UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-16315

Consolidated with 18-16213, 18-16223, 18-16236, 18-16284, 18-16285, 18-16317

SHAHRIAR JABBARI; KAYLEE HEFFELFINGER,
on behalf of themselves and all others similarly situated,
Plaintiffs - Appellees,
v.
JILL PIAZZA,
Objector - Appellant,
v.
WELLS FARGO & COMPANY and
WELLS FARGO BANK, N.A.,
Defendants - Appellees.

On Appeal from the Northern District of California
Civil Action No. 3:15-cv-02159-VC

APPELLANT PIAZZA'S OPENING BRIEF

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STATEMENT OF JURISDICTION

A. District Court's Jurisdiction. This Court has jurisdiction over this action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), because at least one Class member is of diverse citizenship from one Defendant, there are more than 100 Class members, and the aggregate amount in controversy exceeds $5,000,000, exclusive of interest and costs.

B. Appellate Jurisdiction. This Court's jurisdiction exists pursuant to 28 U.S.C. § 1291. The district court entered its Judgment on June 14, 2018 (ER 46) which disposed of the parties' claims. Appellant Piazza timely filed a Notice of Appeal on July 12, 2018 (ER 1). Appellant is a class member who filed a timely objection to the proposed settlement and attorney's fees in the district court.

STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion by failing to perform a lodestar cross-check in order to assess the requested percentage fee, and in awarding a lodestar multiplier of 4.7.

2. Whether the District Court abused its discretion by failing to take into account the prior government enforcement action and appropriately reducing the attorney's fee to reflect the assistance provided by the government?

STATEMENT OF CASE

In a case that lasted less than four months between filing and settlement, apart from the time the case was on appeal, the district court awarded Class Counsel a fee of $21.3 million. This represents a 4.7 multiplier of their claimed $4.5 million lodestar, which was calculated at a blended hourly rate of $585. ER 13, 32. In other words, Class Counsel received an average hourly rate of $2749/hour in this low-risk, short duration case that was largely duplicative of the Consumer Financial Protection Bureau's enforcement action. Once Wells Fargo admitted to liability and agreed with the CFPB, the City of Los Angeles and the Office of the Comptroller of the Currency to pay $185 million in fines for the same wrongful conduct alleged in the complaint in this action, settlement of this case was a foregone conclusion. Document 162 at p.4. At that point, it was clear that Wells Fargo was willing to admit to liability and to pay a substantial amount of money in settlement of this action that would permit Class Counsel to request a fee in excess of their lodestar. Unsurprisingly, this case settled for $110 million at the same time Wells Fargo agreed to pay $185 million to the three governmental agencies. ER 74. Document 162 at p.4 (the settlement of this action was reached on September 6, 2016, and the settlement of the CFPB and OCC actions was announced on September 8, 2016).

In 2013, the Los Angeles Times first reported on Wells Fargo's practice of encouraging its employees to open additional accounts under its customers' names,

without their authorization, which generated income for Wells Fargo and its employees, but harmed the customers by causing them to incur additional fees and damaging their credit ratings. Document 186 at p. 2. This case was filed on May 13, 2015. ER 40. This case largely relied on publicly available information from the CFPB, OCC and City of Los Angeles investigations. Document 186 at p. 3. After the Court granted Defendant's motion to compel arbitration on September 23, 2015, Plaintiffs appealed to the 9th Circuit, and proceedings in this case remained stayed for a year while the parties engaged in the Ninth Circuit's mediation program. ER 73-74. Class Counsel never filed a brief in that appeal, and did not obtain a reversal of the district court's order. *Id*. Once Wells Fargo decided that it would settle with the CFPB and the other government agencies, it began discussing settlement of this case as part of the appellate mediation. After a settlement in principle was reached on September 6, 2016, the appeal was dismissed without prejudice to reopen the appeal if the district court refused to approve the settlement of this case. ER 74. The district court case was reopened in October 2016, and the parties immediately began seeking approval for the settlement that was reached while the case was on appeal. ER 47-48. There was no adversary motion practice after remand.

