No. 18-56371
(Consolidated with Nos. 18-56272 and 18-56273)

In the United States Court of Appeals for the Ninth Circuit

JOANNE FARRELL, RONALD ANTHONY DINKINS, and LARICE ADDAMO,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

RACHEL THREATT,
Objector-Appellant,

v.

BANK OF AMERICA, N.A.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California

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TABLE OF AUTHORITIES

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In re HP Inkjet Printer Litigation,
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In re Hyundai & Kia Fuel Economy Litigation,
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In re Online DVD-Rental Antitrust Litigation,
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In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation,
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In re Washington Public Power Supply System Securities Litigation,
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Torres v. Mercer Canyons Inc.,
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12 C.F.R. § 7.4001(a) 6, 9

12 C.F.R. § 7.4002(b)(2) 6

Federal Rule of Appellate Procedure 4(a)(1)(A) 5

Other Authorities

American Law Institute, *Principles of the Law, Aggregate Litigation* (2010) 19, 44

Rebecca Borne, et al., Center for Responsible Lending, *Broken Banking: How Overdraft Fees Harm Consumers and Discourage Responsible Bank Products* (May 2016), https://bit.ly/2YJgNuA 8

Competitive Enterprise Institute, *Annual Report* (2015 & 2016), http://bit.ly/2NnP3u8 21

Consumer Financial Protection Bureau, *Checking Account Overdraft* (July 2014), http://bit.ly/2RVUvD1 8

Consumer Financial Protection Bureau, *Study of Overdraft Programs* (June 2013), https://bit.ly/2ssg6Hm 7, 8, 9

Federal Deposit Insurance Corporation, *Study of Bank Overdraft Programs* (Nov. 2008), http://bit.ly/2KXxkHS 7, 8

Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) 17

Manual for Complex Litigation (4th ed. 2004) 4, 19, 51, 53

Leslie Parrish, Center for Responsible Lending, *Overdraft Explosion: Bank fees for overdrafts increase 35% in two years* (Oct. 2009), https://bit.ly/2XL7MV8 8

Testimony of Travis Plunkett (Consumer Federation of America), U.S. Senate Banking Committee, July 14, 2009, https://bit.ly/2YPCUPO 9

Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809 (2000).................... 52

INTRODUCTION

The nationwide class-action settlement at issue here is the culmination of a years-long campaign to halt Bank of America's practice of charging usurious interest to customers with negative account balances. These extended-overdraft charges had become a major source of profits for the bank, earning it hundreds of millions of dollars every year at the expense of its poorest, most vulnerable customers. As class counsel successfully argued below, fees charged for unpaid negative balances are a form of interest subject to usury limits set by the National Bank Act. The charges—often with interest of several thousand percent or more—far exceeded those limits.

Despite their confidence in their legal position, class counsel knew that they faced strong headwinds. In challenges to extended-overdraft charges brought by class counsel in courts around the country, banks had uniformly prevailed—in four district courts and one circuit—on their argument that the charges are not subject to usury limits. So the odds were long: If class counsel couldn't achieve a settlement soon, it was likely that their clients would never see a penny in relief.

In the end, they beat the odds. In a "hard fought battle," class counsel defeated the bank's efforts to get the case dismissed and ultimately extracted its agreement to stop charging the fees. ER 15. As the district court recognized, "forcing a bank of [Bank of America's] stature to cease a lucrative banking

practice" is a "staggering" victory—one that in this case will save the bank's customers a whopping $1.2 billion in charges over the next few years. *Id.*

But class counsel got more: They also persuaded the bank to reimburse customers for past charges to the tune of $37.5 million in cash payments and to completely forgive all of the $30.3 million owed in unpaid charges. After adding in notice and administration costs that the bank also agreed to pay, class counsel obtained over $70 million in immediate relief for the class, on top of the $1.2 billion in future savings.

The district court commended this as a "remarkable" result, achieved "through tenacity and great skill." ER 15. Class counsel's "accomplishment is … all the more remarkable" because they faced an "adverse legal landscape," a "highly sophisticated and well represented defendant," and a "substantial risk" that they would never be compensated for years of litigation. ER 13, 15. Considering all that—and given that the $14.5 million in attorneys' fees represented just 1% of the settlement's value and 21% of the immediate relief, well below this Court's 25% benchmark—the court approved both the settlement and the fees as reasonable.

On appeal, one objector has filed a brief contending that the district court abused its discretion. She argues that a conflict of interest between those class members entitled to debt forgiveness and those entitled to cash relief led to inadequate representation. Not only does she fail to identify any issue on which

class members' interests actually diverged, but her claimed conflict cannot be reconciled with the district court's carefully considered finding that the class representatives' identities and the structure of the negotiations ensured that all class members were protected. That finding is entitled to deference and may be disturbed only if there was a "clear error of judgment." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1135 (9th Cir. 2016). There was none.

The objector's remaining arguments attack the reasonableness of the district court's attorneys' fees award. She first claims that the fees, as a percentage of the settlement's total value, are based on inflated estimates. But it was Bank of America that calculated the $1.2 billion figure, using its own records. And her arguments, even if credited, would barely chip away at the "staggering" present and future relief. ER 14. The objector also argues that the court erred in basing fees on class counsel's risk in bringing this case, their skill and hard work, and their extraordinary success. This Court's precedent, the objector claims, required a *second* fee determination based only on the number of hours expended. This Court has encountered that argument before and described it as "either mistaken or a deliberate misrepresentation of the law." *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 547 (9th Cir. 2016). What this Court's precedent instead establishes is the district court's discretion to determine the best method for calculating fees in each case. Here, the court had counsel's detailed time records before it and considered

the objector's request to reduce the fees based on those records. Given the strength of the reasonableness showing, the court declined to do so.

That decision was not an abuse of discretion. Based on a legal theory that even today has still not survived dismissal in any other case, class counsel succeeded in forcing one of the largest banks in the nation to abandon a controversial practice, obtaining in the process more than a billion dollars in relief. The results achieved here far exceed what almost any reasonable legal observer would have predicted when the case was filed. As this Court has recognized, counsel should not "receive a lesser fee for settling a case quickly." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2002). Fees based on risks and results create an incentive to "achieve[] a timely result for class members in need of immediate relief." *Id.* The alternative approach—rewarding lawyers merely for keeping the meter running—"creates incentives for counsel to expend more hours than may be necessary," *id.*, or even to "prolong the litigation until sufficient hours have been expended." *Manual for Complex Litigation* § 14.121, at 188 (4th ed. 2004). The district court had discretion to award a fee that recognizes both the extraordinary risks that class counsel took in bringing this case and the extraordinary results they efficiently obtained for the class. This Court should affirm the district court's reasonable exercise of its discretion.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. The court entered an order granting final approval of the parties' proposed class-action settlement on August 31, 2018, and issued a final judgment on September 19, 2018. ER 1–2. Objectors Rachel Threatt, Estafania Osorio Sanchez, and Amy Collins filed timely notices of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) on October 17, September 21, and September 25, 2018, respectively. ER 35, 39, 42. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion when it rejected the objector's argument that, by obtaining full debt forgiveness for class members with unpaid extended-overdraft charges, class counsel and the class representatives inadequately represented other class members who actually paid the charges and are thus entitled only to cash reimbursements?

2. Did the district court abuse its discretion in awarding attorneys' fees by overvaluing the relief that the settlement provides or by failing to accept the objector's unsubstantiated claims of collusion between the parties?

3. Did the district court err in declining to conduct a lodestar cross-check, despite circuit precedent holding that a cross-check is discretionary?

STATEMENT OF THE CASE

A. Statutory and regulatory background

Whenever a national bank like Bank of America charges interest, the National Bank Act makes it illegal to exceed "the rate allowed by the laws of the State ... where the bank is located." 12 U.S.C. § 85. That maximum interest rate is known as the usury limit, and the Act gives a cause of action to anyone who is charged a rate exceeding that limit. 12 U.S.C. § 86. When banks charge fees other than interest, however, they have "discretion" to impose "non-interest charges and fees"—subject only to vague "safe and sound banking principles." 12 C.F.R. § 7.4002(b)(2).

The permissibility of particular charges by a bank thus often turns on whether the charge is "interest"—an ambiguous term that is not defined in the statute. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996). That hole has been filled by the Act's implementing agency: the Office of the Comptroller of the Currency. The OCC defines "interest" to include "any payment compensating a creditor … for an extension of credit," 12 C.F.R. § 7.4001(a), and the Supreme Court has held that courts must defer to that interpretation. *See Smiley*, 517 U.S. at 739–43.

B. Factual and procedural background

1. Class counsel conduct a long and hard-fought nationwide campaign to challenge extended-overdraft charges as usurious interest under the National Bank Act.

