No. _____

In The
Supreme Court of the United States

DURANT BROCKETT, RONALD COX, FRANK SCHEUNEMAN, THERESA BRIDIE, MARC KANTOR, PAOLA KANTOR, TIM RICE, WAYLAND WOODS, T.E., H.A., EDWARD ROURKE, EDDY LAYNE, CLYDE GARRETT, LARRY ALFORD, and AARON PIHA,

Petitioners,

v.

MATTHEW E. ORSO, in his capacity as court-appointed Receiver for REX VENTURE GROUP, LLC d/b/a ZEEKREWARDS.COM,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), this Court held that it would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a state court judgment in a case where they were not parties and were not adequately represented. The Fourth Circuit's decision presents the same question in the somewhat different context of defendant class actions. The Fourth Circuit agreed the district court erroneously departed from the dictates of Rule 23 of the Federal Rules of Civil Procedure by failing to appoint class counsel and by failing to conduct a Rule 23(g) adequacy of counsel analysis when it belatedly appointed counsel.

Nonetheless, the Fourth Circuit affirmed the $181 million judgment against 6,800 class members, based on an erroneous determination that the argument was not sufficiently preserved and that it was too late to correct the error. In so ruling, the Fourth Circuit departed from key precedent of this Court and created an insoluble conflict with relevant decisions of other circuits. This case thus raises an important issue not yet addressed by this Court, but that is sure to repeat itself given the increasing frequency of defendant class actions. The specific questions presented are:

- Is the Due Process Clause of the Fifth Amendment violated by the entry of a final judgment against a class of absent defendants, if the absent defendants were not parties to the federal class action litigation and were not adequately represented?

QUESTIONS PRESENTED – Continued

- What error-correcting obligation is conferred on the Circuit Courts of Appeals when confronted with an obvious denial of the absent defendant class members' due process rights?

PARTIES TO THE PROCEEDING

Petitioner Durant Brockett is a named defendant in the district court proceeding who appealed the final judgment.

Petitioners Ronald Cox, Frank Scheuneman, Theresa Bridie, Marc Kantor, Paola Kantor, Tim Rice, Wayland Woods, T.E., H.A., and Edward Rourke are absent members of the defendant class who appealed the final judgment after the denial of their various motions to intervene, decertify the class, and/or vacate the final judgment.

Petitioners Eddy Layne, Clyde Garrett, Larry Alford, and Aaron Piha are absent members of the defendant class who appealed the final judgment.

Todd Disner, Trudy Gilmond, Trudy Gilmond, LLC, Jerry Napier, Darren Miller, Rhonda Gates, David Sorrells, Innovation Marketing LLC, Aaron Andrews, Shara Andrews, Global Internet Formula, Inc., T. Lemont Silver, Karen Silver, Michael Van Leeuwen, David Kettner, Mary Kettner, P.A.W.S. Capital Management LLC, and Lori Jean Weber are the remaining named defendants to the district court proceeding, who did not appeal the final judgment.

The Defendant Class of Net Winners in Zeek Rewards.Com is the class of defendants certified by the district court.

PARTIES TO THE PROCEEDING – Continued

Respondent Matthew E. Orso, in his capacity as successor court-appointed Receiver for Rex Venture Group, LLC d/b/a ZeekRewards.com, was the plaintiff in the district court proceeding and the appellee in the circuit court proceeding.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

STATEMENT OF RELATED CASES

The proceedings below in federal trial and appellate courts identified below are directly related to the above-captioned case in this Court.

- *Kenneth D. Bell v. Todd Disner, Durant Brockett, Trudy Gilmond, Trudy Gilmond, LLC, Jerry Napier, Darren Miller, Rhonda Gates, David Sorrells, Innovation Marketing LLC, Aaron Andrews, Shara Andrews, Global Internet Formula, Inc., T. Lemont Silver, Karen Silver, Michael Van Leeuwen, David Kettner, Mary Kettner, P.A.W.S. Capital Management LLC, and Lori Jean Weber, Defendant Class of Net Winners in Zeekrewards.com*, Case No. 3:14CV91, Western District of North Carolina. The judgment was rendered on August 14, 2017.