Therefore, while this case had been pending for three years at the time the settlement was approved, the amount of time during which this case was actively

litigated was only four months. Thereafter, Class Counsel was appealing the arbitration order, engaging in settlement negotiations and seeking approval of the settlement. There was no motion practice or formal discovery. This action followed in the footsteps of the CFPB and OCC actions and a parallel action by the City of Los Angeles. This action did not uncover Wells Fargo's wrongful conduct, but instead piggybacked on the state and federal enforcement actions to demand civil damages while the government actions sought fines. Document 186 at pp. 2-3.

Moreover, the original settlement announced in March 2017 was in the amount of $110 million. Document 162 at p. 5. Wells Fargo later raised the amount to $142 million in April 2017 based upon its own internal investigation, in order to extend the settlement back to 2002. *Id*. Class Counsel cannot take credit for the $32 million addition to the settlement fund that was made *sua sponte* by Wells Fargo, because Wells Fargo desired a release for all improper unauthorized account activity uncovered by their internal investigation.

The $142 million settlement is intended to cover two types of damages: (1) damage to credit scores as a result of the opening of unauthorized accounts; and (2) reimbursement of actual fees charged. Document 162 at p. 30.

On July 8, 2017, the district court granted Plaintiffs' motion for preliminary approval of the settlement, conditionally certifying the Class for settlement

purposes. ER 56. Class Counsel later filed their fee petition, which revealed that their lodestar through the date of the fee motion was $4.5 million. ER 32. Class Counsel also asserted that they would incur an additional 2500 hours of work related to implementation of the settlement going forward, and requested that a multiplier also be applied to this entirely risk-free time. *Id*. Class Counsel included the future contingent hours in their lodestar for purposes of the lodestar cross-check, falsely representing that their requested multiplier was 3.62. ER 34. However, because it is improper to apply a risk multiplier to hours spent after settlement approval, because there is no risk of non-recovery associated with such hours, the true lodestar multiplier is 4.7.

Objector Jill Piazza filed her objection on February 16, 2018, in response to the Class Notice. ER 59 (Document 192). She questioned the value that the class counsel brought to the class in light of the CFPB's, City of Los Angeles's and Office of the Comptroller's involvement, and asked the court to limit attorney's fees to 8% of the total settlement, or a multiplier of no more than 2.5. *Id*.

On June 14, 2018, the district court entered its Final Order approving the Settlement and awarding attorneys' fees in the full amount requested of $21.3 million. ER 13. In its Order, the court declined to conduct a lodestar cross-check, referring to "the range of awards made in similar cases, which are often well above the 15% requested here." *Id*. The court also rewarded Class Counsel's loss on the

issue of arbitration, finding that the arbitration agreement constituted a considerable risk. *Id*. Indeed, that risk was realized, and this action was dismissed by the district court because it was preempted by the arbitration agreement. ER 47 (Document 69). While that order was on appeal to this Court, and Class Counsel was totally disarmed, Wells Fargo agreed to a settlement, which it later raised to $142 million on its own initiative. ER 74.

STANDARD OF REVIEW

A district court's approval of a class action settlement is reviewed for abuse of discretion. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). "Although a district court has broad discretion to determine attorneys' fees, it abuses that discretion if it makes an error of law." *In re Mercury Interactive Corp. Securities Litig.*, 618 F.3d 988, 993 (9th Cir. 2010).

SUMMARY OF ARGUMENT

The district court awarded fees as if three government agencies had not already investigated Wells Fargo for three years, obtained a concession of liability, and secured $185 million in fines. In contrast, Class Counsel performed no formal discovery, unsuccessfully opposed a motion to compel arbitration, and achieved at most $110 million of the total $142 million fund. Class Counsel lost on the only issue that it litigated, resulting in dismissal of this case. At the time of the settlement, Class Counsel was completely disarmed, with no ability to proceed to

trial. Yet, the district court awarded class counsel $21.3 million, which represents a 4.7 multiplier of their $4.5 million lodestar.

