No. 17-56745, No. 17-56746

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OMAR VARGAS, et al.,
Plaintiffs-Appellees,

v.

BRENDA LOTT, et al.,
Objectors-Appellants,

v.

FORD MOTOR COMPANY,
Defendant-Appellee.

Appeal from the U.S. District Court for the Central District of California
(Hon. Andre Birotte Jr., United States District Judge)

OPENING BRIEF FOR OBJECTORS-APPELLANTS LOTT, ET AL.

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INTRODUCTION

This appeal is from the approval of a class action settlement in a case alleging that Ford Motor Company fraudulently concealed and denied the existence of a transmission defect that cannot be cured, injuring a class of 1.9 million current and former owners of the defective cars. The settlement agreement—negotiated without a certified class—benefits Ford (a windfall release of liability with no guaranteed payout to the class), class counsel (about $9 million in attorneys' fees and costs under a "clear-sailing" agreement), and the representative plaintiffs (incentive awards of up to $10,000), but provides little or no benefit to the rest of the class. Only an estimated six percent of the class is currently eligible to seek cash payments, and only about two percent of the class is immediately eligible to use the settlement's arbitration program to attempt to force Ford to buy back their defective cars. The settling parties have offered no reliable estimate of whether, or how many, additional class members will become eligible to seek relief in the future. Former owners included in the class certainly will not. Nevertheless, the settlement releases the claims of everyone who bought or leased a car with the defective transmission, unless they excluded themselves by opting out or filing their own lawsuit. The released claims are indisputably valuable, particularly for class members in states like California that have robust consumer-

protection statutes. Indeed, Ford routinely offers to settle individual cases alleging the same claims made here for more than $75,000 each.

The district court erred in granting final approval of a settlement that (1) forces the vast majority of the class to surrender valuable claims for no relief; (2) distributes what little relief is available based on criteria that do not account for variations in the value of class members' claims because of factual differences or the impact of varying state consumer-protection laws; and (3) provides for an award of attorneys' fees to class counsel that dwarfs the value of the settlement to the class. The district court's approval of the settlement should be vacated.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332(d)(2). The district court's orders overruling objections to class action settlement, ER 13, granting final approval and entering judgment, ER 5, and granting plaintiffs' motion for attorneys' fees, costs, and service awards, ER 1, which resolved all claims of all parties, were entered on October 18, 2017. Appellants (known as the Lott Objectors) filed their notice of appeal on November 14, 2017. ER 165. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Whether the district court erred in approving a class settlement that (1) forces the vast majority of class members to release valuable claims in exchange

for no consideration; (2) fails to distribute settlement benefits among class members based on the relative value of their claims; and (3) provides class counsel with attorneys' fees disproportionate to the value of the settlement to the class.

STATEMENT OF THE CASE

A. The Class Action

This class action consolidates three cases brought against Ford seeking damages and injunctive relief under a variety of statutory and common-law claims on behalf of a class of consumers who bought or leased a 2011-2016 Ford Fiesta or 2012-2016 Ford Focus equipped with the PowerShift transmission. According to the operative complaint, the defective transmission "slips, bucks, kicks, jerks and harshly engages; has premature internal wear, sudden acceleration, delay in downshifts, delayed acceleration and difficulty stopping the vehicle, and eventually suffers a catastrophic failure." ER 238, ¶ 2. The complaint further alleges that the defect cannot be cured. No matter the number of repair attempts, and despite any temporary relief obtained, the symptoms of the defect return.

Ford allegedly knew of the defect prior to the sale of the class vehicles but fraudulently concealed the defect from purchasers. Ford instructed its dealers to tell customers who complained about the defect that the problems they were experiencing were "normal driving characteristics," which discouraged customers from continuing to seek warranty repairs for their defective transmissions. ER

238–42, ¶¶ 3–16; ER 305, ¶ 251. According to the complaint, "Ford either refused to acknowledge the defects' existence or performed ineffective software upgrades or other repairs that simply masked the defect." ER 247, ¶ 37. "When consumers present the Class Vehicles to an authorized Ford dealer for repair of the transmission, rather than repair the problem under warranty, Ford dealers either inform consumers that their vehicles are functioning properly, or conduct ineffective repairs or software updates that delay the manifestation of [the] defect in an attempt not to pay for it under warranty." ER 309, ¶ 266. The operative complaint acknowledges that Ford voluntarily issued two extended warranties during the pendency of this litigation (the 14M01 and 14M02 customer satisfaction programs), but explains that the programs are worthless because they "simply offer[] additional ineffectual repairs" "that do not actually fix the problem." ER 238, ¶ 3; ER 241–42, ¶¶ 13, 15; ER 306–07, ¶¶ 254, 257. The complaint also alleges that Ford's concealment of the defect tolled all applicable statutes of limitations. ER 314–15, ¶¶ 281–85.

The complaint defines a nationwide class and eleven subclasses based on state of residency. ER 310–11, ¶ 271. It asserts eighteen separate causes of action, including claims for violations of various state consumer-protection statutes, breach of warranty, and unjust enrichment. ER 315–50, ¶¶ 286–501.

