NO. 17-16873

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW CAMPBELL and MICHAEL HURLEY, on behalf of themselves, and all others similarly situated,
Plaintiff-Appellees,

v.

ANNA W. ST. JOHN,
Objector-Appellant,

v.

FACEBOOK, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, No. 4:13-cv-05996-PJH

Opening Brief of Appellant Anna St. John

COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
Anna St. John
1310 L Street NW, 7th Floor
Washington, D.C. 20005
(703) 203-3848
ted.frank@cei.org
Attorneys for Objector-Appellant Anna St. John

Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of FRAP 26.1, Anna St. John declares that she is an individual and, as such, is not a subsidiary or affiliate of a publicly owned corporation and there is no publicly held corporation that owns ten percent or more of any stock issued by her.

Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Statement of Subject Matter and Appellate Jurisdiction

The district court has jurisdiction under 28 U.S.C. § 1332(d)(2) because plaintiff's class-action complaint alleges claims that exceed $5,000,000 exclusive of interest and costs, there are millions of class members, most of which are citizens of states other than defendant's state of citizenship. For example, named plaintiff Matthew Campbell is a citizen of the State of Arkansas, while defendant Facebook is a Delaware corporation with its principal place of business in Menlo Park, California. ER166.[1] The district court also has jurisdiction under 28 U.S.C. § 1331, because the complaint alleges violations of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq. Id.*

This Court has jurisdiction under 28 U.S.C. § 1291. The district court ordered final approval of the settlement on August 18, 2017 ("Final Approval Order"), and issued final judgment under Fed. R. Civ. P. 58(a) on August 24, 2017 ("Final Judgment"). ER10, ER1. Objector Anna St. John, the appellant in this case, filed a notice of appeal on September 15, 2017, appealing the Final Judgment and all opinions and orders that merged therein. ER31. St. John's notice of appeal is timely under Fed. R. App. P. 4(a)(1)(A). St. John, as a class member who objected to settlement approval below, has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

[1] "ER" refers to St. John's Excerpts of Record. "Dkt." refers to the district court docket in this case.

Statement of the Issues

1. This Court holds that an injunction is "of no real value" where it "does not obligate [defendant] to do anything it was not already doing." *Koby v. ARS Nat'l Servs.*, 846 F. 1071, 1080 (9th Cir. 2017). Did the district court err in finding a settlement fair based on relief that (i) "acknowledges" that the defendant voluntarily ceased certain activities and made certain disclosures prior to settlement, with no injunction or other requirement preventing resumption of those activities; and (ii) requires a 22-word disclosure that substantively overlaps with a disclosure the defendant had voluntarily made prior to settlement, to be posted for one year on a webpage that the overwhelming majority of the class will never see? (Raised at ER68-73; ruled on at ER23-29.)

2. This Court demands that the district court investigate the "economic reality" of the class benefits vis-à-vis the fee award in determining settlement fairness. *Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015). Did the district court err by failing to quantify the injunctive relief or exercise heightened scrutiny when the settlement contained signs of a lawyer-driven deal, as *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011), requires? (Raised at ER68, ER73-75; ruled on at ER23-29.)

3. This Court holds that a class action settlement is unfair under Rule 23(e) when class counsel is the primary beneficiary. *Allen*, 787 F.3d at 1224. Did the district court err by approving a settlement that pays the attorneys $3.89 million and provides the class only acknowledgments of action that pre-dates the settlement and an injunction requiring a 22-word disclosure to be posted for one year on a webpage that

the overwhelming majority of the class will not see? (Raised at ER68, ER73-75; ruled on at ER23-29.)

Standard of Review

A district court's decision to approve a class action settlement is reviewed for abuse of discretion. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011). A failure to apply the correct standard of law is an abuse of discretion. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004). Questions of law are reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The abuse of discretion standard does not preclude an appeals court from "interven[ing] when a District Court makes a finding that is methodologically flawed." *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 184 (3d Cir. 2004) (Becker, J.).

Statutes and Rules

Federal Rule of Civil Procedure 23. Class Actions.

…

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

…

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdraw only with the court's approval.

…

Statement of the Case

A. Researchers publicize that Facebook tracks URLs sent in private messages between users, a practice that it discontinues in 2012, over a year before suit is filed.

Facebook is a social networking site with more than 1.2 billion users. ER165. Facebook users are able to share content with other users, including photos, text, and video. Content can be posted publicly or with a select group of people on a Facebook user's wall. Alternatively, Facebook users can send email-like "private messages" directly to other users. ER193-194.

On October 3, 2012, a security researcher publicized that the "like" count of a third-party webpage would increase when the URL[2] of the webpage was sent by private message on Facebook. ER172. When a private message contained a link to a third-party website, *and* that website had installed Facebook's social media plugin, Facebook added up to two additional "Likes" for that webpage. ER174. For example, if 100 Facebook users clicked the "Like" button on a webpage, such as a *New York Times* article,[3] and a single Facebook user sent a link to the same page, the number of likes displayed on that page would increase from 100 to 101 or 102. Additionally, the owners of third-party websites could obtain "anonymous, aggregate data about interaction with and traffic to their websites," and this data would include the

[2] A Uniform Resource Locator (URL) is often called an internet address or link. It is a reference to an internet resource that usually specifies the location of a specific web page.

[3] Facebook "Like" widgets no longer appear on the *New York Times*, nor on most popular websites.

aggregate demographic information of users who has sent URLs of their websites. ER132. Facebook discontinued both of these practices on December 19 and October 11, 2012, respectively. ER131-132.

B. Over a year later, Plaintiffs file two complaints over Facebook's handling of links in private messages.

Two sets of plaintiffs filed class actions, eventually consolidated into one suit, against Facebook on December 30, 2013 and in January 2014. The original and consolidated complaint alleged that Facebook's handling of private messages violates the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.* ("ECPA"), the California Invasion of Privacy Act, California Penal Code §§ 630 *et seq.* ("CIPA"), and the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq. ("UCL"). Dkts. 1 and 25. In particular, plaintiffs alleged that Facebook routinely scans its users' private messages without their consent for generating "Likes" for web pages, data mining, user profiling, and targeted advertising. Although plaintiffs pleaded that Facebook's personal message scanning was without their knowledge or consent, the original complaint also quoted Facebook's Data Use Policy, which then stated: "We receive data about you whenever you use or are running Facebook, such as when you . . . send or receive a message . . ." Dkt. 1 at 20.

Each of the two named plaintiffs in the first-filed action—Matthew Campbell and Michael Hurley—are personal friends with counsel in this case. *See* Dkt. 178-2 at 15-16; Dkt. 180-1. The named plaintiff in the second-filed action, David Shadpour, voluntarily dismissed his claims with prejudice on October 2, 2015. *See* Dkt. 123.

Shadpour's original counsel had been ineffective, apparently failing, for example, to provide him with a copy of the consolidated complaint. ER209.

In June 2014, Facebook moved to dismiss all counts and represented to the district court that the complained-about practices had already ceased. Dkt. 45 at 5-7. On December 23, 2014, the district court dismissed only the UCL claims, finding that plaintiffs failed to plead the loss of money or property. ER241. The court declined to dismiss any injunctive claims, finding plaintiffs had pleaded "a 'sufficient likelihood' that Facebook could resume the practice." *Id.*

C. Facebook revises disclosure in its Data Use Policy.

In January 2015, Facebook revised its Data Use Policy disclosure. In particular, it clarified a paragraph concerning data collection as follows:

Data Use Policy 2013	**Data Use Policy January 2015**
We receive data about you whenever you use or are running Facebook, such as when you look at another person's timeline, send or receive a message, search for a friend or a Page, click on, view or otherwise interact with things, use a Facebook mobile app, or make purchases through Facebook.	We collect the content and other information you provide when you use our Services, including when you sign up for an account, create or share, and message or communicate with others. This can include information in or about the content you provide, such as the location of a photo or the date a file was created. We also collect information about how you use our Services, such as the types of content you view or engage with or the frequency and duration of your activities.

Compare Dkt. 1 at 20 *with* ER54.

D. The court certifies an injunctive relief class.

On November 13, 2015, Plaintiffs moved for certification of a class for damages under Rule 23(b)(3) and alternatively a class for injunctive relief under

Rule 23(b)(2). Dkt. 138. Plaintiffs moved for a slightly different class definition than in their complaint because not all URL content in private messages triggered Facebook's algorithms, but only "private messages that included URLs in their content, *(and from which Facebook generated a URL attachment)*." Dkt. 138 at 10 (emphasis added).

