No. 17-17367

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: LITHIUM ION BATTERIES ANTITTRUST LITIGATION,

INDIRECT PURCHASER PLAINTIFFS,
Plaintiffs-Appellees,

v.

MICHAEL FRANK BEDNARZ,
Objector-Appellant,

v.

PANASONIC CORPORATION; PANASONIC CORPORATION OF NORTH AMERICA; SANYO ELECTRIC CO, LTD; SANYO NORTH AMERICA CORPORATION; MAXWELL CORPORATION OF AMERICA; TOSHIBA CORPORATION; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; SAMSUNG SDI CO. LTD.; SAMSUNG SDI AMERICA, INC.; SONY CORPORATION; SONY ENERGY DEVICES CORPORATION; SONY ELECTRONICS, INC.,
Defendants,

HITACHI MAXWELL, LTD.; HITACHI, LTD.; LG CHEM AMERICA, INC.; LG CHEM, LTD.; NEC CORPORATION; NEC TOKIN CORPORATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California, No. 4:13-md-02420-YGR

Opening Brief of Appellant M. Frank Bednarz

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Statement of Subject-Matter and Appellate Jurisdiction

The district court had jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). The amount in controversy exceeds $5,000,000, exclusive of interest and costs. ER124. The class consists of millions of members, and at least one plaintiff's citizenship is different from at least one defendant's citizenship. Dkt. 1168 at 140.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. On October 27, 2017, the district court entered final judgment under Fed. R. Civ. Proc. 54(b) with respect to all claims against defendants Hitachi, NEC, and LG Chem. ER1. (Dkt. 2004.) Appellant-Objector Michael Frank Bednarz filed a notice of appeal on November 20, 2017; this notice is timely under Fed. R. App. Proc. 4(a)(1)(A). ER130. (Dkt. 2034.) Bednarz, as a class member who objected to settlement approval below, has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Statement of the Issues

In this antitrust class action, the district court certified a settlement class and approved a settlement combining two distinct types of indirect purchasers of lithium-ion batteries: (i) those who have viable claims because they are from states that allow indirect purchasers of goods to sue for money damages under state antitrust law and (ii) those who have no claims because they are from states that do not allow such suits. Under the settlement, the funds will be distributed *pro rata* to indirect purchasers nationwide, regardless of their states of citizenship.

1. *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 625 (1997), holds that the adequate representation requirement of Federal Rule of Civil Procedure 23(a)(4) mandates the absence of "conflicts of interest between named parties and the class they seek to represent." Did the district court err in holding Rule 23(a)(4)'s adequacy requirement satisfied where the single settlement class of indirect purchasers included both class members who have a viable claim and class members who do not? (Raised at ER220; ER227-31; ruled on at ER7.)

2. *Mazza v. Am. Honda Motor, Inc.*, 666 F.3d 581, 596 (9th Cir. 2012), holds that when "variances in state law overwhelm common issues," they "preclude predominance for a single nationwide class" under Rule 23(b)(3). Did the district court err in holding Rule 23(b)(3) satisfied where the single settlement class here combines indirect purchasers who have viable state-law antitrust claims with indirect purchasers who do not, a combination that the court previously found impermissible? (Raised at ER220; ER225-27; ruled on at ER8.)

3. The court approved a *pro rata* settlement distribution that treats all class members identically, including those residents of states whose state antitrust law precludes recovery. Did the court err in approving the settlement as fair, reasonable, and adequate under Rule 23(e)(2) when the *pro rata* distribution to class members with no claims materially dilutes the amount of money available for distribution to those with viable claims? (Raised at ER220; ER232-33; ruled on at ER7-8.)

4. *In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 701-02 (9th Cir. 2018), requires district courts to conduct a choice-of-law analysis and assess potential differences in state laws before certifying a nationwide settlement class under

Rule 23(b)(3). Did the district court commit reversible error when it failed to do so where it had previously refused to certify a litigation class because its choice-of-law analysis had revealed material differences in state laws. (Raised at ER226; ER228; ER232; ruled on at ER8.)

Preliminary Statement

Attorneys with the Center for Class Action Fairness, which became part of the non-profit Competitive Enterprise Institute on October 1, 2015, bring Bednarz's objection and appeal. (Bednarz is a Center attorney.) The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won over a hundred million dollars for class members. *See, e.g.*, Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOST. GLOBE (Dec. 17, 2016); 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"); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising the Center's work); *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 WL 3854501, at *29 (W.D. Wash. Jun. 15, 2012) (same). This appeal is brought in good faith both to vindicate Bednarz's interests as a prejudiced class member and to protect other class members in this and future class actions against unfair and abusive settlements.

Statement of the Case

The settlement-only certification here binds together class members with viable claims and class members with no claims. Under federal antitrust law, indirect

purchasers of goods generally may not sue for money damages. But under state antitrust law, about half the states authorize indirect purchasers to bring these claims, while the other half do not. After payment of attorney's fees and expenses, the settlement challenged here would distribute almost $40 million *pro rata* to indirect purchasers of lithium-ion batteries nationwide—about half of whom hail from states that do not allow indirect-purchaser claims and who thus would lose if they brought an individual suit. Bednarz challenges the class certification and settlement because, even assuming that the settlement amount is fair in the aggregate, the settlement dilutes the viable claims of indirect purchasers by about $20 million that is rightfully theirs, while netting a windfall in an equal amount for indirect purchasers who have no claims but are nevertheless grouped in the same class.

I. Under undisputed background antitrust principles, half the class members have viable claims, and half the class members have no claims.

