

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

Opening Brief
of Appellant Marie E. Newhouse

CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
1718 M Street NW, No. 236
Washington, D.C. 20036
(703) 203-3848

Attorneys for Objector-Appellant Marie E. Newhouse

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

Statement of Subject Matter and Appellate Jurisdiction..... 1

Statement of the Issues 2

Statutes and Rules..... 5

Statement of the Case 6

Statement of the Facts 7

 A. Apple’s MagSafe Power Adapter..... 7

 B. The complaint and settlement. 8

 C. Marie E. Newhouse objects. 10

 D. The district court rubber stamps the settlement. 10

 E. The appeal bond..... 12

Summary of Argument 13

Preliminary Statement..... 16

Argument..... 18

I. The district court’s approval of a settlement where class counsel received approximately 80% of the settlement benefit was an abuse of discretion..... 18

 A. A district court must protect absent class members’ interests..... 19

 B. *Bluetooth* requires reversal because of this settlement’s multiple signs of self-dealing..... 21

 1. Class counsel’s disproportionate award dwarfs class recovery and reflects self-dealing. 22

 2. The settlement’s “clear sailing” provision shows self-dealing..... 33

 3. The “kicker” arrangement is another sign of self-dealing. 34

 4. The claims process is further evidence of self-dealing..... 36

 C. The district court’s failure to apply *Bluetooth*, failure to justify departure from the 25% benchmark, and failure to exercise independent judgment are each reversible errors. 38

II. The district court’s bond order is impermissibly punitive, and should have been vacated..... 42

A. The district court applied the wrong legal standard in its bond order.... 43

B. The district court’s finding of \$25,000 in costs is contradicted by the record evidence and common sense, and is thus clearly erroneous..... 45

C. The district court’s order requiring appellants who did not post an appeal bond to dismiss their appeal was *ultra vires*..... 47

III. Objector Newhouse has standing to appeal the settlement approval and to appeal the fee award to the extent it bears upon the fairness of the settlement. 49

CONCLUSION 52

STATEMENT OF RELATED CASES

PURSUANT TO NINTH CIRCUIT RULE 28-2.6 54

CERTIFICATE OF COMPLIANCE

WITH FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1 55

PROOF OF SERVICE 56

TABLE OF AUTHORITIES

Cases

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997)	20
<i>In re American Pres. Lines, Inc.</i> , 779 F.2d 714 (D.C. Cir. 1985)	43-44
<i>In re Aqua Dots Prod. Liab. Litig.</i> , 654 F.3d 748 (7th Cir. 2011)	26, 30
<i>Azizian v. Federated Dept. Stores</i> , 499 F.3d 950 (9th Cir. 2007)	3-4, 43-44, 47-48
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	49
<i>Besinga v. United States</i> , 923 F.2d 133 (9th Cir. 1991)	28
<i>In re Bluetooth Headset Prod. Liab. Litig.</i> , 654 F.3d 935 (9th Cir. 2011)	<i>passim</i>
<i>Casey v. Albertson’s Inc.</i> , 362 F.3d 1254 (9th Cir. 2004)	2-4
<i>In re Cendant Corp. PRIDES Litig.</i> , 243 F.3d 722 (3d Cir. 2001)	31-32, 49-50
<i>Churchill Vill., LLC v. Gen. Elec.</i> , 361 F.3d 566 (9th Cir. 2004)	19-20
<i>In re Classmates.com Consol. Litig.</i> , 2012 U.S. Dist. LEXIS 83480 (W.D. Wash. Jun. 15, 2012)	16
<i>Cobell v. Salazar</i> , 816 F. Supp. 2d 10 (D.D.C. 2011)	46

Cobell v. Salazar,
679 F.3d 909 (D.C. Cir. 2012)49-50

Cobell v. Salazar,
No. 11-5205 Order (D.C. Cir. Jul. 23, 2012) 46

Dennis v. Kellogg Co.,
-- F.3d --, 2012 U.S. App. LEXIS 18576 (9th Cir. Sep. 4, 2012).....*passim*

Devlin v. Scardelletti,
536 U.S. 1 (2002)1, 49-50

Dewey v. Volkswagen AG,
681 F.3d 170 (3d Cir. 2012) 16-17, 50

Dunleavy v. Nadler,
213 F.3d 454 (9th Cir. 2000)..... 20

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974)..... 29

Ferrington v. McAfee, Inc.,
No. 10-CV-01455-LHK,
2012 U.S. Dist. LEXIS 49160 (N.D. Cal. Apr. 6, 2012) 25

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995)21-23, 25, 27, 42

Glasser v. Volkswagen of Am.,
645 F.3d 1084 (9th Cir. 2011).....51-52

Grant v. Bethlehem Steel Corp.,
823 F.2d 20 (2d Cir. 1987) 20

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998).....19-22

Harman v. Apfel,
211 F.3d 1172 (9th Cir. 2000).....4

Hecht v. United Collection Bureau,
691 F.3d 218 (2d. Cir. 2012) 28

In re Hotel Tel. Charges,
500 F.2d 86 (9th Cir. 1974) 30

Johnston v. Comerica,
83 F.3d 241 (8th Cir. 1996) 23, 35

Knisley v. Network Assocs.,
312 F.3d 1123 (9th Cir. 2002) 49-52

Lemus v. H&R Block Enters. LLC, No. C 09-3179-SI,
2012 U.S. Dist. LEXIS 118926 (N.D. Cal. Aug. 22, 2012),
modified on other grounds on reconsideration,
2012 U.S. Dist. LEXIS 128514 (Sept. 10, 2012) 25

Lobatz v. U.S. West Cellular of Cal., Inc.,
222 F.3d 1142 (9th Cir. 2000) 35, 49, 51

Mandujano v. Basix Vegetable Prods., Inc.,
541 F.2d 832 (9th Cir. 1976) 40

Mirfasibi v. Fleet Mortg. Corp.,
356 F.3d 781 (7th Cir. 2004) 20-22

Molski v. Gleich,
317 F.3d 937 (9th Cir. 2003) 20

Nachshin v. AOL,
663 F.3d 1034 (9th Cir. 2011) 16

New England Health Care Emps. Pension Fund v. Woodruff,
512 F.3d 1283 (10th Cir. 2008) 40-42

New Hampshire v. Maine,
532 U.S. 742 (2001) 50

In re Pet Food Prods. Liab. Litig.,
629 F.3d 333 (3d Cir. 2010) 25

Plummer v. Chemical Bank,
668 F.2d 654 (2d Cir. 1982) 40

Powers v. Eichen,
229 F.3d 1249 (9th Cir. 2000) 3, 15, 39, 42

Riordan v. State Farm Mut. Auto. Ins.,
589 F.3d 999 (9th Cir. 2009)3

Robert F. Booth Trust v. Crowley,
687 F.3d 413 (7th Cir. 2012) 16-17, 43-44

Rutter & Wilbanks Corp. v. Shell Oil Co.,
314 F.3d 1180 (10th Cir. 2002)49-50

Six Mexican Workers v. Arizona Citrus Growers,
904 F.2d 1301 (9th Cir. 1990) 22

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003)20-22, 27-28

Swedish Hosp. Corp. v. Shalala,
1 F.3d 1261 (D.C. Cir. 1993).....31-32

Sylvester v. Cigna Corp.,
369 F. Supp. 2d 34 (D. Me. 2005) 14

Torrisi v. Tucson Elec. Power Co.,
8 F.3d 1370 (9th Cir. 1993) 28

Trombley v. Bank of Am. Corp.,
No. 08-cv-456-JD, 2012 U.S. Dist. LEXIS 63072 (D.R.I. May 3, 2012) 25

Twigg v. Sears, Roebuck & Co.,
153 F.3d 1222 (11th Cir. 1998) 28

Union Asset Mgmt. v. Dell, Inc.,
669 F.3d 632 (5th Cir. 2012)49-50

United States v. Alabama
271 Fed. App’x 896 (11th Cir. 2008)49-50

Vaughn v. Am. Honda Motor Co.,
507 F.3d 295 (5th Cir. 2007) 43, 46

Vizcaino v. Microsoft Corp.,
290 F.3d 1043 (9th Cir. 2002) 40

Vought v. Bank of Am., N.A.,
 No. 10-CV-2052,
 2012 U.S. Dist. LEXIS 143595 (C.D. Ill. Oct. 4, 2012) 34

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,
 396 F.3d 96 (2d Cir. 2005) 32

Walter v. Hughes Communs., Inc.,
 No. 09-2136 SC,
 2011 U.S. Dist. LEXIS 72290 (N.D. Cal. July 6, 2011)..... 37

Weinberger v. Great N. Nekoosa Corp.,
 925 F.2d 518 (1st Cir. 1991).....33-34

In re Wells Fargo Sec. Litig.,
 157 F.R.D. 467 (N.D. Cal. 1994).....31-32

Zimmerman v. Oregon Dep't. of Justice,
 170 F.3d 1169 (9th Cir. 1999)..... 41

Rules and Statutes

15 U.S.C. §2310(d)(1) 1, 8

28 U.S.C. §1291..... 1

28 U.S.C. §1331..... 1

28 U.S.C. §1713..... 29

Cir. R. 39-1 45-46

Fed. R. App. Proc. 4(a)(1)(A)..... 1

Fed. R. App. Proc. 7..... 42, 45

Fed. R. App. Proc. 30..... 45

Fed. R. App. Proc. 39..... 4, 45-46

Fed. R. App. Proc. 39(c) 45

Fed. R. Civ. Proc. 23 41

Fed. R. Civ. Proc. 23(e).....2, 14, 28

Fed. R. Civ. Proc. 23(e)(2) 42

Fed. R. Civ. Proc. 23(h)9

Fed. R. Civ. Proc. 24 44

Fed. R. Civ. Proc. 581

U.S. Const., Art. III.....49-51

Other Authorities

Allen, Tiffany,
Anticipating Claims Filing Rates in Class Action Settlements, (Nov. 2008),
available at
http://www.rustconsulting.com/Portals/0/pdf/Monograph_ClaimsFilingRates.pdf. 37

AMERICAN LAW INSTITUTE,
 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. §3.05 *comment b* (2010) 22

AMERICAN LAW INSTITUTE,
 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. §3.05(c) (2010) 27

AMERICAN LAW INSTITUTE,
 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. §3.13 *Illustration 2*
 (2010) 26

Brickman, Lester,
Lawyer Barons (Cambridge U. Press 2011) 35

Brunet, Edward,
Class Action Objectors: Extortionist Free Riders or Fairness Guarantors,
 2003 U Chi. Legal F. 403..... 17

Coffee, Jr., John C.,
The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action,
54 U. CHI. L. REV. 877 (1987)..... 21

Federal Judicial Center,
Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide (2010), available at
[http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf)..... 37

FEDERAL JUDICIAL CENTER,
MANUAL FOR COMPLEX LITIGATION §21.71 (4th ed. 2008)..... 23

Frankel, Allison,
Legal Activist Ted Frank Cries Conflict of Interest, Forces O’Melveny and Grant & Eisenhofer to Modify Apple Securities Class Action Deal,
American Lawyer Lit. Daily (November 30, 2010)..... 16

Henderson, William D.,
Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements,
77 Tul. L. Rev. 813, 816-17 (2003)..... 34

Jones, Ashby,
A Litigator Fights Class-Action Suits,
Wall St. J. (Oct. 31, 2011)..... 16

Karlsgodt, Paul & Raj Chohan,
Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval,
BNA: Class Action Litig. Report (Aug. 12, 2011)..... 17

Macey, Jonathan R. & Geoffrey P. Miller,
The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform,
58 U. Chi. L. Rev. 1 (1991)..... 30

Silver, Charles,
Due Process and the Lodestar Method,
74 Tul. L. Rev. 1809 (2000)..... 35

Weinstein, Jack B.,
Ethical Dilemmas in Mass Tort Litigation,
88 Nw. U.L. Rev. 469 (1994) 14

Statement of Subject Matter and Appellate Jurisdiction

The district court had federal question jurisdiction under 28 U.S.C. §1331, because the plaintiffs' complaint alleges violations, *inter alia*, of the Magnuson-Moss Warranty Act, 15 U.S.C. §2310(d)(1).

