlement negotiations); *Hanlon*, 150 F.3d at 1026 ("settlement class actions present unique due process concerns for absent class members."); *Staton v. Boeing Co*., 327 F.3d 938, 972 n.22 (9th Cir. 2003) (court's role is 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").

16 From the outset of the approval proceedings, plaintiff relied exclusively on her counsel's unsupported assessment of the exaggerated valuation of this feature, rather than any actual evidence. ER 111-15, 121-33, 245. This is because plaintiff had no such evidence: plaintiff had taken no discovery whatsoever to test or investigate any claims of value for this feature.

17 The district court's description ("the remaining $6 million in potential cash or cash-equivalent benefits that is available to every Class Member who submits a Claim Form," ER 28) raises the question of whether the court failed to review the plain language of the settlement. Even if the court misunderstood the deal in this manner, it should have recognized Tinder was receiving a *$5,955,175 reversion* after paying the claims.

18 The only record "evidence" of the $6 million figure (calculated at $25 x 240,000 class members), was the inadmissible testimony of plaintiff's counsel. ER 127. The court simply parroted this number, without inquiry or investigation. ER 28.

19 The Seventh Circuit explained in *Reynolds* - a case where a $25 million settlement released other pending state court litigation worth up to $2 billion:

The ineffectual lawyers are happy to sell out a class they anyway can't do much for in exchange for generous attorneys' fees, and the defendants are happy to pay generous attorneys' fees since all they care about is the bottom line - the sum of the settlement and the attorneys' fees - and not the allocation of money between the two categories of expense....

288 F.3d at 282-83 (Posner, J.). *See also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 388-89 (1996) (Ginsburg, J., concurring in part and dissenting in part) (writing separately to address importance due process requirement of

adequate representation in context of class settlement where objectors alleged a reverse auction allegation: "the Delaware representatives' willingness to release federal securities claims within the exclusive jurisdiction of the federal courts for a meager return to the class members, but a solid fee to the Delaware class attorneys, disserved the interests of the class, particularly, the absentees.").

20 Although Kim apparently waived the arguments in her bare-bones opposition (ER 346), there are many arguments available to other class members to challenge the enforceability of Tinder's arbitration provisions. *See*, *supra,* n.4.

21 For this reason, Kim was not an adequate representative for this class, and releasing these claims would violate due process under this Court's instruction in *Hesse,* 598 F.3d at 588, as discussed below in Section III.

22 Although Kim asserted a UCL claim with a longer statute of limitation, remedies for that claim are limited to injunctive relief and restitution (*see* Cal. Bus. & Prof. Code §17203)-which would permit class members to claim the difference between the discriminatory pricing actually paid and the lower price but *not* the $4,000 per violation Unruh Act statutory damages (Cal. Civ. Code §52(a)).

23 District courts should not be permitted to give weight to mediators' endorsement of the deal they themselves brokered as "fair," ER 401 (ECF 72), when the job of a mediator is to assist the parties in reaching settlement, not to protect the interests of absent class members. Protection of absent class members is the job of the district court, and it is not consistent with the heightened scrutiny required by Rule 23 for a court to delegate that duty, as the Court did here, by deferring to the mediator.

24 As argued to the court below, the "value" calculations by plaintiff's counsel were not even admissible evidence within counsel's personal knowledge. ER 403 (ECF 78-1).

25 The district court invoked *Rodriguez v. W. Publ'g Corp*., 563 F.3d 948, 965 (9th Cir. 2009), which involved a *post*-class certification settlement, and *Lane*, 696 F.3d at 821, but in neither case did this Court endorse a presumption of fairness, or in any way disturb the heightened scrutiny required for pre-certification settlements.

26 *See Clemente v. State of California*, 40 Cal. 3d 202, 209-10, 213 (1985); *Gunn v. Mariners Church, Inc.*, 167 Cal. App. 4th 206, 209, 213 (2008).

27 The court cited *Carter v. City of Los Angeles*, 224 Cal.App.4th 808 (2014) (ER 28), but that case *reversed* a court's settlement approval because it failed to afford notice and opt out rights to individuals who wished to assert damages claims, even while recognizing that the Unruh Act statutory damages claimed there were "unlikely" because the defendant city was arguably not a covered "business establishment." 224 Cal.App.4th at 825. That case provides no support for the court's undervaluation of the class members' Unruh Act claims against Tinder.

28 Further evidence of Kim's failure to adequately litigate the claims in this case: Kim's counsel took no evidence on the scope of arbitration or manner in which Tinder sought to impose it, and then never challenged the provisions of the agreement purporting to waive damages or limiting the statute of limitations (and thus waived these issues for any appeal). ER 346-63. Plaintiff Kim was in no position to adequately represent the interests of the class members - who could have successfully challenged any arbitration agreement that attempted to restrict the remedies available for their claims.

29 *See also Johnson v. Winco Foods, LLC*, 2019 WL 6139161, *8 (C.D. Cal. Sept. 18, 2019) (citing *Hesse*; release of "unprosecuted" claims on which "no discovery" was conducted not binding in later litigation); *McKinney-Drobnis v. Massage Envy Franchising, LLC*, 2017 WL 1246933, *5 (N.D. Cal. April 5, 2017) (applying *Hesse*; release of claims accruing at different times was unenforceable).

30 Appellants raised other concerns with the fee calculation below, including the inflated amount of time that was submitted in light of the minimal amount of work performed. ER 157-59. The $1.2 million fee was not based on the work actually done in the class's favor, but even if counsel had done the claimed $400,000 worth of work for this class, they certainly didn't deserve a 3x multiplier for such a poor result.

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