Nos. 15-3912, 16-1203, 16-1408

(Consolidated with Nos. 15-3909, 15-1245)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re Target Corporation Customer Data Security Breach Litigation,

Leif A. Olson,
Objector-Appellant,

v.

Consumer Plaintiffs,
Plaintiff-Appellee,

Target Corporation,
Defendant-Appellee.

On Appeal from the United States District Court
for the District Of Minnesota –No. 0:14-md-02522-PAM
District Judge Paul A. Magnuson

Opening Brief of Leif A. Olson

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Summary of the Case

This is an appeal of a class action settlement approval. Appellant Leif Olson objected that there was a single settlement class, but the pre-certification settlement was structured to waive the future claims and freeze out an unrepresented and uncertified subclass of millions of class members, many of whom had statutory damages claims that survived a motion to dismiss. But the district court held that it had already certified the class as part of its preliminary approval order authorizing notice to the class, and that no challenges to class certification could be heard at the fairness hearing. On appeal, Olson challenges both the district court's error that class certification could not be revisited once granted, and the violation of Rule 23(a)(4).

It is also an appeal of the district court's imposition of an *ultra vires* appeal bond. Rule 7 permits an appeal bond for costs, and Rule 8 permits a *supersedeas* bond for the expenses of delay, but the district court purported to order Olson to post a $49,156 Rule 7 appeal bond for the putative expenses of delay, though class counsel admitted that their estimated appellate costs would be only $2,284. Worse, after Olson posted his bond, the court unilaterally held that Olson was jointly and severally liable for the costs of other appellants he had no relationship with. Neither class counsel nor the district court identified any applicable statutory authority permitting a settlement-administrator bill to be recoverable appellate costs.

Olson requests twenty minutes of oral argument for each side. Olson is represented by experienced non-profit appellate counsel and oral argument would significantly aid the merits panel's decisional process.

Corporate Disclosure Statement

Appellant Leif A. Olson is an individual.

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Jurisdictional Statement

The district court has jurisdiction under 28 U.S.C. § 1332(d)(2) because plaintiffs' class-action complaint alleges claims that exceed $5,000,000 exclusive of interest and costs, there are millions of class members, most of which are citizens of states other than defendant's state of citizenship. For example, named plaintiff Kethra Ramert is a citizen of the State of Alaska, while defendant Target Corporation is a Minnesota corporation with its principal place of business in Minnesota and, thus, a citizen of Minnesota. A45-A46.[1]

The district court issued a Memorandum and Order granting final approval of class action settlement and payment of attorneys' fees and service awards on November 17, 2015 ("Approval Order"). A15-A23. It is not clear that the Approval Order is a final judgment; the district court has not issued a final judgment under Fed. R. Civ. Proc. 58. On December 15, 2015, Objector Olson filed a Notice of Appeal (No. 15-3912) out of an abundance of caution, however, because under Fed. R. App. Proc. 4, there is no penalty for filing a notice of appeal early but there is a penalty for filing a notice of appeal late. A406. To the extent the Approval Order constitutes a final judgment under Federal Rule of Civil Procedure 58 (or under *Gelboim v. Bank of America Corp.*, 135 S.Ct. 897 (2015)), jurisdiction in this Court exists under 28 U.S.C.

[1] "Axyz" refers to page xyz of the Appendix. "Dkt." refers to docket entries in Case No. 0:14-md-02522-PAM (D. Minn.) below. As 8th Cir. R. 28A(g) requires, the orders under appeal, Dkts. 364, 645, 701, 713, and 717, are attached as an Addendum to this brief.

§ 1291. If the Approval Order is not a final judgment, jurisdiction under 28 U.S.C. § 1291 will vest on April 15, 2016, 150 days from the Approval Order. Fed. R. Civ. Proc. 58(c)(2)(B). Olson's Notice of Appeal for No. 15-3912 is therefore timely. Fed. R. App. Proc. 4(a)(2).

The district court issued a Memorandum and Order on January 21, 2016 granting consumer plaintiffs' motion for an appeal bond ("Appeal Bond Order"). A24-A27. Olson filed a Notice of Appeal (No. 16-1203) of the Appeal Bond Order on January 21, 2016. A408-409.

Amending its Appeal Bond Order, the district court issued an Amended Memorandum and Order on January 29, 2016 ("Amended Bond Order"). A28-A31. The district court also issued an Order dated February 1, 2016 denying Appellant Sciaroni's motion to stay the imposition of the appeal bond ("Stay Order"). A32-A33. Olson filed an Amended Notice of Appeal (No. 16-1408) on February 12, 2016 appealing both the Amended Bond Order and the Stay Order. A416-A418. Olson's notices of appeal (Nos. 16-1203 and 16-1408) are timely under Fed. R. App. Proc. 4(a)(1)(A). Because those orders grant and modify injunctions affecting Olson, this Court has jurisdiction of those appeals under 28 U.S.C. § 1292(a)(1); they are also collateral orders that are final decisions under 28 U.S.C. § 1291.

As a member of the class who objected at the fairness hearing, Olson has standing to appeal without the need to intervene. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Statement of the Issues

1. Did the district court err as a matter of law when it refused, after preliminary approval of the class action settlement, to consider whether the class met class certification requirements including adequacy under Rule 23(a)(4)? *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1145 (8th Cir. 1999); *Barney v. Holzer Clinic*, 110 F.3d 1207, 1214 (6th Cir. 1997); *Grigsby v. North Mississippi Med. Ctr., Inc.*, 586 F.2d 457, 462 (5th Cir. 1978).

2. While the district court certified a single settlement class, the settlement froze out an uncertified and unrepresented "Subclass" who received no pecuniary relief for the waiver of their future and statutory claims, though the settlement provided compensation to the other class members. Did the district court err in holding that there was adequate representation of the disadvantaged "Subclass" even though none of the class representatives were members of the "Subclass" and the "Subclass" did not have separate legal representation? *Dewey v. Volkswagen AG*, 681 F.3d 170, 187-88 (3d Cir. 2012); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997); *In re Literary Works*, 654 F.3d 242 (2d Cir. 2011).

3. Did the district court err as a matter of law in ordering Appellant Olson to post an appeal bond that included $46,872 in increased administration costs although a Rule 7 bond is limited to costs that are expressly authorized by rule or statute and there was no rule or statute authorizing such costs? *Tennille v. W. Union Co.*, 774 F.3d 1249, 1255 (10th Cir. 2014).

Statement of the Case

A. Consumers sue Target over data breach.

Between November 15, 2013 and December 17, 2013, hackers stole the personal and financial information (the "data breach") of up to 110 million customers of Defendant-Appellee Target Corporation. A37.

The Judicial Panel on Multidistrict Litigation transferred numerous pending federal class actions relating to the data breach to Judge Magnuson in the District of Minnesota. Dkt. 1. Judge Magnson divided the matters into three groups: consumer cases, financial institution cases, and shareholder derivative cases. Dkt. 64. This appeal relates to the settlement of the consumer cases.

On May 15, 2014, the district court appointed Vincent Esades of Heins Mills & Olson, PLC as lead counsel for the consumer cases and Michelle Drake of Nichols Kaster PLLP as liaison counsel for the consumer cases. Dkt. 64 at 2; Dkt. 436. The district court also appointed three other attorneys from three other firms as the steering committee for the consumer cases. Dkt. 74 at 2.

Plaintiffs-Appellees (the "consumer plaintiffs" or "plaintiffs") filed their First Amended Consolidated Class Action Complaint on December 1, 2014 ("Complaint") alleging claims against Target arising from the data breach including violations of state consumer laws and state data breach statutes, negligence, breach of implied and express contract, bailment and unjust enrichment. A127-A156. Plaintiffs sought "actual and statutory damages." A157.

On December 18, 2014, the district court granted in part Target's motion to dismiss the Complaint. Dkt. 281 at 45. The district court dismissed the breach of contract claims, the bailment claims, and the negligence claims for some of the states. Dkt. 281 at 45. The consumer-protection statute claims (Count I of the Complaint) were withdrawn or dismissed for claims under 10 of the states. Dkt. 281 at 13, 45. The data breach statutory claims (Count II of the Complaint) were withdrawn or dismissed for claims under 12 of the states. Dkt. 281 at 20-28. The court found that plaintiffs could proceed with data breach claims from 25 states and the District of Columbia and consumer-protection statutes from 39 states and the District of Columbia. Dkt. 281 at 10, 13, 45. Some of the state claims that remained provide statutory damages including, for example,

- Cal. Civ. Code § 1798.83(a), *et seq.* (alleged at A142), which provides statutory damages of $500 and up to $3,000, *see* Cal. Civ. Code § 1798.84(c);
- District of Columbia Consumer Protection Act, D.C. Code §§ 28-3904(a), (d), (e), (f) and (r), *et seq.* (alleged at A131), which provides "[t]reble damages, or $1,500 per violation, whichever is greater," *see* D.C. Code §§ 28-3905(k)(2)(A);
- Rhode Island Deceptive Trade Practices Act, R.I. Gen. Laws § 6-13.1-1(6)(v), (vii), (xii), (xiii) and (xiv), *et seq.* (alleged at A136), which provides actual damages or statutory damages of $200, whichever is greater, *see* R.I. Gen. Laws § 6-13.1-5.2(a).

None of the 112 class representatives were from Rhode Island or the District of Columbia. *See* Dkt. 281 at 5.