The court's final judgment, pursuant to Fed. R. Civ. Proc. 58, issued on April 2, 2012. ER10-12.¹ Class member and objector Marie Newhouse (formerly known as Marie Gryphon),² the appellant in this case, filed a notice of appeal on April 6, 2012. ER86-88. This notice is timely under Fed. R. App. Proc. 4(a)(1)(A).

Post-judgment, the district court issued two orders on May 29 and June 20, 2012, requiring Ms. Newhouse to post an appeal bond. ER1-9. Ms. Newhouse timely amended her notice of appeal on June 2 and June 25, 2012, to include appeals of these two orders. ER22-24; ER42-44.

This court has appellate jurisdiction because this is a timely-filed appeal from a final judgment under 28 U.S.C. §1291. Newhouse, as a class-member and objector to settlement approval, has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardeletti*, 536 U.S. 1 (2002). *See generally* Section III below.

¹ "ER" refers to Newhouse's Excerpts of Record. "Dkt." refers to the district-court docket in this case.

² The district-court filings refer to Marie Gryphon, who has since married and changed her name to Marie E. Newhouse. This brief uses her current name of Newhouse.

Statement of the Issues

1. Under *In re Bluetooth Headset Prod. Liab. Lit.*, 654 F.3d 935, 943, 947-49 (9th Cir. 2011), a district court deciding whether to approve a settlement must consider “indicia” of self-dealing, including (a) whether class counsel “receive[d] a disproportionate distribution of the settlement”; (b) a clear-sailing arrangement; (c) a “kicker” where “parties arrange[d] for fees not awarded to revert to defendants rather than be added to the class fund.” 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.)

Standard of Review: A district court decision to approve a class action settlement is reviewed for abuse of discretion. *Bluetooth*, 654 F.3d at 940 (rejecting settlement). A failure to apply the correct standard of law is an abuse of discretion. *Casey v. Albertson’s Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004).

2. Should it be considered an additional sign of *Bluetooth* self-dealing under Fed. R. Civ. Proc. 23(e) as a matter of law when class counsel agrees to a claims procedure that, while increasing settlement administration costs, artificially reduces the number of claims class members make in a claims-made settlement? (Raised at ER144-47; ER151-56; ruled on *sub silentio* at ER15-16; ER20-21.)

Standard of Review: Questions of law relating to the interpretation of the federal rules of civil procedure are reviewed *de novo*. *Riordan v. State Farm Mut. Auto. Ins.*, 589 F.3d 999, 1004 (9th Cir. 2009).

3. “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 v. Kellogg*, 2012 U.S. App. LEXIS 18576, at *11 (9th Cir. Sep. 4, 2012) (internal quotations omitted). Did the district court abuse its discretion when it approved a settlement without giving any reasoning for rejecting Newhouse’s objection? (Raised at ER143-56; ruled on at ER15-16; ER20-21.)

Standard of Review: A district court decision to approve a class action settlement is reviewed for abuse of discretion. *Bluetooth*, 654 F.3d at 940. Failure of a district court “to specify adequately the basis for its decision” is an abuse of discretion. *Id.* at 949; *Powers v. Eichen*, 229 F.3d 1249, 1256-58 (9th Cir. 2000).

4. The Ninth Circuit prohibits district courts from issuing appeal bonds based on the district court’s assessment of the merits of the appeal. *Azizian v. Federated Dept. Stores, Inc.*, 499 F. 3d 950, 960-61 (9th Cir. 2007). Did the district court err as a matter of law when it required a \$15,000 appeal bond because “the merits of the appeals at issue weigh heavily in favor of requiring a bond, as each is lacking in merit”? (Raised at ER58-60; ruled on at ER7.)

Standard of Review: A district court decision on the amount of an appeal bond is reviewed for abuse of discretion. *Azizian*, 499 F.3d at 955. A failure to apply

the correct standard of law is an abuse of discretion. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004).

5. Did the district court commit clear error when it required an appeal bond of \$15,000 per individual appellant to cover Rule 39 costs that it found to be \$25,000 when the appellees provided no documentation of costs and the Ninth Circuit limits appellate costs to ten cents a page for copying? (Raised at ER64-67; ER78-79; ruled on at ER7-8.)

Standard of Review: A district court decision on the amount of an appeal bond is reviewed for abuse of discretion. *Azizian*, 499 F.3d at 955. “However, the meaning of the phrase ‘costs on appeal’ is a question of law that we review de novo.” *Id.*

6. The Ninth Circuit holds that “[a]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated.” *Azizian*, 499 F.3d at 961 (internal quotations and citation omitted). Did the district court err as a matter of law when it ordered appellants that did not post an appeal bond to dismiss their appeal? (Order issued at ER8 *sua sponte* without notice or opportunity to raise legal error. *Cf.* Dkt. 132, 132-5.)

Standard of Review: Questions of law are reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000).

Statutes and Rules

Fed. R. App. Proc. 7. Bond for Costs on Appeal in a Civil Case

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.

Federal Rule of Civil Procedure 23. Class Actions.

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

...

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

...

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Ninth Circuit Rule 39-1. Costs and Attorneys Fees on Appeal

39-1.1. Bill of Costs

The itemized and verified bill of costs required by FRAP 39(d) shall be submitted on the standard form provided by this Court. It shall include the following information:

(1) The number of copies of the briefs or excerpts of record reproduced; and

(2) The actual cost per page for each document.

...

39-1.3. Cost of Reproduction

In taxing costs for photocopying documents, the clerk shall tax costs at a rate not to exceed 10 cents per page, or at actual cost, whichever is less.

Statement of the Case

Plaintiffs filed a putative class complaint against Apple alleging various breaches of federal and state law over its sale of defective “MagSafe” power adapters. ER205-44. Before the plaintiffs filed a motion for class certification, the parties proposed a settlement of the putative class action. ER183-204. Over several objections, including one from appellant and class member Marie Newhouse, the district court approved the settlement and \$3.1 million request for an attorney award. ER133-76; ER13-19. The district court’s order was indistinguishable from the proposed order. ER126-32. Final judgment issued April 2, 2012. ER10-12. Newhouse timely appealed, as did four other objectors. ER86-88; Dkt. 109, 112, 125, 140.

With respect to the first four appeals, plaintiffs made four motions for appeal bonds totaling \$800,000. Dkt. 127, 131, 132, 133. The district court granted the motions in part, issuing two orders to the four appellants to post \$15,000 each, a total of \$60,000, to secure a supposed \$25,000 in appellate costs. ER1-9. Newhouse timely amended her appeal to appeal both orders, and posted the \$15,000. ER22-29; ER42-44; ER265. No other appellant posted a bond; appellant Robert J. Gaudet timely amended his notice of appeal to cover the appeal bond order. Dkt. 164.

In two orders on May 7, 2012, and June 19, 2012, the Ninth Circuit consolidated the five appeals. Three of the five appellants voluntarily dismissed their

appeals rather than pay or litigate the appeal bond, leaving the appeals of Newhouse and Gaudet in this proceeding.

On June 8, 2012, Newhouse moved to vacate the appeal bond order. On June 15, 2012, plaintiffs moved to dismiss Newhouse's appeal for purported lack of standing. On September 5, 2012, a Ninth Circuit motions panel denied both motions without prejudice.

On August 22, 2012, the district court issued an order purporting to retroactively strike Gaudet's objection as a sanction for his failure to dismiss his appeal. Dkt. 202. Gaudet timely amended his appeal to appeal this order. Dkt. 206.

Statement of the Facts

A. Apple's MagSafe Power Adapter.

Defendant Apple sells laptop computers under the MacBook brand name. Starting in 2006, the only power adapter available for these computers is Apple's MagSafe Power Adapter, a patented magnetic connector designed to disconnect the power cable if it experiences undue strain. ER209; ER212.

But the T-shaped MagSafe itself tended to fray at the joint of the T; the insulating plastic would separate from the magnetic connector and the wires would fray, causing the cable to fail. ER214-15. Apple publicly acknowledged the problem in August 2008, and would replace consumers' frayed MagSafe adapters at no cost. *Id.*; ER159; ER189; Dkt. 44 at 41-42. By 2010, Apple redesigned the MagSafe adapter to

be L-shaped and ceased to sell the T-shaped adapter that had a tendency to fray.³ ER96-98. The parties introduced no record evidence as to how many Apple customers did or did not take advantage of the 2008 replacement program.

B. The complaint and settlement.

On May 1, 2009, several months after Apple announced the replacement program, three plaintiffs filed a class action complaint over the MagSafe adapters. Dkt. 1. The amended class complaint, filed January 19, 2010, alleged violations of the Magnuson-Moss Warranty Act, 15 U.S.C. §2310(d)(1), breaches of warranty, and various state consumer fraud claims on behalf of a nationwide class. ER205-44.⁴ The complaint's allegations of damages were for a single class consisting of all purchasers of MacBook computers with MagSafe adapters or of MagSafe adapters, regardless of how old the adapter was or whether it had yet failed. ER223.

