NO. 12-15782
Consolidated with NO. 12-15757

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re MAGSAFE APPLE POWER ADAPTER LITIGATION,
NAOTAKA KITAGAWA, JR.; TIMOTHY J. BROAD; JESSE REISMAN;
TRACEY HACKWITH; MAXX SCHOLTEN; MICHAEL MARTIN,
Plaintiffs-Appellees,

MARIE E. NEWHOUSE,
Objector-Appellant,

v.

APPLE, INC.,
Defendant-Appellee.

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

Reply Brief
of Appellant Marie E. Newhouse

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Introduction

Marie Newhouse appeals approval of a settlement that provides her with nothing but pays class counsel millions more than their clients. The Ninth Circuit recognizes that district courts must consider such disproportionate attorney benefit and self-dealing before approving settlements—regardless of whether the attorney fee is consistent with lodestar. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 944-45 (9th Cir. 2011) (disproportionate award can be "unreasonable" even if below lodestar); *Dennis v. Kellogg*, 697 F.3d 858, 868 (9th Cir. 2012) ($2 million award out of $5.14 million cash settlement fund "clearly excessive"). Because class counsel negotiated a settlement that limited class recovery while benefiting themselves disproportionately, and because the district court made no attempt to inquire into, much less justify or give a "reasoned response" to, that disproportion, the settlement approval must be reversed.

In re Baby Products Antitrust Lit., 708 F.3d 163 (3d Cir. 2013), reinforces the principle that cash to the class does not excuse structuring a disproportionate share of recovery to the attorneys. There, class counsel negotiated a settlement fund of $35.5M, and won an award of $14M for themselves. But because the district court failed to consider the disproportion between the $14M and the $3M the class received under the settlement's burdensome claims process, the settlement approval was reversed because "class counsel, and not their client, may be the foremost beneficiaries of the settlement." *Id.* at 169, 179.

Plaintiffs spend lengthy time on baseless *ad hominem* attacks on Newhouse's counsel and appellees devote thousands of words to *Hanlon/Churchill Village* factors irrelevant to Newhouse's appeal. These briefing choices make appellees' briefs' omissions all the more remarkable. Appellees' briefs do not contest with any precedent or facts that:

- a district court "abuses its discretion if it applies an incorrect legal standard to decide an issue" (PB34; *see also* OB2);[1]
- the class will receive less than a million dollars in cash while the attorneys will millions more (OB18);
- the district court made no findings about the value of the settlement to the class (OB18; OB38);
- the district court made no mention of the *Bluetooth* factors in its opinion (OB19);
- cataloguing *Hanlon* factors and claiming arms' length negotiation are not enough alone to survive appellate review (OB19-22);
- injunctive relief requiring something the defendant is already doing is not legally a "benefit" (OB26-27);
- paper claims create more administrative expense than electronic claims (OB32);

[1] OB refers to Newhouse's opening brief; PB and DB to plaintiffs' and defendant's response briefs respectively. ER is Newhouse's Excerpts of Record.

- the district court's opinions and oral statement provided no discussion of or reasoned response to Newhouse's objection (OB39-40);
- the district court mischaracterized Newhouse's objection as solely about "fees" (OB40);
- the district court's opinion approving the settlement is just a rubber stamp of a proposed order, striking out the word "proposed" (OB40);
- there was no evidence presented that there would be $25,000 of costs (OB45-47); and
- the district court issued an order requiring the dismissal of appeals without any authority or notice to the affected parties (OB47-48).

All these concessions and waivers alone create multiple independent grounds for reversal, and appellants do not, and cannot, have any justification for the reversible errors.

Plaintiffs, perhaps recognizing that the settlement is indefensible on the merits given *Bluetooth*, repeat a frivolous standing argument, even as they admit that Newhouse has injury and that this Court can provide redress by reversing an unfair settlement. Plaintiffs fail to address the dispositive cases in Newhouse's opening brief, and rest their argument on straw-man misrepresentations of her objection contradicted by the plain language of her argument.

Appellees state that the settlement is fair because it has "no cap on the claims class members could make." *E.g.,* PB23. The parties cite no authority for this questionable proposition, but in any event the premise is false: Newhouse and

similarly-situated class members had their claims capped at zero dollars, and other class members also had their claims capped for less than their complete damages. And there's more than one way to cap claims: an arbitrarily burdensome claims process that deters claims from being made is more than sufficient to ensure that, as here, the defendant won't be paying very much to the class.

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. This is exactly the sort of self-dealing that *Bluetooth* rejected and the district court ignored. Reversal is required.