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that, under federal antitrust law, indirect purchasers generally may not recover damages from antitrust violators. *Id.* at 730. In other words, if A sells a price-fixed product to B, and B resells the product or uses the product in creating a good it sold to C, the indirect purchaser C generally may not recover damages from A under federal antitrust law; only the direct purchaser B has a federal cause of action. The Court reasoned that this rule prevents multiple entities from recovering for the same violation. *Id.* at 738.

Illinois Brick was a controversial decision, and dozens of states passed laws or issued judicial decisions rejecting it to permit indirect-purchaser recovery under state antitrust laws. States have divided almost evenly, with about half allowing recovery

(repealer states) and the other half following federal law and prohibiting indirect purchasers from bringing claims (non-repealer states).[1] Federal antitrust law does not preempt state-law indirect purchaser suits, thus empowering states to chart their own course. *California v. ARC Am.*, 490 U.S. 93, 101 (1989).

II. Plaintiffs file class actions alleging that defendants had conspired to fix the prices of lithium-ion batteries.

Lithium-ion batteries are used in devices such as smartphones, laptops, cameras, and cordless power tools. Dkt. 1735 at 2. Plaintiffs allege that, in 2000, various manufacturers, including the three involved in this appeal—defendants-appellees Hitachi, NEC, and LG Chem[2]—allegedly stopped competing and conspired to price-fix their lithium-ion batteries, yielding a total alleged overcharge to purchasers of more than $127 million. *Id.*; Dkt. 1921 at 12. In 2013, several plaintiffs brought antitrust suits for damages, eventually consolidated for pretrial proceedings in a multi-district litigation in the Northern District of California. The suits included class actions on behalf of direct and indirect purchasers of lithium-ion batteries.

[1] *See* Michael A. Lindsay, *Overview of State RPM*, AntiTrustSource.Com (2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf.

[2] We treat Defendants-Appellees Hitachi Maxwell, Ltd.; Hitachi, Ltd.; LG Chem America, Inc.; LG Chem, Ltd.; NEC Corporation; and NEC Tokin Corporation interchangeably, as the precise corporate distinctions are irrelevant to this appeal.

III. The district court denies the indirect-purchaser plaintiffs' motion for class certification.

At the initial conference in 2013 to decide lead counsel appointment, plaintiffs' counsel Elizabeth Cabraser emphasized the effect of *Illinois Brick* on the case's complexity: "We have 27 states to represent on the indirect purchaser side." Dkt. 148 at 81. The court appointed her firm, Lieff Cabraser, co-lead counsel for the indirect purchasers. Dkt. 194. The initial indirect-purchaser plaintiff complaint sought a nationwide damages class, and, in the alternative, a state damages class for what it now claimed were 29 repealer states. Dkt. 256. In response to a court request for letters on potential intended motions to dismiss, defendants noted their *Illinois Brick* defense. Dkt. 258.

In 2016, the indirect-purchaser plaintiffs moved for class certification. Dkt. 1036. The indirect purchasers sought a nationwide class—that is, a class comprising consumers from both repealer and non-repealer states—and urged the court to apply the repealer-state California antitrust law to all claims. *Id.* at 36. They also asked, alternatively, for the court to certify a class of consumers from *only* the *Illinois Brick* repealer states. *Id.* at 51. This alternative certification would have carved out from the class action purchasers from non-repealer states.

The district court denied the indirect-purchaser plaintiffs' motion because the proposed nationwide class did not satisfy Rule 23(b)(3)'s predominance requirement. ER256. (Dkt. 1735, 2.) Applying California choice-of-law principles, the court concluded that a nationwide class would be inappropriate because "the interests of *Illinois Brick* non-repealer states in precluding indirect purchaser claims would be impaired more significantly" by applying California's antitrust law to the entire class

"than California's interests would be impaired by limiting its application to *Illinois Brick* repealer states." ER278. "It is too much of a stretch to employ California law as an end run around the limitations [non-repealer] states have elected to impose on standing" to protect their resident businesses. ER277 (*quoting In re Optical Disk Drive Antitrust Litig.*, 2016 WL 467444, at *13 (N.D. Cal. Feb. 8, 2016)).

IV. Three groups of defendants settle.

Meanwhile, four groups of defendants settled. One, a settlement and settlement approval with the Sony defendants, is not at issue in this appeal. Dkt. 1712; Dkt. 1715. Under three settlements with the other three defendant groups, appellees Hitachi, NEC, and LG Chem would contribute a total of $44.95 million to a settlement fund, about $40 million of which would go to class members after payment of attorney's fees and expenses. ER189; ER194; ER136. The settlements would distribute the settlement proceeds net of attorneys' fees and expenses *pro rata* to class members based on proof of the number of qualifying purchases of products with lithium-ion batteries. ER3. Class members from non-repealer and repealer states would be treated alike—that is, they would "receiv[e] the same treatment regardless of the state in which the person or entity resides." ER200. In exchange for this relief, the indirect-purchaser class would release their claims against the three groups of settling defendants. ER2; ER189.

