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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

IN RE WELLS FARGO COLLATERAL PROTECTION INSURANCE LITIGATION

Case Number: 8:17-ML-2797-AG-KES

PLAINTIFFS' REPLY (1) IN SUPPORT OF MOTIONS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS; AND (2) IN RESPONSE TO BRIEF OF AMICUS CURIAE

Date: October 28, 2019
Time: 10:00 am
Courtroom: 10D

Hon. Andrew J. Guilford

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I. INTRODUCTION

The Settlement is by all accounts an excellent outcome for millions of consumers who were forced to pay for duplicative, unnecessary, and overpriced Collateral Protection Insurance or "CPI" over an 11-year period. With the objection and opt-out deadline passed, the Court no longer has to take Class Counsel's word for it because there has been an overwhelmingly positive reaction from Settlement Class Members. In the words of a class member, "To know the good trumps bad still exist I thank you for personally taking time and effort out of your day to make sure justice is served." Indeed, following the mailing of 2,254,411 initial Notice Packets, and the e-mailing of 1,019,408 Summary Notices, only five Settlement Class Members objected, and 78 have opted out. This represents approximately 0.0037% of the Class. No objector questions the fundamental fairness of the Settlement. As detailed below, the five objections either complain about issues unique to their own experiences that cannot be addressed by class litigation, or mistakenly interpret the Settlement terms.[1] Given the high-profile and well-publicized nature of this litigation, this low objection and exclusion rate reflects class members' resounding approval of the Settlement and constitutes powerful evidence of the Settlement's fairness and adequacy. *See, e.g.*, *Nat'l Rural Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members.").

Without any support from the constituents they purport to represent, an amicus brief purporting to object to the Settlement and Class Counsel's fee request has again been filed by the Attorney General from Arizona, who is now joined by the Attorneys General from Arkansas, Idaho, Indiana, Louisiana, Nebraska, and Oklahoma (collectively "Amici") ***Notably, not a single class member from these states has objected to the settlement.*** For the reasons described below, the Court should reject Amici's arguments.

[1] Also, one of the five objections was made by a Settlement Class Member who lacks standing because she opted out of the Settlement before lodging her objection.

Amici presume that this Court, after having actively monitored every aspect of this case for the past two years, is unable to determine whether Class Counsel's fee request is fair, reasonable, and adequate without the assistance of a third-party "special master" who has no familiarity with the litigation. Moreover, Amici unashamedly ignore the factual record of this litigation—particularly the declaration of Court-appointed mediator Eric D. Green who states that ***"Class Counsel's vigorous representation of the Class in these negotiations is responsible for the successful resolution of this action."*** ECF No. 294-2 at ¶ 3 (emphasis added).

In the end, the record here is clear. Resolving this litigation was no easy feat. The Settlement is the result of contentious, active litigation coupled with parallel highly-complex settlement negotiations overseen by a court-appointed mediator that took place over the course of 17 months. For their work in achieving this $432.4 million settlement, Class Counsel seek $36 million in attorneys' fees and $483,489.04 for litigation expenses. Defendants have agreed to pay Class Counsel's fees and costs in addition to, and separate from, the amount being paid to the Settlement Class. And, as set forth in Plaintiffs' opening motion, Class Counsel's requested fee is only approximately 8%, which is less than one-third of the Ninth Circuit's 25% benchmark for a reasonable fee award. Finally, Plaintiffs Angelina Camacho, Odis Cole, Nyle Davis, Duane Fosdick, Regina-Gonzalez Phillips, Brandon Haag, Paul Hancock, Dustin Havard, Brian Miller, Analisa Moskus, Keith Preston, Victoria Reimche, Dennis Small, and Bryan Tidwell ("Class Representatives") each request a service award of $7,500 to be paid by Defendants in addition to the Settlement compensation. This service award amount is reasonable in light of the valuable benefits the Class Representatives conferred to the Settlement Class.

For all the reasons set forth below and in Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards, Plaintiffs respectfully request that the Court grant final approval of the proposed Settlement and approve Class Counsel's reasonable request for attorneys' fees and costs, along with service awards for the Class Representatives.

II. ARGUMENT

A. The Settlement is Fair, Adequate, and Reasonable.

At the final approval stage, the primary inquiry is "whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (citation omitted). In making this determination, the question the court must answer "is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Id.* at 1027.

Under Rule 23(e), examination of proposed class settlements occurs at the preliminary approval stage where the court must find it will likely be able to approve the settlement and certify the class for settlement purposes before class notice is sent. Fed. R. Civ. P. 23(e). Here, the Court made these findings when it granted preliminary approval. ECF No. 281. The Court found that the Settlement was "sufficiently fair, reasonable, and adequate to warrant sending notice of Settlement to the Settlement Class." *Id.* ¶¶ 1-2. This remains true, and now we know that the overwhelming majority of the Settlement Class agrees as well.

B. The Settlement Class's Favorable Reaction to the Settlement Strongly Supports Final Approval.

As noted in Plaintiffs' opening motion, the Settlement Administrator commenced the court-approved notice program on August 12, 2019. ECF No. 294 at 10. The notice program was completed on September 5, 2019. *Id.* As of October 21, 2019, Class Counsel have spent hundreds of hours fielding more than 2,000 inquiries from Settlement Class Members who expressed great interest in, and support for, the Settlement. One Settlement Class Member, Jason Morrison, said that he appreciated Class Counsel for "sticking up for us because no one else would." Supplemental Joint Declaration of Roland Tellis, Roman Silberfeld, and David S. Casey, Jr. ("Supp. Joint Decl."), Ex. 1. Mr. Morrison shared with Class Counsel his story of losing his job and home after his repossession. *Id.* Another Settlement Class Member, Chrishanda Dejanette, sent a Thank You card to Class Counsel with this message: "To know the good trumps bad still exist I thank you for personally taking time and effort out of your day to make sure justice is served." *Id.* at Ex.