Before there was any substantive briefing or a motion for class certification, the parties proposed a settlement of the putative class action. ER183-204 ("Settlement"). The settlement class was defined as again as all purchasers of MacBook computers with MagSafe adapters or of MagSafe adapters. Settlement §I.A (ER186). Class members who paid for a new MagSafe adapter within three years of their original

³ On June 11, 2012, Apple introduced a smaller "MagSafe 2" power adapter that was again T-shaped. It is not at issue in this case.

⁴ None of the parties seems to have noticed or expressed concern that the exhibits the amended complaint claims to be attached (*e.g.*, ER215) were never attached. These exhibits can be found attached to an earlier iteration of the consolidated complaint. Dkt. 44.

purchase could file a claim for between \$35 and \$79. Settlement §II.A-C (ER187). Though the class consisted of computer owners, though notice of the Settlement was provided via email, though the claims process created a settlement website from which claim forms could be downloaded, though Apple had an electronic record of who purchased replacement adapters, and though the settlement administrator had experience administering settlements with electronic claims procedures, *MagSafe* class members could not recover without filing a paper claim form. Settlement §§II.E, IV.A-B (ER188; ER190); ER144-47; ER177-82; ER39.

The settlement further provided that the class notice would mention the existence of the replacement program, and permitted Apple to end the program on December 31, 2012, which the parties eventually modified to end in July 2013. Settlement §II.F (ER189); ER96.

The class attorneys would be entitled to request \$3.1 million in fees and costs; Apple provided “clear sailing” and agreed not to challenge the request. Settlement §V.A (ER191-92). Any amounts not awarded to the class attorneys would be retained by Apple. *Id.*⁵ The \$3.1 million included a 1.5 multiplier of the alleged lodestar. Dkt. 97 at 13. Class members would release all non-personal-injury MagSafe-related claims against Apple. Settlement §VI.B (ER192-93).

⁵ An ambiguity in the settlement implies that Apple is liable to class counsel for the entire \$3.1 million “Fees Amount” regardless of the district court’s Rule 23(h) award. Settlement §V.B (ER192).

The settlement was executed in July 2011. ER199-204. Class counsel sought preliminary approval including a requested schedule under which the claims deadline (March 21, 2012) was nearly a month after the fairness hearing (February 27, 2012). *See* Dkt. 75 at 3-5. On September 27, 2011, the district court adopted the proposed schedule, granted preliminary approval of the Settlement and conditionally certified the class. ER177-182.

C. Marie E. Newhouse objects.

Class member Marie E. Newhouse purchased an Apple MacBook in 2006; it had a defective MagSafe power adapter that she replaced at her own expense for \$79 plus tax in 2010. ER34-39. Because she had replaced the adapter at her own expense over three years after her original purchase, the settlement provided her with nothing. Newhouse objected, among other grounds, that the attorneys would receive a disproportionate share of the class recovery while class members such as herself would receive nothing; this, combined with the clear sailing clause, “kicker,” and a claims process designed both to minimize claims and hide from the district court the actual class recovery, was evidence of impermissible *Bluetooth* self-dealing that precluded settlement approval. ER143-56. Newhouse was represented *pro bono* by attorneys affiliated with the non-profit Center for Class Action Fairness, one of whom appeared at the fairness hearing on Newhouse’s behalf. ER75; ER91.

D. The district court rubber stamps the settlement.

There is no evidence in the record how much money Apple refunded pursuant to the settlement. At the fairness hearing, class counsel asserted that of the

approximate 10 million class members, 340,000 class members visited the settlement website, 61,000 claim forms were downloaded, and only 12,000 claims were submitted. ER91; ER104-105. 12,000 reimbursement claims corresponds to pecuniary relief between \$420,000 and \$948,000 depending on whether claims were for \$35, \$50, or \$79. ER104; Settlement §II.A-C (ER187). Class counsel further asserted that 20,000 class members had sought adapter replacement pursuant to the preexisting replacement program, but there was no evidence whether that was even higher than the number of class members obtaining adapter replacement before the settlement was noticed. ER104.

Notwithstanding Newhouse's objection identifying the importance of actual class recovery to the fairness of the settlement, the district court made no findings as to the actual value of the settlement to the class; nor did the district court address, distinguish, or even mention *Bluetooth*. The district court's only finding with respect to the objections was the single sentence "All objections to the Settlement, to the extent not previously withdrawn, are overruled." ER15 ¶7. The district court similarly approved the attorneys' fees without explanation. ER18-19. This, along with everything else in the order approving the settlement and attorneys' fees, was a literal rubber stamp of plaintiffs' proposed order. *Compare* ER13-19 *with* ER126-32. Final judgment issued April 2, 2012. ER10-12. Newhouse timely appealed on April 6, 2012, as did four other objectors. ER86-88; Dkt. 109, 112, 125, 140.

E. The appeal bond.

With respect to the first four appeals, plaintiffs made four motions for appeal bonds totaling \$800,000, a purported \$175,000 in fees and \$25,000 in costs for each appellant. Dkt. 127, 131, 132, 133. Plaintiffs' only evidence for the cost figure included such "costs" as "items of cost incurred with the filing of various motions with the appellate court"; "costs related to conducting discovery in relation to the appeal";⁶ "administrative costs"; and a bald assertion that the total would be "\$25,000 plus tax." ER84-85. Newhouse protested that there was no legal basis to include fees in an appeal bond in this action, and that there was no factual or legal basis for a finding of \$25,000 in costs; Newhouse further noted that plaintiffs' motion intentionally misrepresented facts and law, including relying upon a district court order as precedent without disclosing that the Ninth Circuit had stayed and refused to enforce that order. ER54-83. In particular, plaintiffs falsely claimed that Newhouse was only appealing the attorney-fee award when Newhouse had filed papers with the Ninth Circuit demonstrating that she was challenging the settlement approval on *Bluetooth* grounds. Dkt. 132-1 at 10; No. 12-15782, Dkt. 5; ER76-77.

The district court granted plaintiffs' motions in part, issuing three orders to the five appellants to post \$15,000 each, a total of \$75,000, to secure a supposed \$25,000 in appellate costs. ER1-9; Dkt. 175. The district court's order did not provide any response to or acknowledgement of Newhouse's factual rebuttal and defense of her appeal, repeating plaintiffs' claim that "The remaining objections focus almost

⁶ Plaintiffs conducted no discovery on Newhouse. ER26.

exclusively on the issue of notice and attorney fees.” ER7. The district court’s only stated reason for finding \$25,000 in costs was that “Plaintiffs seek only \$25,000 in costs.” ER7-8. The district court further ordered appellants who did not post an appeal bond to dismiss their appeal—relief that plaintiffs did not request in their motion or proposed order, and that Newhouse never had notice or opportunity to respond to. ER8; Dkt. 132, 132-5.

Though the district court order permitted plaintiffs to move to increase Newhouse’s appeal bond to \$25,000 upon a showing of Newhouse’s ability to pay, and though Newhouse stipulated in writing to her ability to pay a \$25,000 appeal bond, plaintiffs never moved to increase Newhouse’s appeal bond. ER8; ER30-31.

Newhouse timely amended her appeal to appeal both orders relating to her appeal bond, and posted the \$15,000. ER42-44; ER26-27; ER22-24; ER265. No other appellant posted a bond. This Court denied without prejudice and without explanation Newhouse’s motion in the Ninth Circuit to vacate the excessive appeal bond order. Dkt. 204.

Of the other four appellants, all failed to post an appeal bond; three dismissed their appeals; and a fourth, Robert J. Gaudet of Appeal No. 12-15757, was sanctioned for failing to post an appeal bond or dismiss his appeal. Dkt. 202.

Summary of Argument

Marie 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, amounting to a multiple of their lodestar. While class counsel received \$3.1 million, there is no evidence that the class received even a third of that; it is entirely possible that the ratio of attorney recovery to class recovery is higher than 5:1 despite the Ninth Circuit benchmark that attorneys should recover only 25% of what the class actually receives.

The Ninth Circuit recognizes that this sort of self-dealing is unacceptable under Fed. R. Civ. Proc. 23(e). *In re Bluetooth Headset Prod. Liab. Lit.*, 654 F.3d 935 (9th Cir. 2012). This settlement contains all three “indicia” identified by *Bluetooth* as evidence that counsel pursued their own self-interest and “betray[ed] the class’s interests,” including most importantly, a wildly “disproportionate” fee award several times the value of the settlement to the class. *Id.* at 947-49; *see also Dennis v. Kellogg Co.*, 2012 U.S. App. LEXIS 18576, at *22 (9th Cir. Sept. 4, 2012) (attorney fee and expense award of as low as 38.9% of total recovery “clearly excessive”). To this, we can add what should be another sign of self-dealing: a “claims-made” settlement⁷ combined with artificial means to limit the number of claims class members made. Yet the district court approved the settlement without mentioning, much less distinguishing, *Bluetooth*.

⁷ In a “claims-made” settlement, a defendant’s liability is limited to the number of claims that are made, with no penalty to class counsel or the defendant if the claims process limits the number of claims made. *E.g., Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34, 40, 49, 52 (D. Me. 2005); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U.L. Rev. 469, 529-30 (1994).

That we can only guess at the size of the class recovery in this case provides independent reason for reversal: faced with objections regarding the disproportion between what the attorneys received and what the class actually received, the district court committed reversible error by failing to make any findings calculating the “value of benefits to the class.” *Bluetooth*, 654 F.3d at 944. It was similar independent reversible error for the district court to award class counsel a 1.5 multiple of lodestar and approximately 80% of the class benefits without a “clear explanation of why the disproportionate fee is justified and does not betray the class’s interests.” *Id.* at 649; *Powers v. Eichen*, 229 F.3d 1249, 1256-58 (9th Cir. 2000) (“Because the district court failed to specify adequately the basis for its decision, it abused its discretion.”).

Beyond abusing the class action system, the plaintiffs also abused the Federal Rules of Appellate Procedure. The district court ordered the multiple appellants in this case to post \$60,000 in appeal bonds based on the bald assertion by class counsel that appellate costs in this case would be \$25,000. Given that costs in the Ninth Circuit are limited to ten cents a page and it would be physically inconceivable to legitimately generate 250,000 pages of copies in this case, the factual claim should have been sanctionable. Instead, the district court rewarded the avowal of an impossible figure with an excessive appeal bond and an *ultra vires* order commanding the dismissal of appeals designed to shield an erroneous decision and an abusive class action settlement. Three of the five appellants, none of whom had more than \$79 plus tax at stake, were forced to drop their appeals rather than risk contempt; a fourth was sanctioned for refusing to dismiss his appeal. The Ninth Circuit has already held that

appeal bonds should not be used to deter appeals, but this case demonstrates that this Court needs to put more teeth behind that principle, and hold that such appeal bonds divorced from any reasonable finding of appellate costs—and district court orders purporting the requiring of dismissals of appeals—must be vacated immediately.

