No. 21-15763
(Consolidated with Nos. 21-15758, 21-15761, and 21-15762)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: APPLE INC. DEVICE PERFORMANCE LITIGATION

NAMED PLAINTIFFS AND SETTLEMENT CLASS MEMBERS,
Plaintiffs-Appellees,

v.

ANNA ST. JOHN,
Objector-Appellant,

v.

APPLE, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, No. 5:18-md-02827-EJD

Opening Brief of Appellant Anna St. John

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Corporate Disclosure Statement (FRAP 26.1)

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

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Statement of Subject Matter and Appellate Jurisdiction

The district court has jurisdiction under 28 U.S.C. § 1331 because plaintiffs allege that defendant violated the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, *et seq.*, and under 28 U.S.C. § 1332(d)(2) because plaintiffs also allege class action claims that exceed $5,000,000 exclusive of interest and costs, there are over 100 members in the proposed class, and the defendant is a citizen of a State different than at least one class member's state of citizenship. Dkt. 145 at 8; *see also, e.g.*, *id.* at 9-10, 101.[1] The district court also has supplemental jurisdiction over the state-law claims alleged by plaintiffs under 28 U.S.C. § 1367(a) because the alleged claims formed part of the same case or controversy.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court issued orders granting final approval of the settlement and granting in part plaintiffs' motion for attorneys' fees and expenses on March 17, 2021 (ER-12; ER-33), and issued final judgment on March 23, 2021 (ER-4; ER-8). Another objector filed the first notice of appeal, appealing the order granting in part plaintiffs' motion for attorneys' fee and expenses, on April 13, 2021. Dkt. 614. Objector Anna St. John, the appellant, filed a notice of appeal on April 26, 2021, appealing the order granting in part plaintiffs' motion for attorneys' fees and expenses. ER-198. St. John's notice of appeal is timely under Fed. R. App. P. 4(a)(3). As a class member who objected to plaintiffs' fee request and will recover cash diluted from the net common fund after fees, St. John has standing

[1] "ER" refers to St. John's Excerpts of Record. "Dkt." refers to the district court docket here.

to appeal without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

Statement of the Issues

1. The Ninth Circuit holds that the 25% benchmark for attorneys' fees in class actions is of "little assistance" in megafund cases. *In re Wash. Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1297 (9th Cir. 1994). The parties negotiated a settlement where class members could recover $500 million. Class counsel failed to maximize class recovery, and the class recovered only $310 million, but class counsel requested $87.7 million in fees regardless of the actual class recovery. Did the district court err in awarding over the 25% benchmark when it made findings that (a) the "better approach" was to "look to empirical research on megafund cases," which showed a median award of 10.2% and a mean award of 12%, and (b) "no single factor or combination of factors" supported the requested upward departure from the benchmark, and ignored St. John's objection that class counsel must realize consequences for leaving $190 million in settlement value on the table by failing to maximize class recovery? (Raised at ER-93-103; ruled on at ER-17-25, ER-27.)

2. To the extent that the district court awarded fees based on a lodestar and multiplier and held that a "2.43 multiplier is high" and "an award exceeding a 2.232 multiplier would result in 'windfall profits,'" did the district court err in failing to address objections that the underlying lodestar was exaggerated with document review rates of $350/hour, duplicative work, and other inefficiencies and excesses? (Raised at ER-103-112; ruled on at ER-26-27.)

Standard of Review for All Issues Presented

A district court's award of fees and costs to class counsel is reviewed for an abuse of discretion. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011). But "though a district court has discretion to choose how it calculates fees, we have said many times that it abuses that discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward." *Id.* at 944 (cleaned up). "'A court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact.'" *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015) (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011)). "[A]ny element of legal analysis that figures into the district court's [fee] decision is reviewed de novo." *Yamada v. Snipes*, 786 F.3d 1182, 1207 (9th Cir. 2015). A court's failure to "give a 'reasoned response' to all non-frivolous objections" is likewise an abuse of discretion. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012). So too is a failure to explain why the district court exercised its discretion in a particular way. *Traxler v. Multnomah Cty.*, 596 F.3d 1007, 1015-16 (9th Cir. 2010). And so too is failure to consider "a factor entitled to substantial weight." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009). Questions of law are reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000).

Statutes and Rules

Federal Rule of Civil Procedure 23. Class Actions.

…

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by the law or by the parties' agreement. The following procedures apply:

…

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

Statement of the Case

This is an appeal over approval of an attorneys' fee award in a class action. The settlement permitted class recovery of up to $500 million, but, after a notice and claims process that failed to use practices known to the settlement administrator or harness class members' ongoing relationship with the defendant, the class will receive only the minimum settlement amount of $310 million, minus $12.75 million in costs. Meanwhile, class counsel submitted a fee request as if they had recovered the full $500 million amount for the class. The district court awarded class counsel an above-benchmark fee award of $80.6 million with a lodestar multiple of 2.232 without scrutinizing class counsel's failure to maximize class recovery or examining excesses in the lodestar calculation.

A. A class of plaintiffs sues Apple over performance defects in its devices.

In 2015, consumers began to report that their iPhones and other Apple devices were shutting down for no discernible reason, even when their batteries retained a significant charge. ER-34. The complaints continued in 2016 and 2017, with additional reports of unexplained heating in the Apple devices. *Id.* In 2017, Apple released a new version of its operating system—iOS 10.2.1 and 11.2—to address the alleged defects. *Id.* Plaintiffs allege, however, that rather than fix the defects, the iOS updates "concealed" the defects "by secretly throttling the Devices' performance to reduce the number of unexpected shutdowns to a more manageable volume." Dkt. 244 ¶¶ 9-10.

Apple issued a statement in December 2017 addressing a performance management feature in these software versions to prevent unexpected power-offs from

occurring in its devices. It acknowledged that "[l]ithium-ion batteries become less capable of supplying peak current demands when in cold conditions, have a low battery charge or as they age overtime, which can result in the device unexpectedly shutting down to protect its electronic components." *Id.* ¶ 16. The feature in the released software versions "smooth[ed] out the instantaneous peaks only when needed to prevent the device from unexpectedly shutting down during these conditions." *Id.* About a week later Apple issued another statement explaining that the "power management system" in its updated software versions for certain iPhone devices "works by looking at a combination of the device temperature, battery state of charge, and battery impedance. Only if these variables require it, iOS will dynamically manage the maximum performance of some system components, such as the CPU and GPU, in order to prevent unexpected shutdowns. As a result, the device workloads will self-balance, allowing a smoother distribution of system tasks, rather than larger, quick spikes of performance all at once." *Id.* ¶ 22. Apple also acknowledged that device users may notice effects such as longer app launch times, lower frame rates while scrolling, backlight dimming, lower speaker volume, gradual frame rate reductions in some apps, and disabling of the camera flash. *Id.*

Beginning shortly thereafter, consumers filed dozens of class action lawsuits against Apple in federal courts nationwide and another four lawsuits in California Superior Courts. ER-35-36. The U.S. Judicial Panel on Multidistrict Litigation consolidated these actions in an MDL proceeding in the Northern District of California. ER-36; Dkt. 1.