2. These sentiments are just a small sampling of the overwhelmingly positive response Class Counsel received from Settlement Class Members.

The October 7, 2019 deadline to object or opt-out has now passed. Plaintiffs are pleased to report that following the mailing of 2,254,411 initial Notice Packets and the e-mailing of 1,019,408 Summary Notices, only 78 Settlement Class Members opted-out,[2] and only five Settlement Class Members have objected to the Settlement.[3] Supp. Joint Decl. ¶¶ 2-4. This represents approximately 0.0037% of the Class. Such a small percentage of exclusions and objections under any circumstances strongly favor final approval, especially here given the well-publicized nature of this litigation and the alleged conduct that was at issue. *See Churchill Vill. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming final approval where "only 45" of the approximately 90,000 notified class members objected and 500 opted out); *Asghari v. Volkswagen Grp. of Am.*, No. 13-02529-MMM, 2015 WL 12732462, at *22 (C.D. Cal. May 29, 2015) (approving class settlement where 15 objected out of 224,853 class notice recipients, which "indicates that generally, class members favor the proposed settlement and find it fair"); *Cruz v. Sky Chefs, Inc.*, No. C-12- 02705 DMR, 2014 WL 7247065, at *5 (N.D. Cal. Dec. 19, 2014) ("A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it.") (citing *Churchill*, 361 F.3d at 577); *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529 ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members.").

[2] Attached as Exhibit 10 to the Supp. Joint Decl. is a list showing the names of the 78 Settlement Class Members who have opted out of the Settlement.

[3] On September 12, 2019 Settlement Class Member John Taylor objected to the Settlement. On October 3, 2019, Mr. Taylor informed Class Counsel that he was withdrawing his objection in its entirety in light of his request to be excluded from the Settlement. Mr. Taylor submitted his exclusion request on October 2, 2019. To Class Counsel's knowledge, there was no payment or other consideration provided to Mr. Taylor in exchange for him withdrawing his objection.

i. The Five Settlement Class Member Objections Should be Overruled.

There is a strong judicial policy favoring settlement, "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 526 (quoting 4 A. Conte & H. Newberg, *Newberg on Class Actions*, § 11:40 at 155 (4th 3d. 2002)). "[T]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982). Furthermore, in challenging the reasonableness of a class action settlement, "objectors to a class action settlement bear the burden of proving any assertions they raise challenging the reasonableness of a class action settlement." *In re Google Referrer Header Priv. Litig.*, 87 F. Supp. 3d 1122, 1137 (N.D. Cal. 2015) (citing *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990)). Here, five Settlement Class Members objected to the Settlement—Michael & Ruth Varallo ("the Varallos"), Dawn Horton, Delthenia Bell, Brenda Starnes, and Dianne Neal.[4] Plaintiffs address each of the objections below.

a. The Varallos' Objection Mistakenly Interprets the Settlement Terms and Provides No Legitimate Basis for Challenging Class Counsel's Fee Request.

The Varallos object to the Settlement on two grounds: (1) the calculation of damages on behalf of themselves and Settlement Class Members who do not reside in Arkansas, Michigan, Mississippi, Tennessee or Washington when CPI was placed on their accounts; and (2) Class Counsel's fee request. *See* Supp. Joint Decl. Ex. 3 at p. 1.

The Varallos first contend that they believe they are entitled to additional compensation under the Settlement because they experienced a repossession on June 10, 2012. *Id.* Wells Fargo's documents show that they ***did not*** experience a repossession due to CPI. *See* Supp. Joint. Decl. at ¶ 9. The Varallos took out two different loans on the vehicle at issue. *Id.* The first loan, which originated on October 31, 2007, had a CPI policy

[4] Attached as Exhibits 3 through 7 to the Supp. Joint Decl. are true and correct copies of the objections lodged by the Varallos, Horton, Bell, Starnes, and Neal.

placed on it that was subsequently cancelled. *Id*. The $47.53 refund mentioned in their objection relates to that CPI policy. *Id.* On September 22, 2010, that loan was paid off. *Id.* That same day, the Vallaros took out a second loan on the same vehicle. *Id.* Unlike the first loan, the second loan ***never had a CPI policy placed on it***. *Id.* On June 10, 2012, the Varallos' vehicle was repossessed for reasons other than CPI. *Id*. Because CPI was ***not*** the cause of their repossession, the Varallos do not qualify for the repossession compensation.[5] *Id.*

The Varallos next state that they were "informed by counsel that they would receive additional compensation automatically . . . including the payment of $4,000.00 if [they] resided in [Arkansas, Michigan, Mississippi, Tennessee or Washington] when CPI was placed on [their] account." Supp. Joint Decl. Ex. 3 at pp. 1-2. This statement mistakenly interprets the terms of the Settlement.

The Settlement ***does*** provide Settlement Class Members who suffered a repossession caused by CPI and who ***did not*** reside in Arkansas, Michigan, Mississippi, Tennessee, or Washington at the time CPI was placed ("Duplicative Coverage—Repossession Customers")[6] with the ***same*** monetary and non-monetary benefits as those

[5] The Varallos appear to think that moving from Colorado to Washington also may have disqualified them from receiving the repossession compensation. Supp. Joint. Decl. Ex. 3 at p. 4. Even if they were entitled to the repossession compensation, this is simply not the case because residency is only relevant at the time of CPI placement.

[6] "Duplicative Coverage-Repossession Customers" means Customers included in the Settlement Class who: (a) had a Duplicative CPI Policy on their Account(s) that became effective at any time between October 15, 2005 and September 30, 2016 (for WFDS Customers) or between February 2, 2006 and September 1, 2011 (for WFAF Customers); (b) experienced a CPI-Related Repossession on their Account at any time between October 15, 2005 (for WFDS Customers) or February 2, 2006 (for WFAF Customers) and the Effective Date; and that CPI Policy is not eligible for compensation under the definition of 12 Five State-Repossession Customers. *See* ECF No. 262-2 at ¶ 35.

who did ("Five State—Repossession Customers").[7] *See* ECF No. 262-3 at ¶¶ 2, 4. The difference, however, is that Five State—Repossession Customers are not required to have had their own physical damage insurance during the time period defined in the Settlement in order to qualify for the repossession compensation. This is not favoritism. It is simply due to variations under the law of those Five States that provide stricter regulation over CPI placement.