I. The settlement is impermissibly self-dealing.

Class counsel's recovery—$3.1 million—exceeds the class's monetary recovery by millions. OB18-19. The district court made no findings valuing the injunctive relief, which Newhouse contended was illusory, because it merely duplicated what Apple was already providing customers before the parties settled. ER120; DB10. Nor did the district court consider or address the disproportionate benefit going to class counsel versus the class when it approved the settlement.

This ends the inquiry and requires reversal under *Bluetooth*, *Dennis*, and *Baby Products*. Ninth Circuit law and Rule 23(e) do not permit courts to rubber-stamp settlements without analysis of whether the benefits to the class are proportionate to the benefits class counsel negotiated for themselves. OB21-38.

A. Class members received a fraction of what class counsel did.

Appellees neither claim that more than 12,000 class members have made claims, nor dispute that the class will be paid under a quarter of class counsel's $3.1M award. Yet they claim the settlement is worth more than $775,000. But they can point to no factual findings below to support their version of the factual dispute. The appellees' assertions—which are tellingly inconsistent with one another—deserve no deference in the absence of factual findings.

This is especially true because the appellees' factual arguments are wrong. Appellees assert that the injunctive relief—the Adapter Replacement Program (which plaintiffs call a "warranty")—is worth something to the class. DB34; PB52. But as Newhouse noted, and Apple does not dispute, the Adapter Replacement Program existed long ***before*** the lawsuit was even initiated. OB26-27; ER120; ER159; DB10.[2]

[2] Yet plaintiffs' brief repeatedly insinuates that they are responsible for what Apple calls the "previously-established" Adapter Replacement Program. *Compare* DB10 *with, e.g.,* PB10 (falsely taking credit for program); PB23-24 (same).

Apple claims that the settlement "expanded" the replacement program. DB10. Not so. When Apple started the program in 2008, it applied to all adapters, no matter how old. *See* http://is.gd/magsafe20080812 (redirect to Apple page modified August 12, 2008) ("If your adapter is exhibiting strain relief issues and is out-of-warranty, you can take your adapter…to an Apple-Authorized Service Provider or Apple Retail Store for evaluation and replacement if necessary. You may be eligible for a replacement adapter free of charge provided there are no signs of abuse."); http://is.gd/magsafe20100505 (redirect to Apple page modified May 5, 2010) (same with "accidental damage" replacing "abuse")). The settlement made the program *worse* by limiting replacement to adapters less than three years old; the web-page now reads:

It is thus not a benefit of the ***settlement***. The ALI's *Principles of the Law of Aggregate Litigation* §3.13 *Illustration 2* (2010) ("*Principles*") is directly on point: this sort of imaginary relief does not count as settlement value. Appellees do not mention Illustration 2, much less distinguish it or give a public-policy reason for this Court to disregard it.

The parties assert that the settlement notice created class value, but this is an empirical question: how many class members took advantage of the Adapter Replacement Program ***because*** of the notice? The benefit to the class is the material improvement in class welfare attributable to the notice, rather than the cost of the notice to the defendant. *Bluetooth*, 654 F.3d at 944. The class is not better off if notice was delivered in a $4.99 Hallmark greeting card instead of email. OB27-30.

> This program will cover strain relief for a period of three years after the purchase of an adapter with computer or a standalone adapter. …
>
> Whether your product is in or out of warranty , you can take your adapter to an Apple Authorized Service Provider or Apple Retail Store for evaluation and replacement if necessary. Pending the results of evaluation, you may or may not be eligible for a replacement adapter free of charge. Signs of accidental damage would negate any coverage.

See http://is.gd/magsafe20120904 (redirect to Apple page modified Sep. 4, 2012). The district court did not resolve this factual dispute, and the parties have introduced no evidence comparing how many adapters the pre- and post-settlement adapter replacement programs replaced.

There is no record evidence of this benefit, though it was readily calculable: how many claims were made under the Adapter Replacement Program before the notice went out, and how many additional claims were made after the notice?[3] Apple doesn't say, though it has the information in its possession. We can thus draw an adverse inference: there is no evidence that the notice made any difference whatsoever. How many claims have been made in the year since the fairness hearing compared to the year before the fairness hearing? Again, Apple doesn't say, though it has the information in its possession; again, we can draw an adverse inference. *Bluetooth* is directly on point: "Plaintiffs urge us to find that the fee award is justified because the injunctive relief confers a valuable benefit and was the primary objective of the lawsuit, but the district court did not make findings on the value of the injunctive relief, so we cannot evaluate whether it justifies an otherwise disproportionate award." 654 F.3d at 945. Here plaintiffs do not even satisfy the prerequisite that injunctive relief was the primary objective of the lawsuit.