When bank customers attempt to spend or withdraw money from their checking accounts in amounts that exceed their available funds, the bank may honor the overdrawn transaction. ER 3; *see* FDIC, *Study of Bank Overdraft Programs* 16 (Nov. 2008), http://bit.ly/2KXxkHS. The bank typically does that by automatically advancing (that is, loaning) the customer enough money to cover the amount of the overdraft plus a $35 overdraft fee—a charge for the overdraft service. ER 3; *see* Consumer Financial Protection Bureau (CFPB), *Study of Overdraft Programs* 14, 54 (June 2013), https://bit.ly/2ssg6Hm. Bank of America went further: It required the customer to pay back that money, including the overdraft fee, within five days or face another $35 charge. ER 3. It was this second fee, known as an Extended Overdrawn Balance Charge (EOBC)—or, more plainly, an "extended-overdraft charge"—that was at issue here. ER 3; *see* CFPB, *Study of Overdraft* at 54.

Banks charge customers a variety of overdraft-related fees, which generate billions of dollars every year and make up a significant share of their profits. *See* CFPB, *Study of Overdraft* at 10, 14, 15. Although banks often market overdraft programs as a convenience feature, the programs' lack of transparency and rapidly

accumulating fees create significant costs for consumers. *See id.* at 10, 17–18. Banks in recent years have dramatically increased overdraft charges, which now make up the majority of checking-account fees. *See id.* at 15–16; *see also* Leslie Parrish, Center for Responsible Lending, *Overdraft Explosion: Bank fees for overdrafts increase 35% in two years* 5 (Oct. 2009), https://bit.ly/2XL7MV8. Today, Americans pay an estimated $17 billion in overdraft fees—more than twice what they spend annually on eggs ($7.4 billion), far more than they spend on baby clothes ($9.7 billion), and more than they spend on books, newspapers, and magazines combined ($13.1 billion). Rebecca Borne, et al., Center for Responsible Lending, *Broken Banking: How Overdraft Fees Harm Consumers and Discourage Responsible Bank Products* 5 (May 2016), https://bit.ly/2YJgNuA. Those costs are disproportionately borne by low-income consumers, who tend to maintain low balances and for whom even a small overdraft can trigger significant fees. *See* CFPB, *Study of Overdraft* at 18; FDIC, *Study of Bank Overdraft* at IV-V. Overall, less than 10% of bank customers pay almost 85% of all overdraft charges. CFPB, *Study of Overdraft* at 18.

Extended-overdraft fees, in particular, are lucrative for banks, representing about 10% of all overdraft-related fees. *See* CFPB, *Checking Account Overdraft* 10 (July 2014), http://bit.ly/2RVUvD1. Until it agreed to cease the practice as part of the settlement in this case, Bank of America charged among the highest extended-overdraft fees in the industry—a practice that drew criticism from consumer

advocacy groups because it effectively forced the bank's poorest customers to "unknowingly borrow" funds at "astronomical interest rates." Testimony of Travis Plunkett (Consumer Federation of America), U.S. Senate Banking Committee, July 14, 2009, at 14, https://bit.ly/2YPCUPO. At one point, Bank of America imposed about $20 million in such fees *every month*. ER 4; *see* CFPB, *Study of Overdraft* at 54.

In a series of complaints filed in courts across the country, plaintiffs—represented by the same counsel as the nationwide settlement class is in this case—challenged the imposition of extended-overdraft charges as a form of usurious interest prohibited by the National Bank Act. *See, e.g.*, *In re TD Bank, N.A.*, 150 F. Supp. 3d 593, 642 (D.S.C. 2015).[1] As noted above, the OCC defines "interest" as "any payment *compensating* a creditor … for an *extension of credit*." 12 C.F.R. § 7.4001(a) (emphasis added). Because banks expect to be repaid for covering a customer's overdraft, the plaintiffs argued, the practice is an "extension of credit." *See, e.g.*, *TD Bank*, 150 F. Supp. 3d at 642. And because the challenged fees are designed to "compensate[e]" the bank for extending that credit rather than for providing any additional services, the fees satisfy the OCC's definition of "interest." *See, e.g.*, *id.*

Early on, the decisions began to go against the plaintiffs. The first four district courts to reach the issue—including one in a case against Bank of

[1] Class counsel are experienced consumer class-action lawyers from the firms of Tycko & Zavareei LLP; Kopelowitz Ostrow Ferguson Weiselberg Gilbert; Creed and Gowdy, P.A.; and Kelley Uustal PC. Doc. 72 ¶ 14.

America—held that extended-overdraft charges are not "interest" because they are "flat fees contingent upon a customer's failure to remedy an overdrawn account, rather than payment for the use of money." *Id.*; *see also Johnson v. BOKF, Nat. Ass'n*, 341 F. Supp. 3d 675, 680 (N.D. Tex. 2018) (noting earlier dismissal); *Shaw v. BOKF, Nat. Ass'n*, 2015 WL 6142903 (N.D. Okla. 2015); *McGee v. Bank of Am., N.A.*, 2015 WL 4594582 (S.D. Fla. 2015), *aff'd*, 674 F. App'x 958 (11th Cir. 2017). The courts in all four cases granted the banks' motions to dismiss. *See, e.g.*, *TD Bank*, 150 F. Supp. 3d at 642–63.[2]

Arising in that growingly hostile legal climate, this case thus represents the culmination of class counsel's years of effort to hold banks accountable for the billions of dollars they earn in usurious extended-overdraft charges.

2. The district court below, splitting with every other court to have reached the issue, agrees with the plaintiffs that Bank of America's extended-overdraft charges are "interest."

Plaintiff Joanne Farrell wrote several checks that overdrew her Bank of America checking account. ER 20. Although the bank honored the checks, it also charged her $210 in overdraft fees and left her account with a negative balance. ER 115–16 ¶¶ 17–18. When Ms. Farrell failed to pay off that balance within five days, the bank imposed an additional $35 extended-overdraft charge. *Id.* That charge, as a

[2] Later decisions reached the same result. *See Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133 (1st Cir. 2019); *Walker v. BOKF, Nat. Ass'n*, 2019 WL 3082496 (D.N.M. 2019); *Moore v. MB Fin. Bank, N.A.*, 280 F. Supp. 3d 1069 (N.D. Ill. 2017).

percentage of the amount advanced by the bank to cover the overdraft and the original overdraft fee, amounted to an interest rate of between 897% and 71,170%—far exceeding the 8% maximum rate that the National Bank Act permits. ER 121 ¶¶ 43–44.

Despite having lost similar challenges against Bank of America and other banks, class counsel drafted and filed a complaint on Farrell's behalf. Doc. 1; Doc. 80-2 ¶¶ 2–4. The complaint alleged that Bank of America charged usurious interest rates in violation of 12 U.S.C. § 85, and sought certification of a class of "[a]ll holders of a [Bank of America] checking and/or money market account who, within the two-year period preceding the filing of this lawsuit, incurred one or more Extended Overdrawn Balance Charges." Doc. 1 ¶ 16.[3]

Bank of America moved to dismiss, relying on decisions from around the country holding that extended-overdraft charges are not "interest" under the National Bank Act. ER 7. Class counsel's response relied on banking regulations, common law, and longstanding historical practice to show that a bank's coverage of an overdraft is a recognized form of credit; that the charges serve no purpose

[3] Ms. Farrell passed away while the case was in the district court and her adult children were substituted as plaintiffs. Doc. 100. In addition, counsel added additional plaintiffs who Bank of America charged extended-overdraft fees. Doc. 80-2 ¶ 16.

other than to compensate the bank for providing that credit; and that the charges are therefore necessarily a form of interest as the OCC defines it. Doc. 16.

In a carefully reasoned opinion, the district court rejected the conclusions of every other court to have decided the issue and denied the motion to dismiss. Doc. 20. The court began by noting the parties' agreement that Bank of America's extended-overdraft charges would violate the National Bank Act "if they amount to interest" under the Act. Doc. 20 at 3. Thus, the "dispute focuse[d] squarely on the legal question of whether [extended-overdraft] charges constitute 'interest' under § 85." *Id.*

On that question, the court noted that the bank had advanced funds to Ms. Farrell "and did so with the expectation that [she] pay [it] back." Doc. 20 at 8. "It follows," the court wrote, "that this provision of money amounted to an 'extension of credit'" under the National Bank Act. *Id.* And, given that the alleged purpose of the extended-overdraft charges is to compensate the bank for extending that credit, the court held that the charges satisfied the OCC's definition of "interest." *Id.* at 9.

The court acknowledged that the only courts to have previously decided the issue had all gone the other way. *Id.* at 5 (citing *TD Bank*, 150 F. Supp. 3d 593; *Shaw*, 2015 WL 6142903; *McGee*, 2015 WL 4594582). But the court found those decisions unpersuasive, noting that none cited "any authority suggesting that flat fees cannot constitute interest." Doc. 20 at 6. The court did, however, consider the contrary

authority to be evidence of "reasonable grounds for a difference of opinion on [the] issue." Doc. 61 at 3. For that reason, and because this important and consequential question was the controlling issue of law in the case, the court granted Bank of America's motion for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). Doc. 61. Based on the district court's certification, the bank petitioned this Court for leave to appeal, and this Court granted the petition. Docs. 62, 63.