Preliminary Statement

Attorneys with the non-profit Center for Class Action Fairness are representing Newhouse *pro bono*. The Center’s mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won millions of dollars for class members. *See, e.g.,* Ashby Jones, *A Litigator Fights Class-Action Suits*, Wall St. J. (Oct. 31, 2011); Allison Frankel, *Legal Activist Ted Frank Cries Conflict of Interest, Forces O’Melveny and Grant & Eisenhofer to Modify Apple Securities Class Action Deal*, American Lawyer Lit. Daily (November 30, 2010); *In re Classmates.com Consol. Litig.*, 2012 U.S. Dist. LEXIS 83480 (W.D. Wash. Jun. 15, 2012).

In other briefing in this case in this Court, class counsel makes the *ad hominem* attack against Newhouse’s non-profit counsel as a “serial and ideological objector who makes his living objecting to class action settlements.” No. 12-15782, Dkt. 22-1 at 2-3. The *ad hominem* is, of course, irrelevant to the merits of Newhouse’s appeal, but, to the extent class counsel continues to argue that the identity of Newhouse’s non-profit counsel is somehow relevant, it cuts in favor of her arguments, as her counsel has won four of the five federal appeals of class action settlements he has argued that have been decided as of this briefing, including both in the Ninth Circuit. *Bluetooth, supra; Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *Dewey v.*

Volkswagen AG, 681 F.3d 170 (3d Cir. 2012); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012).

The reference to being a “serial objector” is perhaps an attempt to unfairly tar Newhouse’s objection with those of “professional objectors,” for-profit attorneys who file objections to blackmail plaintiffs’ attorneys for payment in exchange for withdrawing his or her objections. Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Litig. Report (Aug. 12, 2011) (distinguishing the Center from professional objectors); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal Forum 403, 437 n.150 (public interest groups are not “professional objectors”). Neither the Center nor Frank has ever agreed to a *quid pro quo* settlement of an objection. ER76.

The difference between a “professional objector” and a public-interest objector is a material one. Under the current federal rules, “professional objectors” have an incentive to file objections regardless of the merits of the settlement or the objection; their profits come from being paid not to cause delay. In contrast, a non-profit public-interest attorney representing objectors must triage dozens of requests for *pro bono* representation, loses money on every losing objection (and most winning objections) brought, can only raise charitable donations necessary to remain afloat by demonstrating success, and has no interest in wasting limited resources and time on a meritless objection. ER75-76. This objection is brought in good faith to overturn an unfair settlement that waives Newhouse’s claims for absolutely zero compensation,

and in the public interest of creating precedent deterring future class counsel from negotiating settlements designed to benefit attorneys at the expense of their putative clients.

Argument

I. The district court's approval of a settlement where class counsel received approximately 80% of the settlement benefit was an abuse of discretion.

Here, the district court failed to make any findings about the size of the class benefit, but we know from record evidence that the class received between \$420,000 and \$948,000.⁸ Class counsel's \$3.1 million award dwarfs this amount and consumes approximately 80% of the settlement fund. ER18; ER104; ER187. Again, because the district court failed to make the required findings about the size of the settlement benefit, we can only estimate: class counsel received between 76% (\$3.1/\$4.05 million) and 88% (\$3.1/\$3.52 million) of the settlement fund. We will use shorthand when referring to this as "approximately 80%," though the actual percentage is likely higher than 80%.

That disproportionate 80% is untenable: it is over three times this Circuit's 25% benchmark and is "clearly excessive" under Ninth Circuit precedent. *See Dennis v. Kellogg Co.*, 2012 U.S. App. LEXIS 18576, at *22 (9th Cir. Sept. 4, 2012) (attorney fee and expense award of 38.9% of total recovery "clearly excessive"); *see In re Bluetooth*

⁸ There were 12,000 reimbursement claims (ER104), which corresponds to pecuniary relief between \$420,000 and \$948,000 depending on how many of those claims were for \$35, \$50, or \$79. Settlement §II A-C (ER187).

Headset Prods. Liab. Litig., 654 F.3d 935, 942 (9th Cir. 2011) (noting benchmark for a reasonable award in case alleging economic injury is 25% of the class benefit).

If counsel “receive[s] a disproportionate distribution of the settlement,” it is a “warning sign” that “class counsel have allowed pursuit of their own self-interests ... to infect the negotiations.” *Bluetooth*, 654 F.3d at 947 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998)). While Objector Newhouse apprised the court of the many warning signs, the court failed to consider class counsel’s disproportionate distribution and the other *Bluetooth* signs of self-dealing.

Objector Newhouse does not argue that the parties colluded to limit class members’ recovery; nor does she dispute that the parties can choose to settle in the neighborhood of \$3 to \$5 million. She does dispute, however, that class counsel can arrange such a settlement where class counsel captures a share of the benefits over three times the Ninth Circuit’s 25% benchmark, with no hope of the class recapturing the overage of the unreasonable fee request. Settlement §V.A-B (ER191-92). The settlement is impermissibly self-dealing, and should not stand as a matter of law. In any event, the failure of the district court to address the issue of self-dealing and to explain its independent reasoning, its rejection of the objections, and its significant departure from the 25% benchmark requires remand.

A. A district court must protect absent class members’ interests.

This Circuit’s precedents call upon courts to consider an eight-factor test to evaluate the fairness of a settlement. *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). But “where, as here, a settlement agreement is negotiated prior to

formal class certification, consideration of these eight *Churchill* factors alone is not enough to survive appellate review.” *Bluetooth* at 946-47.

“[W]here the court is ‘[c]onfronted with a request for settlement-only class certification,’ the court must look to the factors ‘designed to protect absentees.’” *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). “[S]ettlements that take place prior to formal class certification require a higher standard of fairness.” *Molski*, 318 F.3d at 953 (quoting *Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir. 2000) and citing *Hanlon*, 150 F.3d at 1026). “[P]re-certification settlement agreements require that we carefully review the entire settlement, paying special attention to ‘terms of the agreement contain[ing] convincing indications that the incentives favoring pursuit of self-interest rather than the class’s interest in fact influenced the outcome of the negotiations.’” *Dennis*, 2012 U.S. App. LEXIS 18576, at *18-19 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003)).

Other circuits agree. A “district court ha[s] a fiduciary responsibility to the silent class members.” *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987). “Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole.” *Mirfasibi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (Posner, J.).

B. *Bluetooth* requires reversal because of this settlement’s multiple signs of self-dealing.

The concerns about the potential conflict of interest between class counsel and their clients “warrant special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement...” *Hanlon*, 150 F.3d at 1021; *accord Bluetooth*, 654 F.3d at 947. “If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained.” *Staton*, 327 F.3d at 964; *accord Bluetooth*, 654 F.3d at 947; John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 883 (1987) (“The classic agency cost problem in class actions involves the ‘sweetheart’ settlement, in which the plaintiff’s attorney trades a high fee award for a low recovery.”).

It is not enough that the settlement happened to be at “arm’s length” without explicit collusion; the settlement must be objectively reasonable as well and avoid self-dealing by the class counsel. Courts “must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests ... to infect the negotiations.” *Bluetooth*, 654 F.3d at 947 (citing *Staton*, 327 F.3d at 960). 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.” *Staton*, 327

F.3d at 964 (quoting *In re Gen. Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995)); accord *Bluetooth*, 654 F.3d at 949; *Mirfasibi*, 356 F.3d at 785.

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. *Staton*, 327 F.3d at 964. The relevant inquiry is whether the attorneys are unfairly attuned to their self-interest at the expense of the class. *Mirfasibi*, 356 F.3d at 785; *Bluetooth*, 654 F.3d at 947; cf. also AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §3.05, comment b at 208 (2010) (“*Principles*”).

Bluetooth suggests a nonexclusive list of three possible signs of self-dealing. *Bluetooth*, 654 F.3d at 947. As in *Bluetooth*, all three of these “multiple indicia” of unfairness are present here.

1. Class counsel's disproportionate award dwarfs class recovery and reflects self-dealing.

One of the most telling signs of self-dealing in this Settlement is counsel's receipt of an exceedingly “disproportionate distribution of the settlement.” *Bluetooth*, 654 F.3d at 947 (quoting *Hanlon*, 150 F.3d at 1021). The benchmark for a reasonable award in the Ninth Circuit in a case alleging economic injury is 25% of the class benefit. *Id.* at 942; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). Even if the plaintiffs wish an award based on their lodestar, a court must cross-check the request against the percentage of the fund. “Just as the lodestar

method can ‘confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate,’ the percentage-of-recovery method can likewise ‘be used to assure that counsel’s fee does not dwarf class recovery.’” *Bluetooth*, 654 F.3d at 945 (quoting *GMC Pick-Up*, 55 F.3d at 821 n.40). The cross-check is there to provide a ceiling, not a floor.

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. ER18; ER104; ER187. By asking for over triple what their clients received, class counsel has obtained approximately 80% of the constructive common fund for itself. *See GMC Pick-Up*, 55 F.3d at 820 (severable fee structure “is, for practical purposes, a constructive common fund”); *id.* at 821 (“[P]rivate agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case.”); *Johnston v. Comerica*, 83 F.3d 241, 246 (8th Cir. 1996) (“[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal.”); *Dennis*, 2012 U.S. App. LEXIS 18576, *20 (designating similar settlement “constructive common fund”). “If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees” then “the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class.” MANUAL FOR COMPLEX LITIGATION §21.71 (4th ed. 2008).

The 80% distribution is more than triple the 25% benchmark in this Circuit. The recently decided *Dennis v. Kellogg, Co.* highlights the enormity of this departure from the benchmark. In *Dennis*, the Ninth Circuit reversed the district court's approval of a class action settlement because the *cy pres* award was defective. 2012 U.S. App. LEXIS 18576, at *19-*20. The Court warned the parties to carefully examine the value of any revised settlement on remand because, after discounting the defective *cy pres* relief, "the \$2 million attorneys' fees award becomes 38.9% of the total, which is clearly excessive under our guidelines." *Id.* at *22. Because a 38.9% attorney award is "clearly excessive" under Ninth Circuit law, the 80% award in this case is indefensible *a fortiori*.