B. Target settles the consumer cases.

On March 18, 2015, before any classes had been certified, class counsel moved for preliminary approval of a class action settlement of the consumer cases ("Settlement"). Dkt. 355. The Settlement defined the class as:

> All persons in the United States whose credit or debit card information and/or whose personal information was compromised as a result of the data breach that was first disclosed by Target on December 19, 2013.
>
> Excluded from the class are the Court, the officers and directors of Target, and persons who timely and validly request exclusion from the Settlement Class.

A223.

Under the Settlement, Target would create a fund of $10 million ("Settlement Fund") from which the 41.9 million class members that had credit card information stolen and the 60 million class members that had personal information stolen could submit a claim.[2] A222; A272-A274. Claimants could be reimbursed for their losses up to $10,000 if they submitted satisfactory documentation ("Documented Claims"), or claimants could receive an equal share of the amount remaining in the Settlement Fund after payment of the Documented Claims. A246-A248.

While the Settlement defines the class to include everyone who had their information compromised as a result of the breach, only those class members who

[2] The court awarded service awards to the class representatives totaling $57,500 ($1000 for three of the class representatives and $500 fo the remaining 109 class representatives) that would also be deducted from the Settlement Fund. A21.

incurred costs or unreimbursed expenses could submit a claim and receive compensation. A249. Question 3 on the claim form required class members to identify the type of loss incurred from the following categories:

- Unauthorized, unreimbursed charges on your credit or debit card.
- Time spent addressing unauthorized charges on your credit or debit card.
- Costs to hire someone to help correct your credit report.
- Higher interest rate on an account or higher interest fees that you paid.
- Loss of access or restricted access to funds.
- Fees paid on your accounts (i.e. late fees, declined payment fees, overdrafts, returned checks, customer service, card cancellation or replacement).
- Credit-related costs (i.e. buying credit reports, credit monitoring or identity theft protection, costs to place a freeze or alert on your credit report or a drop in your credit score).
- Costs to replace your driver's license, state identification card, social security number, or phone number.
- Other costs or unreimbursed expenses as a result of the Target data breach.

Id. The claim form instructed class members that "if you were unable to check any of the boxes under question 3, you are not eligible to submit a Claim under the Settlement." *Id.* Because the Settlement provided (and the district court later certified) only a single settlement class, A15, class members who could not submit a claim were part of a *de facto* uncertified and unrepresented subclass ("Subclass") that was not entitled to any of the Settlement Fund.

Whether a class member's Documented Claim included satisfactory documentation was based solely on the discretion of the settlement administrator, Rust

Consulting, Inc. ("Settlement Administrator"). A221, A247. The Settlement Administrator would evaluate each claimant's claim and determine if there was "reasonable documentation that the claimed losses were actually incurred and more likely than not arose from the Intrusion." A246. The Settlement included a "dispute resolution process" which allows claimants to appeal the Settlement Administrator's decision to the Settlement Administrator and then to the settling parties. A247-A248. Separate from the Settlement Fund, the Settlement Administrator would receive $6.57 million for notice and administration costs. A227; Dkt. 482 at 35.

The Settlement also required business changes by Target: designation of a chief information security officer; maintaining a written information security program; maintaining a process to monitor for information security risks; and providing security training to "relevant" Target employees. A228-A229. Target had hired its chief information security officer in June 2014, nine months before the Settlement was reached, and six months before the Complaint. *See* Target Press Release dated June 10, 2014, available at *https://corporate.target.com/article/2014/06/target-names-brad-maiorino-senior-vice-president-c.*

Under the Settlement, class members would release Target of all potential claims including unknown and future claims. A229-A231.

The Settlement permits class counsel to request fees up to $6.75 million and Target would pay the fees awarded by the court separate and apart from the Settlement Fund. A232. Under the Settlement, Target expressly waives its right to appeal any award not to exceed $6.75 million. *Id.* Because the $6.75 million was not part of the

Settlement Fund, if the court awarded class counsel less than $6.75 million, the difference would return to Target instead of the class members. *Id.*

C. The district court preliminarily approves the settlement.

The district court preliminarily approved the proposed Settlement. A1-A14. The preliminary approval order designated six firms as class counsel: Heins Mills & Olson, PLC, Nichols Kaster, PLLP, Morgan & Morgan Complex Litigation Group, PA, Milberg, LLP, Stueve Siegel Hanson LLP, and Girard Gibbs, LLP. A4.

In seeking preliminary approval, the only argument class counsel made in support of the adequacy of the class representatives was that "[n]o conflict exists between Consumer Plaintiffs and other members of the Class. All seek damages and appropriate injunctive relief. Consumer Plaintiffs and all Class members have similar interests in establishing Target's liability for the same conduct and recovering damages resulting from that conduct." A183. At the preliminary approval hearing, neither class counsel nor the district court made any mention of the adequacy of the class representatives. A276-A296.

And in its preliminary approval order, the only finding the district court made regarding the class representatives included: "Consumer Plaintiffs identified in Exhibit 8 attached to the Settlement Agreement are designated as the Settlement Class Representatives. The Court finds that the Settlement Class Representatives are similarly situated to absent Class Members and therefore typical of the Class and that they will be adequate Settlement Class Representatives." A3. The Settlement listed 112 class representatives. A266-A268.

D. Olson objects to the settlement and fee request.

Leif A. Olson is a class member who received individual notice of the Settlement. A338. Although Olson is part of the class, Olson did not suffer any of the losses listed on the claim form and therefore, Olson did not submit a claim. *Id.* Olson did not know whether he would suffer future damages from the data breach, but any such future claims would be waived by the Settlement.

Olson filed an objection to the Settlement and fee request on July 30, 2015 ("Objection"). A300-A335. In his declaration in support of his Objection, Olson declared that he was bringing his objection in good faith and was willing to stipulate to an injunction prohibiting him from accepting compensation in exchange for the settlement of his Objection. A338. This is Olson's first objection. *Id.*

As required under the Preliminary Approval Order (A10), Olson's counsel, Melissa A. Holyoak and Theodore H. Frank, founder of the Center for Class Action Fairness ("CCAF"), submitted lengthy detailed declarations detailing all class actions in which they had been involved. Dkt. 513-2; A357-A378. Frank informed the district court that CCAF has never settled an appeal for a *quid pro quo* payment, and CCAF brought the Objection and appeal in good faith to overturn an unlawful settlement. A377. The declarations documented a substantial track record of good-faith objections honored by district and appellate courts, including this Court. A357-A378.

The Objection argued that the Settlement failed to meet Rule 23's adequacy requirements because it created an unrepresented, uncertified subclass ("Subclass") that froze out millions of class members without compensation. A306-A311. Olson argued

that none of the class representatives were part of the Subclass and thus the class representatives had an incentive to maximize their recovery at the expense of the Subclass who received nothing. A309 (citing A37-A91). Olson questioned how a class action could be superior for the Subclass when they were releasing their claims for zero compenstion. A314. Olson argued that the Subclass needed both separate subclassing and representation who would prosecute the interests of class members like Olson. A310-A311.

The Objection argued that Rule 23's superiority and predominance requirements also could not be satisfied. A311-A315. Specifcially, Olson argued that predominance could not be met because the proposed class involved consumer-protection statutes from 37 states and the District of Columbia, and unjust enrichment laws from 50 states and the District of Columbia. A314-A315. Further, the claims process—which involved the Settlement Administrator's review of the claimant's individual losses and submitted proof in the nine categories of losses listed above—demonstrated that individual questions would overwhelm common questions of causation and damages. A311-A312.

The complexity of the claims process also showed that superiority could not be satisfied. A313. Olson argued that the settling parties did not explain how the Settlement Administrator would deal with fraudulant claims. *Id.* The Settlement Administrator was required to determine whether a charge on a claimant's credit card was unauthorized (or other type of loss), whether it was caused by the data breach, and whether that charge had been reimbursed or reversed by the credit card company. *Id.*

There was no explanation as to how the Settlement Adminitrator would accomplish this. *Id.* As Olson argued, how could it be superior for class members to submit their "individual claims to an artificial judicial forum (run by the consulting group hired by the defendant) with absolute discretion over claims instead of a court of law that offers the protections of procedural rules and the Constitution?" *Id.*

Olson also argued that the Settlement was unfair because there were multiple signs of class counsel's self-dealing including structuring the settlement to deter legitimate objections and protecting their excessive fee request from scrutiny ("clear-sailing"), structuring a "kicker" arrangement where unpaid attorneys' fees would revert to Target rather than the class, hiding the claims rate and actual benefits to the class, and seeking a disproportionate fee award. A316-A324.

Olson argued that class counsel's $6.75 million fee request amounted to an excessive 40.3% ratio (class counsel's fee of $6.75 million compared to the $16.75 million benefit ($6.75 million fees + $10 million settlement fund for class recovery)). A318. Class counsel had argued that their fee request was 28.9% of the benefit, but Olson explained that class counsel had wrongly included the $6.57 million in notice and administration costs in valuing the class benefit. A319. Olson explained that notice and administration costs are not part of the value received from the settlement by the class members and awarding class counsel a commission on notice and administration creates perverse incentives for class counsel to overspend on third parties (rather than class members). *Id.*

Olson further argued that class counsel was attempting to justify their excessive fee request with an exaggerated lodestar. A320. While only six firms were appointed as class counsel, class counsel submitted the lodestar for 45 different firms totaling $5.12 million in fees and expenses for time spent *after* the appointment of lead and liaison counsel. *Id.* (citing A297-A299).