B. The parties negotiate a settlement and move for preliminary approval.

The district court appointed Cotchett, Pitre & McCarthy LLP and Kaplan Fox & Kilsheimer LLP as interim lead counsel ("class counsel") in May 2018. Dkt. 99. The court also appointed attorneys from 23 firms to the Plaintiffs' Executive Committee and attorneys from 14 firms to the Steering Committee. *Id.* at 4-7. Apple expressed concerns about the potential duplication of efforts and inefficiency raised by the appointment of 39 law firms. Dkt. 78 at 1-3. The court nevertheless proceeded with those appointments based on plaintiffs' counsel's representation that the structure was designed to secure an efficient and beneficial result for the class. *Id.* at 2-3.

Litigation proceeded, with the operative, post-motions-to-dismiss complaint alleging, among other things, claims for trespass to chattels and violations of the federal Computer Fraud Abuse Act and the California Computer Data Access and Fraud Act. Dkt. 145; Dkt. 415 at 4. The alleged damages exceeded $1 billion. *See* Dkt. 605 at 32:2-3.

Mere months after appointment of class counsel, the parties agreed to conduct mediation and settlement discussions with the Honorable Judge Layn Phillips (Ret.) as mediator, with the first session in January 2019. Dkt. 470-1 ¶¶ 1, 8. Judge Phillips made a mediator's proposal in September 2019. The parties accepted the proposal and began negotiating a term sheet and settlement agreement. *Id.* ¶ 9.

The parties executed a settlement agreement in February 2020 that resolved all the claims consolidated in the federal MDL and coordinated in San Francisco Superior Court. ER-170. Plaintiffs moved for preliminary approval of the settlement, which the district court granted in May 2020. ER-164.

The settlement class is defined as: "All former or current U.S. owners of iPhone 6, 6 Plus, 6s, 6s Plus, 7, 7 Plus, and SE devices running iOS 10.2.1 or later (for iPhone 6, 6 Plus, 6s, 6s Plus, and SE devices) or iOS 11.2 or later (for iPhone 7 and 7 Plus devices), and who ran those iOS versions before December 21, 2017." ER-165. This nationwide settlement class included class members in both the federal MDL and the California state court actions.

The settlement included a minimum settlement fund amount of $310 million and a maximum settlement fund amount of $500 million. Out of this fund, settlement class members were expected to receive $25 for each eligible iPhone, with provisions for increasing or decreasing that amount depending on the number of approved claims. For example, the cash payment to each class member would increase if the payment of $25 for each approved claim plus the payment of attorneys' fees and expenses, named plaintiff service awards, and notice and administration costs equaled less than $310 million. Meanwhile, the payment would decrease on a pro rata basis below $25 if that amount exceeded $500 million until the total equaled $500 million. ER-173; ER-180-181.

C. Plaintiffs seek final approval of the settlement and an award of attorneys' fees and expenses.

Following the grant of preliminary approval, the settlement administrator disseminated notice to the class, including about 90.1 million class notices emailed to potential class members and over 5.6 million mailed postcard notices. Dkt. 470-2; Dkt. 551 ¶ 3. The settlement administrator subsequently sent a second round of notice with the same features to class members. Dkt. 470-2 ¶¶ 15-16; Dkt. 551 ¶¶ 16, 18. The

settlement administrator sent the email notices directly from a new domain created for the settlement, instead of coordinating with Apple to evade spam filters by sending notice from an Apple domain or having Apple send a push notification to class members that would allow them to access the claim form directly or download an application to file a claim. Experience shows that Apple has the capability to alert users to the availability of relief and to submit a claim through an app. *See, e.g.*, "Apple officially launches iPhone 4 Case Program via App Store," *Apple Insider* (July 23, 2010).[2] As a result, many notices went to class members' spam folders, where they likely never saw them or saw them too late to file a claim. *See* ER-122-123 ¶¶ 10, 13; ER-117 ¶ 7; Dkt. 589 at 102:15-103:1. The settlement administrator claimed that she took "several precautions to avoid many frequent 'red flags' that might otherwise cause a potential Settlement Class Members' spam filter to block or identify the email notice as spam." But she identified only two such precautions: (1) including the claim form or notice form as a link rather than an attachment; and (2) sending the notice from an email address associated with the settlement website. She did not explain why spam filters would not block emails from such an unknown domain name ("smartphoneperformancesettlement.com") that, common in spam emails, included weblinks. Dkt. 551 ¶¶ 7, 9. The settlement administrator did not attest to working with email providers to have the notice emails placed on a white list or identify any reason for not sending the emails from Apple's domain or through push notifications to

[2] *Available at* https://appleinsider.com/articles/10/07/23/apple_officially_launches_iphone_4_case_program_via_app_store.

iPhone users to minimize spam filters' blocking the emailed notices and increase the number of class members who received notice. She provided no reason to believe that Google did not direct to spam any class notices sent to Gmail users such as St. John and her counsel, who found their class notices in their spam folders. Dkt. 605 at 56:2-5. Instead, she suggested it was class members' fault based on their email security settings that Google and other email providers systematically sent millions of spammed emails to a spam filter and that the media coverage of the settlement made up for deficiencies in the direct notice to the class. Dkt. 551 ¶ 10.

The notice and claim form required class members to declare under penalty of perjury that they currently own an iPhone device included in the class definition, even though the settlement states that it provides benefits to all class members who are "former of current U.S. owners of iPhone 6, 6 Plus, 6s, 6s Plus, 7, 7 Plus, and SE devices running 10.2.1 or later…." ER-165.