B. The Settlement Agreement

On March 24, 2017, plaintiffs announced that they had reached a settlement with Ford and filed the agreement as an exhibit to a motion for preliminary approval. ER 16. The settlement covers about 1.5 million vehicles and about 1.9 million class members. In exchange for releasing Ford from liability for any claims that could have been asserted in connection with the transmission defect, other than personal injury and property damage claims, some class members may be eligible to pursue two types of relief—cash payments (or discount coupons) to compensate for the inconvenience of multiple service visits for unsuccessful repair attempts, and an opportunity to seek repurchase of their vehicle through binding arbitration. The agreement also provides for attorneys' fees, incentive awards to the class representatives, and cash awards to plaintiffs in a separate case resolved by the settlement. On April 25, 2017, the district court granted preliminary approval of the settlement, entering—without change—the proposed order submitted by plaintiffs. Doc. 133.

1. Cash payments

The cash payment provision of the settlement is available to class members who timely submit a claim form and attach documentation establishing that they had at least three separate service visits for software flashes, or at least three separate service visits for transmission hardware replacements. *See* ER 30–32,

§§ II(B), (C). Cash payments are available for the third and each additional service visit resulting in the same category of repair attempt, but any particular visit cannot count toward more than one category of repair and class members cannot receive a cash payment for both software flashes and transmission hardware replacements. Class members can receive $50 for each service visit for software flashes beginning with the third visit. Software flash payments are capped at $600, which corresponds to fourteen visits for such service. Payments for service visits for transmission hardware replacements begin with a payment of $200 for the third visit, increase with each visit up to eight, and are capped at a cumulative total of $2,325.[1]

2. Arbitration

Class members who want Ford to buy back their defective vehicles can seek such relief in binding arbitration. To prevail, class members must convince an arbitrator that they would be entitled to repurchase under their state's lemon law or under a default standard set forth in the agreement. The arbitrator cannot award any relief other than a refund of the purchase price less an allowance for use, even where additional relief is available under the applicable state lemon law or any of the other myriad causes of action waived by the settlement. ER 44, § II(N). The

[1] Under certain circumstances, class members may also be eligible for a refund of the amount they paid a Ford dealer for a third clutch replacement. *See* ER 40, § II(G).

arbitration program imposes requirements to bring a lemon law claim in arbitration that often exceed those required to bring the same claim in court. To proceed immediately to arbitration, a class member must have had at least four unsuccessful transmission repair attempts. ER 154. Class members with fewer than four repair attempts must provide Ford with an additional opportunity to attempt to repair the car before they can submit their claim to the arbitrator. *Id.* Attorneys' fees for class members who successfully arbitrate a repurchase claim are capped at $6,000, inclusive of fees incurred during any arbitration appeal.

3. Limits on relief

A class member who can document the required number of service visits to be eligible to seek relief under the settlement can pursue both a cash payment and repurchase arbitration, but cannot benefit from both. If the class member prevails in arbitration, the amount awarded for vehicle repurchase must be reduced by any amount received under the cash payment provision of the settlement. Because a class member must have four or more unsuccessful transmission repair attempts to pursue arbitration, or provide Ford another opportunity to attempt a repair, a class member eligible for arbitration will likely have been eligible for a cash payment.

4. Attorneys' fees and service awards

The settlement includes a "clear sailing" provision under which Ford agrees not to oppose an award to class counsel of $8,856,500 in attorneys' fees and costs.

The settlement provides for incentive awards ranging from $5,000 to $10,000 for each of the eighteen named plaintiffs and class representatives, and payments of $1,000 each to 46 plaintiffs in a similar case filed in the Northern District of Illinois who are not named plaintiffs or class representatives in this case.

C. Objections

On August 28, 2017, plaintiffs filed a motion for final approval of the settlement. Doc. 150. Objections were due one week later, and fifteen absent class members submitted objections.

The Lott Objectors urged the district court to deny final approval because the settling parties failed to show that the settlement provides fair compensation to the class in exchange for the release of class members' claims. They explained that it is impossible to ascertain the fairness of the settlement because the settling parties did not reveal the value of the claims released or estimate the value of the relief to be provided, and there is no dedicated fund available to compensate the class. The Lott Objectors also explained that most class members will receive no relief at all—not because they did not experience transmission problems, but because Ford discouraged repeated service visits by fraudulently claiming that the transmission was operating as intended. They further argued that any relief awarded would likely be modest even for the small number of class members who are eligible and pursue a claim, because the nuisance payments require multiple

service visits for ineffective repairs, and many class members would have recognized the futility of returning again and again for repairs that do not work. Lott Objections, Doc. 157, at 5–12.

The Lott Objectors also explained that the arbitration program provides no benefit to most class members; rather, it benefits Ford by imposing mandatory binding arbitration that is less favorable for most class members than proceeding in court because of higher barriers to bringing a claim and severe limits on the relief that can be awarded. They explained that the relief available in arbitration—repurchase under lemon law standards less an allowance for use—pales in comparison to the relief that would be available to the class under consumer-fraud and breach-of-warranty theories. *Id.* at 12–17.

The Lott Objectors further argued for denial of final approval because of unresolved conflicts among the various subclasses, such as current and former owners, or differences based on differing state consumer-protection laws. Finally, they explained that the attorneys' fees provision of the settlement includes all three characteristics identified by this Court as warning signs that "'class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.'" Doc. 157, 18–19 (quoting *In re Bluetooth Headsets Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011)).