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[3] Plaintiffs' bald assertion that it is "not feasible" to calculate the value of the injunctive relief, PB53, is thus false. The value of the injunctive relief to the class is the value of the replacements that class members received because of the settlement that they would have not received without the settlement. There is neither evidence that Apple was going to end a Replacement Program it started for customer satisfaction before litigation ever began; nor evidence that the settlement notice increased the number of claims under the Replacement Program or was more effective than Apple's preexisting webpage. Thus, the parties failed to carry their burden of proving that the injunctive relief had any value. Even if the district court *had* made factual findings that the injunctive relief was worth something, it would have been clearly erroneous on this record.

Plaintiffs (but not Apple) claim the value of the settlement is the amount "available to the class, not the amount actually claimed by class members." PB51-52. As *Baby Products* demonstrates, this is legally incorrect: the amount the class *actually receives* is of great relevance to the fairness of a settlement. 708 F.3d at 170 (vacating settlement approval where court failed to consider whether settlement provided "sufficient direct benefit" to class members). Plaintiffs' claim is absurd. Under plaintiffs' proposed standard, a settlement that hand-delivers $100 bills to a million class members is equal in value and fairness to a settlement that requires a million class members to show up in person in Duluth, Minnesota, on December 25 and wait in line to collect a $100 check. But no reasonable person thinks the second settlement is worth $100 million to the class. "Class members are not indifferent to whether funds are distributed to them" or whether Apple gets to keep the money, and courts "and class counsel should not be either." *Baby Products*, 708 F.3d at 178; *id.* at 178-79 (counsel has "responsibility to seek an award that adequately prioritizes direct benefit to the class" and fees should reflect that (*citing, inter alia, Dennis,* 697 F.3d at 867-68)); *accord Principles* §3.13 *Illustration 1* (2010) (fees should be based on actual direct benefit received, not potential benefit that reverts to defendant). This is especially true where, as here, the parties spent extra money to structure a claims process to artificially reduce the number of claims made. OB36-38; *see* §I.C. below.

Plaintiffs fail to mention *Baby Products* entirely. Apple asserts that *Baby Products* is distinguishable because "only a small percentage of Adapters failed due to strain relief damage," and thus the fact that barely 0.1% of the class made claims is irrelevant.

DB42. But Apple could have made that argument to the district court, and asked the district court to make that factual finding as an explanation for the low claims rate. Apple did not and the district court did not. More importantly, even if Apple's claim were true, it 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, in violation of Rules 23(a)(4), (e), (g)(4), and (h).

B. *Bluetooth* itself says it applies to settlements that award cash to class members; the failure of the district court to apply *Bluetooth* was reversible error.

Appellees assert that *Bluetooth* does not require reversal here. But a closer look at their arguments shows that what they really want is for this Court to ignore the plain language and reasoning of *Bluetooth* entirely.

The parties try to distinguish *Bluetooth* and *Dennis* by asserting that the principles espoused only apply to cases with "little or no" monetary distribution. DB4; DB41-42; PB54. Even if true, that hardly helps them: *Dennis* had more monetary distribution than this settlement, yet the Ninth Circuit rejected it and held a 38.9% attorney-fee share—less than half that here—would be "clearly excessive." 697 F.3d at 863; *id.* at 868. But the parties misread the precedents. *Bluetooth* says a settlement is problematic

"when counsel receive a disproportionate distribution of the settlement, **or** when the class receives no monetary distribution but class counsel are amply rewarded." 654 F.3d at 947 (emphasis added; internal quotations and citations omitted). The parties' reading writes the first clause of *Bluetooth*'s disjunctive out of the opinion. Class counsel here received "a disproportionate distribution of the settlement," the district court failed to address that indicia of self-dealing, and the approval must be reversed. *Accord Baby Products*, 708 F.3d 163 ($14M to attorneys, $3M direct benefit to class).

Plaintiffs assert, without citing any appellate authority, that the clear-sailing clause "benefits the class, by reducing the amount of time and resources counsel must spend contesting a fee petition." PB54. That benefits class counsel to be sure, but not the class. The very argument shows that class counsel confuse their own self-interest with the interests of their clients. More importantly, class counsel's argument directly contradicts the binding precedent of *Bluetooth*. 654 F.3d at 947-49. *See generally* OB33-34. Perhaps a district court can find that a settlement does not involve impermissible self-dealing despite clear sailing. But the district court neither did so nor even mention the clear-sailing clause or *Bluetooth* in its opinion. Without such a reasoned finding, the Ninth Circuit "must vacate the Approval Order and remand for further consideration." *Bluetooth*, 654 F.3d at 949; *id.* at 947-48.