This notice program differed both in form and result from that in *In re Google Plus Profile Litig.*, No. 18-cv-06164-EJD (N.D. Cal.), and *In re Facebook Biometric Info. Privacy Litig.*, No. 15-cv-03747-JD (N.D. Cal.). In *Google Plus*, the settlement administrator "work[ed] closely with Defendant to determine the most efficient way to send the emails" giving notice of the class settlement. ER-137 (*Google Plus*, Dkt. 57-6 at 5). The *Google Plus* class notices disseminated from a Google domain and thus avoided class members' spam filters. *See* ER-123 ¶16; ER-152. Although the *Google Plus* settlement provided only a $7.5 million common fund distributed *pro rata* to claimants

in the settlement class of "up to approximately 10 million" user accounts,[3] over 1.8 million *Google Plus* class members filed claims to recover only about $3 each. *Google Plus*, Dkt. 96-1 ¶ 10 & Ex. A at 2; *id.* Dkt. 96 at 9, 12. Similarly, in *Facebook Biometric*, the court credited counsel for effectively using means to "generate[] a claims rate of approximately 22%, a result that vastly exceeds the rate of 4-9% that is typical for consumer class actions." *Facebook Biometric*, -- F. Supp. 3d --, 2021 WL 757025, 2021 U.S. Dist. LEXIS 36801, at *10 (N.D. Cal. Feb. 26, 2021). To achieve this claims rate, among other things, when counsel discovered that millions of class members' notices had been routed to spam folders, "they worked directly with Google to fix the problem, which resulted in a 99.9% delivery success rate outside the spam filters," and also litigated successfully to require the use of defendant's online channels to notify the class. *Id.* at *16, *9; *Facebook Biometric*, 2020 WL 4818608, at *4, 2020 U.S. Dist. LEXIS 151269 (N.D. Cal. Aug. 19, 2020).

Plaintiffs moved for final approval of the settlement. Dkt. 470. As of that filing, class members had filed about 1.4 million valid claims. *Id.* at 6. At the end of the claims period, about 2.27 million class members had submitted approved claims. Dkt. 596 at 1. The total number of submitted claims was about 3.3 million, for an overall response rate of 3.6%, a figure which counts claims rejected for involving the wrong device or devices that did not download the software version during the class period. *Id.*; ER-50.

[3] An earlier filing in *Google Plus* referred to "the number of potential class members" as "over 53 million." Dkt. 88 at 15. Regardless of whether the ultimate class size was 53 million or 10 million, the *Google Plus* settlement class was much smaller than the one here and had a materially better claims rate, despite much less money being available to class members.

Plaintiffs also moved for an award of attorneys' fees of $87.73 million, plus expenses of $995,245, for a total request of $88.725 million. This amount equaled 28.6% of the $310 million gross minimum settlement fund amount. Dkt. 468. Plaintiffs' request did not vary based on whether the class recovered the minimum $297.25 million (after notice and administrative expenses) or the maximum $500 million. The requested service awards for named plaintiffs equaled another $216,000. *Id.* at 3. Plaintiffs claimed a lodestar multiplier of 2.4 based on class counsel's work following their appointment. *Id.* Despite the district court's order specifically appointing two co-lead counsels and 37 members to the executive and steering committees, the lodestar included the time of 304 individual timekeepers from 47 different law firms from the MDL and state court actions. ER-108.

D. Appellant St. John objects to class counsel's attorneys' fee request.

Class member and appellant Anna St. John filed a timely objection to class counsel's request for attorneys' fees. ER-82. She argued that class counsel's fee should depend on the class's ultimate recovery and, in any event, should be no more than 17.7% of the actual class recovery. She showed that empirical surveys show that a fee award between 15 and 20% is typical of settlements the size of the one before the court. The requested 28.3% exceeded the Ninth Circuit's 25% benchmark, but was even more excessive because (1) the class and fund size create economics of scale that warrant a reduced percentage; (2) the percentage omits $1 million in litigation expenses paid in addition to the fees; and (3) class counsel included notice and administration costs as a class benefit. Awarding 17.7% of the actual recovery rather than the excessive and

above-benchmark percentage requested by class counsel would return over $35 million to the consumer class.

St. John also argued that class counsel's lodestar did not support its fee request as a crosscheck. Class counsel failed to submit any meaningful breakdown of aggregate lodestar information to class members, depriving class members of the opportunity to conduct a lodestar review as contemplated by Rule 23(h). The information provided shows that class counsel overstated their lodestar by millions of dollars by charging the class for substantial document review at exorbitant billing rates. Once one normalized rates to still-generous rates approved by other courts, the multiplier would be an excessive 2.51—before any additional deductions necessary to account for the inefficiencies and duplication of effort inherent in having dozens of firms appointed in the MDL and another six firms in the state action.

Finally, St. John argued that the botched notice program and the exceptionally poor claims rate that resulted cost class members over $200 million and was another reason to deny class counsel their full fee request and to apply a smaller percentage to the actual amount the class recovered. Because of the defective notice program that resulted in the class notice being filtered into many class members' email spam folders, class members filed claims at a rate more common in much smaller value settlements. Class counsel was willing to accept 17% of a full $500 million recovery, and should not be rewarded with the same dollar amount as if they had achieved that recovery.

St. John subsequently filed a notice of supplemental authority on *Facebook Biometric*, involving a $650 million settlement for which the court had reduced class counsel's requested fee from 16.9% to 15% because use of the 25% benchmark as a

starting point in a megafund fee analysis would "be the equivalent of a Willy Wonka golden ticket." ER-69 (quoting *Facebook Biomatic*, 2021 U.S. Dist. LEXIS 36801, at *34).

E. After a fairness hearing, the district court approves the megafund settlement and awards above-benchmark attorneys' fees.

The district court held a fairness hearing on December 4, 2020, where it heard from counsel to the parties and several objectors on settlement approval. *See* Dkt. 589. St. John's counsel reiterated that many millions of class members likely had the class notice go directly to their spam folder because the settlement administrator sent it from a mysterious, unknown domain that was not white-listed by Google, when the notice could have been sent by Apple, or the administrator could have negotiated with the most widely used email providers in advance to ensure the notice would not end up in the spam folder where no one would see it. Dkt. 589 at 102:15-103:1. Her counsel contrasted the email notice here with the notice in the *Google Plus* settlement. There, Google sent notice, and it knew in advance not to filter emails to Gmail to spam folders. Here, however, no one conferred in advance with email providers to ensure that the class notices—which shared features with traditional spam, such as being a duplicative blast email with links to websites—were not directed to spam folders. St. John's counsel also noted that while the settlement administrator had stated in a declaration that the spam problem was not an issue, she gave no reason for that statement, such as having talked to email providers. This notice deficiency, which would have been easy to correct, resulted in a low claims rate. *See id.* at 105.

