No. 12-15782
consolidated with No. 12-15757
SCHEDULED FOR ARGUMENT APRIL 8, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAOTAKA KITAGAWA, Jr.; et al.
*individually and on behalf of all others similarly situated*,
*Plaintiffs-Appellees*,

MARIE NEWHOUSE,
*Objector-Appellant*,

v.

APPLE INC.,
*Defendant-Appellee*.

On Appeal from the United States District Court
for the Northern District of California, San Jose No. 5:09-cv-01911-JW

# Appellant Marie Newhouse's Motion for Sanctions

CENTER FOR CLASS ACTION FAIRNESS
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## Introduction and Background

This is a motion for sanctions for statements made by class counsel in a Rule 28(j) letter. Ms. Newhouse requests that this motion be referred to the merits panel in this case, an appeal by an objector of a class-action settlement approval.

On October 17, 2013, Ms. Newhouse filed a Rule 28(j) letter (attached as Exhibit 1) notifying this Court to the post-briefing decision of *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013), which is directly on point to several issues in this appeal. Appellee class counsel filed a Rule 28(j) response on October 23, 2013 (attached as Exhibit 2). The October 23 letter made several statements regarding Ms. Newhouse's arguments and briefing to date in this appeal.

In this motion, Ms. Newhouse will not use any adjectives to describe class counsel's statements; instead, she will merely list the statements that merit attention, and compare them directly to quotes from her briefing in this case. The comparison speaks for itself.

Pursuant to Ninth Cir. R. 27-1, Newhouse asked appellees their position on this motion. Appellee class counsel opposes this motion. Appellee Apple states that it takes no position on the motion.

## I. Newhouse's briefs directly contradict class counsel's October 23 Rule 28(j) letter's assertions about Newhouse's briefing and argument.

As shown in the table below, class counsel's October 23 Rule 28(j) response letter makes several claims about Newhouse's briefing. Rule 28(j) does not permit

Newhouse to reply to those claims. This motion is Newhouse's only possible recourse.

| **October 23 Rule 28(j) letter** | **Newhouse's briefing** |
|---|---|
| "The court went on to fault the objector for failing to identify any way in which the benefit to class members could be improved, just as Newhouse fails to do here." October 23 Rule 28(j) letter at 2.<br><br>"The only purpose of her [Newhouse's] objection is to reduce compensation to Plaintiffs' counsel." *Id.* | "Apple's claim … does not address the problem that the settlement was structured to limit class recovery while providing disproportionate benefit to class counsel in a manner that violated *Bluetooth*. With the same $3.9 million Apple paid to settle this case, the parties could have constructed a settlement where class members were fully reimbursed and class counsel did not receive over 80% of the settlement benefit. Instead, class counsel took a blind eye to class benefit and focused on its own self-interest at the expense of their putative clients…" Newhouse Reply Merits Br. at 9.<br><br>"But plaintiffs' assertion that distributing unawarded fees would be infeasible is wrong. There were 12,000 claimants. If the district court had reduced fees by $900,000, it would be enough to fully compensate any of the 12,000 existing claimants who did not receive a full $79 refund, plus pay full $79 refunds to another five- to ten-thousand class members in Newhouse's position who receive $0 under the current unfair settlement—and even then class counsel would still receive an amount that dwarfed what the class members received and was in excess of lodestar." *Id.* at 11. |

| **October 23 Rule 28(j) letter** | **Newhouse's briefing** |
|---|---|
| "Even if Ms. Newhouse had standing -- and she does not because she expressly declaimed [sic] any entitlement to relief for her Adapter…" October 23 Rule 28(j) letter at 2. | "Newhouse is objecting to a class action settlement that waived all of her claims while paying her zero. This is not because Apple was not willing to fund a settlement with enough money to pay claims like hers; it is because class counsel chose to structure the settlement so that there were multiple clauses protecting their excessive fee request from scrutiny, and the lion's share of the settlement benefits would end up in their own pockets…" Newhouse Opening Merits Br. at 13-14.<br><br>"Plaintiffs assert Newhouse does not have standing because she 'claims no injury this action should or does not already redress' and 'does not argue that the settlement failed to provide her relief, or that if she prevailed, she would benefit in any way.' PB19. Yet, plaintiffs ***expressly admit*** 'Newhouse has stated that her Adapter stopped working' and ***expressly admit*** 'Newhouse has stated that… she is entitled to something that the settlement does not provide.' PB26-27 (citing ER34 and OB49)." Newhouse Reply Merits Br. 22 (footnote omitted, emphasis in original).<br><br>"Newhouse *is* limited under the settlement to zero, an unfair betrayal of the class's interests that class counsel made so that they could later negotiate for a higher fee and disproportionate share of the settlement. *Bluetooth* forbids this, and Newhouse is entitled to ask the Ninth Circuit to enforce the law and reverse the settlement approval that injures her." *Id.* at 24 (also objecting that Newhouse was "gerrymandered" from recovery; emphasis in original). |

| **October 23 Rule 28(j) letter** | **Newhouse's briefing** |
|---|---|
| "…her [Newhouse's] objection has nothing to do with the 'allocation' of the settlement." October 23 Rule 28(j) letter at 2. | "Did the district court err as a matter of law when it failed to apply *Bluetooth* standards, or even mention *Bluetooth*, in evaluating the fairness of a settlement that (a) ***awarded $3.1 million to the attorneys, but less than $1 million to class members***; (b) had a clear-sailing arrangement; and (c) had a 'kicker'? (Raised at ER151-56; ruled on *sub silentio* at ER15-16; ER20-21.)." Newhouse Opening Br. at 2 (first question presented in Statement of the Issues) (emphasis added).<br><br>"Rather than explicit collusion, there need only be acquiescence for such self-dealing to occur: '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.'" *Id.* at 21 (emphasis added, citation omitted).<br><br>"Thus, a settlement can be unfair even when negotiated at arms' length: class counsel can achieve an impermissible self-dealing settlement simply through a defendant's and a mediator's indifference to ***the allocation***." *Id.* at 22 (emphasis added, citation omitted).<br><br>"No matter how you slice it, the district court approved a settlement where class counsel received an impermissibly disproportionate share of the settlement." *Id.* at 33.<br><br>(continued on next page) |