The \$0.42 to \$0.95 million class benefit is calculated based on plaintiffs' estimation of 12,000 claims. ER104; ER187. The district court made no findings as to the actual value of the settlement to the class,⁹ though the amount the class actually receives under the settlement is a critical component in performing the *Bluetooth* disproportionality analysis. *Bluetooth*, 654 F.3d at 943 (reversing and remanding after district court failed to make comparison between fee award and value of settlement

⁹ The fault did not lie alone with the district court. The settling parties' decision to set the claims deadline a month after the fairness hearing can and should be considered another *Bluetooth* warning sign of an unfair settlement, for it is designed to insulate the fee requests from a comparison with the actual amounts claims by class members. ER 144, 148, 152. Without information regarding the actual value of the settlement, class counsel could more readily disguise how excessive their fee request is. *Cf. Dennis*, 2012 U.S. App. LEXIS 18576, at *24 (rejecting a similar "Just trust us. Uphold the settlement now, and we'll tell you what it is later" argument).

benefit to class); *GMC Pick-Up*, 55 F.3d at 822 (“At the very least, the district court on remand needs to make some reasonable assessment of the settlement’s value and determine the precise percentage represented by the attorneys’ fees.”); *cf. Dennis*, 2012 U.S. App. LEXIS 18576, at *22 (instructing that settlement valuation “must be examined with great care to eliminate the possibility that it serves only the ‘self-interests’ of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious”).¹⁰ A consensus of district courts post-*Bluetooth* have applied disproportionality analysis in this manner. *E.g. Lemus v. H&R Block Enters. LLC*, No. C 09-3179-SI, 2012 U.S. Dist. LEXIS 119026, at *21-22 (N.D. Cal. Aug. 22, 2012), *modified on other grounds on reconsideration* 2012 U.S. Dist. LEXIS 128514 (Sept. 10, 2012); *Trombley v. Bank of Am. Corp.*, No. 08-cv-456-JD, 2012 U.S. Dist. LEXIS 63072, at *8-9 (D. R.I. May 3, 2012); *Ferrington v. McAfee, Inc.*, No. 10-cv-1455-LHK, 2012 U.S. Dist. LEXIS 49160, at *36-37 (N.D. Cal. Apr. 6, 2012).

In plaintiffs’ dismissal briefing to this Court, plaintiffs argued that the value of the class benefit should also include \$1.6 million for class members who received replacement adapters under the Adapter Replacement Program, as well as \$1 to \$2 million in notice and administration costs. *See* No. 12-15782, Dkt. 27 at 12-13. This

¹⁰ Because the claims period expired seven months ago, the settlement’s actual value could now be calculated exactly. *In re Pet Food Products Liability Litigation* involved a claims process where the claims period closed six weeks after the fairness hearing. 629 F.3d 333, 340 n.11 (3d Cir. 2010). At the Third Circuit’s request, the claims administrator provided updated information regarding the total amount of claims. *Id.* (reversing settlement because district court had insufficient information to determine whether settlement was fair).

Court should reject all three inclusions as a matter of law, but even assuming the inclusions *arguendo* does not save plaintiffs from the conclusion that class counsel engaged in impermissible self-dealing.

a. The plaintiffs failed, as a matter of law, to prove the replacement program was a class benefit resulting from the settlement.

The Adapter Replacement Program was instituted in August 2008, nearly a year prior to the filing of the action. ER214-15; ER159; ER189; Dkt. 44 at 41-42; Dkt. 1. The *pre-existing* replacement program is not a benefit of this suit or Settlement. The ALI's *Principles of the Law of Aggregate Litigation* has an illustration that is precisely on point: class counsel cannot take credit for an injunction that has the defendant doing what it was already doing before the litigation started. §3.13 *Illustration 2* (2010). *Cf. also In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (“Plaintiffs want relief that duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class.”).

Perhaps the plaintiffs will claim for the first time that what they really mean is that they did a better job of publicizing the 2008 replacement program than Apple did, and that this was a marginal benefit. But whether the settlement increased participation in the 2008 replacement program is an empirical question, rather than a proposition that can be asserted *ipse dixit*. How often did class members take advantage of the program before the settlement, and how often did they take advantage after the settlement notice? Even if the settlement increased the participation rate by 33%, that means the marginal benefit of the settlement from the

new publicity of the replacement program is \$400,000, not \$1.6 million, because Apple would have replaced \$1.2 million of adapters anyway without the settlement. The parties introduced no record evidence as to how many Apple customers participated in the 2008 replacement program before the settlement, much less whether participation figure in the 2008 replacement program increased by even a single percentage point after the settlement notice. Because the settling parties bear the burden of proof (*GMC Pick-up*, 55 F.3d at 785; *Principles* § 3.05(c)), we can draw an adverse inference from the failure to submit any evidence to the district court that this was not a class benefit. At a minimum, the district court erred by failing to make findings. *Bluetooth*, 654 F.3d at 944-45.

b. Notice costs are costs, not benefits, of class actions and class action settlements.

The notion that class counsel is entitled to count the costs of notice and claims administration as a benefit to the class is fundamentally mistaken and poor public policy. Awarding attorneys' fees regardless of whether settlement money is paid to settlement administrators, the postal service, or to the class members (who are the attorneys' actual putative clients) creates poor incentives that contradict the purposes behind this Circuit's "percentage of the recovery" fee approach.

Plaintiffs' argument is undoubtedly based on *Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003), which asserted "The post-settlement cost of providing notice to the class can reasonably be considered a benefit to the class." *Staton* cited no authority and provided no reasoning for this *dicta*. In the context of the *Staton* opinion—which

found the attorneys' fee award in that case impermissibly high even including the costs of notice as a class benefit—it appears that this Court was merely assuming that the costs of notice was a class benefit *arguendo*.

This Court should reject the argument for two reasons: *first*, as a matter of law, post-settlement notice is something that is done for the benefit of *defendants*, rather than the class, and thus should not be double-counted as a class benefit; *second*, the *Staton* holding, carried as far as plaintiffs would, has absurd results that contradict Rule 23(e) and the Class Action Fairness Act.

The sole consideration that defendants receive for settling a class action is a waiver of all claims by class members. But if an individual class member “later claims he did not receive adequate notice and therefore should not be bound by the settlement, he can litigate that issue on an individual basis when the settlement is raised as a bar to a lawsuit he has brought.” *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). Defendants therefore have every incentive to ensure that class notice meets constitutional requirements. This is not a hypothetical concern: defendants have found themselves on the end of repeat litigation when class members failed to receive constitutionally-adequate notice. *See, e.g., Besinga v. United States*, 923 F.2d 133, 137 (9th Cir. 1991) (reversing dismissal of plaintiff's case because no notice was given in prior class action) (citing cases); *Hecht v. United Collection Bureau*, 691 F.3d 218 (2d. Cir. 2012) (permitting relitigation of class action because of inadequacy of class notice in previous settlement); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226-29 (11th Cir. 1998) (same). Notice benefits the defendants by creating claim

preclusion that would not otherwise exist. Notice enables class members to make claims, but those amounts claimed are already included in the final tabulation of settlement value, there is no need for double-counting by including the costs of the notice in addition to its yield. As such, the expense of class notice should not be counted as a benefit on the class's side of the ledger.¹¹

Indeed, if this Court adopts the plaintiffs' view about the value of class notice, ***the very act of settlement*** could be considered "consideration"—even if class members get nothing in exchange for waiving their rights—simply because they received a letter in the mail notifying them of the settlement. For example, one could imagine a nationwide zero-dollar settlement where the defendant is entitled to deduct half the cost of notice from individual customers' accounts to pay for attorneys' fees. Such a settlement would normally be prohibited by 28 U.S.C. §1713.¹² But under plaintiffs' reading of the law, the very act of notice "substantially outweighs the monetary loss," so the skimming of class members' accounts would be permissible.

Similarly, one can imagine a settlement that requires the defendant to spend \$30 million to provide personal service to every class member, hand-delivering an

¹¹ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974), does not help plaintiffs' argument. *Eisen* does not require the *class* to pay for class notice; it requires the representative *plaintiff* to pay for class notice. The benefit to the representative plaintiff is not a class-wide benefit.

¹² "The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss."

eight-page letter that informs class members that all of their claims will be waived and the class will receive nothing, but the attorneys will get \$10 million because they provided such good notice. Such examples demonstrate the absurdity of counting notice as a class benefit.

The recently decided *In re Aqua Dots Products Liability Litigation* is informative: the Seventh Circuit recognized that items such as the notice and class administration expense of class action settlement and litigation are a social *cost* that present an argument against class certification; if class notice was a class benefit, *Aqua Dots* would have reached the opposite result. 654 F.3d 748, 751 (7th Cir. 2011) (Easterbrook, J.). *Cf. In re Hotel Tel. Charges*, 500 F.2d 86, 91-92 (9th Cir. 1974) (“Whenever the principal, if not the only beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, *a costly* and time-consuming class action is hardly the superior method for resolving the dispute.”). *Cf. also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 28 (1991) (social benefits of class action notice in “the large-scale, small-claim class action” “appear minimal at best”).

The costs of notice are there to protect the defendants’ interests, and are not by themselves something that class counsel should be allowed to use to artificially inflate the size of the class benefit and thus the permissible attorneys’ fee.

c. The same is true for administrative expenses.

The same reasoning applies to administrative expenses. Claims administration should not be treated as a class benefit. To do so would lead to the absurd conclusion that the class is indifferent between an \$8 million settlement where \$1 million is paid to the class and \$7 million is spent on administration and a settlement where \$7 million is spent on claims and \$1 million on administration. Class members clearly prefer the latter settlement. Why should class counsel get a commission on the profits of a third-party settlement administrator? Such a calculation is the economic equivalent of a kickback where class counsel gets money based on how much the settlement administrator bills.

These principles are not solely a matter of common-sense economics; Judge Vaughn Walker made precisely this point in a case where he was evaluating competing bids for lead class counsel. “First, an attorney generally has no incentive to minimize litigation expenses unless his fee award is inversely related to such expenses. Second, when an attorney treats a resource devoted to litigation as a reimbursable expense, the attorney has a clear incentive to substitute that resource for those paid for out of the attorney fee, even if it increases the overall cost of the litigation to the client.” *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 470 (N.D. Cal. 1994). Conversely: “If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses.” *Id.* at 471. This principle of the need to align attorney incentives with maximizing class benefit is what lies behind several circuits’ adoption of the “percentage-of-the-fund” approach in

calculating fee awards that the Ninth Circuit uses. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 n.12 (3d Cir. 2001); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265-71 (D.C. Cir. 1993). *See also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (attorney-fee calculations should use methods that align the interests of attorney and client). “Put another way, incentives to minimize expenses and to allocate resources properly go much farther toward cost efficiency than can *post hoc* judicial review.” *In re Wells Fargo Sec. Litig.*, 157 F.R.D. at 471.