In addition to the Objection, Olson filed a Motion to Exclude the Expert Opinion of Hon. Arthur J. Boylan on October 26, 2015 ("Motion to Exclude"). Dkt. 623. Olson argued that as mediator of the class action settlement, Judge Boylan could opine as to whether the settlement was negotiated at arm's length, but Judge Boylan's Declaration impermissibly opined on whether the settlement satisfied the requirements of Rule 23 and on the structure and effect of the Settlement contract. Dkt. 625 at 3-8.

E. Olson appears at the fairness hearing.

Counsel represented Olson at the fairness hearing on November 10, 2015. A380.

Class counsel confirmed that there were 61 million email notices sent out, or approximately 64% of the class. A383-A384. Class counsel revealed that they received 225,780 total timely claims, of which 6,096 were Documented Claims. A387. This means that 0.2% of the class submitted valid, timely claims. A383, A387. Approximately $442,722 would be paid to Documented Claims and for the remaining 220,000 undocumented claims, claimants would receive around $40 each. A387.

Olson responded to class counsel's arguments contained in their motion for final approval. A391-A392. Olson argued that the court could not ignore the

requirements of Rule 23 simply because this was a settlement rather than litigation class: the Supreme Court held that other than trial management issues, the requirements of Rule 23 require "heightened attention in the settlement context." A393. Second, Olson argued that the intraclass conflict did not disappear based on the availability of injunctive relief because such relief applied to all class members while the Subclass was frozen out of the available pecuniary compensation. A395.

Third, Olson responded to class counsel's argument that the claims process did not present superiority problems because settlement administrators often distributed settlement funds. A395-A396. As Olson explained, the complex claims procedures—where the Settlement Administrator had to separately evaluate each claim and judge whether the loss was caused by the data breach— was fundamentally different than a typical claims administrator who simply distributed the funds without exercising such broad discretion. *Id.*

Fourth, Olson responded to class counsel's argument that the 45-firm lodestar was appropriate because all the firms that contributed should be paid. A397. Olson argued that the problem was that 45 firms should *not* have contributed. *Id.* The court had appointed six firms to act as lead and liaison counsel; there was no need *after* that appointment for 45 firms to spend $5.1 million in negotiating and reaching a settlement. *Id.*

Fifth, Olson argued that the notice and administration costs should be excluded in calculating attorneys' fees because it created an incentive for class counsel to increase administration costs (with the complex claims process) so that they could

receive a higher fee award. A398. Class members thus ended up having to pay $13.3 million ($6.57 million administration + $6.75 million fees) to get $10 million in relief. A397-A398.

Sixth, Olson argued that while the Settlement did not include the terms "clear-sailing" or "kicker", it was the structure (and not semantics) that determined whether the Settlement contained these offending provisions. A398-A399.

Finally, Olson argued that it was important for class counsel to reveal how the fee award would be allocated among the 45 law firms because this would demonstrate which firms might be receiving an improper windfall. A399-A400.

With respect to Olson's Motion to Exclude, Olson argued that Judge Boylan's declaration opining as to the certification requirements was improper under Rule 702. A400-A401. The district court responded that a Rule 702 motion only applied to jury cases. A401.

Class counsel responded to Olson's arguments. First, regarding the conflict between the Subclass (class members like Olson who were not entitled to compensation) and those class members who could submit a claim, class counsel indicated that they did not negotiate the Settlement for the Subclass or those who did not suffer "actual damages." A402. (This contradicted the Complaint, which had alleged that all class members—which included the uncertified Subclass of those who could not identify a specific loss on the claim form—suffered an "actual injury" ("having their credit or debit card account and personal information compromised and stolen") and damages ("diminuation in the value of his or her personal and financial

information"), as well as "imminent, certainly impending injury arising from the substantially increased risk of future potential fraud, identity theft and misuse." A89-A90.) And while the Complaint sought recovery of actual and statutory damages for the entire class (including the uncertified Subclass), *see* A121, A157, and the Settlement released the statutory damages and future damages for the entire class (including the uncertified Subclass), *see* A229-A231, class counsel explained that in structuring the settlement they were not going to "hold up recovery for clients who have suffered actual damages" for those like Olson (and the Subclass). A402. Class counsel did not deny that the uncertified Subclass was unrepresented. *Id.*

Second, class counsel argued that the individualized injury determinations flow from the same event so it was not fatal to predominance requirements. A402. Third, class counsel defended the need for 45 law firms to negotiate the settlement by arguing that's "how these cases are litigated and organized." A403. Third, regarding a "clear sailing" provision, class counsel argued that Target still had the right to object to the fee request from the beginning, A404. Target never opposed class counsel's fee request.

The district court did not ask Olson or class counsel any questions relating to Olson's arguments; the court indicated that it would approve the settlement and would submit a written opinion. A404-A405.

F. The district court approves the settlement and fee request.

The district court issued a written opinion on November 17, 2015 granting final approval of the Settlement, granting plaintiffs' request for attorneys' fees and class representative awards, and denying Olson's Motion to Exclude. A15.

The district court rejected Olson's arguments. The district court observed: "Olson captions his objection as both an objection and as a motion for attorney's fees. Nowhere in the pleading, however, does Olson discuss his purported request for fees. The Court will therefore deny this purported motion without further discussion." A20. Olson's Objection was actually captioned "Olson's Objection to Settlement and **to** Motion for Attorneys' Fees." A300 (emphasis added). Rather than seeking fees, Olson was objecting both to the Settlement and to class counsel's fee request, and was not seeking fees. *Id.* While Olson's Objection provided detailed analysis of the claims process, the structure of the Settlement and a breakdown of class counsel's submitted lodestar, A306-A313, A318-A323, the district court simply dismissed Olson's Objection as "boilerplate arguments." A20.

To demonstrate Olson's good faith and to prove that he was not trying to extort class counsel with a bad-faith objection, Olson had expressed a willingness to stipulate to an injunction against objectors receiving payment without court approval. A338. The district court treated this as a motion, and criticized it as unnecessary. A20.

The district court refused to consider Olson's intraclass conflict and class certification arguments because it had "certified a settlement class in the preliminary approval order, and will not revisit that determination here." *Id.* The district court

recognized that "the fact that the laws of many different states may apply to class members' claims **would make class certification unlikely were this case to proceed**, but that legal complexity and corresponding weakness in Plaintiffs' case renders a settlement more appropriate." A21 (emphasis added).

The district court rejected Olson's argument regarding the disproportionate fee request. A20. The district court found that the total benefit to the class included the $6.57 million notice and administration costs and thus, the fees were a reasonable 29%. *Id.* The district court recognized that Target could not appeal a fee award of more than $6.75 million, and that any fees less than $6.75 million would revert to Target, but the district court did not discuss the appropriateness of the kicker or clear-sailing settlement structure. A22.

The district court found that the fee was appropriate under lodestar or percentage of recovery because the lodestar was a 0.74 multiplier, although the district court did not respond to Olson's arguments regarding the inclusion of the lodestar from 45 different law firms. *Id.*

Olson timely appealed the district court's November 17, 2015 order on December 15, 2015. A406-A407. Three other objectors appealed.

G. The district court orders an appeal bond.

On December 21, 2015, plaintiffs moved the district court for an order requiring Olson, objector-appellant Sciaroni (15-3909) and two other objector-appellants (Lindsay Gibson and Sam Miorelli, whose appeals were consolidated in Appeal Nos. 15-3914 and 15-3915) to be jointly and severally responsible for an appeal bond of

$49,156. Dkt. 678 at 1. The $49,156 consisted of $2,284 in direct-appeal costs and $46,872 in increased class action administration costs for delay caused by the appeals. *Id.* In support of their motion, plaintiffs submitted a declaration indicating that their estimated costs on appeal for copying and binding their brief and appendix and for copies of the reporter's transcript would total $2,284 against the four appellants. Dkt. 681 at 2. Plaintiffs also submitted a declaration from the claims administrator indicating that the appeal would result in additional administration expenses of $46,872 for six months of delay. Dkt. 682 at 2. Plaintiffs noted that one of the appellants, Miorelli, requested $2 million to drop his appeal. A26.

On January 21, 2016, the district court granted plaintiffs' motion for an appeal bond order requiring Olson, Sciaroni and the two other appellants to be jointly and severally responsible for an appeal bond of $49,156 ("Appeal Bond Order") that was to be posted with the court by January 29, 2016. A24-A27. The district court ignored the appellate authorities cited by Olson's opposition that administrative costs were not "costs on appeal," and relied entirely on the precedent of a district-court opinion. A25. The district court held that it "treats with particular disapproval the objections and appeals of 'professional objectors' whose objections amount to a 'tax that has no benefit to anyone other than to the objectors'" and "Objectors Olsen [sic] and Gibson fall in this category of professional objectors." A25-A26. On January 21, 2016, Olson filed a notice of appeal ("January 21 Notice of Appeal") of the district court's Appeal Bond Order. A408-A409.