Plaintiffs argue that the kicker is necessary here because a reversion to the class distributing unawarded fees would be infeasible. PB55. But, again, the district court did not make that finding (or even mention the kicker or *Bluetooth*), and it would be inappropriate for the appellate court to resolve the factual dispute *ab initio*. Again,

without a consideration of the effect of the kicker on settlement fairness, the Ninth Circuit "must vacate the Approval Order and remand for further consideration." *Bluetooth*, 654 F.3d at 949.

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. Even in the counterfactual world where there were 50,000 claimants who each received less than $79, a $900,000 reduction would bump each one's recovery by $18.[4] It is just as feasible to distribute a $68 check as a $50 check.

Plaintiffs assert that it is acceptable to ignore the disproportionate distribution because the fee is based on a lodestar multiple, rather than a share of the constructive common fund. PB43.[5] Again, this directly contradicts *Bluetooth*, which requires a

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[4] And even with this hypothetical quadrupling of claimants and reversion of $900,000, the resulting $2.2 million award would *still* be in excess of the 25% benchmark: that's how disproportionate the current award is.

[5] Plaintiffs also complain that Newhouse's counsel has previously made fee requests that would entail multipliers. PB48-49. True, but irrelevant: in the two cases cited by plaintiffs, Newhouse's counsel requested fees of 4.4% and 11.9% of the recovery on a percentage-of-the-fund basis. If class counsel were defending a 12% request rather than an 80% request, plaintiffs' claim of inconsistency might be fair—

cross-check of the percentage of recovery "to assure that counsel's fee does not dwarf class recovery."[6] *Bluetooth*, 654 F.3d at 945. As in *Bluetooth*, "If the district court here took that second look, the record does not reflect it." *Id.* If plaintiffs' argument was correct, *Bluetooth* and *Baby Products*, two cases where the disproportionate fee was *less* than unenhanced lodestar, would have been affirmances, not reversals.

Bluetooth provides multiple independent grounds for reversal, and appellees neither distinguish *Bluetooth* nor give any public-policy reason for disregarding it.

C. California law does not trump *Bluetooth*.

Plaintiffs also argue that one can ignore *Bluetooth* requirements for Rule 23(e) and instead apply California state law to find the fee, and thus the disproportionate distribution, fair. PB43-46; PB50-51. The argument is wrong on multiple counts. *First*, fairness of the settlement and fees in a federal class action is adjudged by federal procedure, Rules 23(e) and (h). As the Supreme Court has repeatedly held, under 28 U.S.C. §2072, federal procedural law trumps state procedural law. *Shady Grove Orthopedic Associates, P.A. v. Allstate*, 130 S.Ct. 1431 (2010) (federal court cannot apply N.Y. Civ. Prac. Law Ann. §901(b) to abrogate plaintiffs' rights to proceed under Rule 23); *cf. also Makaeff v. Trump University*, No. 11-55016 (9th Cir. Apr. 17, 2013) (Kozinski

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but Newhouse would not be here if the settlement paid the class $3.4 million and the attorneys $0.5 million.

[6] Plaintiffs' string cite at PB46 n.19 are all civil rights cases, where awarding lodestar (without a multiplier) vindicates intangible civil rights under 42 U.S.C. §1988; Newhouse is not arguing for application of *Bluetooth* to §1988 fee requests, which are inapposite from consumer class-action pecuniary claims.

and Paez, JJ., concurring). California procedure for determining attorneys' fees cannot abrogate Newhouse's right to a settlement that meets Rule 23(e) procedural standards.

Second, even if state procedure could somehow override Rule 23, why would it be California procedure? Newhouse is a citizen of Massachusetts who purchased Apple products in Virginia and the District of Columbia. ER34-39. Why does California get to impose an unfair settlement approval procedure upon her? Due process rejects that proposition. *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985); *Mazza v. American Honda*, 666 F.3d 581 (9th Cir. 2012).

Third, the claim that this case is really a California-state-law case does not distinguish it from *Bluetooth*, which also involved California law, and even had a California citizen objecting and appealing. 654 F.3d at 938 n.2, 943.

California law does not provide a basis for ignoring *Bluetooth*.

D. Appellees have no legitimate justification for throttling the claims process at the class's expense.

It is at least three times as expensive to process a paper claim than an electronic claim, but the parties chose to only use paper claims—even though the class consisted of computer users, notice was provided electronically, and claim forms were available for downloading. ER178-79, 182.