In March 2017, the district court preliminarily approved the proposed settlement and certified for settlement only a nationwide class of indirect purchasers who "purchased goods containing lithium-ion batteries manufactured by the defendants" during the class period. ER288-90; ER196. The court designated twenty-three class

representatives. ER289. This representative group, like the class generally, included members from both repealer and non-repealer states. *Id.*

V. Bednarz objected to the settlements and class certification.

Class member Michael Frank Bednarz objected to the proposed settlement and class certification. (Dkt. No. 1902). Bednarz had standing to object as a member of the class of indirect purchasers through his purchase of a laptop in 2006 and a lithium-ion battery replacement for his laptop in 2010. ER220; ER222; ER241. Bednarz resides in Illinois and made these purchases when he resided in Illinois and Massachusetts—both repealer states that allow recovery for goods purchased by indirect purchasers under their own antitrust laws. ER221; ER241. As a class member with a personal stake in the settlements' *pro rata* allocation to class members nationwide, Bednarz argued that the conflict between members from repealer states and members from non-repealer states diluted his recovery and precluded the certification. ER224. He maintained that, given this intraclass schism, the class could not satisfy Rule 23(a)(4)'s adequacy requirement or Rule 23(b)(3)'s predominance requirement. ER224, ER226. He further contended that the proposed *pro rata* settlement allocation failed Rule 23(e)(2) because it unfairly diluted the recovery of repealer-state class members like him. ER231.

Bednarz acknowledged that a recent nonprecedential decision of this Court, *In re Transpacific Passenger Air Transp. Antitrust Litigation*, 701 F. App'x 554, 555 (9th Cir. 2017), rejected similar arguments, but argued that this case was distinguishable because, unlike in *Transpacific*, which held the conflict "speculative," the parties had been

litigating the *Illinois Brick* defense and were aware that it was a material barrier to recovery for half the class. ER225; ER149.

VI. The court granted final approval to the settlements and class certification.

After a fairness hearing (ER139), the district court granted final approval to the settlements and class certification, overruling all objections and finding that Rule 23's prerequisites were satisfied. ER2. The court relied heavily on *Transpacific* and *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011), to hold that predominance was satisfied despite the intraclass fissure between repealer and non-repealer class members, without addressing the distinction Bednarz drew with *Transpacific*. ER8. The court also found the *pro rata* settlement allocation plan "fair and adequate despite these differences" under Rule 23(e)(2). *Id.* (At the fairness hearing, the court suggested that it might unilaterally change the *pro rata* allocation plan proposed by class counsel, ER143, but its approval order accepted it.) Without explanation, the court further held that Rule 23(a)(4)'s adequacy requirement was satisfied. ER8. The court did not consider the differences between the rights of repealer- and non-repealer-state class members that had earlier led it to deny class certification. *Id.* The court awarded an interim $5.3 million in fees to class counsel, without prejudice to additional fee requests. ER136. The court entered final judgment under Rule 54(b). ER1. This timely appeal followed. ER130. (A *pro se* lay objector also appealed these orders in Appeal No. 17-17369, but does not raise any of the issues Bednarz raises in this appeal.)

While this appeal was pending, the court again denied a motion for class certification for a class of indirect purchasers from thirty states that plaintiffs contended permitted indirect-purchaser recovery. ER122. Plaintiffs filed a request for Rule 23(f) review, which is pending as Appeal No. 18-80042.

Summary of Argument

The district court approved a settlement and class certification that binds together two disparate groups of indirect purchasers of lithium-ion batteries. Purchasers from one group have viable claims because they hail from repealer states—that is, states that effectively repealed *Illinois Brick* and allow indirect purchasers to sue for money damages under state antitrust law. Purchasers from the other group have no claims because they hail from non-repealer states that do not allow such suits. Initially, the court denied the indirect-purchaser plaintiffs' motion for class certification because of this very divergence. But when it came time to analyze the parties' settlement-only certification, the court reversed course, overlooked that divergence, and approved the certification and settlement. The court made four legal errors, each of which independently requires reversal.

I. Where two subgroups' interests clash, no single class representative or class counsel can adequately represent the interests of both subgroups, rendering a finding of Rule 23(a)(4) adequacy impossible. *See Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999). Class counsel cannot simultaneously maximize the value of the claims of repealer-state class members and non-repealer-state class members, because they are both fighting for shares from the

same pie. Though one subgroup has a much stronger claim than the other, class counsel resolved the conflict through the Procrustean means of treating all class members alike, effectively selling out the class members from repealer states. This inherent intraclass conflict between members who have viable claims and members who do not precludes a finding of adequacy.

II. The district court also erred in approving this certification because it violates Rule 23(b)(3), which requires "questions of law or fact common to class members to predominate over questions affecting individual members." This predominance rule mandates that the class be "sufficiently cohesive." *Amchem*, 521 U.S. at 623. Thus, where "variances in state law overwhelm common issues," that "preclude[s] predominance for a single nationwide class." *Mazza v. Am. Honda Motor, Inc.*, 666 F.3d 581, 596 (9th Cir. 2012). Here, we do not simply have "variances" in state law, but rather a black-and-white contrast between indirect purchasers who have viable claims and indirect purchasers who have none. The class is anything but cohesive and thus fails Rule 23(b)(3)'s predominance requirement—as the district court previously found when ruling on the original motion for class certification. ER283. That this case involves a settlement class, rather than a litigation class, requires a stricter, rather than a more lenient standard, as *Amchem* holds.

III. The district court erred in approving a *pro rata* allocation plan that was not "fair, reasonable, and adequate," as Rule 23(e)(2) requires. By authorizing a distribution of settlement funds equally to all claimants, the court allowed those with no claims to improperly dilute the recovery of those with viable claims. Appellant Bednarz, for instance, who hails from and made his purchases in repealer states, has had his rightful

recovery cut in half by a settlement that unfairly favors the interests of class members who have no claims at all.

IV. The court erred in failing to conduct a choice-of-law inquiry, which under this Court's precedent must precede the certification inquiry. *See In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 701-02 (9th Cir. 2018). This failure to conduct the requisite inquiry backpedals on the district court's order denying the indirect purchasers' original motion for certification, where the court applied choice-of-law principles and concluded that a nationwide class under California's substantive antitrust law would be inappropriate. ER278. The case for reversible error here is stronger than in *Hyundai*, because Bednarz's objection highlighted the choice-of-law problem. ER225.