This is not a hypothetical concern. The burdensome claims process here not only reduced claims, but unnecessarily multiplied administrative costs. Though the class consisted of owners of Apple *computers*, though notice of the Settlement was provided via *email* and the claim form to be *downloaded* from the settlement website, and though the settlement administrator had experience administering settlements with *electronic* claims procedures, claimants had no means of submitting claims *online*. ER178-79; ER182; ER144-47. Instead, the claimant had to fill out a paper form and send it via mail to the settlement administrator for manual processing, reducing the number of claims. ER182; *see generally* Section I.B.4 below. Such manual processing is more expensive than a claims process done purely electronically. Under class counsel’s reasoning, class counsel has every incentive to structure an inefficient and costly settlement structure to recover a commission on administration costs at the expense of the class. Class members would lose twice.

d. Even if one artificially inflates the calculation of class benefit as plaintiffs unreasonably request, class counsel *still* received a disproportionate share of the settlement.

Finally, even if this Court were to grant the benefit of the doubt to every unreasonable legal and factual argument class counsel makes for artificially inflating the calculation of the class benefit—by including the expensive and burdensome claims process as a “benefit” to the class, by shifting the accounting ledger on notice as a “benefit” to the class rather than the defendant, by assuming every claim was paid for \$79 (rather than \$35), and by unreasonably generously assuming that no one ever took advantage of the 2008 replacement program until after the 2011 settlement and including all \$1.6 million of claims from the pre-existing replacement program in the calculation of class benefit—class counsel would still be receiving a “clearly excessive” 40% of the settlement value. *Dennis*, 2012 U.S. App. LEXIS 18576, at *22. \$3.1 million/\$7.65 million (\$3.1M fees + \$0.95M class recovery + \$2M notice and administration costs + \$1.6M adapter program) = 40.5%. No matter how you slice it, the district court approved a settlement where class counsel received an impermissibly disproportionate share of the settlement.

2. The settlement’s “clear sailing” provision shows self-dealing.

The settlement has a “clear sailing” provision (ER191-92) providing for the payment of attorneys’ fees separate and apart from class funds without challenge from the defendants. *Bluetooth*, 654 F.3d at 948. A clear sailing clause stipulates that attorney awards will not be contested by opposing parties. “Such a clause by its very nature

deprives the court of the advantages of the adversary process.” *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). The clause “suggests, strongly,” that its associated fee request should go “under the microscope of judicial scrutiny.” *Id.* at 525. The clear sailing clause lays the groundwork for lawyers to “urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red carpet treatment on fees.” *Id.* at 524; accord *Bluetooth*, 654 F.3d at 947; see also *Vought v. Bank of Am., N.A.*, No. 10-CV-2052, 2012 U.S. Dist. LEXIS 143595, *83-*84 (C.D. Ill. Oct. 4, 2012) (rejecting settlement with clear sailing provision because “while the present case does not utilize a classic reversionary fund in which attorneys’ fees are paid from a common pool that directly reduces the class’s recovery, it undoubtedly did not escape either party’s attention that every dollar not claimed from the fund was one dollar that [defendant] could use to pay class counsel’s fees”); William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 *Tul. L. Rev.* 813, 816-17 (2003).

Here, class counsel put its own fees ahead of the interests of the class by negotiating a provision that insulated those fees from challenge by the defendant. Class counsel provided no justification for this self-serving clause.

3. The “kicker” arrangement is another sign of self-dealing.

Simply reducing the attorney fee wouldn’t correct the unfairness of the settlement, because the settlement contains a “kicker” arrangement (ER191-92) by which the “parties arrange[d] for fees not awarded to revert to defendants rather than be added to the class fund.” *Bluetooth*, 654 F.3d at 947. A “kicker arrangement

reverting unpaid attorneys' fees to the defendant rather than to the class amplifies the danger" that is "already suggested by a clear sailing provision." *Id.* at 949. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Id.* The class is unambiguously worse off when any reduction in a fee award reverts to the defendant instead of the class. The only reason to negotiate that provision is for the self-serving effect of protecting class counsel by deterring court scrutiny of the fee award. *E.g.*, Charles Silver, *Due Process and the Lodestar Method*, 74 *Tulane L. Rev.* 1809, 1839 (2000) (reversionary kicker is "a strategic effort to insulate a fee award from attack"); Lester Brickman, *Lawyer Barons* 522-25 (2011) (same; further arguing reversionary kicker should be considered *per se* unethical).

The potential overpayment of fees in a settlement does not just affect the defendant, but affects the class, especially when the attorneys are receiving a "disproportionate fee" that may "betray the class's interests." *Bluetooth*, 654 F.3d at 949. If "class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class." *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000). Thus, judges must look at the settlement and the fees together holistically to determine the fairness of the settlement. "Even when technically funded separately, the class recovery and the agreement on attorneys' fees should be viewed as a 'package deal.'" *Bluetooth*, 654 F.3d at 948-49 (quoting *Johnston*, 83 F.3d at 245-46).

Here, the inequity in relief to class members highlights the impropriety of the self-dealing kicker provision. Some class members (such as Newhouse) spent \$79 to replace their adapters but will receive nothing from the settlement. While Apple committed to paying \$3.1 million to class counsel, class counsel jealously guarded this fee with the kicker provision rather than risking that overage might redound to their clients who walked away empty-handed. Had the settlement been structured as a common fund, rather than with a kicker, the inequity would have been more apparent, and a split of \$1 million for the attorneys and \$3 million for the class—rather than the reverse—would have allowed class members like Newhouse to receive their fair share of the settlement.

Again, class counsel provided no justification for this clause that injured class members' interests.

4. The claims process is further evidence of self-dealing.

In addition to the *Bluetooth* self-dealing signs, the Settlement's claims process further evidences self-dealing. As explained above, the settlement procedure for the class of Apple *computer* owners was in large part electronic: notification was sent via *email* and the notice and claim form were available for *downloading* from the settlement *website*. ER178-79. Yet when it came to the actual submission of a claim, a claimant had to fill out a paper form and send it via mail to the settlement administrator for manual processing. ER182. Class members had to jump through these hoops even though Apple had internal records of who purchased replacement adapters. *E.g.*, ER39. The settlement administrator here had experience administering settlements

with *electronic* claims procedures. ER 146. The only reason the defendant would agree to incur this additional settlement administration expense was if they expected the additional costs to be more than offset by the number of class members deterred from seeking to make claims by the inconvenience of the hoop-jumping. Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* 6 (2010);¹³ Tiffany Allen, *Anticipating Claims Filing Rates in Class Action Settlements* (Nov. 2008) (“online claims-filing tends to increase the overall claims rate, as it is a convenient option for class members of many demographics”);¹⁴ *see also* *Walter v. Hughes Communs., Inc.*, No. 09-2136 SC, 2011 U.S. Dist. LEXIS 72290, *40-*41 (N.D. Cal. July 6, 2011) (rejecting a settlement with a postal-mail-only claims process because “[f]or unknown reasons, the parties have opted for an unnecessarily taxing claims procedure over [online] alternatives”).

And it worked. Of the approximate 10 million class members, 340,000 class members visited the settlement website and 66,000 claim forms were downloaded or mailed to class members. ER91; ER104-105. Yet only 12,000 claims were submitted. ER104. The fact that only 0.1% of the class actually submitted a claim demonstrates that the cumbersome process deterred potential claimants. Class counsel agreed to a claims process—including requiring manual resubmission of information in Apple’s

¹³ Available at [http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf).

¹⁴ Available at http://www.rustconsulting.com/Portals/0/pdf/Monograph_ClaimsFilingRates.pdf.

possession—that would artificially throttle the number of claims made, and thus the recovery of their clients. In conjunction with the disproportionate recovery and other *Bluetooth* red flags, the evidence of self-dealing is abundantly clear.

In short, this case has all the indicia of self-dealing present in *Bluetooth* and more. *Bluetooth* required rejection of the settlement as a matter of law—but the district court did not even mention it.

C. The district court’s failure to apply *Bluetooth*, failure to justify departure from the 25% benchmark, and failure to exercise independent judgment are each reversible errors.

Even if this Court disagrees that the settlement is unfair as a matter of law, reversal is required because the district court failed to apply the law in numerous respects. *First*, although Newhouse raised the *Bluetooth* problems in her objection and at the fairness hearing, the district court approved the settlement without even mentioning *Bluetooth* or addressing any of Newhouse’s objections. ER13-21. The opinion did not mention the clear-sailing provision; the opinion did not mention the kicker; the opinion did not even consider the question of what the class “actually received” or consider the problem of the disproportionate fee request to the fairness of the Settlement. *Id.* As such, *Bluetooth* requires, at a minimum, remand for a district court to evaluate the fairness of the settlement under the correct legal standard. *E.g.*, 654 F.3d at 947-48 (finding reversible error because, *inter alia*, district court “ignored the clear sailing provision”); *id.* at 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).

Second, the district court did not provide justification for the 80% class counsel award—which was not only disproportionate, but a multiple of its surely excessive lodestar given that class counsel made more filings on the docket to attack objectors and try to prevent an appeal than it did prosecuting the case. If the district court is to depart from the 25% benchmark, it must provide “adequate explanation in the record of any ‘special circumstances’ justifying a departure.” *Bluetooth*, 654 F.3d at 942. That was entirely absent from the record here. *Powers v. Eichen* is directly on point. 229 F.3d 1249, 1256-58 (9th Cir. 2000). There, the district court mentioned at an oral hearing that there were reasons to depart upward from the 25% benchmark, and reasons to depart downward from the benchmark, but issued an opinion that simply awarded 30% without explanation why it departed from the benchmark. *Id.* The Ninth Circuit remanded because it could not “conduct meaningful appellate review” on the reasoning for departing from a 25% benchmark. *Id.* at 1258. Here, the district court’s 80% award is much more drastic than the departure in *Powers*. While it is difficult to imagine how an 80% distribution would ever be appropriate in a consumer class action seeking pecuniary relief, the court made no attempt to justify the extraordinary departure.

Third, the district court’s failures to apply *Bluetooth* and justify departure from the 25% benchmark are indicative of an overarching problem: the court simply failed to exercise independent judgment in approving the settlement. While multiple class members objected, and raised a number of legitimate concerns about the Settlement,

the district court's opinion approving the settlement is just a rubber stamp of a proposed order, striking out the word "proposed." *Compare* ER13-19 *with* ER126-32.

Such "[r]ubber-stamp approval, even in the absence of objections, is improper." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (fee award). "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*, 2012 U.S. App. LEXIS 18576, at *11 (internal quotations omitted); *see also Mandujano v. Basix Vegetable Prods., Inc.*, 541 F.2d 832, 836-37 (9th Cir. 1976). *Accord Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2d Cir. 1982). There was no such reasoned response at the fairness hearing or at any other time. In fact, at the fairness hearing, the district court expressed an unspecified "intent to make some final adjustments" to the settlement, an intent that went unrealized. ER21; ER13-19. Moreover, in the district court's separate post-appeal opinion and order requiring an oversized appeal bond in violation of Fed. R. App. 7, it adopted class counsel's mischaracterization of the nature of Newhouse's objection as solely about "fees," again without mentioning *Bluetooth*, the claims process designed to deter claims, or even Newhouse's objection and appellate papers, thus further demonstrating that the district court never fairly evaluated, much less responded to, Newhouse's objection. ER7.