Bluetooth indicated that its list of three indicia of self-dealing was not exclusive. 654 F.3d at 947. In a question of first impression for this Circuit, Newhouse asks the Court to hold that an unnecessarily complex claims process is an additional sign of self-dealing requiring additional scrutiny when the result is actual class recovery less

than attorney recovery. *Cf. generally Levine v. Entrust Group, Inc.,* No. C 12-03959 WHA, 2013 U.S. Dist. LEXIS 6715, at *5-*6 (N.D. Cal. Jan. 15, 2013). Newhouse argued that the only reason the defendant would agree to incur this additional settlement administration expense was if it expected the additional costs of administration to be more than offset by the number of class members deterred from making meritorious claims. That plaintiffs agreed to this artificial throttling of class recovery is evidence of self-dealing when the resulting claims process produces such disproportionate results. *Baby Products*, 708 F.3d at 176 (district court settlement approval decision must consider whether "a restrictive claims process was in the best interest of the class" when result is disproportionate lack of direct benefit to class members).

Plaintiffs provide no explanation for the restriction; they simply assert that "[n]o court has required an online claims process." This is untrue. In the absence of appellate guidance, district courts widely differ on how much protection they provide to absent class members. While many rubber-stamp what the parties put in front of them without consideration of Federal Judicial Center recommendations (OB37); others have rejected paper-mail claims processes because of the effect on the class. *E.g.*, *Smith v. Levine Leichtman Capital*, No. C 10-00010 JSW, 2012 U.S. Dist. LEXIS 163672, at *8 (N.D. Cal. Nov. 15, 2012) (denying approval and suggesting direct distribution); *Walter v. Hughes Communs., Inc.*, No. 09-2136 SC, 2011 U.S. Dist. LEXIS 72290, *40-*41 (N.D. Cal. July 6, 2011) (criticizing lack of electronic alternatives). Contrary to appellees' assertions, district courts have repeatedly rejected paper claims processes, and sometimes hold even an electronic claims process too onerous.

Apple defends the paper process by saying that the online process would be more difficult because the "proof of purchase requirement…necessitated use of a paper claim form" and thus electronic claims would require "scanners for creating digital copies of paper proofs of purchase." DB24; DB52. Apple seems not to have read its own brief, where it trumpets that it "created an online lookup tool so that class members could obtain duplicate receipts as proof of purchase"—*i.e.*, digital copies that consumers then had to print out and physically mail. DB12. And no scanner is needed for an electronic signature. Moreover, the existence of an electronic-claims process does not preclude a second-option paper-claims process for the rare Apple consumer without an internet connection who saved a years-old paper receipt. It's hardly "speculation" that electronic-claims processes are less burdensome than paper-claims processes; when class members are given a choice, over 90% choose to file claims electronically, even when the class consists disproportionately of the elderly. *E.g.*, *In re Bayer Corp.*, No. 09-md-2023 Dkt. 195 (E.D.N.Y.).

There is no existing appellate authority *requiring* an electronic claims process, but that is because it is a question of first impression in this Circuit whether settling parties can agree to spend settlement money to create arbitrary burdens on class members to reduce the claims made to a level below the attorneys' fees.[7] But the only reason to impose such burdens on class members and on the settlement administration costs—when Apple admits that it has electronic copies of receipts and

[7] Apple's claim that it "put its belief in the reliability of its products to the test" (DB6) is thus negated. A fair test requires a sensible claims process.

can match them to email addresses through an "online lookup tool"—is if the parties are trying to reduce class recovery. Apple admittedly established an "online lookup tool" to provide the digital copies of the documentary evidence. That was the hard part. It would have been trivial to add two buttons to electronically sign the required statements under penalty of perjury and to submit the claims form along with the receipt that Apple was electronically providing to the class member—but then class members might actually exercise their rights.

Using the claims process to reduce the number of claims is not necessarily unfair: if a settlement fund is capped, settling parties might prefer that a medium-sized number of class members who are most aggrieved are getting full compensation rather than a large-sized number of class members get a pittance, with the same direct benefit to the class in each scenario. But when the parties establish an unnecessarily burdensome claims process that results in a disproportionate distribution between attorneys and their clients, it is evidence of self-dealing and tacit collusion at the class's expense, and should require scrutiny utterly absent from the district court's analysis here.

The Ninth Circuit should adopt the guidance of Judge Alsup's *Levine v. Entrust Group* opinion and of the Federal Judicial Center, and, as the Third Circuit did in *Baby Products*, require district courts to scrutinize restrictive claims processes that are not designed in the best interests of the class. 708 F.3d at 176.

II. Reversal and remand is required for the independent reasons that the district court failed to provide a reasoned response to substantive objections.