3. Class counsel negotiate a settlement that includes more than $1 billion in cash and other relief.

While Bank of America's appeal was pending, class counsel began to pursue the possibility of settlement. Doc. 80-2 ¶ 18. The parties agreed to mediation before Layn Phillips, a retired federal district judge and "a highly respected" mediator. *Id.*; ER 4. As part of a thorough mediation process, class counsel obtained informal discovery from Bank of America, retained an expert to provide damages analysis, and prepared their settlement position. Doc. 80-2 ¶ 19. For months, the parties participated in mediation and engaged in adversarial negotiations of a potential global resolution to the litigation over extended-overdraft fees. *Id.* ¶¶ 19–23.

Class counsel focused the negotiations first on stopping Bank of America from continuing to charge the disputed fees—their ultimate goal for the litigation—and on obtaining the maximum possible cash relief for class members who had already paid them. Doc. 128 at 6. Once an agreement on those issues was reached, they then raised the issue of debt forgiveness for class members who were charged

the fee but never paid. *Id.* Eventually, the parties reached a nationwide class-action settlement agreement that provides class members with three primary forms of relief.

First, the settlement provides that Bank of America will stop imposing extended-overdraft charges for least five years. ER 4. That will eliminate $20 million in such charges per month, for a total of at least $1.2 billion in eliminated fees. *Id.* Although some class members no longer have accounts with Bank of America, the vast majority still do "and will therefore benefit" by saving "easily many hundreds of millions of dollars." SER 9 ¶ 14.

Second, it provides cash reimbursements of up to $37.5 million, before fees and costs, to all class members who paid extended-overdraft charges to Bank of America. ER 4. Approximately 93% of all class members actually paid such fees and are thus entitled to cash payments. Docs. 128 at 8, 128-2 ¶¶ 3–4. Unlike the vast majority of class-action settlements, the settlement here requires no claims process for those payments. Instead, class members will automatically receive either a direct deposit to their Bank of America accounts or a check in the mail covering their pro rata share of the settlement funds. ER 5; Doc. 124 at 8–9. If enough funds remain after the initial distribution to make it economically feasible, a second distribution of cash will be made to the class. ER 5. And any funds remaining after

that second distribution will go to a cy pres beneficiary rather than reverting to Bank of America. *Id.*

Third, the settlement provides debt forgiveness of up to $35 per charge (the full amount) to all class members with unpaid extended-overdraft charges, including those who are also entitled to cash payments. ER 5. It gives the class, in other words, "complete … debt forgiveness"—a total of $30.3 million in relief. ER 14.[4] About 7% of class members—those did not pay any of the fees they were charged—are entitled to debt forgiveness alone. Another 5% of class members—those who paid some of the fees they were charged but not others—are entitled to both cash relief and debt forgiveness. Docs. 128 at 8, 128-2 ¶¶ 3–4. Like the cash payments, this relief will be provided automatically to all qualifying class members. ER 5; Doc. 124 at 8–9. In cases where Bank of America reported such debt to credit bureaus, the bank must also notify those bureaus about the debt forgiveness, to ensure that the extended-overdraft charge is no longer listed on customers' credit reports. ER 5.

In sum, the settlement provides at least $1.2 billion in relief from future extended-overdraft charges and $66.6 million in immediate monetary relief (as

[4] The settlement preliminarily values the debt forgiveness at $29.1 million, and the district court relied on that number in approving the settlement and awarding attorneys' fees. ER 14; Doc. 128 at 8 n.3. The settlement actually provides, however, that *all* debt from extended-overdraft charges will be forgiven—an amount later valued at nearly $30.3 million. Doc. 128 at 8 & n.3.

either cash or debt forgiveness). On top of that, Bank of America agrees to pay administration and notice costs estimated at $2.9 million—bringing the total immediate monetary relief to $69.5 million. *Id.*[5]

Class counsel moved for preliminary approval of the proposed settlement, and the district court granted the motion. Docs. 69, 72. The court found the settlement to be "the product of arm's length negotiations between Class Counsel and counsel for [Bank of America], which occurred following mediation" and that it "confers substantial benefits upon the [class], without the costs, uncertainties, delays, and other risks associated with continued litigation, trial, and/or appeal." ER 28.

4. Class counsel move for attorneys' fees at a minuscule percentage of the settlement's value.

Class counsel also moved for an award of attorneys' fees and costs. Doc. 80. They initially requested fees of $16.65 million, representing 25% of the $66.6 in direct monetary relief and 24% of the $69.5 million in total immediate monetary benefits (including estimated administration and notice costs). Doc. 80. Considering just those immediate benefits, the requested fees are therefore at or below this Court's 25% "bench mark percentage for the fee award." *Paul, Johnson, Alston &*

[5] Again, that number is based on the preliminary value of debt forgiveness provided in the settlement. Considering the actual value of debt relief, the total immediate monetary relief is about $70.7 million. Doc. 128 at 8 & n.3.

Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989); *see also* SER 5–6 ¶ 8. But those calculations do not even include the value of eliminating future extended-overdraft charges, which, as class counsel have explained, is the most significant element of the relief and the "primary goal" of the litigation. Doc. 124 at 7. Including the $1.2 billion in future fees that the settlement eliminates, the initial fee request represented a minuscule percentage—only about 1% of the settlement's total value.[6]

In support of their motion, class counsel filed the declaration of law professor Brian T. Fitzpatrick, an expert on attorneys' fees in class-action litigation. SER 1. Professor Fitzpatrick has served as an expert witness on attorneys' fees in numerous class action cases, including nearly two dozen cases in which plaintiffs challenged some form of bank overdraft fee. SER 3–4 ¶ 4. He is also the author of "the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published." SER 2–3 ¶ 3 (citing Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010)). The study looked at the attorneys' fees awarded in every class action approved by a

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[6] Discounting the value of future fees eliminated for Bank of America customers who are not members of the class makes little difference to that analysis. The settlement's total value to the class would still be "easily many hundreds of millions of dollars" and the fees would still be "exceedingly below the benchmark" at "well below 5% of the total value of the settlement … to the class." SER 5–6, 9 ¶¶ 8, 13–14.

federal court over a two-year period, including 169 settlements from district courts in the Ninth Circuit. *Id.*[7]

Based on his own and other studies of past fee awards, and on the "consensus opinion of class action scholars," Professor Fitzpatrick wrote that "courts should generally use the percentage method" to calculate the fees of class counsel "whenever the value of the settlement can be reliably calculated." *Id.* at ¶ 11. Under the percentage method, "courts select a percentage that they believe is fair to class counsel, multiply the settlement amount by that percentage, and then award class counsel the resulting product." *Id.* ¶ 10.

As Professor Fitzpatrick explained, courts "[a]t one time" preferred the "lodestar" method for determining fees, *id.* at ¶ 9, which involves "multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonably hourly rate, and, if circumstances warrant, adjusting the lodestar to account for other factors which are not subsumed within it." *Staton v. Boeing Co.*, 327

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[7] Professor Fitzpatrick is a professor of law at Vanderbilt University, a member of the Executive Committee of the Federalist Society's Litigation Practice Group, and a member of the American Law Institute. *Id.* at ¶¶ 1–2. After graduating from Harvard Law School, he served as a law clerk to Judge Diarmuid O'Scannlain and then to Justice Antonin Scalia. *Id.* at ¶ 1. He practiced law for several years at Sidley Austin LLP in Washington, D.C. before joining New York University School of Law as the John M. Olin Fellow in Law and Economics. *Id.* ¶ 1. He became a member of the Vanderbilt law faculty in 2007, where he teaches Civil Procedure, Federal Courts, and Complex Litigation. *Id.* ¶¶ 1–2. He has published numerous articles on class-action litigation and is a frequent speaker on the subject. *Id.* ¶ 2.

F.3d 938, 965 (9th Cir. 2003). "Over time, however," courts came to disapprove of the method because it was "difficult to calculate" and required "review [of] voluminous time records and the like." SER 6 ¶ 9. More importantly, the lodestar approach "did not align the interests of class counsel with the interests of the class" because class counsel's fees under that approach "did not depend on how much the class recovered, but, rather, on how many hours could be spent on the case." *Id.* In other words, the lodestar method rewards and incentivizes inefficiency. *See Manual for Complex Litigation* § 14.121, at 188 ("[T]he lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended.").

Today, "the lodestar method is … used to award fees in only a small percentage of class action cases, usually those involving fee-shifting statutes or those where the relief is injunctive in nature and the value of the injunction cannot be reliably calculated." SER 6 ¶ 9. The percentage method, the approach now used in almost all class actions, "correct[s] the deficiencies of the lodestar method: it is less cumbersome to calculate, and … it aligns the interests of class counsel with the interests of the class because the more the class recovers, the more class counsel recovers." *Id.* at ¶ 10; *see also* Am. Law. Inst., *Principles of the Law, Aggregate Litigation* § 3.13(b) (2010) ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases."); *Manual for Complex Litigation* § 14.121 ("[T]he vast

majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases.”).