A court abuses its discretion when it fails to appropriately discount attorney's fees to account for government assistance that led to the settlement or contributed to the amount of the settlement. It is clear from the chronology of this case that, once Wells Fargo conceded liability and decided to settle the government actions for a total of $185 million, it desired a global peace that required settlement of this action and other civil actions that had been filed against it. Indeed, Wells Fargo's desire for a global settlement led it to agree to enter into a settlement of this action *after it had achieved dismissal* based upon its arbitration agreement, and to *sua sponte* raise the amount of the settlement to $142 million and expand the class period back to 2002, in response to its own internal investigation. Class Counsel should not receive credit for this expansion that was not driven by litigation but instead the result of Wells Fargo's own investigation.

Class Counsel should not receive full credit even for the original $110 million settlement, because that settlement was not driven by this litigation, or created by Class Counsel's skillful litigation. Class Counsel lost the only motion that the district court ruled upon, resulting in the dismissal of this case. On appeal, Class Counsel were in a disarmed position, and had no leverage to demand a settlement. It was Wells Fargo's decision to settle with the CFPB and other

government agencies that drove its decision to settle this case, and the amount of the settlement.

The district court improperly confused Class Counsel's lack of success in this litigation with risk, and rewarded Class Counsel for losing on the arbitration issue. Once Wells Fargo achieved dismissal of this action on its motion to compel arbitration, it was in the driver's seat, and in a position to dictate a settlement that served its interests on its own terms. Class Counsel were disarmed and had nothing to do with Wells Fargo's decision to enter into a settlement. Wells Fargo's agreement to compensate its customers through this action likely led the CFPB to demand fines of only $185 million, rather than a higher amount that could have been distributed to injured customers.

If Class Counsel had overcome the risk of having the case dismissed based upon the arbitration agreement, such as by winning the appeal of that order, that would be a different matter. Winning such a long-shot appeal might justify a multiplier of 3 or higher, to the extent that it is appropriate to reward the filing of low-percentage lawsuits. But that is not what happened here. Class Counsel knowingly filed an action that was preempted by the arbitration agreement, and had their case dismissed on that basis. Then, rather than winning a reversal of that ruling, Class Counsel were merely the beneficiaries of decisions made by Wells

Fargo in connection with rehabilitation of its corporate image and resolution of government enforcement actions.

Class Counsel is entitled to be paid for the time it devoted to this action, along with a reasonable multiplier to reflect the delay in payment and outlay of expenses. In the circumstances of this case, where the litigation initiated by Class Counsel was not a driving factor in the settlement that Wells Fargo eventually agreed to, that multiplier should not exceed 2.5.

ARGUMENT

I. The District Court Abused Its Discretion in Awarding Fees Based On A Percentage of Recovery This Lawsuit Did Not Secure.

A. The district court failed to properly scrutinize the attorney's fees.

Here, the district court declined to engage in a lodestar analysis, reasoning that under the percentage-of-the-fund method the fee request was below the 25% benchmark. ER 13.[1] "Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (citing *In re Coordinated Pretrial Proceedings*, 109 F.3d 602, 607 (9th Cir.1997). Here, the court did not perform sufficient analysis of attorney's fees to

[1] "Noting that the Ninth Circuit's "benchmark" for percentage-of-the-recovery awards is 25%, the Court finds that the attorneys' fee award, which is 15% of the Settlement Fund is fair and reasonable under the percentage-of-the-recovery method…" ER 13.

determine a reasonable result. The district court abused its discretion in choosing between the percentage and lodestar methods, and failed to engage in analysis prior to opting for the percentage method.

