IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-14630

JENNIFER LEE,
on behalf of herself and all others similarly situated, *et al*.,
Plaintiffs - Appellees,

MARGO PERRYMAN,
Interested Party – Appellant,

v.

OCWEN LOAN SERVICING, LLC, *et al*.
Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Florida

OPENING BRIEF OF APPELLANT MARGO PERRYMAN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following persons and entities have an interest in the outcome of this appeal:

ABI International

ABIG Holding de Espana, S.L.

ALOC Holdings ULC

American Bankers General Agency, Inc.

American Bankers Insurance Company of Florida

American Bankers Insurance Group, Inc.

American Bankers Life Assurance Company of Florida

American Bankers Management Company, Inc.

American Memorial Life Insurance Company

American Security Insurance Company

Anderson & Stewart, LLP

Aronovitz, Tod

Assurant Argentina Compania de Seguros Sociedad Anonima

Assurant Chile Compania de Seguros Generales S.A.

Assurant Co. Ltd.

Assurant Consulting Company Limited

Assurant Danos Mexico S.A.

Assurant Deutschland GmbH

Assurant Direct Limited

Assurant Direta Corretora de Seguros Ltda

Assurant General Insurance Limited

Assurant Group, Limited

Assurant Holding Mexico, S. de R.L. de C.V.

Assurant Holdings France SAS

Assurant Intermediary Limited

Assurant International Division Limited

Assurant Italia Agenzia di Assicurazioni s.r.l.

Assurant Life Limited

Assurant Life of Canada

Assurant New Ventures, Inc.

Assurant Payment Services, Inc.

Assurant Reinsurance of Turks & Caicos, Ltd.

Assurant Seguradura S.A.

Assurant Service Protection, Inc.

Assurant Services (UK) Limited

Assurant Services Argentina, S.A.

Assurant Services Canada Inc.

Assurant Services de Chile, SpA

Assurant Services Italia s.r.l.

Assurant Services Korea Limited

Assurant Services Limited

Assurant Services of Puerto Rico, Inc.

Assurant Services, LLC

Assurant Servicios de Mexico, S.A. de C.V.

Assurant Servicos, SA

Assurant Solutions Assistance B.V.

Assurant Solutions Comercio e Servicos de Equipamentos Electronicos Ltda.

Assurant Solutions Holding Puerto Rico, Inc.

Assurant Solutions Spain, S.A.

Assurant Vida Mexico S.A.

Assurant, Inc. (AIZ)

Automotive Capital Services, Inc.

Axios Valuation Solutions, LLC

Bankers Atlantic Reinsurance Company

Becker, Ryan A.

BHI Liquidation, Inc.

Blacklocks, Stephen R.

Blue Bananas, LLC

Broadtech, LLC

BuckleySandler, LLP

Burt, Franklin G.

Bushman, Howard

Caribbean American Life Assurance Company

Caribbean American Property Insurance Company

Carlton Fields Jorden Burt P.A.

Ciolko, Edward W.

Clarizia, John

Consumer Assist Network Association, Inc.

Cooper River Financial, LLC

Cooperatieve Assurant Netherlands U.A.

Correspondent One Investor, LLC

Correspondent One S.A.

Correspondent One, Inc.

Coulthurst, Gerald

CWI Corporate

CWI Distribution

CWI Group

CWork Financial Management LLC

CWork Solutions, LP

Dental Health Alliance, LLC

Denticare of Alabama, Inc.

Dhaliwal, Amanjot Singh

Digital Services (UK) Ltd.

Disability Reinsurance Management Services, Inc.

Dominguez, Enrique

Double A Funding, LLC

eMortgage Logic, LLC

Engelhardt, Lisa Chamberlin

Erving, Frances

Erving, Johnnie

Family Considerations, Inc.

FamilySide, Inc.

FAS-Nationstar, LLC

FAS-OWB Utilities, LLC

FAS-Tenant Access Utilities, LLC

Federal Warranty Service Corp.

Field Asset Services, LLC

Financial Management Solutions, Inc.

Florida Office Corp.

Fortson, Mary K.

Funding America Mortgage Asset Trust

Funding America Mortgage Warehouse Trust

Funding America Mortgage Warehouse Trust I

Golant, Jeffrey

Golant, Margery Ellen

Goodman, Jonathan

GP Legacy Place, Inc.

Gravante, John III

Guardian Travel, Inc.

Gunster Yoakley & Stewart, PA

Gurian Group, P.A.

Gurian, Joseph

Harke Clasby & Bushman LLP

Harke, Lance

Heard, Shelia D.

Himmelstein Law Network

Himmelstein, Barry R.

Holland & Knight LLP

Homeward Agency Advance Funding Corporation I

Homeward Agency Advance Funding Trust 2012-1

Homeward Residential Corporation India Private Limited

Homeward Residential Holdings, Inc.

Homeward Residential India Holdings, Inc.

Homeward Residential Mauritius Holdings Company

Homeward Residential, Inc.

Hunton & Williams

I.Q. Data International, Inc.

Insureco Agency & Insurance Services, Inc.

Insureco, Inc.

Interfinancial Inc.

Investors Mortgage Insurance Holding Company

Jhabvala, Farrokh

John Alden Financial Corp.

John Alden Life Insurance Company

Kelly, Sheri L.

Kessler, Topaz, Meltzer & Check, LLP

Kozyak Tropin & Throckmorton, PA

Law Office of S. David Sheffman

Law Office of Sheri L. Kelly

Lee, Corey Anthony

Lee, Jennifer

Lenard, Joan A.

Liberty Home Equity Solutions, Inc.

Lifestyle Services Group Ltd.

Lifshitz, Tal J.

Litton Loan Servicing, LP

LLS Commercial Servicing Inc.

Lower Tranche Residuals Holdco, LLC

LSG Espana Ltd.

LSG Insurance

Lyle, Abigail M.

Merten, W. Glenn

MFTR 1994-1 Holding Corporation

MobileServ 5 Ltd.

Moskowitz, Adam

MS Diversified Corp.

MSR Holdings, Inc.

National Insurance Agency

National Insurance Institute, LLC

Neary, Robert J.

Nesmith, Roosevelt N.

NHP Affordable Housing Partners - Marina Bay, L.P.

NHP Affordable Housing Partners, L.P.

NHPAHP Affordable Housing CA14 Limited Partnership

NHPAHP Affordable Housing CA5 Limited Partnership

NHPAHP Affordable Housing Corporation CA14

NHPAHP Affordable Housing Corporation CA5

NHPAHP Development Corporation

NHPAHP Development III Corporation

NHPAHP Development III Limited Partnership

NHPAHP Development Limited Partnership

NHPAHP Mayberry Limited Partnership

NHPAHP Meadowview Apartments Limited Partnership

NHPAHP MFCA14 Limited Partnership

NHPAHP MFCA5 Limited Partnership

NHPAHP Vista Seniors Limited Partnership

North Star Marketing Corporation

NSM Sales Corporation

Ocbus, Inc.

Ocwen – Freddie Servicer Advance Funding LLC

Ocwen – Freddie Servicer Advance Receivables Trust 2012-ADV1

Ocwen 2000 - LLC

Ocwen 2009 - LLC

Ocwen Advance Facility Transferor, LLC

Ocwen Asia Holdings Ltd. I

Ocwen Asset Investment Corp.

Ocwen Business Solutions, Inc.

Ocwen Capital Management II, LLC

Ocwen Capital Management, LLC

Ocwen Capital Trust II

Ocwen Financial Corp. (OCN)

Ocwen Financial Insurance Services, Inc.

Ocwen Financial Services S.R.L.

Ocwen Financial Solutions Private Limited

Ocwen Freddie Advance Depositor LLC

Ocwen Freddie Advance Funding LLC

Ocwen General, Inc.

Ocwen International VI, Inc.

Ocwen Investment Corporation

Ocwen Investment Trust II

Ocwen Liquidating Trust, LLC

Ocwen Loan Servicing Corp.

Ocwen Loan Servicing, LLC

Ocwen Luxembourg II S.ãr.l.

Ocwen Luxembourg S.ãr.l.

Ocwen Master Advance Receivables Trust

Ocwen Mortgage Asset Holdings General Partner

Ocwen Mortgage Asset Holdings, Inc.

Ocwen Mortgage Asset Investment Company, LLC

Ocwen Mortgage Asset Partners, L.P.

Ocwen Mortgage Asset Trust I

Ocwen Mortgage Asset Trust II

Ocwen Mortgage Company LLC

Ocwen Mortgage Owner Trust I

Ocwen Mortgage Servicing, Inc.

Ocwen MSR Holdco, Inc.

Ocwen Netherlands B.V.

Ocwen Partnership, L.P.

Ocwen Real Estate Asset Liquidating Trust 2007-1

Ocwen Servicer Advance Facility Transferor III LLC

Ocwen Servicer Advance Funding (Small Business Commercial), LLC

Ocwen Servicer Advance Receivables Trust III

Ocwen Structured Investments, LLC

OMAT I REO Holdings, LLC

Otero, Brian V.

Patrick, Douglas A.

Perryman, Brian Patrick

Perryman, Margo

Podhurst Orseck, P.A.

Power Abstract Services, Inc.

Power Equity Holdings, LLC

Power Valuation Services, Inc.

PowerLink General Partner, LLC

Prieto, Peter

Property VIII LLC

Protection Holding Cayman

Real Estate Servicing Solutions Inc.

Reliable Lloyds Insurance Company

REO Management, LLC

RMSI Inc.

Ronzetti, Thomas

Service Delivery Advantage, LLC

Shaw, Sean Michael

Sheffman, S. David

Signal Financial Management LLC

Signal GP LLC

Signal Holdings LLC

Signal Northwest LLC

Solares, Irma Reboso

Solidify Software, LLC

Solotaroff, Jason L.

Solutions Cayman

Solutions Holdings

STAMS Holding Ltd.

STAMS Ltd.

Standard Guaranty Insurance Company

Stratus Asset Management Group, LLC

StreetLinks, LLC

Sullivan, Rachel

Sureway, Inc.

Telecom Re, Inc.

The Merlin Law Group

The Signal LP

Time Insurance Company

Tracksure Insurance Agency, Inc.

TS Holdings, Inc.

UDC Dental California, Inc.

UDC Ohio, Inc.

Union Security DentalCare of Georgia, Inc.

Union Security DentalCare of New Jersey, Inc.

Union Security Insurance Company

Union Security Life Insurance Company of New York

United Dental Care of Arizona, Inc.

United Dental Care of Colorado, Inc.

United Dental Care of Michigan, Inc.

United Dental Care of Missouri, Inc.

United Dental Care of New Mexico, Inc.

United Dental Care of Texas, Inc.

United Dental Care of Utah, Inc.

United Service Protection Corp.

United Service Protection, Inc.

Voyager Group, Inc.

Voyager Indemnity Insurance Company

Voyager Service Warranties, Inc.

Weinshall, Matthew P.

WePurchit.com LLC

Dated: December 23, 2015

Respectfully submitted,

/s/ Barry Himmelstein

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Margo Perryman

STATEMENT REGARDING ORAL ARGUMENT

Appellant Margo Perryman ("Perryman") desires oral argument. Oral argument should be heard because this case presents an important question of law on which the district courts should have clear and controlling guidance: Whether a class action settlement may require the unnecessary submission of claims, in order to greatly reduce the anticipated payout to the class, because the settling defendants are ostensibly unwilling to pay more. This same issue was recently before this Court in at least six other cases involving parallel class action settlements, but each of these appeals was voluntarily dismissed prior to oral argument: (a) *Varnes, et al. v. JPMorgan Chase Bank, N.A., et al*., 11th Cir. Case No. 14-11085; (b) *Kirktindoll, et al. v. HSBC Bank USA, N.A., et al*., 11th Cir. Case No. 14-12021; (c) *Jabrani, et al. v. Suntrust Mortgage Inc., et al.*, 11th Cir. Case No. 14-14892; (d) *Nadeau, et al. v. Wells Fargo Bank, N.A., et al*., 11th Cir. Case No. 14-15000; (e) *Meloy v. HSBC Bank USA, N.A., et al.*, 11th Cir. Case No. 14-15355; and (f) *Hall, et al. v. Trapasso, et al*. (*Bank of America*), 11th Cir. Case No. 14-15712.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

(A) **District court's subject-matter jurisdiction:** The district court had federal question and diversity jurisdiction over this case, pursuant to 28 U.S.C. §§ 1331 and 1332(d)(2)(A), because the complaint included a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq*., and was brought on behalf of a class including members who are citizens of states different from defendants, and the amount in controversy exceeded $5 million. D.E. 1.

(B) **Appellate jurisdiction:** This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, because this appeal is taken from a final judgment of the district court. D.E. 184; 185; 187.

(C) **Timeliness of appeal:** This appeal is timely. The district court entered its order granting final approval to the class action settlement, and the final judgment, on September 14, 2015. D.E. 184; 185. Perryman timely-filed a notice of appeal on October 13, 2015. D.E. 187.

(D) **This appeal is from a final order:** Perryman took her appeal from the district court's order granting final approval to the class action settlement, and from the final judgment. D.E. 187.

STATEMENT OF THE ISSUES

1. May a class action settlement require the unnecessary submission of claims, in order to greatly reduce the anticipated payout to the class, because the settling defendants are ostensibly unwilling to pay more?

2. Was the district court's finding "that it is not feasible to determine systematically whether [lender-placed insurance] premiums were paid or are still owed by any given Class Member" clearly erroneous, where the uncontroverted evidence establishes that this information *can* be systematically determined for all but an identifiable subset of class members?

3. Did the district court err in holding that class members who received government assistance in making their mortgage payments would receive a "windfall" if they received a partial refund of overcharges for force-placed insurance?

4. Did the district court abuse its discretion in finding the class action settlement fair, reasonable, and adequate, where it was collusively structured to maximize attorneys' fees and minimize the anticipated payout to the class?

STATEMENT OF THE CASE

I. Summary Of *Lee* Action

Plaintiff-appellee, Jennifer Lee ("plaintiff," or "Lee") filed this action in March 2014 in the Southern District of Florida against defendants-appellees Ocwen Loan Servicing, LLC ("Ocwen"), Assurant, Inc. ("Assurant"), and its subsidiary, American Security Insurance Company ("ASIC") (collectively, "defendants") ("Lee" and "defendants" are collectively referred to as the "parties"). D.E. 1.

Lee's original and amended complaint asserts claims arising from Ocwen's lender-placed insurance ("LPI") program, the force-placement of insurance coverage on mortgagors' properties, and the inflated premiums imposed on homeowners whose "voluntary" property insurance has lapsed. D.E. 1; 106. Lee asserts claims for relief pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d), the Florida Deceptive and Unfair Trade Practices Act, and common law claims. D.E. 1 at 21 – 36; 106 at 33 – 47. Lee seeks certification of a nationwide class and a Florida subclass of homeowners affected by these practices. D.E. 106 at 28, 29.

Before this case settled, the parties fully briefed motions to dismiss. D.E. 61 – 63; 78 – 80; 86 – 88. Before an order issued on those motions, the parties requested a stay to pursue mediation, and subsequently reached a nationwide class

action settlement in principle in November 2014. D.E. 92; 103. At the time of the settlement, judges in the Southern District of Florida – including the magistrate judge who presided over the settlement of this case – had dismissed materially similar RICO claims asserted by Class Counsel[1] in other LPI cases. *See Montoya v. PNC Bank, N.A.,* No. 14-20474-CIV, 2014 WL 4248208 (S.D. Fla., Aug. 27, 2014) (Goodman, M.J.); *Circeo-Loudon v. Green Tree Servicing, LLC,* No. 14-21384-CIV, 2014 WL 4219587 (S.D. Fla., Aug. 22, 2014).

The *Lee* action is one of at least eight substantially similar LPI cases settled by Class Counsel within the past two years in the Southern District of Florida.[2] All of these settlements have been structured on a "claims-made" basis, which requires class members to submit claim forms to obtain relief, instead of the defendants

[1] Lee's attorneys, Kozyak, Tropin, & Throckmorton, LLP, Podhurst Orseck, P.A., and Harke Clasby & Bushman LLP.

[2] *See Saccoccio v. JPMorgan Chase Bank, N.A.,* 297 F.R.D. 683 (S.D. Fla. 2014) ($20 million in attorneys' fees awarded); *Hamilton v. Suntrust Mortgage Inc.,* No. 13-60749-CIV, 2014 WL 5419507 (S.D. Fla., Oct. 24, 2014) ($3.6 million in attorneys' fees awarded); *Fladell v. Wells Fargo Bank, N.A.,* No. 0:13-cv-60721, 2014 WL 5488167 (S.D. Fla., Oct. 29, 2014) ($19 million in attorneys' fees awarded); *Diaz v. HSBC USA, N.A.,* No. 1:13-cv-21104, 2014 WL 5488161 (S.D. Fla., Oct. 29, 2014) ($10 million in attorneys' fees awarded); *Hall v. Bank of America, N.A.,* No. 1:12-cv-22700-FAM, 2014 WL 7184039 (S.D. Fla., Dec. 17, 2014) ($16 million in attorneys' fees awarded); *Braynen v. Nationstar Mortgage, LLC,* No. 14-cv-20726-GOODMAN, 2015 WL 6872519 (S.D. Fla., Nov. 9, 2015) ($5 million in attorneys' fees awarded); *Williams v. Wells Fargo Bank, N.A.,* No. 11-cv-21233 (S.D. Fla.), D.E. 356 ($5.48 million in attorneys' fees awarded).

mailing settlement checks to the class members or crediting their accounts. *Id*.; D.E. 111-1; 111-2. All unclaimed funds revert to the defendants. *Id*.

The claims requirement of these settlements has resulted in a very low payout to the classes. In LPI settlements using the same claim form as this case, less than four percent of class members submitted claims by the time of the final approval hearing. *See, e.g., Hamilton,* 2014 WL 5419507, at *4 – 5. In contrast, these settlements have resulted in exceedingly lucrative fees for Class Counsel. Of the LPI settlements granted final approval, including this one, the defendants have collectively agreed to pay Class Counsel a total of $88.93 million in fees. *See* n.2, *supra*; D.E. 111-1 at 49.

In this case, the class is comprised of approximately 400,000 Ocwen borrowers. D.E. 144 at 2. The amount nominally "made available" in the settlement is $140 million. *Id*. By the time of the final approval hearing, 14,339 of these class members submitted claims, which is less than four percent of the class, resulting in a total estimated payout of approximately $5.5 to 5.6 million. D.E. 144-4; 171-1. In contrast, defendants agreed to pay Class Counsel $9.85 million in fees. D.E. 173 at 2; 111-1 at 49.

Class Counsel have settled their LPI cases, including this one, while other parallel class actions against the same banks, loan servicers, and LPI insurers have been pending in district courts across the country.[3]

II. Class Counsel Paid Counsel for Seven of the Nine Class Representatives To Withdraw Their Objections to Other Claims-Made LPI Settlements and Join This One

Class Counsel were joined in this settlement by lawyers from Kessler, Topaz, Meltzer & Check, LLP ("Kessler Topaz") and others, who serve as counsel for plaintiffs prosecuting parallel class actions in the Southern District of New York, *Lyons v. Litton Loan Servicing LP,* No. 13-cv-513 (S.D.N.Y.) ("*Lyons"*), and *Clarizia v. Ocwen Financial Corp.,* No. 13-cv-2907 (S.D.N.Y.) ("*Clarizia*"). D.E. 144; 144-3. As in this case, at the time of the settlement, the parties in *Clarizia* and *Lyons* had not obtained rulings on motions to dismiss their RICO claims. D.E. 146 at 4. Instead, plaintiff's counsel in *Clarizia* and *Lyons* had lost two motions to dismiss RICO claims in similar LPI cases, one also pending in the Southern District of New York. *See Miller v. Wells Fargo Bank, N.A.,* 994 F.

[3] In 2012 and again in 2013, the Judicial Panel on Multidistrict Litigation denied motions to consolidate pending LPI litigation. *See In Re: Mortgage Lender Force-Placed Insurance Litigation,* 895 F. Supp. 2d 1352, 1353 (J.P.M.L. 2012); *In Re: Wells Fargo Bank, N.A., Mortgage Corporation Force-Placed Hazard Insurance Litigation,* 959 F. Supp. 2d 1363, 1363-64 (J.P.M.L. 2013); *In re: Bank of Am., N.A. Mortg. Corp. Force-Placed Hazard Ins. Litig.,* 959 F. Supp. 2d 1365, 1366 (J.P.M.L. 2013); *In re: HSBC Mortg. Corp. Force-Placed Hazard Ins. Litig.,* 959 F. Supp. 2d 1370 (J.P.M.L. 2013).

Supp. 2d 542 (S.D.N.Y. 2014); *Gustafson v. BAC Home Loans Servicing, LP,* No. SACV 11-915-JST (ANx), 2012 WL 7051318 (C.D. Cal., Dec. 20, 2012); D.E. 146 at 4 – 5.

Prior to joining this settlement, plaintiff-appellees Johnnie and Frances Erving, Lisa Chamberlin Engelhardt, Gerald Coulthurst, Enrique Dominguez, and Sheila Heard – *six of the nine class representatives* – represented by their counsel, Kessler Topaz, moved to intervene to transfer this case to the Southern District of New York, or in the alternative, to stay or dismiss the case.[4] D.E. 4. These plaintiff-appellees claimed that Class Counsel "sold out" the classes in their LPI settlements by agreeing to unnecessary claims-made procedures, and unethically put forward one of their own law partners as a class representative in the HSBC case. D.E. 44 at 8 – 10. These plaintiff-appellees also argued that Class Counsel's LPI cases were the weakest among the competing LPI cases, incentivizing the defendants to negotiate with them rather than litigate against stronger plaintiff's counsel:

> Plaintiff Lee's counsel [] stat[ed] in open court in *Hall v. Bank of America* [] that "[t]hese cases are about finding the weakest plaintiff to have a sweetheart settlement with. That's what this is all about." [] The end result is a series of settlements guaranteeing tens of millions of dollars in Plaintiff counsel's

[4] As set forth above, Kessler Topaz also represented plaintiff-appellee John Clarizia, a plaintiff in *Clarizia*, for a total of seven of the nine persons later named class representatives in this action.

> attorneys' fees with no guaranteed or minimum payout to the classes.

Id.

Kessler Topaz and its clients in parallel cases likewise objected to Class Counsel's LPI settlements with Wells Fargo, HSBC, and JPMorgan Chase on the basis that the claims-made requirement was unnecessary. *See, e.g.,* D.E. 146-1 at 56. Class Counsel agreed to pay Kessler Topaz to withdraw these objections. D.E. 181 at 10. Kessler Topaz and the six plaintiff-appellees who previously *opposed* a claims-made settlement in this case then joined in it. *See* D.E. 144 at 3; 144-3 at 3-6.

III. The Parallel *Perryman* Action In The Northern District of California

In May 2014, Perryman filed a parallel class action on behalf of homeowners force-placed with LPI against Ocwen, ASIC, and other defendants in the United States District Court for the Northern District of California, captioned *Perryman v. Litton Loan Servicing LP, et al.*, No. 14-cv-02261-JST (N.D. Cal.) ("*Perryman*"). D.E. 131 at 3. Perryman's complaint sought certification of a nationwide class and a subclass of California homeowners. *Id*. at 3, 4.

In August 2014, the *Perryman* court held oral argument on Ocwen's and ASIC's motions to dismiss the complaint, which included a RICO claim, and strongly indicated that the motions would be denied. D.E. 131-1 at 2. Six days later, the parties in *Lee* announced that they "have decided to pursue a possible

settlement in this matter." D.E. 92 at 1. On October 1, 2014 – before the Lee parties reached a settlement in principle (D.E. 103) – the *Perryman* court issued an order upholding Perryman's claims against Ocwen and ASIC under the RICO act, against Ocwen for breach of contract, including breach of the implied covenant of good faith and fair dealing, against Ocwen and ASIC for violations of California's Unfair Competition Law, California Business and Professions Code § 17200, *et seq.*, and rejected the defendants' filed-rate doctrine defense. D.E. 131-2; *Perryman v. Litton Loan Servicing, LP, et al.,* No. 14-cv-02261-JST, 2014 WL 4954674 (N.D. Cal., Oct. 1, 2014) ("*Perryman I*"). Shortly after issuing this order, the *Perryman* court appointed interim class counsel and set a class certification schedule. D.E. 131 at 4; 131-3; 131-4.

After learning of the mediation scheduled in this case, Perryman's counsel sought to participate in the mediation. D.E. 140-1. Perryman's counsel informed defendants they would agree to a claims-made settlement "*only* if" it was truly necessary. *Id*. The defendants excluded Perryman's counsel from the mediation. *Id*.

Perryman served discovery requests on Ocwen and ASIC relevant to whether a claims-made procedure is necessary, *i.e.*, whether Ocwen and ASIC can systematically identify the class members who paid force-placed insurance premiums. D.E. 131 at 6; 131-8 at 9; 131-8 at 24. Ocwen and ASIC refused to

respond to Perryman's discovery, citing the settlement in this case, and filed a motion to stay. D.E. 131 at 6; 131-5. The *Perryman* court declined to order Ocwen and ASIC to provide discovery, holding that, "[t]he judge to whom such requests should be directed, if judicial action is required, is the judge in the [*Lee*] case – not the undersigned." D.E. 131 at 6; 131-7; *Perryman v. Litton Loan Servicing, LP,* 81 F. Supp. 3d 893, 900 – 901 (N.D. Cal. 2015) ("*Perryman II*").

Perryman is the second LPI case that Class Counsel have settled on a claims-made basis soon after Perryman's counsel obtained orders sustaining RICO claims in LPI litigation pending in the Northern District of California. Perryman's counsel litigated two parallel LPI class actions against Wells Fargo in the Northern District of California, *Cannon v. Wells Fargo Bank, N.A.,* N.D. Cal. No. 3:12-cv-01376 ("*Cannon*"), and *Lane v. Wells Fargo Bank, N.A., et al.,* N.D. Cal. No. 3:12-cv-04026 ("*Lane*"), overcoming motions to dismiss in both cases. D.E. 140 at 3 – 4; *Cannon v. Wells Fargo Bank, N.A.,* 917 F. Supp. 2d 1025 (N.D. Cal. 2013); *Lane v. Wells Fargo Bank N.A.,* C 12-04026 WHA, 2013 WL 269133 (N.D. Cal. Jan. 24, 2013).

In June 2013, Class Counsel, who served as co-counsel with former members of Perryman's counsel in *Fladell v. Wells Fargo Bank, N.A.,* No. 13-cv-60721 (S.D. Fla.), demanded that *Cannon* and *Lane* be voluntarily dismissed for nothing more than Wells Fargo's agreement to participate in a mediation in the

Southern District of Florida. D.E. 140 at 3, 14 – 19. Class Counsel made this demand within days of the hearing on class certification in *Lane* because the judge presiding over that case "disfavors settlements where funds revert to the defendants and those that involve a claims procedure," attaching his "Notice Regarding Factors To Be Evaluated For Any Proposed Class Settlement." D.E. 140 at 3, 34 – 36. When their co-counsel refused, Class Counsel shut them out of all further participation in *Fladell*. D.E. 140 at 3.

In September 2013, the *Cannon* complaint was amended to assert a claim for violation of the RICO Act. D.E. 140 at 3. At the January 23, 2014 hearing on the ensuing motion to dismiss the RICO claim, the court announced that the motion would be denied, exposing Wells Fargo and ASIC to treble damages for the first time in any force-placed litigation, and solving the problem that has vexed plaintiffs throughout this cluster of litigation – the inability to certify a national class asserting only state claims. *See Cannon v. Wells Fargo Bank, N.A.,* C-12-1376 EMC, 2014 WL 324556, *2-4 (N.D. Cal. Jan. 29, 2014) (denying motion to dismiss RICO claim); D.E. 140 at 3, 4.

At the hearing on the motion to dismiss, Wells Fargo's counsel assured the court that no settlement negotiations were then in progress in any of the other cases. D.E. 140 at 4. Eleven days later, Wells Fargo and Class Counsel

announced that they had reached an "agreement in principle" to settle *Fladell*, even though not a single ruling of substance had been issued in that case. *Id*.

The identical pattern repeated itself in this case.

IV. Settlement Proceedings

A. Preliminary Approval

The parties' settlement agreement identifies two categories of Settlement Class Members, those who "charged but did not pay and still owe their LPI premium," and those who "paid their LPI premium." D.E. 111-1 at 6, 7. Both categories of borrowers must submit claim forms to obtain relief. *Id*. at 26, 27; D.E. 111-2 at 11 – 19.

Class Counsel's motion for preliminary approval justified the claims requirement in a footnote:

> A claims-made process is appropriate here, as Ocwen and the Assurant Defendants have represented, *and discovery has confirmed*, that they cannot, on a system-wide basis and without an individualized review, determine the amount of force-placed premiums paid or currently owed by a borrower, or the number of loans that are in foreclosure, or have been modified or refinanced. The claims that are filed will provide that information for each claimant.

D.E. 111 at 5 n.5 (emphasis added). In response to an objection to preliminary approval (D.E. 116), the defendants similarly claimed that "[f]or various reasons (subsequent foreclosure, bankruptcy, short sale, etc.) many borrowers have not, and will never, pay or continue to owe LPI premiums … without individualized,

detailed escrow account analyses, there is no readily available way to determine if money paid was on account of LPI, or if a borrower still owes their charge." D.E. 118 at 10, 11. The parties submitted no evidence supporting these contentions.

The magistrate judge overruled all objections to preliminary approval, and entered an order granting preliminary approval substantially identical to the proposed order submitted by the parties. D.E. 111 – 2 at 35-54; 119; 122.

B. After Preliminarily Approval, the Magistrate Judge Denies Perryman's Request For Discovery

Perryman filed a motion for discovery, asking the court to compel the parties to provide her with the discovery referenced in Class Counsel's motion for preliminary approval, purportedly "confirming" that a claims-made settlement structure is necessary. D.E. 131. Perryman based her motion on the directive from the Federal Judicial Center, which instructs that, "[w]hen the defendant already holds information that would allow at least some claims to be paid automatically, those claims should be paid directly without requiring claim forms." *Id.*; *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010).[5]

The parties opposed Perryman's motion. D.E. 134; 135. Class Counsel stated that defendants "represented to Class Counsel, before, during, and after the

[5] Available at: http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf.

mediation that they could not query their systems to identify on a class wide basis whether class members had paid or still owed some portion of the amounts charged them for force-placed insurance," but identified no evidence they obtained supporting these claims. D.E. 135 at 4.

Defendants' opposition included a declaration by an Ocwen representative, Jason Jastrzemski, executed after preliminary approval had been granted, purportedly confirming the necessity of a claims-made procedure. D.E. 134-1. Jastrzemski claimed that it was not possible to systematically determine the universe of borrowers that paid for LPI, because Ocwen cannot "categorize the type of assistance" provided to borrowers when there has been a loan modification, or when loans are liquidated as part of short sale or deed-in-lieu of foreclosure transactions, requiring a file-by-file manual review. *Id*. at ¶ 7. Perryman's reply asked the court to allow her to take Jastrzemski's deposition. D.E. 140 at 6, 9.

The magistrate judge denied Perryman's motion on the grounds that: (1) Perryman had not yet formally objected to the settlement; (2) many courts had approved claims-made processes in LPI settlements; (3) Jastrzemski's declaration "demonstrates why it is not feasible to determine specific information about proceeds on a member-by-member basis;" and (4) discovery taken by Class Counsel in other LPI cases "showed that a claims process was necessary in those cases." D.E. 145.

C. Perryman Objects to Final Approval

Perryman objected to final approval on the basis that Class Counsel failed to show that the claims-made structure of the settlement was necessary. D.E. 146. Perryman renewed her request to take the deposition of Jason Jastrzemski. *Id*. at 13 – 15. She also cited seven force-placed insurance settlements – many against the same banks as the LPI cases filed and settled by Class Counsel – providing direct payments to hundreds of thousands of class members. *Id*. at 6, 7. Perryman submitted the expert reports of Professor Adam J. Levitin and Rebecca Walzak, who submitted these reports on behalf of objectors represented by Kessler Topaz in *Diaz v. HSBC Bank USA, N.A.,* No. 1:13-cv-21104-FAM (S.D. Fla.). D.E. 146-1 at 55 – 88, 56, 90. Class Counsel agreed to pay Kessler Topaz to withdraw these objections prior to the final approval hearing. D.E. 181 at 10.

Professor Levitin opined as follows:

> [A]ny mortgage servicer, has all of the data necessary to readily determine which Class members were charged and actually paid FPI premiums *other than for those Class members who have received loan modifications, short-sales, or short-refinancings*. HSBC should be able to readily identify those Class members who have received loan modifications, short-refinancings, or short-sales (collectively "Mod Beneficiaries"). Accordingly, there is no real obstacle to using a claims-paid structure for Class members *other than Mod Beneficiaries*, whose accounts could be credited if they are still currently serviced by HSBC or otherwise paid by check.
>
> *Excluding Mod Beneficiaries*, the only situation in which a borrower with an escrow account could not have paid for FPI

> is if the escrow account ran a continuous negative balance (a deficiency) from the time of the advance of the insurance premium by the servicer until the effective date of the proposed settlement and there were no subsequent credits to the escrow account from borrower payments.

D.E. 146-1 at 65, 66, 70 ¶ 92 (emphasis added).

Professor Levitin also attested that loan servicers are required to comply with numerous reporting obligations pursuant to the loan servicer's contracts with the Federal Home Loan Mortgage Corporation (Freddie Mac), and federal securities law, and that these requirements compel the conclusion that "[a]ny servicer operating within industry standards," has the information necessary "for administering a claims-paid settlement."[6] D.E. 146-1 at 65 – 71, ¶¶ 65 – 77. Professor Levitin also identified the requirements of the federal Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2609(c)(2)(A) and Regulation X (Reg X) thereunder, 12 C.F.R. § 1024.17(i). *Id*. at 69. Reg X requires servicers to provide annual escrow statements to a borrower showing the total amount paid into the escrow account on an annual basis, and the total amount paid out of the escrow account during the same period for, *inter alia*, insurance premiums. *Id*.

Nowhere in the parties combined 52-pages of briefing in opposition to Perryman's objection (D.E. 154, 155), the three-and-one-half hour final approval hearing (D.E. 161), Assurant's 59-page proposed order (D.E. 170-1), or Class

[6] "Claims-paid" referred to a settlement structure where defendants compensate class members without requiring them to submit claim forms.

Counsel's 49-page proposed order (D.E. 172-1) did the parties dispute that Ocwen was subject to the reporting requirements identified by Professor Levitin, or reconcile these requirements with their claim that Ocwen's loan servicing system is incapable of systematically identifying class members that paid, or still owe, force-placed insurance charges, excluding "Mod Beneficiaries."

D. Jastrzemski is Deposed and Contradicts Class Counsel's Justifications For the Claims-Made Settlement

In response to a question from the court as to whether a deposition of Jastrzemski was needed to support the claims-made requirement of the settlement (D.E. 149 at 4, ¶ 7), Class Counsel argued that his deposition was unnecessary. D.E. 155 at 3; 161 at 107:19 – 111:12. The court *sua sponte* ordered that Class Counsel *could* take Jastrzemski's deposition, but were not *required* to do so: "if you want to take Mr. Jastrzemski's deposition in order to further bolster that particular point [the claims requirement], you may do so in the next two weeks." *Id*. at 133:24 – 134:20; 159 at 1 – 2. In so ordering, the court observed that "both parties, both sides are trying to sufficiently demonstrate to me the need for a claims made methodology[.]" D.E. 161 at 116:16 – 24. As to whether Perryman could participate, the magistrate judge ordered that "counsel for parties of record, *not the objectors* … will naturally be able to attend and ask questions if they like." D.E. 161 at 134:13 – 20; 159 at 2.

Class Counsel took Jastrzemski's deposition, and it lasted 46 minutes. D.E. 169-1. During this brief exchange, Jastrzemski testified that Ocwen's system *can* systematically identify various loan changes and adjustments including the occurrence of a loan modification:

> Q.: Can you identify, systematically, the loans that have had modification transactions?
>
> A.: Yes.
>
> Q.: Okay. Can you identify, systematically, loans that have payments from programs like the Hardest Hit program?
>
> A.: Yes.
>
> Q.: Can you identify, systematically, the amount of payments received for borrowers from a government program like the Hardest Hit program?
>
> A.: Yes.

D.E. 169-1 at 23:13 – 24:3. Jastrzemski's testimony contradicted Class Counsel's original explanation for agreeing to a claims-made process. As stated by Class Counsel in their motion for preliminary approval:

> *[D]iscovery has confirmed*, that [Ocwen] cannot, on a system-wide basis and without an individualized review, determine … *the number of loans that are in foreclosure, or have been modified or refinanced*.

D.E. 111 at 5 n.5 (emphasis added). And as stated in Class Counsel's joint declaration in support of final approval:

> *Discovery that Class Counsel has taken in several other force-placed insurance class actions confirms [] that Ocwen's system, RealServicing, has capability limitations similar to those of the systems used by other lenders*[.] In *Williams v. Wells Fargo Bank, N.A.*, [] a Wells Fargo corporate representative testified [] that "without a borrower-by-borrower manual examination of each loan file, [Wells Fargo's systems] cannot accurately determine the universe of borrowers who [] *may have entered into loan modification, short sale, refinance, or other agreements with Wells Fargo Bank*."

D.E. 144-3 at ¶ 39 (emphasis added).

E. Class Counsel Demands That Perryman Submit Additional Evidence Supporting Her Objection; Perryman Obliges

After Jastrzemski's deposition, Class Counsel filed a motion for an order to show cause, asking the court to require Perryman to submit additional evidence supporting her objection, or deem her objection filed in bad faith. D.E. 166. Perryman obliged, and submitted two declarations from Rebecca Walzak, an expert in the operations of mortgage loan originators and servicers, and who reviewed Jastrzemski's declaration and deposition testimony. D.E. 173; 173-1; 181; 181-1. Walzak, like Professor Levitin, identified Ocwen's RESPA reporting requirements, which require all servicers to "show the amounts received from the borrower for each item escrowed as well as what is paid out" on an annual basis for LPI as proof that Ocwen can systematically identify and directly pay those borrowers that paid force-place insurance charges, *except* for certain categories of borrowers that *could* be systematically identified:

> *Because Ocwen's systems are capable of systematically identifying which borrowers received third party assistance, which borrowers received a loan modification, and which loans were liquidated as part of a short-sale or deed-in-lieu foreclosure transaction*, Ocwen can identify at least a subset of borrowers who paid, or still owe, force-placed insurance charges. For borrowers who did not receive third party assistance or assistance from the servicer on behalf of the lender, if their escrow account ceased to have a deficiency following payment, then the borrower would have necessarily paid the force-placed insurance charges, because the deficiency created by the advancing of premiums would have been covered by the borrower's subsequent payments. For all other borrowers who did not receive third party assistance or assistance from the servicer on behalf of the lender, if their escrow account showed a deficiency, they would still owe force-placed insurance charges.

D.E. 173-1 at 5, 6, ¶ 9, 9, 10; 181-1 at 2 (emphasis added). After Perryman submitted Walzak's initial report, the magistrate judge invited Class Counsel to submit additional evidence rebutting Walzak's conclusion that class members who did not fall into one of the enumerated categories (borrowers who received third party assistance, a loan modification, or whose loans were liquidated as part of a short-sale or deed-in-lieu foreclosure transaction) could be systematically identified and directly paid. D.E. 174. Neither Class Counsel nor Ocwen submitted such evidence. D.E. 177, 178. No evidence in the record rebuts this conclusion.

Instead, Class Counsel *admitted* that "Ocwen can [systematically] identify mortgage loans that have undergone modification, or those paid through

Government programs like the Hardest Hit Fund," as well as "borrowers whose loans were modified or those whose loans were liquidated as part of a short sale or deed-in-lieu of foreclosure transaction." D.E. 178 at 9, 10.

In light of Class Counsel's admissions, Jastrzemski's testimony, and Walzak's unrebutted conclusions, Perryman argued, "[a]t a minimum, the Settlement Class members who do *not* fall into one of these categories [borrowers whose loans underwent modification, or received assistance from the Hardest Hit Fund, as wells as borrowers whose loans were liquidated as part of a short sale or deed-in-lieu of foreclosure] should be paid directly without requiring claim forms," citing the Federal Judicial Center's directive that "[w]hen the defendant already holds information that would allow at least some claims to be paid automatically, those claims should be paid directly without requiring claim forms." D.E. 181 at 4.

F. The Court Grants Final Approval; Perryman Appeals

The parties submitted proposed orders granting final approval (D.E. 159 at 2; 170-1; 172-1), before Perryman submitted the post-fairness hearing expert reports of Walzak. D.E. 173; 173-1; 181, 181-1.

The magistrate judge entered a 75-page order granting final approval on September 14, 2015. D.E. 184. The majority of the order adopts the proposed order submitted by the Assurant defendants verbatim. *Id.*; D.E. 170-1. The order does not consider Perryman's argument that class members that did not fall into

one of the categories set forth above should be paid directly, and ignored Walzak's post-fairness hearing expert reports.

The magistrate judge held "that it is not feasible to determine systematically whether LPI premiums were paid or are still owed by *any* given Class Member." D.E. 184 at 23 – 25, 45 – 48; 170-1 (emphasis added). The magistrate judge further held that "in any event, Defendants would not have agreed to a direct-payment structured settlement." D.E. 184 at 41, 62 – 63.

The magistrate judge overruled Perryman's request to depose Jastrzemski (D.E. 146 at 13 – 15), holding that, "[s]ettlement related discovery causes delay and distraction and should be denied." D.E. 184 at 62. The court further held that "extensive formal discovery about the necessity of a claims process [is] unnecessary," because of the record evidence, and that "full-scale discovery of the kind needed to try a complex case would defeat the settlement's true purpose – to put aside the burdens, costs, and uncertainties of litigation[.]" D.E. 184 at 58 – 63.

The magistrate judge further held that the settlement is fair, reasonable, and adequate "independent" of the number of claims submitted, and that the claims-made procedure is desirable in its own right, because: (1) other courts approved similar claims-made LPI settlements; (2) a settlement's fairness is judged by "the opportunity created for the class members, not by how many submit claims;" and

(3) the claims process is needed to reduce the risk of "fraud, waste, and abuse," and prevent "windfalls" to class members. D.E. 184 at 38, 42, 50, 56.

In analyzing Class Counsel's "likelihood of success at trial," the magistrate judge held that the claims in this case were fundamentally uncertain, as many courts had dismissed materially similar LPI cases. D.E. 184 at 16 – 21. The magistrate judge did not consider the impact of the order issued by the *Perryman* court, upholding RICO and other claims for relief against the same defendants for the same wrongdoing, and rejecting their file-rate doctrine defense. *See Perryman I,* 2014 WL 4954674.

The magistrate judge also held that there was no "collusion" present because Class Counsel mediated the case at "arms-length." D.E. 184 at 25. The magistrate judge did not consider other indicia of unfairness, including: (a) the imbalance between the value of the settlement to the class as a whole and the agreed amount of attorneys' fees; (b) the existence of a stronger, parallel class action with greater prospects for success than the settling case; (c) similar settlements between Class Counsel and the same defendant in unrelated cases; and (d) payments by Class Counsel to objectors to withdraw their objections to identically structured LPI settlements.

Perryman timely-filed a Notice of Appeal on October 13, 2015. D.E. 187.

SUMMARY OF THE ARGUMENT

As the Federal Judicial Center directs, "[w]hen the defendant already holds information that would allow at least some claims to be paid automatically, those claims should be paid directly without requiring claim forms." The uncontroverted evidence in this case establishes that Ocwen can, in fact, systematically identify *all* class members who paid or still owe force-placed insurance charges, *except* for a subset of class members who can themselves be systematically identified: those who received loan modifications, whose loans were liquidated as part of a short-sale or deed-in-lieu of foreclosure transaction, or who received mortgage payment assistance from government programs. The district court's finding that "it is not feasible to determine systematically whether LPI premiums were paid or are still owed by *any* given Class Member" was clearly erroneous.

This is the *eighth* claims-made settlement of force-placed insurance litigation entered into by Class Counsel in the Southern District of Florida. Most of these settlements have also involved Assurant and ASIC. As in these other cases, the parties were well-aware there would be a single-digit – approximately 4% – claims rate in this case, leaving approximately 96% of class members uncompensated, and allowing defendants to retain approximately 96% of this purported $140 million settlement. That is *why* the class members who *could* be systematically identified, and paid directly, were required instead to submit claims.

The parties argued, and the district court accepted, that class members should not be paid directly, because "Defendants would not have agreed to a direct-payment structure," which would have cost them considerably more. That is not a valid reason for requiring the unnecessary submission of claims.

This case has all the indicia of an unfair and collusive settlement, carefully structured to maximize attorneys' fees and minimize the payout to the class: an unnecessary claims requirement, resulting in attorneys' fees of nearly *twice* the anticipated payout to the class; an agreement by defendants not to object to the fees requested; a provision whereby any fees not awarded revert to the defendants, instead of being used to benefit the class; and a string of similar settlements between Class Counsel and common defendants.

The district court's finding that class members who received *mortgage* payment assistance from the government would receive a "windfall" if they received a partial refund of amounts paid out of their escrow accounts for force-placed insurance has no basis in law or fact. As other courts have found in rejecting the same argument, these funds were intended to assist homeowners in making their mortgage payments, not to allow banks and insurance companies to escape liability.

Because the settlement in this case is not fair, reasonable, and adequate, the final order and judgment approving it should be reversed.

ARGUMENT

I. Standard of Review

A district court's decision to approve a class action settlement is reviewed for abuse of discretion. *Day v. Persels & Assocs., LLC,* 729 F.3d 1309, 1316 (11th Cir. 2013). Review of a class action settlement is subject to heightened scrutiny when the settlement is negotiated before class certification. *See Allen v. Bedolla,* 787 F.3d 1218, 1223 (9th Cir. 2015); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 786 – 800 (3d Cir. 1995). "Proponents of class action settlements bear the burden of developing a record demonstrating that the settlement distribution is fair, reasonable and adequate." *Holmes v. Cont'l Can Co.,* 706 F.2d 1144, 1147 (11th Cir. 1983). "[C]areful scrutiny by the court is necessary to guard against settlements that may benefit the [] attorneys at the expense of absent class members." *Id*. (internal quotation omitted). "[T]o survive appellate review, the district court must show it has explored comprehensively all factors, and must give a reasoned response to all non-frivolous objections." *Bedolla,* 787 F.3d at 1223 (quoting *Dennis v. Kellogg Co.,* 697 F.3d 858, 864 (9th Cir. 2012)).

"A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States,* 518 U.S. 81, 100, 116 S.Ct. 2035, 2047 (1996). It also abuses its discretion if it "applies the law in an unreasonable or incorrect

manner." *Citizens for Police Accountability Political Comm. v. Browning,* 572 F.3d 1213, 1216 (11th Cir. 2009). Abuse of discretion is found where the district court "fails to afford consideration to relevant factors that were due significant weight" or where "it considers the proper factors but balances them unreasonably." *United States v. Irey,* 612 F.3d 1160, 1189 (11th Cir. 2010) (*en banc*) (citing cases).

When a district court adopts a party's proposed factual findings, the clearly erroneous standard applies, although close scrutiny of the record is appropriate. *Anderson v. City of Bessemer City,* 470 U.S. 564, 571 – 573, 105 S.Ct. 1504, 1510 – 1511 (1985). A factual finding is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes and of Malta v. Florida Priory of the Knights Hospitallers of the Sovereign Order of Saint John of Jerusalem, Knights of Malta, the Ecumenical Order ("Sovereign Military"),* -- F.3d --, No. 14-14251, 2015 WL 6000633 (11th Cir., Oct. 15, 2015). As to the weighing of evidence, a district court may "weigh competing expert testimony but may not arbitrarily ignore expert testimony; rather, some reason must be objectively present for ignoring expert opinion testimony." *Knight v. Thompson,* 797 F.3d 934, 942 (11th Cir. 2015). A court "commits a clear error when it makes a factual finding that has no support in the record." *Day,* 729 F.3d at 1327. A

court also commits a clear error by not assigning weight to "ample, unrebutted evidence." *Jean v. Nelson,* 711 F.2d 1455, 1509 (11th Cir. 1983).

II. The Parties Failed To Meet Their Burden To Show That A Claims Process Is Necessary Or Desirable

A. Claims-Made Settlements Are Abusive When Used Solely to Reduce The Payout to Class Members

The Federal Judicial Center's ("FJC's") *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010) instructs district courts to consider whether "a claims process [is] actually necessary[]," cautioning that "[i]n too many cases, the parties may negotiate a claims process which serves as a choke on the total amount paid to class members. When the defendant already holds information that would allow at least some claims to be paid automatically, those claims should be paid directly without requiring claim forms."[7]

Claims-made settlements are disfavored because they "tend to promise far more than they deliver":

> In most class action settlements … claiming may be quite low because of the small claims nature of the relief and the often difficult hurdles of claiming; if the defendant is disgorged of only the amounts claimed, and not of a fixed fund, it is likely to pay only a small percentage of the potential total recovery to the class. This troubles courts, even more so if the settlement also includes a "clear sailing" agreement whereby the defendant agrees not to contest class counsel's fee request up to a certain

[7] Available at: http://www.fjc.gov/public/pdf.nsf/lookup/notcheck.pdf/$file/notcheck.pdf.

> level. The combination makes it appear as if class counsel agreed to a low defendant liability in exchange for an easy fee.

WILLIAM B. RUBENSTEIN, *Newberg on Class Actions,* § 13:7 (5th ed. 2015).

"[T]heoretical and empirical evidence suggest[s] that few class members file claims in most cases[.]" *Newberg,* § 12.17. This is true here. In this case and Class Counsel's other LPI settlements, less than four percent of class members submitted claims by the time of the final approval hearing.[8] D.E. 173 at 2; *SunTrust Mortgage,* 2014 WL 5419507, at *4-5 (out of 63,000 class members, 2,514 filed claims).

For these reasons, the leading treatise states that, "the best practice in most cases is to create a system for distributing the class's funds without the necessity of any claiming practice[.]" *Newberg,* § 12:17. "[I]f direct payment is possible, but not utilized, a court might consider that a red flag warning of a bad settlement[.]" *Id*. at § 12:18.

Recent appellate decisions have reversed the approval of class action settlements with unnecessary claims procedures, when, like here, all unclaimed funds revert to defendants, and when they are coupled with indicia of self-dealing

[8] Class Counsel stated at the final approval hearing that the final claims rate is anticipated to range between 10 to 15 percent. D.E. 161 at 13:21 – 23; 184 at 54. Class Counsel submitted no evidence supporting this assertion.

on the part of class counsel.[9] In *Pearson v. NBTY, Inc.,* 772 F.3d 778, 787 (7th Cir. 2014), the Seventh Circuit reversed a district court's order approving a class action settlement that resulted in a small number of class members recovering any money but provided large attorneys' fees to class counsel. The court noted that claims-made settlements coupled with high attorneys' fees pose a risk that class counsel will "connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class." *Id*. at 781. In *Eubank v. Pella*, 753 F.3d 718 (7th Cir. 2014), the Seventh Circuit similarly reversed the approval of a claims-made settlement that would result in a meager recovery to the class, remarking on the

> incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers – the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests.

Id. at 728-29.

And the Ninth Circuit reversed approval of a claims-made settlement where, as here, (1) counsel received a disproportionate distribution of the settlement; (2) the parties negotiated a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds, noting that such an

[9] Discussed fully in Section II-E, *infra*.

arrangement carries "the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class," and (3) the parties arranged for fees not awarded to revert to defendants rather than be added to the class fund. *In re Bluetooth Headset Products Liability Litigation,* 654 F.3d 935, 947 (9th Cir. 2011).

B. Class Members Who Can Be Systematically Identified Should be Directly Paid

The district court abused its discretion and erred as a matter of law by approving the settlement in light of the unrebutted evidence that the class members that paid or owe LPI premium who did not receive third party assistance or loan modifications, and whose loans were not liquidated in a short sale or deed-in-lieu of foreclosure transaction, can be identified systematically, and therefore "should be paid directly without requiring claim forms." *Judges Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010); D.E. 173; 173-1; 181; 181-1.

Based on Jastrzemski's testimony, Class Counsel admitted that "Ocwen can [systematically] identify mortgage loans that have undergone modification, or those paid through Government programs like the Hardest Hit Fund," as well as "borrowers whose loans were modified or those whose loans were liquidated as part of a short sale or deed-in-lieu of foreclosure transaction." D.E. 178 at 9, 10. Class Counsel did not dispute Walzak's conclusion that class members who paid or

owe LPI premium, and who did not fall into one of these categories, can be systematically identified and directly paid. D.E. 178 at 7 – 10; 173; 173-1 at ¶ 9; 181; 181-1 at 2. *No evidence in the record rebuts this conclusion*.

Ocwen also did not directly dispute Walzak's conclusions or submit rebuttal evidence. D.E. 177. Ocwen instead made the non-controversial argument that the determination of whether a borrower paid or owed LPI premium would require consideration of many factors, such as whether "LPI was cancelled; whether the premium was refunded in whole or in part; whether the borrower received third-party assistance; whether the borrower received a loan modification[.]" *Id*. at 4. But, as admitted by Ocwen (*id*. at 2 n.2), the borrowers who fall into these categories *can be systematically identified* in Ocwen's systems. And neither Ocwen – *nor any other bank or loan servicer in LPI litigation in the Southern District of Florida* – has claimed or submitted evidence that it cannot systematically determine the population of borrowers who had LPI premiums cancelled or refunded. *Id*. In this case, such borrowers are excluded from the class. D.E. 111-1 at 16, ¶ 3.1. And banks, including JPMorgan Chase and U.S. Bank, have provided this information to plaintiffs to facilitate direct-payment LPI settlements.[10] D.E. 146 at 81; 146-1 at 27 – 28. Finally, as Ocwen is required to

[10] For example, JPMorgan Chase, in a direct-payment LPI settlement in the Northern District of California, provided the following information for all the class members: (1) dates of placement for LPI; (2) LPI premium charged for all class

equally compensate borrowers who paid *or* owe LPI premiums under the settlement, it is of no consequence if it is "equally possible to say" that a borrower paid or owes LPI premium because of the characteristics of a borrower's escrow account.[11] D.E. 177 at 3, 4. For those class members who did not receive third

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members; and (3) LPI premium amount refunded for all class members. D.E. 146-1 at 27.

[11] The parties' claim that Ocwen cannot systematically identify the class members that paid for or owe LPI charges is based largely on a description of characteristics common to any account, whether it be a checking account, mortgage escrow account, or a "running tab" at the local market. Money is deposited into the account, not earmarked for any particular debit; debits are posted to the account, not tied to any particular deposit; after netting the two, the amount available (in the case of a checking account) or owed (in the case of a mortgage escrow account) constitutes the "running balance." D.E. 134-1 at ¶ 6 ("The escrow account balance in RealServicing is a running balance. Payments by a borrower to her escrow account are not allocated to a specific bill or charge, but are applied generally to the balance of the account."). To call this "Accounting 101" would be an overstatement.

Jastrzemski's declaration, executed prior to his deposition, states that Ocwen is unable to determine whether class members "paid or still owe[] Ocwen the cost of the LPI premium" because (1) "[a] payment into a borrower's escrow account[] is not attributed[] to specific escrow charges,[] so payment to an escrow account will not be reflected[] as a payment for LPI;" and (2) "[e]scrow account credits[] include accounting adjustments and payments received from third parties," such as when there is a "loan modification, or when loans are liquidated as part of short sale or deed-in-lieu of foreclosure transaction," or when borrowers "may have had all or part of their LPI charges paid by third-party homeowner assistance programs, such as the United States Treasury's Hardest Hit Fund," so that "the fact that there is a credit before or after an LPI debit does not mean necessarily that a *borrower* actually reimbursed Ocwen for LPI premium." D.E. 134-1 at ¶¶ 3, 7.

During his deposition, Jastrzemski admitted that borrowers that fall into these categories *can* be systematically identified (D.E. 169-1 at 23:13 – 24:3), and

party assistance or otherwise have their LPI premium cancelled or refunded, the fact that they were *charged* for LPI entitles them to compensation under the settlement, no matter if they paid, or did not pay, but still owe, LPI premium. D.E. 111-1 at 16, ¶ 3.1. Thus, Ocwen has identified no obstacle to identifying and providing direct payments to those class members who did not fall into one of the categories enumerated above.

Other courts have similarly found that there is no impediment to identifying such borrowers. In *Lane v. Wells Fargo Bank,* for example, the court found that Wells Fargo was capable of identifying such borrowers based, in part, on Class Counsel's settlement in *Williams v. Wells Fargo Bank*:

> Defendant raises a number of scenarios where a borrower may have been charged for force-placement of insurance but never actually paid the charges, e.g., "borrowers in various stages of delinquency[.]" This includes borrowers with homes in active foreclosure, those who no longer own the subject properties following a foreclosure sale, and those who are delinquent on their loans[.] These arguments … were recently addressed in a similar class action against defendant involving state law claims related to force-placed flood insurance. There, the district court addressed these issues by narrowing the class definition to exclude certain groups of borrowers who had been reimbursed or were unlikely to ever pay the insurance charges. *Williams v. Wells Fargo Bank, N.A.,* 280 F.R.D. 665, 674 (S.D. Fla. 2012) (Judge Robert Scola). Following the certification of a Florida class of borrowers, the parties reached a settlement agreement, which has been submitted to that court for approval. The

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Walzak concluded that class members that did *not* fall into these categories can similarly be systematically identified and directly paid.

> definition of the settlement class there was substantially similar to the certified class and was defined as:
>
> > All borrowers that had mortgages with and/or serviced by Wells Fargo Bank … on property located within the State of Florida, and were charged for Lender Placed Insurance … This class excludes borrowers who: (1) the lender obtained a judgment against; (2) entered into a short-sale agreement with the lender; (3) granted a deed in lieu of foreclosure to the lender; (4) entered into a loan modification with the lender; (5) filed a claim for damages which has been paid in full or part by the lender-placed insurer; or, (6) had a lender-placed insurance policy in which the cost of lender-placed insurance was canceled out in full.
>
> *Here, plaintiffs argue that this class settlement indicates that Wells Fargo can identify borrowers who have been charged for insurance but have been reimbursed or will not pay the charged premiums. This order agrees.*

Lane v. Wells Fargo Bank, N.A., No. 12-cv-04026, 2013 WL 3187410, *9 – 10 (N.D. Cal., June 21, 2013) (emphasis added). Similarly here, the unrebutted evidence shows there is no impediment to systematically identifying those class members who fall into one of the enumerated categories, requiring only *them* to submit claims, and directly paying or crediting all others the amount they were charged for LPI. In light of this fact, the settlement as a whole is not fair, reasonable, and adequate.

The final approval order does not address Walzak's post-fairness hearing expert reports, and does not consider whether the settlement is reasonable in light of the unrebutted evidence that Ocwen can systematically identify class members

who did not fall into one of the enumerated categories, and who paid or owe LPI premium. D.E. 184. The court instead limited its factual findings to whether Ocwen can systematically identify the *entire* class of borrowers who paid or still owe LPI premium, and concluded that Ocwen cannot. *Id*. In making these factual findings, the final approval order adopted the defendants' proposed findings on this issue nearly word-for-word – which were filed *before* Perryman submitted Walzak's post-fairness hearing expert reports. *Compare* D.E. 170-1 at 19 n.4, 32 – 34, *with* D.E. 184 at 24 n.7, 45 – 48.

The court abused its discretion by failing to consider Walzak's reports and Perryman's argument that the settlement is not fair, reasonable, and adequate because class members who did not fall into one of the enumerated categories can be feasibly identified and directly paid. A district court may not "arbitrarily ignore" expert opinion testimony. *Knight,* 797 F.3d at 942. To survive appellate review, a district court "must give a reasoned response to all non-frivolous objections." *Bedolla,* 787 F.3d at 1223; *accord, Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977). Where, as here, "the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for such deference by an appellate court disappears." *Sovereign Military,* 2015 WL 6000633 at *17. As a matter of law, the order approving the settlement must be reversed.

C. There Is No Legitimate Justification For Excluding Class Members Who Received Mortgage Payment Assistance From The Settlement, Or Requiring Them to File Claims

Perryman's objection identified seven LPI settlements that provided direct payments to class members. D.E. 146 at 6 – 7. These settlements provided payments to class members whose accounts (1) were charged for LPI, and/or (2) whose LPI policies were not cancelled in their entirety such that premiums charged and/or collected were refunded or credited to the borrower. *See, e.g.,* D.E. 146 at 59 – 60, ¶ 3; 146-1 at 50 – 51, ¶ 5; *Arnett v. Bank of America* ("*Arnett*"), No. 3:11-cv-1372, 2014 WL 4672458, *4 (D. Or., Sept. 18, 2014). Perryman argued these direct payment settlements showed that defendants could similarly effectuate a direct payment settlement to the class here. D.E. 146 at 6 – 7.

The parties argued, and the magistrate judge accepted, that these direct payment settlements likely resulted in "windfall" payments to class members who received third party assistance, and that defendants were not willing to risk such "windfalls" in a large settlement like this one. D.E. 184 at 45, 48 – 50.[12] *Id*. The magistrate judge erred as a matter of law by accepting this argument. All of the "third party assistance" identified by defendants consists of funds earmarked for *mortgage payment assistance* – not assistance for LPI payments. D.E. 134-1, ¶ 7.

[12] The number of class members in these settlements was not "small" as argued by defendants. For example, in *Arnett,* the number of class members was 359,320 (*Arnett,* 2014 WL 4672458 at * 6), approximately 90% of the class size in this case.

There is no justification for withholding settlement payments to borrowers on the grounds that they received mortgage payment assistance from third parties.

The first group of borrowers who defendants identified as ineligible to receive settlement proceeds are borrowers who received assistance from the U.S. Treasury's "Hardest Hit Fund." D.E. 134-1 at 4, ¶ 7. The assistance provided from this fund varies from state to state, but may include the following: (1) mortgage payment assistance for unemployed or underemployed homeowners; (2) mortgage principal reduction; (3) funding to eliminate second lien loans; and (4) help for homeowners transitioning out of their homes and into more affordable housing.[13] *See, e.g., Mukarugwiza v. JPMorgan Chase Bank, N.A.,* No. CV-15-00079-PHX-NVW, 2015 WL 3960889, *1 (D. Ariz., June 30, 2015). As this assistance is for *mortgage payments,* borrowers who received such funds should not be barred from recovery under this settlement. *Id*. As one judge in the Northern District of California held in rejecting ASIC's identical arguments:

> ASIC . . . argues that the class definition is unmanageable because some borrowers may have received assistance from loan assistance programs such as the U.S. Treasury's Hardest Hit Fund or Keep Your Home California. The programs provide mortgage assistance to borrowers who are delinquent or facing default. . . . ASIC argues that it would be unmanageable to conduct the file-by-file review needed to ascertain whether the program assistance was credited to borrowers' LPI charges. [] This order does not exclude

[13] https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/hhf/Pages/Program-Purpose-and-Overview.aspx

> program payments credited to LPI charges, which in turn eliminates ASIC's manageability concern because no file-by-file review will be necessary. *This approach also is consistent with the point of the programs, which is to help borrowers with delinquent mortgages*. If Defendants credited mortgage assistance to LPI charges, then refunds of the charges—again, identifiable from general records—allow the program funds to be used for their intended purpose: delinquent mortgage payments. Defendants do not offer any arguments that support a contrary conclusion.

Ellsworth v. U.S. Bank, N.A., No. C 12-02506 LB, 2014 WL 2734953, *13 (N.D. Cal., June 13, 2014) (emphasis added). Simply put, assistance from the Hardest Hit Fund and other government assistance programs is intended to assist homeowners – not line the pockets of banks and insurance companies. The magistrate judge erred as a matter of law in holding otherwise.

D. That Defendants "Would Not Have Agreed" To Providing Direct Payments, In Order To Greatly Reduce The Anticipated Payout to The Class, Is Not A Valid Reason For Approving The Settlement

Class Counsel's motion for preliminary approval justified the claims requirement in this settlement because "discovery" in this and other of their LPI cases purportedly "confirmed" that Ocwen cannot systematically identify the class. D.E. 111 at 5 n.5; 144-3 at ¶ 39. After Jastrzemski's 46-minute deposition revealed that Class Counsel's "discovery" confirmed no such thing, Class Counsel rationalized the settlement by arguing that whether a claims-made structure is necessary "is entirely beside the point," in part because defendants would not have

agreed to a direct pay settlement. D.E. 178 at 2, 10. The magistrate judge subsequently approved the settlement in part because "Defendants would not have agreed to a direct-payment structure." D.E. 184 at 42, 63.

That defendants "would not have agreed" to a direct payment settlement is an improper reason for approving a settlement that will leave 96 percent of the class uncompensated. Class counsel, as fiduciaries of the class, had a duty to reject an early inadequate settlement offer and litigate the case unless and until an adequate settlement could be reached.

This settlement was reached at a very early stage of the proceedings. Prior to agreeing to this settlement, Class Counsel obtained *no* rulings on the merits of the case, and conducted *no* discovery related to the necessity of a claims-made procedure – relying instead on defendants' representations at mediation – which turned out to be false. Where a settlement, like this one, is negotiated prior to class certification, "there is an even greater potential for a breach of fiduciary duty owed the class during settlement." *Bluetooth,* 654 F.3d at 946. Class Counsel abdicated their duties. In accepting the settlement terms, Class Counsel knew the vast majority of the class would receive no compensation under the settlement. Indeed, the class members here, by definition, were unlikely to respond to an unsolicited class notice – just as they did not respond to notices notifying them that their voluntary insurance had lapsed. D.E. 106 at ¶ 38. But even though Class Counsel

argued that defendants would not agree to a direct payment settlement, they were able to negotiate for themselves a whopping $9.85 million fee.

As one judge in the Northern District of California held in an analogous case, rejecting the reasoning accepted by the magistrate judge here:

> …The Court is left with the fact that [defendant] and class counsel reached an agreement whereby counsel may be awarded the lion's share – 80 percent – of the total payout, a result the parties anticipated[.] *[C]lass counsel explained they were reluctant to push for direct payment to class members … instead of a claims process, because they feared [defendant] may have been unwilling to pay a higher aggregate sum to the class in settling that claim[.] Yet, class counsel was able to negotiate for themselves a fee award and cost reimbursement of over $4 million*[.] In sum [] the Court concludes that, despite the vigorous representation by [class counsel] throughout this litigation and the lack of any conscious collusion, the settlement proposed by the parties is not fair, reasonable, and adequate.

Harris v. Vector Marketing Corp., No. C-08-5198 EMC, 2011 WL 4831157 * 4 – 8 (N.D. Cal., Oct. 12, 2011) (emphasis added).[14] As *Harris* explained, just because

[14] *Accord, Milan v. Cascade Water Services, Inc.,* -- F.R.D. --, No. 1:12-cv-01821, 2015 WL 5916750, *10 (E.D. Cal., Oct. 8, 2015) ("the claims process appears to serve little purpose here, other than minimizing Defendant's payout … [r]equiring submission of a claim form … appears to serve no legitimate purpose"); *De Leon v. Bank of America, N.A. (USA),* 2012 WL 2568142 (M.D. Fla. 2012), report and recommendation adopted, 2012 WL 2543586 (M.D. Fla. 2012) (noting that the high probability of a low claims rate "raises the question of why a claims made process is actually necessary" and "a settlement that does not require class members to submit a claim form to receive payment would be preferable in this case[.]"); *Vought v. Bank of America, N.A.,* 901 F. Supp. 2d 1071, 1075 (C.D. Ill. 2012) ("for a settlement where BANA is required to do what it should have done two years ago [] and to compensate class members [] just $38,000 and class counsel $2,000,000 is not something that would strike a jury in downstate Illinois

a defendant "may have been unwilling to pay a higher aggregate sum" is not a legitimate reason for approving an unnecessary claims-made settlement, especially where (1) attorney's fees are disproportionate to the class award; (2) there is a "clear-sailing" agreement where defendants agree not to object to an attorneys' fee award up to a certain amount; and (3) there is a reverter provision under which all fees not awarded revert back to defendants, rather than be used to benefit the class. *Id*. at *3 (citing *Bluetooth,* 654 F.3d at 947). All three features are present here. D.E. 111-1; 111-2.

Importantly, no recent appellate decision has affirmed the approval of an unnecessary claims requirement in a class action settlement, employed to greatly reduce the anticipated payout to the class, because the defendant was ostensibly unwilling to pay more. Just the opposite is true. *See Pearson,* 772 F.3d at 787 (reversing approval of unnecessary claims-made settlement coupled with high

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as a particularly good bargain"); *Stewart v. USA Tank Sales and Erection Company, Inc.,* No. 12-05136-CV-SW-DGK, 2014 WL 836212, *6 (denying final approval to claims-made settlement because it was a "collusive vehicle resulting in significant fees for class counsel, a low payout by defendants, and limited benefits to the class"); *Sylvester v. CIGNA Corp.,* 369 F. Supp. 2d 34, 52 (D. Me. 2005) (rejecting settlement with claims-made procedure, in part because "'claims-made' settlements regularly yield response rates of 10 percent or less"); *Kakani v. Oracle Corp*., No. C 06-06493 WHA, 2007 WL 1793774 (N.D. Cal., June 19, 2007*).* (denying preliminary approval to a proposed claims-made settlement and suggesting that a revised settlement release only the claims of those class members who file forms); *Acosta v. Trans Union, LLC,* 243 F.R.D. 377, 391 (C.D. Cal. 2007) ("In reality, the bulk of the economic relief hypothetically available under the Settlement is merely illusory due to its strict eligibility conditions, while much of what is attainable will go unpaid as a result of the claims-made process.").

attorneys' fee); *Eubank,* 753 F.3d at 728-29 (same); *Bluetooth,* 654 F.3d 947 (same). The magistrate judge abused his discretion by approving the settlement for this reason.

E. The District Court Improperly Disregarded Multiple Indicia of Self-Dealing On The Part of Class Counsel

In approving this claims-made settlement, the district court found that "[t]here is simply no evidence of self-dealing, collusion or other unethical behavior" on the part of Class Counsel, in part because the negotiations were conducted at "arms-length." D.E. 184 at 27. The magistrate judge's analysis on this point was incomplete, and in error.

It is not enough that the settlement was negotiated at "arm's length" without explicit collusion; the settlement must also be objectively reasonable. Rather than 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." *Staton v. Boeing,* 327 F.3d 938, 964 (9th Cir. 2003) (quoting *In re Gen. Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.,* 55 F.3d 768, 819-20 (3d Cir. 1995)); *accord Bluetooth,* 654 F.3d at 949; *Mirfasihi v. Fleet Mortg. Corp.,* 356 F.3d 781, 785 (7th Cir. 2004); *In re Dry Max Pampers Litigation,* 724 F.3d 713, 717 (6th Cir. 2013).

A settlement can be unfair when negotiated at arms' length: class counsel can achieve an unfair settlement simply through a defendant's and a mediator's indifference to the allocation. *Staton,* 327 F.3d at 964. The relevant inquiry is whether the attorneys are unfairly attuned to their self-interest at the expense of the class. *Mirfasihi,* 356 F.3d at 785; *Bluetooth,* 654 F.3d at 947. As discussed throughout this brief, Class Counsel here was principally concerned with their own interests, at the expense of the class.

Bluetooth suggests a nonexclusive list of three possible signs of self-dealing: (1) attorneys' fees disproportionate to the class award; (2) a "clear-sailing agreement where defendants agree not to object to an attorneys' fee award up to a certain amount; and (3) a reverter provision under which all fees not awarded revert back to defendants rather than be used to benefit the class. *Bluetooth,* 654 F.3d at 947. As discussed throughout this brief, all three signs are present in this case.

There are also several not so subtle signs of self-dealing present here, including multiple claims-made LPI settlements between Class Counsel and the Assurant defendants, suggesting a continuing collusive relationship, and Class Counsel's payments to objectors to withdraw their objections. *See* Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* (3d Ed. 2010).

III. The District Court Applied The *Bennett* Factors In An Incorrect And Unreasonable Manner

A. The District Court Erred By Failing To Consider The Likelihood of Success of the *Perryman* Case

This Circuit sets forward six criteria for judicial approval of a class action settlement, the first being "the likelihood of success at trial." *Bennett v. Behring Corp.,* 737 F.2d 982, 986 (11th Cir. 1984). This criterion is "by far the most important factor" in evaluating a class action settlement. *Figueroa v. Sharper Image Corp.,* 517 F. Supp. 2d 1292, 1323 (S.D. Fla. 2007) (citing cases). "'The likelihood of success on the merits is weighed against the amount and form of relief contained in the settlement.'" *Id*.

In analyzing plaintiffs' likelihood of success on the merits here, the magistrate judge held that "[t]he Settlement's terms were achieved notwithstanding many courts," in unrelated LPI cases against other loan servicers, "disagreeing about whether the underlying theories of liability even state valid claims for relief," and expressed skepticism regarding the viability of plaintiffs' claims. D.E. 184 at 16 – 20. At the time of settlement, Class Counsel had not obtained rulings on defendants' motions to dismiss, and had recently lost two similar motions – one before the same magistrate judge presiding over the settlement proceedings. *See Montoya,* 2014 WL 4248208; *Circeo-Loudon,* 2014 WL 4219587.

In evaluating the first *Bennett* factor, the magistrate judge ignored the one case that mattered, and that directly posed a significant threat to defendants: the *Perryman* case in the Northern District of California, where the court had rejected the defendants' filed-rate defense and upheld Perryman's claims under the RICO Act. *Perryman,* 2014 WL 4954674. RICO claims are "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Federal Bank,* 948 F.2d 41, 44 (1st Cir. 1991). While defendants may have faced a weak case in the Southern District of Florida, they faced just the opposite in the Northern District of California. The magistrate judge's failure to consider the posture of the *Perryman* case in connection with the first *Bennett* factor, and the significant threat it posed to defendants, was incorrect, and unreasonable.

Rather than consider the threat the *Perryman* case posed to defendants, the magistrate judge instead held that Perryman "is among 'the small and vocal minority of class members who have objected[,] fueled by would-be class counsel in competing lawsuits, so their objections are suspect,'" citing *Figueroa,* 517 F. Supp. 2d 1315. D.E. 184 at 31. But *Figueroa rejected* the proposition for which the magistrate judge cited it. Instead, *Figueroa* denied final approval to a class action settlement, where, like here, the plaintiffs' counsel was disadvantaged due to the pendency of a stronger, related case elsewhere, and whose only viable path

to hold onto their case was to strike a deal for global peace on terms acceptable to the defendant:

> There is no evidence of fraud or collusion between Class Counsel and counsel for Sharper Image. That concern may be quickly disposed of. What cannot be so easily eliminated is the perception, and the undersigned's conviction, that Sharper Image selected counsel confronted with a most precarious position, insisted upon amendments to the pleading to broaden the scope of this litigation to obtain a global peace, and then proceeded to offer and convince Class Counsel to accept highly undesirable terms to settle the case.

Id. at 1321.[15]

The *Figueroa* settlement came at a time in the litigation when plaintiffs were vulnerable to a dismissal because of other related, stronger lawsuits. *Id*. at 1321-22. The fact that defendants negotiated with weaker plaintiff's counsel showed that the defendant was taking advantage of counsel for whom a settlement was the only way to stay in the game. *Id*. "Thus, Plaintiffs' counsel necessarily negotiated

[15] *Accord, Reynolds v. Beneficial Nat. Bank,* 288 F.3d 277, 282-83 (7th Cir. 2002) (reversing approval of class action settlement, noting that a "reverse auction" is "the practice whereby the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant."); *Blair v. Equifax Check Services, Inc.,* 181 F.3d 832, 839 (7th Cir. 1999) ("Perhaps Equifax found a plaintiff (or lawyer) willing to sell out the class … and then tried to use Crawford as a way to thwart parallel actions where the class had more vigorous champions."); *Cullan and Cullan LLC v. M-Qube, Inc.,* 2014 WL 347034, *10 (D. Neb. 2014) (noting that "[t]he pending similar cases in other districts raise the specter of a 'reverse-auction' type of situation" and denying preliminary approval).

from a position of weakness, with the specter of a stay of this case a constant companion." *Id*. The court in *Figueroa* recognized the dynamics of negotiation and properly looked beyond the narrow question of collusion.[16]

The defendants in this case were aware of and exploited these dynamics. They chose with to negotiate with the plaintiffs' counsel in the most precarious position, and expressly excluded *Perryman's* counsel from the mediation. D.E. 140-1. And Class Counsel, and no doubt defendants, were aware that judges in the Northern District of California disfavor unnecessary claims-made settlements. *See, e.g.,* D.E. 140 at 3, 34 – 36 (Class Counsel citing Northern District of California's "Notice Regarding Factors To Be Evaluated For Any Proposed Class Settlement," which disfavors claims-made settlements); *Harris,* 2011 WL 4831156, *4 – 8; *Kakani,* 2007 WL 1793774, *5; *Myles v. AlliedBarton Security Services, LLC,* No. 12-cv-05761, 2014 WL 6065602, *3 (N.D. Cal., Nov. 12, 2014). Defendants knew it would be nearly impossible to obtain approval of the same sort of deal in the Northern District of California that they reached with Class Counsel. Every LPI settlement in the Northern District of California has been a direct payment settlement. *See, e.g.,* D.E. 146 at 70 – 146-1 at 53 (*Ellsworth* and *Clements*

[16] *Accord, Dennis,* 697 F.3d at 864 ("where … class counsel negotiates a settlement agreement before the class is even certified, courts 'must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.'") (quoting *Bluetooth,* 654 F.3d at 947).

settlement papers); *Hofstetter v. Chase Home Finance, LLC,* No. C 10-01313-WHA, 2011 WL 5545912 (N.D. Cal., Nov. 14, 2011); *Guerrero v. Wells Fargo Bank, N.A.,* No. C 12-04026 WHA, 2014 WL 4351113 (N.D. Cal., Sept. 2, 2014). Additionally, the Northern District of California is the only court that has certified a multi-state LPI class as a result of a contested class certification motion. *See Ellsworth,* 2014 WL 2734953.

The *Figueroa* court properly analyzed the first *Bennett* factor, the plaintiff's probability of success at trial, in relation to the strength of the parallel cases, noting that in these stronger cases, the court held "Sharper Image had no probability of prevailing at trial." *Figueroa,* 517 F. Supp. 2d at 1324 – 26. In light of the posture of these stronger cases, the court correctly held that the *Figueroa* plaintiffs "have a strong likelihood of succeeding at trial on some of their causes of action which rely on the ineffectiveness of the product," even though in their *own* case, they had obtained no such rulings and were instead subject to a stay or dismissal. *Id*. In this case, the magistrate judge was incorrect in failing to similarly recognize the significant threat to defendants posed by the *Perryman* case.

B. The Vast Majority of Class Members Will Recover Nothing Under The Settlement

The next *Bennett* factors are the range of possible recovery and the point on or below the range at which a settlement is fair, adequate and reasonable. *Bennett,* 737 F.2d at 986. These factors are generally analyzed together. *See Behrens v.*

Wometco Enter., Inc., 118 F.R.D. 534, 541 (S.D. Fla. 1988). As set forth above, the claims-made structure of this settlement is not fair, adequate, and reasonable because the vast majority of the class will not receive *any* compensation. *See, e.g., Pearson,* 772 F.3d at 787 ("only one-fourth of one percent of these fraud victims will receive even modest compensation … [a]nd for conferring these meager benefits class counsel should receive almost $2 million? The judgment is reversed[.]").

One of the principal functions of the class action device is to deter a defendant's future misconduct. *Newberg*, § 1:8. "[T]here is little to suggest that a low claims rate … [is] more beneficial to the class in the aggregate as opposed to a lower payout with no claims process." *Harris,* 2011 WL 4831157, *6 n.6. Perryman's objection cited *Arnett v. Bank of America, N.A.,* 2014 WL 4672458 (D. Ore., Sept. 18, 2014) which established a $31 million non-reversionary common fund for 359,320 class members, approximately 90 percent of the class size in this case. The magistrate judge held that the *Arnett* LPI settlement is inferior to this one (and that *any* direct payment settlement would likely be inferior), because class members who submit a claim in this case will likely receive a larger payout. D.E. 184 at 5, 49 – 50. But the defendants' total payout in this case will likely be only about $5.6 million, which is approximately *18 percent* of the $31 million *Arnett* settlement, and *less than four percent* of the $140 million in *potential* claims in this

case. The *Arnett* settlement was far more beneficial to the class in the aggregate than the settlement here. And allowing the Defendants to wipe out an enormous $140 million liability for four cents on the dollar imposes no deterrent effect. It is for this reason that unnecessary claims-made settlements, like this one, are disfavored and should not be approved. *Newberg,* at § 13:7.

C. Class Counsel Did Not Have Adequate Information Before Entering Into This Claims-Made Settlement

Another *Bennett* factor is the "stage of proceedings at which the settlement was achieved." *Bennett,* 737 F.2d at 986. Where, like here, class counsel "had insufficient information available to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation," this factor "weighs against a finding favorable to the parties." *Figueroa,* 517 F. Supp. 2d at 1328.

The magistrate judge erred to the extent he found that Class Counsel had adequate information about the necessity of a claims process prior to settling the case. D.E. 184 at 23. Prior to agreeing to the settlement, Class Counsel relied on the defendants' representations at mediation concerning the capabilities of their loan servicing systems to identify the class members. D.E. 135 at 4. Class Counsel also identified discovery they took in other LPI cases, which purportedly "confirmed" the necessity of a claims process here. D.E. 184 at 59. Jastrzemski's deposition, however, confirmed that Class Counsel's "discovery" in other LPI cases was inadequate. His testimony contradicted the deposition testimony Class

Counsel submitted from the *Williams v. Wells Fargo* case, the only such discovery in the record from Class Counsel's other LPI settlements. D.E. 169-1 at 23:13 – 24:3; 144-3 at ¶ 39; 111 at 5 n.5. More importantly, Jastrzemski's testimony contradicted Class Counsel's original justification for entering into the claims-made settlement in the first instance. *Id*.

Where lead counsel has failed to conduct adequate discovery into an issue relevant to the fairness of a settlement, the settlement should not be approved. *See Saylor v. Lindsley,* 456 F.2d 896, 904 (2d Cir. 1972) (settlement should not have been approved over opposition of plaintiff when there was a doubt whether there had been adequate discovery, and plaintiff was afforded no opportunity for any thereafter); *Martin v. Cargill, Inc.,* 295 F.R.D. 380, 389 (D. Minn. 2013) (approval of settlement should not be granted where lead counsel conducts insufficient discovery); *Reynolds v. Beneficial National Bank,* 260 F.Supp.2d 680, 686 (N.D. Ill. 2003) (finding settlement class counsel inadequate, in part, because of lack of discovery conducted prior to settlement); *Cf. In re Community Bank of Northern Virginia,* 418 F.3d 277, 316 (3d Cir. 2005) ("discovery may be appropriate if lead counsel has not conducted adequate discovery or if the discovery conducted by lead counsel is not made available to objectors.").

Once again, Class Counsel abdicated their duties to the class by failing to obtain sufficient information prior to entering into this claims-made settlement. The magistrate judge erred in holding otherwise.

IV. Conclusion

For the foregoing reasons, the settlement in this case is not fair, reasonable, and adequate, and the final order and judgment approving it should be reversed.

Dated: December 23, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,685 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

I certify that 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 for Mac 2011 in 14 point Times New Roman font.

Dated: December 23, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on December 23, 2015.

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.

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Respectfully submitted,

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