Miorelli's appeal was dismissed for lack of jurisdiction on January 26, 2016, *see* Appeal Nos. 15-3914, and Gibson moved to dismiss her appeal, which was granted on January 27, 2016, *see* Appeal No. 15-3914. With the dismissal of Miorelli and Gibson's appeals, the only remaining appellants responsible for the appeal bond were Olson and Sciaroni. On January 26, 2016, Sciaroni filed a motion to stay in the district court requesting a stay of the Appeal Bond Order. Dkt. 706. Sciaroni did not deposit any money into the district court's registry before the January 29, 2016 deadline. A419-A470. On January 29, 2016, with no other appellants being willing to contribute to the bond, Olson deposited the entire $49,156 into the district court's registry and documented compliance with the Appeal Bond Order. A410-A415. In a letter to the clerk, Olson's counsel indicated that the "deposit is only for the appeal bond for Mr. Olson's appeal, No. 15-3912, and not for the appeal bond of any other appellant." A415.

On January 29, the district court amended its Appeal Bond Order changing "Appellants shall post an appeal bond in the amount of $49,156" to "Appellants shall deposit into the Court registry an appeal bond in the amount of $49,156," and extending the time to comply with the Appeal Bond Order to February 5 ("Amended Bond Order"). A26, A30. Shortly after the district court issued its Amended Bond Order, the district court clerk acknowledged receipt of Olson's $49,156 deposit. A410.

On February 1, 2016, the district court denied Sciaroni's motion to stay the Appeal Bond Order as moot. A32-A33. The district court held that Sciaroni's obligation to post the appeal bond had been "fully satisfied" by appellant Olson,

despite the fact that Olson had indicated that his deposit was only for Olson's appeal. A32. Olson timely amended its January 21 Notice of Appeal, adding the district court's Amended Bond Order and the February 1, 2016 Order holding that Olson was jointly and severally liable for Sciaroni's costs. A416-A417.

On February 12, 2016, Olson filed in this Court a Motion to Vacate $46,872 of the Appeal Bond, or, in the Alternative, Motion for an Order Vacating Joint and Several Liability and Requiring Appellant Sciaroni to Contribute His One-Half Share of the Appeal Bond or, in the Alternative, to Dismiss Sciaroni's Appeal. On March 28, this Court denied the motion to vacate the appeal bond without explanation; the March 28 Order did not explicitly rule on Olson's motions for alternative relief.

Summary of Argument

The Settlement here, which pays class members about $10 million, and attorneys and settlement administrators over $13 million, is rife with red flags, such as "clear sailing" and "kicker" clauses designed to shield excessive attorney fee requests from scrutiny. *E.g., In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947-49 (9th Cir. 2011); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014) (Posner, J.). The district court did not scrutinize any of these problems in approving the Settlement. On appeal, class member Leif Olson focuses on just a single flaw and district-court dereliction of duty. The parties structured the Settlement with a single settlement class, the members of which waive all future and statutory claims in the Complaint (A121, A157) and otherwise (A229-A231)—but limited recovery to just one swath of the Complaint, and provided no means for any class members to claim future or statutory damages,

freezing out over 99% of the class as an unrepresented and uncertified subclass with no recovery or consideration for their waiver. Olson objected to this fatal flaw of the pre-certification Settlement, which would preclude class certification in normal circumstances, but especially in this case, where class counsel acknowledged that it had focused on achieving recovery for only a small swath of the class. A402. But the district court held that it had already certified the class as part of its preliminary approval order authorizing notice to the class, and that no challenges to class certification could be heard at the fairness hearing. A20. This is reversible legal error, because *of course* a district court must evaluate the class certification at a fairness hearing. At a minimum, remand is required to fix this disregard. But the Court can go further, and hold that single-settlement-class certification in this scenario is impermissible as a matter of law.

Olson also appeals the district court's imposition of an *ultra vires* appeal bond of $49,156. Fed. R. App. Proc. 7 permits an appeal bond for costs, and Fed. R. App. Proc. 8 permits a *supersedeas* bond for the expenses of delay, but the district court purported to order Olson to post a $49,156 bond for the putative expenses of delay, without satisfying the requirements of Rule 8. Rule 7 simply does not permit the imposition of a bond to cover costs that have no statutory or rules-based authority, and neither class counsel nor the district court identified any such authority.

Moreover, the district court expressly held that it was imposing the bond because it thought Olson was a "professional objector" who was attempting to impose a "tax that has no benefit to anyone other than the objectors" and was otherwise objecting in bad faith. A25-A26. There was no evidence to support this insulting

finding, and unrebutted evidence that Olson and his non-profit *pro bono* counsel were objecting in good faith.

The district court also erred because, after Olson posted his bond to secure the costs of his appeal, the court unilaterally held that Olson was jointly and severally liable for the costs of other appellants he had no relationship with, and did not require the other appellants to participate in the bond. This is impermissible and tremendously unfair to Olson, who has no control over whether other appellants comply with appellate rules or even file non-frivolous papers that comply with Fed. R. App. Proc. 38.

The district court's abusive and unfair insults to Olson and his non-profit counsel merit reassignment on remand.

Preliminary Statement

Attorneys with the non-profit Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") are representing Olson *pro bono* on appeal. The district court, without any basis, accused Olson of objecting solely to extort the class for his own benefit. A25-A26. This is not so.

CCAF's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won tens of millions of dollars for class members. *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling Center attorney Frank "the leading critic of abusive class action settlements") ("Liptak"); Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011); *Pearson*, 772 F.3d at 787 (Posner, J.) (praising CCAF's

work); *In re Classmates.com Consol. Litig.*, 2012 U.S. Dist. LEXIS 83480, at *29 (W.D. Wash. Jun. 15, 2012) (same). This appeal is brought in good faith to protect class members in this and future settlements, and while other objectors may have made abusive demands to class counsel (A26 (Miorelli)), Olson has no interest in seeking or accepting payment from class counsel to dismiss his appeal.

Argument

I. The district court erred as a matter of law in certifying a settlement class with an intraclass conflict between class members who received compensation and class members who were part of an unrepresented, uncertified subclass that received nothing.

Standard of Review: A district court's ruling approving a class action settlement is generally reviewed for abuse of discretion. *In re Uponor, Inc.,* 716 F.3d 1057, 1063 (8th Cir. 2013). The requirements of Fed. Rule Civ. Proc. 23—designed to protect absentee class members from unwarranted or overbroad class definitions—require "heightened attention" in the settlement context. *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1145 (8th Cir. Mo. 1999) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). The Eighth Circuit recognizes that federal courts apply a "*de novo* standard of review to legal determinations made in the course of deciding whether or not to certify a class despite the overall abuse of discretion standard applicable to certification rulings." *In re Baycol Prods. Litig.*, 593 F.3d 716, 723 (8th Cir. 2010), *rev'd on other grounds sub nom.*, *Smith v. Bayer Corp.*, 564 U.S. 299 (2011) (citing *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 573 (7th Cir. 2008)). "The district court's rulings on issues of law are reviewed *de novo*, and the court abuses its discretion if it commits an error of

law." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). "The district court also abuses its discretion if its conclusions rest on clearly erroneous factual determinations." *Id.* Mixed questions of law and fact are reviewed *de novo*. *Donaldson Co. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 731 (8th Cir. 2009). And a district court that "fails to follow applicable law" abuses its discretion. *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 969 (8th Cir. 2002) (*en banc*). "To survive appellate review, the district court must…give a reasoned response to all non-frivolous objections." *Dennis v. Kellogg*, 697 F.3d 858, 864 (9th Cir. 2012) (internal quotation and citation omitted).

Olson argued to the district court that the Settlement class could not be certified because Rule 23(a)(4) adequacy could not be satisfied based on an intraclass conflict. A306-A311. The court refused to consider Olson's arguments because it would not "revisit" its certification decision from preliminary approval of the Settlement. A20. That the parties did not reveal the conflict to the court during preliminary approval is not surprising, because it was an *ex parte* non-adversary proceeding. That is why objectors "play an essential role in judicial review of proposed settlements of class actions and why judges must be both vigilant and realistic." *Pearson*, 772 F.3d at 787 (Posner, J.). The district court's omission is by itself legal error requiring remand, because a district court has a continuing obligation to ensure class certification is appropriate, especially when presented with new arguments that had not previously been considered.

But this Court can go further, and hold that the combination of the settlement structure and class counsel's representations that it was uninterested in pursuing the

statutory damages alleged in the Complaint mean that Rule 23(a)(4) simply was not met.

A. The district court's refusal to consider whether the settlement class failed to satisfy Rule 23(a)(4) adequacy requirements based on the intraclass conflict is independent error requiring reversal.

Olson argued to the district court that an intraclass conflict between class members and the uncertified Subclass was fatal to Rule 23(a)(4) adequacy. A306-A311. The district court, however, refused to even consider Olson's arguments because "the Court certified a settlement class in the preliminary approval order, and will not revisit that determination here." A20. The court's refusal to assess whether Rule 23(a) requirements remained satisfied for final approval was independent error. "A district court has a duty to assure that a class once certified continues to be certifiable under Fed. R. Civ. P. 23(a)." *Petrovic*, 200 F.3d at 1145 (citing *Hervey v. Little Rock*, 787 F.2d 1223, 1227 (8th Cir. 1986)).