The Varallos also assert the only Settlement Class Member objection to Class Counsel's fee request. They contend that the fee request is "excessive and unearned" because "*the attorneys did not protect [their] interests and those claimants in the non-preferred States*." Supp. Joint Decl. Ex. 3 at p. 2 (emphasis added).

As a threshold issue, the Varallos lack standing to object to fees. A "class member must be 'aggrieved' by the fee award in order to have standing to challenge it." *Glasser v. Volkswagen of America, Inc*., 645 F.3d 1084, 1088 (9th Cir. 2011). If "modifying the fee award would 'not actually benefit the class member,' the class member lacks standing because his challenge to the fee award cannot result in redressing any injury." *Id*. (quoting *Knisley v. Network Assocs., Inc*., 312 F.3d 1123, 1126 (9th Cir. 2002)); *Stetson v. Grissom*, 821 F.3d 1157, 1163-64 (9th Cir. 2016) (explaining that objectors lack standing to challenge fee award if modifying it would not benefit them). Here, Class Counsel's fees and costs are being paid in addition to, and separate from, the compensation to the Settlement Class. Therefore, any reduction in attorneys' fees would not be distributed to the Settlement Class, but, rather would be retained by Defendants. The Vallaros have no redressable injury with respect to any fees awarded to Class Counsel.

[7] "Five State—Repossession Customers" means Customers included in the Settlement Class who: had a CPI Policy placed on their Account(s) in any of the following states during the period indicated below for each: (i) Arkansas (between July 30, 2012 and September 30, 2016); (ii) Michigan (between July 30, 2011 and September 30, 2016); (iii) Mississippi (between July 30, 2014 and September 30, 2016); (iv) Tennessee (between July 30, 2011 and September 30, 2016); or (v) Washington (between July 30, 2011 and September 30, 2016); and experienced a CPI-Related Repossession on their Account at any time between October 15, 2005 (for WFDS Customers) or February 2, 2006 (for WFAF Customers) and the Effective Date. *See* ECF No. 262-2 at ¶ 47.

Even if the Varallos did have standing to object to fees, their objection is based on a mistaken interpretation of the terms of the Settlement. Just because Five State—Repossession Customers are not required to have had physical damage insurance to qualify for additional repossession compensation in light of stricter laws in their States does not mean that that Class Counsel has somehow failed to protect the interests of Duplicative Coverage—Repossession Customers. In fact, Class Counsel secured the ***same*** monetary and non-monetary benefits for eligible class members who ***did not*** reside in Arkansas, Michigan, Mississippi, Tennessee, or Washington at the time CPI was placed as those who did.

b. Horton, Bell and Starnes Seek Relief for Alleged Harm That Falls Outside the Scope of this Litigation.

Neither Ms. Horton, Ms. Bell nor Ms. Starnes challenge the adequacy of the Settlement. Instead, their objections primarily seek relief for events that have uniquely impacted their life, but have no direct relation to the claims made in this litigation.

Ms. Horton seeks an individual payment of $50 to $60 million dollars to compensate her for "all unethical, deceptive, and illegal practices by CPI, Wells Fargo, and Nissan Dealership." Supp. Joint Decl. Ex. 4 at 3-4. While Ms. Horton does state that she was improperly charged for CPI and that the CPI placement caused her hardship, her objection focuses on a host of other unfortunate circumstances starting with two automobile accidents where her airbags failed to deploy and she suffered personal injuries. *Id.* at 2-3. She recounts that because of these personal injuries, she went through a period of time where she had no income which caused her to fall into substantial debt and experience significant hardships. *Id.*

Ms. Bell's objection and supporting documents also appear to relate to a 2007 car accident where the vehicle she was financing through Wells Fargo was deemed a total loss, and to a purported GAP insurance policy that allegedly failed to pay Wells Fargo the

balance she owed on that vehicle.[8] Supp. Joint Decl. Ex. 5 at 6-7. Ms. Bell also indicates that she may have had issues with various insurance companies about the type of coverage she was carrying, and alleges that at least one of these insurance companies was making false statements about her insurance coverage. *Id.* at 7.

Finally, Ms. Starnes who states that her objection "applies only to me," seems to be seeking an additional payment of no less than $50,000 to compensate her for the "financial, mental and familial anguish" she experienced in connection with her repossession. Supp. Joint Decl. Ex. 6 at 1.

These objectors seek relief unavailable in this case even if the case was tried to verdict. Objections such as these lack merit and should be overruled. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 461-63 (9th Cir. 2000) (affirming district court's final approval of a settlement over objection made by class member that he was entitled to additional damages not available in the litigation).

c. Neal Does Not Have Standing to Object to the Settlement.

Ms. Neal lacks standing to object to the Settlement because she excluded herself prior to lodging her objection.[9] *See Churchill*, 361 F.3d at 572, 578-79 (reasoning that one must be a party bound by class settlement to object to it). However, even if Ms. Neal did have standing to object (she does not), her objection does not counsel against granting final approval.

First, while Ms. Neal appears to have received her Class Action Notice—after all, she did file a timely request for exclusion—her chief complaint is that she and her son "were not notified or informed regarding the settlement" by an attorney whom she

[8] In her objection, Ms. Bell states that she only objects to the Settlement if it is excluding her from "[c]ompensation that CA Law allows [her]." Supp. Joint Decl. Ex. 5 at p. 1. Otherwise, she does not object. *Id.* However, Ms. Bell does not articulate whether the claim she does not want excluded under California law relates to this litigation or not.