Standard of Review

A district court's decision to approve a class-action settlement is reviewed for abuse of discretion. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011). A failure to apply the correct standard of law is an abuse of discretion. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004). Questions of law are reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). With respect to class certification, "[w]hen the trial court's application of the facts to the law requires reference to the values that animate legal principles [this Court] review[s] that application de novo." *Mazza*, 666 F.3d at 588.

Argument

Run-of-the-mill civil settlements do not trigger judicial scrutiny. But class-action settlements are different. First of all, class-action lawyers have no relationship with, and therefore cannot be monitored by, their absent class member clients as in ordinary litigation. Class-action settlements thus create "the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own," *In re Dry Max Pampers Litigation*, 724 F.3d 713, 715 (6th Cir. 2013), and the risk that defendants will "purchase res judicata" on large scale and push through unjust settlements at the expense of substantive rights, *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000). These concerns are particularly salient where, as here, class certification is not contested but occurs as part of, and simultaneous with, settlement. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). "The adversarial process—or what the parties here refer to as their 'hard-fought' negotiations —extends only to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members. For the economic reality is that a settling defendant is concerned only with its total liability, and thus a settlement's allocation … is of little or no interest to the defense." *Pampers*, 724 F.3d at 717; *see generally In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 778, 820 (3d Cir. 1995) (Becker, J.); *see also Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 621-22 (1997) (noting similar concerns); *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289, 294 (7th Cir. 2010) (listing cases and scholarship on problem). No collusion is necessary to create these problems: simply

class counsel and the defendant working for each of their own self-interests at the expense of the class without adequate checks from the judiciary.

Concern over these risks is why Rule 23's protections exist and are so important. The rule "aims to ensure that the interests of the[] absent class members are safeguarded" by "charging the judge with that responsibility in requiring her judicial stamp of approval." William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 13:40. "Because there is typically no client with the motivation, knowledge, and resources to protect its own interests, the judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation." MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.61. In other words, "the court plays the important role of protector of the absentees' interests, in a sort of fiduciary capacity, by approving appropriate representative plaintiffs and class counsel." *In re GMC Pick-Up*, 55 F.3d at 784. Rule 23 corrects the informational asymmetry by mandating judicial scrutiny, not deference. Indeed, objectors like Bednarz "play[] a highly important role for the class and the court because he or she raises challenges free from the burden of conflicting baggage that Class Counsel carries." *In re Prudential Ins. Co. Am. Sales*, 278 F.3d 175, 202 (3d Cir. 2002); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 830 (9th Cir. 2012) (Kleinfeld, J., dissenting); Deborah R. Hensler *et al.*, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 491-96 (Rand Inst. for Civil Justice 2000).

Here, the court recognized that a proposed nationwide class was untenable for litigation purposes. ER278. But the court failed to discharge its responsibilities in the settlement context, giving short shrift to Rule 23 analysis and holding the rule satisfied

"for settlement purposes" with conclusory, and unsupported, certitude. ER7-8. For example, in addressing a Rule 23(b)(3) predominance objection, the court simply held that "for purposes of settlement, common issues predominate," without any further analysis on that point. (*Id.*) But the court got it backwards. With one exception not applicable here, the Supreme Court requires "undiluted, even heightened" scrutiny for class certification in the settlement context compared to the litigation context, because "a court asked to certify a settlement class will lack the opportunity … [to later] adjust the class, informed by the proceedings as they unfold." *Amchem*, 521 U.S. at 620.

Rule 23(e) "was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)." *Amchem,* 521 U.S. at 621. And just in case Justice Ginsburg's message was unclear: "The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class context." *Id.*

Predictably, the risks associated with class-action settlements materialized in this case. The settling parties steamrolled the interests of inadequately protected class members. The certification redistributed about $20 million from indirect purchasers who had viable claims (because they hailed from *Illinois Brick* repealer states) to indirect purchasers who had no claims (because they hailed from non-repealer states). This Court should vacate the district court's order certifying the class and approving the settlements.

I. The class does not satisfy Rule 23(a)(4)'s adequacy-of-representation requirement.

A. The district court erred by not subjecting the settlement-only certification to a heightened adequacy analysis.

Amchem requires "undiluted, even heightened, attention" to a settlement-only class certification. 521 U.S. at 620. Here, the district court not only failed to subject the settlement-only class certification to heightened attention, it did just the opposite. In evaluating the plaintiffs' initial motion for certification, the court acknowledged the conflict between the two different types of indirect purchasers within the nationwide class. It observed that "the interests of *Illinois Brick* non-repealer states in precluding indirect purchaser claims would be impaired" by allowing indirect purchasers to circumvent those restrictions through application of California law to the entire class. ER277-78. But when it came to the settlement-only certification, rather than amplifying its scrutiny (as required), the court watered down its scrutiny, no longer bothered by the conflict it had earlier identified and held precluded certification. This by itself is reversible error requiring remand, but this Court can go further and simply reject the class certification, as the district court correctly did when presented with the exact same question in the litigation context.

B. The class does not satisfy Rule 23(a)(4)'s adequacy-of-representation requirement because the two subgroups' interests and incentives conflict.

1. Adequacy under Rule 23(a)(4) requires the class representatives to "possess the same interest and suffer the same injury as the class members" and the absence of "conflicts of interest between named parties and the class they seek to represent."