STATEMENT OF RELATED CASES – Continued

- *Kenneth D. Bell v. Durant Brockett, Ronald Cox, Frank Scheuneman, Theresa Bridie, Marc Kantor, Paola Kantor, Tim Rice, Wayland Woods, T.E., H.A., Edward Rourke, Eddy Layne, Clyde Garrett, Larry Alford, and Aaron Piha*, Case No. 18-1149, the United States Court of Appeals for the Fourth Circuit. The judgment was rendered on September 5, 2014.

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Petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 922 F.3d 502 (4th Cir. 2014), and is found at Appendix (App.) page 1. The court of appeals' order denying Petitioners' timely petition for rehearing and rehearing *en banc* was entered May 21, 2019, and is found at App. page 133. The order of the United States District Court for the Western District of North Carolina granting Respondent Receiver's motion to certify the defendant class is available at 2015 WL 540552 (W.D. N.C. 2015), and is found at App. page 88. The district court's order denying the Petitioners' motion to intervene in this action and decertify the class or alter the final judgments is available at 2018 WL 296035 (W.D. N.C. 2018), and is found at App. page 35.

JURISDICTION

Petitioners seek review of the decision of the United States Court of Appeals for the Fourth Circuit entered on September 5, 2014. Timely petitions for rehearing and rehearing *en banc* were denied on May 21, 2019. A thirty-day extension of time was granted to file the petition for writ of certiorari by September 18, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the United States Constitution states:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Rule 23 of the Federal Rules of Civil Procedure is attached at App. 213.

STATEMENT OF THE CASE

This litigation is related to the Securities and Exchange Commission ("SEC") civil enforcement action against Rex Venture Group, LLC ("RVG") d/b/a www.ZeekRewards.com, which arose from an alleged $850 million Ponzi scheme. *See Securities and Exchange Commission v. Rex Venture Group, LLC d/b/a ZeekRewards.com and Paul Burks*, Civil Action No. 3:12cv519 (W.D. N.C. 2012). In that action, the district court appointed Kenneth Bell[1] as the Receiver (R. 676), who filed the instant claw back litigation against victims of the scheme who made net profits of $1,000 or more (R.[2] 18).

[1] Kenneth Bell has since been replaced by Matthew E. Orso as the Receiver.

[2] "R" refers to the Joint Appendix filed in the circuit court proceeding.

The defendants in this action were not accused of fraud or illegal conduct (R. 677). As the Receiver explained, "They just won money in a rigged game and they've got to pay it back." (R. 677). The Receiver sought the return of all monies earned with interest, and he successfully opposed any setoffs for taxes paid, legitimate business expenses, and compensation for their labor (App. 104-13).

A. The Receiver moves for class certification. The majority of the proposed named representatives do not object.

A year into the litigation, the Receiver moved to certify a defendant class and to appoint one or more of the named defendants as class representatives. The Receiver sought class litigation on two questions: 1) whether Zeek Rewards operated as a Ponzi and/or pyramid scheme and 2) whether net winnings received by the defendants should be returned to the Receiver. The district court did not appoint interim class counsel to respond on behalf of the interests of the absent class members, *see* Fed. R. Civ. P. 23(g)(3), even after a majority of the proposed class representatives (seven) defaulted on the motion by failing to respond.

The record reflects that only one lawyer (lead counsel) filed an opposition memorandum on behalf of two proposed representatives (App. 135). The opposition highlighted the named defendants' lack of will and financial resources to represent and fund the defense of ten thousand class defendants (App. 137). The

memorandum of law proposed that the Receiver cover the cost of the class defense and reimburse the defendants their fees to date should a defendant class be certified (App. 149-50). No one requested on behalf of the absent class members that the common issues concerning the methodology and calculation of damages be added to the list of certified questions should the district court certify a class.

A second lawyer (Edmundson), admitted *Pro Hac Vice*, adopted lead counsel's memorandum on behalf of three other proposed class representatives (App. 164).