[9] Attached as Exhibit 8 and Exhibit 9 to the Supp. Joint Decl. are true and correct copies of Dianne and Robert Neal's opt-out letters made through counsel, dated September 23, 2019.

retained and who originally filed a case on her behalf in Mississippi and then California.[10] Supp. Joint Decl. Ex. 7 at 2-3.[11]

Ms. Neal goes on to state that she and her son "have endured a lot of pain and suffering from the harassment of [W]ells [F]argo" and that this harassment "has caused pain and suffering from asthma attacks, depression, high blood pressure, and other health related problems." *Id.* at 2. While it is not clear if Ms. Neal is objecting to the Settlement because it fails to compensate her and her son for the alleged health issues, such personal injuries would fall outside the scope of this litigation.

In sum, these five objections do not undermine the Settlement's fairness as they raise unique issues that either do not relate to, or are not compensable in this litigation, or are premised on a mistaken interpretation of the terms of the Settlement. In light of these facts, this Court should overrule these objections.

C. Amici Seek Relief That Is Contrary To The Interests Of The Settlement Class.

The Arizona Attorney General ("Arizona AG") purports to act in the interests of Settlement Class members, but his involvement, and that of the Attorneys General of Arkansas, Idaho, Indiana, Louisiana, Nebraska and Oklahoma (collectively "Amici"), in class actions have not been without controversy. Indeed, just last year, the New Jersey District Court criticized the Arizona AG's amicus opposition to the settlement of an antitrust and fraud class action as follows:

> The Court recognizes that the Arizona Attorney General, along with the Attorneys General of Idaho, Louisiana, Rhode Island, and Texas, purport to act conscientiously as *parens patriae*. Certainly, the statutory regime Congress has put in place establishes and encourages a vital role for them in providing a

[10] Ms. Neal and her son Robert Neal are Plaintiffs in a case filed on August 28, 2017 and assigned to this Court. The case is captioned *Blaine Boone, et al. v. Wells Fargo and Company, et al.*, Case No. 8:17-cv-01473-AG-KES. On October 24, 2017, this Court entered an Order including the case in this MDL.

[11] Ms. Neal also claims that the Settlement website was blocked preventing people from following the case deadlines and rulings. The Settlement website has never been blocked. In fact, as of Monday, October 21, 2019 the Settlement website has had 344,077 visits, representing 250,589 unique users and over 475,077 website pages presented. Supp. Joint. Decl. at ¶ 5.

> check against inequitable settlements in order to protect their citizens. 28 U.S.C. § 1715. ***Here, however, their efforts are seriously misguided and myopic; their ardor and zeal badly misplaced.*** …
>
> ***Still, our Amici continue in their quixotic quest to vindicate a principle that is not offended, on behalf of their citizens who have not complained. And in doing so, they have succeeded in delaying approval of the settlement, have frustrated its orderly administration and ultimately sought to scuttle an agreement that promised real, tangible and substantial benefit to literally thousands of their own citizens in each of their respective states.***
>
> In the view of this Court, the proper invocation, and indeed the very definition, of *parens patriae* requires a wiser, more discreet, pragmatic and equitable application.

Talone v. American Osteopathic Assoc., 1:16-cv-04644-NLH-JS, 2018 WL 6318371, at *18 (D.N.J. Dec. 3, 2018) (emphasis added). And, just weeks ago the Sixth Circuit affirmed a District Court's refusal to allow the Arizona AG to intervene in a class action for purposes of objecting to a settlement and appealing a final approval order, finding that he lacked Article III standing to intervene. *See Chapman et al. v. Tristar Prods., Inc.*, Nos. 18-3847/18-3866, 2019 U.S. App. LEXIS 30354, at *5-17 (6th Cir. Oct. 10, 2019).

Amici have no standing to object here because they explicitly released all of their claims pertaining to Wells Fargo's placement of CPI in a prior settlement for which the Attorneys General of the Fifty States and the District of Columbia received $575 million in civil penalties from Wells Fargo.[12] The Arizona AG has been quoted as saying, "If people are going to use the judicial system to make sure people are held accountable, the

[12] Under the Attorneys General's settlement entered into on December 28, 2018—*two weeks after* Plaintiffs and Wells Fargo reached an agreement-in-principle to resolve the vast majority of claims pertaining to the force-placement of duplicative and unnecessary CPI—Amici and all other "Attorneys General release[d] and discharge[d] the Wells Fargo Releasees from all civil claims, including common law claims, that the Attorneys General have or could have asserted arising out of or related to the Covered Conduct prior to the Effective Date." AG Settlement Agmt. at 12, ¶ 42, https://www.attorneygeneral.gov/wp-content/uploads/2018/12/Wells-Fargo-Multistate-Settlement-Agreement-12-28-18.pdf.

victims should be the ones getting the restitution and the benefits."[13] Yet unlike the Settlement here, which provides $432 million in monetary relief to Settlement Class members, ***consumers will not see a single dollar from Attorneys General's settlement.***

Although not one class member from the States of Arizona, Arkansas, Idaho, Indiana, Louisiana, Nebraska, or Oklahoma has objected to the Settlement, the relief Amici seek through the appointment of a special master would, at a minimum, substantially delay payment of proceeds to Settlement Class members who have already been harmed by the CPI scheme. If Amici somehow convince the Court to "reject the Proposed Settlement outright," ECF No. 309-1 at 1, they will have succeeded in wiping out that relief. And even if the Court reduces the fee award at Amici's request, those funds will not benefit the Settlement Class. Rather, Amici will be able to claim credit for lining the pockets of Wells Fargo and National General. One wonders whose interests are being served by the Attorneys General's amicus participation at all. Certainly not the Settlement Class.

