NO. 17-16873

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW CAMPBELL and MICHAEL HURLEY, on behalf of themselves, and all others similarly situated,
Plaintiffs-Appellees,

v.

ANNA W. ST. JOHN,
Objector-Appellant,

v.

FACEBOOK, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, No. 4:13-cv-05996-PJH

Reply Brief of Appellant Anna St. John

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Introduction

The parties' responses don't alter or excuse the critical defect in this case: The Settlement provides over $3.8 million to attorneys and 22 prosaic words on one of Facebook's webpages for one year to everyone else. The 22-word disclaimer comprises the only enforceable injunction against Facebook, and it reads: "We use tools to identify and store links shared in messages, including a count of the number of times links are shared." ER133. Under the Settlement, Facebook is not required to change any other behavior, nor is it prohibited from reviving allegedly unlawful practices.

The settling parties' attempt to excuse the Settlement is rife with contradictions:

- They defend the 22-word disclaimer as an allegedly valuable disclosure tailored to the claims of this case (PB39; DB31),[1] yet they also defend the remarkable lack of notice (PB54; DB45), which assures few class members will ever see these supposedly valuable words.

- Plaintiffs rationalize the dismal settlement relief as a consequence of the district court refusing to certify a damages class and limiting the claims at issue. PB23. At the same time, they distinguish *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017) as involving a "meritless" claim that "should not have proceeded to settlement at all." PB29.

- Meanwhile, Facebook argues that requiring proportional class relief would make it "difficult—if not impossible—for parties to resolve weak claims." DB26.

[1] "PB" refers to Plaintiffs-Appellees' Brief, "DB" refers to Defendant-Appellee's Brief, "OB" refers to St. John's Opening Brief, "ER" refers to St. John's Excerpts of Record, and "Dkt." refers to the docket below.

- Plaintiffs emphasize the court's narrowing of the claims to three alleged uses by Facebook and the release's "limited" scope. PB39-41. But the release is not limited to those three alleged uses, and its broad coverage will preclude class members from seeking injunctive relief relating to Facebook's recent acknowledgement of invasive practices of reviewing content and even suppressing messages.

While the claims released by the Settlement may be weak, a settlement that offers almost $3.9 million to attorneys and 22 words that their clients will never read cannot be fair under Rule 23(e).

Argument

I. Settling parties do not provide any reasoned argument to affirm finding "substantial value" in a vague, cumulative, and misleading 22 words.

A. Facebook's recent disclosures underscore the valueless nature of the 22 words for which class members must waive their claims.

Recent events have confirmed that the 22-word disclosure is not only worthless and redundant with Facebook's preexisting data policy, but is incomplete, misleading, and therefore potentially *harmful* to class members. The 22-word notice only references "tools to identify and store links shared in messages, including a count of the number of times links are shared," ER133, but since St. John filed her opening brief, Facebook has admitted to much more aggressive interception of users' "private messages," which the banal 22-word notice obscures rather than illuminates.

In far more detail than the settlement disclosure, Facebook recently admitted that it continues to intercept private messages and—not disclosed by the Settlement—*crawls and scans the contents of linked webpages*, and sometimes even suppresses messages based on the contents of linked websites. Facing criticism for its handling of user

privacy, Facebook CEO Mark Zuckerberg described how the company suppresses messages thought to incite violence: "[P]eople were trying to use our tools in order to incite real harm. Now, in that case, our systems detect that that's going on. We stop those messages from going through."[2] Facebook not only monitors the text content of messages, but interprets links in these messages. Explained by a Facebook spokesperson elaborating on Zuckerberg's remarks, "on Messenger, when you send a photo, our automated systems scan it using photo matching technology to detect known child exploitation imagery or when you send a link, we scan it for malware or viruses."[3]

Nonetheless, plaintiffs credit the settlement for providing a meaningful account of URL handling. PB37-38. In truth, the Settlement discloses only generalities and trivia, and gives class members a false picture of Facebook's practices. Plaintiffs conducted supposedly "intensive technical discovery" (PB17), yet they errantly boast that Facebook "detailed the extent" (PB27) to which it uses URL content in messages.

Not only does the Settlement fail to illuminate Facebook's scanning of message links, if anything, it obscures this practice. The 22-word disclosure misleads class members into thinking that stored links are merely counted. Link-counting is the *only* example of data handling listed in the disclosure. Any class member who stumbles upon

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[2] Ezra Klein, *Mark Zuckerberg on Facebook's hardest year, and what comes next*, Vox.com (April 2, 2018), https://www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge.

[3] Sarah Frier, *Facebook Scans the Photos and Links You Send on Messenger*, Bloomberg.com (April 4, 2018), https://www.bloomberg.com/news/articles/2018-04-04/facebook-scans-what-you-send-to-other-people-on-messenger-app.

the 22-word disclosure will be less informed than if she had simply read Facebook's 2015 Data Policy, which stated: "We collect the content and other information you provide when you use our Services, including when you … message or communicate with others." ER54.

St. John calls the 22-word disclosure "milquetoast" because of how little it actually discloses. It does not enable an "informed choice." *Cf.* PB31; DB31; *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1126 (N.D. Cal. 2015). The Settlement is valueless—even detrimental—because the 22-word disclosure misleads class members into believing that Facebook was merely counting website links in their personal messages when Facebook actually reviewed the *content* of those links and the *content* of users' personal messages, attempted to match users' images to other images, and even censored users' personal messages. Nothing in the Settlement prevents Facebook from continuing these practices.

B. The district court erred by construing the Settlement's description of past practices as "declaratory relief."

The parties do not dispute that the district court clearly erred in crediting nonexistent declaratory relief. OB23. Apart from the injunction requiring Facebook to include 22 words on a Help Center page, the Settlement includes no other operative relief. Instead, the Settlement agreement recounts "Acknowledgment regarding the Cessation of Practices," which states that certain link-handling practices ceased in 2012 and 2014 and that the Data Policy was revised in 2015—long before the Settlement was executed.

