No. 17-56745, No. 17-56746

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OMAR VARGAS, et al.,
Plaintiffs-Appellees,

v.

BRENDA LOTT, et al.,
Objectors-Appellants,

v.

FORD MOTOR COMPANY,
Defendant-Appellee.

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

REPLY BRIEF FOR OBJECTORS-APPELLANTS LOTT, ET AL.

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INTRODUCTION

As explained in the Lott Objectors' opening brief, the settling parties failed to present the district court with sufficient evidence to determine whether the proposed settlement is fair, reasonable, and adequate as required by Federal Rule of Civil Procedure 23(e). Lacking the information needed to determine whether the agreement is a reasonable compromise in relation to the possible risks and benefits of continued litigation, the district court erred in approving the settlement. Moreover, what little information was provided indicates that the settlement is not fair, reasonable, and adequate. Further, large subclasses are disadvantaged by the settlement relative to other portions of the class. Those subclasses should have had separate representation to ensure that their interests were not sacrificed for those of other class members. Finally, the district court erred by failing to subject the settlement to a higher level of scrutiny based on the presence of all three factors this Court has identified as warning signs that class counsel may have allowed pursuit of their own self-interests to infect the negotiations. For all these reasons, the Court should vacate the final approval of the settlement and remand the case for further proceedings.

ARGUMENT

I. The District Court Erred by Failing to Determine Whether the Settlement Reflects a Reasonable Compromise in Relation to the Possible Risks and Benefits of Continued Litigation.

In their opening brief, the Lott Objectors quoted the non-exhaustive list of factors set forth in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), that a district court may consider in assessing whether the settling parties have met their burden of demonstrating that the settlement terms are fair, reasonable, and adequate for the absent class members who are to be bound by the settlement. Lott Br. 19–20. The essence of the inquiry is whether the settlement reflects a reasonable compromise in light of the prospects of further litigation.[1] Evaluating the adequacy of a settlement necessarily requires consideration not only of the risks of going forward, but also of the potential benefits—that is, consideration of the strengths of the case and the amount of damages the class would recover if it succeeded on its claims. *See, e.g.*, *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1070 (C.D. Cal. 2010) (stating that the court must determine whether the "settlement is reasonable in relation to the value of the claims surrendered"). The

[1] Plaintiffs inexplicably claim that the Lott Objectors do not acknowledge the key *Hanlon* factors that require the district court to evaluate the settlement by weighing the strength of plaintiffs' case against the risks of further litigation. Pl. Br. 32; *see also id.* at 36 (claiming that the Lott Objectors "ignored the *Hanlon* factors"). To the contrary, the Lott Objectors have trained their focus on the *Hanlon* factors that call for the district court to compare the value of the settlement to the risks and benefits of further litigation.

reviewing court must also consider the fairness of the distribution of any benefits among the class members.

In their answering briefs, the settling parties focus exclusively on the claimed weaknesses of Plaintiffs' case and assert that a reviewing court need not consider the potential benefit to the class if the case were litigated to a successful conclusion. Plaintiffs also argue that the district court may assume a 100 percent claims rate when determining the value of a settlement, and both settling parties claim that the court need not consider the fairness of the distribution among the class so long as the class members received notice and an opportunity to opt out. As explained below, none of these arguments are correct.

A. The district court could not determine whether the settlement was a reasonable compromise because the settling parties failed to estimate the benefit to the class if the litigation was successful.

The settling parties assert that a court reviewing a proposed class action settlement need not consider the value of the potential recovery if the litigation is successful. *See* Ford Br. 12–14; Pl. Br. 45. Both of the settling parties rely on *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012), but the decision in *Lane* does not go nearly that far. In *Lane*, this Court noted that "a district court must of course assess the plaintiffs' claims in determining the strength of their case relative to the risks of continued litigation," but found that the district court was not required to find a "specific monetary value" corresponding to each of the plaintiffs' five statutory

causes of action. 696 F.3d at 823. The Court concluded that "[t]he district court acted properly in evaluating the strength of the plaintiffs' *case* in its entirety rather than on a claim-by-claim basis." *Id.* Despite the settling parties' claims to the contrary, the Lott Objectors have never asserted that the district court is required to follow a "rigid mathematical formula" or "precisely" calculate the "specific" amount of money that successful litigation would yield for the class on each of the eighteen causes of action set forth in the operative complaint. *See* Pl. Br. 22; Ford Br. 12. Rather, the Lott Objectors have simply explained that because the value of the settlement must be assessed *in relation to* the risk and benefits of further litigation, the district court is necessarily required to consider the range of damages that would be available if the class prevailed. Here, the settling parties refused to present the district court with *any* information about the value of the claims, if successful, making it impossible for the district court to assess the adequacy of the settlement.

As noted in the opening brief, the Seventh Circuit has held that a district court should estimate "the likely outcome of a trial … in order to evaluate the adequacy of the settlement." *Eubank v. Pella Corp.*, 753 F.3d 718, 727 (7th Cir. 2014). According to Plaintiffs, this Court rejected that requirement in *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009), Pl. Br. 45–46. In fact, however, the district court in *Rodriguez* did compare the settlement amount to the

amount of damages estimated by the class expert. 563 F.3d at 964. The issue in *Rodriguez* was whether "it was legal error for the court to consider only estimates of *single* damages without considering the *treble* damages" that might have been available. *Id.* This Court found that the district court could have used estimated treble damages if the strength of the case warranted it, but that the court was not required to do so in all cases. *Id.* at 964–65. Thus, Plaintiffs are wrong to suggest that this Court has held that a district court need not consider the amount of damages when determining a reasonable settlement value. Rather, this Court has recognized that district courts will "arrive at a reasonable range for settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value." *Id.* Here, the district court could not consider the potential recovery because the settling parties refused to provide a damages estimate. *See In re Baby Products Antitrust Litigation*, 708 F.3d 163, 175 (3rd Cir. 2013) (vacating district court's approval of settlement "because it did not have the factual basis necessary to determine whether the settlement was fair").

B. The settling parties err by focusing solely on Plaintiffs' litigation risk, even though the claims have substantial value and the risk to Ford is high.

Although a court reviewing a proposed settlement must consider the risks and benefits of further litigation, the briefs' of the settling parties address only the

risks. Ford spends much of its brief cataloguing the weaknesses of Plaintiffs' case, arguing that every claim on the operative complaint is "utterly implausible," Ford Br. 6, and asserting that the case would never have survived a motion to dismiss and that a litigation class could never have been certified, *id.* at 20–23. In light of such weaknesses, Ford argues that the class should be satisfied with anything it gets in settlement because the litigation would have achieved nothing. It is not surprising that a defendant claims that a suit brought against it is baseless.

In contrast, Plaintiffs have, until this appeal, argued that "their case is strong on the merits." SER 472. Thus, this Court should view with skepticism Plaintiffs' sudden conversion to Ford's way of thinking. First, Plaintiffs assert that they will have great difficulty in proving a design defect, Ford's prior knowledge of the defect, or diminution of value. Pl. Br. 33. Plaintiffs further assert that they will not be able to certify a litigation class because they failed to develop a damages model. *Id.* at 34 (citing *Philips v. Ford Motor Co.*, No. 14-CV-02989, 2016 WL 7428810, at *17 (N.D. Cal. Dec. 22, 2016)). And they note that class counsel recently lost another automotive defect case against Ford. *Id.* at 34–35 (citing *Coba v. Ford Motor Co.*, No. 12-1622-KM, 2017 WL 3332264 (D.N.J. Aug. 4, 2017). Because their counsel's recent loss to Ford came after "years of litigation and exorbitant out-of-pocket costs," *id.* at 34, and because they would need to retain expensive "engineering and technical experts" to successfully challenge Ford in this case, *id.*

at 35, and because they are ill-prepared to seek certification, Plaintiffs argue that they are justified in giving up and settling for whatever they could get, even if it means releasing the claims of 1.9 million class members. To the contrary, these facts suggest that class counsel has a significant financial incentive to cut its losses and settle the lawsuit, even on terms that do not benefit the vast majority of the class.

Plaintiffs should not be so eager to throw in the towel, because even if the case is as weak as Plaintiffs and Ford now say, the risk to Ford is high. And, as explained below, there is considerable evidence that Ford appreciates that risk and prefers this class settlement to having to contend with individual cases.

To begin with, Plaintiffs' case cannot possibly be as weak as the settling parties now suggest because Ford has made settlement offers of more than $75,000 each to more than one hundred individual plaintiffs in California who are pursuing the same claims asserted here but on an individual basis, and a forensic accounting and damages expert has valued such cases at $214,838. *See* Lott Br. 17, 30. Plaintiffs' only response is to assert, without citation to any authority, that these more than 100 cases are "outlier cases." Pl. Br. 46. And Ford surmises that the individual cases must be stronger than those of the 1.9 million class members, because those with the strongest cases can be expected to opt out of the settlement. *See* Ford Br. 24. Ford also argues that most of the value of the individual claims

comes from attorneys' fees that "routinely exceed $50,000" "because of the length of time it takes to resolve lemon-law litigation in California." *Id.* at 24–25. It remains undisputed, however, that Ford has offered to settle the claims of 100 individuals for more than $7.5 million, which is more than the expected *total* payout to the 1.9 million class members. *See* Pl. Br. 23–24 (explaining that the total value of the cash payment provision based on service visits for unsuccessful transmission hardware replacements is unlikely to exceed $6.4 million). Such a disparity shows that the relief to the class is too low to justify the release of claims.

Further, as explained in the opening brief, Ford's extraordinary efforts—ultimately unsuccessful—to invalidate thousands of opt-outs and force those individuals into the class to be bound by the settlement demonstrates that Ford views this settlement as a windfall release of liability. Pl. Br. 15, 30. The fact that neither Ford nor Plaintiffs address this issue in their answering briefs speaks volumes.

C. The district court erred in valuing the cash payment provision of the settlement based on an unrealistic 100 percent claims rate.

After the objections were filed, Plaintiffs for the first time attempted to demonstrate the benefit of the settlement to the class by submitting a declaration from a valuation expert. As explained in the opening brief, the expert opined that the primary benefit of the settlement—cash payments for three or more

transmission hardware replacements—has a current value of about $35 million assuming a 100 percent claims rate. Lott Br. 22–23. Because claims rates are typically less than ten percent, a more realistic valuation of the cash payment provision is about $3.5 million. *Id.*

Plaintiffs assert that, as a matter of law, the value of a class settlement is the gross amount potentially available to class members, not the amount claimed, even in a reversionary common fund or a claims-made settlement. In other words, Plaintiffs want credit for a theoretical value regardless of what the class will actually receive or what Ford will actually pay. In support of this remarkable proposition, Plaintiffs cite a single case, *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (per curiam), and it is inapposite. *Williams* does not address how a district court should value the benefit of a settlement for purposes of determining fairness under Rule 23(e). Rather, the decision is limited to the issue whether attorneys' fees may be based on the entire common fund, rather than the amount claimed by class members. *Id*.

In judging the fairness of a settlement, courts assess the value of the settlement to the class—that is, what the class will actually receive. For example, in *Eubank*, the settling parties estimated "that the settlement was worth $90 million to the class." 753 F.3d at 723. The court found that if the settlement were actually worth that much it "would have been defensible." *Id.* But, as with most claims-

made settlements, only a fraction of the class filed claims, resulting in a maximum aggregate value of the settlement to the class of $8.5 million. *Id.* at 726. The court held that the district court should have considered the fairness of the settlement based on a realistic valuation of the settlement's benefits to the class. *Id.*; *see Allen v. Bedolla*, 787 F.3d 1218, 1221–24 (9th Cir. 2015) (noting the substantial difference between the gross amount of a reversionary settlement fund and the likely payout to the class based on a low claims rate and vacating the approval of the settlement and remanding for a more searching inquiry into the substantive fairness of the agreement).

Plaintiffs also assert that the four cases cited in the Lott Objectors' opening brief to show that claims rates are typically less than ten percent of the class members eligible for relief were "cherrypicked," and Plaintiff cites two cases where the claims rate was higher, although still far less than 100 percent. Pl. Br. 41–42. The Lott Objectors can hardly be faulted for the scarcity of decisions reporting the outcome of claims-made settlements because benefit distribution data is almost never revealed by the settling parties, and settlement administrators are typically bound by contract to maintain the confidentiality of claims rates. In any event, the claims rates cited by the Lott Objectors reflect that, on average, claims rates are less than ten percent. *See Couser v. Comenity Bank*, 125 F. Supp. 3d

1034, 1044 (S.D. Cal. 2015) (describing a 7.7 percent claims rate as "higher than average").

D. The settling parties failed to provide any evidence regarding the value of the arbitration program or the number of class members expected to qualify for repurchase.

The Lott Objectors' opening brief noted that the settling parties failed to present any estimate of the number of class members who will qualify to pursue repurchase through the arbitration program, the number of such class members expected to prevail, or the net amount of any payments expected to be awarded in arbitration after deductions for the cash payment provisions of the settlement and an allowance for use of the car prior to repurchase. *See* Lott Br. 24–27. Without such estimates, the district court had no basis to conclude that the arbitration program will provide significant value to the class.

In response, Plaintiffs assert that the arbitration program is "exceptionally valuable," Pl. Br. 38, and "imposes tremendous costs and risks on Ford," *id.* at 50. Yet nothing in the record supports Plaintiffs' claim.[2] Plaintiffs seek to excuse their failure to present any evidence regarding the value of the arbitration program by stating that "the actual value of the [arbitration] Program cannot be ascertained prior to its implementation." Pl. Br. 38. Although the precise value may be

[2] Similarly, Plaintiffs claim—without citation—that the provision of the settlement that provides for payments based on three or more service visits for software flashes "will benefit a large percentage of the Class," Pl. Br. 56, but nothing in the record supports that assertion.

unknowable, Plaintiffs could have retained an expert to review repair data and estimate the number of class members likely to become eligible for arbitration during the life of the agreement and the amount that might be awarded for repurchase to those class members who proceed to arbitration and win. Plaintiffs chose not to do so, even though the settling parties bear the burden of developing the record to demonstrate that the settlement is fair, reasonable, and adequate.

Currently, only two data points reveal anything about the number of class members that might benefit from the arbitration program, and neither suggests that the benefit will be substantial. First, according to Plaintiffs' valuation expert, 35,028 class vehicles (about two percent) currently have the four transmission hardware replacements required to invoke the settlement-created standard for proceeding to arbitration. ER 152–53, ER 234. Second, Plaintiffs assert in their answering brief, without citation, that "Class Counsel is aware that over five thousand Class Members have already submitted notices of intent to submit a repurchase claim." Pl. Br. 19. Five thousand class members is less than 0.3 percent of the class. Admittedly, these two data points do not account for every class member who will ultimately qualify to pursue repurchase arbitration. But the point is that the limited information in the record suggests that very few class members will benefit from the availability of the arbitration program, undermining

Plaintiffs' bare assertion that the program is "exceptionally valuable," Pl. Br. 38, and will "impose[] tremendous costs and risks on Ford," *id.* at 50.

Both Plaintiffs and Ford claim that the Lott Objectors misstated the settlement's terms when they explained that a class member must have had four transmission repair attempts to immediately proceed to arbitration. Plaintiffs claim that the Lott Objectors mistakenly used the term "repair attempts" when the settlement only requires "service visits." Pl. Br. 55. Plaintiffs are wrong. The arbitration rules that are incorporated in the settlement agreement provide:

> If your Class vehicle had no more than three (3) total *repair attempts*, you must provide Ford with an opportunity to perform a single, additional repair at no charge to you. If the vehicle had four (4) or more *repair attempts*, you have no obligation to provide Ford with any additional opportunities to repair.

ER 154 (emphasis added). Ford asserts that "one additional repair attempt" by Ford itself, as opposed to an authorized Ford dealer, is all that is needed to pursue arbitration for those class members who do not already have four repair attempts if they live in a state that allows lemon law claims after fewer repair attempts. Ford Br. 8 n.1; *see id.* at 16. The Lott Objectors have not stated otherwise. Rather, they noted that only those class members with four or more repair attempts may proceed *immediately* to arbitration. *See* Lott Br. 1, 7, 11, 12, 24, 31.

As the opening brief explained, the arbitration program benefits Ford more than the class. Lott Br. 24–27. In its answering brief, Ford does not disagree,

instead acknowledging that forcing class members into individual arbitration where they cannot pursue consumer fraud claims or any type of relief other than repurchase, "admittedly, is a concession to Ford." Ford Br. 17. Ford argues, however, that the extended statute of limitations to bring lemon-law claims in arbitration is a concession to the class. *Id.* at 17. Such a concession is illusory, because the class is trading consumer-fraud claims in court for lemon-law claims in arbitration, and the statute of limitations for the consumer fraud-claims asserted in the complaint has been tolled for all members of the class since this case was filed in 2012.[3] *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

Plaintiffs assert that the arbitration program is not a concession to Ford because the civil penalties and uncapped attorneys' fees that are not available in arbitration are not available under some state's lemon laws or are difficult to obtain. *See* Pl. Br. 12 n.5; 51 n.22; 62 n.32. That is not the correct comparison. The correct comparison is between the relief available under the consumer-fraud claims on which the complaint is based, and the relief available under the lemon-law

[3] The Lott Objectors made this point in their objections filed in the district court. Plaintiffs criticize the Lott Objectors for not including their written objections in the excerpts of record, *see* Pl. Br. 47 n.19, but Circuit Rule 30-1.5 states that the "excerpts of record shall not include briefs or other memoranda of law filed in the district court." The settling parties ignore Circuit Rule 30-1.5 and have filed supplemental excerpts of record totaling 641 pages that consist almost entirely of the briefing below.

standards incorporated in the arbitration program. Civil penalties and uncapped attorneys' fees are commonly awarded—and sometimes required—in consumer-fraud cases. *See, e.g.*, *Richards v. Ameriprise Fin., Inc*., 152 A.3d 1027 (Pa. Super. Ct. 2016) (awarding treble damages and attorneys' fees for fraudulent conduct in violation of Pennsylvania's consumer protection law); *Wanetick v. Gateway Mitsubishi, OCT*, 750 A.2d 79 (N.J. 2000) (noting that treble the amount of compensatory damages and an award of attorneys' fees is required for violations of New Jersey's consumer fraud act).

E. The ability to opt out does not cure the unfairness of a settlement that provides no relief to large subclasses.

The settling parties acknowledge that many class members will release valuable claims for little or no benefit, but they argue that the district court did not need to consider the fairness of the settlement with respect to those class members because they could have opted out. *See, e.g.*, Ford Br. 24 ("[T]he opt-out process is specifically intended to allow class members with the strongest and most valuable claims to opt out of the settlement."); Pl. Br. 58 ("[T]he opt-out procedure is sufficient to protect class members for whom the settlement's benefits are insufficient."); *id.* at 65 (Class members "with unique harms who may not qualify for the Settlement's many benefits, could have opted out."). The settling parties' argument turns the approval process on its head. "The right of parties to opt out does not relieve the court of its duty to safeguard the interests of the class." *In re*

GM Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 809 (3d Cir. 1995); *see Allen*, 787 F.3d at 1223 ("The district court has a fiduciary duty to look after the interests of the absent class members.") (citing *Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 319 (3d Cir. 2011); *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 280 (7th Cir. 2002); *Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072, 1078 (2d Cir.1995)).

Although courts have observed that the ability to opt out can protect *individuals* with exceptionally strong claims from being bound by a class action settlement, the opt-out right is not sufficient to protect large *subclasses* that—as here—are disadvantaged by the settlement. For example, there are 1.9 million class members but only 1.5 million class vehicles. The difference indicates that at least 400,000 class members are former owners. Former owners are severely disadvantaged by the settlement, because if they do not already have the required number of service visits to qualify for a cash payment, they will not be able to become eligible in the future by accruing more service visits for ineffective repairs. Similarly, the extended statute of limitations for current owners to pursue arbitration does not apply to former owners, who are subjected to a reduced statute of limitations.

Current owners who first experience transmission problems after the opt-out date are also disadvantaged by the settlement because they will have had no reason

to opt out to pursue relief outside the settlement. By the time they realize that they are bound by this settlement, it will be too late to opt out. Although the number of such owners is unknown, the number is certainly significant because the class includes late model-year vehicles. Similarly, class members in states with robust consumer protection laws, like California, are also disadvantaged by the settlement. Although the number of class members in California has not been revealed by the settling parties, it is likely significant given California's share of the nation's population.

Because of the size of the subclasses disadvantaged by the settlement, it is no answer to say that they should have opted out. Indeed, had they done so, Ford would likely have withdrawn from the settlement because it would no longer provide Ford with a windfall release. *See* ER 61 (provision of settlement agreement allowing Ford to withdraw from the agreement if opt outs exceed 75,000). And to accept Ford's argument would be effectively to hold that an opportunity to object is not necessary, as long as an opportunity to opt out is provided. No court has adopted that radical position. Indeed, absent class members' right to object is constitutionally protected. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) (finding that due process requires courts to afford absent class members an opportunity to be heard and participate in the litigation).

II. The District Court Should Have Required Separate Representation to Protect the Subclasses.

The subclasses described above should have had separate representation to avoid having their interests traded off against those of other class members. *See Radcliffe v. Experian Info Solutions, Inc.*, 715 F.3d 1157, 1168 (9th Cir. 2013) (finding that courts "must be vigilant in guarding against conflicts of interest in class-action settlements because of the unique due process concerns for absent class members who are bound by the court's judgments") (citations and internal quotation marks omitted). Although the Lott Objectors raised the issue of intra-class conflict before the district court, the district court dismissed the concern, stating that "there is no intra-class conflict" between the small number of class members who qualify for relief and the vast majority who do not because "any class member who qualifies will get the remedy."[4] ER 14. The problem, however, is that the relief available under the settlement will not benefit major subclasses that are releasing valuable claims for nothing.

As discussed in the opening brief, this Court recently rejected a class-action settlement in a case alleging consumer-protection claims against an automobile

[4] Plaintiffs' assertion that any claim of intra-class conflict based on differences in state consumer-protection law has been waived because "this objection was not raised below," Pl. Br. 61, is incorrect. The issue was raised in the written objections, *see* SER 546–47, and at the fairness hearing, *see* ER 176, 191, and the district court found that the Objectors had argued "that there is an intra-class conflict," ER 14.

manufacturer because the district court failed to consider whether differences among state consumer-protection laws were such that common issues did not predominate. *See In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679 (9th Cir. 2018). Although the Court rested its decision on the predominance requirement for class certification, the principle applies equally to the fairness requirements of Rule 23(e). Where class members are not similarly situated, whether because of their status as former owners, owners of late-model cars, or because of state-law differences, subclasses should have separate representation. Plaintiffs recognized the need for subclasses in their complaint, *see* ER 310–11, but abandoned the concept in the settlement. In their answering brief, Plaintiffs ignore this history and offer no explanation for their change of position.

Plaintiffs argue that *Hyundai* is inapposite because, here, the settling parties accounted for the differences in state law by providing that the arbitrator will apply the class member's state lemon law or the settlement-created standard. Pl. Br. 62. Plaintiffs miss the point. The settlement operates to the disadvantage of class members in states with more robust consumer-protection statutes because those causes of action are released in favor of an arbitration program that applies lemon law and can award only a single type of relief. The intra-class conflict rests on both differences in state lemon laws and differences in the released consumer-protection claims.

Plaintiffs also attempt to distinguish *Hyundai*, and *Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 590–91 (9th Cir. 2012), by arguing that those decisions apply only to affirmative misrepresentation cases, and Plaintiffs claim—for the first time—that this case is a "pure omissions" case. Pl. Br. 63. To the contrary, Plaintiffs' theory throughout this litigation has been that Ford made affirmative misrepresentations to fraudulently conceal and deny the existence of a transmission defect that Ford knew about before it sold the class vehicles. Indeed, Plaintiffs alleged that Ford instructed its dealers to tell customers who complained about the defect that the problems they were experiencing were "normal driving characteristics," which discouraged customers from continuing to seek warranty repairs for their defective transmissions. ER 238–42, ¶¶ 3–16; ER 305, ¶ 251.

III. The District Court Erred by Failing to Subject the Settlement to a Higher Level of Scrutiny Based on the Presence of the *Bluetooth* Factors.

Throughout their brief, Plaintiffs urge this Court to defer to the views of class counsel and emphasize that the district court's review of the fairness of a class-action settlement is "extremely limited." Pl. Br. 25–26 (citing *Lane*, 696 F.3d at 818). Plaintiffs fail to acknowledge, however, that a district court must apply a higher level of scrutiny to pre-class-certification settlements, and must be 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." *In re Bluetooth Prods.*

Liab. Litig., 654 F.3d 935, 947 (9th Cir. 2011). This Court in *Bluetooth* identified three such signs: disproportionate fees to class counsel, clear-sailing, and reversion of unawarded fees. All three are present here. *See* Lott Br. 36–38. Thus, even aside from the *Hanlon* factors, the district court erred by failing to examine carefully the warning signs identified in *Bluetooth* before concluding that the settlement was fair. *See Allen*, 787 F.3d at 1224–25 (9th Cir. 2015) (vacating final approval of a class action settlement where the district court failed to consider the *Bluetooth* factors).

In their answering brief, Plaintiffs do not dispute that the second and third *Bluetooth* factors are present, but they argue that their fee is not disproportionate to the benefit to the class *if* 100 percent of the class members eligible for a cash payment submit a claim. Plaintiffs further argue that the reasonableness of a fee must be judged against the amount theoretically available to the class even if the amount claimed, and thus the cost to Ford, is substantially less. Pl. Br. 77. Plaintiffs cite *Williams*, 129 F.3d at 1027, as authority for their assertion that, if viewed as a constructive common fund comprised of the estimate of the value of the settlement assuming a 100 percent claims rate plus the amount awarded for attorneys' fees and costs, the fee award would appear "reasonable as a percentage of the benefits conferred." Pl. Br. 78. First, although courts may consider the potential awards rather than actual awards claimed, they are not required to do so.

See Strong v. BellSouth Telecommunications, Inc., 137 F.3d 844, 848, 851 (5th Cir. 1998) (finding that the district court did not err by withholding fees pending submission of claims-rate information and then "comparing the attorneys' fees to the actual amounts claimed by the class members rather than the entire 'common fund.'").

Second, whether the first *Bluetooth* factor is based on actual value or a theoretical value that assumes a 100 percent claims rate, Objectors' point remains the same: "When reviewing a district court's approval of a class settlement reached before formal class certification, [this Court] will not affirm if it appears that the district court did not evaluate the settlement sufficiently to account for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit." *Lane*, 696 F.3d at 819. Here, the district court did not scrutinize the settlement in light of the presence of all three *Bluetooth* factors; thus, this Court cannot "undertake even [its] deferential substantive review." *Allen*, 787 F.3d at 1224.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 32(a)(7)(B) because this brief contains 5,534 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

/s/ Michael T. Kirkpatrick

CERTIFICATE OF SERVICE

I certify that on March 9, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael T. Kirkpatrick