Amici recycle arguments the Arizona AG made at preliminary approval, but once again they do not claim that the Settlement itself suffers from any obvious deficiencies. Amici do not challenge the propriety of the class notice program, the relief for Settlement Class members, or the scope of the release. They do not suggest that the Settlement favors class representatives or certain segments of the Settlement Class. And importantly, Amici do not contend that the Settlement is the product of collusive negotiations. Nor could they. Amici simply do not like the fact that Class Counsel achieved an extraordinary result and are entitled to a reasonable fee for their work—here only 8% of the class recovery to be paid separately by Defendants. That result is more than justified under the Ninth Circuit's standards and falls well below the average fee awarded in so-called "mega fund" settlements, as class action expert Prof. Brian Fitzpatrick has opined. *See* ECF No. at 295-3 at ¶¶ 10-11. The Court should reject Amici's baseless arguments.

[13] Diana Novak Jones, Class Action Settlements Face Ariz. AG's Scrutiny, Law360 (May 14, 2019), https://www.law360.com/classaction/articles/1158386/class-action-settlements-face-ariz-ag-s-scrutiny.

i. Plaintiffs Complied with the Preliminary Approval Order by Detailing Class Counsel's Role in Creating Value for the Class.

Contrary to Amici's assertions, Class Counsel specified their contributions to the Settlement:

- Before Plaintiffs filed this lawsuit, there existed on-going investigations by the Regulators[14] into Wells Fargo's CPI practices, an internal Wells Fargo audit into its CPI program, the creation of a special committee of Wells Fargo executives who reviewed the internal audit's findings, Wells Fargo's management's escalation of the CPI concerns to its then-CEO, and Wells Fargo's retention of a special consultant to design a so-called consumer "remediation" program, ECF No. 305-1 at ¶ 74;
- Despite all of this activity, before this case was filed the most Wells Fargo was prepared to pay consumers was approximately $64 million of cash remediation along with $16 million of "account adjustments" for post-2012 borrowers who paid for duplicative and unnecessary CPI premiums, but no relief for those who paid unearned commissions, *id.*;
- Wells Fargo updated former CEO Tim Sloan, other senior executives, the Board of Directors, and importantly the Regulators throughout its analysis of the CPI program and development of its initial remediation program in late 2016 and early 2017, *id.* at ¶¶ 80, 84-87;
- Sloan and other Wells Fargo executives believed that this limited initial remediation plan, which was not challenged until after Plaintiffs sued, was extremely generous and more than sufficient to satisfy the Regulators, *id.* at ¶¶ 86, 94, -99;
- The Consent Orders provided guidelines for Wells Fargo to develop a remediation program but did not specify the total dollar amount or individual amounts to be paid to consumers, the individuals for whom remediation would be available, the methodology for determining who would qualify, the process and procedures for

[14] Wells Fargo's Regulators are the Consumer Financial Protection Bureau ("CFPB") and the Office of the Comptroller of the Currency ("OCC").

providing redress to consumers, or a mechanism for consumer enforcement of their rights, *id.* at ¶¶ 88-89[15]; and

- Details concerning the scope and extent of remediation were left to subsequent negotiations with all stakeholders including Wells Fargo, the Regulators, and Class Counsel, *id.* at ¶ 89.

Against this backdrop, Class Counsel began a 17-month effort to maximize class member benefits. This included active, contentious litigation to push the case toward trial, coupled with five in-person mediation sessions before Court-appointed mediator Professor Eric D. Green, as well as countless telephone calls, focusing in great detail on all significant issues. Amici entirely ignore Professor Green's declaration which describes his observations about Class Counsel's role in achieving the Settlement in light of the Consent Orders. ECF No. 294-2 at ¶ 3. Professor Green attests:

> Based on my personal observations, ***Class Counsel's vigorous representation of the Class in these negotiations is responsible for the successful resolution of this action.*** … The parties' settlement negotiations were hard fought and adversarial, though professional, with respect to virtually every issue, including but not limited to the amount and scope of customer compensation, and a mechanism by which customers could enforce their right to redress. Throughout the course of these mediated negotiations, neither the OCC nor the CFPB was represented or participated in any way. … Throughout our negotiations, Class Counsel sought a comprehensive settlement structure that would be acceptable to all stakeholders, including the OCC and CFPB, and one that was enforceable through a Rule 23 class action settlement subject to the jurisdiction of this Court.

Id. ¶¶ 3-4, 15 (emphasis added). Amici make no effort to rebut this evidence, nor could they. Contrary to Amici's assertion, Plaintiffs have not used "chronology to establish

[15] *In the Matter of Wells Fargo Bank, N.A.*, File No. 2018-BCFP-0001 (Bureau of Consumer Financial Protection Apr. 20, 2018), Consent Order ("CFPB Consent Order"), https://files.consumerfinance.gov/f/documents/cfpb_wells-fargo-bank-na_consent-order_2018-04.pdf; *In the Matter of Wells Fargo Bank, N.A. Sioux Falls, South Dakota*, AA-EC-2018-15 (Dep't of Treas. Comptroller of the Currency Apr. 20, 2018), Consent Order ("OCC Consent Order"), https://www.occ.gov/static/enforcement-actions/ea2018-025.pdf.

causation," ECF No. 309-1 at 3, but instead have presented more than sufficient evidence that their work created value for the Settlement Class.

ii. Amici Urge The Court To Apply Erroneous Legal Standards.

Amici ignore the governing standard for a fee award in the Ninth Circuit: "a plaintiff who obtains a court order incorporating an agreement that includes relief the plaintiff sought in the lawsuit is a prevailing party entitled to attorney's fees." *Labotest, Inc. v. Bonta*, 297 F.3d 892, 895 (9th Cir. 2002). Under that standard, Class Counsel are entitled to fees for bringing about the overall Settlement.