These recitations do not obligate Facebook to do anything. Nor do they constitute declaratory relief, which "declare[s] the rights and other legal relations of any interested party," OB24 (quoting 28 U.S.C. § 2201(a)). A description of past practices is just that. It does not obligate the parties to do or not do anything. Plaintiffs vaguely claim that the "acknowledgements" have value if class members happen to pursue future potential claims against Facebook. PB18. But the Settlement contains no admission of wrongdoing; in fact, it includes Facebook's express denials of that. ER127, 131. Because the Settlement simply describes Facebook's prior practices—without any stipulation regarding the legality of such practices—the recitations offer no real benefit for future claims. Allowing descriptions of past business practices to count as substantive relief would render *Koby*'s rule a nullity. It is "no real value" to obligate a defendant to continue doing what it was already doing. *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1080 (9th Cir. 2017). "Acknowledgements" are strictly worse than the injunction in *Koby* because they do not even require a defendant to continue abstaining from allegedly illegal behavior. Under the Settlement, Facebook remains free to resume its practices and/or remove its Data Policy. Under the irrational framework that the appellees propose, instead of obligating the defendant to do what it was already doing, settling plaintiffs can simply obligate the defendant to describe what it had been, but is no longer, doing.

Because the alleged "declaratory" and injunctive relief provides neither relief nor a declaration of rights, the Settlement's only relief ($3.9 million) is unfairly consumed by the attorneys.

II. Rule 23(e) does not permit class counsel to receive a disproportionate share of the Settlement's value, even in cases involving fee-shifting statutes.

Class-action settlements require judicial scrutiny under Rule 23 because they implicate the rights of absent class members. Here, the Settlement includes a release of class members' claims, yet they will receive the same injunctive "relief" as any prospective Facebook user. To protect absent class members, and the integrity of the class system, the requirements of Rule 23(e) apply even where the class's claims arise under a statute with a fee-shifting provision. *See*, *e.g., Koby,* 846 F.3d at 1081 (protecting class members from attorney-driven settlement of FDCPA litigation even though FDCPA provides for fee-shifting under 15 U.S.C. § 1692k); *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 882 (7th Cir. 2000) (same); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006) (same; even though the FCRA provides for fee-shifting). If the law were otherwise, unscrupulous plaintiffs' attorneys could prolong litigation in cases of questionable merit, ultimately trading away class members' claims for injunctive relief that provides no incremental value while claiming substantial attorneys' fees for themselves. Fee-shifting statutes do not intend such socially useless litigation.

The settling parties insist that the disparity between attorneys' fees and class recovery does not matter because in the abstract fee shifting may be awarded under the ECPA. (PB49; DB38). This response ignores the distinction between a judgment and settlement in fee-shifting cases:

> Where a class action has been brought under a statute containing a fee-shifting provision, however, a proposed settlement transforms the action, so far as fees are concerned, from a "fee-shifting case" to what is called a

> "common-fund case." The fee award is no longer statutory, because statutory fee-shifting provisions impose a liability only upon judgment.

Restatement (Third) of Restitution and Unjust Enrichment § 29 cmt c (2011); *see also Brytus v. Spang & Co.*, 203 F.3d 238, 246 (3d Cir. 2000) ("When there has been a settlement, the basis for the statutory fee has been discharged, and it is only the fund that remains."). Thus, "common fund principles properly control a case that is initiated under a statute with a fee-shifting provision, but is settled with the creation of a common fund." *Florin v. Nationsbank*, 34 F.3d 560, 564 (7th Cir. 1994). Both *Brytus and Florin* were endorsed by this Court in *Staton v. Boeing Co.*, 327 F.3d 938, 967 n.18 (9th Cir. 2003).

Settlements thus require an equitable division between class and counsel, even if the underlying statute provides for fee shifting and the relief is not a pure common fund. *E.g., Crawford*, 201 F.3d at 882. Accordingly, the parties' generalized citations to ECPA fee-shifting fail to negate the protections that Rule 23(e) provides to absentees.

Under the parties' rule, a court would have to award lodestar in any settlement involving a fee-shifting statute, without regard to what was actually achieved. *Contra In Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) (reversing even though fee award was substantially less than lodestar and case was brought under state laws permitting fee shifting). Moreover, class counsel would be incentivized "to delay settlement in order to run up fees while still failing to align the interests of the class and its counsel." *In re GMC Pick-Up Truck Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995). *GMC Pick-Up*, though cited by plaintiffs (PB48), actually undermines their argument; while the fees can be awarded on a lodestar basis, courts must "vigilantly guard against

the lodestar's potential to exacerbate the misalignment of the attorneys' and the class's interests." *Id.* The Third Circuit remanded, instructing the district court "to make some reasonable assessment of the settlement's value and determine the precise percentage represented by the attorneys' fees." *Id.* at 822; *accord Bluetooth*, 654 F.3d at 943. Thus, ECPA fee shifting does not presumptively entitle plaintiffs to a lodestar-sized share of the settlement fund. *Contra* PB50.

Even if, *arguendo*, fee-shifting statutes could override Rule 23(e)'s requirement of proportionality in settlements, the Settlement's lack of relief precludes fee-shifting. OB42; OB44 n.7. The ECPA provides for the recovery of attorneys' fees only if there is "a judicial finding, or at least an admission, of liability." *Rozell v. Ross-Holst*, 576 F. Supp. 2d 527, 537 (S.D.N.Y. 2008) (removing hours devoted to ECPA claims where defendant admitted no wrongdoing). "Since this case was settled without any determination of a violation, fees may not be awarded under the ECPA." *Id.*

Even if, contrary to *Rozell*'s conclusion, "prevailing party" status is sufficient for fee shifting under the ECPA, the Settlement's lack of judgment or relief precludes such an award. As discussed in Section I, the Settlement includes no valuable relief, nor any declaratory judgment of fault. Plaintiffs' original complaint sought billions of dollars in statutory damages and ultimately achieved non-pecuniary trifles. Dkt. 1 at 34. Nor do Facebook's voluntary pre-settlement cessation of certain practices in 2012 and 2014, and its 2015 Data Policy amendment—upon which the Settlement piggybacks—qualify plaintiffs as prevailing parties. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (repudiating catalyst theory even for vindication of civil rights claims). Rather than finding liability, the district court affirmatively found

that there was no ongoing violation of the ECPA at the time of settlement in light of Facebook's previous changes. ER24.