Amchem, 521 U.S. at 625-26 (cleaned up). So, if the "interests of those within the single class are not aligned," and the named parties seek "to act on behalf of a … class rather than on behalf of discrete subclasses," then it will be impossible for any one representative to adequately represent the entire class, and the class as structured simply can never satisfy the adequacy rule. *Id.* "[T]he linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." *Dewey v. Volkswagen A.G.*, 681 F.3d 170, 183 (3d Cir. 2012).

Here, no single representative could ever adequately represent the entire class because the class members' interests diverge too widely. On the one hand, class members from repealer states have viable claims. On the other hand, class members from non-repealer states have *no* viable claims. If they were to bring antitrust suits for money damages on their own, they would win *nothing*, or at most settle for a nuisance recovery. Adequately represented repealer-state class members would demand that the entire settlement pie—or at least the vast majority of it—go to them; non-repealer-state class members would seek equal treatment, but would be willing to settle for nuisance value. By binding together two disparate groups with fundamentally divergent interests competing for shares of the same settlement pie, the settlement-only certification here has created an insurmountable conflict that renders adequacy impossible and the district court's approval unlawful. And, as the *pro rata* settlement shows, class counsel favored the non-repealer-state class members at the expense of the repealer-state class members like Bednarz.

Amchem is squarely on point. The Supreme Court there held an asbestos class settlement unlawful because it combined (i) class members exposed to but not injured

by asbestos and (ii) class members already suffering from asbestos-related injuries. 521 U.S. at 597. "[F]or the currently injured, the critical goal [was] generous immediate payments," but for the exposure-only members, the critical goal was inflation-protected funds for future compensation. *Id.* at 626-27. Those goals "tugged against" each other. *Id.* Because the interests and incentives "of those within the single class [were] not aligned," the named plaintiffs' attempt to represent the whole class rather than each "separate constituency" fell far short of Rule 23(a)(4)'s demands. *Id.* So too here, the named plaintiffs failed to "operate[] under a proper understanding of their representational responsibilities," and the "settling parties … achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.*

Two years later, in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court repeated what should have been "obvious after *Amchem*": "a class divided between holders of [disparate] claims … requires division into homogeneous subclasses with separate representation to eliminate conflicting interests of counsel." *Id.* at 856. In *Ortiz*, the proposed class combined (i) claimants exposed to a company's asbestos products before 1959 and (ii) claimants first exposed after 1959 (the expiration year of the insurance policy that would fund the settlement). "Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants." *Id.* at 857. Absent subclassing, these "disparate interests" precluded adequacy. *Id.*; *see Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010) (concluding that representative plaintiff had an "insurmountable conflict of interest" when "one group within a larger class possesse[d] a claim" that was "no[t] shared by the class representative").

The settlement-only certification here represents an even starker violation of Rule 23(a)(4)'s adequacy requirement than the certifications struck down in *Amchem* and *Ortiz*. Here, the two groups' claims do not simply differ in strength or value (because of a temporal variable); their goals do not merely "tug against" each other; their interests and incentives are not merely "disparate." Rather, the indirect purchasers from repealer states have viable claims, while the indirect purchasers from non-repealer states have *no* claims. Individual litigation would yield them *nothing*. Mathematically, the two groups' claim values are not just substantially different—they are *infinitely* different. The conflict here could not be more insurmountable, the interests and incentives more at odds, or the representation less adequate.

Note that Bednarz is not claiming that every intraclass difference makes representation impossible. Some settlements properly allow for balancing, approximation, and "rough justice." *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Where differences are *de minimis* or relatively immaterial, one may permit efficiency concerns to override "fine lines." *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) (Easterbrook, J.). But this case presents the direct opposite scenario where "recovery depends on law that varies materially from state to state" such as state "antitrust" law, which "differ[s] in ways that could prevent class treatment if they supplied the principal theories of recovery." *Id.* at 746-47. The district court here did not simply gloss over minor variances in claim values, applicable laws, or factual positions; instead, the court fused together class members with cognizable claims and members with no claims at all. This is wrong, as the district court itself recognized when it refused to certify a nationwide litigation class.

2. The prescription for resolving untenable intraclass conflict is to create subclasses under Fed. R. Civ. P. 23(c)(5) and to assign each discrete subclass "separate representation." *Ortiz*, 527 U.S. at 840. *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011), is directly on point. There, the court of appeals reversed the district court's failure to subclass and provide separate representation in a settlement involving authors whose copyrighted works had been electronically published without their authorization. *Id.* at 246. Class counsel attempted to negotiate compensation from the defendant for three separate "categories" of class members in a single settlement, with each category A, B, and C, receiving a different damages formula. *Id.* As in this case, each class representative "served generally as a representative for the whole, not for a separate constituency." *Id.* at 251 (quoting *Amchem*, 521 U.S. at 627). Some named plaintiffs and class members had a mix of claims; other named plaintiffs and class members had *only* C claims. *Id.* at 252-53. But the district court did not require subclasses. *Id.*

On appeal, the objectors pointed out that no named class member could adequately represent a C-claim-only plaintiff. *Id.* The Second Circuit agreed, reasoning that a C-only plaintiff was uniquely and exclusively interested in "maximizing the compensation for that one category of claim." *Id.* Without subclassing, even a named plaintiff who had only C claims could not adequately protect the C-only plaintiffs because that named plaintiff would be obligated "to advance the collective interests of the class, rather than those of the subset of class members whose claims mirrored their own." *Id.* Thus, "[o]nly the creation of subclasses, and the advocacy of an attorney representing each subclass, [could] ensure that the interests of that particular subgroup

[were] in fact adequately represented." *Id.* When "fundamental" differences in interests exist between different groups within the class, Rule 23(a)(4) requires the settlement to create subclasses, with separate representatives and class counsel for each subclass. *Id.* at 250 (quoting *Ortiz*, 527 U.S. at 856); MANUAL FOR COMPLEX LITIGATION (4th ed.) § 21.23.