| **October 23 Rule 28(j) letter** | **Newhouse's briefing** |
|---|---|
| "…her [Newhouse's] objection has nothing to do with the 'allocation' of the settlement." October 23 Rule 28(j) letter at 2.<br><br>(continued from previous page) | "Here, class counsel received $3.1 million (a multiplier of over 150% of their lodestar), when the class received approximately $0.42 to $0.95 million, less than a third of class counsel's receipts. … By asking for over triple what their clients received, class counsel has obtained approximately 80% of the constructive common fund for itself. … The 80% distribution is more than triple the 25% benchmark in this Circuit." *Id.* at 24-25 (citations omitted).<br><br>"[The district court opinion did not] consider the problem of the disproportionate fee request to the fairness of the Settlement." *Id.* at 38 (*citing In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 934, 943 (reversible error when district court fails to compare fees to results achieved for the class in evaluating fairness of fees, which implicate fairness of settlement)).<br><br>"Apple was willing to fund the settlement with about $3.9 million in cash, likely enough to compensate all injured class members in full and still leave class counsel a fair 25% of the settlement fund. But instead Newhouse and other class members were left in the cold while class counsel got 80% of the constructive common fund." Newhouse Reply Merits Br. at 4<br><br>"The settlement is unfair because Apple was willing to pay about $3.9 million to settle the case, but plaintiffs unfairly structured the settlement so that they got over 80% of the benefit. If there had been a proportional distribution consistent with *Bluetooth*, the settlement would have not needed to be gerrymandered to exclude Newhouse from recovery." *Id.* at 24; *see also id.* at 9, 11. |

The last allegation especially troubles Newhouse. Class counsel argues in their October 23 letter that *Pampers* is inapplicable because Newhouse's argument "has ***nothing*** to do with the 'allocation' of the settlement" (emphasis added). But the crux of Newhouse's objection and appeal, including in the very first question presented, is the allocation of the settlement. As Newhouse noted in her reply brief, "Newhouse would not be here if the settlement paid the class $3.4 million and the attorneys $0.5 million." Newhouse Reply Merits Br. 12 n.5. While Newhouse's briefing raises other reversible errors made by the district court, the single most important question on appeal is the fairness of the settlement allocation.

## II. Newhouse has previously complained about class counsel's characterizations of the record.

The October 23 Rule 28(j) letter is not the only time in the Ninth Circuit class counsel has made claims about Newhouse's arguments that merited correction. On multiple occasions in multiple briefs in this proceeding, class counsel has repeatedly made similar claims, and has been repeatedly corrected. 12-15782 Docket No. 25 at 14-17 (correcting premise of class counsel's motion to dismiss); Newhouse Reply Merits Br. 22-23 (correcting class counsel's characterization of Newhouse's argument by, *inter alia*, citing other parts of class counsel's merits brief); *see also* ER59 (opposition to appeal bond motion correcting same claim by class counsel in Docket No. 132-1).[1] Yet class counsel chose to repeat the claims in yet a third filing in this Court, and, to

[1] This Court can and should take into account litigation activity and papers filed in the proceeding below. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 57 (1991); *Western Sys. v. Ulloa*, 958 F.2d 864, 873 (9th Cir. 1992).

boot, added new claims about Newhouse's briefing that Newhouse has had to correct with this motion. *Cf. Aetna Life Ins. v. Alla Med. Servs.*, 855 F.2d 1470, 1476 (9th Cir. 1988) ("persistent pattern of clearly abusive litigation activity … will be deemed to have been filed for an improper purpose and sanctionable") (Fed. R. Civ. Proc. 11).

## III. This Court has authority to issue sanctions for the above statements.

Class counsel has multiplied proceedings by filing a motion to dismiss premised on the same characterizations of Newhouse's arguments, making a standing argument in their merits brief premised on ignoring that Newhouse has appealed settlement approval, and by filing a Rule 28(j) letter that required this motion to correct the record.

This Court has the authority under both 28 U.S.C. § 1927 and the inherent authority of the Court to issue sanctions when counsel misrepresents the litigation position of their adversary. *Hamilton v. Boise Cascade Express*, 519 F.3d 1197 (10th Cir. 2008) (McConnell, J.); *see also Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) ("many misrepresentations of record") (citing *MacDonald v. Musick*, 425 F.2d 373, 376 (9th Cir. 1970); *Southern Pacific Transp. v. Public Utils. Comm'n*, 716 F.2d 1285, 1291 (9th Cir. 1983)); *cf. also Romala Corp. v. United States,* 927 F.2d 1219, 1224 (Fed. Cir. 1991) (imposing sanction of counsel where they engaged in "misrepresentations and distortions of its opponent's arguments and the Claims Court's opinion") (Fed. R. App. Proc. 38).

## Conclusion

Newhouse requests that this motion be referred to the merits panel, and that her motion for sanctions be granted.

Dated: January 31, 2014

Respectfully submitted,

*/s/ Theodore H. Frank*

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**Proof of Service**

I hereby certify that on January 31, 2014, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record who are registered electronic filers.

*/s/ Theodore H. Frank*
Theodore H. Frank