The Settlement also differs from meaningful civil rights settlements because none of the relief sought in the operative complaint has been achieved. An adversarial complaint provides an objective "benchmark" for determining whether plaintiffs have prevailed on non-monetary claims. *GMC Pick-Up*, 55 F.3d at 810. Here, the plaintiffs flounder. Plaintiffs' amended complaint—filed *after* the district court's winnowing of the case—did not seek a milquetoast disclaimer but instead sought substantive restrictions on how Facebook processes its messages. *See* OB29-30. No such relief has been achieved. "[T]he value of the injunctive relief is not apparent…from the face of the complaint, . . . nor from the progression of the settlement talks, the last of which occurred after defendants had already voluntarily added new warnings to their websites…." *Bluetooth*, 654 F.3d at 945 n.8.

To the extent plaintiffs suggest they are entitled to fees under California's CIPA, such fee shifting appears unavailable because plaintiffs present no evidence that they "engaged in a reasonable attempt to settle [the] dispute with the defendant prior to litigation," as is required under California's catalyst theory. *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 144 (Cal. 2004).

III. Counsel enjoys nearly all benefits provided by the Settlement.

The settling parties cannot dispute that counsel enjoys nearly all of the benefits provided by the Settlement. The Rule 23(e) settlement fairness inquiry requires courts to compare the fee award with the amount the class members will receive to determine

whether fees are proportionate to class relief. *See In re Hyundai and Kia Fuel Econ. Litig.*, 881 F.3d 679, 705 (9th Cir. 2018); *Bluetooth,* 654 F.3d at 943. If class counsel has anointed itself the primary beneficiary, a settlement is unfair under Rule 23(e). *See Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015) (zeroing in on the "economic reality" of payment to the class); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) ("settlement that gives preferential treatment to class counsel" is impermissible); *In re Subway Footlong Sandwich Mkt'g and Sales Practices Litig.*, 869 F.3d 551, 556-57 (7th Cir. 2017).

That fees can be awarded on a lodestar basis is insufficient: it's the *comparison* of fees and relief that is required for Rule 23(e). *Bluetooth*, 654 F.3d at 943. In *Bluetooth,* after the district court awarded fees on a lodestar basis (reducing lodestar by nearly 50% after scrutinizing billing records), this Court nevertheless found error because the district court made "no comparison between the settlement's attorneys' fees award and the benefit to the class or degree of success in the litigation" and "no comparison between the lodestar amount and a reasonable percentage award." *Id.*

A. The purported narrowness of the release does not remedy an unfair settlement allocation.

The settling parties repeatedly argue that the token injunctive relief is justified by the purportedly narrow scope of the case: three particular practices involving tallying URLs in private messages. PB42; DB10.

First, the parties' argument seems disingenuous because the release is *not* limited to the three identified uses of URLs. Instead, class members waive all claims "known or unknown, existing or preexisting, recognized now or hereafter" relating to those that

"were alleged in, or could have been alleged in, the Action" except for monetary relief. ER136-37. This release insulates Facebook from prospective litigation over Facebook's recently disclosed monitoring, crawling, and suppression of certain messages.[4] Because the Settlement extinguishes all claims accruing post-settlement until the effective date is reached, ER136, none of the potentially 100 million class members are currently able to seek injunctive relief for claims relating to the recent revelations. Plaintiffs have agreed to a settlement that gives up all injunctive claims that could have been brought, but provides only a worthlessly narrow disclaimer.

Second, class members are still left empty-handed by the Settlement, while their counsel captures all of its value. Facebook proclaims (DB36) that it "was not willing to 'hand over $3.9 million to extinguish' the class claims," yet the fact that it paid that amount to settle the case speaks otherwise. More of this settlement value should have been directed toward class members.

The settling parties offer no authority for the proposition that a settlement cannot provide class members monetary relief over and above the injunctive release. *See Cobell v. Salazar*, 679 F.3d 909, 917-18 (D.C. Cir. 2012) (allowing (b)(2) certification of settlement that provided uniform monetary payments). But even if a direct monetary

[4] Such claims fall squarely within the scope of the complaint and thus release: "[W]henever a private message contains a URL, Facebook uses a software application called a 'web crawler' to scan the URL, sending HTTP requests to the server associated with the URL and then seeking various items of information about the web page to which the URL is linked." ER170. Independent of the settlement, Facebook has now confirmed that it visits links sent in personal messages, and even blocks messages based on the content of these links. *See supra* 3 n.2.

distribution were impermissible under Rule 23(b)(2), an absent class can benefit from other uses of those funds (e.g. *cy pres* relief). The parties' own citations provide examples of how to structure a more equitable settlement. *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), for example, distributed an $8.5 million settlement fund. PB32; DB32. "In fact," plaintiffs brazenly assert, "the settlement here is better than the one in Google because . . . Facebook has here already ceased the challenged practices." PB33. This assertion bears no relationship to reality; the *Google Referrer* plaintiffs achieved $8.5 million dollars in relief (albeit in a form less valuable than direct compensation)[5], from which counsel sought only 25%. Injunctive relief in *Google Referrer* was so *de minimis* that this Court correctly characterized it as a "*cy pres*–only settlement." 869 F.3d at 739. Moreover, although the *Google Referrer* parties provided for real publication notice (unlike here), the district court still found the disclosure underwhelming in comparison to the relief sought in the complaint. 87 F. Supp. 3d 1122, 1129, 1133 (N.D. Cal. 2015).