Since the CFPB secured the $185 million in fines while this case was on appeal, and Wells Fargo entered into this settlement while the case was on appeal and before Class Counsel had even filed their brief, let alone won the appeal, the district court committed clear error in holding that Class Counsel was the primary factor in achieving the settlement of *this case*. Class Counsel clearly did not create the $142 million value, since Wells Fargo easily could have won affirmance of the district court's arbitration clause dismissal.[2] Even allowing for a slight chance of reversal, Wells Fargo would have waited for this Court to issue its decision in the arbitration appeal before it would have entered into settlement negotiations, if it had not been driven by other factors to offer the $110 million settlement, later raised to $142 million. In the absence of the CFPB and other government enforcement actions, Class Counsel would have achieved no settlement in this case unless it won the arbitration appeal. Class Counsel should not be rewarded with a

[2] Wells Fargo likely would still have been willing to pay $142 million in compensatory damages to its injured customers, and would have done so through the CFPB or City of Los Angeles settlements. The existence of this action provided a convenient vehicle for Wells Fargo to make compensatory payments that it was obligated to make as part of its settlements with CFPB, the OCC and the City of Los Angeles.

fee at the highest range of lodestar multipliers for essentially losing a critical motion that had the result of disarming the Class.

Blind application of the percentage method in a case like this one is an abuse of discretion. The district court did not discuss its election to apply the percentage method instead of the lodestar method, in light of the unique circumstances of this case. This alone constitutes an abuse of discretion, which is compounded by the fact that the court's percentage fee award amounts to a 4.7 lodestar multiplier in a case that does not warrant that level of bonus over lodestar.

B. Attorneys' fees awarded under Rule 23 must be based on the actual benefits secured by Class Counsel.

A district court abuses its discretion when it fails to exclude from the settlement's valuation benefits that have been secured by governmental action. *In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 336-338 (3rd Cir. 1998).

> We question the court's decision to base its fee calculation on the entire value of the settlement, including any portion which would have been provided to the class under the Task Force Plan.

Id. at 336.

> Allowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs' attorneys to minimize the cost of failure by free riding on the monitoring efforts of others.

Id. at 337.

The district court's fee award fails to account for the benefits that the CFPB conferred independently, benefits for which Class Counsel is not the but-for cause. The court awarded fees to Class Counsel based on benefits secured by the CFPB.

"[C]lass counsel's compensation must be proportioned to the incremental benefits they confer on the class, not the total benefits." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002). To award fees without regard to incremental class recovery is to misalign the interests of class counsel and the class. Here, Class Counsel failed to meet its burden of showing a class benefit attributable to counsel that warrants attorneys' fees anywhere close to $21.3 million. The evidence of that is that Wells Fargo agreed to a $110 million settlement of this action when Class Counsel did not even have an active case pending against it. Class Counsel merely had a long shot appeal of a sound decision dismissing this case based upon the arbitration clause.

> The crux of this inquiry is distinguishing those benefits created by class counsel from the benefits created [by the government]. This determination is especially crucial in consumer class actions where federal or state agencies, including attorneys general, have conducted their own investigations of wrongdoing. The district court did not address these issues. Because it credited class counsel with creating the entire value of the settlement it did not attempt to distinguish between those benefits created by [the government] and those created by class counsel.

Prudential, *supra*, 148 F.3d at 338.

The district court improperly based its fee award on the portion of the settlement that would have been provided to the Class anyway in the absence of this lawsuit, as part of the CFPB enforcement action. It is clear from the procedural history of this lawsuit that the CFPB action was the impetus for both the $185 million fine and the $142 million in remedial payments to Class members. The factual similarities between this case and *Prudential* are striking. There, as here, "there is evidence to suggest that, absent the institution of the class action proceedings, state regulators would have reached an agreement with Prudential similar to the Task Force plan." Id. at 337. To be eligible for attorney's fees, class counsel must be a "material factor" in the creation of benefits; that is, it had to have been "more than an initial impetus behind the creation of the benefit." *Id*. Otherwise, it would "undermine the equitable principles which underline the concept of the common fund, and would create an incentive for plaintiffs' attorneys to minimize the costs of failure … by freeriding on the monitoring efforts of others." *Id*.

In addition, as in this case, the *Prudential* class action was stayed during the period when the settlement was negotiated. "[A] stay order was in place from October 1995 until after the Task Force issued its report on July 9, 1996." *Id*. at 338. Likewise, here, this case was on appeal from September 2015 until October

2016, the period during which all of the critical settlements were reached by Wells Fargo.

The district court should have apportioned credit for the settlement between the CFPB and Class Counsel by crediting Class Counsel with no more than 50% of the settlement's value, or $71 million.

II. The District Court Erred By Focusing Too Heavily on The Benchmark and Ignoring the Lodestar.

The unenhanced lodestar is a presumptively reasonable amount of attorney's fees. *Perdue v. Kenny A.*, 559 U.S. 542, 554 (2010). *See also, Morales v. City of San Rafael*, 96 F.3d 359, 363, fn 8 (9th Cir. 1996). "The benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Wininger v. SI Mgt. L.P.*, 301 F.3d 1115, 1126–27 (9th Cir. 2002) (citing *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir.1990).

The district court ignored the decisions of courts that have awarded percentages far lower than 25%. Courts have previously awarded less than 15% in cases that posed little risk and were of short duration. *See, e.g., Rose v. Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 121641 (N.D. Cal. Aug. 29, 2014). In *Rose*, the district court rejected a request for a 25% fee that would have resulted in a

multiplier of between 5 and 8, and instead applied a multiplier of 2.59 to a reduced lodestar, resulting in a fee award of 7.5%. *Id.* at *36-37. *See also Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1049 (S.D. Cal. 2015) (awarding 15% fee resulting in 2.8 multiplier).

Similarly, in *Rodriguez v. Kraft Foods Grp., Inc.*, 2016 U.S. Dist. LEXIS 186531 (ED CA Dec. 20, 2016), the district court affirmed a magistrate's finding that a 2.39 multiplier was excessive, where "the discovery taken in this case was not substantial prior to settlement [and] the only pretrial motions included those for preliminary and final approval of the class settlement …" Id. at *4. The court ultimately awarded a multiplier of 1.84. *Id*. While Class Counsel here litigated an additional pretrial motion – namely the motion to dismiss based upon the arbitration clause – they were unsuccessful in their opposition to that motion, and achieved no movement toward reversal on appeal.

In light of this case's chronology, and the fact that the earlier government enforcement actions were the true impetus for the $142 million compensatory settlement, the court should have awarded a fee of no more than 2.5 times Class Counsel's lodestar, or $11.36 million, regardless of what percentage that fee represents. If the $11.36 million fee is compared to the entire $142 million settlement it represents 8%; if it is compared to the $110 million settlement announced in March 2017 it represents 10.3%; if the district court had

appropriately credited Class Counsel with just 50% of the value of the settlement because the CFPB is entitled to at least half the credit for forcing Wells Fargo to the table, the $11.36 million fee represents 16% of the settlement, or about what Class Counsel requested.

The district court's error is further clouded by Class Counsel's misrepresentation of the amount of their lodestar, through the inclusion of future hours that may never be incurred and which carry no risk in any event. It is not clear from the district court's opinion whether it was misled by Class Counsel to believe that the fee represented a lodestar multiplier of 3.62, which would still be excessive on the facts of this case, but not as outrageous as the true 4.7 multiplier.

A 4.7 lodestar multiplier is at the high end of the range previously approved in this Circuit, and should be reserved for cases that are truly rare and exceptional. When a fee representing a 4.7 multiplier is awarded in a case that lasted just 4 months before it was dismissed, and that was not the catalyst that led to the settlement, simply because the fee expressed as a percentage is less than 25%, it renders fee law incoherent.