Instead, Amici argue that Class Counsel's entitlement to attorneys' fees should be decided by reference to a Latin maxim generally reserved for first year law students: "*post hoc ergo propter hoc.*" ECF No. 309-1. For this proposition, Amici cite *Black's Law Dictionary*, a Supreme Court case from 1894, and two unpublished Ninth Circuit cases that cannot be cited to this Court under Ninth Circuit Rule 36-3(c). *See Hardt v. Heidweyer*, 152 U.S. 547 (1894) (affirming dismissal of creditors' complaint arising from the debtors' assignment of bills receivable and accounts to other creditors); *Tafoya v. County of Fresno*, 13 Fed. App'x 715, 2001 U.S. App. LEXIS 16108 (9th Cir. 2001) (affirming dismissal for failure to establish unlawful retaliation by municipal employer); *Loyd v. Bullhead City*, No. 89-16652, 1991 U.S. App. LEXIS 9824, at *17-18 (9th Cir. May 6, 1991) (same in summary judgment context).[16] It should come as no surprise that none of these cases pertains to a request for attorneys' fees. Indeed, Plaintiffs are unaware of any case in the Ninth Circuit citing "*post hoc ergo propter hoc*" as a standard for an award of attorneys' fees, let alone in a Rule 23 class action.

Amici continue to rely on *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998), which has never been adopted in the Ninth Circuit, to argue that Class Counsel must parse out each specific item of value they added to the Settlement. Even if that decision applied here—it does not—the parsing that Amici

[16] Amici erroneously cite this case as *Loyd v. City of Bullhead City*, 931 F.2d 897 (9th Cir. 1991), but that order is a one-word disposition ("AFFIRMED") and a reference to Ninth Circuit Rule 36-3(c).

demand is ***not required*** under *Prudential*. Instead, that case would only require Class Counsel to show that they are a "material factor" in bringing about the relief available to the Settlement Class. *Id.* at 337. The evidence before the Court, particularly the uncontroverted declaration of Court-appointed mediator Eric D. Green, readily satisfies the Third Circuit test. As described above, based on first-hand knowledge, Professor Green credited Class Counsel's "vigorous representation" as being "responsible for the successful resolution of this action," and testified that "this outcome and the Settlement are also due to the efforts of Class Counsel, defense counsel and their clients who worked with me to achieve this result." ECF No. 294-2 ¶¶ 3, 15. This is *not* a case where Class Counsel can "be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill." *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992); *see also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998) ("The role of Class Counsel was critical, not only in achieving the significant recovery, but in framing the issues which became the subject of the later [government action].").

Amici's erroneous citation to *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 914 F.3d 623 (9th Cir. 2019), cannot be squared with the facts or holding of that decision. The Ninth Circuit's opinion *does not* address the interplay between government-negotiated consent decrees and fee requests by class action attorneys. Instead, it reviews the denial of fees to firms that failed to comply with the district court's pretrial order authorizing only lead counsel to assign work. *Id.* at 643. Nearly 100 law firms adhered to the pretrial order and received fees for the assigned work they performed. *Id.* at 644. Another 244 firms performed unassigned work without having

complied with the pretrial order. *Id.* at 635-38. The district court exercised its discretion to deny those firms' fee requests, *id.* at 639, and the Ninth Circuit affirmed, *id.* at 644-45.[17]

The Ninth Circuit's decision is inapposite to the facts before this Court. Here, Class Counsel are seeking a fee award for work performed that they were authorized to do in compliance with the Order Re Protocol For Common Benefit Work And Expenses (ECF No. 54) ("Common Benefit Order"). Thus, Class Counsel are in the position of the nearly 100 firms in *Volkswagen* that played by the rules and were compensated for their work, rather than the 244 that went rogue. Nothing in *Volkswagen* suggests that the Ninth Circuit adopted *Prudential*. To the contrary, in a related district court decision, Judge Breyer overruled objections challenging class counsel's role in creating settlement benefits as compared to government regulators: "Simply put, none of the agreements can be viewed in a vacuum and none can function without the others…." *In re Volkswagen "Clean Diesel" Marketing, Sales, Practices Prods. Liab. Litig.*, MDL No. 2672 CRB, Order Granting Plaintiffs' Motion for Attorneys' Fees and Costs (N.D. Cal. Mar. 17, 2017) (ECF No. 3053). Amici's failure to adequately distinguish the *Volkswagen* district court decision speaks volumes.

iii. The Court Should Reject Amici's Request to Appoint a Special Master.

The Court should reject Amici's request that it take the extraordinary step of appointing a special master to determine the attorneys' fees requested by Class Counsel here. Amici's proposal for satellite litigation entailing an extensive analysis of Class Counsel and the Regulators' relative contributions to the Settlement, as well as an audit of Class Counsel's daily time records by a special master, are contrary to the legal standards that apply to Plaintiffs' fee request, and would result in unnecessary and unwarranted

[17] The Ninth Circuit's *Volkswagen* ruling is consistent with the Third Circuit's decision in *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173 (3d Cir. 2005) (declining to award attorneys' fees in PSLRA case to non-lead counsel for pre-leadership appointment work and work not done at direction of lead counsel that did not benefit the class). However, neither case addresses the issue here, specifically the interplay between government-negotiated consent decrees and fee requests by class action attorneys.

delay of a case that all parties and the Court have worked very hard to move swiftly to resolution.[18] This Court—which has actively presided over every aspect of this case for the past two years—is best equipped to apply the standards that govern Plaintiffs' fee motion on the basis of the record before it, and should not convert this motion into "second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), by appointing a special master who lacks any familiarity with the case to act as a "green-eyeshade accountant[]" seeking "auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838 (2011).