Similarly, Facebook argues that "a settlement provides valuable relief to class members even when the challenged practices ceased prior to settlement." DB32 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 825 (9th Cir. 2012)); *see also* PB24. But *Lane* was another multi-million dollar *cy pres* settlement. Due to the cash component, this Court

[5] St. John and her counsel contend that *cy pres* relief should not be included dollar-for-dollar in percentage-of-fund calculations, and that such relief may only be employed where direct recovery is impossible, but this Court disagreed in *Google Referrer*. Although the United States Supreme Court has granted a *certiorari* petition to review this decision, under extant law *cy pres* recovery could have been employed by the settling parties as it has in many other privacy settlements, including settlements involving Facebook.

found the comparatively slight value of injunctive relief "of little moment." *Lane*, 696 F.3d at 825. *Lane* further provided a "judicially-enforceable agreement" preventing Facebook from reviving the complained-about practice. *Id.* The Settlement here does nothing of the sort. This failure is conspicuous because plaintiffs successfully pleaded a "sufficient likelihood" that Facebook would resume allegedly unlawful practices, and the district court refused to dismiss injunctive claims precisely because plaintiffs could obtain such an injunction. ER241. In both *Lane* and *Google Referrer*, class counsel sought and received smaller fees than here even though they each produced *cy pres* funds of nearly $10 million *in addition to* injunctive relief.

While a settlement need not provide direct monetary benefit to the class, it must provide *some* benefit. Plaintiffs' contrary citations miss the mark. PB24. Again, *Lane* provided millions of dollars of *cy pres* relief absent here. 696 F.3d at 825. *Carr v. Tadin, Inc.* was never appealed and wrongly approved due to a mistaken belief that counsel was "contractually entitled" to fees under the settlement agreement. 51 F. Supp. 3d 970, 977 (S.D. Cal. 2014). In *McDonough v. Horizon Blue Cross Blue Shield of N.J.*, the settlement relief enjoined practices that the defendant had not stopped before the settlement was reached, and obtained "transparency reforms sought by the class." 641 Fed. Appx. 146, 151 (3d Cir. 2015). *Green v. Am. Exp. Co.* is a mistaken out-of-circuit district court case involving TILA claims that cap class damages at $500,000. 200 F.R.D. 211, 213 (S.D.N.Y. 2001). *Garber v. Office of Comm'r of Baseball* did not involve "an objection virtually identical" to St. John's; it involved a "frivolous" objection in which the court held a hearing to determine whether to issue *sua sponte* sanctions. 2017 WL 752183 (S.D.N.Y. Feb. 27, 2017). Finally, *Laguna v. Coverall N. Am., Inc.* (cited at PB48) is not

binding on this Court as it was vacated. 753 F.3d 918 (9th Cir. 2014) *vacated at* 772 F.3d 608. Moreover, even the *Laguna* majority opinion supports measuring class relief against attorneys' fees: "the district court prudently cross-checked the award against the alternative percentage-of-recovery method." *Id.* at 922.

Here, plaintiffs have achieved a valueless 22 words for the class and negotiated for themselves $3.9 million. A purportedly narrow release cannot justify this eye-popping disparity.

B. *Bluetooth* standards for self-dealing settlements apply before and after class certification; this Settlement flunks fairness under any level of scrutiny.

The settling parties do not attempt to justify clear sailing. Instead, Facebook parrots the district court's argument that *Bluetooth* does not apply to settlements without a common fund. DB42. But repeating the district court's error of law does not make it true: *Bluetooth* itself lacked a common fund. 654 F.3d at 943.

The parties also perversely argue that their Settlement includes no kicker because there is no fund for any reduction in fees to revert to. "[T]his is not a 'common fund'" exclaims Facebook. DB42. Neither was *Bluetooth*, but the kicker was still an indication of self-dealing. *Id.* at 949. Plaintiffs make a slightly more nuanced argument that the kicker was problematic in *Koby* and *Bluetooth* because those settlements included "*cy pres* funds into which any amount in un-awarded attorney's fees could have flowed." PB52. Because plaintiffs have structured a strictly worse settlement that provides zero *cy pres* relief or other pecuniary relief, plaintiffs argue no kicker exists. Plaintiffs' proposed interpretation of the kicker favors settlements that provide absolutely no monetary

relief—suggesting that *Bluetooth* would have been affirmed if the plaintiffs there had only obtained the meaningless disclaimer instead of the disclaimer and the *cy pres* relief. This approach defies common sense: something is better than nothing. Courts have repeatedly held that the reversion to defendant is part of a constructive common fund and reflects money that a defendant would have been willing to pay class members to settle, whether it was negotiated separately or not. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786-87 (7th Cir. 2014) (finding no "justification" for kicker); *Bluetooth*, 654 F.3d at 948-49; *see also* Lester Brickman, LAWYER BARONS 522-25 (2011) (reversionary kicker should be considered *per se* unethical). Contrary to the parties, a reduction in attorneys' fees in an injunctive settlement need not revert to defendant. Class members potentially would benefit from funding additional injunctive measures or even *cy pres* as a last resort. Settling parties should not be able to evade *Bluetooth* by withholding even the crumbs of class relief.

Bluetooth holds that courts must review all class action settlements for "signs that class counsel have allowed pursuit of their own self-interests" including disproportionate fee awards, clear-sailing agreements (where defendant agrees not to challenge fees), and fee reversion agreements or "kickers" (where negotiated but unawarded fees revert to defendant). *Id.* at 947. Additionally, district courts "must ensure that both the amount and mode of payment of attorneys' fees are fair, regardless of 'whether the attorneys' fees come from a common fund or are otherwise paid.'" *Id.* at 949.