It is well settled that after the initial determination that the class representatives fairly and adequately represent the class members, the court has an ongoing duty to ensure that the Rule 23(a)(4) adequacy is satisfied. *Petrovic*, 200 F.3d at 1145 (citing *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) (noting that courts are "required to reassess their class rulings as the case develops"). *Accord Barney v. Holzer Clinic,* 110 F.3d 1207, 1214 (6th Cir. 1997) ("The district court's duty to assay whether the named plaintiffs are adequately representing the broader class does not end with the initial certification."); *Grigsby v. North Mississippi Med. Ctr., Inc.*, 586 F.2d 457, 462 (5th Cir. 1978) (holding that after initial certification, the district court "must continue

carefully to scrutinize the adequacy of representation and withdraw certification if such representation is not furnished"); *Key v. Gillette Co.*, 782 F.2d 5, 7 (1st Cir. 1986) (holding that court has "ongoing duty" to make sure adequacy is "complied with at all stages of the litigation"); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir.) (reversing trial court's settlement approval and noting that district court has "stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation"). *See also Burns v. United States R.R. Retirement Bd.*, 701 F.2d 189, 191-92 (D.C. Cir. 1983) ("The original definition and certification . . . may require alteration or amendment as the case unfolds.") (Ruth Bader Ginsburg, J.) When the district court refused to revisit the adequacy determination during final approval of the Settlement, the court abandoned its basic duty of ensuring that the Rule 23 requirements were satisfied.

Moreover, while the district court abandoned its duty at final approval, the district court never properly fulfilled its duty in the first place. At preliminary approval, the district court did not apply the "rigorous analysis" required in determining whether Rule 23 was satisfied. This Court has explained that courts must conduct "rigorous analysis" of whether the class representatives fairly and adequately represent the class in order "to protect unknown or unnamed potential class members, and by definition those people do not and cannot participate in any stipulations concocted by the named parties." *Hervey*, 787 F.2d at 1227; *see Amchem*, 521 U.S. at 620 (holding that Rule 23 requirements "designed to protect absentees by blocking unwarranted or overbroad

class definitions—demand undiluted, even heightened, attention in the settlement context").

Here, plaintiffs' motion for preliminary approval summarily argued that there was "[n]o conflict" and all class members had "similar interests." A183. There was no discussion of adequacy at the preliminary approval hearing, *see* A276-A296, and the district court's preliminary approval order merely stated that the class representatives "will be adequate Settlement Class Representatives" without any discussion of possible conflicts. A3. The court failed to perform the "rigorous analysis" or "heightened scrutiny" designed to protect the absent class members. And as a result, the class members were actually harmed. Doubtless numbers of class members in the Subclass went unrepresented and ended up with nothing. *See* Section I.B.

The district court's failure to exercise discretion is an abuse of discretion. *Cf. In re American Medical Sys.*, 75 F.3d 1069, 1087 (6th Cir. 1996) (granting writ of mandamus to decertify class because district court failed "to make any genuine findings on any of the elements of Rule 23" and "failed to exercise properly his broad discretion within the framework of Rule 23"). The district court's refusal to assess whether the adequacy requirements of Rule 23(a)(4) had been satisfied was independent error and reason alone for this Court to remand for the district court to perform the appropriate analysis that was never made. *See also Dennis*, 697 F.3d at 864.

So at a minimum remand is required. But this Court can go further. As explained in the next section, class counsel's admissions at the fairness hearing demonstrate conclusively as a matter of law that the single settlement class cannot be

certified without subclassing and separate representation for the ignored uncertified Subclass.

B. The district court erred in certifying the settlement class because Rule 23(a)(4) adequacy requirements were not satisfied: the zero-recovery subclass required separate representation.

The Settlement here provides for a single settlement class: "[a]ll persons in the United States whose credit or debit card information and/or whose personal information was compromised as a result of the data breach that was first disclosed by Target on December 19, 2013." A223. But a subclass within that class—uncertified and unrepresented—receives no recovery or benefit under the Settlement. To receive compensation under the Settlement, class members must submit a claim showing specific types of injury by the claims deadline. A249. Settlement class members who are not eligible to receive cash under the Settlement waive all of their statutory-damages claims and future claims (known or unknown) as surely as every other class member. A229-A230 (Settlement §§ 6.1, 6.3). They get no consideration for these waivers.

The class members that are ineligible for settlement relief are part of a zero-recovery *de facto* uncertified subclass. Class certification of the single settlement class is improper because this zero-recovery subclass is not adequately represented. Indeed, class counsel explicitly stated that, though the Complaint sought recovery of statutory damages for the entire class (*see* A121, A157), and the Settlement released the statutory damages and future damages for the entire class (including the uncertified Subclass) (A229-A231), in structuring the settlement they were not going to "hold up recovery for clients who have suffered actual damages" for the those like the zero-recovery

Subclass. A402. Class counsel does not deny that the uncertified Subclass was unrepresented. *Id.*

In order to proceed as a class action, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (internal quotation and citation omitted); *see Bishop v. Comm. on Prof'l Ethics and Conduct of Iowa State Bar Ass'n*, 686 F.2d 1278, 1289 (8th Cir. 1982). Among other criteria, a class action cannot be certified unless the court determines that the class representatives "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The purpose of Rule 23(a)(4) is to assure that the absent class members' interests are represented in the litigation so as to make it fair to bind them to the release and settlement of the action. *Amchem*, 521 U.S. at 621. The court must

> determine that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, **and that there is no conflict between the individual's claims and those asserted on behalf of the class.** This inquiry is vital, as class members with divergent or conflicting interests from the named plaintiffs and class counsel cannot be adequately represented.

In re Community Bank of N. Va., 622 F.3d 275, 291 (3d Cir. 2010) (internal quotation marks and citation omitted and emphasis added).

Unfortunately, insufficient weight was given to zero-recovery class members who were waiving statutory-damages claims and rights to recover for future injury by both class counsel and the district court. This precludes certification as a matter of law. As Judge Smith noted in dissent in *In re Asbestos Litigation*, a class "representative must

possess the same interest and suffer the same injury as the class members and must be aligned in interest such that no conflicts exist between the representative and any discrete subclasses within the broader class he purports to represent. *Amchem* demands a structural assurance of fair and adequate representation for the diverse groups and individuals affected." 134 F.3d 668, 677 (5th Cir. 1999). That dissent was vindicated when the Supreme Court reversed the Fifth Circuit for just this reason in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). It "is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under [what is now Rule 23(c)(5)], with separate representation to eliminate conflicting interests of counsel." *Id.* at 856 (citing, *inter alia*, *Amchem,* 521 U.S. at 627). This Court should not repeat the Fifth Circuit's error, and must reverse the class certification.

Here, the class representatives all had past claims addressed by the Settlement; all received incentive payments of $500 to $1,000) that were not available to any other class member. A21. The class representatives got theirs, and had no interest in protecting the interests of the class members frozen out by the Settlement and who might have statutory claims or future damages. Because the entire settlement class, even the unrepresented Subclass, waived all claims as part of the Settlement, the class representatives' performance maximized the recovery for those similarly situated to them at the expense of the litigation value of the latent and statutory claims of the uncertified and unrepresented Subclass that was zeroed out by the Settlement.

Dewey v. Volkswagen AG, 681 F.3d 170 (3d Cir. 2012), is exactly on point an example of the conflicts that may arise between a class representative and a class. In *Dewey*, representatives of a single settlement class negotiated reimbursement for one set of car owners, but the remaining carowner class members could only make "goodwill" claims on the residual amount of the settlement fund, if any. *Id.* at 173. Because none of the class representatives were in the "residual group," and the residual group did not have separate representation for their competing interests, the class could not be certified under Rule 23(a)(4). "The structure of the settlement agreement itself, which divides a single class into two groups of plaintiffs that receive different benefits, supports the inference that the representative plaintiffs are inadequate" as a matter of law. *Id.* at 187. As here, "Put simply, representative plaintiffs had an interest in excluding other plaintiffs from the reimbursement group, while plaintiffs in the residual group had an interest in being included in the reimbursement group. This is precisely the type of allocative conflict of interest that exacerbated the misalignment of interests in *Amchem*, 521 U.S. at 626-27." *Id.* at 188; *see also Day v. Whirlpool Corp.*, 2014 U.S. Dist. LEXIS 169026, at *13-20 (W.D. Ark. Dec. 3, 2014) (denying approval because "[p]laintiffs might not share interests with—or at least might not vigorously pursue the interests of—putative subclass members"); *Henke v. Arco Midcon, LLC*, 2014 U.S. Dist. LEXIS 31810, at *31 (E.D. Mo. Mar. 12, 2014) (holding that named representative with personal injury claims could not represent class with only property damage claims).

Here, the class representatives incurred the types of expenses and costs identified in Question 3 of the Claim Form and are eligible to submit claims for class relief. *Compare* A249 (Claim Form), *with* A37-A91. The class representatives are thus not part of the uncertified zero-recovery Subclass; indeed, none of the **112** are from Rhode Island and D.C., among other jurisdictions with statutory damages claims. The class representatives had an incentive to maximize their recovery at the expense of the unrepresented Subclass members. Because of this intra-class conflict, Rule 23(a)(4) is not met. *Ortiz*, 527 U.S. at 856; *Amchem*, 521 U.S. at 627; *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010) ("Conflicts of interest may arise when one group within a larger class possesses a claim that is neither typical of the rest of the class nor shared by the class representative."). Indeed, this conflict is worse than the one in *Dewey*. In *Dewey*, the Third Circuit noted that the unrepresented and uncertified subclass had at least a chance at contingent recovery if there were leftover settlement funds. Here, however, the intra-class conflict is particularly egregious because the Subclass is releasing their claims for no consideration under any circumstances. *Cf. Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) (Posner, J.) (rejecting settlement approval as abuse of discretion where subclass was shut out without any lower-court finding that underlying claim of subclass was meritless).