The requirement of separate representation and class counsel was true even though 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 category was unfair or inadequate. In that sense, the *Literary Works* settlement is superior on every dimension to the settlements here, where class counsel simply grouped everyone in the same class with the same recovery without trying to weight the relative value of their claims, and the district court made no attempt to evaluate the relative strength of the different claims. Nevertheless, *Literary Works* struck the settlement on Rule 23(a)(4) grounds because the class representatives "cannot have had an interest in maximizing compensation for *every* category." *Id.* at 252 (emphasis in original).

Here, where there is only one single set of attorneys for the class and the class representatives were charged with representing the collective interests of *all* class members, no one is exclusively interested in maximizing the compensation for the repealer-state claimants. Instead, class counsel maximized compensation for the non-repealer-state claimants at the expense of diluting the recovery for repealer-state claimants. The repealer-state claimants were inherently inadequately represented. Rule 23(a)(4) was violated as a matter of law. Either the class should have been restricted to repealer-state

residents, or there should have been subclassing. But certifying a single Procrustean nationwide settlement class was impermissible.

C. *Transpacific* does not salvage the inherent inadequacy of the representation here.

Over a dissent, this Court recently affirmed a district court's approval of a settlement that declined to resolve an *Illinois Brick* intraclass-conflict objection similar to the one here. *In re Transpacific Passenger Air Trans. Antitrust Litig.*, 701 F. App'x 554, 555 (9th Cir. 2017) (non-precedential). There, this Court stated that, in reviewing the settlement, the district court was not required "to weigh the prospective value of each class member's claims." *Id.* But that proposition is wrong for the reasons explained above, particularly where, as here, the value of the class members' claims differ so starkly. *Transpacific*, 701 F. App'x at 557 (Rawlinson, J., dissenting) (majority's view is at odds with *Amchem*). Indeed, *Transpacific* contradicts Ninth Circuit law, which holds precisely the opposite proposition: the first factor a district court must consider in evaluating a class-action settlement is "the strength of the plaintiffs' case" relative to the "amount of the settlement." *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 575-76 (9th Cir. 2004).

But even if *Transpacific* were good law, it is distinguishable here. *Transpacific* ultimately declined to resolve the *Illinois Brick* intraclass-conflict objection, which it viewed as "speculative," because "at the time of settlement, Defendants-Appellees had not raised" an *Illinois Brick*-based defense, "and the district court had not ruled" on one. *Id.* at 555-56. Here, however, there is nothing "speculative" about the intraclass conflict. Class counsel acknowledged the *Illinois Brick* issue at the very first hearing, defendants

here *have* raised and briefed the defense, and the district court effectively accepted it when it denied the initial motion for class certification on the basis of the very conflict that the *Illinois Brick* defense created among the nationwide class of indirect purchasers. *See* Statement of the Case § III above. Even on its own terms, then, *Transpacific* does not apply.

II. Class certification also fails Rule 23(b)(3)'s predominance requirement.

Under Rule 23(b)(3), the district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

A. The class does not meet Rule 23(b)(3)'s predominance requirement because of the binary difference between repealer and non-repealer state laws.

Common questions of law or fact among the class members here do not predominate over questions affecting individual members because material variations in state law render the class incohesive. *See Amchem*, 521 U.S. at 623 (noting that the "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation"). Although all indirect purchasers bought batteries from the defendants, there is a clear-cut divide in their ability to bring antitrust claims for money damages. About half hail from repealer states, which allow indirect purchasers to bring these claims, and the other half live in states that do *not* recognize these claims.

Amchem is again instructive. There, a proposed nationwide class of asbestos claimants included people who had suffered no apparent injury from their exposure to asbestos—"exposure-only plaintiffs"—and people who were "currently injured." 521 U.S. at 626. For this reason, among others, such as differences among class members in the "availability of causes of action" under state tort law, the Court held that the class was incohesive, thus defeating predominance. *Id.* at 610, 624.

Applying *Amchem*, this Court in *Mazza v. American Honda Motor, Inc.*, decertified a class of Honda purchasers encompassing members from jurisdictions with materially divergent consumer-protection laws, holding that the "variances in state law overwhelm[ed] common issues and preclude[d] predominance." 666 F.3d at 596. The plaintiff class alleged that Honda's advertisements misrepresented information regarding its cars' braking systems. *Id.* at 585. Yet predominance was not satisfied despite this common claim because, among other differences, California's consumer-protection laws require plaintiffs to demonstrate reliance, while other states' consumer-protection laws do not. *Id.* at 591; *see also Perras v. H & R Block*, 789 F.3d 914, 916-19 (8th Cir. 2015) (nationwide class based on Missouri state law alone does not satisfy Rule 23(b)(3)); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011) (where "laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving [a] dispute"). So too here, the black-and-white contrast between indirect purchasers from repealer states (who have a claim) and those from non-repealer states (who do not have a viable claim) renders the class incohesive and defeats predominance.

B. The district court erred in relying on *Sullivan* because *Sullivan* contradicts Supreme Court and Ninth Circuit precedent.

The district court relied on an outlier, *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc), to conclude that "common issues predominate[d], even if individual state laws might have affected … class members' right to recover." ER8.