The district court's failure here is akin to the reversible error in *New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283 (10th Cir. 2008). In *New England Health Care*, the Tenth Circuit reversed the approval of a class action

settlement in a securities fraud case. 512 F.3d at 1290-91. The district court had summarized the contentions of the non-settling defendants and then “simply ‘overruled’” their objections “noting only that the provisions were ‘either legally required, or [were] legally appropriate’ in the case ‘[b]ased on the reasons stated, arguments advanced, and authorities cited by [settling defendant] in its reply.’” *Id.* at 1290. The Tenth Circuit held such cursory examination to be “insufficient” because it did not allow the appellate court “to know the path the district court followed.” *Id.* This case is even worse. Here, the district court’s dismissed the objections with a single sentence: “All objections to the Settlement, to the extent not previously withdrawn, are overruled.” ER15 ¶ 7. Reversal is required because this Court has no means of reviewing whatever path—if any—the district court followed here.¹⁵

This is not merely a technicality, but goes to the fundamental nature of the class action settlement process. A district court has an independent responsibility to ensure that a settlement is fair; that independent scrutiny is a prerequisite for ensuring that the absent class members’ due process is protected under Rule 23.

Bluetooth is further precedent that this is the correct result. 654 F.3d at 944-45 (criticizing failure of district court to calculate “value of benefits to the class” and remanding for findings); *id.* at 949 (“approval of the settlement had to be supported by a clear explanation of why the disproportionate fee is justified and does not betray

¹⁵ There is no reason to depart from *New England Health Care*; this Court will only create a circuit split upon “painstaking inquiry.” *Zimmerman v. Oregon Dep’t. of Justice*, 170 F. 3d 1169, 1184 (9th Cir. 1999).

the class's interests"; reversing and remanding "[b]ecause the district court did not provide such explanation"); *see also GMC Pick-Up*, 55 F.3d at 822 ("At the very least, the district court on remand needs to make some reasonable assessment of the settlement's value and determine the precise percentage represented by the attorneys' fees.").

The district court has given no reasoning for approving the settlement and overruling the objections, and nothing for this Court to review. Under *Powers v. Eichen*, under *Bluetooth*, under *Dennis*, under *New England Health Care*, and under Rule 23(e)(2), this is reason enough to reverse the settlement approval.

II. The district court's bond order is impermissibly punitive, and should have been vacated.

After final judgment was entered, the district court issued an order granting in part plaintiffs' motion to require the objectors-appellants to each post a Fed. R. App. P. 7 appeal bond. The district court found that the costs would be \$25,000 per objector but based on perceived financial hardship, the court ordered each objector to pay \$15,000 for a total of \$60,000. ER8. Fed. R. App. Proc. 7 limits an appeal bond to the "amount necessary to ensure payment of costs on appeal." The district's appeal bond order should be vacated for three reasons: (1) the district court improperly based its ruling on its evaluation of the merits of the appeal, in direct contradiction of Ninth Circuit binding precedent; (2) the court's finding that taxable costs for appellees would be \$25,000 was clearly erroneous, unsupported by any competent evidence, and absurdly overstated; and (3) the order, going beyond what class counsel requested,

purported to require appellants to dismiss their appeals. The real purpose of the bond is punitive, rather than to secure costs, and this is wrong.

A. The district court applied the wrong legal standard in its bond order.

The district court stated that it was granting the appeal bond motion because “the merits of the appeals at issue weigh heavily in favor of requiring a bond, as each is lacking in merit.” ER7. This is legal error. The 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. *Azizian v. Federated Dept. Stores*, 499 F.3d 950, 961 (9th Cir. 2007); accord *Vaughn v. Am. Honda Motor Co.*, 507 F.3d 295, 299 (5th Cir. 2007); *In re American Pres. Lines, Inc.*, 779 F.2d 714, 714 (D.C. Cir. 1985).

“Allowing districts court to impose high Rule 7 bonds on where the appeals *might* be found frivolous risks ‘impermissibly encumber[ing]’ appellants’ right to appeal and ‘effectively preempt[ing] this court’s prerogative’ to make its own frivolousness determination.” *Azizian*, 499 F.3d at 961 (quoting *American Pres. Lines*, 779 F.2d at 717, 718). *Azizian* thus instructs that ordering excessive Rule 7 bonds based on prejudgment of the appeal is improper for two reasons.

First, such prejudgment improperly encroaches on appellant’s rights. It is not surprising that a district court would find an appeal of its *own* decision to be meritless. But allowing such prejudgment to affect the district court’s bond appeal determination runs the risk that a district judge may order excessive bonds simply to avoid scrutiny of his own opinions. As Judge Easterbrook recently held, a “district

judge ought not try to insulate his decisions from appellate review.” *Robert F. Booth Trust*, 687 F.3d at 318 (Rule 24). The district court’s excessive bond based on improper prejudgment had the practical effect of driving three of the five appellants away and stripping them of their appellate rights; a fourth, Gaudet in the companion appeal No. 12-15757, now faces the additional hurdle of having to appeal sanctions for failing to comply with an order to dismiss his original appeal on the merits. The district court impermissibly acted to prevent this Court from reviewing its reversible failure to apply *Bluetooth*, its reversible failure to explain the significant departure from the 25% benchmark, and its reversible failure to exercise independent judgment.

And *second*, such prejudgment is unnecessary. The appellate courts are well equipped to deal with frivolous appeals by means of dismissal or monetary remedies under Rule 38. *American Pres. Lines*, 779 F.2d at 717. The district court need not act as gatekeeper and deprive this Court of its own merits determination—especially when the order requires an appellant to dismiss his or her own appeal, when failure to post an appeal bond is not necessarily a grounds for appeal dismissal. *Azizian*, 499 F.3d at 962 (declining to order dismissal of appeal for failure to post appeal bond).

The legal error—combined with the portion of the order requiring appellants to dismiss their own appeal if they failed to post the bond, and a later order sanctioning a different appellant for failing to dismiss the appeal—shows that the purpose of the appeal bond was an impermissibly punitive attempt to deter appeal, and is independent reason to vacate the appeal bond order.

B. The district court's finding of \$25,000 in costs is contradicted by the record evidence and common sense, and is thus clearly erroneous.

Taxable costs for a Fed. R. App. Proc. 7 appeal bond are determined by Fed. R. App. Proc. 39. Plaintiffs are appellees: they have no filing fees, and have no independent responsibility for producing excerpts of record under Fed. R. App. Proc. 30 unless appellant Newhouse fails to include necessary documents. Their only taxable costs are the costs of copies of their briefs, which this Court caps at ten cents a page. Fed. R. App. Proc. 39(c); Cir. R. 39-1. It will be impossible for the appellees to generate 250,000 copies in this Court, given the lack of litigation or transcript pages in the court below. The district court's finding that taxable costs would be \$25,000 is clearly erroneous: it is extraordinarily unlikely that appellees' costs will exceed a tenth of that.

The sole evidentiary support for the district court's finding was Paragraph 20 of the declaration of Craig Briskin, which asserted under oath that costs would be \$25,000. ER84-85. But that figure made no representations or calculations about taxable Rule 39 costs, and included multiple expenses far outside the scope of Rule 39, such as copying costs for motion briefs (though the Ninth Circuit forbids paper copies of motion briefs), "costs related to conducting discovery in relation to the appeal" (though this is not an appellate cost under Rule 7 or Rule 39 and though plaintiffs had no reason to conduct discovery and conducted no discovery on Newhouse (ER26; ER31-32)) and "incremental administration costs the parties may incur as a result of [Newhouse's] appeal" (which again is not an appellate cost). *Id.* The district court committed legal error in relying upon Mr. Briskin's bald assertion of

costs, because that calculation failed to comply with Fed. R. App. Proc. 39 and Cir. R. 39-1 and was on its face self-refuting because it included expenses that could never be awarded. *See generally* ER78-79.

Recent cases confirm that, when courts take the trouble to scrutinize and calculate taxable costs (as opposed to simply issue impermissibly punitive bonds), those costs are in the range of a few thousand dollars at most—even when the cases are far more complicated than the case at bar, which involved a handful of amended complaints and then immediately settled on Docket Entry 70 before there was any motion practice. For example, in *Cobell v. Salazar*, a class action involving two separate classes, a multi-billion dollar settlement of dozens of different claims, fifteen years of litigation, thousands of docket entries with countless exhibits under seal, and over twenty reported opinions, the district court “agree[d] with [the objector appellant] that the plaintiffs’ actual taxable costs pursuant to Fed. R. App. P. 39 will be closer to \$200 than the \$34,000 or so asserted by the plaintiffs.” 816 F. Supp. 2d 10, 16 (D.D.C. 2011). (And, indeed, the eventual cost award in that case was \$765. *Cobell v. Salazar*, No. 11-5205 (Order of Jul. 23, 2012).) *See also Vaughn*, 507 F.3d at 300 (reducing bond from \$150,000 to \$1,000).

Here, the plaintiffs will be submitting a single brief as appellees; it is extraordinarily unlikely that their supplemental excerpts of record will exceed one volume. Plaintiffs failed to submit legitimate evidence of taxable costs. Plaintiffs failed to rebut (and the district court gave no indication that it considered) Newhouse’s evidence that taxable costs would be under \$2,000. ER78-79. The district court’s

finding that taxable costs would be \$25,000—more than ten times the likely costs in this case—is thus clearly erroneous.

The bad faith of plaintiffs' claim of the need for \$25,000 for an appeal bond is demonstrated by their sudden indifference to pursuing Newhouse for costs once she demonstrated her willingness to post the bond. The district court ordered a \$15,000 appeal bond from Newhouse, but told plaintiffs they could make an expedited motion for an increase to \$25,000 if they demonstrated Newhouse's "ability to pay." Newhouse stipulated that she did not contest her "ability to pay" \$25,000. Yet plaintiffs never asked for an increase in the appeal bond amount from \$15,000 to \$25,000. ER1-2; ER29; ER8; ER4; ER26-27.

The failure of plaintiffs to file a one-page motion to increase the appeal bond to \$25,000—even as they blizzarded the Ninth Circuit with procedurally improper motions—demonstrates that they had zero concern about its ability (or power) to recover \$25,000 in costs, and were simply hoping to create an illegitimate barrier to appeal.