D. The Settling Parties' Responses

The settling parties each submitted a brief in response to the objections, Doc. 168 and Doc. 170, in which they argued for the first time that the extended warranties issued by Ford during the pendency of the litigation should be considered in assessing the value of the settlement. Plaintiffs alleged in the operative complaint that the extended warranties are worthless because the defect cannot be repaired, but in response to the objections they argued that this litigation was the catalyst for the extended warranties. Doc. 170 at 9. The settling parties observed that some courts have approved automotive defect class action settlements where the defect could be repaired and the principal benefit to the class was an extended warranty and reimbursement of out-of-pocket costs. Doc. 168 at 3–4; Doc. 170 at 16–18.

With regard to the value of the cash payments for service visits involving transmission hardware replacements, Plaintiffs submitted a declaration from a valuation expert who estimated that 92,891 class vehicles (about six percent) have had three or more service visits involving transmission hardware replacements, and that if all of the vehicles are still owned or leased by a class member and 100 percent of such class members submit a claim, the value of the cash payments would be $35,409,600. ER 233–34. The settling parties speculated that additional class members could become eligible for such payments in the future if they

accrued a sufficient number of service visits for ineffective transmission hardware replacements. The declaration of Plaintiffs' expert revealed that 35,028 class vehicles (about two percent) currently have the four repair attempts required to immediately submit a claim for repurchase through the arbitration program. ER 234.

The settling parties also argued that although the number of class members who will qualify in the future to seek cash payments or repurchase through arbitration is unknown, the settlement extends the statute of limitations for current owners to pursue arbitration, which could benefit some current owners who live in states that do not recognize cross-jurisdictional tolling. They conceded, however, that the agreement shortens the statute of limitations for former owners to bring such claims.

E. The Fairness Hearing

The district court held a fairness hearing on October 2, 2017. The Lott Objectors, through counsel, argued that the settlement should not be approved under Federal Rule of Civil Procedure 23(e) for several reasons. First, they explained that the court should compare the value of the settlement to the potential recovery if the litigation is successful, discounted for the risk of non-recovery. They explained that because only about six percent of the class vehicles have had three or more service visits involving transmission hardware replacements, no

more than six percent of the class is currently eligible for a corresponding cash payment, leaving 94 percent of the class ineligible for such relief even though they suffered harm from the defect and its concealment as alleged in the complaint. ER 172–74. Further, they explained that the Plaintiffs' expert's valuation of $35 million is based on a 100 percent claims rate, but the typical claims rate is under ten percent. Thus, the current value of the cash payment provision of the settlement is about $3.5 million and would likely benefit only 0.6% of the class. ER 175. Because at least four unsuccessful transmission repair attempts are required to immediately proceed to repurchase arbitration, only about two percent of the class is currently eligible, and there is no estimate as to the percentage of arbitration-eligible class members who would prevail if they submitted their repurchase claim to an arbitrator. ER 182–83.

Although the settling parties argued that more class members might become eligible for relief in the future, the Lott Objectors explained that former owners who do not currently qualify will not be able to become eligible by having further unsuccessful repair attempts because they no longer own the vehicle. ER 175–76. The Lott Objectors also argued that the value of the extended warranties that Ford voluntarily provided for its own business reasons could not be counted as consideration for the release of the class members' claims, because the extended warranties are not a benefit of the settlement. Moreover, because this case involves

a defect that Ford knew about, failed to disclose, but cannot repair, the extended warranties do not remedy the harm, in contrast to other automobile defect cases where the defect can be cured and an extended warranty and reimbursement of out-of-pocket costs can make the class whole. ER 176–78.

With respect to the value of the claims surrendered, the Lott Objectors explained that Plaintiffs had provided no estimate of the value of the case if they won in litigation, nor had they discovered what Ford was paying to settle individual claims. The Lott Objectors suggested that the court require Ford to disclose the number of individual settlements and the aggregate amount that they had paid out to provide a basis for determining the value of the released claims. ER 179–81.

Finally, the Lott Objectors explained that the arbitration program provided more restrictions than benefits to the class, because a class member who could prevail on the merits in arbitration could also do so in court. But, arbitration is limited to a single cause of action and a single type of relief and has a cap on attorneys' fees, compared to the wide range of consumer-protection and breach-of-warranty claims that could be asserted in court, with greater varieties of relief, and no caps on attorneys' fees. ER 182–84.

F. The Decision Below

On October 18, 2017, the district court issued an order overruling all objections to the settlement. ER 13. With respect to the Lott Objectors, the court made four findings.

First, the court observed that because the cash payments are intended to reimburse class members for the "inconvenience associated with repeated failed repair attempts," ER 14, requiring a minimum of three service visits to establish such an injury is reasonable. The court further found that there is no intra-class conflict "because any class member who qualified will get the remedy." *Id.* The court did not address the conflict between the vast majority of class members who must surrender all consumer-fraud and breach-of-warranty claims to allow a small percentage of class members to receive payments for inconvenience, or the conflict between current and former owners. Further, the court did not acknowledge that many class members suffered the inconvenience of visiting their Ford dealers seeking repairs to their defective transmissions, but do not have the requisite repair attempts to qualify for relief because the dealers refused to make repairs and insisted that the vehicles were operating as intended.

Second, the court found that the arbitration component may be "more favorable to claimants than the typical lemon law suit" because the procedure is more "streamlined" and "designed to provide quicker relief." *Id.* The court found

that class members who want to preserve more lucrative consumer-protection and breach-of-warranty claims that cannot be pursued in arbitration should have opted out. ER 15.