On May 18, 2016, the district court denied certification as to a damages class, but granted certification for an injunctive-relief class under Rule 23(b)(2). ER221. The court's certification for an injunctive-relief class arose from three specific alleged uses by Facebook of URLs included in private messages: (1) Facebook's cataloging URLs shared in private messages and counting them as a "Like" on the relevant third-party website, (2) Facebook's sharing of data regarding URLs in messages, and attendant demographic data about the messages' participants, with third parties, and (3) Facebook's use of data regarding URLs shared in private messages to generate recommendations for Facebook users. ER195-97. With respect to the first two alleged uses, these ceased before the complaint was filed. Facebook stopped including in external "Like" counts "the number of shares, by users, of URLs in private messages" as of December 19, 2012, and discontinued sharing with third parties "information about URL shares in Facebook Messages … and attendant statistics and demographic information" as of October 11, 2012. *Id.* With respect to the third alleged use, the district court may have been referring to the backup algorithm of the Recommendation Feed, which stopped using URL share counts on July 9, 2014.[4]

[4] During certification, the district court discussed use of "data to generate recommendations for other users" (ER195-196), which does not resemble the

ER132. The court also directed the Plaintiffs to file a Second Amended Complaint. ER198.

E. Second Amended Complaint seeks substantive injunctive relief.

Plaintiffs filed their Second Amended Complaint ("Complaint") in June 2016. ER164. In the Complaint, plaintiffs pleaded that Facebook continues to violate the ECPA; that any "interception" and "scanning" of messages unneeded for transmission violates the ECPA. ER186-188. Plaintiffs likewise pleaded that Facebook continues to violate CIPA. ER189. Even though Facebook no longer reflected shared URLs as "Likes," plaintiffs alleged that it remains unlawful for Facebook to "intercept" messages and store data from such messages "for the current or future objective of accumulating and analyzing user data and thereafter refining user profiles." ER176. Plaintiffs further complain that "Facebook retains the user data it has collected." ER180.

F. The parties seek approval of a class action settlement and insist that no notice to the class is necessary.

After a single discovery motion that was denied (Dkt. 218), the parties settled on March 1, 2017. ER123. The Settlement defines the class as "All natural-person

---

Recommendations Feed product aimed at developers to show "the most recommended webpages on that developer's site." The Recommendations Feed product was not mentioned in the Second Amended Complaint, which instead lists the "Graph API" and "link_stats" API. ER177. The Settlement does not say when the allegedly unlawful uses of URL counts ceased for "Graph API" and "link_stats" API, but merely "acknowledges" that as of the date of the agreement they did not use data from the EntShares created from URLs sent in private messages. ER132-133.

Facebook users located within the United States and its territories who have sent, or received from a Facebook user, private messages that included URLs in their content (and from which Facebook generated a URL attachment), from December 30, 2011 to March 1, 2017." ER130.

The Settlement provided only one form of injunctive relief: a 22-word disclosure to be posted within Facebook's online help pages:

> **Additional Explanatory Language.** Facebook shall display the following, additional language, without material variation, on its United States website for Help Center materials concerning messages within 30 days of the Effective Date: "*We use tools to identify and store links shared in messages, including a count of the number of times links are shared.*" Facebook shall make this additional language available on its United States website for a period of one year from the date it is posted, provided however that Facebook may update the disclosures to ensure accuracy with ongoing product changes.

ER133 (emphasis added). (There are dozens of Help Center webpages relating to messaging on the Facebook website, and nothing in the settlement specifies which one will receive this additional information, and how transparent or opaque the additional twenty-two words will be to users.)

The Settlement purports to offer other forms of "consideration and injunctive relief," but these are not enforced by an injunction at all. Instead, the Settlement includes recitations for "Acknowledgement regarding the Cessation of Practices" including that (1) until 2012, sending links by private message often increased the "like" count associated with third-party websites, (2) until 2012, owners of third-party

websites could obtain aggregate statistics and demographic information about users sharing links in messages, and (3) until July 2014, developers using the "Recommendation Feed" feature would *sometimes* see page recommendations for their own websites that used a backup "PHP backend" algorithm, which *in part* considered the number of times a link was shared via private message. ER131-132. The Settlement also acknowledges that Facebook changed its Data Policy in 2015. ER133.

As for its actual practices, from which plaintiffs had sought injunctive relief, Facebook merely "confirms, *as of the date it has executed this Agreement below*," that Facebook was not using data "from EntShares created from URL attachments sent by users in Facebook Messages for: 1) targeted advertising; 2) sharing personally identifying user information with third parties; 3) use in any public counters in the 'link_stats' and Graph APIs; and 4) displaying lists of URLs representing the most recommended webpages on a particular web site." ER132-133 (emphasis added). Facebook makes no commitment not to resume those practices, and the settlement creates no future obligation for them.

The Settlement also provided clear-sailing for $3,890,000 in attorneys' fees and costs. That is, Facebook agreed in advance not to oppose the fee request by class counsel. ER138-139. The Settlement segregates the fee award, such that any reduction in the fee request would revert to Facebook. ER139.

"The Parties agree[d] that class notice is not necessary in this action." ER138. However, the district court did not accept parties' proposal to provide only 28 U.S.C. § 1715 notice to state attorneys general. The court informed the parties at the preliminary approval hearing that it would require some notice to the class, and the

parties agreed to post settlement-related filings on class counsel's websites. Dkt. 236. The district court granted preliminary approval of the Settlement on April 26, 2017. ER116. The preliminary order directed that "information about the Settlement—including this Order, the Settlement Agreement, Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Plaintiffs' Motion for Attorneys' Fees and Incentive Awards, any opposition or reply papers related to these motions—shall be posted on Class Counsel's public websites." ER119. The order did not direct that any notice should be sent or advertised to the class of Facebook users. There is no evidence in the record that class members had any way of knowing that settlement information was posted on law-firm websites.

G. Plaintiffs seek final approval of the Settlement and attorneys' fee award.

In seeking final approval, plaintiffs argued that "the Settlement achieves significant changes to Facebook's practices related to the use of URLs in private messages that address each of the three practices certified for class treatment." ER107.

As for attorneys' fees, plaintiffs did not provide detailed billing but instead provided block bill totals claiming a lodestar amount of $6,509,773. Dkt. 238 at 1; Dkt. 239. Plaintiffs submitted that the "negative" [sic] multiplier of 0.497 "strongly suggests" the reasonableness of their fee request. Dkt. 238 at 1. Additionally, plaintiffs argued the fee to be appropriate due to fee shifting provided by California's private attorney general statute. *Id.* at 9.

H. St. John objects to the Settlement and attorneys' fee request.

Anna St. John objected to the Settlement and attorneys' fee award. ER57. She is represented *pro bono* by attorneys at the non-profit Center for Class Action Fairness ("CCAF"), and brought her objection in good faith to prevent approval of an unfair settlement and ratification of an improper class certification. ER96.

St. John is a class member because she sent or received Facebook private messages that included URLs in their content and from which Facebook generated a URL attachment, from December 30, 2011 to March 1, 2017. ER36

St. John objected, *inter alia*, that plaintiffs failed to prove that the Settlement's injunctive relief—providing a 22-word disclosure—provides any value to the class, rendering the Settlement unfair under Rule 23(e). ER69-73 (citing *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071 (9th Cir. 2017); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *and In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016)).

St. John also argued that the Settlement is unfair under Rule 23(e) because class counsel would receive all of the settlement value: $3,890,000 in attorneys' fees and costs, compared to a 22-word disclosure that was substantively duplicative of a disclosure Facebook first made in 2015 to its users. ER73-75; Dkt. 255 at 10:24-11:15. St. John argued that in addition to the disproportionate fee request, the Settlement contains other warning signs of class counsel's self-dealing including "clear-sailing" (where defendant agrees not to oppose the fee request) and "reversion" (where any reduction in fees reverts back to defendant rather than to the class). ER73-78.

Finally, St. John argued that notice to the class was constitutionally deficient. The *ad hoc* law firm website postings failed to provide a "clear and concise[]"

statement of necessary information and was not directed to class members in a reasonable manner. ER81-85. Given that class members are on Facebook, which transmits at no cost to users 60 billion personal messages a day, reasonable notice under Rule 23(e)(1) should have been provided via Facebook. ER64.

Facebook contested St. John's suggestion that the 22-word disclosure was valueless and provided a declaration concerning visits to the Facebook Help Center page where the disclosure will appear. In the first six months of 2017, the relevant page was visited 369,159 times. ER51. There is no record evidence of how closely those visits read the entire substance of the page or click through to individual answers provided.

I. The court overrules St. John's objection and approves the Settlement.

The district court held a fairness hearing on August 9, 2017 and granted final approval of the Settlement and plaintiffs' entire request for attorneys' fees. ER30. The district court promised a "supplement to the proposed orders regarding impact of the cases relied upon by the objector." *Id.*

On August 18, 2017, the district court entered its order overruling St. John's objection. The district court found that "The settlement offers immediate, tangible benefits directed to the three uses of URLs challenged by plaintiffs, without requiring class members to release any claims for monetary damages that they may have against Facebook." ER23. While the district court acknowledged that "much of the relief obtained for the class was the result of Facebook's changes in business practice in response to the litigation," it concluded that "the settlement still provides substantial

benefits to the class," specifically that "Facebook has confirmed that the three challenged practices have ceased, and there is no ECPA or CIPA violation going forward in light of the disclosure changes adopted by Facebook." ER24.