Bluetooth is not limited to pre-certification settlements. *Contra* PB48; DB33. *Bluetooth*'s self-dealing rules apply to all settlements but *Bluetooth* creates a separate,

higher standard for pre-certification settlements. *Id.* at 946-47. Nothing about the self-dealing signs (disproportionate fees, clear-sailing, reversion) turn on a class certification earlier in the litigation. Those offending provisions do not become proper because there exists a cohesive, numerous, certifiable class or because the attorneys had, at the time of certification, demonstrated adequate representation. Indeed, under the parties' reading of Ninth Circuit law, class certification gives class counsel *carte blanche* to engage in self-dealing post-certification. Courts must scrutinize for self-dealing in all settlements, and then probe even further when there has not been class certification. *Allen*, 787 F.3d at 1224.

Whatever level of scrutiny is applied, however, there is no hiding the self-dealing in this Settlement.

1. The district court clearly erred by refusing to consider the disproportion between settlement benefits and attorneys' fees.

While the district court did not need to numerically bean count the settlement value, it was required to compare the value of the settlement to the fee award. *E.g., Bluetooth*, 654 F.3d at 943. Any plausible value depends on (1) the disclosure's content and (2) its reach (exposure). For reasons discussed above, the 22 word-content is of trivial or even negative value. *See* Section I *supra*. As for reach, the settling parties do not deny that only a "tiny portion of the class" will ever navigate the Help Center page. OB35. Only 740,000 users will visit the page in the year covered by the injunction (ER51) out of the class "which likely tops 100 million." PB53. Based on plaintiffs'

estimate of the class size, perhaps 7 in 1000 class members will load the unspecified Help Center page, and only a fraction of these will read the 22 "decisive" words.

While the parties argue that this is a valuable result (PB32; DB31), Facebook's own advertising pricing suggests otherwise. For example, a $5000 ad campaign targeted to maximize reach to Facebook and Facebook Messenger users in the United States would reach an estimated 540,000 to 3.4 million users in one day. *See* https://www.facebook.com/adsmanager/creation/ (last visited May 10, 2018). Thus, a one-day ad buy of $5000 would likely expose more class members to the 22-word message than the Settlement does over the course of the injunction. With Facebook's own sophistication, even more comprehensive reach could be achieved. For example, Russian entities were able to reach approximately 126 million Americans (probably half of all class members) with a total ad expenditure of only about $100,000.[6]

Next to nearly $3.9 million in agreed attorneys' fees, the Settlement's value constitutes less than a peppercorn. The district court made no effort to assess the settlement's value, and the 22-word disclosure may well have *negative* value because it misleads class members. *See* Section I.A. Alternatively, if the disclosure's content was of nominal value, a valuation at the market cost of such disclosure at $5000 (the cost of a one-day ad buy with similar reach to the Help Center) would mean that the attorneys have captured 99.87% of the net settlement value through clear-sailing. Plaintiffs proffer no explanation for their failure to provide any notice whatsoever of the

[6] Samidh Chakrabarti, *Hard Questions: What Effect Does Social Media Have on Democracy?*, Facebook Newsroom (Jan. 22, 2018), https://newsroom.fb.com/news/2018/01/effect-social-media-democracy/.

supposedly-valuable 22-word message, a failure especially inexplicable given the low cost of Facebook notice. *See* Section IV, *infra*.

Inclusion of the 22-word disclaimer on the Help Center page is the only part of the Settlement that requires Facebook to do anything it was not already doing, as defendant emphasizes. DB31. This Settlement has no other purported benefit justifying its fees, so the vacuousness of the disclaimer, and its non-existent dissemination preclude finding valuable injunctive relief under *Koby*.

While weak claims may justify a small settlement, they cannot excuse disproportion between class and counsel. *Bluetooth* explains that lodestar may be an appropriate method for injunctive relief not easily monetized, *but,* "the Supreme Court has instructed district courts to [] 'award only that amount of fees that is reasonable in relation to the results obtained." 654 F.3d at 942 (cleaned up); *see also* OB44-45 (discussing, *inter alia*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013)). Because the 22-word disclaimer is worthless or nearly worthless, it cannot justify almost $4 million dollars in fees.

The parties repeatedly state that there was no collusion (PB52, PB53, DB38), and Facebook claims that St. John has been "[u]nable to identify any specific evidence of self-dealing." DB38. These arguments conflate self-dealing (which is evidenced by the settlement itself) with inter-party collusion (which St. John does *not* allege (OB39 n.6)). The Settlement's elements—disproportional attorneys' fees, protected by clear-sailing and kicker—*are* "subtle signs" of self-dealing. *Bluetooth*, 654 F.3d at 947; *see also id.* at 948 (distinguishing between "*actual* fraud, overreaching or collusion" and "instances of unfairness not apparent on the face of the negotiations") (emphasis in original). As is

the lack of notice to class members. OB48-51. A fee award that vastly exceeds the class relief is disproportionate and renders the settlement unfair. *E.g.*, *Bluetooth*, 654 F.3d at 945 (vacating approval where fees amounted to more than 83% of the constructive common fund); *Pampers*, 724 F.3d 713 (vacating settlement where fees consumed $2.7 million of the $3.1 million constructive common fund value); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish").

Defendant mischaracterizes (DB44) St. John as simply seeking a "better" settlement, but she nowhere argues that the parties must settle for $10 million instead of $4 million. Instead, a larger share of the $4 million should have gone to the class, and a smaller share to class's lawyers. How the settlement is allocated between class counsel and the class is an inherent and inseparable part of the settlement, and any evaluation of the settlement's fairness must include it: "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness … The settlement must stand or fall in its entirety." *Bluetooth*, 654 F.3d at 948 (emphasis, quotations, and citations omitted).

Finally, plaintiffs err in their assertion that "the party objecting to a class action settlement [must] demonstrate that the proposed settlement 'is unreasonable.'" PB22. Plaintiffs have it backwards. "As the proponents of the settlement, [they] bore the burden of demonstrating that class members would benefit from the settlement's injunctive relief." *Koby*, 846 F.3d at 1079. "The burden of proving the fairness of the settlement is on the proponents." *Pampers*, 724 F.3d at 719 (quoting 4 Newberg on Class Actions § 11:42 (4th ed.)).