Applying the percentage method to the settlement here, Professor Fitzpatrick concluded that the requested fees are justified in comparison to the fees awarded in other class actions. The most common percentage awards both in the Ninth Circuit and nationally are 25%, 30%, and 33%, with the “vast majority” between 25% and 35%. SER 10 ¶ 16. Thus, depending on whether the settlement’s value includes the value of future benefits and the costs paid by Bank of America, “the fee percentage requested here is either *far below, below, or at* virtually all of the average and median data both nationwide and in the Ninth Circuit.” *Id.* ¶ 16. It is also below the fees awarded in cases challenging other forms of bank overdraft fees. In all of the nearly two dozen such cases in which Professor Fitzpatrick has served as an expert, “the fee percentages awarded by the courts were more—sometimes much more—than 25% of the cash portion of the settlements.” *Id.* ¶ 18. “Thus, no matter which set of data is considered—national class action data, Ninth Circuit class action data, or overdraft class action data—the fee request here is modest compared to other cases.” *Id.*

Because the fees as a percentage of recovery are reasonable, class counsel and Professor Fitzpatrick explained that the district court was not required to formally compare those fees to the fees that would have resulted from using the

lodestar method (a "lodestar cross-check"). SER 15–17 ¶¶ 23–25. In case the court did decide to conduct a cross-check, however, class counsel submitted time records showing an estimated 2,158 hours along with declarations establishing counsels' reasonable hourly rates and lodestar fees. Doc. 80-1 at 25. Based on those numbers, Professor Fitzpatrick stated that application of a lodestar cross-check would not change his opinion that the requested fee award was reasonable. SER 17–18 ¶ 26.

5. Objectors argue against the award of fees, and class counsel agree to voluntarily reduce those fees by $2 million.

After the district court granted preliminary approval, notice of the settlement was sent to more than seven million class members nationwide. Docs. 72, 75, 122-1 ¶ 21. Of those seven million Bank of America customers, just one hundred opted out and only eleven filed objections. Doc. 122-1 ¶ 26.

One of those objectors—and the only one who has filed a brief on appeal—is Rachel Threatt. As her objection highlights, Ms. Threatt's papers were filed by Ted Frank and his Center for Class Action Fairness—frequent objectors to class-action settlements whose stated ideological agenda includes "lowering the economic payout for trial attorneys." Competitive Enterprise Institute, *Annual Report* 1 (2015 & 2016), http://bit.ly/2NnP3u8; *see* ER 83; *see also City of Livonia Emps.' Ret. Sys. v. Wyeth*, 2013 WL 4399015, at *5 (S.D.N.Y. 2013) (observing that an

objection was not "grounded in the facts of [the] case" but in Mr. Frank's "objection to class actions generally").[8]

Ms. Threatt urged the district court to evaluate the request for attorneys' fees with a lodestar cross-check, ER 87–91, and, alternatively, argued that the fee request was excessive—even when considered as a percentage of the settlement's total value—because some benefits included by the parties in that value were, in her view, illusory. ER 98–103. The other two objector-appellants, Ms. Sanchez and Ms. Collins, raised similar arguments against the award of attorneys' fees. ER 44–50, 53–67. In addition, Ms. Sanchez argued that the cash-payment and debt-forgiveness benefits "are entirely different and in conflict," and thus that "separate subclasses should be created with separate subclass representatives" for each form of relief. ER 48–49.

Based on Ms. Sanchez's objection, the district court ordered the parties and objectors to submit additional briefing on "why the absence of subclasses is not problematic for purposes of" Rule 23(a)(4)'s requirement that class representatives "adequately protect the interests of the class," and, in particular, "whether there exists a conflict of interest between the named plaintiffs and the class they seek to represent." ER 19, 24. In their responsive briefs, the parties explained that the cash

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[8] At the time the objection was filed, the Center was part of the Competitive Enterprise Institute. ER 83. Since then, it has moved to the Hamilton Lincoln Law Institute, which has similar goals. *See* Threatt Br. at 5.

and debt-forgiveness portions of the settlement were negotiated separately—class counsel did not raise the issue of debt forgiveness until they had obtained as much cash relief as Bank of America was willing to pay. Doc. 128 at 1. The parties, in other words, never considered reducing the cash portion of the settlement to increase the debt-forgiveness portion, or vice versa. *Id.*

Class counsel also offered to mediate with the objectors. Doc. 104-3 at ¶¶ 43–44. All the represented objectors except Ms. Threatt agreed. *Id.* As a result of the mediation, class counsel offered to reduce their fees by more than $2 million, to $14.5 million—a proposal that most of the participating objectors agreed was reasonable and acceptable to them, although they ultimately did not agree to drop their objections. *See id.* ¶ 45; *see also* Doc. 124 at 11. That reduced the requested fees, as a percentage of immediate monetary relief, from the 25% benchmark to 21%.

6. The district court certifies the class and approves the proposed settlement and attorneys' fees.

The plaintiffs moved for certification of a settlement class, final approval of the proposed class settlement, and an award of attorneys' fees and costs. ER 2. Following a hearing, the district court granted the motions. *Id.*

Class certification. The court first concluded that all the prerequisites for certifying a class action under Rule 23(a) and (b)(3) are satisfied here. ER 6–11. The court found that the case-dispositive question of whether Bank of America's charges are "interest" under the National Bank Act is a common issue that

predominates over individualized issues in the case and that renders a class action the superior method for resolving the controversy. ER 11.

Having ordered additional briefing on Rule 23(a)(4)'s adequacy requirement, the court devoted particular attention to that issue. ER 3–10. Because the "[n]amed plaintiffs and Class Counsel have demonstrated their ability to vigorously prosecute this action on behalf of the class," the court found that "the only question as to adequacy is whether there exists a conflict of interest between named plaintiffs and the class as a whole that would render named plaintiffs inadequate representatives." ER 8. On that question, the court examined whether the interest of the named plaintiffs, who would be entitled only to a cash payment, conflicted with the interests of the portion of the class entitled only to debt forgiveness. *Id.* It concluded that there was no such conflict. ER 10.

In reaching that conclusion, the court noted that the portion of the class entitled to debt forgiveness would be "fairly compensated for their actual economic losses" by receiving "complete … forgiveness" of debt resulting from the disputed charges. *Id.* The court acknowledged that the class representatives and other recipients of the cash award, unlike recipients of debt forgiveness, would "recover less than one hundred percent of their economic loss." *Id.* But, because each of the class representatives is entitled to only cash relief, that arguably "less favorable treatment" showed, if anything, "a *lack* of self-dealing on the part of the named

representatives." *Id.* (emphasis added). Concluding that Rule 23(a)(4) is satisfied, the court granted certification of the class action. *Id.*

Settlement approval. Turning to the fairness of the proposed settlement, the court found that the circumstances, "strongly support" approval here. ER 12. First, the court found that the settlement's terms weighed in favor of approval. "Most importantly," it wrote, "the injunctive relief, estimated at about $1.2 billion, is substantial." ER 13. In addition, "[t]he $37.5 million in cash and $29.1 million in debt relief alone" amount to a "meaningful" recovery. *Id.* The conclusion that the settlement has significant value is bolstered, the district court found, by the fact that, out of a class of seven million, only one hundred class members chose to opt out. *Id.*

Second, the court considered the fact that the plaintiffs would face significant "risk and expense" in pushing forward with the case without a settlement. *Id.* Given that "every other court to consider the question" has rejected the plaintiffs' legal position, it reasoned, the plaintiffs would face a serious risk of losing on appeal. ER 12–13. Moreover, the plaintiffs would still have a "substantial" distance to cover before they could prevail even in the district court: "To succeed, Plaintiffs would need to defeat [Bank of America's] permissive interlocutory appeal," "engage in formal discovery," "win a contested class certification motion," "survive summary judgment," and "win at trial." ER 13. "Considering Bank of America is a highly

sophisticated and well represented defendant, Plaintiffs would almost certainly encounter substantial difficulty and expense in fully litigating this case." *Id.*

Third, "the quality and tenacity of Class Counsel's work on this case … and the presence of a highly respected neutral in negotiations" provided further evidence that "this settlement was reached through arms' length negotiations and not collusion." ER 14.

The court rejected the objector's argument that the debt-forgiveness component of the settlement is illusory because Bank of America does not expect to recover it anyway. ER 13. Even if the debt forgiveness costs the bank "very little," the court reasoned, "it does not follow that the relief is meaningless to … recipients." *Id.* Nor, the court found, is the debt forgiveness valueless because some class members may have chosen never to pay off the debts. *Id.* Because the "debt, at present, is legally enforceable," the bank "could initiate proceedings to collect" or "could sell the debt at a discount to another entity that might be more willing to undertake collection efforts." *Id.* Debt relief, the court found, "immunizes recipients from worrying about or suffering through any efforts to collect on this debt" and "will also benefit recipients in the form of the improved credit scores some class members will realize once [Bank of America] reports the debt relief to the credit bureaus." *Id.*

The court thus approved the settlement "as fair, reasonable, adequate, and in the best interest of the Settlement Class members." ER 14.