The district court found that two of the warnings signs of *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011)—clear sailing and kicker—were "inapplicable to this case because there is no common fund, 'constructive' or otherwise: the certified class is injunctive-relief-only, and monetary damages claims are not at issue." ER25. As for the third factor, disproportion, the district court found that it was "not the result of collusion, but merely a function of this court's decision to certify only an injunctive relief class, combined with the fee-shifting provisions of ECPA." *Id.*

The district court distinguished *Koby*, *Pampers*, and *Walgreen* because, among other things, each precedent involved settlements of worthless or illusory value, whereas the Settlement "provides value to the class." ER26-28.

Finally, the district court found notice reasonable because individual direct notice "would carry substantial costs in light of ascertainability issues, and, importantly, the court was persuaded that such notice would create serious risks of confusion for the class members." ER28.

On August 18 the district court also entered, nearly verbatim, plaintiffs' proposed orders approving the Settlement and the fee request. ER3; ER10. The district court struck through plaintiff's proposed language finding that notice was the "best practicable" under Rule 23(c)(2). ER13.

The court shortly thereafter issued final judgment. ER1. This timely appeal followed.

Summary of Argument

This class-action settlement approved by the district court provides $3.89 million to the class attorneys and 22 words on one of Facebook's help pages for one year to everyone else. The 22-word disclosure materially overlaps with a disclosure made in Facebook's Data Use Policy, as revised in 2015. Putting the disclosure on a single help page constitutes the only relief of the proposed settlement; all other purported relief merely acknowledges changes to practices that Facebook implemented years ago, largely before this litigation commenced, and which Facebook is not bound to maintain.

The district court's approval of this settlement is contrary to this Court's decision in *Koby*, which requires a settlement's proponents to demonstrate that class members will benefit from a settlement's injunctive relief and holds that injunctive relief that does not obligate a defendant "to do anything it was not already doing" provides no real value to the class. 846 F.3d at 1079-80. Here, the only relief that meets that standard is the 22-word disclosure regarding Facebook's collection of message content that is itself worthless. That bare-bones addition to one of Facebook's little-read help pages is duplicative of a disclosure Facebook made in its Data Use Policy well before a settlement was reached, and is unlikely to be seen by—much less provide a benefit to—the overwhelming majority of the class.

The approval is also contrary to this Court's rule that class members—not class counsel—must be the principal beneficiaries of a settlement. The settlement here gives preferential treatment to class counsel, allocating virtually the entire settlement benefit to the lawyers rather than the class. The district court erred by failing to examine the gross disparity that would have been evident from any attempt to quantify the relief's value based on "economic reality" *Allen*, 787 F.3d at 1224, and added to that error by dismissing additional signs of a lawyer-driven settlement this Court identified in *Bluetooth* as reasons for a district court to exercise greater scrutiny of a settlement.

Settlement approval should be reversed.

Preliminary Statement

Attorneys with the Center for Class Action Fairness, which became part of the non-profit Competitive Enterprise Institute on October 1, 2015, bring Objector Anna St. John's objection and appeal. (St. John is an attorney at the Center.)

The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won more than $100 million for class members. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling Center attorney Theodore H. Frank "the leading critic of abusive class action settlements"); Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising the Center's work); *In re Classmates.com Consol. Litig.*,

No. 09-cv-0045-RAJ, 2012 WL 3854501, at *11 (W.D. Wash. Jun. 15, 2012) (same). This appeal is brought in good faith to protect class members in this and future class actions against unfair and abusive settlements.

Argument

I. Class-action settlements have perverse incentives without rules requiring class counsel to prioritize benefits for class members.

Unlike settlements in other civil litigation, class-action settlements require court approval pursuant to the standards set out in Federal Rule of Civil Procedure 23. The need for this additional layer of review, during which the court acts as a fiduciary of the class, arises from the self-interested incentives inherent in class actions:

> Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of the unnamed class members who by definition are not present during the negotiations. And thus there is always the danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own.

Pampers, 724 F.3d at 715.

As this Court has observed, the potential for conflict in class-action settlements is structural and acute because every dollar reserved to the class is a dollar defendants cannot pay class counsel. "Ordinarily, 'a defendant is interested only in disposing of the total claim asserted against it,' and 'the allocation between the class payment and

the attorneys' fees is of little or no interest to the defense.'" *Bluetooth*, 654 F.3d at 949 (quoting *Staton v. Boeing*, 327 F.3d 938, 964 (9th Cir. 2003)). Thus, while class counsel and defendants have proper incentives to bargain effectively over the *size* of a settlement, similar incentives do not govern their critical decisions about how to *allocate* it between the payments to class members and the fees for class counsel. *Id.*; *see also Pampers*, 724 F.3d at 717.

The dysfunction that can result from these incentives is a problem because class actions often are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with diffuse harm. Our adversary system—and the value of our class actions within it—depends upon unconflicted counsel's zealous advocacy for their clients, especially where those clients are absent class members who do not get to choose their counsel for themselves and may not even know their legal rights are at stake. *Cf. Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1167 (9th Cir. 2013). As a result, rigorous adherence to the safeguards of Rule 23 is necessary to ensure that counsel is not self-dealing at the class's expense. Where, as here, class counsel favor themselves over their clients, a district court has a legal obligation to reject the settlement. *Bluetooth*, 654 F.3d at 948-49; *see also Pearson*, 772 F.3d at 786; *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014).

Various tools enable class counsel to obscure settlement misallocations. The tools function primarily by artificially inflating the settlement's apparent relief. The illusion of a large settlement benefits both class counsel and a defendant: "The more valuable the settlement appears to the judge, the more likely the judge will approve it. And the bigger the settlement, the bigger the fee for class counsel." *See* Howard M.

Erichson, *How to Exaggerate the Size of Your Class Action Settlement*, DAILY JOURNAL (Nov. 8, 2017).[5] Without judicial oversight to weed out such practices, class members are left with disproportionate settlements in which class counsel recovers far more than the 25-percent benchmark set by this Court. *See* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859 (2016).

To illustrate this practice, consider the likelihood of settlement approval if class counsel openly sought approval of a cash settlement of $4,000,000, which paid the lawyers $3,890,000 in fees and paid class members $110,000. Few judges would approve that deal, and it is foreclosed by precedent. *See, e.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (class counsel receiving even 38.9% of settlement benefit is "clearly excessive"); *Bluetooth*, 654 F.3d at 947-49 (disproportionate fee award is a hallmark of an unfair settlement). For the deal to have any chance of court approval, it must be structured to conceal this result. The parties can do so by creating hypothetical class recoveries and difficult-to-calculate "benefits" that ultimately have little value to the class but are cheap for defendants to provide (perhaps because, as here, they have already provided them) and so easy to include in the deal.

The classic example of this is a coupon settlement, where most of the coupons ultimately go unredeemed. *In re HP Inkjet Printer Litig.* ("*HP Inkjet*"), 716 F.3d 1173, 1179 (9th Cir. 2013). But there are other ways to achieve the economically identical result. Injunctive relief also enables class counsel and the defendant to inflate the perceived value of the settlement. Indeed, as Judge Vaughn Walker once described it,

[5] *Available at* https://www.dailyjournal.com/articles/344700-how-to-exaggerate-the-size-of-your-class-action-settlement.

an injunctive-relief settlement "'expert valued' at some fictitious figure" coupled with "arrangements to pay plaintiffs' lawyers their fees" is the "classic manifestation of the class-action agency problem." *In re Oracle Secs. Litig.*, 132 F.R.D. 538, 544 (N.D. Cal. 1990). "The defendants thus get off cheaply, the plaintiffs' (and defendants') lawyers get the only real money that changes hands and the court, which approves the settlement, clears its docket of troublesome litigation." *Id.* at 544-45.The value of injunctive relief is "easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Staton*, 327 F.3d at 974. Defendants benefit from *res judicata* following judicial approval of the settlement and the minimal cost of such relief, while class counsel hopes for approval of a higher fee request. The critical question for a reviewing court is whether the change achieved by the settlement actually benefits class members. Even if commencement of the *litigation* might have spurred a defendant to alter its conduct, that change in conduct is not consideration for the class members' release of claims. If a defendant agrees in the settlement to stop doing something it already stopped or to do something it already does, the contractual consideration to class members for waiving their claims is essentially zero. *See* Erichson, 92 NOTRE DAME L. REV. at 874-76; *Koby*, 846 F.3d at 1080; *Staton*, 327 F.3d at 961; *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.* ("*Subway*"), 869 F.3d 551, 556-57 (7th Cir. 2017).

That's what happened in this case. The injunction is, as a matter of law, meaningless—which makes the hypothetical and unquestionably-abusive $4 million settlement discussed above ***better*** than the settlement here, because there at least the class would have gotten $110,000. Here, all the class got was an injunction requiring

the defendant to add 22 words to a help page that are substantively duplicative of a disclosure made in Facebook's existing Data Policy available to users on the website.