B. The district court grants class certification without appointing class counsel, even after being informed of the failure to appoint class counsel.

On February 10, 2015, the district court granted the motion for class certification (App. 88-102). However, the order did not appoint class counsel as required by Rule 23(c)(1)(B), much less resolve how the class' defense would be funded. The district court order deferred the issue of defense fees, explaining that the Receiver would eventually be required to cover *some* portion of the defense, but only after a future determination of what fees the individual class representatives could afford to pay was made (App. 97-99).[3]

[3] The order did not address the inherent conflict of interest between the class and class representatives triggered by the requirement that the named class members cover some portion of the class' defense.

Despite the lack of class counsel, the district court approved a Notice of Class Certification to the absent class members that affirmatively instructed that their presence during the liability stage should not be necessary and that the district court had determined that counsel for the named defendants would fairly represent their interest (R. 795). The notice did not advise the absent class members that class counsel had not been appointed.

The class certification order, which failed to appoint class counsel and address the funding source of the class defense, was followed by an avalanche of attorney withdrawals, starting with lead counsel. By July 10, 2015, Edmunson became the sole attorney representing a defendant in the case. However, Edmunson was neither admitted to practice law in North Carolina nor in the Western District of North Carolina. He was admitted *Pro Hac Vice* (R. 96-99, 103). He also had no demonstrated experience in class action litigation. He described his practice as being devoted to representing clients in connection with SEC investigations and litigation (R. 2431).

The absence of class counsel was twice brought to the district court's attention. On April 16, 2015, Edmundson reminded the district court that class counsel had not been appointed and that he had not agreed to be class counsel. He advised the court that "it appears that no expert can be retained on behalf of the defense class until Class Counsel is appointed and all issues surrounding payment of the expert's fees and expenses are resolved." (R. 2541). Notwithstanding, the district

court entered an order selecting the class' defense expert on March 4, 2015 (R. 2450, 790). The district court received a second reminder of its failure to appoint class counsel on May 27, 2015 (R. 806). The district court did not appoint class counsel or otherwise inform the absent class members that class counsel had not been appointed.

Importantly, neither the letter nor the transcript of the hearing, wherein the court was advised of the absence of class counsel, were contemporaneously docketed on Pacer or made available for the absent class members to review.

C. The belated order appointing class counsel fails to conduct a Rule 23(g) adequacy of counsel analysis, selects a lawyer with no demonstrated experience in class action litigation, and engages counsel to perform only discrete tasks related to the question of liability.

The district court did not appoint class counsel until seven months after class certification. Still, that order appointed class counsel to only partially represent the defendant class. Furthermore, by the time the district court entered the order of appointment (September 14, 2015), the time for appealing the certification order and the deadline for discovery had both expired. Additionally, the district court had made several pivotal rulings affecting the substantive rights of the defendant class members, including an order determining as a matter of law that the net winners,

though not culpable, were not entitled to setoffs (App. 104-13). The district court also selected the class defense expert (App. 83) and defined the scope of work before the appointment of class counsel (R. 790, 797, 799).

The partial order of appointment engaged and hired class counsel to perform only specific tasks related to the question of the defendant class members' liability. Class counsel was only engaged and guaranteed funding to depose the Receiver's financial expert, defend the deposition of the class' rebuttal expert, review the documents the Receiver intended to rely on to establish liability, and respond to the Receiver's summary judgment motion (App. 83-84). The district court order made clear that class counsel would likely not be retained to represent the class during the damages phase after a finding on class liability (App. 82).

The district court did not conduct a Rule 23(g) analysis before appointing class counsel.

D. After entry of summary judgment, class counsel effectively ceases representing the defendant class.

Class counsel conceded that Zeek Rewards operated as a Ponzi Scheme, and the district court granted the Receiver's motion for summary judgment after concluding that Zeek Rewards operated as a Ponzi scheme and that the net winnings earned by the defendants should be returned to the Receiver (App. 44). Counsel was never reengaged to represent the class during the damages phase. Class counsel merely discussed with

the Receiver the process by which the net winners could dispute the Receiver's calculation of their net winnings and posted the damages notice on the class website (R. 2437). Class counsel rendered no other services on behalf of the class during the damages phase.