Similarly, *In re Literary Works* provides another less-egregious example of impermissible conflict. 654 F.3d 242 (2d Cir. 2011). Class counsel attempted to negotiate compensation from Google for three separate "categories" of class members for a single settlement class. *Id.* at 246. Each category received a different damages

formula. *Id.* As in this case, each class representative "served generally as representative for the whole, not for a separate constituency." *Id.* at 251 (quoting *Amchem*, 521 U.S. at 627). The Second Circuit did not dispute that each category had differently valued claims; nor did it make any finding that the compensation negotiated for any specific category was unfair or inadequate. Nevertheless, the settlement was stricken on Rule 23(a)(4) grounds: the class representatives "cannot have had an interest in maximizing compensation for *every* category." *Id.* at 252 (emphasis in original). *See generally Ortiz,* 527 U.S. 815. Here, there has not even been the finding that the zero-recovery Subclass for each of the fifty states and their causes of action has zero litigation value; many survived a motion to dismiss.

Where a class fails on a structural level, it must be vacated without regard to whether "the class members' interests were not actually damaged." *Dewey*, 681 F.3d at 189 n.19. When a portion of the class lacks representation, the Rule 23(a)(4) failure cannot be solved by claiming "no harm, no foul" after the fact. And it's far from clear here that there was no harm, given that class members from states like California waived their right to statutory damages alleged by the Complaint. A127-A144, A157 (citing state statutes and alleging right to statutory damages).

The fact that the class was certified under Rule 23(b)(3) with a right of opt-out is not a panacea. (Indeed, *Amchem* involved an opt-out class.) Opt-out is rarely exercised. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1546 (2004). Opt-out "does not relieve the court of its duty to safeguard the interests of the class and to

without approval from any settlement that creates conflicts among class members." *In re GMC Pick-Up Trucks*, 55 F.3d 768, 809 (3d Cir. 1995); *see also Phillips v. Klassen*, 502 F.2d 362, 367 (D.C. Cir. 1974). It does not "diminish the extent to which a class action settlement is an exercise of judicial power." *Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996). "Regardless of whether class members are given opt-out rights, the court is still required to ensure that the representation is adequate and that the settlement is fair to class members." *Id.*; *see also Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1179 (9th Cir. 1977) (Kennedy, J., concurring). A class action settlement precludes future class litigation, and in the case of a small-dollar claim, "[e]conomic reality dictates" that the case "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974); *Amchem*, 521 U.S. at 616-17. While *In re Uponor, Inc.*, 716 F.3d at 1064, suggests that an opt-out can cure a Rule 23(a)(4) conflict, *Uponor* fails to address *Eisen*; the fact that *Amchem* had opt-out rights; or the contradictory precedent from other circuits. Olson should not be bound by the *Uponor* appellants' waivers of the correct arguments and precedents. (In any event, *Uponor* is also distinguishable: there, the parties engaged in "extensive discovery and preparation for trial." 716 F.3d at 1063.)

Nor can a class member's failure to object or opt-out, particularly in a large-scale consumer class action, cannot be interpreted as agreement with the settlement terms or provide any indication of the settlement's fairness. *See Redman v. Radioshack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (describing it as "naïve" to infer assent from silence); Eisenberg & Miller, *supra*, 57 VAND. L. REV. 1529, 1561 (2004) ("Common sense

indicates that apathy, not decision, is the basis for inaction."); *see generally* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007).

A handful of Eighth Circuit cases besides *Uponor* reject Rule 23(a)(4) challenges, but these cases are distinguishable; to the extent they are not, they conflict with *Amchem*, *Ortiz*, *Dewey*, and *Literary Works*, and should be overruled to the extent necessary to avoid an unnecessary circuit split.

For example, in *Prof'l Firefighters Ass'n. of Omaha, Local 385 v. Zalewski*, 678 F.3d 640 (8th Cir. 2012), this Court affirmed a settlement of a dispute over a union contract with Omaha, though the district court did not appoint separate counsel for adverse subclasses of present and past employees. But that case is distinguishable for multiple reasons because of its unique idiosyncratic facts. *First*, though there was no formal appointment of separate class counsel, the interests of the retired employees were represented by intervening retired firefighters whose separate counsel did participate in the settlement negotiations, and who supported the settlement. *Id.* at 643-44. There was no such representation here. *Second*, the subclass was actually certified, and there were class representatives in the subclass who participated in and approved the settlement negotiations. *Third*, and most important, the *Firefighters* settlement had a unique specific provision of checks and balances to preclude retirees from being unfairly treated by any conflict of interest: retirees could obtain review from an arbitrator if the settlement mechanism of new contract negotiations produced "a proposed change … not 'fair and reasonable to the retirees,'" and the arbitrator could

block that proposed change. *Id.* at 644. These unique facts provided the "structural assurance of fair and adequate representation" that *Amchem* and *Ortiz* require, *id.* at 646-47, but none of these three unique facts apply to this Settlement, where

> the parties agreed upon a class definition and a settlement … and then presented the district court with the … proposed class [and] proposed settlement. The difficulty inherent in such a situation is that the district court "lack[s] the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Amchem,* 521 U.S. at 620.

Id. at 647 (quoting *Petrovic*, 200 F.3d at 1145-46).

Similarly, *Petrovic* turned on the fact that "the parties engaged in more than three years of extensive discovery and preparation for trial, and the class was certified under Fed. R. Civ. P. 23(b)(3) many months before the parties reached the settlement…on the eve of trial." 200 F.3d at 1146. Here, however, "the settlement is not negotiated by a court designated class representative," and the grounds for *Petrovic* distinguishing *Amchem* and *Ortiz* do not apply. *Id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). And as in *Firefighters*, but not like here, the class representatives came from all subgroups. *Id.* at 1147.

Amchem, Ortiz, Dewey, and *Literary Works* are correct, and require reversal here, and none of the Eighth Circuit cases distinguishing *Amchem* and *Ortiz* dictate otherwise. Any other result would create an unnecessary circuit split.

II. The district court erred by ordering a Rule 7 appeal bond that included $46,872 in administration costs for delay.

Standard of Review: "This court reviews *de novo* the district court's interpretation of the Federal Rules of Civil Procedure." *United States ex rel. Kraxberger v. Kan. City Power & Light Co.*, 756 F.3d 1075, 1082 (8th Cir. 2014). (We suggest the district court's interpretation of the Appellate Rules also be *de novo*.) The Eighth Circuit reviews "factual findings for clear error and questions of law or mixed questions of law and fact *de novo*." *Plunk v. Hobbs*, 719 F.3d 977, 980-81 (8th Cir. 2013).

A. While delay costs may be taxed under a Rule 8 bond, because a Rule 8 bond was unavailable here, plaintiffs improperly included the delay costs in a Rule 7 bond.

The district court ordered objector-appellants to post a Rule 7 appeal bond that included delay costs of $46,872 for increased administration expenses. A24-A31. While a Rule 8 *supersedeas* bond can secure delay costs, a Rule 7 appeal bond cannot. *E.g., Vaughn v. Am. Honda Motor Co.*, 507 F.3d 295, 298-99 (5th Cir. 2007). A Rule 8 *supersedeas* bond is not available here because appellants have not sought to stay the final judgment. *E.g., In re Am. President Lines, Inc.*, 779 F.2d 714, 716-18 (D.C. Cir. 1985) (per curiam).

Because a Rule 8 bond was unavailable to plaintiffs, plaintiffs instead sought to secure the delay costs with a Rule 7 bond. The Fifth Circuit specifically rejected this kind of procedural maneuvering in *Vaughn v. American Honda Motor Co.* In *Vaughn*, because the district court's Rule 7 bond was used to secure the class benefits under the settlement, the district court had "essentially us[ed] a bond for costs on appeal as a

surrogate for a supersedeas bond." 507 F.3d at 299. "Bonds to supersede a judgment must be set under Rule 8, not Rule 7." *Id.* at 299-300. As in *Vaughn,* the delay costs here must be set under Rule 8, not Rule 7. Any other result writes Rule 8 out of the books. The district court erred as a matter of law in permitting plaintiffs to circumvent the requirements of Rule 8—and distort the function of Rule 7—by issuing a Rule 7 bond order that secured the costs of delay.

B. Administration delay costs cannot be included in the district court's Rule 7 bond order because (1) they are not authorized by any rule or statute, and (2) they would not be recoverable from Objector Olson.

Federal Rule of Appellate Procedure 7 permits a district court to "require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of **costs on appeal**." Fed. R. App. P. 7 (emphasis added). To be lawfully incorporated into a Rule 7 bond, any such "cost on appeal" must meet two requirements: First, the cost must be expressly provided for by a rule or statute. *Tennille v. W. Union Co.,* 774 F.3d 1249, 1254 (10th Cir. 2014). Second, it must be actually recoverable by appellees from appellants. *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 959 (9th Cir. 2007) (requiring reciprocity). The administration costs at issue here meet neither requirement; accordingly, the district court's inclusion of delay costs was improper.

1. No statute or rule authorizes plaintiffs to recover administration costs on appeal.

Circuit courts that have addressed the issue "consistently define 'costs on appeal' for Rule 7 purposes as appellate costs expressly provided for by **a rule or statute**."