2. *Bluetooth* was correctly decided; this case illustrates why settlements should be decided based on class benefit.

When class counsel and defendants negotiate class action settlements, a defendant cares only about the bottom line, preferring any deal that drives it down. Meanwhile, class counsel have a financial incentive to seek the largest possible portion for themselves, preferring bargains that are worse for the class if their share is sufficiently increased. "From the selfish standpoint of class counsel and the defendant, …the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014).

Whether a settlement is struck before or after certification, or based on a statute with fee shifting, these problematic incentives persist. *See Pearson,* 772 F.3d at 787 (quoting *Eubank*, 753 F.3d at 720). But, when settlement fairness is assessed based on economic realities, it properly aligns class counsel's incentives—class counsel will work very hard to deliver relief to their clients when their own payday is at stake. Thus, the Seventh Circuit in *Pearson* and this Circuit in *Allen* have adopted doctrinal tests that align the incentives of class counsel with those of the vulnerable, absent class members whose claims they settle away.

3. The settling parties' efforts to distinguish St. John's authority miss the mark.

The parties argue that *Bluetooth* and *Koby* should be limited to 23(b)(3) settlements, but the language of these opinions and the principle that animates them is not so confined. "Because the settlement gave the absent class members nothing of value, they could not fairly or reasonably be required to give up ***anything*** in return." *Koby*, 846

F.3d at 1080 (emphasis added). It is a red flag "when counsel receive a disproportionate distribution of the settlement, ***or when the class receives no monetary distribution but class counsel are amply rewarded***." *Bluetooth*, 654 F.3d at 947 (citing, *inter alia*, the decision rejecting a (b)(2) settlement in *Crawford*, 201 F.3d 877). The parties try mightily to pretend that class members' claims are worthless, but the fact remains that they were compromised for a payment of $3.9 million dollars in attorneys' fees. Far from a bilateral settlement of the named plaintiffs' claims; this settlement was the named plaintiffs trading the rights of about 100 million Facebook users for payments of incentive awards and fees.

Other courts have applied the principles embodied in *Bluetooth* and *Koby* to quash sweetheart Rule 23(b)(2) settlements. *See Subway*, 869 F.3d at 554 (class certified under only Rule 23(b)(2)); *Pampers*, 724 F.3d at 716 (same); *Crawford*, 201 F.3d 877 (same). *Pampers*, *Subway* and *Crawford* all involved (b)(2) settlements with limited releases, but each appellate court scrutinized ***whether the disclosures were actually beneficial to class members*** and overturned erroneous district court orders finding such benefit. *Accord In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016) (reversing (b)(2) settlement of merger lawsuit after finding supplemental disclosures to be of "nil" value). As these four cases demonstrate, district courts may not simply presume disclosure relief has value. This Court recognizes that the principle applies generally to all settlements. *See Koby*, 846 F.3d at 1079 (citing *Pampers* for the proposition that "the named plaintiffs bore the burden of demonstrating that class members would benefit from the settlement's injunctive relief").

Nor is this principle limited to cases with full lodestar fee awards. *Bluetooth* itself involved attorneys' fees cut in half, and *Subway* and *Pampers* also involved fractional lodestars. *See also* OB41-45 (refuting same argument).

The parties distinguish *In re HP Inkjet* and *Redman* as coupon settlements under the Class Action Fairness Act, PB49, DB40 n.15, but the cases are not so limited. While *Inkjet* did address CAFA, this Court made clear that it would have reached the same conclusion as to the fairness of the Settlement even if the lodestar method had been available. 716 F.3d at 1186 n.18. As for *Redman*, it spoke broadly on the ratio of fees to class recovery and declined to address CAFA's fee provisions. 768 F.3d at 630, 635.

Plaintiffs attempt to distinguish *Koby*'s injunction because it "expressly allowed the defendant to seek dissolution of the injunction 'at any time if there is a change in the law'" (PB30), but the Settlement here is similarly conditional. Facebook "may update the disclosures to ensure accuracy with ongoing product changes." ER155. Plaintiffs' attempt is doubly odd because *Koby* was discussing that settlement's injunction to stop engaging in allegedly unlawful behavior. 846 F.3d at 1080. The Settlement here provides no such injunction, so is even more illusory.

Plaintiffs mischaracterize *Hyundai* as supporting the theory that counsel can be credited for changes the defendant makes prior to settlement. PB27-28. In fact, *Hyundai* found error in the district court's failure to scrutinize the value of the injunction and thus ultimate failure "to assure itself—and us—that the amount awarded was not unreasonably excessive in light of the results achieved." *Hyundai*, 881 F.3d 679, 706 (quoting *Bluetooth*, 654 F.3d at 943).

Finally, Facebook cites (DB41-42) to *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1121 (10th Cir. 2017), which declined to adopt an economic reality test. But the Tenth Circuit has been of two minds on the issue. *See Fager v. CenturyLink Comms., LLC*, 854 F.3d 1167, 1177 (10th Cir. 2016) ("We see merit in an approach that ties attorney recovery to the amount actually paid to the class."). And Facebook provides no reason to prefer a decision incompatible with this Court's precedent (*Bluetooth*, *Koby*, *Allen*) that requires the district court to look at what the class actually receives. Nor does Facebook provide any sensible reason to reject the sound public policy identified in *Pearson, Redman* and *Baby Products* that supports the *Allen*'s "economic reality" test.

C. Purportedly weak claims do not justify a lopsided settlement.

The settling parties argue that the alleged weakness of the case renders the 22-word injunction fair (DB19-26, PB39), but this misconstrues Objector's argument. St. John does not contend that the Settlement needed to include any particular form or amount of relief. Weak claims are appropriately settled by a modest settlement; but plaintiffs' counsel may not capture nearly $4 million dollars from it while the absent class gets 22 words of dubious or even negative value.[7] This is true even where the attorneys' fees requested and awarded amount to far less than $4 million. *See, e.g.,*

[7] The parties' citations (DB21, PB39) concern the size of settlement rather than the distribution between class and counsel. *See*, *e.g.*, *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968) (concerning compromise claims against debtor in bankruptcy); *Officers for J. v. Civ. Serv. Commn. of City and County of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982) (affirming "cash settlement amounting to only a fraction of the potential recovery").