Attorneys' Fees. The court found that class counsel's requested fees were reasonable. The court recognized that the plaintiffs had originally asked for $16.65 million in fees (25% of the immediate monetary relief), but later reduced their request to $14.5 million (21% of the immediate monetary relief and just 1% of the total including all relief)—an amount that the court observed was well below the 25% fee that this Court has described as the "benchmark rate." ER 14.[9]

The court found that the surrounding circumstances supported the requested rate. First, "the result obtained here by Class Counsel is remarkable." ER 15. "[F]orcing a bank of [Bank of America's] stature to cease a lucrative banking practice," it wrote, is a "meaningful" victory. ER 15. Although the cash and debt-forgiveness components of the settlement themselves "support[] the requested fee," the $1.2 billion saved by eliminating the fees "makes the inquiry much easier." *Id.* And class counsel's accomplishment is particularly notable, the court found, given "the adverse legal landscape" on the question whether the challenged fees constitute interest. *Id.*

[9] Considering the actual value of debt relief ($30.3 million) instead of the preliminary number in the settlement ($29.1 million), the fees are just 20.5% of the immediate monetary relief.

The court also found that the requested fee was supported by the vigorous efforts of class counsel. *Id.* "Though Class Counsel achieved the Settlement before commencement of formal discovery, a cursory glance at the docket demonstrates that this was a hard fought battle," involving, among other things, offensive and defensive motions practice, an interlocutory appeal, discovery, settlement talks and mediation, notice to seven million class members, and certification and final approval of the settlement. ER 15–16. And counsel engaged in that litigation, the court noted, despite "a substantial risk of non-payment." ER 15.

The court particularly stressed that the requested fees were supported by class counsels' demonstrated ability:

> Class Counsel achieved this result through tenacity and great skill. In all of their written submissions and in their presentation at the Final Approval Hearing, Class Counsel's arguments were laudably clear and precise, no small feat given the complexity of the legal questions at issue here. It is clear that substantial preparation went into all of Class Counsel's work on this case.

Id.

The court rejected the objector's argument that debt forgiveness should not be included in the settlement's value for purposes of calculating reasonable fees, noting again that the debt relief has significant value to the class. ER 14. Moreover, even "assuming *arguendo* that it was illusory," the court found "that the staggering $1.2 billion dollars in injunctive relief," which was not included in the settlement's

value when calculating fees, "is worth substantially more" than the $29.1 million in debt forgiveness and thus independently justifies the requested fees. ER 14–15.

Finally, the court also rejected the objector's argument that a formal lodestar cross-check was necessary. ER 16. Because class counsels' claimed hours and lodestar rate were provided in their motion for fees and prominently included in the objections, the court already had those numbers in front of it. ER 54, 81. But the decision whether to conduct a cross-check based on those numbers, it noted, is a matter of discretion. ER 16 (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)). And, having already noted the particularly strong showing of reasonableness under the percentage method, the court found "it proper to exercise [its] discretion and not apply the lodestar cross check" here. *Id.* That decision is consistent with Professor Fitzpatrick's opinion that "the court should not consider class counsel's lodestar at all," but that, if it does, "the lodestar here does not change … that the fee request is reasonable." SER 17 ¶¶ 25–26. Given that the requested fees are "significantly below the benchmark rate of 25%, and because of how high Class Counsel scores on the factors analyzed above," the court found that "the requested fee is reasonable" even without a cross-check. ER 16.

Having approved the settlement and fees, the court granted final judgment on September 19, 2018. ER 1. Three objectors—Rachel Threatt, Estafania Osorio

Sanchez, and Amy Collins—appealed, and this Court consolidated the three appeals. Only Ms. Threatt has filed a brief on appeal.[10]

SUMMARY OF ARGUMENT

I. The settlement in this case eliminated Bank of America's extended-overdraft fees and provided class members charged those fees cash reimbursement, debt forgiveness, or both. In a convoluted argument, the objector claims that Bank of America's agreement to provide debt forgiveness to class members with unpaid fees demonstrates a conflict of interest between those class members and other members who, because they actually paid the fees, were entitled only to cash reimbursements. The interests of class members, however, are aligned: All suffered the same injury and are entitled under the settlement to some kind of monetary relief. And, as the district court found, the settlement's provision for debt forgiveness cannot show self-dealing by the class representatives here, given that none of the representatives is even entitled to that relief. The objector identifies no evidence to overcome the substantial deference owed to the district court's determination.

In the end, the only basis for the objector's claimed conflict is her dissatisfaction with receiving less than a full cash reimbursement. But that is

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[10] Ms. Sanchez and Ms. Collins joined Ms. Threatt's brief under Federal Rule of Appellate Procedure 28(i). For ease of reference, this brief will refer to Ms. Threatt throughout as "the objector."

evidence not that a conflict exists but only that the settlement here—like all settlements—is the product of compromise.

II. The district court's award of attorneys' fees at just 1% of the settlement's value is far below this Court's 25% benchmark and is supported by the court's specific findings that the fees are reasonable in light of all the circumstances. The objector argues that the court relied on inflated values of the settlement's provisions for debt forgiveness and for eliminating future extended-overdraft charges. But the court's findings that those settlement components have value cannot be overcome by the objector's unsupported speculations to the contrary. And, in any event, the court's fee award did not depend on attributing a specific value to the relief. The court held only that debt forgiveness is valuable to the class and that the elimination of future fees is "worth substantially more." ER 14–15. The two forms of relief, together with the value of the cash reimbursements, support the district court's fee award.

The objector also asserts that class counsel faced a number of conflicts in negotiating fees, all of which are baseless.

III. Under long-established circuit precedent, district courts have discretion to use *either* a percentage *or* a lodestar method to determine reasonable attorneys' fees. The objector's argument that *both* methods are required, on the other hand, has never been adopted by this Court and should not be adopted for

the first time here. The only authority that the objector identifies is this Court's decision in *In re Bluetooth Headset Products Liability Litigation*, but the Court there actually reaffirmed a district court's discretion to choose the best method for determining fees under the circumstances of each case. 654 F.3d at 942. The objector's reading of *Bluetooth* as nevertheless *requiring* a lodestar cross-check has been described by this Court as "either mistaken or a deliberate misrepresentation of the law." *Yamada*, 825 F.3d at 547.

The objector argues that the district court failed to justify its determination that a lodestar cross-check was not necessary. She is wrong. The court's justification is bound up in, and inseparable from, its finding that the percentage-based attorneys' fees are reasonable. The court emphasized the remarkable results of the litigation and the risks that class counsel undertook in bringing it—factors that the percentage-based fees are designed to address. The vast majority of district courts choose the percentage method in class actions because that method rewards class counsel for efficiently obtaining large recoveries and thus aligns their interests with the interests of the class. A mandatory lodestar cross-check would undermine district courts' discretion to make that choice by forcing them to also apply a fee methodology that instead encourages prolonged litigation. *See Vizcaino*, 290 F.3d at 1050 & n.5.

Although a lodestar cross-check is one way that a district court can determine that its fee award is reasonable, the district court here instead based its reasonableness determination on its findings regarding the results class counsel obtained, the risks they undertook, and the other circumstances of the case. Having already found that the fees are reasonable, there was no need for the court to conduct a second reasonableness determination with a cross-check. Moreover, the court had class counsel's lodestar in front of it when it declined to conduct a cross-check and thus implicitly considered and rejected reliance on that lodestar in awarding fees. Nothing would be accomplished by reversing the district court's fee order just so the court could add a few words stating that it considered class counsel's lodestar.

STANDARDS OF REVIEW

Adequacy of Representation. This Court "review[s] for abuse of discretion the district court's decision to certify a class for settlement purposes," including its determination of adequacy of representation under Rule 23(a)(4). *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 566 (9th Cir. 2019). The Court's review is limited "to whether the district court correctly selected and applied Rule 23's criteria." *Id.* "When reviewing a grant of class certification," this Court "accord[s] the district court noticeably more deference than when [it] review[s] a denial." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013).

Attorneys' Fees. Likewise, the Court "review[s] for abuse of discretion the district court's award of attorney's fees and costs to class counsel as well as its method of calculating the fees." *Hyundai*, 926 F.3d at 566. The district court has "broad discretion to determine the amount of reasonable fees." *Id.* at 572. That discretion is "appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 453 (9th Cir. 2010).

ARGUMENT

I. Class counsel and the class representatives adequately represented the class by obtaining "remarkable" relief for all class members without subordinating the interests of any subgroup.