Tennille, 774 F.3d at 1255 (emphasis added) (citing D.C., Third, Second, Ninth, Eleventh, and First Circuits). *Tennille* involved the same request plaintiffs made here for a Rule 7 bond that included class action administration costs for delay. 774 F.3d at 1254. The Tenth Circuit reversed the district court's order, holding that a Rule 7 appeal bond could not include any amount to cover notice to class members or increased class action administrative costs. 774 F.3d at 1255. A Rule 7 appeal bond could not include class action administration costs because there was no rule or statute expressly permitting plaintiffs to recover such costs. *Id.*

In their response to Olson's Motion to Vacate filed with this Court, plaintiffs mischaracterized the leading circuit court decision so as to suggest that a split in authority exists on this issue. *See* Consumer Plaintiffs/Appellees' Response to Appellant Olson's Motion to Vacate Part of Appeal Bond (No. 15-3912, Feb. 23, 2016) ("Plaintiffs' Response") at 7 (citing *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6th Cir. 2004)). There is no split. Like *Tenille*, the Sixth Circuit recognized in *Cardizem* that Rule 7 costs must be permitted by rule or statute and upheld the Rule 7 bond that included administration costs under the specific, underlying Tennessee statute. 391 F.3d at 817-18. In fact, the only split in authority concerns whether Rule 7 costs on appeal should, as some circuits hold, be *further* limited to those costs enumerated in Rule 39, which defines "costs on appeal taxable in the district court" to include copying costs and filing fees. *Tennille*, 774 F.3d at 1255 (describing split). *No* published circuit court decision has held that costs may be included in a Rule 7 appeal bond in the situation presented here, the absence of statutory authority. *See id.* at 1254-55

(noting the circuits agree that Rule 7 bonds are limited "to costs that a successful appellate litigant can recover pursuant to a specific rule or statute. . . . even though the circuits disagree as to precisely what costs a Rule 7 appeal bond can cover.").[3]

The district court here ignored the multiple circuit authorities Olson cited, and instead issued the appeal bond securing the delay costs based solely on a *stayed* district court decision, *In re Uponor, Inc.*, 2012 U.S. Dist. LEXIS 130140 (D. Minn. Sept. 11, 2012). A29. There, the district court ordered a $170,000 bond consisting of $25,000 in appeals costs, $20,000 in settlement administration costs, and $125,000 for additional class notice. *In re Uponor, Inc.*, 2012 U.S. Dist. LEXIS at *12. After the district court ordered the bond, objectors appealed, arguing that the bond was excessive. This Court "agreed and entered an order staying 'the requirement that Appellants post an appeal bond in excess of $25,000.'" *In re Uponor, Inc.*, 716 F.3d at 1062. While it did not include its reasoning, this Court's decision to permit only the $25,000 appeals costs suggests that the inclusion of the settlement administration and class notice costs was improper. The appellees did not pursue the issue further, and this Court never reached the issue of the appropriate size of the appeal bond. *Id.* at 1062 n.3. And in the end, although the *Uponor* appellees prevailed, they were awarded no costs for settlement administration

[3] The non-precedential decision in *Nutella Mktg. & Sales Practices Litig.* affirmed a Rule 7 bond that included administration costs primarily based on the objectors' unresponsiveness to the bond request, and provided no reasoned analysis. 589 Fed. App'x. 53, 61 (3d Cir. N.J. 2014) (unpublished). This Court should not *create* a split in authority among the circuits, based on an unpublished decision in which the issue was essentially unlitigated.

and notice. *See In re Uponor*, No. 11-2247, Dkt. 157 (Order Granting Motion to Withdraw/Disburse/Release Funds) (D. Minn. Oct. 21, 2013).

Because the district court's inclusion of delay costs in the Rule 7 appeal bond was not based on a rule or statute—in contravention of all circuit authorities—Plaintiffs' Response attempted to rescue the district court's error by suggesting that such costs could be taxed under Rule 38. Rule 38 permits an *appellate court* to order an appellant to pay costs to the appellee if the *appellate court* finds that an appeal is frivolous. Fed. R. App. P. 38. "While Rule 39 expressly authorizes the district court to tax certain costs on appeal, and while it is usually the district court that ultimately determines entitlement to expenses including attorney's fees on appeal under fee-shifting statutes, only the court of appeals may order the sanction of appellate attorney's fees under Rule 38." *Azizian*, 499 F.3d at 959.

The Ninth Circuit and the D.C. Circuit hold that a Rule 7 bond should not include costs available under Rule 38 for frivolous appeals:

> We agree with the D.C. Circuit that the question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorney's fees under Rule 38. *In re Am. President Lines*, 779 F.2d at 717. 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. *Id.* at 717, 718; *see also Adsani*, 139 F.3d at 79. "[A]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated.").

Azizian, 499 F.3d at 961 (parenthetical omitted); *but see Tennille*, 774 F.3d at 1255 (noting split with *Sckolnick v. Harlow*, 820 F.2d 13, 14-15 (1st Cir. 1987)). As the Ninth Circuit explained, a district court does not get to prejudge the appeal and "deter" appeals it does not like through excessive appeal bonds. *Azizian*, 499 F.3d at 961; *Vaughn*, 507 F.3d at 299; *Am. President Lines*, 779 F.2d 714; *but see Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998). If a judge improperly chills appeals of its decisions, it could forever avoid review of its rulings. *Cf. Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012) (Easterbrook, J.) ("A district judge ought not try to insulate his decisions from appellate review….").

More importantly, Olson's appeal is not frivolous. "Under Rule 38, an appeal is frivolous 'when the result is obvious or when the appellant's argument is wholly without merit.'" *Misischia v. St. John's Mercy Health Sys.*, 457 F.3d 800, 806 (8th Cir. 2006); *Azizian*, 499 F.3d at 960 ("Award of appellate attorney's fees for frivolousness under Rule 38 is highly exceptional…."). Olson's appeal—based on precedent from the Supreme Court and numerous circuits—challenges the adequacy of representation under 23(a)(4) because the district court approved a single settlement class that fails to give any relief to an uncertified and unrepresented subclass. *See* Section I.B. It further challenges the legal error of the district court refusing to consider class certification after preliminary approval in the face of objections—a challenge that is not only not frivolous, but manifestly correct. *See* Section I.A. While the district court overruled and criticized Olson's arguments, and while it found Miorelli's appeal frivolous, it did not

find Olson's arguments frivolous. A20; A26. Plaintiffs' argument is based on a factual finding of frivolousness that the district court never made.

2. The bond order is erroneous because even if plaintiffs are successful on appeal, plaintiffs could not recover administration costs from objector-appellant Olson.

Even if there were statutory authority for reimbursement of administration costs, those costs cannot be included in a Rule 7 bond here, because a Rule 7 bond can only secure costs that an appellee could *actually* recover *from appellant* if appellee were successful on appeal. *See, e.g., Azizian*, 499 F.3d at 959. As one court explained: "More fundamentally, the question is not whether an item represents a 'cost' an appellee may incur during an appeal, but whether such 'cost' is one that a losing appellant will become responsible for paying to the appellee." *Golloher v. Todd Christopher International, Inc.*, 2014 U.S. Dist. LEXIS 91942, *5 (N.D. Cal. July 7, 2014) (citing *Azizian*, 499 F.3d at 959-60).

In *Azizian*, for example, the Ninth Circuit held that although Rule 7 could potentially include attorneys' fees based on the applicable fee-shifting statute, such fees could not be used in the Rule 7 bond in *Azizian* because they were not recoverable against the appellant class member. 499 F.3d at 959-60. The applicable fee-shifting statute only authorized fees to be recovered from the losing defendant (the party that violated the antitrust laws) and not an objecting class member. *Id.*; *see also Young v. New Process Steel, LP*, 419 F.3d 1201, 1204 (11th Cir. 2005) (reversing Rule 7 bond that included attorneys' fees because the fee-shifting statute only permitted recovery of fees

to defendants in exceptional cases, and the district court made no finding that defendant-appellee would actually recover fees).

Plaintiffs cannot secure administration costs in the Rule 7 bond because there is no rule or statute where *Objector Olson* would be liable to plaintiffs for such costs, even if plaintiffs were successful on appeal.

C. The district court erred in finding Olson was a "professional objector" objecting in bad faith and in ordering an appeal bond on that basis.

In ordering the appeal bond, the district court held that it "treats with particular disapproval the objections and appeals of 'professional objectors' whose objections amount to a 'tax that has no benefit to anyone other than to the objectors'" and "Objectors Olsen [sic] and Gibson fall in this category of professional objectors." A25-26 (quoting *In re Checking Account Overdraft Litig.*, 2012 WL 456691, at *2 (S.D. Fla. Feb. 14, 2012)). The court's findings were factually and legally erroneous.

Factually, the district court erred because Olson and his counsel are not professional objectors, and no evidence exists to support that mischaracterization. A "professional objector" is a specific legal term referring to a for-profit attorney who indiscriminately files objections in order to blackmail plaintiffs' attorneys for payment in exchange for withdrawing his or her objections without attempting to benefit the class. *E.g.,* A25-26; 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 for Class Action Fairness from professional objectors). This is not the practice of Olson's non-profit counsel. CCAF's mission is to litigate on

behalf of class members against unfair class-action procedures and settlements, and it has won tens of millions of dollars for class members. *See, e.g.*, Liptak, *supra*; Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, FORTUNE, Dec. 15, 2015 (calling Frank "the nation's most relentless warrior against class-action fee abuse"); *McDonough v. Toys "R" Us,* 80 F. Supp. 3d 626, 661 (E.D. Pa. 2015) ("CCAF's time was 'judiciously spent to increase the value of the settlement' to class members…."); *Pearson,* 772 F.3d at 787; *Classmates.com*, 2012 U.S. Dist. LEXIS 83480, at *29.

