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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BYRON MCKNIGHT,

Plaintiff,

v.

UBER TECHNOLOGIES INC., et al.

Defendants.

Case No. 14-cv-05615-JST

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE

Hon. Jon S. Tigar

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its over 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ is gratified to have been invited by this Court to participate as amicus curiae in this case. AAJ members often serve as class counsel in Rule 23 actions. They have faced threats by bad-faith objectors to delay the approval of fair and adequate negotiated settlements for the sole purpose of obtaining undeserved payment for themselves and their attorneys. For that reason, AAJ supports the application of Rule 23(e)(5)(B) to all such objections, including objections directed solely at class counsel's fee.

INTRODUCTION & SUMMARY OF ARGUMENT

Class actions provide an essential means of access to justice for many who have been wrongfully harmed. Fed. R. Civ. P. 23 ("Rule 23") recognizes the role of objectors in assuring the fairness of class action settlements and provides for awards *by the court* of compensation for their efforts that benefit the class. But the dynamics of class actions also allow "blackmail" objectors to hold a negotiated settlement hostage until they are paid to go away. Bad-faith objectors have become a growing problem because they operate in the shadows, away from judicial scrutiny of their side deals with the parties.

Prior rule changes have not been effective in reducing these practices; nor have sanctions or appeal bonds. Congress enacted Rule 23(e)(5) to address this problem by requiring court approval of any consideration received by objectors in exchange for dropping their objections or their appeals from an order approving a settlement.

Carving out an exception for those objecting only to attorney fees is wholly unwarranted. Neither the Rule's text nor the Advisory Committee's Note even hints at such a limitation. A fee-

only exception would conflict with the requirement in Rule 23(e)(3) that the parties identify to the court any side agreements made in connection with their proposed settlement. An exception would also conflict with Rule 23(h), which provides that compensation of objectors be awarded by the district court.

An exception would also undermine the policies underlying the rule by resurrecting the secrecy that has allowed bad-faith objectors to thrive. It would provide an incentive for objectors to enter vague, general objections, hampering the ability of parties or the court to address genuine deficiencies in the agreement. Finally, it would hamper the efforts of district courts in carrying out their responsibility of overseeing the fairness and adequacy of settlements.

ARGUMENT

I. BAD-FAITH OBJECTORS HAVE LONG POSED A SERIOUS OBSTACLE TO SECURING THE JUST, SPEEDY, AND INEXPENSIVE RESOLUTION OF RULE 23 CLASS ACTIONS.

A. Bad Faith Objectors Use Secret Side Agreements to Extort Payments for Themselves in Exchange for Dropping Their Objections, Resulting in No Benefit to the Class.

AAJ welcomes this Court's invitation to address the issue "whether Rule 23(e)(5)(B) of the Federal Rules of Civil Procedure applies to an objection to Class Counsel's fee request or an appeal of the amount of attorney's fees only[.]" Dkt. 256 at 2. AAJ has historically championed the use of class actions to provide access to justice for those who might not otherwise have practical legal redress.

The "vast majority" of class actions, like most civil actions generally, are resolved by settlement. Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623, 1628 (2009). Rule 23(e)(5)(A) recognizes the role played by class members who may object to settlement provisions. "Good faith objections," the Advisory Committee on Civil Rules ("Advisory Committee") points out, "can assist the court in evaluating" a proposed class action settlement. Fed. R. Civ. P. 23(e) advisory committee's note to 2018 amendment.[1]

[1] Some commentators also point out that good-faith objections are typically raised by public interest law firms, including Public Citizen and Public Justice, other not-for-profit organizations,

Good-faith objectors are not affected by the terms of Rule 23(e)(5)(B). Rule 23(h) authorizes the court to award appropriate compensation "to other counsel whose work produced a beneficial result for the class…[including] attorneys who represented objectors to a proposed settlement." *Id. See also In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. 202, 229 (N.D. Ill. 2019) (incentive award to objector who "offered critiques of the Settlement Agreement that meaningfully assisted the Court").

Rule 23(e)(5)(B) was instead designed to address the serious problem of bad-faith objectors who interject meritless objections in vague, general terms. Their purpose is not to improve the settlement agreement, but to threaten delay "in order to get paid to go away." *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). Many courts and commentators have complained that such objector blackmailers, who "maraud proposed settlements—not to assess their merits—but in order to extort the parties . . . into ransoming a settlement," have become a serious problem. Fitzpatrick, *supra*, at 1636 (quoting *Snell v. Allianz Life Ins. Co*., No. 97-2784, 2000 WL 1336640, at *9 (D. Minn. Sept. 8, 2000)). Such "professional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients." *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010).

For this reason, bad-faith objectors have become "perhaps the least popular parties in the history of civil procedure." Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 472 (2003). Indeed, district courts have not hesitated to call out such serial or professional objectors. *See e.g.*, *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 635, 639 (N.D. Ohio 2016) (professional objector in the business

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and state attorneys general. Bruce D. Greenberg, *Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 St. John's L. Rev. 949, 968 n.74 (2010). *See also* Robert Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly*, 89 Fordham L. Rev. 475, 492 (2020) (stating "good objectors like Public Citizen and Public Justice . . . make the FRCP 23 process work better"); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 456-63 (2003) (describing numerous examples of not-for-profit objectors benefitting the class).

of filing frivolous appeals for the purpose of "slowing down the execution of settlements" (internal citation omitted)); *In re Wal–Mart Wage & Hour Employment Pracs. Litig*., No. 2:06–CV–00225–PMP–PAL, 2010 WL 786513, at *1 (D. Nev. Mar. 10, 2010) (noting objectors' "documented history" of filing notices of appeal from orders approving class action settlements, "thereafter dismissing said appeals when they and their clients were compensated by the settling class or counsel for the settling class").

Nevertheless, bad-faith objecting has grown into a cottage industry. The "blackmail objector," as the epithet implies, operates in the shadows, using side agreements that are unseen by the court and holding the settlement hostage until the objector's demand for payment is met. When class counsel and the defendant reach settlement, their nominally adverse interests become aligned in obtaining judicial approval and implementing the agreement. Their interest in whether buying off objectors results in any other benefit to the class may be overridden by class counsel's interest in receiving compensation for work on behalf of the class and defendant's interest in avoiding costly delays. The only neutral party responsible for assuring fairness to absent class members – the district court – is often kept in the dark. See *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (noting the incentives in class actions to strike a deal "that promotes the self-interest of both class counsel and the defendant," but not of the class); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011) (collecting cases); *see also* David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. Ill. L. Rev. 1217, 1234-35 (2003) ("The court is supposed to protect the class by rejecting unfair settlements, but it is dependent on information provided by class counsel and the defendants, both of whom have incentives to keep information exposing a settlement's unfairness from the court.").

The leverage that bad-faith objectors can exert was dramatically increased by the U.S. Supreme Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), which held that objectors qualify as "parties" for purposes of appealing a district court's approval of a class action settlement. As a result, bad-faith objectors with very little effort could threaten to delay final approval by months or even years. *See* 4 Newberg on Class Actions § 13:34 (5th ed.). As Justice

Scalia wrote in dissent, the "sunny surmise" that professional objectors would not take full advantage of this opportunity was a "triumph of hope over experience." *Devlin*, 536 U.S. at 21-22 & n.5 (Scalia, J., dissenting).[2] Unsurprisingly, objectors perverted the process "by filing frivolous objections and appeals, not for the purpose of improving the settlement for the class, but of extorting personal payments in exchange for voluntarily dismissing their appeals." *In re Petrobras Sec. Litig.*, No. 14-cv-9662, 2018 WL 4521211, at *1 (S.D.N.Y. Sept. 21, 2018). Such activities "impose serious, and sometimes irreparable, harm on the class action process." Robert Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly*, 89 Fordham L. Rev. 475, 477 (2020).

B. Judicial Approval of Side Agreements to Pay Consideration in Exchange for Withdrawal of Objections or of Appeals Is Essential to Reducing the Problem of Bad-Faith Objectors.

In 2018, Congress added Rule 23(e)(5)(B) to address the problem of bad-faith objectors. As discussed above, this problem was not new, though it was exacerbated by the *Devlin* decision in 2002. By 2003, the bad-faith objector problem had become "so problematic," that Congress and the courts devised ways to "terminate the practice of class counsel paying objectors to go away." 4 Newberg on Class Actions § 13:21 (5th ed.). None proved successful.

1. The 2003 rule amendments failed to stem the flood of bad-faith objectors.

In 2003, Congress added Rule 23(e)(4)(B), stating that "an objection may be withdrawn only with the court's approval." The rationale was that forcing objectors to explain to the court why they were withdrawing their objections would dissuade professional objectors. The rule, however, was easily evaded, primarily because withdrawals of objections were easily "papered-over" by the parties, who were not obliged to disclose their side payments. 4 Newberg on Class

[2] Although *Devlin* was technically a case involving an appeal only from a settlement and not an award of attorney's fees, its holding has been extended to appeals from fee awards. *See, e.g.*, *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 976-77 (7th Cir. 2003). This is yet another reason why Rule 23(e)(5)(B), which explicitly addresses objector appeals allowed by *Devlin*, should apply to fee objections as well.

Actions § 13:34 (5th ed.). Consequently, "the courts developed no meaningful jurisprudence applying the 2003 version of Rule 23(e)." *Id.*

2. Sanctions have failed to deter bad-faith objectors.

Imposition of sanctions would appear to be a sensible course of action. Rule 26 (g)(1)(B)(ii) provides that every attorney who signs an objection certifies that the objection is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Rule 11(b) imposes a similar responsibility and Rule 11(c) authorizes the court to impose appropriate monetary sanctions.

In practice, however, some courts have been reluctant to impose substantial sanctions. *See, e.g.*, *In re Petrobras Sec. Litig.*, 2018 WL 4521211, at *11 (imposing a sanction of $10,000, against objectors appealing approval of a $3 billion settlement, and emphasizing the "high burden" to be met before Rule 11 sanctions may be imposed); *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 710-11 (7th Cir. 2001) (vacating $50,000 sanction against "professional objectors" opposing a class action settlement that paid out $18 to $20 million, stating that Rule 11 "requires that the least severe sanction adequate to serve the purpose of the penalty" be imposed).

More importantly, sanctions cannot be imposed—and therefore cannot effectively deter wrongdoers—if the wrongdoers are permitted to hide their extorted payments from the district court and the parties themselves are not motivated to disclose the payments they have made to buy peace from the objectors.

3. Appeal bonds have failed to halt extortionate demands by bad-faith objectors.

Some courts have required objectors to post bonds as a condition of appealing the approval of a class settlement. *See, e.g.*, *In re Wal–Mart Wage & Hour Employment Practices Litig.*, 2010 WL 786513, at *2 (finding that the appeals filed by four objectors were "frivolous" and that the objectors "should be required to file an[] appeal bond sufficient to secure and ensure payment of costs on appeals"); *In re Initial Pub. Offering Sec. Litig.*, 721 F. Supp. 2d 210, 214 (S.D.N.Y. 2010) (ordering serial objectors to post appeal bond of $25,000).

However, it is unclear whether Fed. R. App. P. 7, which authorizes a district court to require an appellant to file a bond "in any form and amount necessary to ensure payment of costs on appeal," is well-suited for this purpose. Courts are broadly divided as to the costs that may be considered, often resulting in "trivial" or "insubstantial" bonds. John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 Fla. St. U. L. Rev. 865, 871-72 (2012). *See, e.g.*, *In re Petrobras Sec. Litig*., 2018 WL 4521211, at *11 (appeal bond in the amount of $5,000 imposed); *Vaughn v. Am. Honda Motor Co., Inc.*, 507 F.3d 295, 300 (5th Cir. 2007) (appeal bond reduced from $150,000 to $1,000). Moreover, appeal bonds only address objectors appealing a district court approval of a settlement agreement, leaving the problem of secret payments to withdraw objections in the district court unaddressed.

The primary reason each of these measures failed to accomplish their objective, AAJ submits, is that bad-faith objectors could continue to operate in the shadows, shielded from the district court's scrutiny. In 2016, the Advisory Committee observed in its minutes: "In all the many encounters with bar groups and at the miniconference last fall, there was virtually unanimous agreement that something should be done to address the problem of 'bad' objectors." Committee on Rules of Prac. & Proc. Agenda Book, Draft Minutes Civil Rules Advisory Committee April 14, 2016, 500 (Jun. 2016), *available at* https://www.uscourts.gov/sites/default/files/2016-06-standing-agenda-book.pdf.

In response, the Advisory Committee proposed and Congress enacted new Rule 23(e)(5)(B):

> *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:
>
> **(i)** forgoing or withdrawing an objection, or
>
> **(ii)** forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

There is no basis for carving out a broad exception to this Rule for consideration paid to objectors whose objection or appeal focuses solely on attorney's fees.

II. AN EXCEPTION TO RULE 23(e)(5)(B) FOR OBJECTIONS ADDRESSED SOLELY TO CLASS COUNSEL'S FEES WOULD BE IN CONFLICT WITH RULE 23(e).

A. An Attorney's-Fees Exception Is Not Supported by the Plain Text of Rule 23(e)(5)(B).

Neither the Rule nor the accompanying the 2018 Advisory Committee's Note contains any limiting language that would warrant excluding fee-only objectors from the Rule's requirement of district court hearing and approval. Indeed, the rationale that underlies the Rule – that extortionate side payments must be brought out of the shadows – applies as forcefully to agreements to drop objections to fees as to objections to drop objections to class treatment.

District Judge Schofield held precisely that in *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 334 F.R.D. 62 (S.D.N.Y. 2019). In that case, the district court had approved settlement of an antitrust class action alleging that major banks had conspired to manipulate benchmark rates in the foreign exchange market. An objector appealed to the Second Circuit, arguing solely that class counsel's fee was excessive. The objector and class counsel then reached an agreement whereby the objector would dismiss his appeal in exchange for a payment of $300,000 from class counsel. Class counsel and the objector moved for an indicative ruling under Rules 23(e)(5)(C) & 62.1 that the court would approve this agreement if the court of appeals remanded for that purpose. *Id.* at 63. The court declared: "This type of agreement *is precisely what the court-approval provision in Rule 23(e)(5)(B) is meant to address*. *Id.* (emphasis added). Stating that "approving the Agreement would make this Court complicit in a practice that undermines the integrity of class action procedure," the court denied the motion. *Id.* at 64.

Similarly, District Judge Rakoff, in a case involving an objection to class counsel's fees, observed that "extortionate efforts, which the Seventh Circuit recently termed 'objector blackmail,' have increasingly interfered with the prompt and fair resolution of class litigation at a direct cost to class members." *In re Petrobras Sec. Litig.*, 2018 WL 4521211, at *1. The court expressed confidence that the soon-to-be-effective rule "may help to curb these abusive side deals in the future." *Id.* The plain text of Rule 23(e)(5)(B) clearly indicates its application to payments made in connection with dropping fee-objections as well as other objection to class settlements.

B. An Attorney's-Fees Exception Would Conflict with the Identifying Requirement of Rule 23.

Rule 23(e)(3) requires that parties seeking approval of a class action settlement "file a statement identifying any agreement made in connection with the proposal." That provision was specifically added in 2003 to require parties to identify side agreements that "although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others." Fed. R. Civ. P. 23(e) advisory committee's note to 2003 amendment.

When the Advisory Committee was considering enumerating the specific agreements that must be identified under the rule, it expressly referenced "simple money buy-outs of objectors." Advisory Committee on Civil Rules Agenda Book, Rule 23(c), (e): April 2002, 155 (May 2002), *available at* https://www.uscourts.gov/sites/default/files/fr_import/CV2002-05.pdf. Although the Advisory Committee ultimately left the types of side agreements covered by the rule open-ended, it instructed that any doubts "should be resolved in favor of identification." Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment.

Although no court has yet applied this to buy-out agreements with objectors, commentators have noted that allowing such side agreements to remain secret undermines district courts' efforts to protect the class by rejecting unfair settlements. Dana & Koniak, *supra*, at 1234.

C. An Attorney's-Fees Exception Will Undermine the Rule 23(e)(5)(A) Requirement That Objectors State Objections with Specificity.

Objectors who have no interest in improving the settlement for the class often enter vague, boilerplate objections sufficient to delay proceedings with little effort. Rule 23(e)(5)(A) was amended in 2018 to require that objections be made "with specificity" so that the parties and the court can better identify and resolve genuine shortcomings in the settlement agreement. Carving out an exception to the hearing and approval requirement of Rule 23(e)(5)(B) would create a contrary incentive for savvy objectors: Immunity from judicial review in the event that consideration is proffered for dropping very general objections or grounds for appeal that could be construed as relating to fees. Even those with legitimate objections may seek to preserve such

an option. *Cf. Pearson v. Target Corp.*, 968 F.3d 827, 838 (7th Cir. 2020) (cautioning district courts not to "be misled by the facile expedient of dressing a class-based objection in individual clothing to avoid scrutiny").

D. An Attorney's-Fees Exception Would Conflict with Rule 23(h), Which Authorizes Compensation of Objectors by the Court.

Where the efforts of an objector have resulted in a benefit to the class, Rule 23(h) allows the district court to award compensation to "attorneys who represented objectors to a proposed settlement." Fed. R. Civ. P. 23(e) advisory committee's note to 2003 amendment. Such an award is committed to the court's sound discretion. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1147 (8th Cir. 1999).

In most cases, the class realizes no benefit when an objector drops an objection to a settlement or dismisses an appeal that ostensibly sought a better deal for the class. Requiring judicial review of objector compensation allows the district court to reject "outlandish fee requests in return for doing virtually nothing," *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008) (involving objectors to class counsel's fee), and turn away bad-faith objectors whose only goal was "to hijack as many dollars for themselves as they can wrest from a negotiated settlement." *In re UnitedHealth Grp. Inc. PSLRA Litig*., 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009). In such a situation, allowing the objector to pocket a payment that the district court would likely have disallowed obviously conflicts with Rule 23(h).

This is true even when the objector has obtained a benefit for the class in exchange for dropping the objection. For example, the Seventh Circuit has held that counsel for an objector was entitled to fees where, in exchange for dropping appeal, parties agreed to a tripling of relief for class and significant reduction in class counsel's fees. *In re Southwest Airlines Voucher Litig.*, 898 F.3d 740, 746 (7th Cir. 2018). To hold that payment to the objector may be determined by class counsel or by the defendant, immune from district court oversight or approval, plainly conflicts with Rule 23(h). As the Advisory Committee pointedly stated, allowing such side payments "perpetuates a system that can encourage objections advanced for improper purposes."

Fed. R. Civ. P. 23(e) advisory committee's note to 2018 amendment. This is so, regardless of whether the objection was directed at the class settlement or at the compensation of class counsel.

III. AN EXCEPTION TO RULE 23(e)(5)(B) FOR OBJECTIONS ADDRESSED SOLELY TO CLASS COUNSEL'S FEES WOULD UNDERMINE THE POLICIES UNDERLYING RULE 23(e).

A. An Attorney's-Fees Exception to Rule 23(e)(5)(B) Would Return Objector Payments to the Shadows in Where Bad-Faith Objectors Thrive.

Rule 23(e)(5)(B) addresses the problem of bad-faith objectors by requiring the district court to hold a hearing and rule on side payments the objectors would receive in exchange for dropping their objections or appeals. To invent a broad exception to this transparency requirement would resurrect the secrecy that has allowed bad-faith objectors to thrive in the first place. When the parties have arrived at a settlement agreement, it is in the self-interest of class counsel and the defendant to remove any obstacles, even bogus ones, by paying off objectors. This dysfunctional dynamic allows blackmail objectors to operate, regardless of whether the bought-off objection was directed at the compensation provided to the class or at the fees provided to class counsel. In either case, the objector has succeeded in holding the class settlement hostage for their own private gain, with little or no benefit for the class – perpetuating the system that Rule 23(e)(5)(B) was specifically designed to address.

B. An Attorney's-Fees Exception Would Result in a Diminished Role for District Courts in Overseeing the Fairness of Class Action Settlement Agreements.

As noted earlier, the underlying premise of Rule 23(e)(3) (Identifying Agreements), Rule 23(e)(5)(A) (specificity of objections), Rule 23(h) (Attorney's Fees), and others is to strengthen the role of the district court in overseeing the fairness of class action settlements. The Federal Rules of Civil Procedure seek to do so by providing the courts with the information they require to carry out that responsibility, particularly with regard to absent class members.

In fact, some observers suggest on the basis of very preliminary observations that "proactive judicial investment" in Rule 23(e)(5)(B) may be credited with a "perceived and dramatic downturn in the level of objections to class action settlements." Elizabeth J. Cabraser & Adam N. Steinman, *What Is A Fair Price for Objector Blackmail? Class Action Objectors and*

the 2018 Amendments to Rule 23, 24 Lewis & Clark L. Rev. 549, 565-67 (2020). Carving out a broad exception to Rule 23's mandate for transparency would reverse these early signs of progress against this serious and persistent problem.

CONCLUSION

For these reasons, AAJ urges this Court to hold that Fed. R. Civ. P. 23(e)(5)(B) applies to an objection to Class Counsel's fee request or an appeal of the amount of attorney's fees only.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California using the CM/ECF filing system. Counsel for all parties are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

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