A. The objector fails to identify any actual conflict between the class members, whose interests are actually aligned.

The settlement provides significant relief for all class members. The agreement ends Bank of America's practice of charging extended-overdraft fees, eliminating a "staggering" $1.2 billion in future charges. ER 13–14. In addition, class members will be reimbursed for the past fees they were charged: Those who actually paid extended-overdraft fees to Bank of America will automatically receive cash payments, while those who were charged the fees but never paid will instead receive "complete … debt forgiveness" along with corrections to their credit

reports. ER 5, 10; Doc. 124 at 8–9, 13. As the district court found, the resulting "$37.5 million in cash and $29.1 million in debt relief alone" amount to a "meaningful" recovery for the class, totaling—after adding in notice and administration costs that Bank of America also agreed to pay—about $70 million in monetary relief. ER 13. Taken together, those results are, as the district court put it, "remarkable." ER 15.

The objector, however, does her best to turn the exceptional relief obtained by class counsel and the class representatives against them, arguing that the high value of the settlement's debt-forgiveness provision demonstrates that class members who were eligible only for cash relief were not adequately represented under Rule 23(a)(4). The argument turns on an aspect of the settlement negotiations designed to *protect* the class's interests—class counsel's two-stage negotiation strategy, under which they negotiated the maximum cash relief that they could obtain from Bank of America before raising the issue of debt forgiveness for the first time. *See* Threatt Br. at 28. The objector posits that, "[i]f Bank of America was actually willing to increase the total settlement amount by over $29 million after class counsel believed they had wrung every last penny from their coffers, then at least some of that relief should have been shared with the cash subgroup." *Id.* Class counsel's success in obtaining full debt forgiveness, in the objector's view, itself "reveal[s] the inadequacy of class counsel and the class representatives in trying to represent both cash and debt subgroups." *Id.* She concludes that the district court

should have certified a separate subclass to represent each group. *Id.* at 43–44. The objector is wrong.

Determining adequacy under Rule 23(a)(4) requires a court to determine whether "the named plaintiffs and their counsel have any conflicts of interest with other class members." *Hyundai*, 926 F.3d at 566. Although the objector tries to frame the argument in terms of a conflict between class members entitled to debt forgiveness and those entitled only to cash relief, she "fail[s] to identify a substantive issue for which there is a conflict of interest." *Staton*, 327 F.3d at 958–59. All class members suffered the same sort of monetary injury from being charged extended-overdraft fees, and both the cash and debt-forgiveness provisions reimburse them for that injury. The claims of all class members are therefore aligned. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 608 (9th Cir. 2018) (rejecting the argument that different relief for class members suffering different but related injuries showed a conflict of interest).[11]

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[11] The adequacy inquiry also asks whether "the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class." *Hyundai*, 926 F.3d at 566. The district court found that requirement satisfied, stressing class counsel's "tenacity and great skill" and the class representatives' "demonstrated … ability" to protect the class. ER 8, 15. The objector does not dispute that finding.

B. The district court's finding that no conflict exists is entitled to substantial deference.

The record shows that that the district court carefully considered and rejected the objector's argument. Based on Ms. Sanchez's objection, the court asked for briefing on the alleged conflict. ER 19, 24, 26. In a three-page section of its class-certification order, the court found that no conflict exists and concluded that the adequacy requirement of Rule 23(a)(4) is satisfied. ER 8–10. That finding is entitled to deference on appeal. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (holding that the district court is entitled to deference because it "is exposed to the litigants, and their strategies, positions and proof").

As to the portion of the class entitled to debt forgiveness, the court found adequate representation because the settlement gave them "complete … forgiveness" of their debts and thus "fairly compensated [them] for their actual economic losses." ER 10; *see Volkswagen*, 895 F.3d at 609 (concluding that class subgroups did not suffer a conflict where the relief obtained in the settlement "was in an amount that generally fairly compensated for such losses"). As to the class members entitled to cash relief, the court acknowledged that they would "recover less than one hundred percent of their economic loss." ER 10. But, because all of the class representatives are member of that subgroup, it found that any "comparably less favorable treatment … is not grounds for finding an improper conflict of interest." *Id.* "To the contrary," it found, "the fact that the least

represented group appears to have received the more favorable treatment would seem to suggest a *lack* of self-dealing on the part of the named representatives." *Id.* (emphasis added).

The district court's careful consideration of the objection and reasonable explanation for finding a lack of conflict shows that the court, with "a firsthand grasp of the claims, the class, the evidence, and the course of the proceedings," was vigilant on behalf of absent class members. *Volkswagen*, 895 F.3d at 611. Even if the district court "could, also without abusing its discretion, have declined to certify the overall class in favor of certifying discrete sub-classes," this Court must defer to its determination that the adequacy requirement does not bar certification here. *Staton*, 327 F.3d at 956.

C. There is no evidence of a conflict.

The objector does not argue that the district court's adequacy analysis failed to identify or apply the proper legal standard. *See Torres*, 835 F.3d at 1135. Nor does she identify any "error of law concerning the kinds of factors to be weighed." *Id.* Her argument is thus limited to the contention that the district court considered the "correct mix of factors but ma[de] a clear error of judgment" in applying them. *Id.* at 1132. She falls far short of meeting that demanding standard.

That the district court did not consider class counsel's course of negotiations inadequate does not show such an error in judgment, let alone "clear error." As

even the objector recognizes, there is an obvious explanation for Bank of America's willingness to give up the unpaid fees even when it was unwilling to pay additional cash relief: It likely considers the unpaid debts of its customers to be significantly less valuable than the cash value of those debts. *See* Threatt Br. at 25. As the objector points out, Bank of America could never have hoped to recover the full value of class members' unpaid fees. *See id.* Given that fact, Bank of America's late agreement to provide debt forgiveness is "fully explicable" and does not "reveal an intra-class conflict." *Volkswagen*, 895 F.3d at 609.[12]

Moreover, far from demonstrating a conflict, the two-stage negotiation on which class counsel relied actually *protected* the interest of class members entitled to cash relief. By fully negotiating the settlement's cash component before even raising the issue of debt, class counsel eliminated any possibility that they could have considered trading away value from those cash claims in exchange for additional debt forgiveness. *See* Doc. 128 at 1. There is no dispute that, if class counsel had stopped negotiating at that point, the portion of the class entitled to cash relief

[12] The objector argues that, if the debt is worthless to Bank of America, the district court should not have included it in the value of the settlement when determining reasonable attorneys' fees. Threatt Br. at 25. As explained in the next section, however, the settlement's value depends not on its cost to Bank of America but on its value to the class. See *Bluetooth*, 654 F.3d at 944. Here, the district court found that debt forgiveness has real value to the class. ER 13.

would be no better off today. That counsel instead went on to obtain additional relief for other class members thus cannot show inadequate representation.

Finally, the objector fails to show that the settlement is "so unfair" to class members entitled to cash relief that it must "be the product of inadequate representation." *Volkswagon*, 895 F.3d at 608. That those class members are not "made whole" under the settlement just reflects the fact that the settlement is a compromise, not that "it was necessarily the product of inadequate representation." *Id.* at 609. And any class member who nevertheless thought "that his or her personal claim was being sacrificed for the greater good … had the right to opt-out of the class." *Hanlon*, 150 F.3d at 1027. Given all that, the court did not abuse its discretion in finding the adequacy requirement satisfied. *Id.*

II. The district court's award of attorneys' fees is reasonable as a percentage of the relief that class counsel actually obtained on behalf of the class.

A. The district court reasonably exercised its discretion in awarding fees.

The district court awarded attorneys' fees of $14.5 million, representing just 1% of the settlement's total value and 21% of the value of the immediate monetary relief. The court did not abuse its discretion in determining that those fees were reasonable.

To begin with, the district court was well within its discretion to conclude that 21% of the immediate monetary relief is a reasonable fee percentage. As the

court observed, that rate "is significantly below the benchmark rate of 25%" that this Court has set for reasonableness. ER 16. It is also "modest" in comparison with the 25% to 35% rates awarded in other Ninth Circuit class actions and, in particular, other cases challenging bank overdraft fees. SER 11 ¶ 18; *see also In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997) ("We have said that common fund fees commonly range from 20% to 30%."); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1297 (9th Cir. 1994) (noting that a "range of 20–40 percent is typical in many common fund cases"). And including the $1.2 billion in relief from future extended-overdraft fees, the court found, "generally makes the inquiry much easier." ER 15. In that case, the rate is just 1%—"*far below*" average fees in other cases. SER 10 ¶ 16. At least in the absence of "special circumstances" showing that the rate was not reasonable, the court's award of fees at 21% of the immediate monetary relief was not an abuse of discretion. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376–77 (9th Cir. 1993).

The district court also "provide[d] a reasoned explanation for [its] decision to approve the fee request," in the process making specific findings on the record that the fees were reasonable in light of all the facts. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 955 (9th Cir. 2015); ER 15. The court found that class counsel, "through tenacity and great skill," had achieved "remarkable" results for the class, especially in light of the "hard fought battle" with Bank of America, the "adverse

legal landscape," and the "substantial risk of non-payment." ER 15. The objector makes no attempt to argue that the district court's findings are clear error. "Thus, the court did not abuse its discretion in … its decision to approve the attorneys' fees award." *Online DVD-Rental*, 779 F.3d at 955.