True, *Sullivan*, like the district court here, approved a settlement that bundled together indirect purchasers from non-repealer and repealer states. 667 F.3d at 305-07. But *Sullivan* is wrong because it "misconstru[ed] Supreme Court precedent," including *Amchem*, by bundling indirect purchasers who had no claims with indirect purchasers who did. *Sullivan*, 667 F.3d at 345 (Jordan, J., dissenting). *Amchem* recognizes a truth that *Sullivan* did not: "the requirements for certification are not the defendant's to waive; they are intended to protect absent class members." Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1506 (2013). A "defendant's willingness to waive an argument is not a reason to ignore it. It is rather the very reason that collusive settlements are a problem." *Sullivan*, 667 F.3d at 354 (Jordan, J., dissenting).

As one commenator put it, the settlement appproved in *Sullivan* "served the interests of the defendant and of class counsel but disserved the interests of class members with viable claims." Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 895-98 (2016). "By including additional class members whose claims were not viable under applicable state law, the settlement diluted the value of the claims for which the defendant was willing to pay valuable consideration. Had each group—the *Illinois-Brick*-state claimants and the non-*Illinois-Brick*-state claimants—been certified for litigation as a separate class action, their settlement

leverage would have differed from each other, if indeed the first group could get any settlement at all." *Id.* Exactly so here.

Sullivan and the district court below made the same conceptual error: zeroing in on the perfunctory commonalities among the indirect purchasers and deeming the class cohesive simply because the plaintiffs cited common, generalized proof to show the defendants' anticompetitive conduct. "Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding." *Amchem*, 521 U.S. at 623-24. After all, "[a]ny competently crafted class complaint literally raises common 'questions.'" Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131-32 (2009).

Mazza shows why a focus on superficial commonalities is wrong. Half the class is affected by an *Illinois Brick* defense; the other half is not. This dissimilarity on a key, dispositive question precludes "the generation of common answers," *see* Nagareda, above, at 132, defeating predominance. While plaintiffs could satisfy their "limited burden" to show an Rule 23(a)(2) common question, they cannot show (b)(3) predominance of either legal or factual questions. *Mazza,* 666 F.3d at 589. This is not a mere technicality when it dilutes the recovery of class members with colorable claims by tens of millions of dollars.

C. Nevertheless, this Court need not reach the question whether to reject *Sullivan* to reject this settlement under Rule 23(a)(4).

Sullivan simply ruled on the Rule 23(a) commonality question and the Rule 23(b)(3) predominance question. Although Bednarz and this Circuit's existing precedent disagree with *Sullivan*, this Court need not directly confront *Sullivan* to reject

this settlement, because the appellants in *Sullivan* failed to "press…in their briefs" the dispositive Rule 23(a)(4) issue that Bednarz raises in Section I above. *Sullivan*, 667 F.3d at 342 n.4 (Jordan, J., dissenting). The class certification here can be reversed and the settlement approvals rejected on Rule 23(a)(4) grounds alone without reaching the Rule 23(b)(3) predominance issue.

III. The district court's *pro rata* allocation plan is not fair or reasonable under Rule 23(e)(2) because class members without viable claims will receive the same amount as class members with colorable claims.

Settlements may be approved only if they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Courts also "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).[3] This fairness requirement is intended to "ensure that similarly situated class members are treated similarly and that dissimilarly treated class members are not arbitrarily treated as if they were similarly situated." William B. Rubenstein, 4 NEWBERG ON CLASS ACTIONS § 13:59 (5th ed. 2014). Put simply, class members with different claims ought not "receive the same relief." Id. at § 13:60.

[3] Bednarz is not alleging (and need not allege) explicit collusion; there need only be acquiescence for such self-dealing to occur: "'a defendant is interested only in disposing of the total claim asserted against it,'" and the allocation between class members or between the class and the attorneys' fees "'is of little or no interest to the defense.'" *Bluetooth*, 654 F.3d at 949 (quoting *Staton v. Boeing*, 327 F.3d 938, 964 (9th Cir. 2003); *see* above at 13-14).

Note that Bednarz is not contending that the settlements should be $450 million or $90 million, or any number other than the $45 million that the defendants settled for. The parties are entitled to the arm's-length valuation of the litigation. His objection is that the allocation of those funds within the class is unfair because half of the class is receiving a windfall at the expense of the other half of the class.

In determining whether a potential settlement is fair, adequate, and reasonable, a court must weigh several factors, most importantly, and of particular relevance here, the strength of the plaintiffs' case against the amount offered in settlement. *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004).

Where, as here, the settlement-only certification "gives the same monetary remedy to all members of the class, despite significant differences in the nature of their claims or injuries," the agreement is not "fair or reasonable." AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.05, cmt. b. (2010). Numerous district courts in this circuit recognize this principle. *See, e.g.*, *Philliben v. Uber Tech., Inc.*, 2016 WL 4537912, at *5 (N.D. Cal. Aug. 30, 2016) (rejecting a settlement treating those within the class who had a strong claim the same as those who did not); *Sanchez v. Frito-Lay, Inc.*, 2015 WL 4662636, at *9 (E.D. Cal. Aug. 5, 2015) (identical treatment unwarranted where some employees worked different hours for different pay); *Altamirano v. Shaw Indus.*, 2015 WL 4512372, at *1 (N.D. Cal. Jul. 24, 2015) ("[The] proposed *pro rata* method did not account for [the] reality" of the intraclass disparity, resulting in "drastic[] undercompensate[ion]" for one class subgroup); *Valdez v. Neil Jones Food Co.*, 2014 WL 3940558, at *11 (E.D. Cal. Aug. 11, 2014) (rejecting settlement where class members made differing wages); *Newman v. Americredit Fin. Servs.*, 2014 WL

12789177, at *5 (S.D. Cal. Feb. 3, 2014) (rejecting a settlement that proposed treating equally all members of a class where half the class potentially had no claim).