Bluetooth, 654 F.3d at 938 ($800,000 in fees); *Koby*, 846 F.3d at 1075 ($67,500 in fees); *Subway*, 869 F.3d at 553 ($525,000 in fees); *Walgreen*, 832 F.3d at 721 ($370,000 in fees); *Pampers*, 724 F.3d at 715 ($2,730,000 in fees).

Facebook incorrectly argues that St. John's position would make it "difficult—if not impossible—for parties to resolve weak claims." DB26. Weak claims could still be settled, but class members must remain the "foremost beneficiaries" of such settlements. *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013). Facebook rehashes the argument of the defendant in *Subway*, who predicted that it would be trapped in eternal litigation if worthless settlements could not be approved. Instead, soon after the Seventh Circuit's decision, the *Subway* plaintiffs dismissed the complaint: plaintiffs have no incentive to invest in cases that can cannot provide value to their clients. When plaintiffs' counsel cannot settle meritless claims for millions of dollars in attorneys' fees, they will have no incentive to prosecute such meritless claims. By ensuring that class members are the foremost beneficiaries, counsel will not be tempted to over-invest in a losing claim.

In any event, Facebook misapplies other *Hanlon* factors. DB29. The purported "reaction of the class" is meaningless when no notice was provided to them. *GMC Pick-Up*, 55 F.3d at 813. And as discussed below, the mailing of CAFA notice does not constitute the "presence of a governmental participant" any more than writing or tweeting at a celebrity makes you their best friend.

IV. Deficient notice indicates an unfair settlement.

The principle of disclosure through notice has been referred to as the "first and perhaps most important principle for class action governance." Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 118 (2003). Facebook possesses the contact information of every class member; after all, each Facebook account holder entrusts Facebook with his or her personal information. Nevertheless, class members were not afforded any form of notice of the settlement. Had the parties issued proper notice, the 22 words that plaintiffs profess to be so valuable could have been put before tens of millions of class members, instead of the fewer than 740,000 persons who will visit Facebook's help page.

On one hand, the settling parties argue that notice is entirely optional in a Rule 23(b)(2) settlement; on the other, they bizarrely insist that notice *was* provided in the form of: "(i) CAFA notices . . . (ii) publicly available filings accessible through the federal court filing system (PACER/CM-ECF); and (iii) extensive news coverage in multiple widely read publications." DB45-46; *see also* PB54. None of these methods constitute notice to "class members who would be bound by the proposal." Rule 23(e)(1). CAFA notice is required by 28 U.S.C. § 1715 and does not effectuate notice to class members, but instead distributes settlement documents to government representatives that have historically ignored them. "DOJ receives over 700 CAFA notices every year, but has only participated in two cases, and those were more than a decade ago" because mail handling delays prevented timely review of such notices. Department of Justice Office of Public Affairs, *Associate Attorney General Brand Delivers Remarks to the Washington, D.C.*

Lawyers Chapter of the Federalist Society (Feb. 15, 2018).[8] For this reason, Facebook's argument that the "presence of governmental participants" can be presumed from the mailing of CAFA notice (DB29) is fanciful.[9] Similarly, PACER access exists in every federal case and does not constitute notice because class members have no way of knowing they're bound by a class action settlement that they could hypothetically access, for a fee, online. The same defect exists with respect to posting case documents on plaintiffs' counsel's lawsuits. Without any independent publication, no class member could find them. Again, St. John only became aware of this suit because her co-worker tendered a freedom of information request with a state attorney general's office. OB50. Finally, the parties argue that news coverage of the case constitutes notice, but this is plainly false. Most coverage of the case predates the Settlement, and no article apprises class members of their right to object to the settlement. *See* FB-SER067-74.

"A proper notice must indicate that a member of the class can object to the proposed settlement as well as to the manner in which the class is defined." *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 835 (9th Cir. 1976). Contrary to the settling parties, CAFA notice, PACER, and news coverage does not constitute reasonable notice under Rule 23(e)(2). Facebook's own citation contradicts their assertion: "some form of post-settlement notice is mandatory under Fed. R. Civ. P. 23(e) before approval

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[8] *Available at* https://www.justice.gov/opa/speech/associate-attorney-general-brand-delivers-remarks-washington-dc-lawyers-chapter.

[9] Plaintiffs cite to an even more outlandish factual error by a district court finding that "Class Notice to States' Attorneys' General" provides "dissemination to the public." *Bee, Denning, Inc. v. Capital All. Group,* 13-CV-02654, 2016 WL 3952153, at *9 (S.D. Cal. July 21, 2016). It does not.

of a class action settlement." *Harris v. Pernsley*, 654 F. Supp. 1042, 1047 (E.D. Pa. 1987) (approving civil rights settlement under Rule 23(b)(2) that employed publication notice, was posted in Philadelphia prisons, and received widespread coverage in local news prior to fairness hearing).

Both parties continue to argue that notice is entirely optional in Rule 23(b)(2) settlements, but the plain text of the Rules belies their claim. While it is true that under Rule 23(c)(2)(A) courts have some discretion over whether to notify a 23(b)(2) class about class *certification*, that discretion does not extend to notice of a binding *settlement*. "The court ***must direct*** notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(e)(1) (emphasis added). Courts must provide notice to all class members who would be bound by settlement "regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." Manual for Complex Litigation (Fourth) § 21.312. Indeed, this Court agrees that even when the settlement class is to be certified under Rule 23(b)(2) rather than (b)(3), "it is necessary that the notice be given in a form and manner that does not systematically leave an identifiable group without notice." *Mandujano*, 541 F.2d at 835; *see also Mendoza v. United States*, 623 F.2d 1338, 1350 (9th Cir. 1980) (rejecting idea that notice can be dispensed with in a (b)(2) settlement).