C. The district court's order requiring appellants who did not post an appeal bond to dismiss their appeal was *ultra vires*.

"[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 has, on occasion, decided not to dismiss appeals where the appellant failed to post a required appeal bond. *Id.* at 962. Yet the district court, *sua sponte* 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, as this Court has already held, “unwarranted and cannot be tolerated.”

For these reasons, the appeal bond order should be vacated and this Court should further order that the bond Ms. Newhouse has posted be returned to her.

Unfortunately, a motions panel of this Court tolerated what the Ninth Circuit previously said “cannot be tolerated”: it refused (albeit without prejudice) to vacate the appeal bond order at Newhouse’s request. Dkt. 204. The Court should thus further issue an opinion making it clear that such punitive bonds are inappropriate, and should be vacated by an appellate court at an early enough juncture so that appellants are not at risk of criminal contempt when district courts issue illegal orders demanding dismissal of appeals.¹⁶

¹⁶ This Court’s failure to issue a substantive ruling on Newhouse’s earlier motion to vacate the appeal bond orders was procedurally unfortunate. Newhouse was forced to post an illegal appeal bond to avoid the risk of being held in contempt. The motions panel’s decision to submit the question to the merits panel instead of disposing of the issue essentially deprived Newhouse of the relief she was legally entitled to—the right to have an appeal heard on the merits without the burden of depositing a substantial amount of money at 0% interest in the district court. The consequences of the motion panel’s abstention were even more dramatic for the other appellant, Gaudet, who is fortunate he was only sanctioned, rather than held in criminal contempt, for disregarding the illegal order to dismiss his appeal. Dkt. 202. Indeed, the motion panel’s abstention effectively punished Newhouse for following a court order instead of simply ignoring it like Gaudet did. It does Newhouse little good to learn that the appeal bond was improper and should be returned *after* she wins her appeal on the merits. That presents perverse incentives for future appellants.

III. Objector Newhouse has standing to appeal the settlement approval and to appeal the fee award to the extent it bears upon the fairness of the settlement.

This case is on all fours with *Bluetooth*, where the successful appellants had standing, and there is no non-frivolous argument that Newhouse does not have standing. Nevertheless, because plaintiffs filed a vexatious motion to dismiss on the theory that Newhouse does not have standing to appeal, she addresses it here.

“To have standing, an appellant must establish that she has suffered an injury, caused by the appellee, that is redressable.” *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1146 (9th Cir. 2000) (citing *Bennett v. Spear*, 520 U.S. 154, 167 (1997)).

As a class member, Objector Newhouse would benefit from a settlement that fairly apportions the \$3.9 million constructive common fund Apple was willing to provide between class members and counsel. The unfair self-dealing of class counsel prevented that. Instead, Newhouse was arbitrarily excluded from recovery by the settlement, which waives Newhouse’s claims against Apple—though Apple would have permitted Newhouse to obtain a free replacement adapter had her original MagSafe lasted to 2012 instead of failing in 2010. Class counsel agreed to gerrymander and artificially limit class recovery for Newhouse and countless other class members to ensure that class counsel received an excessive share of the total class benefit.

Even beyond *Lobatz* and *Bluetooth*, when a class member seeks to reverse an undesired settlement approval order, there is a wide consensus that being bound by the settlement’s release of claims is sufficient Article III injury. *See e.g., Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002) (ability of objecting class member to appeal

settlement approval “does not implicate the jurisdiction of the courts under Article III of the Constitution”); *id.* at 7 (an objector’s “complaint clearly falls within the zone of interests of the requirement that a settlement be fair to all class members”); *Bluetooth*, 654 F.3d at 949 n.9; *Knisley v. Network Assocs.*, 312 F.3d 1123, 1127 (9th Cir. 2002) (rejecting standing of objector to fees only because objector dismissed appeal of settlement approval); *Cobell v. Salazar*, 679 F.3d 909, 919 (D.C. Cir. 2012) (“Any other conclusion would prove a bitter irony for those who have lost their [chose in action]”); *Union Asset Mgmt. v. Dell, Inc.*, 669 F.3d 632, 638-39 (5th Cir. 2012) (“[a]ny class member has standing to object to a class settlement”); *United States v. Alabama*, 271 Fed. App’x. 896, 898-99 (11th Cir. 2008) (*per curiam*); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1183 & n.1 (10th Cir. 2002) (objectors who have objected to entire settlement are entitled to raise all issues relating to settlement fairness with respect to entire class); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727-32 (3d Cir. 2001). Reversing the settlement approval would redress such injury.¹⁷

¹⁷ To the extent plaintiffs are claiming (as they did during the earlier motion briefing) that Newhouse would not be entitled to recover if the settlement was struck down and Newhouse’s claim was litigated as part of the class action, plaintiffs’ claim contradicts their own complaint’s allegations. ER226-30. The fact that the settling parties asked for and received a certification of a single class with common claims that included Newhouse judicially estops them from claiming that Newhouse is actually in an uncertified and unrepresented subclass not entitled to relief under any circumstances. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001); *cf., e.g., Dewey v. Volkswagen AG*, 681 F.3d 170 (3d Cir. 2012) (reversing approval of settlement that “divided a single class into two groups of plaintiffs that receive different benefits” when second group did not have separate representation).

All three prongs of the Article III standing test—injury, causation, and redressability—are thus met.

In its dismissal briefing with this Court, class counsel argued that Objector Newhouse lacks standing under *Glasser v. Volkswagen of Am.*, 645 F.3d 1084 (9th Cir. 2011). *See* No. 12-15782, Dkt. 21 at 9. This is wrong, even frivolous. Newhouse is challenging the settlement approval itself (and the fee award as part of the settlement) under a constructive common fund theory. This immediately creates two critical distinctions with *Glasser*.

First, as *Glasser* itself noted, *Glasser* does not apply: the appellant in *Glasser* had “expressly disclaimed recovery under a constructive common fund theory,” so the independent challenge to the fees had no benefit to the class. 645 F.3d at 1089. Here, by contrast, Newhouse is, and has been, propounding exactly this theory of harm to the class from structural self-dealing. ER150 (referring to the settlement as a “constructive common fund”); ER155; Section I, *supra*. *Glasser* correctly notes that class members have standing where “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 at 1088 (quoting *Lobatz*, 222 F.3d at 1147 (9th Cir. 2000), and citing several other cases); *accord Bluetooth*, 654 F.3d at 949 n.9 (*Glasser* applies only when objector “expressly disclaim[s] recovery under a constructive common fund theory”).

Second, the appellant in *Glasser* appealed merely the fee award, not the order of final approval. 645 F.3d at 1087 (appellant voluntarily dismissed appeal of final approval of settlement); *see also Knisley*, 312 F.3d at 1125 (appellant lacks standing

because no longer challenging approval of settlement). Newhouse, by contrast, challenges not just the fee order, but the overall fairness of the settlement. Newhouse is not objecting that Apple is settling the claims in this case for a \$3.9 million payout—but Newhouse is objecting that the settlement was structured so that class counsel walk away with 80% of that fund while leaving so many class members (including Newhouse herself) without full compensation or an opportunity to benefit from a reduction of the excessive fee request. In such a situation, there is no question of the standing to challenge the final approval order together with the fee order; the disproportionate fees come at the expense of what could have been negotiated on behalf of the class, and thus implicate the fairness of the settlement. *See Glasser*, 645 F.3d at 1088; *Bluetooth*, 654 F.3d at 941-49.

In sum, because Newhouse argues against the fee award on a constructive common fund basis and because she challenges the final approval order in addition to merely the fee award, Ninth Circuit and Supreme Court precedent unequivocally supports a finding of standing.

CONCLUSION

The district court's award to class counsel of \$3.1 million is more than three to five times the benefit received by the class, and otherwise exhibits multiple signs of impermissible self-dealing as a matter of law. The district court's rubber-stamp approval of such a facially unfair settlement—done without once mentioning, much less applying, the relevant legal precedent—should be reversed.

At a minimum, this Court should reverse the settlement approval and fee award and remand with instructions to evaluate the settlement for warning signs of self-dealing under *Bluetooth*; to make a reasonable assessment of the settlement's value and determine the percentage of the constructive common fund represented by the attorneys' fees; and to limit the total award of both fees and expenses to 25% of the class benefit in the absence of particularized findings meriting a higher percentage.

This Court should further vacate the appeal bond, and issue an opinion making clear that such punitive appeal bond orders designed to deter appeals are impermissible, and must be vacated earlier in the appellate process.

Dated: October 29, 2012

Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank

CENTER FOR CLASS ACTION FAIRNESS

1718 M Street NW, No. 236

Washington, DC 20036

Telephone: (703) 203-3848

Email: tfrank@gmail.com

Attorneys for Objector-Appellant

Marie E. Newhouse

**STATEMENT OF RELATED CASES
PURSUANT TO NINTH CIRCUIT RULE 28-2.6**

Appeal No. 12-15757 is an appeal by another objector that has been consolidated with this appeal.

Ciolino v. Hewlett-Packard Co., No. 11-16097 (9th Cir.), raises closely related issues relating to a district court's failure to justify departure from the Ninth Circuit's 25% benchmark. Oral argument is scheduled for November 5, 2012.

Resnick v. Netflix, et al., No. 12-15705 (9th Cir.), raises closely related issues relating to a district court's failure to justify departure from the Ninth Circuit's 25% benchmark. The opening brief was filed on August 22, 2012.

Executed on October 29, 2012.

/s/ Theodore H. Frank

Theodore H. Frank

CENTER FOR CLASS ACTION FAIRNESS

1718 M Street NW, No. 236

Washington, DC 20036

Telephone: (703) 203-3848

Email: tfrank@gmail.com

Attorneys for Objector-Appellant

Marie E. Newhouse

**CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 13,907 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

Executed on October 29, 2012.

/s/ Theodore H. Frank _____

Theodore H. Frank

CENTER FOR CLASS ACTION FAIRNESS

1718 M Street NW, No. 236

Washington, DC 20036

Telephone: (703) 203-3848

Email: tfrank@gmail.com

Attorneys for Objector-Appellant

Marie E. Newhouse

PROOF OF SERVICE

I hereby certify that on October 29, 2012, 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:

Ms. Keri R. Montrose
Jacobson, Russell, Saltz & Fingerman,
LLP Suite 1550
10866 Wilshire Blvd.
Los Angeles, CA 90024

Executed on October 29, 2012.

/s/ Theodore H. Frank

Theodore H. Frank

CENTER FOR CLASS ACTION FAIRNESS

1718 M Street NW, No. 236

Washington, DC 20036

Telephone: (703) 203-3848

Email: tfrank@gmail.com

Attorneys for Objector-Appellant

Marie E. Newhouse