By seeking different treatment for repealer-state class members compared to non-repealer-state class members, Bednarz is not asking for anything revolutionary. The overwhelming majority of state-law antitrust settlements in this circuit routinely and correctly distinguish between class members who purchased in repealer states and those who purchased in non-repealer states, and thus avoid providing the same remedy to differently situated class members. *E.g., In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 WL 7364803, at *1-2 (N.D. Cal. Dec. 19, 2016) (excluding residents of non-repealer states from settlement class definition); *In re Cathode Ray Tube Antitrust Litig.*, 2016 WL 721680 (N.D. Cal. Jan. 28, 2016) (excluding indirect purchasers in non-repealer states from distribution under plan of allocation); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900 (N.D. Cal. Apr. 1, 2013) (same). The district court already recognized this principle when it rejected nationwide class certification in this case. ER278.

Even if "it may be unavoidable that some class members will always be happier with a given result than others," this Court recognizes that "potential injustice arises as the distribution of benefits and burdens in a class becomes increasingly unequal." *Officers for Justice*, 688 F.2d at 624 (cleaned up). That is, even when a class settlement maximizes overall gain to the class as whole, "a small minority of the class members may not be asked to bear an unduly disproportional share of the accompanying burdens." *Id.* Here, the district court approved the allocation of *pro rata* settlement funds to all plaintiffs regardless of the strength, or indeed the existence, of their claims.

Plaintiffs with no claims thus materially diluted the recovery of plaintiffs with claims. So, fully half of the class is bearing an undue burden, netting a windfall for the other half. For these reasons, the settlements were not "fair, reasonable, and adequate" under Rule 23(e)(2).

IV. The district court erred by not conducting the required choice-of-law analysis before certifying a nationwide class.

A district court abuses its discretion when it fails to conduct "a choice of law analysis or rigorously analyze potential differences in state consumer protection laws before certifying a single nationwide settlement class under Rule 23(b)(3)." *In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 701-02 (9th Cir. 2018). *Hyundai* requires district courts, in the settlement or litigation context, to "determine whether [one state's] law could apply to all plaintiffs in [a] nationwide class, or whether the court had to apply the law of each state, and if so, whether variations in state law defeated predominance." *Id.* at 702. In certifying the settlement class, the district court here did not apply California's choice-of-law rules. If it had, it would have concluded, as it did previously, that each non-repealer state's substantive law should apply to class members from those states. ER277. And if the court took that premise to its logical conclusion, it would have held that Rule 23(b)(3)'s predominance requirement could not be satisfied in these circumstances.

The district court's order denying the indirect purchasers' original motion for class certification brings the district court's error in not conducting a choice-of-law analysis into stark relief. ER285. There, the court addressed choice-of-law issues and concluded that a nationwide class under California's substantive antitrust law would be

inappropriate. ER278. The court reasoned that "the interests of *Illinois Brick* non-repealer states in precluding indirect purchaser claims would be impaired more significantly by applying [California's antitrust law] than California's interests would be impaired by limiting its application to *Illinois Brick* repealer states." *Id.* And yet, when the court turned to approving the final settlement and certification, the court backtracked on this earlier, airtight reasoning. Instead, it approved, in conclusory fashion, a settlement-only certification encompassing class members whose interests dramatically diverge. ER1; ER5. This error, too, demands reversal.

Indeed, the ground for reversal here is much stronger than in *Hyundai*. Over the dissent's protests, the *Hyundai* majority reversed the class certification for the district court's omission even though the objectors failed to establish any material differences in state law. 881 F.3d at 710 (Nguyen, J., dissenting). *Compare In re Mexico Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) (Easterbrook, J.) (putting burden on objectors to demonstrate material differences in state law). In contrast, Bednarz specifically singled out the *Illinois Brick* problem that requires a choice-of-law analysis, and the inappropriateness of a nationwide settlement class. ER228.

Conclusion

This Court should decertify the class, reverse the district court's settlement approval, and remand for further proceedings.

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Respectfully submitted,*

/s/ Theodore H. Frank

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Statement of Related Cases
Under Circuit Rule 28-2.6

Appeal No. 18-80042 is a Rule 23(f) appeal by the plaintiffs in this case from the district court's denial of certification of a class of indirect purchasers from thirty repealer states. ER287.

Appeal No. 17-17369 is a *pro se* appeal by a lay objector, Christopher Andrews, from the same settlement approval and final judgment in this case, but raising an entirely different set of issues. Mr. Andrews also appealed the Rule 23(e) approval of a settlement with the Sony defendants in this case in Appeal No. 17-15795; that appeal also does not raise any related issues with this case.

Appeal No. 17-15857 is another *pro se* appeal from an approval of a settlement with the Sony defendants in this case. This Court dismissed it for lack of prosecution.

Appeal No. 16-17235 is a *pro se* appeal from an unrelated order in this case. This Court dismissed it for lack of prosecution.

Appeal No. 18-15125 is an appeal from an individual direct-purchaser action in this MDL over the unrelated question of whether the direct-purchaser class-action settlement precludes that plaintiff's claims.

Executed on April 2, 2018. */s/ Theodore H. Frank*
Theodore H. Frank

Certificate of Compliance Pursuant to 9th Circuit Rule 32-1
for Case Number 17-17367

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 8,210 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 April 2, 2018.

/s/Theodore H. Frank
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Proof of Service

I hereby certify that on April 2, 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 this filing to all who are ECF-registered filers.

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