Further, "class counsel's motion for attorney fees must be 'directed to the class in a reasonable manner'" and "whether that payment comes from the class fund or is made directly by another party, notice is required in all instances." Notes of Advisory Committee to 2003 Amendments to Rule 23, discussing Rule 23(h)(1).

The settling parties cite a hodgepodge of district court orders (PB54-55; DB44), but most of the cited orders are consistent with the Rules. For example, settlements where "no release is provided by any Class Members except the named Plaintiffs" require no notice under Rule 23(e)(1). *Kim v. Space Pencil, Inc.*, No. 11-3796, 2012 WL 5948951 at *2 (N.D. Cal. Nov. 28, 2012). In several other cases cited by the parties, notice *was* provided. *See In re Yahoo Mail Litig.*, 13-CV-4980-LHK, 2016 WL 4474612, at *5 (N.D. Cal. Aug. 25, 2016) (the parties placed banner advertisements "on a collection of popular websites."); *Hart v. Colvin*, 15-CV-00623-JST, 2016 WL 6611002, at *9 (N.D. Cal. Nov. 9, 2016) (publication notice in newspapers and dissemination to "several organizations that are likely to interact with class members"). Parties also cite a line of out-of-circuit district court orders finding that notice may be waived if the cost of notice would otherwise "jeopardize the settlement." *Green v. Am. Express Co.*, 200 F.R.D. at 212-13; *see* PB55. This authority was poor law when decided, and eventually abrogated by *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 225 (2d Cir. 2012). Anyway, the district court here did not make such a finding, and it beggars belief that notice costs would prevent settlement here. As discussed in Section III.B, third parties can reach millions of users on Facebook for just a few thousand dollars, and the "wholesale" cost of Facebook providing such notice is even lower. It is improbable that a modest advertising outlay could jeopardize a settlement to pay plaintiffs' counsel nearly $4 million.

The parties' remaining authority asserts that this Court has not "addressed the issue of whether class notice is required when a 23(b)(2) action is settled." *Lilly v. Jamba Juice Co.*, No. 13-CV-02998-JST, 2015 WL 1248027, at *9 (N.D. Cal. Mar. 18, 2015);

Kline v. Dymatize Enters., No. 15-2348, 2016 WL 6026330 at *6 (S.D. Cal. Oct. 13, 2016). Given the clear language of Rule 23(e), the Advisory Committee's notes, and prior decisions of this Court, this authority cannot persuade.

Thus the rules and due process require reasonable notice. This notice need not have been individual notice, contrary to the parties' strawman refigurements of St. John's position. *Compare* OB50 ("individual notice need not have been used; reasonable notice might include advertising") *with* PB55; DB47. Facebook incorrectly asserts notice was "not reasonably possible or practicable." DB47. Advertising on Facebook is used to publish class action settlements having nothing to do with the platform (ER84), and such notice is even more gainful where class members are, by definition, Facebook users. Facebook provided no evidence that such notice would be burdensome, and the reverse seems to be true. Facebook broadcasts about *100 billion* messages and posts per day,[10] so notifying potential class members of this suit would be no difficulty.

The parties provide no argument how a publication notice would be confusing if written in the common form "you may be a member of a class action settlement." OB50-51. Facebook complains that notice would be overbroad, but advertising to "over ***200 million*** U.S. Facebook users" (DB47-48 (emphasis in original)) is not remarkably over-inclusive considering the class "likely tops 100 million." PB53. While the class size cannot be pinpointed, plaintiffs' estimate seems reasonable because the

[10] Transcript of Mark Zuckerberg's Senate hearing, *available online at* https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/.

class includes every U.S. Facebook user who sent or received a link by private message from 2011 to 2017 (ER130), likely a large fraction of all Facebook users. Defendant's citation to *In re Agent Orange Prod. Liab. Litig.* is doubly inapposite. St. John does not contend that individual notice was required, and the fraction of Facebook users who are class members is much larger than the fraction of Vietnam War veterans exposed to Agent Orange, which was "far fewer" than the gross number of 2.4 million veterans. 818 F.2d 145, 169 (2d Cir. 1987). Indeed, all of defendant's citations in support of their "overbreadth" argument involve settlements that provided direct notice. *See id.* (publication and direct notice to over 120,000 likely class members); *In re Wholesale Grocery Products Antitrust Litig.*, No. 09-MD-2090, 2017 WL 826917, at *3 (D. Minn. Mar. 1, 2017) (direct notice sent to 304 of 321 class members); *Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314, 321 (E.D. Pa. 1993) (publication plus direct notice to class members ascertainable through inquiries to "56 national or international unions"). Here, neither direct nor publication notice was provided to class members; it is preposterous to suggest that *any* notice would be overbroad. Publication notice (and all advertising) is overbroad by necessity. The question is not whether some non-class members will see the notice, but whether the notice is reasonable. Providing zero notice cannot be reasonable, and the parties steadfast refusal to disseminate a supposedly valuable disclaimer suggests the Settlement's unfairness.

Conclusion

For the foregoing reasons, settlement approval must be reversed, and the parties must renegotiate a settlement that makes class members the primary beneficiary.

Dated: May 11, 2018

Respectfully submitted,

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Statement of Related Cases
Under Circuit Rule 28-2.6

Kumar v. Salov North America Corp., No. 16-16405, raises the similar issue of the requirement of the district court to ascertain the value of the purported injunctive relief when evaluating a class action settlement for approval.

Executed on May 11, 2018 */s/ Adam Ezra Schulman*
Adam Ezra Schulman

Certificate of Compliance
Pursuant to 9th Circuit Rule 32-1 for Case Number 17-16873

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rules 32-1 and 32-2(b). The brief is 8,338 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on May 11, 2018.

/s/ Adam Ezra Schulman
Adam Ezra Schulman

Proof of Service

I hereby certify that on May 11, 2018, 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.

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