E. Before entry of final judgment, several absent class members object to entry of final judgment on grounds that they were denied due process because their interests were not adequately represented in the litigation.

The Receiver moved for entry of final judgment against the absent class members (R. 1865). Several of the absent class members filed opposition pleadings (App. 28, 171, 173, 185, 190). They opposed entry of final judgment and sought class decertification on grounds that the absence of adequate class counsel during the litigation, as required by Rules 23(a)(4) and Rule 23(g), denied them due process (App. 189, 191, 200-05). Specifically, they argued: "The Court should decertify the class in light of class counsel's failure to represent the class at important stages of the proceedings." (App, 200).

The asserted basis for the inadequate representation focused on appointed counsel's failure to vigorously challenge the Receiver's liability claims (R. 2160-61, 2228).[4] The unnamed class members highlighted

[4] At the time of filing, the transcript and letter informing the district court of the absence of class counsel were not part of the district court record.

class counsel's failure to depose the Receiver's expert, the decision to concede the existence of a Ponzi scheme, the failure to object to the Receiver's formula for determining class-wide damages, and counsel's total absence during the damages phase (App. 180-84). The movants also alleged defendant class counsel had a conflict of interest, because he represented an alleged insider participant in a parallel action brought by the Receiver (R. 2160-61, 2230). Their reply argument also highlighted the lack of record evidence of the district court conducting any inquiry before appointing class counsel (R. 2245).

The movants also proposed a redo on damages, where class counsel would be appointed to litigate the common issues related to the calculation and methodology of computing the class damages and individual net winnings (R. 2232).

F. The district court denies the motion, entering a $181 million judgment against 6,800 absent class defendants.

The district court denied the motion to intervene and decertify the class on grounds that no one contemporaneously objected to class counsel's appointment and that the absent class members received adequate representation (App. 36-38). The district court also relied on the fact that the class had been certified for over two and a half years and that there had been more than 2,500 settlements of class member claims (App. 42). The district court entered a $181 million collective

judgment (including prejudgment interest) against approximately 6,800 members of the defendant class (R. 2045-2149), some of whom were located in Kailua-Kona, Hawaii (R. 2058) and Sitka, Alaska (R. 2110).

G. The absent class members argue on appeal that they were denied due process because their interests were not adequately represented in the district court proceedings.

On appeal to the Fourth Circuit Court of Appeals, the absent class members again argued that the "absence of legal representation for the class during extended phases of the proceedings violated the due process rights of the defendant class members." (Initial Br. 19). The appeal highlighted the seven-month absence of class counsel after the certification order, the result of the district court's failure to appoint class counsel as required by Rule 23(g). The brief also addressed the district court's failure to conduct a proper Rule 23(g) inquiry when entering the consent order appointing class counsel and the absence of class counsel during the critical damages phase of litigation.

H. The Fourth Circuit Court of Appeals agrees the absent class members did not receive adequate representation but nonetheless affirms the final judgment.

The Fourth Circuit Court of Appeals agreed that Rule 23's adequacy requirements were constitutional and that the district court failed to appoint class counsel and conduct a proper inquiry before appointing

class counsel as required by Rule 23 (App. 19, 21-22). The Fourth Circuit also agreed the error would ordinarily require decertification of the class (App. 22). However, it created an exception because no one objected to the absence of class counsel at the time of class certification and no one objected to the manner in which class counsel was ultimately appointed (App. 22-23). The appellate court also determined that the litigation had progressed to an extent that it would be too difficult if not impossible to remedy the error (App. 24). The court cited the fact that over 2,500 class members had settled the claims against them with the Receiver (App. 24). The court accordingly affirmed the final judgment (App. 26-27). The appellants' petition for rehearing was denied and this petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AS TO WHETHER THE ENTRY OF A FINAL JUDGMENT AGAINST ABSENT DEFENDANT CLASS MEMBERS VIOLATES THE FIFTH AMENDMENT DUE PROCESS CLAUSE IF THEIR INTERESTS WERE NOT ADEQUATELY REPRESENTED.