The district court held a second hearing on February 17, 2021, during which it heard from counsel for the parties and from objectors primarily regarding class

counsel's attorneys' fee request. Dkt. 605. Counsel for Apple pointed out that if class counsel's $87.7 million fee request were granted in full, "it would result in a net reduction of $19 to $20 to each class member." Dkt. 60 at 47: 9-12. Apple also noted that its concern that the large committee of plaintiffs' counsel would result in more litigation than was necessary was borne out. *Id.* at 47:18-25. St. John's counsel presented argument on her behalf on the issues raised in her objection, including the low claims rate caused by class counsel's deficient notice procedures, the excessive components of class counsel's purported lodestar, and the propriety of reducing attorneys' fees to account for class counsel's failure to direct nearly $200 million that Apple was willing to pay to the class members they purported to represent.

The district court approved the settlement and certified the settlement class on March 17, 2021. ER-33. The court acknowledged that many class members may not have received the class notice because it was redirected to a spam folder, which class members may not have checked. ER-40 n.2. Although the court found this fact "disappointing," it also found that "it is not surprising in a case of this magnitude and does not mean the notice program failed to comport with due process." *Id.* The court cited the case-specific website and toll-free number, as well as the "extensive media coverage of the Settlement" as other means of notice that "increased the likelihood" that class members learned of the settlement and process for making a claim. *Id.*

The district court granted in part class counsel's attorneys' fee request also by order dated March 17, 2021. ER-12. Although Apple advocated for a lodestar-based award, the court found that with the non-reversionary and fixed $310 million minimum settlement amount, the settlement involves a common fund and a percentage-based fee

award was appropriate. ER-14; ER-16. The court recognized that the Ninth Circuit has established a benchmark of 25% for attorneys' fees. ER-17. The court also recognized that while the recovery for class members was significant, it differed from the exceptional recovery in precedent awarding above-benchmark fees. The court rejected objectors' argument that the multiple firms vying to be lead counsel showed the risk of litigation was not significant and that precedent supported a sub-benchmark fee in such instance.

The district court determined the "better approach" was to "look to empirical research on megafund cases" to set an appropriate percentage for the fee award. ER-23. The court recognized that "the megafund size of this case exists because of the sheer number of eligible devices"—not because of class counsel's lawyering. ER-28. The court found that "no single factor or combination of factors supports the requested 28.3%," which far exceeded the mean and median percentage in megafund class actions as established by empirical studies. ER-24. The court therefore conducted a lodestar calculation to determine whether to deviate from the 25% benchmark. ER-24-25. The court accepted class counsel's revised lodestar of $36,103,148.05 and noted that class counsel had capped document review at $350/hour and otherwise applied their "customary professional rates." ER-26. The court found that class counsel's requested "2.43 multiplier is high." *Id.* The court also noted Apple's estimate that awarding class counsel's total fee request could reduce class members' recovery for each device by $23. *Id.* at n.7.

Despite finding that the requested "2.43 multiplier is high," and further finding that empirical research on percentage awards in megafunds provided appropriate

guidance, the district court applied a 2.232 multiplier to yield a fee of $80,600,000, equal to about 26% of the $310 million settlement. ER-27-28. The court found that "an award exceeding a 2.232 multiplier would result in 'windfall profits for class counsel in light of the hours spent on the case.'" ER-16 (quoting *Bluetooth*, 654 F.3d at 942). The court did not reconcile this 26% figure with its earlier remarks about the need to look at empirical data on megafund cases.

The court issued judgment on March 23, 2021. ER-4; ER-8. This timely appeal followed. ER-198.

Summary of Argument

The settlement here pays the class over $200 million less than the defendant was willing to pay. The district court still awarded above-benchmark fees more than twice the value of the attorneys' lodestar and well above the median percentages established by empirical surveys for megafund settlements such as this. The court did so without considering whether to reduce fees for class counsel's role in failing to achieve the full recovery available to the class or the excesses apparent in class counsel's lodestar that, once removed, almost certainly would have increased the multiplier above what the court rejected as too high.

District courts in this Circuit have discretion to award reasonable attorneys' fees in class actions involving a common-fund settlement under Rule 23(h) based on either a lodestar or percentage-based analysis. "Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *Bluetooth*, 654 F.3d at 942. Thus, "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." *Id.*

Here, the district court awarded above the 25% benchmark of a megafund settlement where 17-18% would have been in line with the average fee award in settlements of this size and then blessed the windfall profits that the under-scrutinized lodestar revealed. Although class member and appellant St. John objected to both the excessive percentage award and the bloated lodestar, the district court failed to respond as to why those objections were not valid—itself a reason for remand. *Dennis v. Kellogg*, 697 F.3d 858, 864 (9th Cir. 2012). In particular, the district court erred by failing to reduce attorneys' fees to account for class counsel's deficient representation reflected in their failure to realize the full recovery of $500 million that the settlement provided for the class. For example, class counsel failed to ensure class members actually received the class notice, rather than have it go directly to their spam folders, and used a claim form that required a statement under perjury at odds with the class definition. As a result, the claims rate was unusually low, and the class received $200 million less in exchange the very same release of claims they would have provided for the maximum $500 million.

The district court recognized that fee awards in mega-fund settlements such as this should be assessed based on empirical research, which showed a median award of 10.2% and a mean award of 12%, and further found that there were no factors that supported the upward departure from the benchmark requested by class counsel. Yet, in a non-sequitur, the court awarded an above-benchmark 26% of the settlement fund

in fees. Such a conclusion at odds with the court's findings and reasoning evidences an abuse of discretion.

The district court erred again when it justified the $80.7 million fee award based on a lodestar crosscheck. Again, even though St. John identified certain excesses in the lodestar, the district court uncritically accepted class counsel's lodestar in its fee order and did not respond to the issues raised by St. John.

If these errors go uncorrected, each claimant's recovery will be undeservedly reduced and, perhaps just as, if not more importantly, the decision will signal to future class counsels that they do not have an obligation to maximize class recovery by ensuring that the settlement funds end up in class members' hands rather than the defendant's.