B. The district court properly considered the value of future extended-overdraft charges eliminated by the settlement.

The objector argues that the district court's fee award was excessive because class counsel "artificially inflat[ed] the settlement's apparent relief." Threatt Br. at 21. She first challenges the value of eliminating future extended-overdraft charges, arguing that injunctive relief is "easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." Threatt Br. at 22 (citing *Staton*, 327 F.3d at 974). But although that may be true in other cases, the value of the relief here can be accurately estimated based on the amount charged by Bank of America in past years. The bank has done that work and has determined the value of the eliminated fees to be about $1.2 billion over five years. ER 15.

The objector suggests that the value on which the district court relied is illusory because the settlement "does not forbid Bank of America from charging account holders other fees to make up for any such loss in revenue." Threatt Br. at 9. That is not supported by the record. The settlement prohibits Bank of America from charging extended-overdraft charges "*or any equivalent fee*." Doc. 69-2 ¶ 2.2(a)(1)

(emphasis added). And the undisputed evidence showed that, as a result, the bank's earnings would *actually decrease* by about $1.2 billion over five years. SER 21 ¶ 8.

In any event, the court did not include the value of future relief to the class in the value of the settlement for the purpose of determining fees. Instead, it held that the cash and debt-forgiveness components of the settlement alone "support[] the requested fee." ER 15. The court relied on the future relief only for additional support for its fee award, finding that it "makes the inquiry much easier." *Id.* The district court did not abuse its discretion in doing so. *See Allen v. Bedolla*, 787 F.3d 1218, 1225 (9th Cir. 2015) (holding that injunctive relief can give "more justification for the reasonableness of class counsel's fee award").

C. The court also properly considered the value of the settlement's provision for debt forgiveness.

The objector next challenges the value of debt forgiveness for class members who were charged extended-overdraft fees but never paid them. Threatt Br. at 21–22. The "parties essentially acknowledged the valueless nature of this relief," she claims, when they told the district court that class counsel obtained Bank of America's agreement to debt forgiveness only after obtaining the maximum possible cash relief. *Id.* at 23. That fact, the objector concludes, "strongly suggests that the debt relief was … a 'throw-in' item for Bank of America" with "*de minimis* actual accounting value." Threatt Br. at 24.

The district court, however, rejected the objector's conclusion that debt-forgiveness is valueless to the class. ER 13. Even if the debt forgiveness costs the bank "very little," the court found, "it does not follow that the relief is meaningless to … recipients." *Id.* In so finding, the court correctly focused not on "how much money a company spends on purported benefits, but [on] the value of those benefits to the class." *Bluetooth*, 654 F.3d at 944; *see also* Am. Law Inst., *Principles of the Law, Aggregate Litigation* § 3.13(a) (2010) ("Attorneys' fees in class actions, whether by litigated judgment or by settlement, should be based on … the actual value of the judgment or settlement to the class … .").

Nor, the court wrote, is the debt forgiveness valueless because some class members may have chosen never to pay off the debts. ER 13. Given that the "debt, at present, is legally enforceable," the bank "could initiate proceedings to collect" or "could sell the debt at a discount to another entity that might be more willing to undertake collection efforts." *Id.* And debt relief, the court found, "will also benefit recipients in the form of the improved credit scores some class members will realize." *Id.*

Finally, even "assuming *arguendo* that [the debt forgiveness] was illusory," the court found "that the staggering $1.2 billion dollars in injunctive relief," which was not included in the settlement's value when calculating fees, "is worth substantially more" than the $29.1 million in debt forgiveness and thus independently supports

the fee award. ER 14–15. That was also a reasonable use of its discretion. When the value of settlement relief cannot be "accurately ascertained," this Court has held that a district court should still "consider the value … as a 'relevant circumstance' in determining what percentage of the common fund class counsel should receive as attorneys' fees." *Staton*, 327 F.3d at 974.

The objector has no response to the district court's reasoned analysis. She thus fails to demonstrate that the court abused its discretion in valuing the debt relief.

D. The reasonable fees awarded by the district court are not the result of collusion.

The objector makes several additional arguments that aspects of the settlement indicate collusion between Bank of America and class counsel and thus render the fee award unreasonable. Threatt Br. at 20–23. The district court, however, reached the opposite conclusion. Citing both "[t]he quality and tenacity of Class Counsel's work" and "the presence of a highly respected neutral in negotiations," the court found that the settlement "was reached through arms' length negotiations and not collusion." ER 14.

The objector identifies nothing in the record that undermines the district court's finding. The cases she cites warn that class counsel could negotiate away settlement benefits in exchange for additional fees. Threatt Br. at 20–23. But that risk does not exist here, where the fees were not separately negotiated by the parties

but awarded by the district court from a common fund. Moreover, none of the classic "indicia of … collusion" are present. *Bluetooth*, 654 F.3d at 947. The attorneys' fees—at well below this Court's 25% benchmark—are not disproportionate to the class's relief. *See id.* at 938, 947. There is no possibility of settlement funds reverting to Bank of America—any residual funds left over after distribution will result in a second distribution to the class before possibly going to a designated cy pres. *See id.*; ER 5. And although Bank of America did agree not to contest a fee application at or below this Court's 25% benchmark, that is not the sort of "clear sailing" provision that creates incentives for class counsel to bargain away the class's interests. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 961 n.5 (9th Cir. 2009) (noting that an agreement not to contest fees "does not signal the possibility of collusion" where the fees are awarded by the court from a common fund).

The objector, in short, does little more than "float[] out the specter" of collusion. *Hyundai*, 926 F.3d at 569. Without any "facts to give [them] more substance," her allegations do nothing to undermine the district court's thorough reasonableness determination. *Id.*

III. The district court properly exercised its discretion in declining to determine reasonable attorneys' fees twice using two separate methodologies.

A. Under established circuit precedent, the district court was not required to conduct a lodestar cross-check.

In dozens of cases decided over the course of several decades, this Court has held again and again that district courts in common-fund cases have discretion to calculate attorneys' fees using "*either* a percentage *or* lodestar method." *Hanlon*, 150 F.3d at 1029 (emphasis added).[13] None of this Court's cases, in contrast, has never held that district courts are required to use *both* the percentage *and* the lodestar method to determine fees in the same case. Yet, that is precisely the rule the objector contends the district court was required to follow here. Threatt Br. at 29 (arguing that "a lodestar crosscheck is necessary").

The only Ninth Circuit authority that the objector identifies in support of that purported requirement is a single sentence from this Court's opinion in *Bluetooth*, 654 F.3d 935. As an "example" of reasonable use of discretion in determining fees, the Court wrote there that if an award of 25% "would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead."

[13] *See also, e.g.*, *Vizcaino*, 290 F.3d at 1047 ("Under Ninth Circuit law, the district court has discretion in common fund cases to choose *either* the percentage-of-the-fund *or* the lodestar method." (emphasis added)); *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002) (same); *Wash. Pub. Power Supply Sys*, 19 F.3d at 1295 (same).

Id. at 942. But neither there nor anywhere else in the opinion does *Bluetooth* require cross-checks. On the contrary, *Bluetooth* reaffirms a district court's authority "to choose which calculation method they use." *Id.* Although the decision "*encourage[s]* courts to guard against an unreasonable result by cross-checking their calculations," it also permits them to avoid the "time-consuming task of calculating the lodestar" by simply "award[ing] attorneys a percentage of the common fund." *Id.* at 942, 944 (emphasis added) . This Court has thus rejected a reading of *Bluetooth* as holding that courts "*must*" conduct cross-checks, describing that interpretation as "either mistaken or a deliberate misrepresentation of the law." *Yamada*, 825 F.3d at 547.[14]

Nor has any other decision of this Court held that a cross-check is required or reversed a district court's fee determination for failure to perform such a check. Numerous decisions, on the other hand, have squarely held that cross-checks are a matter of discretion. *See, e.g.*, *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 748

[14] The objector argues that *Yamada* "is irrelevant" because it "addresses percentage crosschecks of a base lodestar award" rather than, as here, the other way around. Threatt Br. at 30 n.4. But that is exactly the kind of cross-check that was at issue in *Bluetooth*, and *Yamada* therefore stands for the proposition that *Bluetooth*'s holding does not adopt a mandatory cross-check rule even in the context of the particular facts of that case. And to the extent that the objector reads dicta in *Bluetooth* to suggest a broader cross-check requirement in cases like this one, *Yamada* disapproves of that too. The Court rejected a reading of *Bluetooth* as holding that a "district court *must* guard against an unreasonable result by cross-checking," noting that the Court only "*encourage[s]*" that cross-checking occur. *Yamada*, 825 F.3d at 547.