There is no dispute that the procedural safeguards of Rule 23 of the Federal Rules of Civil Procedure were not followed. The class certification order failed

to appoint class counsel, leaving the defendant class without counsel during pivotal moments in the litigation. The lawyer belatedly appointed to represent the defendant class was not licensed to practice law in the jurisdiction where the case was prosecuted, had no demonstrated experience in class action litigation, and was only partially appointed to perform a discrete list of tasks. Class counsel's deficient performance seriously undermined any opportunity for the defendant class to receive a full and fair opportunity to litigate the claims brought against them.

The Fourth Circuit agreed the district court's failure to comply with the requirements of Rule 23 in the vast majority of cases would render the certification fatally defective (App. 22). Yet, it determined that the facts of this case warranted an exception. *Id.* The decision is an admitted departure from this Court's prior precedent and its purported exception is symptomatic of an ever-growing circuit split concerning the role of federal courts in protecting the rights of absent class members who have been unmistakably denied due process.

A. The appellate decision conflicts with *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), and its progeny on the question of the constitutionality of a final judgment against class members who were not parties to the litigation and who were not adequately represented in the litigation.

Since *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), this Court has consistently acknowledged the "general

application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 388 (1996); *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 798 (1996); *Martin v. Wilks*, 490 U.S. 755, 762 (1989). The concept is derived from "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Ortiz*, 527 U.S. at 846. "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." *Taylor*, 553 U.S. at 892. "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979)).

To secure a valid judgment against the absent class members, the unnamed and absent class members must be adequately represented by the class members present in litigation. *Matsushita Elec. Indus. Co.*, 516 U.S. at 388. In *Richards v. Jefferson County, Ala.*, this Court reminded the state courts that "it would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented." 517 U.S. at 794. Accordingly, "[i]n all cases

where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." *Smith v. Swormstedt*, 57 U.S. 288, 303 (1853).

Adequate class counsel is a key component of adequate representation. *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 (7th Cir. 1977) (quoting *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968); *Cross v. Nat'l Tr. Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977).

The adequate class representation requirement is particularly important in defendant class actions, where the class members are not given opt-out rights. Defendant classes "are more likely than plaintiff classes to include members whose interests diverge from those of the named representatives," in part because the plaintiff chooses the named representatives. *Ameritech Ben. Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814, 820 (7th Cir. 2000). Consequently, defendant classes are "less likely to satisfy the requirements of Rule 23(a)" and are more in need of the due process protections afforded by Rule 23's various safeguards. *Id*. Furthermore, the absence of opt-out rights only exasperates the "inherent tension between representative suits and the day-in-court ideal." *Ortiz*, 527 U.S. at 847. The legal rights of defendants as far away as Alaska and Hawaii are resolved regardless of

whether they consent or object to participating in the litigation. *Id*. If "the interests of class members are not properly presented," "[t]he binding effect of the class action's disposition poses serious due process concerns." *H. L. v. Matheson*, 450 U.S. 398, 433 n.9 (1981).

As the Fourth Circuit correctly noted, "Rule 23's adequacy requirements provide critical safeguards against the due process concerns inherent in all class actions." (App. 19). Class certification is authorized if the district court determines the proposed "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Under the 2003 amendments to Rule 23, the certification order must appoint class counsel under Rule 23(g). Fed. R. Civ. P. 23(c)(1)(B). When deciding who to appoint, the district court must consider counsel's experience in handling class actions, resources that counsel will commit to representing the class, and the work counsel has done in identifying or investigating potential claims in the action. *See* Fed. R. Civ. P. 23(g)(1)(A).

In this case, the Fourth Circuit correctly determined the district court failed to comply with Rule 23's due process safeguards. The certification order did not appoint class counsel under Rule 23(g) as required by Rule 23(c)(1)(B). The ultimate appointment order was seven-months late and omitted the required Rule 23(g) adequacy of class counsel analysis. Consequently, the absent class members were represented by counsel neither licensed to practice law in the jurisdiction where the case was litigated nor competent in class action litigation. