UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP BOBBITT and JOHN J. SAMPSON, individually and on behalf of all others similarly situated, Plaintiffs, and LANCE LABER Intervenor-Plaintiff-Appellant vs. MILBERG LLP; MELVYN I. WEISS; MICHAEL C. SPENCER; JANINE L. POLLACK; LEE A. WEISS; BRIAN C. KERR; UITZ & ASSOCIATES; RONALD A. UITZ; THE LUSTIGMAN FIRM; SHELDON S. LUSTIGMAN; ANDREW B. LUSTIGMAN; GABROY ROLLMAN & BOSSÉ, P.C.; JOHN GABROY and RONALD LEHMAN, Defendants-Appellees	Case No. 13-15812 No. 4:09-cv-629-TUC-FRZ District of Arizona (Tucson)

BRIEF OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees Milberg LLP, Melvyn I. Weiss, Michael C. Spencer, Janine L. Pollack, Lee A. Weiss, and Brian Kerr state that Milberg LLP has no parent corporations, and no publicly held corporation owns 10 percent or more of the stock of Milberg LLP.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

RULES & STATUTES

OTHER AUTHORITIES

Defendants-Appellees Milberg LLP, Melvyn I. Weiss, Michael C. Spencer, Janine L. Pollack, Lee A. Weiss, and Brian Kerr (together, "**Milberg**"), joined by all other Defendants-Appellees (collectively, "**Defendants**"), file this Opposition to the appeal of Intervenor-Plaintiff-Appellant Lance Laber ("**Appellant**").

INTRODUCTION[1]

Appellant seeks review of a September 18, 2012, order (the "**Order**") (ER1-20) denying certification of a nationwide class of over one million people asserting state law malpractice claims of negligence and breach of fiduciary duty arising from *Drnek v. VALIC*, No. CV-01-242 (D. Ariz.) ("***Drnek***" or the "**Underlying Litigation**"). *Drnek* was brought as a putative nationwide class action for fraud in the sale of tax-deferred annuities. Milberg and the other Defendants were counsel to the named plaintiffs in the Underlying Litigation. Bobbitt and Sampson ("**Plaintiffs**")—both Texas residents—were absent putative class members in *Drnek*. Neither was aware of the Underlying Litigation before Plaintiffs' counsel recruited them to serve as class representatives in this case in 2009. Neither

[1] Appellant's Opening Brief (ECF 21-1) is abbreviated "App. Br.__." Emphasis is added to, and internal citations, brackets and quotes are omitted from, quotations throughout this brief, unless otherwise indicated. The same abbreviations for record cites used in Appellant's Opening Brief are used in this brief. "SER__" refers to Appellees' Supplemental Excerpts of the Record.

believed he had an attorney-client relationship with any of the Defendants.[2]

The District Court oversaw this case for nearly three years before denying class certification. It was intimately familiar with the facts developed in extensive class discovery. It carefully applied settled choice-of-law principles to those facts and correctly concluded that the laws of up to 50 states are implicated by the state-law malpractice and fiduciary duty claims that Plaintiffs asserted, leaving Rule 23(b)(3) unsatisfied (ER7, 16).

Bobbitt and Sampson sought—and were denied—interlocutory review pursuant to FED. R. CIV. P. 23(f). *Bobbitt v. Milberg*, No. 12-80184 (9th Cir.) (ECF1-2, 6). They thereafter moved to dismiss their claims with prejudice. (R240). On March 29, 2013, the District Court granted the motion. (ER21). Appellant then intervened "for the limited purpose of appealing the class-certification denial." (SER8).

The Court should reject the appeal for three reasons:

First, the Court lacks jurisdiction to review the Order. Plaintiffs' counsel have attempted to manufacture appellate jurisdiction to review the Order by obtaining a final judgment. But this procedural manipulation—an end-run around the final judgment rule after a failed Rule 23(f) petition—triggers an exception to

[2] SER44:22-25, SER45:17-18, SER51:25-52:24, SER71:4-8; SER93:10-17, SER119:24-121:4, SER122:7-12, SER123:13-15.

the general rule that certification denials merge into final judgments and are reviewable. First articulated in *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), this exception rejects manipulative practices seeking to circumvent the Supreme Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). The finality of the judgment does not make the interlocutory order denying certification reviewable.

Second, the District Court properly exercised its discretion in denying certification based on its fact-intensive choice-of-law analysis. It appropriately determined that judicial estoppel did not relieve Plaintiffs of their burden to show that Arizona law applied to the claims of putative class members, and that Plaintiffs failed to carry this burden.

Third, there are multiple, independent, alternative grounds for affirmance. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) ("we may sustain the court's [certification] ruling on any ground supported by the record").

COUNTER-STATEMENT OF APPELLATE JURISDICTION

On November 8, 2012, this Court denied Plaintiffs' Rule 23(f) petition ("**Petition**") seeking interlocutory review of the Order. *Bobbitt v. Milberg*, No. 12-80184 (9th Cir.) (ECF6). Instead of prosecuting this case to judgment, Plaintiffs' counsel executed a two-stage maneuver to manufacture appellate jurisdiction. *First*, Plaintiffs (Bobbitt and Sampson) sought voluntary dismissal with prejudice

under FED. R. CIV. P. 41(a)(2). *Second*, Appellant (Laber), who had been represented by Plaintiffs' counsel before Plaintiffs' voluntary dismissal, moved to intervene *after* the dismissal to facilitate an immediate appeal from the Order—the same immediate appeal this Court had just denied under Rule 23(f).

This Court has long condemned gamesmanship designed to manufacture a judgment into which an interlocutory ruling may merge because it undermines the "policy against piecemeal litigation and review" and creates "means to avoid the finality rule." *Huey*, 608 F.2d at 1239. *Huey* precludes such tactics by prohibiting merger of the interlocutory ruling and barring review of the certification denial. Under *Huey*, when a "denial of class certification caused the failure to prosecute [claims on the merits], that ruling does not merge in the final judgment for purposes of appellate review." *Id.* at 1240; *see also Ash v. Cvetkov*, 739 F.2d 493, 497 (9th Cir. 1984) (*Huey* "created an exception to the merger rule when denial of class certification leads to the failure of individual class members to prosecute their individual claims"). By barring review of certification denials through appeals taken as a direct and intended consequence of manipulation, this Court "reject[s] the notion that the policies against multiplicity of litigation and against piecemeal appeals may be avoided at the whim of a plaintiff." *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1076 (9th Cir. 1994).

A. JURISDICTIONAL FACTS

On October 2, 2012, Plaintiffs filed the Petition for interlocutory review of the Order, claiming that it sounded a "death knell" because it was not "economically feasible" to prosecute their individual claims. *Bobbitt v. Milberg*, No. 12-80184 (9th Cir.) (ECF1 at 7). On November 8, 2012, this Court denied the Petition. (*Id.* at ECF6). The District Court directed the parties to proceed to litigate. (SER25-29). Plaintiffs declined.

Instead, on December 9, 2012, Plaintiffs filed a joint status report stating that they "may move for voluntary dismissal of their individual claims, after which it is likely that another putative class member would move to intervene for purposes of appealing the denial of class certification." (SER24). On February 4, 2013, Plaintiffs' counsel announced they had located an intervenor and sought consent to dismissal of Plaintiffs' individual claims so that the intervenor could appeal. (SER6 ¶2). Consent was declined. (*Id.* ¶3). On March 1, 2013, Plaintiffs moved for voluntary dismissal. (SER18-22). Defendants took no position on dismissal of Plaintiffs' individual claims, reserving all rights and defenses, including jurisdictional defenses. (SER14-15). Appellant did not seek to intervene prior to judgment, although he could have. (SER6 ¶2).

On March 29, 2013, the District Court granted Plaintiffs' motion for voluntary dismissal (SER13) and entered judgment dismissing their individual

claims with prejudice. (ER21). Appellant then moved to intervene "for the limited purpose of appealing the class-certification denial." (SER8). Defendants opposed the motion, on the grounds that intervention was untimely and was designed to manufacture appellate review and that there was no reviewable final judgment because of the pendency of cross-claims. (R251). Appellant responded that "the Ninth Circuit inevitably will address its own jurisdiction" (SER2).

On April 16, 2013, in light of existing cross-claims, the District Court vacated its March 29, 2013, judgment, directed entry of a Rule 54(b) judgment dismissing Plaintiffs' individual claims with prejudice (ER22), and granted the Motion to Intervene (ER23).

Appellant filed his Notice of Appeal (ER46-48), and Defendants moved to dismiss for lack of appellate jurisdiction (ECF 10). The Appellate Commissioner denied the motion without prejudice to renewing the argument now. (ECF 17).

B. APPELLANT CANNOT MANUFACTURE REVIEWABILITY OF AN INTERLOCUTORY ORDER

Although interlocutory rulings generally merge in the final judgment and are reviewable on appeal, *Sackett v. Beaman*, 399 F.2d 884, 889 n.6 (9th Cir. 1968), they do not merge when a party abandons prosecution to generate review of an interlocutory order. *Huey*, 608 F.2d at 1240; *Ash*, 739 F.2d at 497. This rule is essential to contain "the debilitating effect on judicial administration caused by piecemeal appeal[s]." *Livesay*, 437 U.S. at 471. In *Livesay*, the Supreme Court

rejected the death knell doctrine as a justification for interlocutory review, holding that "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Id*. at 477. *Livesay* identified the death knell doctrine's "principal vice" as "authoriz[ing] indiscriminate interlocutory review of decisions" and stressed that: (1) "Congress carefully confined the availability of such review," (2) "[t]he potential waste of judicial resources is plain," and (3) the "potential for multiple appeals in every complex case is apparent and serious." *Id.* at 473-74. It concluded that any "incremental benefit" to litigants from piecemeal review of certification orders was "outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice." *Id*. at 473.

Rule 23(f) was drafted with these dictates in mind to provide a single opportunity—an express statutory mechanism—for interlocutory review. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Plaintiffs sought 23(f) review, and it was denied.

In *Huey*, this Court declined to review denial of a class certification "even though a final judgment ha[d] been entered." 608 F.2d at 1239. Huey had—like Plaintiffs here—previously sought and been denied interlocutory review, under 28 U.S.C. § 1292. *Id*. at 1236. Also like Plaintiffs, Huey thereafter declined to

prosecute his individual claims because the cost of trial exceeded their value. *Id.* Like Plaintiffs, Huey's abandonment of his claims culminated in dismissal with prejudice. *Id.* at 1236-37.

Even though *Huey* involved an appeal from an ostensibly final judgment, while *Livesay* addressed interlocutory review, *Huey* explained that "the policy against piecemeal appeals recently expressed by the Supreme Court in [*Livesay*] governs the circumstances of this case." 608 F.2d at 1238. *Huey* reasoned that the finality of a judgment obtained through non-prosecution can, as it does here, leave much of the litigation unresolved and threatens the same dissipation of judicial resources as an interlocutory ruling:

> If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in . . . [§] 1291.

Id. at 1239. *Huey* held that "[t]he hardship in refusing review of the denial of class certification after a dismissal allegedly caused by that denial" must be weighed "against the incentive for dilatory failure to prosecute in the district court that would otherwise result," with "the balance . . . struck to discourage piecemeal appeals." *Id.* at 1240; *see also Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 27 (9th Cir. 1981) (death knell doctrine "insufficient to override the policy against piecemeal appeals").

This appeal presents the same mischief that *Livesay*, *Huey*, and Rule 23(f) seek to deter. The sole issue Appellant raises—"whether the claims against Defendants can be maintained as a class action" (SER9)—cannot be resolved in Appellant's favor now because the District Court did not address numerous additional objections to certification, including Plaintiffs' inadequacy and atypicality under Rule 23(a)(3) and (a)(4). No class can be certified based on the existing record (although affirmance of the denial of certification is fully justified on this record). The prior Plaintiffs, as to whom discovery was taken, are permanently out of the case. There is no class representative to certify—Appellant made it very clear in his intervention papers that he has not accepted the role (SER8)—nor has discovery been directed at his fitness to serve, in any event. The most Appellant can hope for is remand, new class certification discovery, briefing directed to an as yet unidentified putative class representative, and subsequent appellate review.[3]

If remand is granted, some putative class representative—perhaps successive putative class representatives—would appear, discovery would be taken, and

[3] In certain cases, the Supreme Court and this Court have left the selection of an appropriate class representative for remand. Those cases, however, involved appeals from *bona fide*, non-collusively obtained final orders. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 393 (1980) (summary judgment); *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1319 (9th Cir. 1997) (after certification denial, "named plaintiffs continued the suit in their individual capacities and eventually settled").

certification litigated. If a class were certified, it would be revisited on appeal if a final judgment were entered for the class—or, perhaps earlier, under Rule 23(f). This will inevitably lead to "repeated [appellate] refamiliarization with the case . . . and undermine one of the primary purposes underlying the final judgment rule—the efficient use of judicial resources." *Dannenberg*, 16 F.3d at 1075-76; *accord Wood v. GCC Bend, LLC*, 422 F.3d 873, 878-79 (9th Cir. 2005). *Huey* bars this.

C. *HUEY* APPLIES TO PLAINTIFFS' VOLUNTARY DISMISSAL

The claims in *Huey* were dismissed under Rule 41(b) after the plaintiff's default in prosecuting the case, but the principles it articulates apply to any dismissal engineered to gain review of an interlocutory ruling, including Plaintiffs' Rule 41(a) voluntary dismissal. *Huey* focuses on a litigant's intent to transform an unreviewable interlocutory order into an appealable final judgment, not the precise tactic used to achieve it. *Huey* relied on *Sullivan v. Pac. Indem. Co.*, 566 F.2d 444, 445 (3d Cir. 1977), 608 F.2d at 1239, and the Third Circuit recently applied *Sullivan* to conclude that appellate jurisdiction was lacking where the appellant effected a voluntary dismissal under Rule 41(a) in order to seek interlocutory review of a decertification order. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245 (3d Cir. 2013). *See also Somers v. Apple, Inc.*, 729 F.3d 953, 960-61 & n.3 (9th Cir. 2013) (*Huey* precluded review of certification denial because plaintiff was unwilling to try his claim (no Rule 41(b) dismissal)).

This Court takes a pragmatic approach in assessing whether an appellant has attempted to "make a nonfinal order appealable by the simple expedient of taking a voluntary nonsuit and appealing." *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1342 (9th Cir. 1985); *Huey*, 608 F.2d at 1239 (dispositive factor is a "conscious choice" to create jurisdiction over interlocutory order by "suffer[ing] the consequence of dismissal rather than to proceed to trial in the posture of the case as it then stood"); *Adonican v. City of L.A.*, 297 F.3d 1106, 1108 (9th Cir. 2002) (decisions focus on "evidence that the parties have attempted to manufacture finality"); *Fletcher v. Gagosian*, 604 F.2d 637, 638-39 (9th Cir. 1979) (a party may not "convert[] what had been an unappealable order into an appealable order;" the "policies against multiplicity of litigation and against piecemeal appeals may [not] be avoided at the whim of a plaintiff"). The present appeal is analytically indistinguishable from these precedents. As in *Am. States Ins. Co. v. Dastar Corp*, 318 F.3d 881, 885-86 (9th Cir. 2003), manipulation is evidenced here by the parties' status report, which admits outright an intent to secure appellate review over an interlocutory decision. (SER24).

In opposition to Defendants' motion to dismiss the appeal, appellant relied on *Omstead v. Dell, Inc.*, 594 F.3d 1081 (9th Cir. 2010), arguing that a Rule 41(a) motion to dismiss with prejudice creates reviewability. In *Omstead*, 594 F.3d at 1085, plaintiffs sought review of an arbitration order—not a class certification

ruling—which "they believed . . . was fatal to their action." In contrast, in the class certification context, *Livesay*, 437 U.S. at 477, has definitively determined that the economic disincentive created by denial of class certification is insufficient to create a "final decision." Consideration of "a death-knell . . . that is independent of the merits of the underlying claims" can be accomplished only under Rule 23(f) and only when "coupled with a class certification decision by the district court that is questionable." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

There is no meaningful distinction between the dismissal in *Huey* and the one procured below. Appellants in both sought an "avenue for reaching" review of an interlocutory certification denial. *See Huey*, 608 F.2d at 1239 (quoting *Hughley v. Eaton Corp.*, 572 F.2d 556, 557 (6th Cir. 1978)). *Huey* precludes merger and appellate review.

D. PROCEDURAL ARGUMENTS DO NOT CURE NON-REVIEWABILITY

Appellant contended, in opposing our previous dismissal motion, that these jurisdictional arguments fail because he followed the "correct procedure" set forth in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), and *Alaska*. (ECF 14 at 11). This argument misses the point. No one disputes that putative class members may intervene after a non-collusively obtained final judgment to appeal a class certification denial. What they may not do under *Huey* is act collusively to create a

judgment with the intent to generate immediate review of a certification denial after failing to obtain interlocutory review. *Huey*, 608 F.2d at 1240.

We have found no decision holding that procedurally correct post-judgment intervention cures appellate non-reviewability. It does not. In *Warren v. Comm'r*, 302 F.3d 1012 (9th Cir. 2002), this Court observed that *Alaska* addressed intervention, not reviewability. It cited *Alaska* in proceeding to postulate that intervention might be appropriate—"[w]e assume *arguendo* that in an appropriate circumstance, a nonparty could intervene at this stage of an appeal"—but concluded that jurisdiction was defective because the questions raised on appeal were non-reviewable. *Id.* at 1014.

Even if Appellant's intervention was procedurally proper under *United Airlines* and *Alaska*, that merely determines the effectiveness of intervention and his ability to appeal the judgment, not the reviewability of the Order. Neither *United Airlines* nor *Alaska* holds that intervention permits review of a certification denial that is otherwise barred under the principles of *Huey*. In both, reviewability of the certification order was assumed, and the only issue was whether post-judgment intervention was timely if made "within the time period in which named plaintiffs could have taken an appeal." *United Airlines*, 432 U.S. at 396; *accord Alaska*, 123 F.3d at 1320. In *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980), the Supreme Court confirmed that *United Airlines* "assumed that the

named plaintiff would have been entitled to appeal a denial of class certification." *Id.* at 338. In *Alaska*, the named plaintiffs did not abandon prosecution after certification was denied—they "continued the suit in their individual capacities and eventually settled." *Alaska*, 123 F.3d at 1319. The cases thus each involved an appeal from a final disposition that was not manufactured to obtain review of a certification denial.

Similarly, the timing of the intervention in *United Airlines* and *Alaska*—after judgment—did not reflect or facilitate any collusive tactics to create reviewability of interlocutory orders. In both, the intervenor did not discover that intervention was necessary before judgment.[4] That is emphatically not the case here. Appellant was not blindsided. Following denial of the Petition, Appellant acted in concert

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[4] *United Airlines*, 432 U.S. at 394 ("there was no reason for the respondent to suppose that [named plaintiffs] would not later take an appeal until she was advised to the contrary *after* the trial court had entered its final judgment;" emphasizing as "critical" that "*as soon as it became clear* to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests"); Brief of Appellant at 7, *Alaska v. Suburban Propane Gas Corp.*, No. 95-36269, 1996 WL 33490404, at *7 (9th Cir. Apr. 11, 1996) (*Alaska* intervenor "did not know about the settlement until shortly before [the end of the 30-day period to appeal]." *See also Koike v. Starbucks Corp.*, 602 F. Supp. 2d 1158, 1160 (N.D. Cal. 2009) (intervenor "had not been involved in the court's proceedings until he filed his motion to intervene" *after* final judgment). *Compare Larson v. JPMorgan Chase & Co.*, 530 F.3d 578, 582, 584 (7th Cir. 2008) (intervention untimely where intervenor discovered prior plaintiffs' intentions early enough to intervene and litigate before judgment entered, "had no good excuse for failing to seek intervention (or bringing its own suit) years ago," and "appear[ed] to have acted for strategic reasons").

with Plaintiffs, through their shared counsel, to generate this appeal. As early as February 4, 2013, Plaintiffs informed Defendants that a potential intervenor (Appellant) had been found. (SER6 ¶2). Appellant signed a declaration in support of intervention on March 1, 2013, six weeks before the District Court entered the April 16, 2013 judgment that gave rise to the Notice of Appeal (SER12, ER23). Appellant had a full and fair opportunity to intervene before judgment. He could have litigated the merits, but did not. There is no reason to relieve Appellant of *Huey*'s "[dis]incentive for dilatory failure to prosecute in the district court." 608 F.2d at 1240.

E. *BERGER'S* RULING ON STANDING—CONCERNING THE ADVERSITY OF A STIPULATED JUDGMENT—IS INAPPOSITE

In *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065-66 (9th Cir. 2014), this Court exercised jurisdiction where plaintiffs stipulated to dismissal of their claims with prejudice following denial of class certification. The holding is inapposite.

The plaintiff in *Berger* brought a putative class action alleging violations of California state law. The district court held that the proposed class did not meet the predominance requirement of Rule 23(b)(3) and denied certification. *Id.* at 1064. Berger then stipulated to dismissal of the action with prejudice and appealed. This Court affirmed the class certification denial.

In exercising jurisdiction, this Court focused on whether, given the absence of settlement by the named plaintiff, a stipulated dismissal is sufficiently adverse to permit an appeal. This is a standing issue relating to an appellant's capacity to appeal a lower court's judgment. Just like *United Airlines* and *Alaska*, it does not address the jurisdictional challenge here because the reviewability of the certification denial was assumed. *Huey*'s merger exception, which precludes reviewability of an order if the dismissal is a subterfuge to secure an interlocutory appeal, was not in issue. Because *Berger* ruled on a different jurisdictional question, it does not determine the existence of jurisdiction to review the certification denial here. *See Bassiri v. Xerox Corp.*, 463 F.3d 927, 933 n.3 (9th Cir. 2006) (finding prior exercise of jurisdiction non-precedential: "it cannot be presumed . . . that by exercising jurisdiction the court has considered and rejected every jurisdictional argument that a party might raise").

STATEMENT OF ISSUES

1. Whether the District Court properly exercised its discretion in denying class certification based on a choice-of-law analysis.

2. Whether the District Court's denial of class certification is independently supported by alternate grounds in the record.

STATEMENT OF THE CASE

Appellant seeks review of the District Court's Order denying class certification because Plaintiffs failed to satisfy Rule 23(b)(3). Analyzing the factual record before it and applying Arizona choice-of-law principles to those facts, the District Court ruled that Plaintiffs

> failed to show that Arizona law applies to this putative nationwide class action. Rather, Arizona's choice of law principles reflect that the law of up to 50 states (*i.e.*, the places of injury and domicile of the absent class members) applies to the state based malpractice causes of action at issue. . . . [ER9].

The certification ruling presented the first opportunity for the District Court to conduct a choice-of-law analysis based on the facts, as opposed to Plaintiffs' allegations. Before class discovery, Defendants filed a motion to dismiss, accepting Plaintiffs' allegations as true, which led to application of Arizona law. These included that: (i) the *Drnek* Court had properly certified a class (SER274 ¶1); (ii) "a substantial part of the events or omissions giving rise to the Plaintiffs' claims occurred in this District" (SER275 ¶21); (iii) "[t]he malpractice . . . occurred in this District" (*id.*); and (iv) "Defendants had an attorney-client relationship with each member of the Underlying Class." (SER276 ¶46). (*See* SER259 n.2, SER260 n.4 & SER261 n.6). None of these allegations proved true.

For purposes of the dismissal motion, and based on the allegations of Plaintiffs' Second Amended Complaint ("**SAC**"), both Milberg and the District

Court assumed that Arizona law applied. (SER261 n.6, SER250 n.5). The District Court granted the dismissal motion in part—on causation and punitive damages—with leave to amend. (SER247-48, R61). Plaintiffs amended their complaint (filing the Third Amended Complaint, or "**TAC**") (ER28-45), and a second motion to dismiss was denied (R91).

On December 7, 2011, Plaintiffs moved for class certification. (R186). On this motion, the District Court no longer applied Arizona law because, "[u]nlike a motion to dismiss, Defendants and the Court are not bound by the liberal motion to dismiss standards which require[s] taking Plaintiffs' allegations as true and drawing all reasonable inferences in their favor." (ER6). The District Court rejected Plaintiffs' claim that the doctrines of law of the case and judicial estoppel required application of Arizona law on the certification motion. (ER5-6).

Among the District Court's key findings—omitted from Appellant's Opening Brief—is that the *Drnek* Court had "summarily granted the motion for class certification . . . without giving any explanation for certifying the nationwide federal securities class action." (ER2). The District Court found that Defendants had no relationship with Plaintiffs or any other absent class member:

> Although Defendants may have had a relationship with the few named class members based in Arizona, as a practical matter, there was no relationship with any of the more than one million absent class members who were widely dispersed geographically. They had no practical relationship with these absent class members . . . [who] never received notice of the class action, never had any contact with

> Defendants, and never had any practical relationship with Defendants. [ER11-12]

The District Court concluded that "the law of all fifty states is implicated and applicable inasmuch as different state laws will apply to different class members under the unique circumstances of this case. . . ." (ER16). The Court further held that Plaintiffs failed to meet their burden of showing that conflicts of law did not defeat predominance. (ER7, 16-17, 17 n.20, 19-20).

A. FACTS RELEVANT TO THE DISTRICT COURT'S ANALYSIS

1. Defendants Had No Attorney-Client Relationship with the Absent Class Members of the *Drnek* Putative Class

a. The *Drnek* Court Neither Made Mandatory Rule 23(c)(1)(B) Findings Nor Ordered Notice

The *Drnek* plaintiffs moved for class certification in April 2003. (R50 Ex. C, R186 Ex. 17). The *Drnek* Court entered a cursory order in January 2004 ("**January 2004 Order**"), which stated, in its entirety:

> Pending before the Court is Plaintiff's Motion for Class Certification. The Motion has been fully briefed and Oral Argument was held December 17, 2004. Also pending is Defendants' Motion for Leave to file a sur-reply. The Motion for Leave is **DENIED** as unnecessary. The Motion for Certification is **GRANTED**.

SER263.

The *Drnek* Court never made any of the findings required by Rule 23(c)(1)(B), which mandates that "[a]n order that certifies a class must define the class and the class claims, issues, or defenses, and must appoint class counsel

under Rule 23(g)."[5] Nor did the *Drnek* Court order that notice be disseminated to putative members of the class. Notice was never disseminated.

Following issuance of the January 2004 Order, both sides recognized that it did not resolve the certification issues. The *Drnek* plaintiffs submitted proposed findings, explaining that "the Ninth Circuit has held [that] a district court's class certification decision must be supported by sufficient findings to be afforded 'the traditional deference given to such a determination.'" (SER225). VALIC moved for reconsideration on the ground that certification was granted "without any written findings, explanation, or analysis as to how Plaintiffs met their burden to satisfy all of the requirements of Federal Rule of Civil Procedure 23," even though "[f]or decades, the Ninth Circuit has required district courts to set out the findings of fact and conclusions of law supporting a ruling certifying a class action." (SER222).

VALIC objected to the *Drnek* plaintiffs' proposed findings for many reasons, including that common issues did not predominate because (i) thousands of unscripted face-to-face sales pitches did not support a common course of conduct, (ii) reliance could not be presumed, (iii) controlling authority undermined

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[5] *See, e.g.*, *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 187-88 (3d Cir. 2006) ("the text of the order or an incorporated opinion must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis").

a uniform classwide duty, and (iv) the damages inquiry was highly individualized. (SER228-235).

On May 4, 2004—before any of these issues was decided—the *Drnek* Court denied VALIC's motion for summary judgment on the issue of whether any duty was owed by VALIC. (SER198-203). It held, *inter alia*, that whether a duty was owed turned on whether the parties to each transaction "had a fiduciary or agency relationship, or if prior dealings or circumstances were such that one party had placed trust or confidence in the other." (SER201) This ruling required a transaction-by-transaction analysis of each putative class member's purchase. VALIC promptly supplemented its motion to reconsider the January 2004 Order, arguing that the Court's summary judgment rulings "require an individualized, fact-specific inquiry into the unique circumstances of each class member, and thus render [*Drnek*] unmanageable on a classwide basis," and "make clear class certification is inappropriate under Rule 23(b)(3)." (SER125-27).

VALIC also objected to notification of the purported class because "[n]umerous class-certification issues have not yet been resolved by this Court. . . ." (SER257).

All motions and disputes regarding certification were to be addressed at a September 9, 2004, hearing (SER129-30), but that hearing was never held. On August 17, 2004, the *Drnek* Court granted VALIC's motion to strike the testimony

of the plaintiffs' proposed expert and plaintiffs' witness list as a sanction for failure to meet court-ordered disclosure deadlines. (SER 270-72). The Court recognized that the sanction precluded "prov[ing] a classwide measure of damages," granted summary judgment for the defendants, and vacated its January 2004 Order (the "**Vacatur Order**") (*Id.*). As a consequence, no class was ever certified in accordance with the strictures of Rule 23; no putative class member was ever sent a notice; and none was afforded an opportunity to opt out. Thus, no attorney-client relationship between any of the Defendants and any absent class member ever existed.[6]

b. Milberg Was Never Appointed "Class Counsel"

Plaintiffs falsely asserted below that "the [*Drnek*] Court appointed Milberg class counsel." (SER193-195). None of the Defendants ever moved to be appointed class counsel, and the *Drnek* Court never appointed any class counsel.

[6] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-445 (2007) ("A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired. If the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation."); *In re Wells Fargo Wage & Hour Emp't Practices Litig. (No. III)*, No. H-11-2266, 2014 WL 1882642, at *5 (S.D. Tex. May 12, 2014) ("a client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired"); *Altier v. Worley Catastrophe Response, LLC*, Nos. 11-241, 11-242, 2012 WL 161824, at *11 (E.D. La. Jan. 18, 2012) (quoting and following ABA Op. 07-445).

Plaintiffs pointed to a February 2002 order entered under the Private Securities Litigation Reform Act ("**PSLRA**") § 21D(a)(3)(B), approving Milberg as "the lead plaintiffs' choice of counsel." (SER218). A PSLRA order is not an order appointing class counsel under Rule 23(g). Indeed, the lead-counsel order in *Drnek* was entered more than a year before plaintiffs even moved for class certification. "Unlike the more general provision of the PSLRA, Rule 23(g) of the Federal Rules of Civil Procedure proscribes an exacting standard for appointing class counsel. . . ." *In re Luxottica Grp., S.p.A. Sec. Litig.*, No. 01-CV-3285, 2004 WL 2370650, at *4 (E.D.N.Y. Oct. 22, 2004).

A Rule 23(g) order is mandatory under Rule 23(c)(1)(B) and (g)(1). No such order ever issued in *Drnek*.

B. FACTS RELEVANT TO ALTERNATIVE GROUNDS SUPPORTING DENIAL OF CLASS CERTIFICATION

1. Plaintiffs Were Inadequate and Atypical

a. Any *Drnek* Class Would Have Excluded Bobbitt

On Plaintiffs' theory, "[m]embership in the [*Bobbitt*] class [was] solely predicated upon membership in the underlying [*Drnek*] class." (SER134). But Bobbitt did not have a claim in *Drnek*, which was reduced to three claims under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 ("**10b-5 claims**") after

the court granted dismissal of 21 state and federal causes of action.[7] Bobbitt, therefore, could never have been a member of any certified *Drnek* class.

The 10b-5 claims were brought "[o]n behalf of Plaintiffs and All Others Similarly Situated . . . Based on the Sale of Units of Interest in a Separate Account." (SER240-45 ¶¶130-51). Bobbitt never acquired Units of Interest in a Separate Account.[8] His single investment was at all times in a Fixed Account.[9] No surviving *Drnek* claim existed for any investment in a Fixed Account. Bobbitt was not, therefore, an adequate or typical member of the putative class he sought to represent.

b. Bobbitt Suffered No Damages

The damages claimed in *Drnek* consisted of "the amounts of fees and charges the class members would not have incurred if they had not been deceived into purchasing a deferred annuity to fund their qualified retirement plan." (SER206). Bobbitt never paid those fees or charges because he was invested in a

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[7] *Drnek* was originally filed in Arizona state court alleging claims under Arizona consumer laws and common-law fraud, breach of fiduciary duty, negligent misrepresentation, negligence and unjust enrichment claims. (R42 Ex. 1). Following removal (R42 Ex. 2), the amended federal *Drnek* complaint added claims under the Securities Act of 1933 and the 10b-5 claims. (SER240-246). In April 2002, the *Drnek* Court dismissed all state law claims. (R42 Ex. 3). In October 2002, it dismissed the Securities Act claims, leaving only the 10b-5 claims. (R42 Ex. 4).

[8] SER141:4-10, SER145:18-146:1.

[9] SER145:18-146:1; SER46:11-14, SER47:13-18, SER49:3-6.

Fixed Account, and "[t]here are no fees associated with the fixed account investment option. . . . He paid nothing." (SER138:4-11, SER138:25-139:3). Accordingly, Bobbitt suffered no damages.

On the contrary, for more than 10 years—encompassing the dot-com crash and 2008 financial meltdown—Bobbitt received returns ranging from 4.5% to 6.9% on his investment. (SER148) (filed under seal). He always had the freedom to transfer investments within his University of Texas Optional Retirement Plan ("**ORP**"), which included his VALIC annuity, without fee or penalty,[10] so he was not "trapped by the high surrender fees," as the TAC alleged (ER36 ¶30).

c. Neither Bobbitt Nor Sampson Relied on Any Alleged VALIC Misrepresentation or Omission

Bobbitt admitted that VALIC never made any misrepresentation to him.[11] Sampson did not recall even meeting or speaking with a VALIC agent before investing.[12]

Both Plaintiffs invested in VALIC annuities through ORP, which provides investments in tax-deferred retirement accounts under Internal Revenue Code ("**IRC**") § 403(b) (ER30 ¶¶5-6). ORP participants could examine potential fees in VALIC prospectuses or the contract or certificates they received. (SER143:21-

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10 SER158; SER167:18-168:9; SER60:14-25.

11 SER64:22-65:2.

12 SER99:11-17.

144:24). Neither Bobbitt nor Sampson—both sophisticated law professors—bothered to read any of these. (SER61:4-9; SER101:22-102:25).

Bobbitt admitted that, had he chosen to look at the prospectus, the fees and expenses associated with his investment options were fully disclosed. (SER49:19-50:2). He also admitted that he was aware, before making his investment, that he received tax deferral by virtue of the IRC regardless of the investment he selected. (SER48:2-13).

Sampson similarly admitted that all fees and charges were set forth in the VALIC prospectus and contract. (SER116:19-118:9). Like Bobbitt, Sampson had not read them. (SER101:22-102:25; SER103:18-104:8; SER106:12-18). Sampson also knew, before investing, that he received tax deferral for his 403(b) account under the federal tax law, and not from the annuity itself. (SER82:4-9; SER84:23-85:10; SER87:7-18; SER89:19-24; SER90:10-16; SER105:3-19).

d. Plaintiffs Continued to Hold Their VALIC Investments

Plaintiffs remained invested in their VALIC annuities notwithstanding everything alleged in *Drnek*. (*See* R196 Ex. 21 at 145; SER148 (filed under seal); SER68:20-69:4; R196 Ex. 3 at SER114:7-9; SER88:14-24). Both could transfer

their investments, cost-free, to any other ORP provider, but chose not to.[13] They obviously did not feel mistreated by VALIC.

STANDARDS OF REVIEW

Denials of class certification are reviewed for abuse of discretion. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1018 (9th Cir. 2011). The Court reviews discretionary determinations supporting denial under the same standard. *Id.* If denial is supported by factual findings, the Court reviews those findings for clear error. *Id.*

SUMMARY OF ARGUMENT

1. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Plaintiffs failed to carry their burden. The District Court properly exercised its discretion in declining to hold that Defendants were judicially estopped from opposing certification on choice-of-law grounds. (ER5-6). Nor did the Court abuse its discretion in denying certification based on choice-of-law. It applied settled Arizona choice-of-law principles to the extensive

[13] SER158, § 3.4.5; SER111:7-9; SER112:20-24; SER113:10-18; SER167:23-168:9.

factual record developed during class discovery. It looked to § 145(2) of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("**§ 145(2)**") as interpreted by the Arizona courts and reached the unremarkable conclusion that the laws of up to 50 states were implicated by the state law claims of a proposed nationwide class and that Plaintiffs failed to satisfy their burden to establish predominance. (ER9, 16 n.20, 17). The District Court's conclusion was based on factual findings that were not clearly erroneous.

2. Apart from the District Court's findings on choice of law, there are adequate independent grounds—which the District Court did not have occasion to address—supporting denial of class certification. Commonality and predominance are lacking—there was no classwide injury and numerous individual issues of law and fact pervaded the putative class claims. In addition, neither Plaintiff was adequate or typical of the class he sought to represent, and Plaintiffs' class definition was overbroad and infirm.

ARGUMENT

A. THE DISTRICT COURT REASONABLY EXERCISED ITS DISCRETION IN DENYING CERTIFICATION ON CHOICE-OF-LAW GROUNDS

1. The District Court Properly Declined to Apply Judicial Estoppel

The District Court reasonably exercised its discretion in ruling that Defendants were not judicially estopped from opposing class certification on

choice-of-law grounds (ER5-6). In *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001), the Supreme Court held that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation." *New Hampshire* provided factors to inform the analysis:

> *First*, a party's later position must be clearly inconsistent with its earlier position. *Second*, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. . . . A *third* consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. [*Id.* at 750-51].

"Additional considerations may inform the doctrine's application in specific factual contexts." *Id.* at 751. Because judicial estoppel is an equitable principle primarily "concerned with the integrity of the *courts*, not the effect on parties," *Ah Quin v. Cnty of Kauai Dep't of Transp.*, 733 F.3d 267, 275 (9th Cir. 2013) (emphasis in original), its application is purely discretionary and "applied on a case-by-case basis." *Id.* at 272.

No Clear Inconsistency. Defendants' acceptance of Arizona law in moving to dismiss based on the allegations of the SAC is not clearly inconsistent with a full post-discovery choice-of-law analysis on the certification motion. (SER35-41). On the contrary, as the District Court recognized, Defendants were forced to

assume the truth of Plaintiffs' allegations in the dismissal motion, which dictated that conclusion:

> While Defendants did previously argue that Arizona law applied, that was primarily in the context of a motion to dismiss where Plaintiffs' allegations in the complaint must be taken as true and all reasonable inferences are drawn in Plaintiffs' favor. . . . Defendants' argument was really akin to what many Defendants do in motions to dismiss; essentially, Defendants assumed that Arizona law applied for purposes of the motion to dismiss as they took the position that the entire case was subject to dismissal in any event under Arizona law. [ER5-6].

In moving to dismiss, Defendants were not permitted to assert facts at odds with those alleged in the complaint. That constraint no longer applied in opposing class certification, and the District Court was free to consider the factual record—including that the January 2004 Order did not satisfy Rule 23, that no class notice was ever ordered or issued, and that there was no factual basis to find any attorney-client relationship between Defendants and the absent putative class members.[14] These and other facts were critical to the District Court's choice-of-law determination on certification because they prevented Plaintiffs from proving that *Drnek* absent class members had a relationship with Defendants sufficient to trigger application of Arizona law. The different contexts, presumptions and

[14] "A party must . . . satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

burdens applicable to dismissal motions and motions for class certification are crucial. (App. Br. 18).[15]

No Threat to Judicial Integrity. The District Court's refusal to apply Arizona law on class certification did not "create the perception that . . . the . . . court was misled" or pose a "threat to judicial integrity." *New Hampshire*, 532 U.S. at 750-51. The District Court knew it had not been misled and made that clear. It was best situated to preserve its own dignity. Its thorough analysis demonstrates that it was not deceived or its integrity in any way impugned (ER5-6).[16]

No Unfair Advantage. Appellant contends that Defendants derived an unfair advantage on the certification motion because they succeeded in "untethering [themselves] from [their] prior assertion" on their dismissal motion. (App. Br. 19-20). There is nothing "unfair" about opposing certification based on facts uncovered during class discovery, which refuted essential allegations of the TAC. (*See* pp. 17-19, *supra*). Plaintiffs had access to the same discovery and a

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[15] *See, e.g., Radiation Sterilizers, Inc. v. United States*, 867 F. Supp. 1465, 1473 (E.D. Wash. 1994) (choice-of-law argument in motion to dismiss did not judicially estop pretrial motion to apply different law).

[16] *See, e.g., Sec. Serv. Fed. Credit Union v. First Am. Mortg. Funding, LLC*, 861 F. Supp. 2d 1256, 1263 (D. Colo. 2012) (court was not misled by defendants' reliance on Colorado law in dismissal motions and California law in their pretrial motions).

full and fair opportunity to address Defendants' choice-of-law arguments. They chose not to. (*See* ER16 & n.20, ER19).

Other Factors. Unique circumstances further militated against judicial estoppel. As the District Court noted, there is no case comparing choice-of-law arguments on a dismissal motion with arguments based on subsequent discovery in a later certification motion—"and certainly not in a nationwide class action such as this that implicates the laws of all fifty states." (ER6 n.9). The two motions "involv[e] completely different standards," with certification requiring the Court "to conduct a rigorous analysis to ensure that the requirements of Rule 23 were satisfied." (*Id.*). The District Court reasonably concluded that it was inappropriate to deprive the parties and the Court of an opportunity to address vital choice-of-law issues with the benefit of a fully-developed record. *See Levin v. Dalva Bros., Inc.*, 459 F.3d 68, 72 (1st Cir. 2006) (there is no "definitive point by which a litigant must raise a choice-of-law argument"—that determination is primarily the province of the court).

2. The District Court's Choice-of-Law Analysis Was Correct

The District Court analyzed the facts and weighed each argument concerning amenability of Plaintiffs' state-law claims to classwide resolution. It concluded that Plaintiffs failed to demonstrate that Arizona law governs the state-law claims of putative class members who had no attorney-client relationship with

Defendants, had no notice of *Drnek*, had no opportunity to opt out of the putative *Drnek* class, had not chosen to litigate in Arizona, and suffered injury in the states in which they reside.

Plaintiffs asserted that the putative class includes over 1.3 million members (SER195) that are "widely dispersed geographically." (SER239 at ¶40(a)). In *Drnek*, this made little difference because the claims were exclusively federal securities claims. In this case, however, the Plaintiffs were asserting exclusively state-law claims. This critical difference made a choice-of-law analysis essential to ensure fairness and due process to each putative class member.

"[W]here the applicable law derives from the law of the 50 states, as opposed to a unitary federal cause of action, differences in state law will compound the [] disparities among class members from the different states." *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1189 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001). *See also Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011) (where "laws of the affected states vary in material ways, no common legal issues favor a class-action approach to resolving this dispute"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 618 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997).

The District Court was obligated to apply Arizona choice-of-law rules.[17] Arizona "appl[ies] the principles of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS . . . to determine the controlling law for multistate torts."[18] This is not a unitary analysis. Applying § 145(2), Arizona courts "resolve tort issues under the law of the state having the most significant relationship to both the occurrence and the parties with respect to any particular question."[19] The District Court's fact-intensive choice-of-law analysis at the certification stage carefully applied this Court's precedent. *See, e.g.*, *Zinser*, 253 F.3d at 1187-88 (affirming denial of certification where law of several states was implicated).

a. Place of Injury

The District Court correctly held that any injury stemming from absent class members' claims occurred in their states of residence (ER9) (citing *Johnson v. KB Home*, 720 F. Supp. 2d 1109, 1122 (D. Ariz. 2010); *Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n*, 624 F.3d 185, 191 (5th Cir. 2010); *St. Paul Fire &*

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17 *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

18 *Bates v. Superior Court of Ariz.*, 156 Ariz. 46, 48, 749 P.2d 1367, 1369 (1988).

19 *Id.* at 1370. *See also Garcia v. Gen. Motors Corp.*, 195 Ariz. 510, 516, 990 P.2d 1069, 1075 (Ct. App. 1999) ("Which forum's law applies to a particular issue depends on which forum has the most significant relationship to the issue."); *accord* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. *d* (2014).

Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP, 233 F. Supp. 2d 171, 172-75 (D. Mass. 2002)).

Appellant contends that the authorities cited by the District Court "provide no insight" in a malpractice case. (App. Br. 34). This settled rule of law, however, has been applied in a putative class's allegations of legal malpractice strikingly similar to the claims here. *See Karnes v. Fleming*, No. H-07-0620, 2008 WL 4528223, at *6 (S.D. Tex. July 21, 2008) (injury to putative class from settlement of underlying case "would have been sustained by each client in his or her home state, where they received their payments").

Appellant maintains that injury from legal malpractice occurs where the underlying lawsuit was pending. (App. Br. 33). But the cases he cites (*id.* n.12) involve plaintiffs who affirmatively determined to pursue the underlying litigation in particular states and assented to those forums. The District Court correctly reasoned that such cases do not dictate the choice-of-law analysis where, as here, plaintiffs are unwitting, unaware absent class members who "did not choose or hire the Defendant attorneys, and did not ask them to litigate a nationwide class action based on violations of federal securities laws." (ER15-16).[20]

[20] The Court distinguished *O'Boyle v. Braverman*, No. 08-553, 2008 U.S. Dist. LEXIS 62180, at *32 (D.N.J. Aug. 12, 2008), and *Foulke v. Dugan*, 187 F. Supp. 2d 253, 257 (E.D. Pa. 2002), on this ground (ER14-16). The other cases Appellant cited were equally inapposite. *Pivnick v. White, Getgey & Meyer Co.*, No. 1:05cv580, 2007 WL 2236609, at *3-5 (S.D. Ohio July 31, 2007) (plaintiff hired

The District Court found no evidence in the record that the absent class members knew about *Drnek* or had any relationship with Defendants litigating in Arizona. The absent class members had no voluntary connection to Arizona and did not sustain an injury in Arizona. The District Court properly concluded that putative class members suffered any loss in their home states, and not the forum of a lawsuit they were unaware of.

Application of Arizona law to claims of putative class members who did not know the claims were being asserted there raises significant due process concerns. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985); *Grayson v. 7-Eleven, Inc.*, No. 09-CV-1353 MMA(WMc), 2011 WL 2414378, at *4 (S.D. Cal. June 10, 2011).

b. Place of Conduct

As the District Court also concluded, *Drnek*'s venue in Arizona does not automatically make Arizona the "place of conduct" for choice-of-law purposes. Determining place of conduct, like all other § 145(2) elements, is a fact-intensive inquiry. *See Collins v. Miller & Miller, Ltd.*, 189 Ariz. 387, 396-97, 943 P.2d 747,

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counsel to file an action in Kentucky for harm suffered on the purchase of a thoroughbred in Kentucky); *Kaiser Grp. Int'l, Inc. v. Squire Sanders & Dempsey LLP*, No. 00-02263-MFW, 2010 WL 3271198, at *5-6 (Bankr. D. Del. Aug. 17, 2010) (plaintiff hired firm in Delaware, entered into written retention describing the scope of their relationship in Delaware, and was represented by defendant in Delaware action).

756-57 (Ct. App. 1996) (where Arizona lawyer's alleged misconduct occurred in Arizona, Arizona law applied to malpractice claim for case filed and litigated in Minnesota); *Club Vista Fin. Servs., LLC v. Maslon, Edelman, Borman & Brand, LLP*, No. 10-CV-3174 (SRN/JJG), 2011 WL 4947629, at *9-10 (D. Minn. Oct. 18, 2011) (Minnesota was place of conduct when attorney botched real estate transaction in Nevada because the attorney and law firm were located in Minnesota, where most of the legal work was performed).[21]

Plaintiffs claimed that Defendants committed malpractice by, *inter alia*, negligently drafting a stipulation (ER38 ¶¶35, 37), failing to timely designate experts and produce reports (*id.* ¶37), and failing to give notice of the Vacatur Order (*id.* ¶42). Plaintiffs offered no evidence on the location of any of this alleged misconduct, and the record showed that only local counsel was located in Arizona—the Defendants conducted business principally in New York and Washington, D.C. VALIC's counsel was located in Texas. (SER266). Consequently, the District Court rejected the notion that Arizona was the "place of conduct" simply because *Drnek* was venued there. (ER12-13 & n.16). The place

[21] Appellant's authorities (App. Br. 39) are not to the contrary. In *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 99-100 (D.D.C. 2002), the court chose Washington, D.C., as the place of conduct because the final, critical legal service occurred there. *O'Keefe v. Darnell*, 192 F. Supp. 2d 1351, 1356 (M.D. Fla. 2002), applied Kansas law based on uncontested allegations that defendants provided services there.

of conduct is, as the Court found, the place where "counsel performed the brunt of their legal work"—"the states where they were based." (ER13).

In conducting its place-of-conduct analysis, the District Court considered § 145 comment *e*'s emphasis on this factor but determined it was "unpersuasive under the circumstances of the case" because the allegedly injurious conduct occurred in at least three states. (ER12-13 & n.16). This determination was consistent with the authority Appellant offers in urging that greater weight should have been ascribed to this factor, *Bryant v. Silverman*, 146 Ariz. 41, 45, 703 P.2d 1190, 1194 (1985) (App. Br. 36), which holds that this factor must be assessed "in light of the issues and facts" of the case.[22] As comment *e* emphasizes, "[t]he importance of th[e] contacts will frequently depend upon the particular issues involved."[23]

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[22] *Bryant* determined the choice of law for wrongful death claims arising from an airplane crash and referred to a RESTATEMENT comment specifically addressing such claims—*id.* at 42-43, 703 P.2d at 1191-92 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 178 cmt. *b* (2014))—which has no application here.

[23] *Stavriotis v. Litwin*, 710 F. Supp. 216, 219 (N.D. Ill. 1988) (App. Br. 32) is inapposite. The place of conduct was given greater weight because plaintiff's place of injury and domicile were difficult to determine (the plaintiff had lived in both Tennessee and Florida, while all of defendants' malpractice took place in New Jersey). *Id.* at 218-19. Here, it is conceded that the absent putative class members live throughout the country. *Stavriotis* also refutes Appellant's place-of-conduct argument—the Court applied New Jersey law, despite allegations that the defendants botched transactions in Tennessee because the conduct giving rise to plaintiff's injury took place in New Jersey, where the law firm was located, "most

c. Domicile

The District Court reasonably concluded that the third factor of § 145(2)—the parties' domiciles—favors application of multiple states' laws (ER10-11). Contrary to Appellant's suggestion (App. Br. 41), it was appropriate for the District Court to consider the domiciles of all putative class members. *See Pilgrim*, 660 F.3d at 947 (denying certification; RESTATEMENT "requir[ed] application of the home-state law of each potential class member"); *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 314 (5th Cir. 2000) (noting that "class members are domiciled and likely bought their guns in all 50 states and the District of Columbia"); *Hale v. Enerco Grp., Inc.*, 288 F.R.D. 139, 144 (N.D. Ohio 2012) (denying certification; observing "that the domicile and residence of the potential class members are scattered across the fifty states"); *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 552 (W.D. Wash. 2008) ("Washington is the domicile of one of the named Plaintiffs and the Defendant, though if a nation-wide class is certified Plaintiffs will have domicile in all states."); *cf. Nat'l Union Fire Ins. Co. v. Elec. Arts, Inc.*, No. C 11-04897 JW, 2012 WL 219428, at *3 (N.D. Cal. Jan. 24, 2012) (staying insurance coverage litigation pending choice-of-law analysis in underlying action, which required discovery into the domiciles of putative class members).

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of [the] actions relating to the allegations . . . took place. . ., and . . . the documents . . . relat[ed] to [a botched transaction] were drafted. . . ." *Id.* at 219.

Appellants argue that the domiciles of the parties in this case points to application of multiple state's laws and that "[t]he Restatement (and common sense) makes clear there is no reason to elevate any one of these . . . above any of the others" (App. Br. 40). Far from rendering the domicile factor "of no weight," this argument demonstrates why the domicile of the parties supports the District Court's application of multiple states' laws.[24] "Looking at all of the class's claims collectively, there are thousands of class members in ***every*** state, and thus no state rises above any other." (App. Br. 41 (emphasis in original)). That is precisely why the District Court found it necessary to look to the laws of "***every*** state" in assessing putative class members' state law claims.

Appellant selectively quotes § 145 comment *e* for the proposition that domicile "carries less weight because the interest is pecuniary." (App. Br. 41). But the partially quoted Comment addresses only whether a court should focus on

[24] Appellant mistakenly urges that the District Court erred by reading the first and third RESTATEMENT factors to "mean the very same thing." (App. Br. 39). It is neither controversial nor surprising, however, when place-of-injury and domicile point to the same place. *See Pilgrim*, 660 F.3d at 946 (plaintiffs' domicile and place of injury were in the putative class members' home states in action alleging that defendant solicited their participation in a program that fraudulently advertised healthcare discounts). In *Drnek*, as in *Pilgrim*, the putative class members alleged harms in their states of domicile. These factors do not "mean the same thing." They merely render the same answer.

a party's domicile rather than its place of business. It does not suggest that domicile is insignificant in pecuniary damages cases.[25]

d. Center of Relationship

The District Court analyzed the "center of relationship" factor of § 145(2) and determined that this factor was "entitled to little weight under the circumstances of this case" because Defendants had "no relationship with any of the more than one million absent class members who were widely disbursed geographically" where, *inter alia*, (1) "[t]he absent class members never received notice of the class action, never had any contact with Defendants, and never had any practical relationship with Defendants" (ER11-12), and (2) "[t]he absent class members did not choose or hire the Defendant attorneys and did not ask them to litigate a nationwide class action based on violations of federal securities laws in Arizona" (*id.* 15).

Appellant is correct that "[n]either Defendants nor the District Court ever identified any other jurisdiction that could possibly qualify as the place of the

[25] *Air Prods. & Chems. Inc. v. Eaton Metal Prods. Co.*, 272 F. Supp. 2d 482, 504 (E.D. Pa. 2003), does not stand for the proposition that a plaintiff's domicile is of minimal importance in pecuniary cases (App. Br. 41). The *Air Products* Court, analyzing a separate passage of the commentary, acknowledged that comment *e*'s guidance—that the parties' place of business is the most important contact for cases involving defamation—did not apply to a claim alleging product defect. *Id.*

relationship of the parties." (App. Br. 41). That is the point. There was no jurisdiction at the center of the relationship because there was no relationship.[26]

e. The Factors of RESTATEMENT § 6 Weigh in Favor of Applying Fifty States' Laws

In evaluating the § 145 factors, Arizona courts consider the general choice-of-law principles of RESTATEMENT § 6. *Lange v. Penn Mut. Life Ins. Co.*, 843 F.2d 1175, 1177-78 (9th Cir. 1988). Appellant's § 6 analysis selectively relies on only three § 6 factors, and even those do not support application of Arizona law. Appellant argues that (1) the "relevant policies of the forum" and (2) the "basic policies underlying the particular field of law" favor Arizona because it has an interest in regulating the conduct of attorneys practicing within its borders and compensating absent class members. (App. Br. 44-46). But this erroneously recasts Arizona's regulation of attorney conduct as a scheme for compensating malpractice victims. Arizona polices acts of attorneys with rules governing court conduct and ethics, but those rules are not designed to redress alleged

[26] Appellant points to the general proposition—set forth in the RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 99 cmt. *l* (2014)—that certification of a class gives rise to an attorney-client relationship (App. Br. 42)—but that is unavailing. Putting aside that the January 2004 Order did not comply with Rule 23 because it failed to include any reasoning or even appoint class counsel, it also, critically, failed to provide for notice and an opportunity to opt out (SER263; SER31-34, SER39 & n.46), which are essential to an attorney-client relationship. *See* n.6, *supra*.

malpractice.[27] *A fortiori*, Arizona's court and ethical rules do not reflect any policies of compensating out-of-state putative class members having no attorney-client relationship with attorneys practicing in Arizona (App. Br. 45-46). Nor, in any event, does Appellant attempt to show that any Arizona rules protect out-of-state putative class members more effectively than their own states' policies. *See Casa Orlando*, 624 F.3d at 193 (denying certification in fiduciary duty claim where plaintiffs could not establish that D.C. protected putative class members "better than the policies of other states").[28]

Appellant ignores those § 6 factors that weigh decidedly against application of Arizona law—the "needs of the interstate . . . system" and the "relevant policies of other interested states and the relative interest of those states in the determination of the particular issue." All states undoubtedly discourage

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[27] *See* Ariz. R. Sup. Ct. 42, *Preamble* ("The Rules . . . are not designed to be a basis for civil liability."); *Stanley v. McCarver*, 208 Ariz. 219, 224 n.6, 92 P.3d 849, 854 n.6 (2004) (Arizona Supreme Court has "declined to use the court's own ethical standards as a basis upon which to impose legal malpractice liability;" although the ethical rules "may provide evidence of how a professional would act, they do not create a duty or establish a standard of care as a matter of law.").

[28] Appellant contends that a third § 6 factor, the "ease in the determination and application of the law," supports application of Arizona law (App. Br. 44). But "[t]his policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. *j* (2014). Where, as here, § 6 and § 145 factors point decisively toward the law of the fifty states, the ease of litigating is entitled to minimal weight.

negligence and breach of fiduciary duty, applying varying standards of liability, but it is the putative class members' resident states that have the compelling interest of compensating and delineating the scope of recovery of their residents. *See Baroldy v. Ortho Pharm. Corp.*, 157 Ariz. 574, 579, 760 P.2d 574, 579 (Ct. App. 1988) ("Compensation of an injured plaintiff is primarily a concern of the state in which plaintiff is domiciled."); *Casa Orlando*, 624 F.3d at 193 (because of differing interests, states "establish different standards . . . and sometimes different remedies"). Applying Arizona law to the claims of all absent class members would unjustifiably subordinate these interests to the particularities of Arizona tort law, and disregard principles of interstate comity. *Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 209 (3d Cir. 2013) ("the interests of interstate comity favor applying the law of the individual claimant's own state"); *Casa Orlando*, 624 F.3d at 193 (where nuances in fiduciary duty law may vary, "the needs of the interstate system direct us not to ignore relevant states' interests in fiduciary law by applying [the forum's] law to all matters of this case").

The "justified expectation of the parties" also compels rejection of Arizona law. Nothing in the record indicates that absent class members knew about *Drnek* or had any relationship with counsel litigating in Arizona. Their conduct occurred in the states in which they purchased the variable annuities at issue and suffered

their alleged injuries. Accordingly, the § 6 factors, like those under § 145(2), support the District Court's choice-of-law analysis.

f. Plaintiffs Defaulted on Their Burden to Address Conflicts of Law

The cases consistently hold that unresolved conflicts of law among multiple jurisdictions vitiate predominance and manageability:

> [N]o matter how similar—or comparable—each state's law on negligence may be, it is clear—despite plaintiffs' argument—that the negligence laws of the fifty states have some differences. . . . [T]he Court would be forced to go through—and to have the jury go through—an individual analysis of each state's negligence law in order to determine defendant's liability for negligence. . . . [T]he complexities that class action treatment would create would more than outweigh any benefits from considering the common issues in one trial, making class action treatment less efficient and definitely not superior.
>
> Furthermore, with this nationwide class, any measurements of compensatory and punitive damages would need to be measured individually, based on the individual circumstances and individual state laws. . . . Having the Court conduct this massive and particularized investigation and analysis is not in the best interests of judicial efficiency.

Haley v. Medtronic, Inc., 169 F.R.D. 643, 653-54 (C.D. Cal. 1996).

It was Plaintiffs' burden to demonstrate that such conflicts were absent. *See, e.g., Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1180 (11th Cir. 2010) ("The party seeking certification . . . must . . . provide an *extensive analysis* of state law variations to reveal whether these pose insuperable obstacles.") (emphasis in original); *Casa Orlando*, 624 F.3d at

195; *see also* Order (ER7). The District Court emphasized that Plaintiffs failed to carry their burden despite repeated opportunities to do so. (ER7, 16-17 n.20).

It is "the court's duty to determine whether the plaintiffs have borne their burden where a class will involve multiple jurisdictions and variations in state law." *Spence*, 227 F.3d at 313. Plaintiffs' failure to provide a detailed choice-of-law analysis prevented the District Court from certifying the putative class:

> [I]n not presenting a sufficient choice of law analysis [plaintiffs] have failed to meet their burden of showing that common questions of law predominate. The district court is required to know which law will apply before it makes its predominance determination. The district court here could not discharge its duty because plaintiffs did not supply adequate information on the policies of other interested states relevant to the choice of law.

Id.

The District Court's choice-of-law analysis does not insulate class counsel from malpractice liability or prevent absent class members from protecting their interests. (App. Br. 47). Among other things, as the District Court pointed out, "Plaintiffs could have advanced a sub-class plan or otherwise argued for an alternative, smaller, state-specific class. Despite the opportunity to do so, Plaintiffs failed to argue in the alternative as to these issues." (ER19). The Order applied choice-of-law principles to the "unique circumstances of this case," (ER16; *see also* ER11, 13-15), including the absence of an attorney-client relationship and

Plaintiffs' failure to perform a manageability analysis under multiple states' laws. It reached the right result.

B. SEVERAL ALTERNATE GROUNDS SUPPORT DENIAL OF CERTIFICATION

1. There Is No Commonality within Rule 23(a)(2), and Individual Questions Predominate within Rule 23(b)(3)

Plaintiffs argued below that the commonality requirement of Rule 23(a)(2) is "minimal" and suggested "a host of legal and factual issues that are common to the proposed class." (SER195-96). This misconceived Plaintiffs' burden. "What matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551 (italics in original).

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. . . . This does not mean merely that they have all suffered a violation of the same provision of law. . . . Their claims must depend upon a common contention . . . [which] must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. [*Id.*]

Even where common questions are present, class certification is inappropriate where, as here, plaintiffs fail to meet the "even more demanding" requirement to establish predominance under Rule 23(b)(3). *Comcast*, 133 S. Ct. at 1432 ("23(b)(3)'s predominance criterion is even more demanding than Rule

23(a). . . . [T]he court's duty [is] to take a close look at whether common questions predominate over individual ones.").

Below, Plaintiffs listed examples of "issues are susceptible to common answers by common proof." (SER196). Their list illustrated the futility of the certification motion. They pointed to "[e]ach element of the negligence claim—whether Defendants owed a duty to absent class members, breached that duty, and caused the loss of valuable rights and interests." (*Id*.). Malpractice causation and injury, however, are highly fact-intensive and depend on individualized proof, rendering certification inappropriate under the facts of this case. *See Comcast*, 133 S. Ct. at 1433 (certification inappropriate where "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class"); *Zinser*, 253 F.3d at 1190 (affirming certification denial because it was "inescapable that many triable individualized issues may be presented" on causation and injury).[29]

[29] With respect to any alleged duty owed, the District Court ruled that "nothing within Rule 23 . . . requires counsel to provide notice of decertification to putative class members who never received notice of class certification," but concluded that "[w]hether class counsel has the duty to inform potential class members that a class was decertified . . . is not a clearly established duty and may be one which is dependent on the facts of a particular case" and is "really an inquiry into the appropriate standard of care." (SER251; SER247-48 (adopting same)). It remains Defendants' position that state law duties inconsistent with Rule 23 are preempted. Absent preemption, however, the putative class member claims are rife with individualized fact issues and conflicting legal standards.

Causation. In the SAC, Plaintiffs had conclusorily alleged that, by failing to provide notice of the Vacatur Order, "Defendants . . . proximately caused Plaintiffs and the Class damages in an amount to be proven at trial." (SER277-78 at ¶¶48, 52). The District Court dismissed the SAC because it lacked facts "which would support an inference that, but for Milberg's failure to provide notice, Plaintiffs would have retained their own counsel and filed their own securities action against VALIC." (SER252; SER247-48). To cure this, Plaintiffs alleged in the TAC that, but for Defendants' failure to notify them of the Vacatur Order, putative class members "would have consulted other lawyers they knew and trusted, such as the lawyers who now represent them, and would have followed their advice in filing their own case against VALIC." (ER40 ¶43).

This lynchpin of Plaintiffs' causation theory is impossible to prove on a classwide basis—it injects innumerable, individualized fact issues. Among them: If a putative class member received notice of the Vacatur Order, would he or she have consulted counsel? What would counsel have advised? Would they have followed the advice? Would they have sued VALIC? Did any putative class members know about the Vacatur Order? Did they nonetheless fail to sue? Would

a putative class member have received notice mailed to the last address in VALIC's files?[30] Would he or she have read the notice?

As Sampson conceded, what putative class members may have done after notice is unique to each of them. (SER115:11-19). The two named Plaintiffs did not even agree as to what they would have done. Bobbitt claimed he would have sued VALIC if counsel had advised him to. (SER66:22-67:4). Sampson "cannot say"—he "might have been too busy." (SER75 at Interrogatory Ans. 18). Plaintiffs' causation testimony demonstrates the predominance of individual issues and the absence of common answers "apt to drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551.

"Case within a Case." To prove causation and injury, Plaintiffs were required to prove the "case within a case"— to establish meritorious claims in *Drnek*.[31] Individualized issues pervade this determination.

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[30] Bobbitt would not have received notice because VALIC had an incorrect address for him. (SER70:10-24).

[31] Plaintiffs' argument that their purported loss can be determined through common proof of a "lost chance" to participate in a possible settlement of *Drnek* was wrong as a matter of law and properly rejected by the District Court. (ER4 n.6) ("the Court would not use the lost settlement chance method urged by Plaintiffs, but would only use the case within a case procedure in this case"). *See Cecala v. Newman*, 532 F. Supp. 2d 1118, 1135 (D. Ariz. 2007) (applying case-within-a-case procedure); *McClure Enters., Inc. v. Gen. Ins. Co. of Am.*, No. CV 05-3491-PHX-SMM, 2009 WL 73677, at *3 (D. Ariz. Jan. 9, 2009) (same).

Drnek was a securities fraud action, but it did not involve "fraud on the market" or invoke the presumption of reliance of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Proof of reliance by each VALIC investor was therefore required, absent some other viable presumption. In briefing below, Plaintiffs pointed to the presumption of reliance under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), but that presumption is inapplicable. *First*, the *Affiliated Ute* presumption is unavailable in cases, like *Drnek*,[32] in which the alleged securities fraud involves both misrepresentations and omissions. *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 941 (9th Cir. 2009); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666-67 (9th Cir. 2004) (no presumption for "mixed claims" of misrepresentation and omission).

Second, "[t]he *Affiliated Ute Citizens* presumption of reliance is rebuttable," *Kramas v. Sec. Gas & Oil Inc.*, 672 F.2d 766, 771 n.5 (9th Cir. 1982), and the evidence in this record rebuts it. Both Plaintiffs conceded at their depositions that they knew the investments in their 403(b) accounts were tax-deferred by operation of law.[33] Both conceded that all VALIC fees and expenses were disclosed in their prospectuses and contract documents, but they never bothered to read these.[34] The

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32 *Drnek* Complaint (SER240-242) Count IV.