III. Risk in this Case Was Minimal.

The district court cited only two factors in support of its assertion that this case was risky – the arbitration clause and the difficulty of obtaining class certification. Certainly, the presence of an arbitration clause that contained a class arbitration waiver was a weakness, but it was one that Class Counsel was fully aware of going into this case. And, ultimately, the arbitration clause actually rendered this case much *less risky* for Class Counsel, for the reason that Class Counsel was spared from expending time on discovery or other substantive motions by the prompt dismissal of this case based on the arbitration clause. And, by the time the case was remanded back to the district court, Class Counsel was assured of a settlement in principle in the amount of at least $110 million. While Derek W. Loeser fails to break down his firm's lodestar by time period in his Declaration (Document 186), it is clear from a review of the case docket that Class Counsel performed minimal work during the four months when this case was proceeding in the district court prior to dismissal. Class Counsel incurred risk with regard to time expended prior to the September 23, 2015 Order granting the motion to compel arbitration, but that time could not constitute more than 25% of Class Counsel's overall lodestar.

The vast bulk of Class Counsel's lodestar, at least 67% of it, was incurred *after* Wells Fargo agreed to a settlement in principle on September 6, 2016 -- i.e.,

was incurred with *no risk* of non-recovery since Class Counsel was guaranteed to receive a fee that represented a modest multiplier of its lodestar after that date. A $110 million settlement was more than sufficient to compensate Class Counsel's lodestar several times over, and Class Counsel knew after September 6, 2016 that it would be compensated for every hour it expended on the case from that day forward, and likely would receive some multiple of its actual time.

Therefore, while Class Counsel is entitled to a multiplier for any time it expended before the obvious weakness of its case was realized on September 23, 2015, as well as during the settlement negotiations that occurred during the appeal, it should receive no or a very modest multiplier on any time incurred after September 6, 2016.

For example, assume that Class Counsel expended one-third of its lodestar, or $1.5 million, prior to September 6, 2016, and that time is enhanced by a multiplier of 3.5, the total fees for that time period would be $5.25 million. And assume that Class Counsel ran the meter in earnest after September 6, 2016, when it was guaranteed of being compensated for every hour of attorney time it expended plus a likely multiplier bonus, and incurred $3 million of its lodestar between that date and the date of its fee motion. If the post-settlement time is enhanced by a 1.5 multiplier, which is more than generous for that risk-free time, that equates to a $4.5 million fee for post-settlement time. This results in an

overall fee of $9.75 million, which is less than the fee represented by an overall lodestar multiplier of 2.5.

The district court abused its discretion by failing to account for the marginal risk that attached to this litigation at various stages of the case. Because the case lasted just four months from filing to dismissal, the amount of time when risk was high was minimal. And because there was no longer any risk after the case settled in principle in September 2016, the district court should have accounted for this discontinuity by applying a different risk multiplier to different periods of time. Because attorney Loeser failed to segregate his firm's lodestar by year or stage of the case, it is impossible for the district court to discharge its duty to even choose between the lodestar and percentage methods of fee calculation, let alone to assess the reasonableness of any chosen percentage fee in light of the resulting lodestar multiplier.

The presence of the arbitration clause, rather than increasing the risk to Class Counsel that it would suffer a loss, actually mitigated the amount of time that Class Counsel had to put at risk because it led to the prompt dismissal of this case. After dismissal, this case moved directly to mediation mode, which meant that Class Counsel was spared from having to incur a substantial time investment until such time as the likely prospect of settlement, aided by the CFPB, OCC and City of Los

Angeles actions, gave assurance that any time expenditures would be compensated at a multiple of Class Counsel's customary hourly rates.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's award of attorney's fees, and remand with instructions to award a fee that represents a reasonable lodestar multiplier in light of the limited risk of this case, and without including future hours in the lodestar.

Appellant Jill Piazza,
By her attorney,

/s/ John J. Pentz

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STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28-2.6

Appeal Nos. 18-16213, 18-16223, 18-16236, 18-16284, 18-16285 and 18-16317 are appeals by other objectors that have been consolidated with this appeal.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 5000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ John J Pentz

PROOF OF SERVICE

I hereby certify that on November 5, 2018, I electronically filed the foregoing Brief with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

/s/ John J Pentz