Whether the fee request appropriately compensates Class Counsel for the value they conferred in the Settlement is exactly the type of issue this Court is well-equipped to resolve. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 308 (3d Cir. 2005) ("[W]e entrust these matters to the sound discretion of Article III trial judges to know when they can adequately protect the class's fiduciary interest or when they need an outsider to aid them in that role."); *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 586 F. Supp. 2d 732, 811 (S.D. Tex. 2008) (The "appointment of a guardian . . . or special master [is not] necessary here, since the Court's personal oversight of all aspects of this case provides a strong basis for evaluating counsel's fee request."); *In re WorldCom, Inc. Sec. Litig.*, 2004 WL 2591402, at *21 (S.D.N.Y. Nov. 12, 2004) (Where the percentage of the settlement fund falls within the range of reasonable fee awards, "[t]here is certainly no need to retain an independent guardian to undertake a further review of Lead Counsel's time records.").

a. Appointment of a Special Master Will Result in Inefficient Satellite Fee Litigation and Delay.

Amici's request for the Court to appoint a special master will delay the distribution of the settlement proceeds to the Settlement Class and cause the parties to incur

[18] Courts in this Circuit can and do reject the lodestar analysis, even as a cross-check, especially where, as here, the percentage of the fund requested is "significantly below the 25% benchmark." *Ebarle*, 2016 WL 5076203, at *11; *Aichele v. City of L.A.*, No. CV-12-10863-DMG, 2015 WL 5286028, at *6 (C.D. Cal. Sept. 9, 2015); *Craft v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1122 (C.D. Cal. 2008). Even where the lodestar is employed as a cross-check, it is a "streamlined" analysis that "need entail neither mathematical precision nor bean counting . . . [and] may rely on summaries submitted by the attorneys." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015) (Corley, J.) (citations omitted).

considerable unnecessary costs. As the Rules Advisory Committee notes, "[i]n deciding whether to direct submission of such questions to a special master or magistrate judge, *the court should give appropriate consideration to the cost and delay that such a process might entail*." Fed. R. Civ. P. 23, adv. comm. notes, 2003 amdts. (emphasis added); *see also* David F. Herr, *Manual for Complex Litig., Fourth* §21.727 (2017) ("Considerations of timing and costs . . . might affect a decision to refer the matter" to a special master); *In re Motor Fuel Temperature Sales Practices Litig.*, 2016 WL 4445438, at *13 n.34 (D. Kan. Aug. 24, 2016) (appointment of a special master would "cause additional delay and expense to the parties, and would be inconsistent with the Court's obligation to dispose of the fee issues in a just, speedy and inexpensive manner"); *In re Enron Corp.*, 586 F. Supp. 2d at 812 ("[A]n appointment [of a guardian] would not only be redundant, but would further increase costs and delay distribution to the class.").

These concerns are not hypothetical. For example, the referral to a special master in *In re Johnson & Johnson Derivative Litigation*, resulted in a 138-page report that was not reviewed by the district court until over a year after the special master had been appointed. *See* 2013 U.S. Dist. LEXIS 180822 (D.N.J. June 13, 2013); 2013 U.S. Dist. LEXIS 167066 (D.N.J. Nov. 25, 2013). Comparable proceedings here would constitute nearly half of the time spent litigating the merits of this case. Moreover, a special master's conclusions of law are reviewed by this Court *de novo*, and, absent agreement to a more deferential standard, so are her findings of fact. Fed. R. Civ. P. 53(f)(3), (4). Amici fail to acknowledge that their request would extraordinarily delay the resolution of this case.[19]

Moreover, the appointment of a special master to engage in the type of litigation advocated by Amici would also be expensive. While Amici argue that the special master's

[19] In *Chapman v. Tristar Prods.*, Case Nos. 1:16-CV-1114, 1:17-CV-2298, 2018 U.S. Dist. LEXIS 150153 (N.D. Ohio Sep. 4, 2018), the district court denied the Arizona AG's motion to intervene so he could object to, and appeal from, an attorneys' fee award to class counsel on the grounds that intervention would create unnecessary delay and prejudice: "When asked whether Arizona's Attorney General would take over class representation if Arizona scuttled the settlement, Arizona's Attorney General said it would not. In a case where over thirteen thousand persons have made settlement claims and where warranty extensions have benefitted more, Arizona's intervention would delay and prejudice class members' rights." *Id.* at *14-15.

fee may be taken from any award to Class Counsel, it is unclear who would pay the special master if the Court ultimately were to award the fees requested by Class Counsel. Amici also ignore the additional costs that would necessarily include the resources to be expended by this Court in supervising this extended collateral litigation, for which no party could compensate. It is not in the interest of the parties or the Court to delay final resolution of this case further than is absolutely necessary.

b. No Exceptional Circumstances Warrant the Appointment of a Special Master to Determine a Lodestar Cross-Check.

Given the legal standard for approving the fee request, and the delay and cost that would be engendered by the additional litigation suggested by Amici, only truly exceptional circumstances warrant appointment of a special master. There are none here.

First, Plaintiffs have satisfied their burden under governing legal standards to show the value Class Counsel contributed to the Settlement. The Court can rule on the basis of the record before it. No additional factual record needs to be developed by litigation before a special master.

Second, the cases to which Amici cite do not counsel appointing a special master here. For example, in *Arkansas Teacher Ret. Sys. v. State Street Bank & Tr. Co.*, 232 F. Supp. 3d 189 (D. Mass. 2017), following the parties' consent, the court appointed a special master to evaluate potential misconduct in connection with counsel's billing submissions including improper double-counting, excessive billing for contract attorneys, and whether counsel actually worked the hours reported. *Id.* at 191-93. *See also Halley v. Honeywell Int'l, Inc.*, No. 10-3345 (ES) (JAD), unpublished slip op. (D.N.J. Oct. 26, 2017) (ECF No. 468) (appointing special master to address issue of comingled expenses). Special masters were appointed in other cases where the parties disputed the requested fee and cost amounts. *See Cerdes v. Cummins Diesel Sales Corp.*, Civil Action No. 06-922 Section "B" (4), 2010 U.S. Dist. LEXIS 84492, at *2-3 (E.D. La. July 15, 2010) (appointing special master where parties disputed fee request and settlement agreement granted court sole and exclusive discretion to determine award); *Scharfenberger v. Sec'y*

of HHS, 124 Fed. Cl. 225, 231 (2015) (reviewing special master's determination of disputed fee request for vaccine injury claim where "[s]pecial masters are statutorily authorized to determine and award 'reasonable attorneys' fees' under the Vaccine Act. 42 U.S.C. § 300aa-15(e)(1) (2012)."). These cases do not apply here, where the parties do not dispute the fee request and there is no suggestion of potential misconduct in calculating the lodestar or expenses.