33 SER48:2-13; SER83:23-84:10; SER87:7-18; SER89:19-24; SER90:10-16.

34 SER48:2-13, SER49:19-50:2; SER100:17-102:11; SER116:19-118:12.

record is clear that neither Plaintiff relied on any alleged misrepresentation or omission by VALIC. *See Quezada v. Loan Ctr. of Cal., Inc.*, No. Civ. 2:08-00177 WBS KJM, 2009 WL 5113506, at *5-6 (E.D. Cal. Dec. 18, 2009) (*Affiliated Ute* presumption rebutted by evidence that plaintiff did not read loan terms or disclosure statements she signed). The *Affiliated Ute* presumption has no application on this record.

The viability of any absent class member's claims in this case implicates individualized inquiries including, *inter alia*: What did each of them know about the alleged tax redundancy before investing? What information did they receive regarding the investment from VALIC or independent brokers? Did they read it? What were their investment goals? What were their views concerning the desirability of insurance features, such as guaranteed death benefits? Sampson admits that the value of different features to each investor varies, and he "can't say that in representing the class . . . the goals of the class are predictable for the class." (SER106:20-107:8; 108:14-15) ("each investor—each member of the class will have different goals, needs, and so forth"). Those issues cannot be resolved on a common basis. *See also* SER110:14-111:6 ("It's not possible" for "anyone to know" what "each member [of the putative class] wants."); SER201 (holding that VALIC's duty to the absent *Drnek* class members turns on whether parties to each transaction "had a fiduciary or agency relationship").

The overwhelming weight of authority disfavors certification where, as in *Drnek*, sales practices are not uniform. *See, e.g.*, *In re LifeUSA Holding Inc.*, 242 F.3d 136, 147 (3d Cir. 2001) (reversing certification because record established "non-standardized and individualized sales pitches presented by independent and different sales agents all subject to varying defenses and differing state laws, thus making certification of individualized issues inappropriate"); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 211 (5th Cir. 2003) ("actions that require proof of individual reliance cannot be certified"); *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir. 2002) ("a common course of conduct is not enough to show predominance, because a common course of conduct is not sufficient to establish liability . . . to any particular plaintiff"); *Van West v. Midland Nat'l Life Ins. Co.*, 199 F.R.D. 448, 454 (D.R.I. 2001) (denying certification where alleged misrepresentations included statements of different agents or brokers).

Even if sales practices arguably have some common elements, certification is improper where, as in *Drnek*, individual defenses based on individual class members' knowledge overshadow common elements. *See, e.g., N.J. Carpenters Health Fund v. Residential Capital, LLC*, 272 F.R.D. 160, 170 (S.D.N.Y. 2011), *aff'd*, 477 F. App'x 809 (2d Cir. 2012).

Compounding the individualized inquiries that pervade Plaintiffs' malpractice claims are the individual inquiries underlying both the claims and defenses in the *Drnek* case-within-a-case. All of these preclude class certification.

2. Plaintiffs Were Inadequate Class Representatives and Their Claims Were Atypical

The record demonstrates that Plaintiffs did not "possess the same interest and suffer the same injury as the class members." *Wal-Mart*, 131 S. Ct. at 2550. The TAC alleges that Defendants supposedly injured Plaintiffs and the putative class by causing them to lose viable claims against VALIC. But the evidence shows that Plaintiffs had no such claims. Further, Bobbitt incontrovertibly suffered no damages because he paid none of the fees or penalties challenged in *Drnek*. Class certification is inappropriate "where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Hanon*, 976 F.2d at 508. *See also Mazur v. eBay Inc.*, 257 F.R.D. 563, 569 (N.D. Cal. 2009) (representatives inadequate where unique defenses create conflicts with other putative class members).

a. Plaintiffs Had No Viable Securities Claims

Bobbitt had no claim because he never purchased a Unit of Interest in a Separate Account, which was the exclusive subject of the surviving 10b-5 claims in *Drnek*. (SER141:4-10). Class discovery established that Plaintiffs were not defrauded by, and did not rely on, any material misrepresentation or omission.

Plaintiffs knew about the tax redundancy and would have learned of the allegedly hidden fees that only Sampson paid if they had bothered to read VALIC's disclosures. (SER48:2-13; SER82:4-9; SER83:23-84:10; SER87:7-18; SER89:19-24; SER90:10-16; SER105:3-19). Plaintiffs' knowledge that their investments would be tax-deferred as a matter of law—regardless of the tax characteristics of the instruments they invested in—was fatal to any claimed reliance. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994) (liability cannot attach "when at least one element critical for recovery under 10b-5 is absent: reliance").

Neither Plaintiff could establish that expiration of his claims against VALIC caused him any injury. *Cecala*, 532 F. Supp. 2d at 1135 (legal malpractice claim cannot proceed without a showing of economic injury); *Schlager v. Clements*, 939 S.W.2d 183, 187 (Tex. Ct. App. 1996) (no legal malpractice if conduct could not have caused economic damage to client).

b. Bobbitt Suffered No Damages Because He Paid No Fees or Penalties

Damages in *Drnek* were predicated exclusively on the economic model of proffered plaintiffs' expert Steve Largent, who computed damages based on fees and penalties from which Bobbitt was exempt. As the *Drnek* plaintiffs described their damages:

> [P]laintiffs intend to show on a classwide basis, through expert testimony, the amounts of fees and charges the class members would not have incurred if they had not been deceived into purchasing a deferred annuity to fund their qualified retirement plan. An expert will identify and measure those fees and charges on a classwide basis, by determining fee levels for comparable non-annuity (non-tax-deferred) investments, and then the calculation of the amounts paid by each class member in excess of the comparable benchmark becomes a matter of arithmetic.

SER206. *See also* Supplement to the Declaration of Steve Largent, June 3, 2004 (SER214) ("individual damages may be appropriately measured by the amount of fees paid to VALIC for insurance that otherwise would not have been purchased had all material facts been disclosed in the sale, and any surrender penalties paid by individuals to exit these products").

Bobbitt paid no fees or surrender penalties because there were none charged to his fixed annuity. Under no circumstances could he prove damages.

3. Plaintiffs' Class Definition Was Overbroad and Infirm

Plaintiffs sought to certify a nationwide class of over a million persons consisting of

> all persons who purchased an individual variable deferred annuity contract or who received a certificate to a group variable deferred annuity contract issued by VALIC, or who made an additional investment through such a contract, on or after April 27, 1998 to April 18, 2003 (Class Period), that was used to fund a contributory retirement plan or arrangement. . . .

ER32-33 ¶23 (the "**Class Definition**"). This Class Definition was overbroad and infirm under Rule 23. It included individuals who had no claim in *Drnek* and therefore could not have had a claim in this case because they:

- Invested exclusively in a VALIC Fixed Account (like Bobbitt).
- Did not rely on any VALIC misrepresentation or omission (like both Plaintiffs).
- Had access to VALIC's May 2002 prospectus which contained the precise disclosure complained about in *Drnek*, as Bobbitt admitted (SER61:4-9; SER62:14-63:6).
- Chose to invest in VALIC annuities because they desired the insurance features (*e.g.*, SER109:14-23) or found VALIC's products suitable given their investment circumstances.
- Read articles or disclosures published before and during the Class Period discussing the tax redundancy of annuity investments in retirement accounts, eviscerating any claim that this was concealed (*e.g.*, SER170-191; SER59:6-18).
- Would have opted out had they received notice of class certification.

Plaintiffs' Class Definition also includes individuals with no claim against *Defendants*, even if they had a claim against VALIC—including those who suffered no injury because they:

- Had alternate state law claims to bring against VALIC on the date this action was filed.
- Were aware of *Drnek* or learned of the Vacatur Order but did nothing.
- Would not have acted as alleged in TAC ¶43 had they received notice of the Vacatur Order.

Where, as here, a proposed class definition sweeps within it persons who could not have been injured by Defendant's conduct, it is impermissibly overbroad.[35] These deficiencies cannot be cured by amending the Class Definition to include only those individuals who do have a claim. Such fail-safe class definitions are equally impermissible. *See Velasquez v. HSBC Fin. Corp.*, No. 08-4592 SC, 2009 WL 112919, at *4 (N.D. Cal. Jan. 16, 2009) ("Fail-safe classes are defined by the merits of their legal claims, and are therefore unascertainable prior to a finding of liability in plaintiffs' favor."); *Randelman v. Fid. Nat. Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) (cannot define class so that "either the class members win or, by virtue of losing, they are not in the class"); *accord Burkhead v. Louisville Gas & Elec. Co.*, 250 F.R.D. 287, 293-94 (W.D. Ky. 2008); *Forman*

[35] *See, e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (reversing certification of nationwide class of consumers where plaintiff alleged injury from marketing brochures and advertisements not necessarily seen or relied upon by class members); *see also Stearns*, 655 F.3d at 1024; *Red v. Kraft Foods, Inc.*, No. CV 10–1028-GW(AGRx), 2011 WL 4599833, at *8 (C.D. Cal. Sept. 29, 2011).

v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004).

CONCLUSION

Defendants respectfully request that the Court dismiss this appeal, or, in the alternative, affirm the District Court.

Respectfully submitted**,**

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C) and Circuit Rule 32-1, the undersigned certifies that the accompanying brief complies with Circuit Rule 32. The brief is double-spaced, utilizes 14-point proportionally spaced Times New Roman typeface, and contains 13,836 words.

/s/ Jeffrey H. Zaiger

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 Ninth Circuit using the appellate CM/ECF system on May 28, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey H. Zaiger