Preliminary Statement

Attorneys with the Center for Class Action Fairness ("CCAF"), which became part of the non-profit Hamilton Lincoln Law Institute in 2019, bring Objector St. John's objection and appeal. CCAF's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won more than $200 million for class members. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016) ($100 million at time); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling Frank "the leading critic of abusive class action settlements"); Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); ER-121-122 (documenting successes). For

example, this Court recently ruled in favor of CCAF's client, an appellant class member who was a CCAF attorney who protested a settlement on Rule 23(a)(4) grounds. *In re Lithium Ion Batteries Antitrust Litig.*, 777 Fed. Appx. 221 (9th Cir. 2019). On remand, the previously disfavored subclass received an additional $10 million of the settlement fund. St. John brings this appeal in good faith to protect class members in this and future class actions against unfair and excessive attorneys' fee awards.

Argument

I. Because of inherent conflicts between class counsel and the class at the settlement stage, and the stronger possibility of windfall fees in megafund settlements, courts must scrutinize attorneys' fee requests.

To protect the members of the class who are not parties to the settlement agreement, courts have a duty to make sure that class counsel do not obtain an unreasonable share of the settlement fund for themselves. Unlike settlements in bilateral civil litigation, class-action settlements and fee awards require court approval under the standards set out in Federal Rule of Civil Procedure 23. The need for this added layer of review, during which the court acts as a fiduciary of the class, arises from the self-interested incentives inherent in class actions. "The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of the unnamed class members who by definition are not present during the negotiations." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). To combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class

members in order to maximize their own," the court must act as a fiduciary of the class and apply zealous scrutiny to the proposed settlement and fee request. *Id.*; *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015).

As this Court has observed, the potential for conflict at the settlement stage of class actions is structural and acute because every dollar reserved to the class is a dollar defendants cannot pay class counsel. "Ordinarily, 'a defendant is interested only in disposing of the total claim asserted against it,' and 'the allocation between the class payment and the attorneys' fees is of little or no interest to the defense.'" *Bluetooth*, 654 F.3d at 949 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003)). Thus, while class counsel and defendants have proper incentives to bargain effectively over the *size* of a settlement, similar incentives do not govern their critical decisions about how to *allocate* it between the payments to class members and the fees for class counsel. *Id.*; *see also Pampers*, 724 F.3d at 717.

The dysfunction that can result from these incentives is a problem because class actions often are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with diffuse harm. Our adversary system—and the value of our class actions within it—depends on unconflicted counsel's zealous advocacy for their clients, especially where those clients are absent class members who do not get to choose their counsel for themselves and may not even know their legal rights are at stake. *Cf. Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1167 (9th Cir. 2013). As a result, rigorous adherence to the safeguards of Rule 23 is necessary to ensure that counsel is not self-dealing at the class's expense. When, as here, class counsel request a

fee that allocates too much of their clients' recovery to themselves, a district court has a legal obligation to reduce the fee to a reasonable amount. Fed. R. Civ. P. 23(h).

The court's role in zealously scrutinizing fee awards is the last and only hope of the unnamed class members to protect their recovered funds from being plundered and of ensuring the vitality of the class-action mechanism. Otherwise, the dysfunction that can arise in the allocation process detracts from the effectiveness of class actions as a way to hold defendants accountable for misdeeds with diffuse harm. The value of a class action depends upon unconflicted counsel's zealous advocacy for their clients, especially where those clients are absent class members who do not get to choose their counsel for themselves and may be unaware of the litigation or their legal rights. *Cf. Radcliffe*, 715 F.3d at 1167.

"[P]ublic confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 692 (Cal. 2016) (Liu, J., concurring). Exorbitant fees erode public confidence in the class action device. To prevent that erosion, "it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." *Piambino v. Bailey*, 757 F.2d 1112, 1144 (11th Cir. 1985); *In re Wash. Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994) (differentiating "reasonable" from "windfall" fees in megafund cases). Thus, while attorneys' fees may be awarded in a class action under Rule 23(h), "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable." *Bluetooth*, 654 F.3d at 941.

The district court's award of $80.6 million failed to meet this standard and, as a result, it awarded class counsel fees in an amount far above what is reasonable under Rule 23(h).

II. The above-benchmark attorneys' fee award in this megafund case cannot stand as a matter of law because it fails to consider that class counsel must realize consequences for failing to maximize class recovery by nearly $200 million.

While the benchmark for a reasonable award in the Ninth Circuit alleging economic injury is 25% of the class benefit, *Bluetooth*, 654 F.3dd at 942, "to avoid routine windfalls where the recovered fund runs into the multi-millions, courts typically decrease the percentage of the fee as the size of the fund increases," *Rodman v. Safeway Inc.*, 2018 WL 4030558, 2018 U.S. Dist. LEXIS 143867, at *10-*11 (N.D. Cal. Aug. 22, 2018) (cleaned up); *Bluetooth*, 654 F.3d at 642 (downward departure from the benchmark prevents "windfall profits" in "mega-fund" settlements).

The district court recognized the propriety of this approach yet still awarded above-benchmark fees, resulting in an unreasonable award for class counsel at the expense of the class. This result is especially untenable here, where the class already was deprived of $200 million that Apple was willing to pay for the same release of claims due to class counsel's failure to take steps to ensure a robust claims rate. The claims rate here is more commonly seen for consumer settlements offering compensation in the single dollar amounts, rather than the $25-$500 per claimant available here. It was unreasonable for the district court to award an above-benchmark fee without considering this detrimental result. Affirming the result will incentivize class counsel to

do the bare minimum on behalf of their clients and lead to fee awards not appropriately calibrated to the actual recovery of the class as Rule 23(h) instructs.

A. Below-benchmark percentages are standard in megafund cases to avoid awarding windfall fees to class counsel.

This Circuit adopted a benchmark percentage approach to fee awards to align class counsel's interests with their clients' to the greatest extent possible. Evaluating the fee award based on the money that class members *actually* receive puts those incentives in exactly the right place—class counsel will work hard to get the settlement relief into their clients' hands when they derive no benefit from a hypothetical valuation. If the fee award doesn't vary based on what the class actually recovers, then the incentives favor class counsel seeking their own payout rather than maximizing the payout to the class. *See Pearson*, 772 F.3d at 783, 787 (quoting *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014)).