(9th Cir. 2017), *vacated and remanded on other grounds sub nom. Frank v. Gaos*, 139 S. Ct. 1041 (2019) ("Although *not required to do so*, the district court took an extra step, cross-checking this result by using the lodestar method." (emphasis added)).[15]

The objector's position, if accepted, would destroy the district court's discretion to choose the best methodology for determining fees in a particular case. Rather than allowing courts the discretion to choose the most reasonable of *either* the percentage *or* the lodestar method, *see Hanlon*, 150 F.3d at 1029, the objector would require the court to apply *both* methods, and to do so in every case. Worse, it would require the court to go through the motions of employing the method even in a case, like this one, where the court has already found a particular fee reasonable under what it determined to be the better method under the circumstances. If a long and complex case results in a simple cash settlement, for example, the objector's rule might require the district court to slog through years of time records to determine the lodestar even if it is clear to the court from the outset that a percentage of the relief would be the most reasonable fee.

The objector also relies on cases brought under fee-shifting statutes, in which reasonable attorneys' fees are presumptively determined by counsel's lodestar.

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[15] *See also, e.g., Fischel*, 307 F.3d at 1007 ("Nor did the district court err by failing to compare the lodestar result to the 25 percent benchmark."); *Online DVD-Rental*, 779 F.3d at 955 ("[A] court *may* cross-check its percentage-of-recovery figure against a lodestar calculation." (emphasis added)).

There is "no justification," she argues, for defining "reasonable" fees any differently in this case. Threatt Br. at 31–32 (citing *Perdue v. Kenny A.*, 559 U.S. 542, 546, 554 (2010)). But the objector's argument overlooks the different considerations when a fee award is based not on a fee-shifting statute but on a common fund established by a class-action settlement. "Unlike statutory fee-shifting cases, where the winner's attorneys' fees are paid by the losing party, attorneys' fees in common fund cases" are paid "by members of the plaintiff class, who shoulder the burden of paying their own counsel out of the common fund." *Wash. Pub. Power Supply*, 19 F.3d at 1300. In the common-fund context, there is nothing unreasonable about basing attorneys' fees on a percentage of the recovery, given that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *Id.* Thus, a fee is "reasonable" under a fee-shifting statute when it "reflects the amount of attorney time reasonably expended on the litigation," but under the common-fund doctrine when it "is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

B. The district court's explanation of its fee award is the justification for its decision not to conduct a cross-check.

The objector argues that, even assuming the district court had discretion to forgo a lodestar analysis, the court failed to justify its decision not to conduct one here. Threatt Br. at 38. But the court did provide a justification—its finding that the percentage-based attorneys' fees are reasonable even without considering class

counsel's lodestar. ER 15. The court's decision not to apply a cross-check is bound up in, and inseparable from, its finding that awarding fees under a percentage rate is reasonable under all the circumstances of the case. ER 16. Those circumstances fully justify the district court's decision.

In explaining the reasonableness of the percentage fee, the court particularly emphasized the "remarkable" results achieved by class counsel. ER 15. Rewarding results is the primary function of the percentage approach. Results-based pay helps "ensure faithful representation" of the class by "tether[ing] the value of an attorneys' fees award to the value of the class recovery." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178–79 (9th Cir. 2013). Under the percentage method, "[t]he more valuable the class recovery, the greater the fees award." *Id.* The lodestar method, in contrast, does "not align the interests of class counsel with the interests of the class" because "class counsel's recovery [does] not depend on how much the class recover[s], but, rather, on how many hours could be spent on the case." SER 6 ¶ 9. It is thus "widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case" rather than to "achieve[] a timely result for class members in need of immediate relief." *Vizcaino*, 290 F.3d at 1050 & n.5; *see also Manual for Complex Litigation* § 14.121, at 188 ("[T]he lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended.").

Results-based compensation is common in a variety of professions precisely because it aligns incentives better than compensation based on time expended. Real-estate agents, for example, earn percentage-based commissions to reward them for furthering their clients' interests by finding a suitable property as quickly as possible. Paying them an hourly rate would discourage efficiency, rewarding them instead for wasting the time of prospective homebuyers by taking them to a large number of unacceptable homes. And investment-fund managers are paid more when they make successful investments for the fund. It would make no sense to reward them instead for spending many hours researching investment opportunities that only lose the fund money.

Likewise, "[w]hen judges look to the market, they will see that the contingent percentage fee is the compensation arrangement of choice for plaintiff representations" and that "[p]laintiffs, including corporations, rarely engage lawyers on other terms." Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809, 1817 (2000). "Result-based compensation provides a strong foundation for trust" by "giving the lawyer an interest in making the right call." *Id.* at 1817–18 "A lawyer who stands to receive a share of every additional dollar paid to a client always has some incentive to prefer more to less." *Id.* Recognizing that, "the vast majority of courts of appeals now permit or direct

district courts to use the percentage-fee method in common-fund cases." *Manual for Complex Litigation* § 14.121, at 187.

The district court here found that the results achieved in this case are "all the more remarkable" because class counsel "faced a substantial risk of non-payment in confronting the adverse legal landscape." ER 15. That recognition of risk is another key feature of the percentage method. A percentage-based fee "mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases." *Vizcaino*, 290 F.3d at 1051. A percentage fee "reward[s] class counsel not only for the hours they had in the case to the date of the settlement, but for carrying the financial burden of the case." *Torrisi*, 8 F.3d at 1376–77; *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (upholding award of attorneys' fees based in part on risk).

The court did not abuse its discretion in relying on the risks that class counsel took and the successes they achieved in its determination of reasonable fees here. In bringing this case, class counsel "anticipated spending hundreds or even thousands of hours and advancing hundreds of thousands of dollars." Doc. 80-2 ¶ 26. Given that all previous decisions had rejected their legal position in the case, they faced a huge risk that they would never recover that investment. *See id.* ¶¶ 26–31. Yet, despite the odds against them, class counsel managed to achieve a

settlement worth more than a billion dollars. The district court's fee award properly recognizes that enormous success. *See Vizcaino*, 290 F.3d at 1048–49 (holding that a district court did not abuse its discretion in considering results and risk in awarding a percentage fee).

A lodestar cross-check in these circumstances would add nothing. A cross-check is just "one way" that a district court can determine that its fee award is reasonable. *Online DVD-Rental*, 779 F.3d at 949. Because the court already found that the percentage-based fee is reasonable under the circumstances of this case, there was no need for a second reasonableness determination. *See Google Referrer Header Privacy*, 869 F.3d at 748 (noting that the district court was "not required" to take the "extra step" of a cross-check). Indeed, application of a cross-check would undermine the purpose of rewarding class counsel's success by penalizing them for "achiev[ing] a timely result for class members in need of immediate relief." *Vizcaino*, 290 F.3d at 1050 & n.5.

C. The district court already considered class counsel's lodestar, and a remand to conduct a formal cross-check would accomplish nothing.

Even if this Court were to agree with the objector that district courts should be required to conduct a lodestar cross-check, this is not the case in which to announce a new mandatory cross-check rule. Class counsel already submitted their lodestar as part of their motion for attorneys' fees, and, as the objector

acknowledges, "the numbers were right in front" of the court when it made its fee determination. Threatt Br. at 29. The court also had in front of it the objector's argument that the lodestar did not support the requested fees, and the declaration of Professor Fitzpatrick (the plaintiffs' fee expert) stating that "the lodestar here does not change [his] opinion that the fee request is reasonable." SER 17 ¶ 26. Although the court did not make "express findings on what it considered to be a reasonable lodestar amount," the arguments of the parties and objectors over whether a cross-check is required and how the lodestar should be calculated demonstrate that the court "considered that lodestar calculation in determining the reasonableness" of its fee award. *Bedolla v. Allen*, 736 F. App'x 614, 617 (9th Cir. 2018). *Cf. Torrisi*, 8 F.3d at 1378 (holding that district court implicitly found Rule 23 satisfied when it found a settlement to be fair, adequate and reasonable).

Even with that information available to it, the district court decided to base its reasonableness determination not on class counsel's hours in the case—a factor that would have penalized counsel for efficiently obtaining relief for the class—but on considerations like the "remarkable" results that class counsel achieved, the "adverse legal landscape" that confronted them, and the "substantial risk of non-payment" they faced (factors that rewarded counsel for obtaining that relief). ER 15. Even if the district court were required to conduct a lodestar cross-check, its decision to determine reasonable attorneys' fees based on factors other than the

number of logged hours was a decision well within its discretion. *See Vizcaino*, 290 F.3d at 1050 & n.5 (holding that a low number of hours on a lodestar cross-check does not require that counsel "necessarily receive a lesser fee for settling a case quickly," but may instead "be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief.").

Having "considered all the circumstances of the case and reached a reasonable" determination of attorneys' fees, the district court has done all that could be asked of it. *Id.* at 1048. Nothing more would be accomplished by vacating its fee award to allow the district court to add a few more words to its order reciting the fact that it considered class counsel's lodestar and declines to rely on it.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,838 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2019, I electronically filed the foregoing brief with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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