Third, there is no need for a special master to review Class Counsel's detailed time records for purposes of a lodestar cross-check. Again, no Settlement Class member supports Amici's request in this regard or argues that the multiplier itself is unreasonable. The Court previously advised the parties: "[R]equiring too much specificity [in billing submissions] is not worth the money invested to do it. … What I'm saying is Lodestar is often kind of a sore thumb analysis. Does it sound right, which fits into … some of [the] other things I've said where a global analysis … is better than a granular analysis." Tr. of Proceedings dated Jan. 29, 2018 at 12:20-21, 15:6-10. Of course, Plaintiffs will submit any additional information the Court requests, but in light of the below benchmark 8% fee request, a detailed accounting of every time record by a special master is unnecessary, wasteful, and will provide no additional benefit to the Settlement Class. *See Perkins v. Linkedin Corp*. 2016 WL 613255, at *17 (N.D. Cal. Feb. 16, 2016) ("[I]t is well established that '[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean counting.'") (quoting *Bellinghausen v. Tractor Supply Co*., 306 F.R.D. 245, 264 (N.D. Cal. 2015)); *Young v. Polo Retail, LLC*, 2007 WL 951821, at *6 (N.D. Cal. Mar. 28, 2007) ("In contrast to the use of the lodestar method as a primary tool for setting a fee award, the lodestar cross-check can be performed with a less exhaustive cataloging and review of counsel's hours.").

Fourth, Amici do not articulate any basis for the appointment of a special master to review whether Class Counsel should be able to submit lodestar for document review attorneys. This is a legal issue for the Court to decide, and requires no assistance from a special master. This Court is well aware that document review work was capped at

$300/hour in the Common Benefit Order. *See* ECF No. 54 at 5. In any event, courts routinely recognize the inclusion of document review attorneys in class counsel's lodestar at the reasonable market rate for their services. *See, e.g., Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1124 (C.D. Cal. 2012) (agreeing with "other courts [that] have found that the hours of contract attorneys—who . . . are not counsel of record—nonetheless merit inclusion in the lodestar hours"); *In re AOL Time Warner S'holder Derivative Litig.*, 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) ("The Court should no more attempt to determine a correct spread between the contract attorney's cost and his or her hourly rate than it should pass judgment on the differential between a regular associate's hourly rate and his or her salary."). Nothing about the resolution of this legal issue requires extensive examination of detailed time records by a special master.

Fifth, Amici's contention that a special master is necessary to determine whether Class Counsel churned the bill to justify the requested fee award is baseless. The Court carefully evaluated the needs to the case and competing applications before appointing Co-Lead Counsel, Liaison Counsel, and the Plaintiffs' Steering Committee. *See* Case Management Order dated Dec. 11, 2017 (ECF No. 35). In doing so, the Court emphasized that "Lead counsel must also avoid duplication of work and unnecessary or inefficient practices." *Id.* at 2. The Court subsequently entered the Common Benefit Order "to ensure that the cost of common-benefit work is kept to a reasonable minimum," ECF No. 55, mandated the collection and review of monthly time and expense submissions to ensure compliance with the Common Benefit Order, ECF No. 54 at 2, and imposed caps on hourly rates, *id.* at 5, which cause the multiplier to appear higher than it would if Class Counsel billed for their true hourly rates. Having actively monitored every aspect of this case, the Court is in a far better position to understand its complexity and the work required to bring it to a successful resolution than a special master.

Finally, Amici's citation to a research paper concerning work performed in securities fraud class actions by three academic, non-litigators who "are skeptical that multiple law firms are required to litigate even the largest cases," is inconsistent with the

Court's extensive case management experience and provides no basis to appoint a special master to examine that amount of work Class Counsel performed. *Working Hard or Making Work? Plaintiffs' Attorneys Fees in Securities Fraud Class Actions*, NYU Law & Econ. Research Paper No. 19-31, at p. 21 (July 15, 2019). While suggesting that plaintiffs' attorneys receive "windfall fee awards in mega-settlement cases at shareholders' expense," when fees are taken out of the compensation to the class, *id.* at 3, that paper has no bearing on this consumer fraud case where fees will be paid separate and apart from the recovery by the Settlement Class. The authors also concede that their "make work" hypothesis may be flawed because, as here, "defendants may have a greater incentive to mount a strong defense in cases with higher stakes, which may offer an alternative explanation for at least some of the additional hours that plaintiffs' attorneys invest in these cases." *Id.* at 40.

In sum, Amici fail to provide any basis to engender unnecessary delay and expense in bringing this case to a conclusion through the appointment of a special master. This Court is in the best position to evaluate Class Counsel's contribution to the Settlement and determine the appropriate fee award.

III. CONCLUSION

The Parties have negotiated a fair, adequate, and reasonable settlement. Accordingly, Plaintiffs respectfully move this Court to enter Plaintiffs' Proposed: (1) Order Granting Final Approval of Settlement (ECF No. 294-5); (2) Order Granting Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards (ECF No. 295-5); and (3) Final Judgment (ECF No. 294-6).

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Dated: October 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2019, I electronically filed the foregoing document entitled **PLAINTIFFS' REPLY (1) IN SUPPORT OF MOTIONS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS; AND (2) IN RESPONSE TO BRIEF OF AMICUS CURIAE** with the Clerk of the Court for the United States District Court, Central District of California using the CM/ECF system and served a copy of same upon all counsel of record via the Court's electronic filing system.

/s/ Roland Tellis
Roland Tellis