Fee percentages should be set with a recognition that "every dollar that goes to the lawyers is a dollar less that goes to the class members." *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 380 (S.D.N.Y. 2013). The district court recognized that the "megafund" status of this settlement was "an important factor in assessing the reasonableness of attorneys' fees." ER-22. The reason that megafund settlements—generally those over $100 million—do not justify the same 25% benchmark applied to smaller settlements is that, often, "the increase [in fund size] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 486 (S.D.N.Y. 1998). Because of economies of scale, a reasonable fee award should use sliding scale percentages to

prevent a windfall for plaintiffs' attorneys at the expense of the class. *See, e.g.*, *Alexander v. FedEx Ground Package Sys.*, No. 05-cv-00038, 2016 WL 3351017 (N.D. Cal. June 15, 2016). "It is not one hundred fifty times more difficult to prepare, try, and settle a $150 million case than it is to try a $1 million case." *Id.* (cleaned up).

As the district court recognized, the "better approach" to determining a fee award "is to look to empirical research on megafund cases" rather than isolated cases. ER-23. Empirical surveys show that a fee award between 15% and 20% is more typical of a settlement of $310 million like the one here. *E.g.*, Logann, Stuart, *et al.*, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports (March-April 2003) (empirical survey showed average recovery of 15.1% where recovery exceeded $100 million); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 265 tbl. 7 (2010) (mean percentage fee in 68 class action settlements with recovery above $175.5 million was 12% and median award was 10.2% with standard deviation of 7.9%). Indeed, once a settlement size of $100 million is reached, empirical data shows that "fee percentages plunge[] well below 20 percent." Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 838 (2010). "The existence of a scaling effect—the fee percent decreases as class recovery increases—is central to justifying aggregate litigation such as class actions [and] a hallmark of a well-functioning class action system." Eisenberg & Miller, 7 J. Empirical L. Stud. at 263. Failing to apply a sliding scale results in overcompensating law firms "who obtain huge settlements, whether by happenstance or skill, … to the detriment of the class members they represent." *Wal-Mart Stores v. Visa USA*, 396 F.3d 96, 122 (2d Cir. 2005) (cleaned up).

B. The district court's above-benchmark and -median fee award was unreasonable and legally erroneous where class counsel failed to maximize class recovery.

Although the district court acknowledged the importance of the empirical surveys showing a sub-benchmark fee award was appropriate for a megafund, and further found that "no single factor or combination of factors" supported the requested 28.3%, the court nevertheless ordered an above-benchmark 26% fee award. It did so without addressing St. John's argument that class counsel's failure to maximize the class recovery by taking steps to ensure a robust claims rate and leaving $200 million in Apple's pocket directly reflected on the quality of counsel's work and the results they achieved. "To survive appellate review, the district court must show it has explored comprehensively all factors and must give a reasoned response to all non-frivolous objections." *Dennis*, 697 F.3d at 864 (cleaned up). It was legal error for the district court not to address these arguments, and it was legal error for the district court to award over $80 million in attorneys' fees—several percentages and millions of dollars above an appropriate amount—in the face of such deficiencies by class counsel.

Class counsel are the ones responsible for the $200 million deficit in the class's recovery, and yet the district court failed to consider that fact in its assessment of the results achieved and the quality of representation in making its fee award. The deficit is not illusory: The district court recognized that the "response rate in this case could very well have surpassed the predicted percentage response rate. Indeed, at the preliminary approval stage, Class Counsel expressed the expectation that the response rate would be 'at the high end of the range, or greater….'" ER-54 n.6 (quoting Pls.' Mot. for Prelim Approval at 18:3-6).

Empirical data shows that claims rates vary depending upon the amount available, with rates increasing as the size of the amount to be claimed increases. *See, e.g.*, Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements* (2010-2018), at 7 (Apr. 2020)[4] (surveying claims rates in 40 settlements, where the relatively high participation rates in two settlements were "likely due to the large cash payments offered"); Tiffany Janowicz, *Settlement Administration: Impacting Claims Filing Rates*, at 24 (Feb. 18, 2014)[5] (data showed claims rates vary depending upon the amount available, from 0-3% at $5, to 5-10% at $100, to 8-15% at $500); *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1046 n.7 (9th Cir. 2019) (18.5% claims rate where "class members stood to receive hundreds of dollars"); *see also* Decl. of Jennifer M. Keough, *Finerman v. Marriott Ownership Resorts, Inc.*, No. 14-cv-1154, Dkt. 219 (M.D. Fla. Aug. 3, 2018) (18% claims rate where average claim was nearly $500).

Here, the claims rate is akin to one from a settlement offering just a few dollars rather than the $25-$500 offered here.[6] The substandard claims rate is not

[4] *Available at* https://www.jonesday.com/-/media/files/publications/2020/04/empirical-analysis-consumer-fraud-class-action/files/empirical-analysis-of-federal-consumer-fraud/fileattachment/empirical-analysis-of-federal-consumer-fraud.pdf.

[5] *Available at* http://media.straffordpub.com/products/crafting-class-settlement-notice-programs-due-process-reach-claims-rates-and-more-2014-02-18/presentation.pdf.

[6] Class counsel may argue that each class member will recover more than the minimum of $25. But the higher recovery ultimately realized per class member is due not to exceptional results by class counsel, but rather to the weak 3.5% response rate unusual for a highly publicized case with a minimum recovery of $25 and actual recovery or around $100.

happenstance. It is a function of the defective email notice program that class counsel is responsible for. The response rate of only 3.5% for a settlement in which class members stand to recover at least $25 and for which there was free and widespread publicity itself reveals the weakness of class counsel's notice efforts and claims process.

It is well known that a low response rate is often tied to class members not receiving adequate notice of a settlement. *See Roes*, 944 F.3d at 1046 n.7. And, here, the record shows that multiple class members, including St. John and her counsel, had their class notice filtered into their email spam folders. ER-117 ¶ 7; ER-122 ¶ 10. Tens of millions of other class members may not have checked their spam folders or otherwise known about the settlement and the need to search for the notice.

The settlement administrator in this case, Angeion Group, is well aware that spam filters pose a problem to email notification programs, and they have solutions available that the parties may choose to deploy to minimize the problem. Unlike in the class-action settlements in *Google Plus* and *Facebook Biometric*, for example, there is no indication that Angeion "work[ed] closely with Defendant to determine the most efficient way to send emails," such as disseminating class notice from an Apple domain or perhaps as an app available through a push notification or other direct online channels. ER-137 (*Google Plus*, Dkt. 57-6 at 5); ER-123 ¶ 16; ER-152.