Third, the court held that the lack of information regarding the value of the settlement "does not mean it is ineligible for approval," and the court noted that "Plaintiffs' expert did *estimate* the value of the settlement as $35 million." *Id.* The court did not acknowledge that the estimate assumed a 100 percent claims rate although such rates typically are under ten percent, nor did the court acknowledge that 94 percent of the class members are not currently eligible to make a claim.

Fourth, the court rejected the suggestion that the attorneys' fees are excessive in comparison to the value of the settlement, asserting, without further explanation, that "the settlement provides substantial value." *Id.*

After overruling the objections, the district court entered, without material change, Plaintiffs' proposed order granting final approval and entering judgment, ER 5, and Plaintiffs' proposed order granting attorneys' fees, costs, and service awards, ER 1.

G. Subsequent Developments

On October 13, 2017, Ford filed a motion to invalidate thousands of opt-outs and force those individuals back into the class. Doc. 188. Ford alleged that two Michigan law firms had made misleading statements that induced more than

12,000 individuals to exclude themselves from the settlement, either by filing lawsuits before the notice date, or by affirmatively opting out. In their opposition to Ford's motion, the Michigan lawyers stated that they and others had an agreement with the settling parties that they could solicit class members to opt out in exchange for not objecting to the settlement.[2] Doc. 206 at 1. They also argued that, if their clients had remained in the class, they would have filed objections and provided evidence that Ford settles individual claims relating to the transmission defect for far more than was suggested during the fairness hearing. *Id.* at 20. The district court denied Ford's motion. Doc. 242. Ford did not appeal.

On October 30, 2017, Ford filed a motion with the U.S. Judicial Panel on Multidistrict Litigation (MDL No. 2814) seeking to consolidate the cases pending in federal court that were brought by owners of class vehicles who are excluded from the class settlement—because they either filed their lawsuits prior to the effective date of the settlement or opted out—and to have the cases transferred to the district court judge who approved the settlement in this case. Ford's motion identified 111 cases, 108 of them in California, asserting claims nearly identical to those in this case. In the vast majority of the related cases, Ford included in its notice of removal either an offer to settle the individual claims for more than

[2] The settling parties did not file a statement identifying this agreement as required by Rule 23(e)(3), and it was not brought to the district court's attention until ten days after the court approved the settlement.

$75,000 each, or stated that the amount in controversy exceeded $75,000. *See* ER 369–93 (summarizing the notices of removal). Ford also relied on the declaration of a forensic accounting and damages expert who placed the value of such a case, including compensatory and punitive damages, at $214,838. *See* ER 417.

SUMMARY OF ARGUMENT

This class action settlement is not "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), as shown by comparing the value of the settlement to the value of the claims surrendered. The district court erred by accepting an estimate of the settlement's value that was based on a 100 percent claims rate, rather than making a finding regarding the value of the settlement based on a realistic claims rate. The court further erred by failing to require the settling parties to disclose, or by otherwise estimating, the value of the released claims.

In addition, the district court should have denied approval because the benefits of the settlement—meager though they are—are not fairly distributed among the class. The vast majority of class members do not qualify for any relief under the settlement, even though they may have suffered harm equal to or exceeding that experienced by the small subclass entitled to relief, and even though they may be sacrificing claims of greater value because of differences in state consumer-protection laws. Such intra-class conflicts required the creation of subclasses to ensure that the interests of some class members were not traded off

against the interests of others. Indeed, class counsel acknowledged this point by pleading eleven subclasses in the complaint. ER 310–11.

Finally, the district court erred by approving an award of attorneys' fees and costs that exceeds any reasonable estimate of the value of the settlement, and by failing to adequately develop the record to support its final approval decision.

For all these reasons, the district court's approval of the settlement should be vacated.

STANDARD OF REVIEW

This Court reviews a district court's approval of a class action settlement for abuse of discretion, *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011), with any legal questions reviewed de novo, *In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 968 (9th Cir. 2007). A district court abuses its discretion if it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact. *Nachshin*, 663 F.3d at 1038. A district court also abuses its discretion if it relies on an improper factor, omits a substantial factor, or commits a "clear error of judgment in weighing the correct mix of factors." *In re Wells Fargo Home Mortg.*, 571 F.3d 953, 957 (9th Cir. 2009). "'To survive appellate review, the district court must show it has explored comprehensively all factors, and must give a reasoned response to all non-frivolous objections.'" *Allen v. Bedolla*, 787

F.3d 1218, 1223–24 (9th Cir. 2015) (quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012)).

ARGUMENT

A district court may approve a class action settlement only "on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). "The primary concern of [Rule 23(e)(2)] is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982). In scrutinizing proposed settlements of class actions, "the district court has a fiduciary duty to look after the interests of the absent class members." *Allen*, 787 F.3d at 1223 (citations omitted).

The settling parties bear the burden of showing that the settlement meets the Rule 23(e) standard. The factors to be considered are "multifarious and indeterminate," *Lane v. Facebook, Inc.*, 696 F.3d 811, 830 (9th Cir. 2012) (Kleinfeld, J., dissenting), but may include:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998); *see Officers for Justice*, 688 F.2d at 624 (noting that such factors are "by no means an exhaustive list of relevant considerations" and the "relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case").

Where, as here, a proposed settlement is reached prior to class certification, consideration of the usual factors "is not enough." *In re Bluetooth*, 654 F.3d at 946. Rather, "such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *Id.* (citations omitted). This "more exacting review . . . is to ensure that class representatives and their counsel do not secure a disproportionate benefit 'at the expense of the unnamed plaintiffs who class counsel had a duty to represent.'" *Lane*, 696 F.3d at 819 (quoting *Hanlon*, 150 F.3d at 1027). Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947 (citing *Staton*, 327 F.3d at 960); *see Allen*, 787 F.3d at 1223–24 (explaining that the district court must explore all factors comprehensively and respond to all non-frivolous objections).

The essence of the fairness inquiry is whether the settlement reflects a reasonable compromise in light of the prospects of further litigation. Where the class seeks a monetary recovery, the court should compare the value of the settlement to the potential recovery if the litigation is successful, discounted for the risk of non-recovery. *See*, *e.g.*, *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1070 (C.D. Cal. 2010) (court must determine whether "settlement is reasonable in relation to the value of the claims surrendered"). The court should also consider the fairness of the distribution of any benefits among the class members, and require subclasses where there are significant variations regarding the value of class members' claims because of factual differences or the impact of varying state consumer-protection laws. *See In re Hyundai and Kia Fuel Economy Litigation*, No. 15-56014, 2018 WL 505343 (9th Cir. Jan. 23, 2018) (rejecting a nationwide class action settlement in a case alleging consumer-protection claims against an automobile manufacturer because of failure to consider differences in state laws). Otherwise, the interests of some class members may have been traded off against the interests of others. *See Nat'l Super Spuds v. N.Y. Mercantile Exchange*, 660 F.2d 9, 19 (2d Cir. 1981) ("An advantage to the class, no matter how great, simply cannot be bought by the uncompensated sacrifice of claims of [other] members.").

I. The Settlement Should Have Been Rejected Because The Settling Parties Failed To Show That It Provides Sufficient Value In Relation To The Value Of The Claims Surrendered.

In *Koby v. ARS National Services, Inc.*, 846 F.3d 1071 (9th Cir. 2017), this Court reversed the approval of a class action settlement that would have relinquished the right of class members to seek damages in any other class action because the proponents of the settlement failed to demonstrate that class members would benefit from the settlement. *Id.* at 1079. The Court held that "[b]ecause the settlement gave the absent class members nothing of value, they could not reasonably be required to give up anything in return." *Id.* at 1080. "The fact that class members were required to give up anything at all in exchange for worthless injunctive relief precluded approval of the settlement as fair, reasonable, and adequate under Rule 23(e)(2)." *Id.* at 1081; *see also In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) ("The court must be assured that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants."). Here, the district court should have rejected the proposed settlement because the vast majority of class members will sacrifice valuable claims for nothing.

A. The district court erred in valuing the settlement at $35 million because that estimate assumes a 100 percent claims rate.

In concluding that the settlement provides value sufficient to warrant approval, the district court noted that "Plaintiffs' expert did *estimate* the value of

the settlement as $35 million, and the Court finds that opinion well-reasoned." ER 15. The problem with the court's conclusion is that it assumes that 100 percent of the eligible class members will submit a claim. In fact, the claims rate in class action settlements is typically less than ten percent of the class members eligible for relief. *See*, *e.g.*, *Allen*, 787 F.3d at 1224 n.4 (noting "the claims rate was less than 8%"); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (en banc) (noting "consumer claim filing rates rarely exceed seven percent"); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 650 (7th Cir. 2006) (noting that by the date of the fairness hearing only three percent of the class had filed claims); *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 52 (D. Me. 2005) (noting "'claims made' settlements regularly yield response rates of 10 percent or less"). Thus, accounting for the typical claims rate, a reasonable estimate of the current value of the settlement is $3.5 million.

B. The value of the settlement will not increase significantly based on additional class members becoming eligible for relief.

Although Plaintiffs' expert determined that only about six percent of class vehicles currently meet the three-visit threshold to be eligible to claim a cash payment, he noted that some class members who are not eligible for a cash payment today may become eligible in the future if they accrue additional service visits for unsuccessful repair attempts involving transmission hardware replacements within 7 years or 100,000 miles of delivery of the vehicle to the first

purchaser, as required by the settlement. According to his declaration, an additional 143,178 class vehicles have had two such visits and could have a third. If all of the two-visit vehicles have a third qualifying visit within the eligibility period and a class member becomes eligible for the corresponding $200 payment, the value of the settlement would increase by about $29 million assuming a 100 percent claims rate. Assuming a realistic claims rate of ten percent or less, a reasonable estimate of the future value of the cash payment provision of the settlement is $2.9 million. Thus, the total value of the cash payment provision based on service visits for unsuccessful transmission hardware replacements is unlikely to ever reach more than $6.4 million ($3.5 million of current value plus an estimate of an additional $2.9 million in contingent value for those who might become eligible in the future).

C. The arbitration program does not provide significant value to the class, but benefits Ford more than the class.

Neither the district court nor the settling parties attempted to estimate the value of the buyback arbitration program to the class, but it is almost certainly negligible. First, any relief awarded in arbitration must be reduced by any amount received under the cash payment provision of the settlement. Thus, arbitration awards add value to the settlement only to the extent they exceed any cash payments received by the class member who successfully arbitrates a buyback claim. Any class member immediately eligible for arbitration would have also been

eligible for a cash payment, because a class member must have had at least four unsuccessful transmission repair attempts to proceed to arbitration without providing Ford with another opportunity to try to repair the car.

The settling parties will argue that the primary benefits of the arbitration program are an extended statute of limitations for some current owners, a default standard for class members that live in a state that has a less-generous lemon law, and potentially faster resolution of repurchase claims. Although these features might provide a benefit to some class members, the settling parties did not attempt to quantify the value of any such benefit. In particular, the value of the extended statute of limitations is likely to be illusory because arbitration awards are limited to the purchase price discounted for use. Thus, a class member who takes advantage of the extended statute of limitations and prevails in arbitration is likely to receive a lower repurchase price because of the advanced age and mileage of the car.

Moreover, the arbitration program can be considered as part of the value of the settlement only to the extent that it benefits *the class*, but the arbitration program was a concession to *Ford*. First, it is generally recognized that mandatory binding arbitration favors businesses over consumers.[3] Here, Ford was able to

[3] *See*, *e.g.*, Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (2015) (finding that consumers who brought claims in arbitration

obtain in settlement of a class action an arbitration program that it could not otherwise have imposed on the purchasers of the class vehicles, because Ford did not deal with the consumers directly. *See*, *e.g.*, *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1134 (9th Cir. 2013) (concluding that automobile manufacturer could not compel arbitration in an automotive defect class action because arbitration clause was in purchase agreements between plaintiffs and dealerships, rather than plaintiffs and manufacturer).

Further, class members who qualify for the arbitration program receive no relief unless they can convince an arbitrator that, after multiple repair attempts, the transmission continues to malfunction. Because Ford denies that the defect exists, Ford is likely to vigorously dispute the merits of any claims brought in arbitration, and Ford is almost certain to prevail in some of the arbitration proceedings. *See Eubank v. Pella Corp.*, 753 F.3d 718, 726 (7th Cir. 2014) (reversing district court's approval of a class action settlement with an arbitration program). Indeed, it is likely that Ford will be represented by counsel with repeat experience in the forum. Class members will be at a disadvantage because the arbitration program does not allow for discovery, and the $6,000 cap on attorneys' fees will make it difficult for class members to obtain representation. And even if a class member wins in

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obtained relief in nine percent of disputes, but financial services companies that made claims or counterclaims in arbitration were granted relief 93 percent of the time).

arbitration, Ford will be better off than if the same claim had been brought in court because the arbitration rules ban any relief other than repurchase, and any causes of action other than state lemon-law claims. In contrast, class members will be worse off in arbitration because in court they would have had additional causes of action and additional forms of relief.

D. The extended warranties are not a benefit of the settlement.

During the pendency of this case, Ford twice issued extended warranties related to the transmission defect. In their responses to the objections and at the fairness hearing, the settling parties argued that the extended warranties should be considered in assessing the value of the settlement. The settling parties were wrong, and the district court erred to the extent it considered the extended warranties as a benefit obtained for the class in exchange for the release of the class members' claims.

First, the extended warranties are not encompassed in the settlement and were not consideration for the release. Rather, Ford issued the extended warranties voluntarily and for its own business purposes. The class would have enjoyed the extended warranties regardless of whether there was a settlement of this class action. Indeed, the people who opted out of the settlement are still covered by the extended warranties. *See Koby*, 846 F.3d at 1080 (rejecting an attempt by the proponents of a class action settlement to claim as a benefit of the settlement

certain changes to business practices that the defendant voluntarily adopted in an effort to avoid further litigation risk); *Eubank*, 753 F.3d at 725 (finding that warranty extensions adopted before the class settlement "were not part of the value created by the settlement").

Second, as Plaintiffs alleged in the operative complaint, the extended warranties are worthless because the defect cannot be fixed. In other automotive defect cases, an extended warranty and reimbursement of out-of-pocket costs might make the class whole, because if the defect is repaired at no cost, the value of the vehicle is restored. In contrast, this case was based on allegations that Ford engaged in a fraudulent scheme to conceal and deny the existence of a defect that cannot be cured, and, as a result, all class members have been harmed because their vehicles have diminished value. Accordingly, approval of the settlement cannot be justified by reference to the extended warranties that are not part of the terms of the deal.

E. The district court erred by failing to consider the value of the claims surrendered.

In assessing the fairness of the settlement, the district court should have considered the value of the settlement in relation to the value of the claims surrendered. *See Eubank*, 753 F.3d at 727 (finding that district court should have estimated "the likely outcome of a trial . . . in order to evaluate the adequacy of the settlement"). The court was unable to do so because the settling parties refused to

disclose what the released claims are worth, and the district court did not require such disclosure or otherwise estimate the value of the class claims.

Plaintiffs steadfastly refused to estimate the amount of the class recovery if they pursued the case to judgment and won. They admitted, however, that they did not know how much Ford had paid in settlements of individual cases based on the same defect and legal theories, explaining that Ford had refused to disclose the information, citing the confidentiality of the settlement agreements. ER 180. Plaintiffs did not hire an expert to analyze the value of their case.

The Lott Objectors urged the district court to require Ford to produce information regarding the value of the claims released because a "fundamental question" in determining whether a proposed class settlement is fair "is whether the district judge has sufficient facts before him to intelligently approve or disapprove the settlement." *Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 620 (S.D. Cal. 2005) (citations omitted); *see also Philips v. Ford Motor Co.*, No. 14-CV-02989, 2016 WL 7428810, at *23 (N.D. Cal. Dec. 22, 2016) (denying class certification in automobile defect case where plaintiffs failed to offer a damages model capable of measuring, on a common basis, the economic harm actually caused to class members by alleged defect). They explained that the court could require Ford to disclose the number of settlements and the aggregate

amount paid by Ford, without revealing the specifics of any particular settlement. ER 180–81. The court declined to do so.

If Ford had been required to reveal what it pays to settle individual claims based on the defect at issue here, it would have shown that the class is sacrificing claims of exceptional value, especially claims under California consumer-protection laws. As explained above, an analysis of the individual cases Ford has removed to federal court and seeks to consolidate in a single multi-district litigation shows that Ford routinely offers more than $75,000 to settle cases asserting the same claims made here, and an expert has estimated that such a case can yield as much as $214,838. Indeed, Ford's extraordinary efforts to invalidate opt-outs and sweep those individuals back into the class suggests that Ford views this settlement as a windfall release of liability.

II. The Settlement Should Have Been Rejected Because Its Benefits Are Not Fairly Distributed Among The Class.

This Court recently rejected a class-action settlement in a case alleging consumer-protection claims against an automobile manufacturer because the district court failed to consider whether differences among state consumer-protection laws were such that common issues did not predominate. *In re Hyundai*, 2018 WL 505343, at *12–*14. Although the Court did not rest its decision on the fairness requirements of Rule 23(e), the principle applies even more strongly here, where state-law differences were expressly presented to the district court and the

need for subclasses expressly briefed by objectors. By glossing over those issues, the district court failed to protect the absentee class members and allowed a settlement that draws arbitrary distinctions between the small number of class members that may benefit from the settlement and the much larger number who will receive nothing.

A. Only a tiny percentage of class members will qualify for relief.

Plaintiffs' expert estimates that about six percent of the class vehicles currently meet the three-visit threshold to be eligible to claim a cash payment based on transmission repairs, and about two percent of the class vehicles currently have the four repair attempts required to immediately submit a repurchase claim for arbitration. Most class members will never qualify for relief either because they already sold their class vehicle, or because they will not pursue multiple ineffective repair attempts just to qualify for a payment based on the inconvenience of doing so. A settlement that leaves the vast majority of the class ineligible for any relief is not fair, adequate, or reasonable. *Koby*, 846 F.3d at 1081; *In re Katrina Canal Breaches Litig.*, 628 F.3d at 195.

Importantly, the existence of an opt-out right cannot cure the unfairness of this settlement. The right to opt out is guaranteed in every class action brought under Rule 23(b)(3). If an opportunity to opt out could counter the unfairness of a settlement's terms, every agreement in a (b)(3) class action certified for settlement

purposes would necessarily be fair, and there would be no need for Rule 23(e)'s requirement that the court protect absent class members by independently evaluating proposed class settlements and approving only those found to be fair, reasonable, and adequate. *See Eubank*, 753 F.3d at 728 ("A low opt-out rate is no evidence that a class action settlement was 'fair' to the members of the class."); *In re GM Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 809 (3d Cir. 1995) ("[T]he right of parties to opt out does not relieve the court of its duty to safeguard the interests of the class."). Moreover, many class members with newer vehicles may not have opted out because they have not yet experienced the symptoms of the transmission defect. Because the opt-out deadline has passed, once those class members suffer transmission problems, they will be precluded from pursuing relief outside the settlement.

B. Former owners are disadvantaged under the settlement.

The settling parties argue that class members not currently eligible for relief benefit from the settlement because they might become eligible for relief in the future by accruing more service visits for ineffective repairs. Former owners, however, will not have that opportunity. Further, although the settlement may extend the statute of limitations for some current owners to bring buyback claims in arbitration, the deadline for former owners to pursue arbitration is reduced to

either the statute of limitations under their state lemon law, or 180 days after final approval of this settlement, "whichever is earlier." ER 45.

Like current owners, former owners were harmed by Ford's fraudulent concealment and denial of the defect. Indeed, many class members likely sold their vehicles at a loss rather than continue to operate them with malfunctioning transmissions, particularly after Ford refused repairs and claimed that the transmissions were operating normally.[4] At a minimum, the former owner subclass should have had separate representation to avoid having its interests traded off against those of current owners.

C. Class members subject to substantially different state consumer-protection statutes and remedies should have had separate representation.

In their complaint, Plaintiffs recognized the potential intra-class conflict and need for separate representation of subclasses based on differing state consumer-protection laws. *See* ER 310–11. In the settlement, the settling parties chose to ignore the conflict and instead negotiated a single nationwide settlement that operates to the disadvantage of class members in states with more robust consumer-protection statutes.

[4] As Plaintiffs explained in the operative complaint, Ford prepared a handout for its dealers to give to customers who complained about the transmission defect "in an apparent attempt to induce customers into believing the problems they were experiencing were 'normal driving characteristics.'" ER 305, ¶ 251. Class members who received that handout would have believed it futile to continue visiting Ford dealerships to seek warranty repairs for their defective transmissions.

For example, Oregon's lemon law allows up to treble the amount of any damages awarded, with a cap of $50,000, if the manufacturer did not act in good faith. Or. Rev. Stat. § 646A.412. Maryland allows up to $10,000 if the manufacturer acted in bad faith. Md. Code, Com. Law. § 14-1504(b). North Carolina permits treble damages if the manufacturer unreasonably refused to make or arrange for repairs or provide a refund or replacement. N.C. Gen. Stat. § 20-351.8. And, as explained above, individuals with claims under California consumer-protection laws routinely are offered more than $75,000 to settle those claims because California consumer-protection statutes provide for compensatory damages, civil penalties, and punitive damages.

Similar claims are worth less in a number of other states. Indeed, at the fairness hearing, Plaintiffs' counsel emphasized that treble damages are "only available in a few states," ER 211, and Plaintiffs emphasized in their response to objections that "[o]nly Kentucky, Maryland, North Carolina, and Tennessee authorize punitive damages for lemon law claims," Doc. 170 at 29 n.29. Nonetheless, the settlement treats all class members the same, regardless of the differing value of the relief available to them under their respective state laws. This point was expressly raised in the district court, and the court erred by approving the settlement without insisting on the creation of subclasses to account for the variations in applicable state laws.

D. The district court's finding of no intra-class conflict was based on circular reasoning.

The district court held that "there is no intra-class conflict" between the small number of class members who qualify for relief and the vast majority who do not because "any class member who qualifies will get the remedy." ER 14. The issue, though, is whether the criteria that result in only a small number of class members qualifying for relief are based on a fair assessment of the relative harm suffered, rather than expedience or a desire to limit Ford's exposure.

The court observed that the payments are for "inconvenience," and concluded that those with more service visits for unsuccessful repairs were more inconvenienced than other class members. This conclusion ignores the harm to class members who repeatedly took their car in for service, only to be turned away without a qualifying repair attempt because Ford instructed its dealers to tell such class members that their cars were operating as intended. The court's conclusion also ignores the harm to class members who gave up and sold their car after failed repair attempts. Indeed, obtaining payments for the nuisance of engaging in multiple unsuccessful service visits was not the objective of the litigation. Once that became the objective of the settlement, the subclasses that do not qualify for nuisance payments (and wanted relief for fraud, breach of warranty, and diminished value) should have had separate representation.

III. The District Court Erred By Failing To Scrutinize The Effect Of The Attorneys' Fees On The Class Settlement.

This Court has identified three "signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations": (1) a disproportionate distribution of fees to counsel; (2) a clear-sailing agreement; and (3) the reversion of unawarded fees to the defendant. *In re Bluetooth*, 654 F.3d at 947 (citations omitted). The proposed settlement includes all three of these warning signs, but the district court failed to heed them based on its erroneous conclusion that "the settlement provides substantial value." ER 15.

As explained above, a reasonable estimate of the current value of the cash payment provision of the settlement is about $3.5 million, and even if additional class members qualify for such relief in the future, the total value is unlikely to ever exceed $6.4 million. Any additional value conferred by the arbitration provision is unknown but likely to be negligible, because it will be offset by the amount of any cash payments, only two percent of the class is currently eligible to submit claims for arbitration, and the value of any arbitration awards will decrease over time as the vehicles advance in age and mileage. Thus, any reasonable estimate of the value of the settlement to the class is less than the nearly $9 million in attorneys' fees and costs awarded to class counsel. Because the clear-sailing provision authorized "unreasonably high attorneys' fees," the district court erred by failing to "scrutinize closely the relationship between attorneys' fees and benefit

to the class." *In re Bluetooth*, 654 F.3d at 948, 950; s*ee also Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (explaining that a clear-sailing provision provides a strong temptation for class counsel to accept a settlement that provides less for the class "in exchange for red carpet treatment on fees").

Moreover, because the district court's use of the lodestar method (with a multiplier) resulted in an award that "overcompensates the attorneys according to the 25% benchmark standard" used in this circuit, the court should have taken "a second look to evaluate the reasonableness of the hours worked and rates claimed." *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997). Because the district court failed to do so and the award is disproportionate to the benefit obtained for the class, the case should be remanded to the district court "to permit it to make the necessary calculations and provide the necessary explanations." *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009); *see Allen*, 787 F.3d at 1225 (vacating final approval of a class action settlement and remanding for district court to make express findings about the value of the relief and to examine carefully the warning signs identified in *In re Bluetooth*).

Finally, Plaintiffs will argue that the separate negotiation of fees following an agreement on relief for the class weighs in favor of a finding of non-

collusiveness, but this Court has rejected that assertion. "The district court's responsibility to conduct an independent inquiry into the reasonableness of attorneys' fees is of equal, if not greater, importance when attorneys' fees are awarded separately from the class award." *In re Hyundai*, 2018 WL 505343, at *15 n.28 (citing *In re Bluetooth*, 654 F.3d at 943).

CONCLUSION

The district court's approval of the settlement should be vacated.

Respectfully submitted,

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STATEMENT OF RELATED CASES

An appeal filed by Objector Jason DeBolt, No. 17-56746, has been consolidated with this one, as indicated on the cover of this brief. An appeal was also filed by Opt-Out Gina DeBose, No. 17-56764, on behalf of herself and thousands of others who were the subject of Ford's motion to invalidate certain opt-outs. Counsel is not aware of any other related cases pending before this Court.

/s/ Michael T. Kirkpatrick

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 32(a)(7)(B) because this brief contains 8,927 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

/s/ Michael T. Kirkpatrick

CERTIFICATE OF SERVICE

I certify that on February 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael T. Kirkpatrick