The undisputed evidence was that CCAF has never settled an appeal for a *quid pro quo* payment to CCAF, and CCAF brought the Objection in good faith to overturn an unlawful settlement. A377. CCAF has won several landmark appellate rulings improving the fairness of class-action and derivative-settlement procedure, including its only appeal in this Circuit: *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015). Likewise, there was no basis for the court to find that Olson himself was a professional objector or acting to "tax" class members in bad faith for his own benefit. A25, A29. Olson had never previously objected to a class action, and he expressly swore his willingness to stipulate to an injunction prohibiting him from settling his objection without the district court's approval. A338. Remarkably, the district court treated this expressed willingness to be enjoined as a motion for an injunction, criticized the "motion" as unnecessary—and then found Olson attempted precisely what Olson expressed a willingness to be enjoined against doing. A20; A25-26. That another appellant with a frivolous appeal demanded millions to settle (A26) is no

reason to make findings against Olson. Moreover, Olson's actions in appealing immediately demonstrated that he was not appealing for the purposes of delay; because the district court never entered a Rule 54(b) or Rule 58 final judgment, an appellant seeking maximum delay could have waited until May 15, 2016, to appeal, guaranteeing the case would not be decided until 2017 at the earliest.

Legally, the district court erred because whether an appellant is a professional objector is not an appropriate basis for setting an excessive appeal bond. As repugnant as objector blackmail is—again, Olson and his counsel offered to stipulate to an injunction precluding such blackmail—imposing a punitive appeal bond to curtail objector appeals is improper. A district court does not get to prejudge the appeal and "deter" appeals (or appellants) it does not like through excessive appeal bonds. *Azizian*, 499 F.3d at 961; *Vaughn*, 507 F.3d at 299; *Am. President Lines*, 779 F.2d 714; *contra Adsani,* 139 F.3d at 79.[4]

Perhaps the district court used the inflammatory language with the more neutral intent of criticizing Olson's attorneys for frequently representing objectors. But that is perhaps worse, because then the district court is acting punitively against Olson because he retained attorneys with a successful track record in challenging abusive and

[4] If the district court or class counsel had any real concern that there was extortion afoot, the injunction Olson offered and the district court rejected as unnecessary would have been sufficient to banish a bad-faith objector from the case. After all, if an objector is objecting in bad faith to seek an extortionate payment, an injunction against that payment eliminates the objector's reason to proceed. Instead, the district court criticized Olson for "seeking" the injunction, and then defamed him as someone attempting to extort class counsel.

illegal class-action settlements. (Should someone seeking to object to a class-action settlement hire a family-law attorney instead?) But a punitive bond against a good-faith objector punishes *the class* because "appellate correction of a district court's errors…a benefit to the class." *Crawford v. Equifax Info Servs.*, 201 F.3d 877, 881 (7th Cir. 2000). Thus, a "district judge ought not try to insulate his decisions from appellate review" by attempting to make it impossible to appeal. *Robert F. Booth Trust*, 687 F.3d at 318.

In short, the district court cannot impose a punitive bond based on its opinion of the merits, be it the legal arguments presented or the worthiness of the appellant.

D. The appeal bond's imposition of joint and several liability was unconstitutional.

The appeal bond imposed joint and several liability of the bond on Olson and Sciaroni, the only remaining appellants. A26, A30. Joint and several liability of the appeal bond is unconstitutional. If this Court orders sanctions against Sciaroni for a frivolous appeal or vexatious litigation, plaintiffs could attempt to collect from Olson's money deposited in the court's registry. The court erred by making Olson financially responsible for Sciaroni's actions that are outside Olson's control. *Cf. Hessel v. O'Hearn*, 977 F.2d 299, 305 (7th Cir. 1992) (Posner, J.) ("Happily that principle [of collective punishment] is not—not generally, anyway—a part of our law. Proximity to a wrongdoer does not authorize punishment."); *Houston Contractors Ass'n v. Metro. Transit Auth. of Harris County*, 993 F. Supp 545, 558 (S.D. Tex. 1997), *vacated on other grounds*, 189 F.3d 467 (5th Cir. 1999) ("The Constitution disallows collective guilt. A person cannot be held responsible for an act unless he did it. We do not accept the concept that a

person is responsible for what others of her race, town, profession, or politics may have done."). This Court should make clear that "joint and several liability" for a *bond* is impermissible when the multiple appellants affected are unrelated.

* * *

In short, the district court's appeal bond order violates Fed. R. App. Proc. 7 on multiple independent grounds and must be vacated.

III. On remand this Court should reassign this case to a different district court judge.

Objector Olson requests that this Court reassign this case on remand, as authorized by its supervisory power under 28 U.S.C. § 2106. This Court applies the appearance of partiality standard in determining whether to order reassignment under § 2106. *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009), citing *United States v. Tucker*, 78 F.3d 1313, 1323-24 (8th Cir. 1996). "In accordance with that standard, recusal or reassignment is appropriate where impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case." *Sentis Group*, 559 F.3d at 904 (internal quotation marks and citation omitted). *See also Tucker*, 78 F.3d at 1324 (granting reassignment "in order to preserve the appearance as well as the reality of impartial justice"); *Gov't of the V.I. v. Walker*, 261 F.3d 370, 376 (3d Cir. 2001) (exercising the supervisory power to reassign a case because the "conduct and comments of the trial judge … ma[d]e it exceedingly difficult to resurrect an appearance of impartiality").

The district court's rejection of Olson's Objection and its abusive and unfair criticism of Olson shows bias. The district court labeled Olson's arguments "boilerplate," A20, despite the Objection's detailed analysis of the claims process, the structure of the Settlement, a breakdown of class counsel's submitted lodestar, and separate set of unique papers with respect to the admissibility of a putative expert declaration in support of settlement approval. A306-A311, A318-A323; Dkt. 625. The district court refused to even consider Olson's arguments regarding the intraclass conflict, abandoning its duty to assure that the class could be certified. *See* Section I.A. The district court entirely ignored the appropriateness of the kicker and clear-sailing clauses of the settlement, though Olson flagged them and cited substantial law and public policy why they were problematic. A322-A324. The district court paid so little mind to Olson's papers that it asked Olson's counsel no questions and, then, in its written order, interpreted "Olson's Objection to Settlement and to Motion for Attorneys' Fees" (A300) as a request for *Olson* to be awarded attorneys' fees, and then criticized Olson for failing to substantiate his "request." A20. The district court couldn't even be bothered to spell Olson's name correctly. A25-A26.

The district court's bond order further demonstrates bias against objector Olson and his counsel. The district court criticized Olson with "particular disapproval" for being a "professional objector, whose objections amount to a tax that has no benefit to anyone other than to the objectors" (A25-A26) disregarding unrebutted evidence to the contrary—including Olson's offer to stipulate to an injunction against receiving money from the settling parties without court approval, which the district court

ironically criticized as unnecessary. *See* Section II.C. The district court imposed a punitive and unlawful appeal bond based on its erroneous findings. A29-A30. The court unfairly and unlawfully made Olson financially responsible for Sciaroni's conduct by making Olson jointly and severally liable for the punitive appeal bond. *See* Section II.D.

Such baseless accusations of bad faith demonstrate partiality and merit reassignment. *See United States v. Kennedy*, 682 F.3d 244, 259 (3d Cir. 2012) (reassigning case because district court "question[ed] the propriety of the prosecution," "question[ed] the integrity of the Government's evidence collection practices, undermin[ed] the professionalism of the prosecutor, and accus[ed] the Government of prosecuting in bad faith—all without evidence"). Because the district court's "impartiality might reasonably be questioned," this Court should order that this case be reassigned on remand. *Sentis Group*, 559 F.3d at 904.

While this Court applies the "appearance of partiality" standard for reassignment, Olson believes that reassignment is also appropriate even under a lesser standard, and asks this Court to adopt the Seventh Circuit's standard. *E.g.,* 7th Cir. R. 36 (ordering reassignment on remand as presumption absent joint request of parties); *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 313 F. 3d 385, 392 (7th Cir. 2002); *cf. Sarchet v. Chater*, 78 F.3d 305, 309 (7th Cir. 1996) (noting in discussing remand to ALJ that reassignment to different district court can be appropriate in circumstances short of bias).

Conclusion

At a minimum, the Court must vacate settlement approval and remand for an evaluation of the class certification that never happened. But this Court can go further and hold that the single settlement class in this particular pre-certification Settlement structure cannot be certified, and that on remand, the Subclass needs to be separately certified with separate class representation and separate legal counsel.

Independently, the appeal bond must be vacated as a violation of Rule 7. Olson asks that this Court explicitly hold that "costs" without statutory authority cannot be included in a Rule 7 bond, and that parties cannot back-door a *supersedeas* bond without complying with Rule 8. Furthermore, this Court should vacate the joint and several responsibility of the appeal bond.

On remand, the Court should reassign this case to a different district-court judge.

Dated: April 7, 2016

Respectfully submitted,

/s/ Theodore H. Frank

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Certificate of Service

I hereby certify that on April 7, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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