The *Google Plus* and *Facebook Biometric* notice processes differed materially from the less thoughtfully planned notice program for the settlement at issue. Here, Angeion sent the emails directly, rather than coordinating with Apple to evade spam filters by sending it from an Apple domain. Angeion's post-notice declaration indicates no awareness that the notice program has had spam filter troubles. Dkt. 470-2. The

difference has been stark: while the *Google Plus* settlement provided only a $7.5 million common fund to be distributed *pro rata* to claimants among at least 10 million class members, over 1.8 million *Google Plus* class members filed claims to that settlement, even though their claims were worth less than $3 each. ER-123 ¶ 17; *see also Google Plus*, Dkt. 96-1 ¶ 10; *id.* Dkt. 96 at 9, 12. The settlement at issue here covers millions more class members and offered at least eight times as much money per claim—yet it has nearly the same number of claims as the much smaller *Google Plus* settlement fund. And the *Facebook Biometric* settlement achieved a 22% claims rate—more than *six times* the rate achieved here—and reached after counsel intentionally took steps to correct the spam folder problem and to notify class members directly through the defendant's online channels. Class counsel took no similar steps here.

The notice was not the only problem with class counsel's implementation of the settlement that impacted the claims rate. The claims forms require class members to declare under penalty of perjury that they currently own an iPhone device that fits within the class definition. Dkt. 416-1 at 3-4. Yet the settlement states that it provides benefits to all class members, defined to include "former or current U.S. owners of iPhone 6, 6 Plus, 6s, 6s Plus, 7, 7 Plus, and SE devices running iOS 10.2.1 or later…" ER-165; Dkt. 416-1 at 2. The required attestation that one now owns one of the listed devices may have stemmed from sloppy drafting, but it almost certainly affected the claims rate.

The notice and subsequent claims process shortcomings are traceable back to class counsel's financial indifference over whether their clients receive $297.25 million or $500 million. Class counsel made a static fee request that was not tethered to the

actual recovery to the class, and the district court went along with this approach by failing to consider the anemic claims rate—regardless of the cause. This dynamic meant that class counsel lacked an incentive to ensure that enough claims were filed to avoid having the class effectively pay the notice and administrative costs rather than Apple and leaving on the table $200 million that could have gone to the class. By operation of the settlement, instead of Apple paying the notice and administration costs on top of the common fund, at least $12.75 million will be drawn from the fund and thus reduce the $310 million fund—and the ultimate recovery for the class—by that same amount. *See* ER-181 ¶¶ 5.2, 5.3.1.

In her objection, St. John identified the problems with class counsel failing to actively work to achieve a respectable claims rate. ER-93-98. The court, however, disregarded the actual difference in recovery or class counsel's representational deficiencies in that regard in awarding fees. The court's approach violates Rule 23(h)'s directive that courts make "the result *actually achieved* for class members" a fundamental focus of the fee determination. 2003 Advisory Committee Notes to Rule 23(h) (emphasis added). "In many instances, the court may need to proceed with care in assessing the value conferred on class members [including] scrutiniz[ing] the manner and operation of any applicable claims procedure … [and] defer[ring] some portion of the fee until actual payouts are known." *Id.* When awarding fees, "quality of representation" matters and, indeed, "the benefit obtained for the class" always remains the "foremost consideration." *Bluetooth*, 654 F.3d at 942. When the district court made findings regarding the quality of representation, it omitted consideration of the ultimately feeble claims rate, noting only the $310 million in relation to what was

possible at litigation and the results obtained on a per-device basis. (ER-17-24). Omitting such an essential factor is an abuse of discretion. *See In re Optical Disk Drive Antitrust Litig.*, 959 F.3d 922, 932-35 (9th Cir. 2020) (reversing fee award when district court awarded fees without considering a vital factor).

Without consequences for leaving $200 million on the table, class counsel will have no incentive to go beyond the bare minimum required for notice or even the bare minimum in ensuring that the class recovers funds. Instead, once a certain threshold is met, class counsel will be secure in knowing that they are entitled to a massive fee award without having to engage in any additional work.

At a minimum, the district court should have considered St. John's objection and given a reasoned response. Instead, the court legally erred by rewarding class counsel with a fee award that fails to take into account the actual recovery, which is $200 million less than the class should have recovered, and that is above the benchmark in normal settlements and the median and mean percentages for megafunds of this size.

III. Lodestar methodology does not justify the attorneys' fees here.

The district court suggests that its attorneys' fee award ultimately was justified by the 2.232 lodestar multiplier that its $80.6 million fee award yielded. ER-27. The court's lodestar analysis, however, does not make the fees reasonable under Rule 23(h). It erroneously accepted the 2.232 multiplier as reasonable, without analyzing the purported lodestar for overbilling and other excesses that, once removed, would have resulted in an even higher and more unreasonable lodestar closer to the 2.43 multiplier the court rejected as high. The district court even acknowledged that "an award

exceeding a 2.232 multiplier would result in 'windfall profits for class counsel in light of the hours spent on the case.'" ER-27 (quoting *Bluetooth*, 654 F.3d at 942). This acknowledgment makes the court's failure to scrutinize class counsel's lodestar all the more erroneous because once excess billings were removed, the multiplier would have increased, and the district court would have reduced fees by the amount needed to maintain a 2.232 multiplier. While the 2.232 multiplier cannot be justified in this case, the error of the district court's fee award was compounded by the lack of attention it gave to the lodestar and St. John's objections thereto.

A. While lodestar alone is reasonable, the 2.232 multiplier was unreasonable.

The Ninth Circuit has held that a 2.232 multiplier—indeed, any multiplier—is reasonable under Rule 23(h). *E.g., Farrell v. Bank of America Corp.*, 827 F. App'x 628 (9th Cir. 2020). In this section, St. John preserves this issue for further review.

A lodestar analysis looks at whether the number of hours expended and the hourly rates charged were reasonable. *Staton*, 327 F.3d at 965. But that does not eliminate the need to examine the lodestar underlying the analysis itself for excessive hours or billing or the need to examine the multiplier. If anything, a lodestar analysis requires the court to get the lodestar right. Here, however, the court did not analyze the excesses glaringly apparent even from the lodestar summaries as identified by St. John. The court not only awarded more than twice the value of the attorneys' lodestar but also failed to consider whether the lodestar accurately reflected the value of the attorneys' work before accepting a 2.232 multiplier as reasonable while rejecting the 2.43 multiplier represented by class counsel's request of $87.7 million as "high." The

court noted that an $87.7 million award would reduce class recovery by approximately $23 per-class device recovery, but failed to acknowledge that its $80.6 million fee award still reduced per-class device recovery by nearly $20. ER-26 n.7.

In *Perdue v. Kenny A.*, the Supreme Court held that "there is a 'strong presumption' that the lodestar figure is reasonable" without an enhancement multiplier. 559 U.S. 542, 546, 554 (2010). An enhancement is justified only in "rare and exceptional" circumstances where "specific evidence" demonstrates that a lodestar fee alone "would not have been adequate to attract competent counsel." *Id.* at 554 (cleaned up). In megafund cases such as this, "the lodestar cross-check assumes particular importance" because percentage-based awards can become arbitrary in the megafund context. *Alexander*, 2016 WL 3351017, at *2. The crosscheck helps to uncover the "disparity between the percentage-based award and the fees the lodestar method would support." *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1124 n.8 (9th Cir. 2002).

Here, there was no trouble attracting counsel as the district court received three applications for lead counsel, and dozens of suits were filed separately before they were consolidated in the MDL. The lodestar alone therefore would have been sufficient compensation; the more-than-doubled lodestar that was awarded was excessive. The district court did not make any findings—general or specific—that would warrant an above-lodestar enhancement. The court instead noted that the result was due to the size of the class rather than any particular effort or skill by class counsel. ER-28. Without additional findings based on specific evidence that a lodestar enhancement was necessary to attract counsel, no lodestar multiplier was appropriate.

Even if an enhancement were appropriate, however, the district court's lodestar crosscheck was deficient and, had it applied appropriate scrutiny, would have revealed excess in class counsel's billings so as to require a significant reduction in the $80.6 million award.

B. Even if a 2.232 multiplier is acceptable, the district court erred by accepting the proffered lodestar calculation at face value without scrutinizing evidence of overbilling.

The district court held that a 2.4 multiplier was unreasonable but that a 2.232 multiplier was reasonable, and awarded fees on that basis. But the district court failed to scrutinize the underlying lodestar calculation though St. John identified several places where class counsel inflated it. Because even a slight reduction in the lodestar would inflate the resulting fee award above the multiplier the district court held unreasonable, the district court's failure to scrutinize the lodestar was reversible error.

Although class counsel did not submit any meaningful breakdown of aggregated lodestar information to class members or itemized billing records, the limited lodestar review that St. John was able to conduct confirmed the excessiveness of the fee award. Despite pointing out certain excesses to the district court, the court did not critically examine the inclusion of hours and rates that resulted in class counsel substantially overstating what the lodestar was. Nor did the court provide a reasoned response to St. John's objection regarding the excessive lodestar, which is itself a reason for remand. With such face-value acceptance of the lodestar by the court, class counsel can get away with improper and excessive billing of their putative clients, who do not oversee the

bills like clients in bilateral litigation, and there is no consequence for tendering unreasonable bills.

For example, while class counsel excluded contract attorney time from the lodestar, they billed document review by staff attorneys and other attorneys at the exorbitant rate of $350/hour. As a result, the lodestar included, and the class likely paid over a million dollars above the market rate for such work. ER-158 n.2. Any lodestar calculation requires that only reasonable hours and reasonable hourly rates be included. *See Staton*, 327 F.3d at 965. The reasonableness of an hourly rate is determined based on the rates prevailing in the community of "lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). The best measure of the market rate is to review what paying clients are willing to pay. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 589 (S.D.N.Y. 2008). The rates charged for document review are over $100 more than even the overly generous $240/hour that other courts in the district have allowed for staff attorney time. *See In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, 2018 U.S. Dist. LEXIS 140137, at *133 (N.D. Cal. Aug. 17, 2018); *Nevarez v. Forty Niners Football Co.*, 2020 U.S. Dist. LEXIS 131491, at *22 (N.D. Cal. July 23, 2020). Other rates billed to the class are similarly excessive, including paralegals billed at $450/hour, IT staff at $475/hour, and a law clerk at $325/hour. Without more detailed billing information, St. John is not able to provide a specific estimate of the overbilling.

Even on its face, the lodestar is excessive, as it included a massive 60,000 hours of work. ER-163. In *In re High-Tech Employee Antitrust Litigation*, 2015 WL 5158730, 2015 U.S. Dist. LEXIS 118052 (N.D. Cal. Sept. 2, 2015), there was more discovery, more

depositions, more motion practice, and yet the hours billed totaled 36,000—almost half of what plaintiffs' counsel billed here.

The district court had such information and, at a minimum, had a duty to scrutinize the lodestar in the light of these objections before awarding the highest multiplier it deemed appropriate. Instead, the district court did not address St. John's identification of these excesses, other than to note that "Class Counsel applied their customary professional rates"—a statement that does not address whether those rates are in line with the market or whether the number of hours billed to the case was even close to reasonable. ER-26. As discussed above, this by itself is reversible error for failure to address all objections under *Dennis*.

Given the court's strict adoption of 2.232 as the highest reasonable multiplier, the court's failure to excise unreasonable rates and hours from class counsel's lodestar calculation had a direct impact on the class's recovery. The lodestar records should been made available to enable objectors to identify additional excesses to the court. Without these protections, the Rule 23(h) reasonable requirement was not met, and the order awarding fees should be vacated and remanded.

Conclusion

The fee award should be vacated. At a minimum, remand is required for the district court to consider and give a reasoned response to St. John's objections and to consider class counsel's attorneys' fee request in the light of the actual results they achieved and the quality of their representation in achieving those results and a crosscheck based on a lodestar analysis that excludes excessive hours and rates.

Dated: October 1, 2021

Respectfully submitted,

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Statement of Related Cases
Under Circuit Rule 28-2.6

This Court consolidated the following appeals arising out of the same district court case: *In re: Apple Inc. Device Performance Litigation*, Nos. 21-15758 (appellants Feldman & Jan), 21-15761 (appellant Best Companies, Inc.), and 21-15762 (appellant Pantoni).

Executed on October 1, 2021 *s/ Theodore H. Frank*
Theodore H. Frank

Certificate of Compliance
Pursuant to 9th Circuit Rule 32-1

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 10,121 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on October 1, 2021.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on October 1, 2021, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/ Theodore H. Frank
Theodore H. Frank