The appellees violated Ninth Cir. R. 30-2 by submitting multiple volumes of irrelevant excerpts, much of which they never cite. Yet nowhere in those excerpts or in the 26,763 words of their briefs do they identify or quote a "reasoned response" by the district court to Newhouse's objections: the issue of the three *Bluetooth* indicia; the illusory nature of the injunctive relief; or the expense the parties went through to create arbitrary barriers to making a claim. Indeed, the only discussion of Newhouse's objection is an incorrect characterization of it in the appeal-bond opinion as solely about "fees," a fundamental misunderstanding of the *Bluetooth* self-dealing issue. ER7. *See generally* OB38-41.

All of this is reversible error. "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 858 (internal quotations and citation omitted). *See also Bluetooth*, 654 F.3d at 947-48 (finding reversible error because, *inter alia*, district court "ignored the clear sailing provision"); *Baby Products*, 708 F.3d at 181 (reversible error for district court to fail "to determine whether the settlement will provide sufficient direct benefit to the class"). The conclusory "overruled" to address a thought-out objection from a public-interest objector requires remand because it does not permit this Court to "conduct meaningful appellate review." *Powers v. Eichen*, 229 F.3d 1249, 1256-58 (9th Cir. 2000). To top it all off, the opinion was merely a rubber-stamp. *Compare* ER13-19 *with* ER126-32.

The words "reasoned response" are absent from plaintiffs' brief. Apple argues that an opinion can be conclusory if there is a reasoned response elsewhere in the record. DB55. Fair enough: but there is no such reasoned response to Newhouse's objections elsewhere in the record, and Apple identifies none. The fact that the district court "held both a preliminary hearing and a fairness hearing" (DB55) hardly rationalizes ignoring objectors: ***all*** class action settlement approvals, including the ones in *Dennis* and *Bluetooth*, involve a preliminary hearing and a fairness hearing where "the court read and listened to class members' objections." Apple's proposed exception to the "reasoned response" requirement swallows the rule and makes a mockery of the fairness hearing process. "[M]eaningful appellate review" is impossible when a court only holds "Because I say so."

Apple argues that *Powers* is "inapposite" because the district court here did not "rel[y] on the percentage-of-recovery method." DB57. That is itself a fatal admission of yet another independent reversible error. *Bluetooth*, 654 F.3d at 943 (reversible error when district court fails to compare fees to results achieved for class in evaluating fairness of fees, which implicate fairness of settlement); *id.* at 944-45 (criticizing district court's failure to calculate "value of benefits to the class"; remanding for findings).

The district court did not make even a token effort to comply with Ninth Circuit precedent of considering indicia of *Bluetooth* self-dealing or to give a ***reasoned*** response to objections; nor did it perform the required cross-check against direct benefits to the class. These are each independent reasons for reversal.

III. The district court's bond order should be vacated.

Apple does not attempt to defend the punitive appeal-bond order. Plaintiffs' arguments ignore binding Ninth Circuit precedent.

A. There is no authority for the district court's *ultra vires* order requiring appellants who did not post an appeal bond to dismiss their appeal.

"[A]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated." *Azizian*, 499 F.3d at 961 (brackets in original, internal quotations and citation omitted). Indeed, this Court decides on a case-by-case basis whether to dismiss an appeal when an appellant does not pay a bond. *Id.* at 962. Yet the district court, without a motion by plaintiffs (Dkt. 132, 132-5) or notice to Newhouse that such an order was in the cards, ordered any appellant that failed to post an appeal bond to dismiss her appeal. ER8. This is wrong. OB47-48.

Plaintiffs skirt the issue with only a single sentence: "the District Court's statement that Appellants should either post the bond or 'file a notice of dismissal of his or her appeal' (ER8) properly reflects that posting of a bond was a requirement to appeal, and an order of the court." PB41. This *non sequitur* cites no authority; nor can it. A district court does not have the authority to require the dismissal of an appeal. It can set an appeal bond, and appellees can move in appellate court to dismiss an appeal where no bond has been posted. But a district court that can threaten a party with criminal contempt for prosecuting an appeal is infringing upon the authority of the appellate court to decide whether breach of an appeal bond order merits the sanction of dismissal. *Azizian*, 499 F.3d at 962; *cf. also id.* at 961 (question of the merits of the appeal "is best left to the courts of appeals"; a district court does not get to

prejudge the appeal and "deter" appeals it does not like through excessive appeal bonds).

Robert F. Booth Trust v. Crowley provides additional support. *Crowley* reversed a denial of a motion to intervene: "A district judge ought not try to insulate his decisions from appellate review by preventing a person from acquiring a status essential to that review." 687 F.3d 314, 318 (7th Cir. 2012). But *Crowley* only makes sense if district court cannot "insulate his decisions from appellate review" by issuing a punitive appeal-bond order and then ordering an appellant to dismiss her appeal for failure to meet it upon pain of criminal contempt. The Ninth Circuit must speak out strongly against such district court abuses.

B. The finding of $25,000 of costs contradicts *Azizian* and the evidence.

Plaintiffs, by omission, effectively concede that they could never request anywhere near $15,000 of Rule 39 costs.[8] They look to other sources of "costs" to justify the punitive bond, but none are consistent with Ninth Circuit law.

While *Azizian* does not limit "costs" to those in Rule 39(e), that is not a blank check. *Azizian does* limit costs outside of Rule 39(e) to those premised on a ***symmetrical*** fee-shifting statute; an asymmetrical fee-shifting statute that only permits prevailing plaintiffs to recover from defendants does not provide the basis for recovery against fellow class members who are appealing a settlement approval. 499

[8] The district court found that costs were $25,000 while ordering a $15,000 bond. ER8; *cf.* ER26-27. Plaintiffs make no attempt to defend the district court's actual finding of fact, essentially conceding that it was clearly erroneous.

F.3d at 959-960. Yet the words "symmetrical" and "asymmetrical," though critical to the expansion of Rule 7 rights under *Azizian*, are entirely absent from plaintiffs' brief and reasoning.

Plaintiffs argue that the costs are justified by the fee-shifting provisions of the underlying substantive statutes. PB38 n.13. But as plaintiffs' own footnote acknowledges, these statutes award fees only to "prevailing plaintiffs" and are thus asymmetrical under *Azizian*. Indeed, plaintiffs are barred from claiming otherwise by law-of-the-case: they made the same argument to the district court asking for a $200,000 appeal bond, and the district court correctly held that the fee-shifting provisions of the consumer statutes did not apply under *Azizian*'s symmetry requirement. ER7 at n.12. Plaintiffs did not cross-appeal this adverse ruling denying their request for fee-shifting, and have waived the issue, but even in the absence of waiver, the argument does not even attempt to comply with the *Azizian* standard; nor can it.

Plaintiffs further argue that the $15,000 in costs is justified because the California Code of Civil Procedure permits cost-shifting for deposition and other expenses. PB38-39. But this is federal court, and federal, not California, law of costs applies. *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1167-68 (9th Cir. 1995) (costs determined by federal law); *see also* Section I.C, above.

The district-court issued a punitive appeal bond. It was reversible error to do so. Other class counsel defending similarly abusive settlements are trying to deter appeals by seeking similarly punitive appeal bonds. Far too many district courts in this

Circuit are ignoring the limitations of Rule 7 and *Azizian*. A strong statement is needed vacating this erroneous order. District courts do not have the power to order an appeal be dismissed, and this Court should jealously guard its authority in this arena.

IV. Plaintiffs essentially concede Newhouse's standing.

Plaintiffs assert Newhouse does not have standing because she "claims no injury this action should or does not already redress"[9] 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). Plaintiffs do not claim that Newhouse is lying about her adapter breaking in 2010; indeed, they decided not to depose her when she presented documentary evidence of her entitlement to relief under the allegations in the complaint. ER26. As Newhouse's opening brief stated:

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[9] Plaintiffs do not expand on "should," but their complaint claims Newhouse should get relief. ER238 at ¶141(e). Plaintiffs successfully argued for certification of a settlement class because class members were similarly situated. Yet their brief repeatedly insinuates that Newhouse is not entitled to relief because of the age of her defective adapter—though before the settlement made things worse, Apple was replacing adapters regardless of warranty. Plaintiffs are judicially estopped from claiming that Newhouse is somehow differently situated from other class members and not entitled to the same relief that other class members are. If class counsel persists in this argument, the correct response is to remand with instructions to decertify the class. OB50 n.17.

> 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…

OB13-14. Only by pretending that Newhouse is not making this argument can plaintiffs claim she has no standing to appeal an order that waives all of her rights in return for absolutely zero. Plaintiffs' standing argument is based entirely on straw-man misrepresentations of Newhouse's argument. For example, at PB24, plaintiffs state "Newhouse challenges the Final Order only to the extent that it affects the fee award." This is 100% baseless: Newhouse asked to reverse the "approval of a facially unfair settlement." OB52-53. Make no mistake: Newhouse would argue on remand that the necessary reduction of an oversized fee request without reversion to the class would be a *per se* violation of Rule 23(e) under *Bluetooth*, because there is "no apparent reason the class should not benefit from the excess allotted for fees." 654 F.3d at 949.

Plaintiffs claim that the settlement provides "unlimited liability" to Apple, and imply this somehow divests Newhouse of the standing to make a *Bluetooth* argument. PB23. That argument misses "the distinction between being in the right and the absence of a case or controversy." *Gates v. Towery*, 430 F.3d 429, 432 (7th Cir. 2005) (Easterbrook, J.). That plaintiffs think Newhouse's *Bluetooth* argument is wrong does not mean that she has no standing to make the *Bluetooth* argument. "That's not the way things work: A bad theory … does not undermine federal jurisdiction." *Id.* (*citing Bell v. Hood*, 327 U.S. 678 (1946)).

But in any event, nothing's wrong with Newhouse's theory: Apple's liability is not "unlimited"; 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. *See* Section I, *supra*. This case is on all fours with *Bluetooth*, where the successful appellants had standing.

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. Reversal of settlement approval with instructions to apply *Bluetooth*'s proportionate distribution requirement to the $3.9 million Apple is willing to pay will result in a future settlement that will treat equitably class members situated like Newhouse. But regardless of the outcome on remand, Newhouse's injury is redressed immediately when this Court nullifies the unfair settlement binding her.

Thus, Newhouse has standing even under the cases plaintiffs cite. *Glasser v. Volkswagen* correctly notes that class members have standing where the complaint is that "class counsel might obtain an excessive attorney fee award as part of a deal to accept an inadequate settlement for the class." 645 F.3d 1084, 1088 (9th Cir. 2011) (*quoting Lobatz*, 222 F.3d at 1147 (9th Cir. 2000), and citing several other cases). That's

Newhouse's complaint (OB18-42), albeit one of tacit unspoken collusion from defendant indifference rather than deliberate conspiracy. OB21-22.

There is no dispute that Newhouse is a class member; there is no dispute that the settlement adversely affects Newhouse by waiving her rights. ER186; ER192-93; ER34-39.[10] This gives her standing to appeal settlement approval under *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002). Plaintiffs do not address *Devlin* or the other cases Newhouse cites demonstrating she has standing. OB49-50.

Rule 23(e)(5) gives Newhouse, like "any class member," the right to challenge an unfair settlement. If she succeeds in winning reversal, and the parties respond by complying with Ninth Circuit law in a future settlement, she would be entitled to an objector incentive payment for her efforts in improving class recovery. *E.g.*, *Dewey v. Volkswagen of Am.*, 2012 U.S. Dist. LEXIS 177844, at *74 (D.N.J. Dec. 14, 2012); *In re Apple Inc. Sec. Litig.*, 2011 U.S. Dist. LEXIS 52685, at *16 (N.D. Cal. May 17, 2011); *Lonardo*, 706 F. Supp. 2d at 816-17 (N.D. Ohio 2010). This right to seek an objector incentive award by winning additional money for the class is a third

[10] Plaintiffs make the throwaway insinuation that this evidence is late. PB26-27. But the timing comes solely because plaintiffs did not ask for it in any briefing or at all until the hearing on the appeal bond. SER25; *cf.* ER31. It was at plaintiffs' request that Newhouse (then named Gryphon) presented additional belt-and-suspender documents proving her standing, after which plaintiffs dropped their deposition demand. Plaintiffs cite no authority for the insinuation that this timing affects jurisdiction. Nor can they: Newhouse may submit new evidence of jurisdiction even at the appellate level. 28 U.S.C. §1653; *e.g., Cobell v. Salazar*, 679 F.3d 909, 919 (D.C. Cir. 2012).

independent reason that Newhouse has standing. *Epenscheid v. Directsat USA*, 688 F.3d 872 (7th Cir. 2012) (Posner, J.).

Plaintiffs' standing argument rests on misstatements of the law, misstatements of the facts,[11] contradictions of their own complaint and class-certification motion, failure to address the binding precedent cited by Newhouse, and misrepresentations of the plain language of Newhouse's appeal and objection. Newhouse has standing.

CONCLUSION

The settlement unfairly provides disproportionate pecuniary benefit to class counsel at the expense of the class; the injunctive relief gives the class only what they already had, and there are no factual findings supporting a claim it has value. The Court should reverse the settlement-approval and appeal-bond orders.

[11] Plaintiffs' repeated *ad hominem* attacks misrepresenting the positions of Newhouse and her non-profit *pro bono* counsel in this case are especially egregious and contradict the undisputed evidence in the record. ER75-78; *see also* OB16-18 (citing cases). Even if the slurs were true, this Court holds that the litigation history and motives of parties are irrelevant to the merits of their claims. *Antoninetti v. Chipotle Mexican Grill,* 643 F.3d 1165, 1175 (9th Cir. 2010); *Molski v. MJ Cable*, 481 F.3d 724 (9th Cir. 2007).

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Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on April 26, 2013, 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. Additionally, I caused to be sent a copy of the foregoing via first-class mail to the following non-registered attorney:

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