Where settling parties are not prodded to do better, settlements often look a lot like the one here: valueless injunctive relief and attorneys' fees disproportionate to the actual benefit to the class. *E.g., Subway*; *Pampers*. Exacerbating the problems, the Settlement includes a "clear sailing" clause whereby defendant agreed not to challenge the attorneys' fees as well as a "kicker" such that any reduction in the fee award reverts to Facebook rather than the class. ER138-139. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Bluetooth*, 654 F.3d at 949. As in *Subway* and *Bluetooth*, that the fees awarded may be less than lodestar does not exonerate a settlement that puts class counsel ahead of a class receiving worthless relief.

The vitality of the class-action mechanism depends on zealous scrutiny by the judiciary and the application of doctrinal tests that properly align the incentives of class counsel with those of the vulnerable, absent class members whose claims they settle away. The district court's scrutiny failed to meet this standard and, as a result, it overlooked the red flags of settlement unfairness identified by this Court.

II. The district court abused its discretion and erred as a matter of law by assigning value to the duplicative and illusory injunctive relief.

In approving the Settlement, the district court erred by accepting plaintiffs' assertion that the Settlement provides "substantial value" to class members. ER25. In fact, the Settlement provides only one form of injunctive relief: requiring the posting,

for one year, of a 22-word disclosure that the overwhelming majority of class members will never see and that is substantively duplicative of language already available online in the Data Policy. The settling parties provided no evidence that the milquetoast 22-word disclosure buried in the middle of one of Facebook's numerous Help Center pages would be valuable to the class, yet the district court found otherwise. "Cases are better decided on reality than on fiction"; it was error for the district court to exalt a fiction that this disclosure provided the class any marginal value. *Pampers*, 724 F.3d at 721.

In addition, the district court clearly erred by finding substantial value in the form of "declaratory relief and the Data Policy change." ER24. The alleged "declaratory" relief and 2015 change to Facebook's Data Policy are not enforced by injunction at all. The Settlement merely recounts "Acknowledgement regarding the Cessation of Practices," which states that certain link-handling practices ceased in 2012 and July 2014—years before the Settlement was executed. The Settlement includes no provision forbidding Facebook from resuming these practices. The acknowledgements are not even conveyed to the class on Facebook's pages or in any other reasonable manner. The "acknowledgements" are found in the Settlement itself, which was posted temporarily on the sites of class counsel as a parody of notice to the class. The purported declaratory relief provides nothing more than what Facebook provided years ago: acknowledgement that the complained-about practices ceased, mostly before the first complaint was even filed. *See* Dkt. 45 at 5-7. As for the change to the Data Policy, which predates the Settlement by over two years, it too may be

amended or reversed by Facebook at will; the Settlement merely "acknowledges" the 2015 change.

Contrary to the district court's characterization (ER19), mere "acknowledgements" do not constitute declaratory relief because they do not "declare the rights and other legal relations of any interested party." 28 U.S.C. § 2201(a). The Settlement does not stipulate that Facebook's former practices violated any law; in fact, the Settlement expressly says "Facebook denies the allegations in the Second Amended Complaint, denies that it has engaged in any wrongdoing, denies that the Class Representatives' allegations state valid claims." ER127. To the extent the Settlement encapsulates any change in rights among the parties, it permanently waives the claims of absent class members—and such declaratory "relief" is no benefit to those class members.

The "acknowledgements" are no obstacle to Facebook resuming the complained-about practices. Whereas this Court denied defendant's motion to dismiss injunctive relief claims because "plaintiffs have adequately alleged that there is a 'sufficient likelihood' that Facebook could resume the practice," ER241, plaintiffs have secured nothing to prevent the "sufficient likelihood" of such relapse. No injunction attaches to Facebook's representations and acknowledgements, which apply only as of the date of execution. Under the proposed settlement, Facebook may resume all of the complained about practices immediately; the only future-facing relief is the injunction requiring it to post the agreed vague disclosure somewhere in its "Help Center" for one year.

Because the alleged "declaratory" and injunctive relief provides no relief to the class, the district court erred in approving the Settlement as a matter of law. The proponents of a Settlement must bear "the burden of demonstrating that class members would benefit from the settlement's injunctive relief." *Koby*, 846 F.3d at 1079; *Pampers*, 724 F.3d at 719 (compiling authorities). Under Ninth Circuit law, injunctive relief that does not obligate defendant "to do anything it was not already doing" provides no real value to the class. *Koby*, 846 F.3d at 1079. The parties failed to meet their burden of showing the relief was favorably to the contrary here.

The district court purported to distinguish *Koby* in two ways that do not withstand scrutiny. "First, as discussed above, the settlement here provides substantial value to the class. Second, and critically, the class is not giving up anything of real value in exchange for the settlement." ER26. That is, "the class members here (other than the named representatives) do not waive any claims for damages." *Id.* Neither distinction merits approval of the settlement. As discussed further below, this settlement's injunctive relief is strictly worse than in *Koby,* which at least required the defendant to continue refraining from the complained-about conduct for two years. No such requirement exists here: Facebook may do whatever it pleases as long as 22 words are posted in one of the myriad Help Center webpages for 12 months. (And even this requirement is somewhat conditional, as Facebook "may update the disclosures to ensure accuracy with ongoing product changes." ER155.) As for the release, class members should not be compelled to waive *any* claims for "relief" that provides no benefit to them. *See* § II.B. below. No reasonable "compromise" would make a class member worse off than before the settlement.

A. The district court erred in concluding that a recitation of Facebook's pre-Settlement changes in business practices constitutes "substantial value" to the class.

In *Koby*, this Court reversed approval of a settlement like this one, where the district court erroneously assumed value to changed business practices the defendant voluntarily undertook prior to settlement. 846 F.3d at 1080.

In *Koby*, the parties settled an FDCPA class action relating to misleading voicemail messages sent by a debt collection company. 846 F.3d at 1074. The settlement included no cash relief for class members, only a *cy pres* award to a third party and an injunction requiring defendant "ARS to continue using, for a period of two years, the new voicemail message it had already adopted voluntarily back in August 2011." *Id.* at 1075. The defendant in *Koby* changed its practices about two years *after* the suit was filed against it, but this chronology did not make the injunction any more valuable to class members. The injunctive relief was worthless because, among other things, it "d[id] not obligate ARS to do anything it was not already doing." *Id.* at 1080. This Court concluded that the defendant already "took that step for its own business reasons (presumably to avoid further litigation risk), not because of any court- or settlement-imposed obligation." *Id.* For this reason, the defendant was "unlikely to revert back to its old ways regardless of whether the settlement contained the stipulated injunction." *Id.* (citing *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 882 (7th Cir. 2000)).

In terms of relief, the Settlement compares unfavorably to *Koby* in two ways. First, unlike in *Koby*, Facebook changed most business practices, as "acknowledged" by the Settlement, *before the suit was even filed*. In contrast, *Koby*'s injunction required the

cessation of practices that post-dated the complaint but predated settlement. The changes in *Koby* could at least have arguably been precipitated by the lawsuit, unlike Facebook's discontinuance in 2012 of counting links sent in URLs, which is the chief subject of plaintiffs' complaint.

Second, the injunction in *Koby* at least required the defendant to refrain from its former practices for two years. Here, plaintiffs pleaded a "sufficient likelihood" of the practices resuming; the district court declined to dismiss injunctive claims because plaintiffs could have obtained an injunction to prevent relapse. And yet plaintiffs failed to secure even this dubious benefit.

In all respects, the supposed relief no more benefits the class than the *Koby* settlement. The district court erred by holding that the Settlement was valuable simply because the changes occurred "in response to the litigation, rather than a result of the Settlement Agreement per se." ER24. Even if the business practice changes were meaningful at the time, the acknowledgment now is "of no real value" since it "does not obligate [Facebook] to do anything it was not already doing." *Koby*, 846 F.3d at 1080; *see also Hofmann v. Dutch LLC*, No. 3:14-cv-02418-GPC-JLB, 2017 WL 840646, at *7 (S.D. Cal. Mar. 2, 2017) (refusing to credit injunctive relief when the defendant had voluntarily revised its labeling before the settlement); *Polar Int'l Brokerage Corp. v. Reeve,* 187 F.R.D. 108, 114 (S.D.N.Y. 1999) (finding "reassurance" that rights had not been violated to be "virtually worthless").

Illusory and duplicative "relief" simply cannot provide fair consideration for the waiver of class members' claims. Even low-value injunctive claims for which class members are unlikely to file their own actions have litigation value in the class action

context—as evidenced by the fact here that Facebook settled them for about $4 million, of which class counsel took all the value. "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)." *Koby*, 846 F.3d at 1081. *Koby* is not alone; courts routinely hold that voluntary pre-settlement changes, later duplicated in settlement do not count as a compensable class benefit. *Subway*, 869 F.3d at 556-57 (comparing "state of affairs before and after the settlement" to find relief "utterly worthless"); *Pampers*, 724 F.3d at 719; *Staton*, 327 F.3d at 961; *see also In re Hyundai and Kia Fuel Econ. Litig.*, No. 15-56014, -- F.3d --, 2018 WL 505343, at *15 (9th Cir. Jan. 23, 2018). It is only the "*incremental* benefits" that count, not ones that preceded settlement. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002) (emphasis in original).

There are practical reasons for only crediting relief provided by the settlement. If defendants' changes in policy could be credited to a later-agreed Settlement, counsel can freely game the system by agreeing to credit illusory injunctive relief while providing royal treatment for attorneys' fees. This sort of gaming appears to have occurred here, where plaintiffs achieved none of the injunctive relief they sought, but arranged for class counsel to be paid $3.9 million; meanwhile, Facebook got a release of non-monetary claims and an end to the litigation at no additional cost.

B. The district court erred by concluding that the Settlement could be salvaged due to a narrow release of class claims.

The district court compounded its clear factual error with an error of law in asserting that *Koby* effectively stands for the proposition that Rule 23(b)(2) settlements

need not benefit the class. The district court misapplied *Koby* based on this Court's observation that the class in *Koby* "received 'worthless' injunctive relief in exchange for 'g[iving] up their right to assert damages claims against the defendant in any other class action.'" ER26 (quoting *Koby*, 846 F.3d at 1073). According to the district court, even assuming the injunction was worthless "this case would still be unlike Koby because the class is not 'required to give up anything [of value] in return.'" *Id.* (quoting *Koby*, 846 F.3d at 1080).

In the first place, the class is emphatically being asked to give up something of value. If the waiver of class claims were worthless, Facebook would not have agreed to hand over $3.9 million to extinguish them.

To the extent that *Koby* requires weighing relief against the value of claims extinguished, the Settlement still comes up short. None of the complaints filed in this action sought "relief" in the form of a 22-word notice in Facebook's Help Center. The complaint shows what sort of relief plaintiffs actually sought rather than the pretextual relief of the Settlement, so this is a useful guide. For example, in *Bluetooth*, "the value of the injunctive relief is not apparent to us from the face of the complaint, which seeks to recover significant monetary damages for alleged economic injury, nor from the progression of the settlement talks, the last of which occurred after defendants had already voluntarily added new warnings to their websites and product manuals." 654 F.3d at 945 n.8. The discordance between the complaint and the settlement is even more apparent here than in *Bluetooth*.

Comparing the complaints to the 22-word injunction and "acknowledgements" demonstrates that plaintiffs have *not* prevailed on the merits in spite of receiving

nearly $3.9 million in attorneys' fees and costs. Putting aside claims for damages, which the district court refused to certify, the complaint suggests numerous forms of injunctive relief which the Settlement does not provide. Plaintiffs pleaded that any "interception" and "scanning" of messages unneeded for transmission violates the ECPA (ER185-186), yet the settlement agreement implicitly endorses Facebook's continued scanning of links sent through private message. Facebook merely "confirms, *as of the date it has executed this Agreement below*," that Facebook was not using data "from EntShares created from URL attachments sent by users in Facebook Messages for: 1) targeted advertising; 2) sharing personally identifying user information with third parties; 3) use in any public counters in the 'link_stats' and Graph APIs; and 4) displaying lists of URLs representing the most recommended webpages on a particular web site." ER132-133 (emphasis added). Read next to the complaint, this disclosure provides astonishingly little assurance. The representation allows that Facebook continues to analyze shared links "for the current or future objective of accumulating and analyzing user data and thereafter refining user profiles." ER176. Facebook also apparently may still share certain data collected from message URLs with third parties, provided that it is not personally identifiable—otherwise the words "personally identifying" would be unneeded in the above-quoted acknowledgement. Yet plaintiffs specifically complained about the sharing of demographic data with third parties. ER176-177. Thus, the district court clearly erred when it found Settlement benefit based on the class obtaining "essentially all of declaratory and injunctive relief that they sought." ER24. In particular, contrary to the district court, the Settlement emphatically does not assure class members there is "no

ECPA or CIPA violation going forward in light of the disclosure changes adopted by Facebook." *Id.*

And of course, the acknowledgements are just that—acknowledgements as of the date the Settlement was executed (March 1, 2016). For all we know, none of these statements remains true. The class lacks protection from the complained-of practices and has no way of knowing whether they've resumed.

In short, *Koby* is not limited to damages settlements. This conclusion is further bolstered by *Walgreen* and *Subway*, all (b)(2) settlements discussed below, none of which concerned a settlement waiving individual damages claims. (*Pampers* was also a (b)(2) certification with injunctive relief.) So, even if *Koby* requires weighing class claims against relief, the Settlement fails because it provides nothing of value, and certainly not the injunctive relief plaintiffs actually sought.

C. The 22-word disclaimer provides no marginal value to class members.

Only one provision of the Settlement requires Facebook to do something it was not already doing: the requirement that Facebook post these 22 words on a page in its Help Center:

> We use tools to identify and store links shared in messages, including a count of the number of times links are shared.

ER133.

The district court erred as a matter of law in failing to apply *Pampers* and *Walgreen*, in view of *Koby*, which show that disclosures cannot justify waiver of the class's injunctive claims unless they actually provide value to the class. The district court attempted to distinguish *Koby* as concerning only (b)(3) settlements that waive

damages claims, but *Pampers*, *Walgreen*, and a new case—*Subway*—each demonstrate that relief to class members is required for *all* settlements that waive the rights of absent class members. *See Koby*, 846 F.3d at 1079 (citing *Pampers* for the proposition that "the named plaintiffs bore the burden of demonstrating that class members would benefit from the settlement's injunctive relief"); *Pampers*, 724 F.3d at 716 (class certified under only Rule 23(b)(2)); *Subway*, 869 F.3d at 554 (same). Each of *Pampers*, *Walgreen*, and *Subway* involved (b)(2) settlements with limited injunctive releases, but each appellate court scrutinized ***whether the disclosures were actually beneficial to class members*** and overturned erroneous district court orders finding such benefit. In these three cases, as here, the answer was clear: no, the disclosures are not beneficial. Each district court had committed reversible error by failing to accurately answer the question.

The proposed injunction is much less substantial than the ones found to be lacking in *Pampers*. As here, the settlement in *Pampers* required revisions to defendants' website (except for *two* years), and it further required label changes and the resumption of a refund program that had been voluntarily offered by the defendant. *Pampers*, 724 F.3d at 716. Under Rule 23(b)(2), the settlement preserved class members' individual damages claims. *Id.* However, the court observed that "'courts must be particularly vigilant' for 'subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.'" *Id.* at 718 (quoting *Dennis*, 697 F.3d at 864). In *Pampers*, given the meaningless relief and $2.73 million in attorneys' fees, "[t]he signs [were] not particularly subtle." *Id.* The signs are even less subtle here, where plaintiffs secured

only 22 words on a website as purported justification for nearly $3.9 million in fees and expenses. Even if the fees were reduced by 95%, the settlement would still be too lopsided to approve. *See Koby*, 846 F.3d 1071 ($67,500 : $0 ratio untenable); *Crawford*, 201 F.3d at 882 ($78,000 : $0 ratio unsupportable). "The issue, again, is whether the value of these changes is so great, for unnamed class members, as to render counsel's $2.73 million fee reasonable rather than preferential in light of it." *Pampers*, 724 F.3d at 719.

The Settlement resembles both *Pampers* and *Koby* because class members are not the primary beneficiaries of the purported relief. In *Pampers*, the parties argued that past customers would benefit from new disclosures, and in *Koby*, the parties argued that a class would benefit from the modification of collection practices by the defendant, but in each case the proposed injunction provided no unique benefit to the class. As here, the injunctions in *Pampers* and *Koby* applied to all *future* customers and debtors respectively, whether or not they were class members, which was "an obvious mismatch between the injunctive relief provided and the definition of the proposed class." *Koby*, 846 at 1079.

Precisely such a mismatch exists here. The class includes past Facebook users, but the only conceivable beneficiaries are *future* users. Under the proposed settlement, all Americans with an internet connection receive the same dubious relief—a statement buried in Facebook's Help Center. Even if this were valuable, and even if class counsel was not the primary beneficiary of the agreement, this "relief" is conferred on *all* future users, regardless of class membership. "The fairness of the settlement must be evaluated primarily based on how it *compensates class members*—not

on whether it provides relief to other people, much less on whether it interferes with the defendant's marketing plans." *Pampers*, 724 F.3d at 720 (cleaned up). "[F]uture purchasers are not members of the class, defined as it is as consumers who have purchased [the product]." *Pearson*, 772 F.3d at 786. "No changes to future advertising by [the defendant] will benefit those who already were misled by [the defendant]'s representations." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010).

Likewise, *Walgreen* stands for the proposition that whenever injunctive relief "may be largely or even entirely worthless" then "even a modest award of attorneys' fees … is excessive." 832 F.3d at 721. *Walgreen* concerned a PSLRA strike suit filed against a merging company over allegedly deficient disclosures filed with the SEC. The parties resolved the suit with defendants agreeing to provide six new disclosures totaling "fewer than 800 new words." *Id.* at 722. Although the amount of attorneys' fees sought for this purported relief was merely $370,000, the Seventh Circuit reviewed each of the six disclosures and found that none were beneficial. *Id.* at 722-23. "In deciding whether to approve a class settlement, a court must consider whether the agreement benefits class members." *Id.* at 723. Given that 97 percent of shareholders voted in favor of the merger, the court found it "inconceivable that the six disclosures added by the settlement agreement either reduced support for the merger by frightening the shareholders or increased that support by giving the shareholders a sense that now they knew everything." *Id.* at 723.

The benefit is even less conceivable here, where Facebook provided testimony that perhaps 740,000 people will navigate to the Help Center page over the year when

it must be displayed. ER51. With a class numbering in the millions, only a tiny portion of the class will ever navigate to the page where the message is displayed, and even fewer will read the 22 words which will constitute only part of an existing page.

Had the district court recognized that the 22-word disclosure was the only injunctive relief, it could have only concluded the injunction is worthless. Any reasonable class member could infer that Facebook uses "tools to identify and store links shared in messages," since this is necessary for the site to generate a preview of the link. As for the statement that Facebook stores "a count of the number of times links are shared," this is merely a subset of all user data, which Facebook's Data Use Policy expressly states is retained. The 22-word disclosure merely adds a specific example of Facebook's practices already disclosed to users in its Data Use Policy. Since 2015, the Data Use Policy advises all class members that Facebook "**collect[s] the content** and other information you provide **when you use our Services, including when you . . . message or communicate with others**." ER54 (emphasis added). And this disclosure only incrementally added to Facebook's policy as it existed before plaintiffs filed their first complaint: "We receive data about you whenever you use or are running Facebook, such as when you . . . send or receive a message . . ." Dkt. 1 at 20.

The district court further purports to distinguish *Pampers* and *Walgreen* as being settled early in the course of litigation, and *Pampers* as having been reversed in part for excessive fees, but neither precedent suggests there should be a litigation time limit on evaluating benefits to absent class members. Such a rule would cause perverse outcomes, as counsel would be encouraged to grind away at meritless litigation in

order to seek approval of a settlement that provides meaningless disclosures for the class and hefty attorneys' fees for counsel.

Nor is the supposed distinction regarding counsel's work and effort even correct with respect to *Pampers*. There the district court's unchallenged conclusion that a $2.73 million fee was "less than what the lodestar calculation would reflect, and [would] properly compensate[] class counsel for extraordinary work" could not justify a settlement where the fee was not "commensurate" with class relief. *Compare* Transcript of Fairness Hearing, No. 10-cv-301 (S.D. Ohio.), Dkt. 76, at 35, *with Pampers*, 724 F.3d at 720-21. Similarly, in *Subway*, an opinion issued after the district court's order, and, unlike this settlement, the *Subway* settlement required adherence to specific business practices in addition to providing disclosure. 869 F.3d at 554. These changes were to remain in effect for *four* years and defendant agreed to provide $520,000 in attorneys' fees—which was well below plaintiffs' $1.125 million lodestar. *See In re Subway Footlong Sandwich Mktg. and Sales Practices Litig.*, 316 F.R.D. 240, 253 (E.D. Wis. 2016). Like *Pampers* and *Walgreen*, the settlement in *Subway* was much more robust than the one at issue and involved much more modest attorneys' fees, but approval of it was reversed because it was "utterly worthless" to the class: even with those changes, a class member would receive the same volume of food and had the same likelihood of receiving a sandwich baked to the full 12 inches as before the settlement, with consumers already knowing "as a matter of common sense" that bread length can vary as a result of the baking process. *Id.* at 556-57. The same conclusion applies here.

The district court contradicted *Koby*'s prohibition on assigning value to worthless injunctive relief. *Koby*, *Pampers*, *Walgreen*, and *Subway* are not limited to Rule 23(b)(3) settlements, nor settlements filed early in the litigations, nor settlements seeking fees in excess of lodestar. The proponents of *any* class action settlement must show that "members of the proposed class would derive a benefit from obtaining the injunctive relief afforded by the settlement." *Koby*, 846 F.3d at 1080; *see also In re Hyundai and Kia Fuel Econ. Litig.*, No. 15-56014, -- F.3d --, 2018 WL 505343, at *15 (9th Cir. Jan. 23, 2018) (error not to calculate the value of settlement).

The parties did nothing of the sort. Regarding the "acknowledgements," the Settlement merely recites Facebook's past actions—the most significant ones having occurred before the suit was even filed—and nothing more is required of Facebook except to post a 22-word notice for one year. The district court did not articulate any reason that class members benefit from posting 22 words in the Facebook Help Center, and the parties bore the burden of showing such benefit. Even if it were valuable, it provides no particular relief to the class of past Facebook users, so cannot possibly justify nearly $3.9 million in fees and expenses.

III. Preferential treatment to class counsel renders the settlement unfair.

The district court approved a settlement in which class counsel negotiated nearly $4 million for themselves and some "acknowledgements" and an injunction that are virtually worthless for all of the reasons detailed above. The Settlement should have been rejected under *Koby* because the relief is valueless as a matter of law. But even if one assumed the 22-word injunctive relief might have *some* value, the

district court committed reversible legal error by approving a settlement that overwhelmingly favors class counsel over the class. In doing so, the court deviated from Circuit law by failing to ascertain the specific value of the injunctive relief and disregarding other signals of a lawyer-driven deal.

Because of the diverging interests of the class and counsel described in section I, this Court requires that relief be proportional to attorneys' fees. A class action settlement that is designed to make class counsel the primary beneficiary—and where class counsel *is* the primary beneficiary, as here, is *per se* unfair under Rule 23(e). *See Allen*, 787 F.3d at 1224 n.4 (9th Cir. 2015) (zeroing in on the "economic reality" of payment to the class); *Pampers*, 724 F.3d at 718 ("settlement that gives preferential treatment to class counsel" is impermissible). Class counsel is entitled to fees only in proportion to the actual relief created by the settlement. *See Reynolds*, 288 F.3d at 286 ("class counsel's compensation must be proportioned to the *incremental* benefits they confer on the class, not the total benefits") (emphasis in original).

The parties can use a number of tools to obscure disproportional results from the court. To help root out such abusive settlements, Circuit law "require[s] district courts to look for 'subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations.'" *Allen*, 787 F.3d at 1224 (quoting *Bluetooth*, 654 F.3d at 947). "The rule 23(e) reasonableness inquiry is designed precisely to capture instances of unfairness not apparent on the face of the negotiations." *Bluetooth*, 654 F.3d at 948.

Here, the warnings signs followed the familiar path beaten by the settlement in *Bluetooth*. Specifically, (1) the fee award, when compared to the benefit to the class

judged in terms of "economic reality," shows disproportionately preferential treatment for the attorneys; (2) Facebook agreed not to oppose a fee request that does not exceed $3.89 million (clear sailing); and (3) any reduction from the $3.89 million by the court will go to Facebook rather than the class (a kicker). Even beyond what *Bluetooth* identified, there was what this Court should consider to be a fourth red flag: The parties did not want to provide any notice of the Settlement to the class and ultimately gave notice only by posting settlement documents on the law firm websites. No notice was provided on the Facebook platform, despite a class comprised of Facebook users. When such indicia of a lawyer-driven deal are present, a district court "ha[s] a special obligation to assure itself that the fees awarded in the agreement were not unreasonably high." *Bluetooth*, 654 F.3d at 947 (internal quotation marks omitted).[6]

Rather than scrutinize the settlement terms, however, the district court dismissed the applicability of the clear sailing and kicker in a (b)(2) settlement and failed to make any findings regarding the proportionality of settlement benefit. The district court instead assumed the supposedly vindicated privacy interests of the class provided them unquantified value and further cited the sub-lodestar fee request, which was based on inadequate billing records and, in any event, never justifies self-dealing of settlement benefit. Under the correct analysis, the Settlement falls short of

[6] These signs do not signal—and St. John does not and need not allege—explicit collusion; there need only be acquiescence for such self-dealing to occur: "a defendant is interested only in disposing of the total claim asserted against it" and "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Bluetooth*, 654 F.3d at 949 (quoting *Staton*, 327 F.3d at 964).

the Rule 23(e) fairness requirement because class counsel allocated nearly the entire benefit to themselves. Settlement approval should be reversed.

A. Even if the Settlement's injunctive relief would provide a trifle of value, it is not commensurate with the almost $4 million allotted for attorneys' fees.

The allocation of settlement benefit must be assessed using "economic reality." *Allen*, 787 F.3d at 1224. Particularly where the relief is not a monetary fund, the district court must scrutinize the *actual* value of that relief to ensure the settlement does not unfairly favor class counsel in violation of Rule 23(e). *See* Notes of Advisory Committee on 2003 Amendments to Rule 23 ("fundamental focus is the result *actually achieved* for class members" (emphasis added); *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) (court must examine the ratio of (i) the fee to (ii) the fee plus what the class actually received)). "Because the district court could not compare the fees award to the settlement value without considering these questions and determining the actual settlement value, it failed 'to assure itself—and us—that the amount awarded was not unreasonably excessive in light of the results achieved.'" *See In re Hyundai and Kia Fuel Econ. Litig.*, No. 15-56014, --- F.3d ----, 2018 WL 505343, at *15 (9th Cir. Jan. 23, 2018) (quoting *Bluetooth*, 654 F.3d at 943).

Courts appropriately exercise skepticism concerning the value of injunctive relief in class-action settlements. *E.g., In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 803 (3d Cir. 1995) ("[N]on-cash relief…is recognized as a prime indicator of suspect settlements."). Here, however, the district court failed to quantify the injunctive relief, but only speculated that the relief provided "substantial value"

based on Facebook's acknowledgment that it had ceased complained-of practices long before the Settlement or, in many cases, the litigation itself.

A proportionate attorneys' fee award is roughly 25% of the settlement value. An award that vastly exceeds this benchmark is disproportionate and renders the settlement unfair. *E.g.*, *Bluetooth*, 654 F.3d at 945 (vacating approval where fees amounted to more than 83% of the constructive common fund); *Pampers*, 724 F.3d 713 (vacating settlement where fees cannibalized $2.7 million of the $3.1 million constructive common fund value); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"). Thus, for the Settlement to justify the nearly $4 million allocated for attorneys' fees, the benefit to the class would have to be valued at more than $15.5 million. The burden of proving that settlement value lies with the proponents of the settlement. *See Koby*, 846 F.3d at 1079.

As a matter of law, the declaratory and injunctive relief provided by this Settlement is not worth anywhere near the $15.5 million required to make the allocation fair. Nor did the district court find such: The court did not calculate any specific value at all, nor did it scrutinize what *actual* relief the class would receive. Instead, the district court noted without record support that "the privacy interests of the class vindicated by the settlement and through this litigation are substantial," and stated that "it is difficult to put a dollar figure on their value" in order to make the fee comparison required by *Bluetooth*. ER25.

A proper legal analysis would have led to the inexorable conclusion that the settlement value is *de minimis*. Section II details the myriad ways in which the relief fails to provide any discernible value to the class. In short, none of the voluntary, pre-

settlement changes that were later noted in the Settlement—that is, all of the "acknowledgements" and the 2015 change to the Data Use Policy—counts as a compensable class benefit. *Subway*, 869 F.3d at 556-57 (comparing "state of affairs before and after the settlement" to find relief "utterly worthless"); *Pampers*, 724 F.3d at 719; *Staton*, 327 F.3d at 961. Further codification of that relief in a settlement injunction is "of no real value" since it "does not obligate [the defendant] to do anything it was not already doing." *Koby*, 846 F.3d at 1080. The only relief that is not duplicative of action Facebook had already taken (or stopped) is the 22-word disclosure that Facebook is required to display in its Help Center for one year. But it, too, is duplicative because it materially overlaps with a disclosure in already the 2015 Data Use Policy. The value of this change cannot render counsel's $3.89 million fee award reasonable rather than preferential. *See Pampers*, 724 F.3d at 719.

B. A below-lodestar fee request does not justify a lopsided allocation.

The district court acknowledged that the relief was disproportionate. ER25. But the rationales the court gave for approving the settlement are both erroneous as a matter of law.

First, the district court suggested that the disproportion was because of "a function of this court's decision to certify only an injunctive relief class, combined with the fee-shifting provisions of ECPA." *Id.* But nothing in the ECPA calls for disproportionate fee shifting of a *settlement* where class counsel has compromised the class's injunctive-relief claims and, as discussed above in Section II.B, there is no assurance to the class that there will be no ECPA violations going forward. Moreover,

that class counsel was unable to certify a Rule 23(b)(3) class is perhaps a reason for the *total* relief to the class to be small, but no reason for class counsel to obtain a disproportionate share of the relief for itself. The district court's reasoning creates a perverse incentive whereby class counsel can be rewarded more for bringing relatively meritless class actions than meritorious ones, because the lack of merit relieves them of their fiduciary obligation to avoid self-dealing.

Second, the district court further found the settlement was fair, in part, because "the significant lodestar discount" of approximately 50 percent accepted by class counsel "mitigates any disproportionality." ER25-26. In making this finding, the district court accepted the lodestar at face value, despite acknowledging that the court "usually requires more detailed billing records to support a lodestar application" than what class counsel provided. ER28. But this is also incorrect as a matter of law.

A lodestar discount cannot make a settlement fair when the attorneys take a disproportionate share of the settlement relief for themselves. Ninth Circuit precedent requires the district court to analyze a settlement's disproportion no matter which methodology a court uses to determine a reasonable amount of attorneys' fees. This requirement is meant to address the risk that "some class counsel may urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *HP Inkjet*, 716 F.3d at 1178. That risk is present, and disproportion can exist, regardless of how fees are calculated.

Bluetooth is directly on point. That case *also* involved a settlement that provided $0 and injunctive relief to the class and *also* involved sub-lodestar attorneys' fees with clear sailing. Even after the district court's scrutiny of class counsel's billing records

resulted in a nearly 50% reduction of the lodestar, the court had not done enough to "assure itself—and [the Ninth Circuit]—that the amount awarded was not unreasonably excessive in light of the results achieved." 654 F.3d at 943. The district court still needed to compare the fee award with both the value of the benefit to the class and a "reasonable percentage award." *Id.*

Here, the district court skipped a critical step in the analysis. The district court expressly stated that "it is difficult to put a figure on the[] value [of the injunctive relief] and compare them to the attorneys' fees sought." ER25. The closest the court got to comparing the attorneys' fees with the value of the benefit to the class was its assessment that the "privacy interests of the class vindicated by the settlement and through this litigation are substantial." *Id.* Such a vague conclusion is inadequate when the plaintiffs settled for less than the full measure of injunctive relief they sought.

Without conducting a proper analysis, the district court cannot rely on the "strong presumption that a lodestar figure represents a reasonable fee," as such presumption generally applies only after a court has found the settlement fair or that a benefit has been conferred. In *Rodriguez v. West Publishing Corp.*, 602 Fed. Appx. 385, 387 (9th Cir. 2015), which the district court quoted for that proposition, the Ninth Circuit previously had found the objecting class members' attorneys had conferred a benefit on the class and instructed the district court to calculate the appropriate amount of attorneys' fees "in light of th[at] benefit." *Rodriguez v. Disner*, 688 F.3d 645, 659-60 (9th Cir. 2012). The district court awarded fees based on a fractional lodestar, rather than the higher amount the attorneys sought based on a percentage-of-the-benefit calculation. It was only on appeal again, after remand for a determination of

the appropriate amount of fees, that the Court echoed the Supreme Court's guidance in *Kenny A. v. Perdue*, 559 U.S. 542, 546 (2010), regarding "the strong presumption."[7]

The benefit conferred on the class is a precondition and the guiding light for fees awarded by any method. It is always the case that a district court must "consider[] the relationship between the amount of the fee awarded and the results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (superseded on other grounds). This analysis is necessary because "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *HP Inkjet*, 716 F.3d at 1182; *see also Redman*, 768 F.3d at 633, 635 ("the reasonableness of a fee cannot be assessed in isolation from what it buys"; "hours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel").

If a multi-million fee award were justified because it is below lodestar, no matter how little the class received, it would be reasonable for class counsel to negotiate a settlement where the class receives a single peppercorn—much like the 22-word substantively duplicative disclosure here—as consideration for the class's

[7] Furthermore, under fee shifting statutes like 42 U.S.C. § 1988, attorneys' fees are awarded only to a "prevailing party" (*Kenny A.*, 559 U.S. at 550), which requires "plaintiff must obtain at least some relief on the merits of his claim." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). As explained in Section II, plaintiffs have not done this, so would not qualify as prevailing parties for the purpose of fee shifting, assuming that fee shifting under California's private attorney general statute is ever permissible to override the restrictions of Rule 23 in a nationwide class action, which is doubtful. *See Shady Grove Orthopedic Associates v. Allstate Ins.*, 559 U.S. 393 (2010); *In re Hyundai and Kia Fuel Econ. Litig.*, No. 15-56014, -- F.3d --, 2018 WL 505343, at *14 (9th Cir. Jan. 23, 2018).

release. Such a rule creates a perverse incentive to bring low-merit cases where the risk of litigation will makes it easy to justify a settlement that does not pay the class much while class counsel gets millions of dollars. Recognizing this reality, the Ninth Circuit, along with numerous other courts, "aim to tether the value of an attorneys' fees award to the value of class recovery." *HP Inkjet*, 716 F.3d at 1179. That means that a sub-lodestar fee award cannot make a settlement fair when the result would still be disproportionate. *Id.* at 1177 (lodestar multiplier of 0.32 does not justify disproportionate results); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 n.14 (3d Cir. 2013) (lodestar multiplier of 0.37 not "outcome determinative"); *Bluetooth*, 654 F.3d at 943 (reversing settlement approval notwithstanding district court's finding that the lodestar "substantially exceed[ed]" the fee requested and awarded).

C. Clear-sailing and a kicker cannot be excused by the lack of a common fund nor mitigated by a (b)(2) class certification.

The Settlement contained both clear sailing, with Facebook agreeing to pay up to $3.89 million in attorneys' fees, and a kicker, such that Facebook rather than the class keeps any difference between that amount and the fees awarded by the court. Settlement ¶ 57. These provisions act as "warning signs" of an increased "likelihood … that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of … less injunctive relief for the class than could otherwise have been obtained." *Bluetooth*, 654 F.3d at 947 (cleaned up). But the district court dismissed the relevance of these signs as "inapplicable to this case because there is no common fund, 'constructive' or otherwise." ER25.

Bluetooth was express on this point: "***Whether or not we view this as a common-fund case***, … the district court needed to do more to assure itself—and [the Ninth Circuit]—that the amount awarded was not unreasonably excessive in light of the results achieved" due to the inclusion of clear sailing, a kicker, and disproportionate allocation of benefit. 654 F.3d at 943, 947 (emphasis added); *id.* at 949 (district court "must ensure that both the amount and mode of payment of attorneys' fees are fair, regardless of whether the attorneys' fees come from a common fund or are otherwise paid" (internal quotation marks omitted)). The specific structure of a settlement is irrelevant because conflicts of interest are pervasive: A defendant can bargain with attorneys' fees to "induce class counsel to accept a settlement proposal that does not provide adequate relief for the class, regardless of whether the settlement provides for injunctive relief or monetary damages." *Padro v. Astrue*, No. 11-CV-1788, 2013 WL 5719076, at *9 (E.D.N.Y. Oct. 18, 2013). Clear sailing and a kicker are problematic because they benefit only class counsel and, in the case of a kicker, affirmatively make the class worse off. They are signs that class counsel is prioritizing its own benefit over that of the class—and that is true no matter whether there is a common fund. Because the district court failed to scrutinize the Settlement more closely to determine "why the parties negotiated such a disproportionate distribution between fees and relief," *Bluetooth*, 654 F.3d at 947-48, its conclusion that the disparity was legally acceptable is in error. ER25-26.

In response, plaintiffs may point to the district court's finding that the class "obtained essentially all of the declaratory and injunctive relief that they sought" through the work of class counsel. ER24. This simply is not true; there was other

relief sought that could have been offered in the settlement negotiation. As one example, in the same order, the court acknowledged that "much of the relief" was not the result of the Settlement, but rather, Facebook changed its business practices in response to this litigation. *Id.*. Implicit in this acknowledgement, and indisputable on the record, is that class counsel failed to secure an injunction requiring Facebook to maintain those changes going forward. There are other forms of injunctive relief suggested in the complaint that the Settlement also fails to provide. *See* Section II. The district court's premise is clearly erroneous.

That this settlement class was certified under Rule 23(b)(2) likewise fails to excuse the lack of scrutiny by the district court in the face of *Bluetooth*'s warning signs. Class counsel may argue that clear sailing and kickers are irrelevant to fairness in a (b)(2) settlement because class members do not stand to benefit from any fee reduction. The issue, however, is the Rule 23(e) fairness of the settlement. If settlement approval is overturned, class members may benefit from a new settlement in which Facebook uses some portion of what it earmarked for fees to provide additional injunctive relief. *See Pampers*, 724 F.3d at 718 (in (b)(2) settlement, unreasonably high fees may signal class counsel traded those fees for less injunctive relief for the class). The possibility of such reallocation is rooted in defendants' recognized indifference to how their expenditure on a class action is allocated—an indifference that exists regardless of whether a class is certified under (b)(2) or (b)(3). Even without an improved settlement, class members benefit by not trading their injunctive-relief claims for nothing more than fees for their attorneys. *See Subway*, 869 F.3d at 555.

D. The deficient notice indicates a disregard for the class's interests.

Another indication that class counsel put their own interests ahead of those of absent class members is the deficient notice provided to the class. By definition, this is a settlement class of Facebook users. The defendant, Facebook, not only possesses the contact information of every class member; it also can send messages and display ads and messages to every one of its users. Facebook handles 60 *billion* messages every day at no cost to users. ER64.

The district court found that "Tellingly, only a single class member has objected to the Settlement." ER23. Aside from the fact that it is "naïve" to infer support from a settlement from a low number of objections, given the burden to class members of objecting, *Redman*, 768 F.3d at 628, this fact tells us little indeed when class members had no reasonable way to know that their rights were being waived. The only public notice of the settlement was the posting of settlement-related documents—not on Facebook—but on law firm websites that class members had no reason to visit. ER119. The district court required this notice after the settling parties originally proposed no notice whatsoever. ER138. Tellingly, the district court rejected St. John's due process-based objection to the notice on the grounds that "the only thing at stake for the absent class members is their right to sue for an injunction against practices that have already ceased." ER28. The paltry nature of the relief for class members, combined with the nearly $4 million that Facebook was willing to pay to end the lawsuit, underscores why class members should have received reasonable notice: More class members might have objected to the disproportionate allocation of the settlement package had they been aware of it. Under the circumstances, it's

miraculous *anyone* found out about the manifestly objectionable Settlement, which trades class members' claims for no specific benefit to them.[8]

This is, in fact, one of the purposes of the notice requirement. Class members have a due process right to "reasonable" notice. Fed. R. Civ. P. 23(e)(1), 23(h)(1); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). That notice must be sufficient to "apprise interested parties of the pendency of the action" such that they are afforded "an opportunity to present their objections." *Mullane*, 339 U.S. at 314. At best, settlement websites—in this case merely webpages on class counsel's websites—are a "useful supplement," but cannot replace direct or publication notice as the pillar of a notice program. Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION § 21.311 (4th ed.).

The district court elided this issue in final approval, finding that "[i]ndividual direct notice would carry substantial costs in light of ascertainability issues, and, importantly, the court was persuaded that such notice would create serious risks of confusion for the class members." ER28. In the first place, individual notice need not have been used; reasonable notice might include advertising. For example, Facebook itself is often used as a medium to advertise notice in class actions where class members are not Facebook users by definition. *See* ER84. Nor would individual notice to Facebook users be unduly confusing. Approved notice frequently says "you may be

[8] Even though St. John works for a non-profit that objects to unfair class action settlements and has colleagues who monitor news, Facebook, Twitter, and Westlaw for class action settlements, she learned of her class membership only because of a colleague's freedom of information request to a state attorney general's office.

a member of a class action settlement." Reasonable notice simply requires *some* form of notice so that class members can learn they might be part of a class action settlement without reading the minds of attorneys they do not even know have been appointed to represent them.

The district court adopted the parties' rationale that publication notice would create "confusion" (i.e. some non-class members would see the advertising). ER28. Overinclusiveness is a natural outcome in virtually any publication notice plan; it is not an acceptable reason to eschew notice. Fearing that members of the public who read click on the banner ad may be confused is simply another instantiation of the settling parties "denigrat[ing] the intelligence of ordinary consumers (and thus of the unnamed class members." *Pampers*, 724 F.3d at 720.

Whatever the specific contours of a due process-compliant notice program for a (b)(2) class, there is no debate that the only public-facing notice provided by class counsel here was the posting of documents on law firm websites. But class counsel and the district court had a "fiduciary obligation" to class, which entails the duty to provide reasonable notice. *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 995 (9th Cir. 2010). Simply put, reasonable notice in a class action settlement involving Facebook users is at least *on Facebook*.

The failure to provide reasonable notice, particularly when combined with the other indicators of self-dealing, leads one to an observation once made by another district court: "If plaintiffs and their attorneys are acting like they have something to hide from the absent class members, perhaps it's because they do." *Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 408 (W.D.N.Y. 2013).

Conclusion

Settlement approval should be reversed.

Dated: January 25, 2018

Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank
Anna St. John
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street NW, 7th Floor
Washington, DC 20005
Telephone: (573) 823-5377
Email: ted.frank@cei.org

Attorneys for Appellant Anna St. John

Statement of Related Cases
Under Circuit Rule 28-2.6

Kumar v. Salov North America Corp., No. 16-16405, raises the similar issue of the requirement of the district court to ascertain the value of the purported injunctive relief when evaluating a class action settlement for approval.

January 25, 2018 *s/Theodore H. Frank*
Theodore H. Frank

Certificate of Compliance
Pursuant to 9th Circuit Rule 32-1 for Case Number 17-16873

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,955 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on January 25, 2018.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on January 25, 2018, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/ Theodore H. Frank
Theodore H. Frank