Nos. 21-15758, 21-15761, 21-15762, and 21-15763
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: APPLE INC. DEVICE PERFORMANCE LITIGATION,

NAMED PLAINTIFFS AND SETTLEMENT CLASS MEMBERS,

Plaintiff-Appellee,

v.

SARAH FELDMAN; HONDO JAN; BEST COMPANIES, INC.; DEBORAH PANTONI; AND ANNA ST. JOHN

Objectors-Appellants

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, Hon. Edward J. Davila

BRIEF OF KENTUCKY, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, LOUISIANA, MINNESOTA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, TEXAS, AND UTAH AS AMICI CURIAE SUPPORTING APPELLANTS AND REVERSAL OF FEE ORDER

Brett R. Nolan
Office of the Kentucky Attorney General
700 Capital Ave., Ste. 118
Frankfort, Kentucky 40601
502-696-5300
Attorney for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF INTERESTS OF *AMICI*[1]

The *amici* States, through their respective Attorneys General, have an interest in this case that stems from their responsibility under state law and under the Class Action Fairness Act to protect their states' consumers. *See* 28 U.S.C. § 1715; *see also* S. Rep. 109-14, at 33 (2005). When, as in this case, class counsel in a consumer class action settlement are awarded an unreasonable fee that reduces the amount of recovery to the class, those consumer class members are directly harmed. The *amici* States file this brief to highlight that harm to consumers and to urge this Court to correct it by reversing the district court's fee award.

[1] The amici are authorized to file this brief without consent of the parties or leave of the Court pursuant to Federal Rule of Appellate Procedure 29(a)(2).

INTRODUCTION

At the fee-setting stage, class action settlements notoriously pit the class against its counsel. Because of this, courts must act as fiduciaries for the class by jealously guarding and protecting the class's interests. Only in doing so can courts ensure that any fee ultimately awarded is "reasonable"—the touchstone for all fee awards.

This Court has explained that what is "reasonable" varies with the circumstances of each case. In general, courts can use either of the two recognized methods for awarding fees (percentage or lodestar). But when a case involves a "megafund," the Ninth Circuit has been explicit: If the amount awarded under a percentage method would result in windfall profits for class counsel, then the court must either adjust the percentage accordingly, or use the lodestar method instead.

In this case, the district court did neither. Despite recognizing that the case involved a megafund, despite recognizing the existence of windfall profits, and despite explicitly finding that an upward adjustment was not warranted, the district court used the percentage method anyway and *increased* the percentage awarded from 25% (the Ninth Circuit benchmark) to 26%, for a total fee of $80,600,000. That

amount is approximately $44.4 million above class counsel's base lodestar.

By awarding the fee in this way and in this amount, the district court abused its discretion. More importantly, from the *amici* States' standpoint, by using the percentage method of calculating attorneys' fees, the district court unjustifiably gave away money to class counsel that should have gone to the consumer class members. The result was a windfall to class counsel at the expense of the consumers. The district court could have fairly compensated class counsel while better protecting the interests of the class members if it had used the lodestar method of calculating attorneys' fees, or, at the very least, if it adjusted the percentage awarded to mitigate against windfall profits. Because it did neither, the district court's order should be reversed.

SUMMARY OF THE ARGUMENT

The district court abused its discretion in two ways when it awarded class counsel their fee in this case. First, when deciding what calculation method to use, the court failed to consider that a megafund was at play. Instead, the court based its decision solely on there being a common fund in this case. The result was a "mechanical or formulaic"

decision to use the percentage method merely because that is the "prevailing practice" in cases involving common funds. *See Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) ("The district court abuses its discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward.").

Second, even after deciding to apply the percentage method, the district court made at least two errors in applying that method. Its first error was failing to recognize that awarding the 25% benchmark would in fact result in windfall profits to class counsel. To avoid this, the district court should have adjusted the percentage *downward*. In addition, the district court erred by awarding a fee in excess of the Ninth Circuit's benchmark percentage. Despite finding that no upward adjustment to the fee was justified, the court nonetheless awarded a fee that represented 26% of the megafund, an increase from the Ninth Circuit's 25% percentage benchmark.

ARGUMENT

I. The district court abused its discretion in choosing the percentage method.

The district court decided to apply the percentage method solely

because this case involves a common fund. The district court ended its inquiry with that mechanical, formulaic approach. And it erred in doing so. *See Powers*, 229 F.3d at 1256 ("The district court abuses its discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward."). This Court forbids such a perfunctory way of choosing calculation methods. *See id.* Plus, by ending its inquiry prematurely, the district court failed to consider the megafund aspect of this case, which could have—and should have—convinced it to choose the lodestar method instead.

A. The district court erred by using a "mechanical or formulaic approach."

In general, when a court decides what fee calculation method to use, it must look to *all* the relevant circumstances of the case. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.* (*In re Wash. Pub. Power*), 19 F.3d 1291, 1296 (9th Cir. 1994). Here, the district court did not do so. Instead, it mechanically applied the percentage method because, it found, a common fund was involved. [ER-14 ("The Court finds that the Settlement involves a common fund as explained below, and therefore

the Court will award fees based on a percentage of the $310 million Settlement amount.")].[2]

That is not sufficient. *See Powers*, 229 F.3d at 1256. There is no requirement or even presumption that the percentage method be used in common fund cases. *In re Wash. Pub. Power*, 19 F.3d at 1296. In fact, courts have routinely found the lodestar method to be more appropriate even when there is a common fund. *See, e.g.*, *id.* at 1298.[3] So the court should have probed deeper. But it stopped short and decided to use the percentage method, in large part, because it is the "prevailing practice" in the Ninth Circuit for common fund cases. [ER-15]. That was an error that, as explained in more detail below, ultimately led the court to award an unreasonable fee. For that reason alone, the court abused its discretion. *See Powers*, 229 F.3d at 1256.

---

[2] The Excerpts of Record cited in this brief are those filed by Objector-Appellants Sarah Feldman, Hondo Jan, and Deborah Pantoni, which appears in the record as DktEntry 26.

[3] *See also In re Yahoo! Inc. Customer Data Sec. Breach Litig.* (*In re Yahoo!*), No. 16-MD-02752-LHK, 2020 WL 4212811, at *24 (N.D. Cal. July 22, 2020) (using lodestar over percentage); *Gutierrez v. Wells Fargo Bank*, N.A., No. C 07–05923 WHA, 2015 WL 2438274, at *4 (N.D. Cal. May 21, 2015) (same); *In re High-Tech Employee Antitrust Litigation*, No. 11–CV–02509–LHK, 2015 WL 5158730, at *7 (N.D. Cal., Sept. 2, 2015) (same).

B. The district court did not consider the megafund aspect of this case.

By focusing only on whether the settlement amounted to a common fund, the court did not consider how a relevant circumstance of the case, the "megafund" component of the settlement, should impact what fee calculation method to use. This Court has explained that if a class action settlement involves a "megafund," then that circumstance should be factored into the court's decision on what fee calculation method to use. "[W]here 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." *In re Bluetooth Headset Prod. Liab. Litig.* (*In Re Bluetooth*), 654 F.3d 935, 942 (9th Cir. 2011) (internal citations omitted).

Here, the district court ignored that instruction. To be sure, the district court recognized that the settlement was a megafund, [ER-27], and it acknowledged that windfall profits were present (under class counsel's requested 28.3%), [*id.*], but it never took the final step of analyzing what those two points meant for choosing a fee calculation

method at the outset, [*see id.* at ER-14–17, ER-27]. Instead, the district court limited its analysis to only whether the settlement represented a common fund. That was an error. *See In re Wash. Pub. Power*, 19 F.3d at 1296 (holding that fee awards out of common funds must be "*reasonable under the circumstances*") (emphasis in original) (internal citation and quotation omitted); *In re Bluetooth*, 654 F.3d at 942–43 (identifying a settlement's "megafund" status as a relevant circumstance). If it had appropriately analyzed these points, the court could—and should—have determined the lodestar was more appropriate.[4]

II. The district court abused its discretion in applying the percentage method.

The district court also abused its discretion in how it applied the percentage method to the facts of the case. The court's application was wrong in two ways: (1) it failed to reduce the award in order to avoid windfall profits; and (2) it awarded a percentage amount (26%) above the Ninth Circuit's benchmark (25%) without a sufficient basis to do so.

[4] Or at least decided that the percentage awarded should be reduced. As explained in Section II (A), the court did not do this either.

A. The district court awarded a windfall to class counsel.

The district court's adjustment of the fee award to avoid windfall profits did not go far enough. The Ninth Circuit has made clear that "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." *In re Bluetooth*, 654 F.3d at 942–43 (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)).

Courts adjust the benchmark percentage in megafund cases because of the economies of scale present in those types of cases. *See, e.g.*, *In re Yahoo!*, 2020 WL 4212811, at *24 ("[R]ote application of the 25% benchmark" is inappropriate because it will "produce a windfall for Class Counsel because the recovery in the instant case is largely a function of the size of the Settlement Class."); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 374 (S.D.N.Y. 2013) ("[i]n cases with exceptionally large common funds, courts often account for these economies of scale by awarding fees in the lower range.") (internal citations and quotations omitted). Indeed, as one prominent authority (that the district court cited below) has noted, "[t]he existence of a

scaling effect—the fee percent decreases as class recovery increases—*is central to* justifying aggregate litigation such as class actions." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 263 (2010) (emphasis added).

Here, the district court recognized that class counsel would receive windfall profits if the court awarded the fee that counsel had requested (28.3%), so it scaled back the award to 26% instead. [ER-26–27]. But that approach ignored that even a 25% award—which is the Ninth Circuit benchmark—would have resulted in windfall profits for class counsel. Therefore, awarding anything above 25% would necessarily also be too much. In fact, empirical research supports awarding a much lower percentage—between 12% and 16%—in this case. *See In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617, 632 (N.D. Cal. 2021), appeal dismissed, No. 21-15555, 2021 WL 2660668 (9th Cir. June 22, 2021) (relying in part on empirical research cited by the plaintiffs' expert that "found that the mean award in the top tranche (settlements over $175.5 million) was 12%" as a basis to award class counsel 15% of the $650 million common fund).

Awarding 25% of $310 million results in a fee of $77,500,000, which is $41,396,851.95 more than class counsel's lodestar ($36,103,148.05). That more than $40 million difference is a windfall. In another recent case before the Northern District of California, the court held that a *$10 million* difference between the two calculation methods was a windfall. *See In re Yahoo!*, 2020 WL 4212811, at *24. And the court there did what the district court here failed to do: choose the lodestar method instead.

Rather than adopting the lodestar method, or even starting at the 25% benchmark and working downward to avoid a windfall for class counsel, the district court here started with the class counsel's requested percentage and subtracted a modest amount that had no material impact on the windfall analysis. Here, the difference between the 26% awarded ($80,600,000) and the lodestar ($36,103,148.05) is more than four times higher ($44,496,851.95) than the amount deemed unacceptable in *In Re Yahoo!*. Yet the district court still found 26% to be acceptable. The district court should have recognized that windfall profits were present even when awarding 25% and revised downward

from that number, not downward from the requested percentage (28.3%). Failure to do so was an abuse of discretion.

B. The district court awarded an upward adjustment without justification.

No upward adjustment at all was warranted under *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002). [ER-24–27]. Nevertheless, the court seemed to conclude that only an upward adjustment *to 28.3%* (the amount requested) was unjustified, thus leaving room to still award 26% and remain analytically consistent. But it remains true under this Court's precedent that no upward adjustment—no matter how much—was warranted in the first place. Yet, the district court awarded one anyway. It departed upward from the 25% benchmark and awarded $80,600,000 or 26% of the megafund, erroneously calling 26% the benchmark in the Ninth Circuit. [ER-27]; *see In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) ("A district court abuses its discretion if its decision is based on an erroneous conclusion of law….") (internal citations and quotations omitted).

The Ninth Circuit benchmark percentage is 25%. *In re Bluetooth*, 654 F.3d at 942. The difference between awarding 25% and 26% of the megafund is $3.1 million. That difference is significant, considering that the amount separating the fee amount requested ($87,730,000) and the amount awarded ($80,600,000) is only $7.13 million. And a three million dollar difference is also certainly significant to a class whose interests in the common fund must be "jealously" protected. See *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 895 F.3d 597, 610 (9th Cir. 2018) ("[W]e impose upon district courts a fiduciary duty to look after the interests of…absent class members.") (internal citations and quotations omitted); *In re Wash. Pub. Power*, 19 F.3d at 1302 ("It is obligatory, therefore, for the trial court judge to act with a jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is.") (internal citations and quotations omitted).

Based on its own finding, the district court should have adjusted the benchmark percentage amount *downward*, or the very least sufficiently explain why, despite its finding under *Vizcaino*, an increase to 26% was justified. By doing neither, the court abused its discretion.

See In re Bluetooth, 654 F.3d at 942–43; *Powers*, 229 F.3d at 1256–57 ("A district court may depart from the benchmark but, [i]f such an adjustment [to the benchmark] is warranted…it must be made clear by the district court how it arrives at the figure ultimately awarded.") (internal citations and quotations omitted).

CONCLUSION

The district court awarded a windfall to class counsel, and it did so at the expense of the consumer class members. In the interest of protecting their citizens, the *amici* States respectfully request that the district court's fee award be vacated and the case remanded for reconsideration of attorneys' fees.

Date: October 8, 2021

Respectfully submitted by,

/s Brett R. Nolan
Brett R. Nolan
Office of the Kentucky Attorney General
700 Capital Ave., Ste. 118
Frankfort, Kentucky 40601
502-696-5300
Attorney for Amici Curiae

ADDITIONAL COUNSEL:

STEVE MARSHALL
Attorney General of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36104

MARK BRNOVICH
Attorney General of Arizona
Office of the Attorney General
2005 N. Central Ave.
Phoenix, Arizona 85004

LESLIE RUTLEDGE
Attorney General of Arkansas
Office of the Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201

ASHLEY MOODY
Attorney General of Florida
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399

JEFF LANDRY
Attorney General of Louisiana
Office of the Attorney General
1885 North Third St.
Baton Rouge, Louisiana 70802

KEITH ELLISON
Attorney General of Minnesota
Office of the Attorney General
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

DOUGLAS J. PETERSON
Attorney General of Nebraska
Office of the Attorney General
2115 State Capitol
PO Box 98920
Lincoln, Nebraska 68509

AARON D. FORD
Attorney General of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

WAYNE STENEHJEM
Attorney General of North Dakota
Office of Attorney General
500 N. 9th Street
Bismarck, ND 58501-4509

DAVE YOST
Attorney General of Ohio
Office of the Attorney General
30 E. Broad St., 14th Floor
Columbus, Ohio 43215

KEN PAXTON
Attorney General of Texas
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

SEAN D. REYES
Attorney General of Utah
Office of the Attorney General
PO Box 142320
Salt Lake City, Utah 84114-2320

CERTIFICATION OF COMPLIANCE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 21-15758, 21-15761, 21-15762, and 21-15763.

I am the attorney or self-represented party.

This brief contains 2,463 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[**X**] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Brett R. Nolan **Date: 10-8-21**
*(use "*s/[typed name]*" to sign electronically filed documents)*

CERTIFICATE OF SERVICE

I certify that on October 8, 2021, the foregoing was filed electronically using the Court's CM/ECF system. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

s/ Brett R. Nolan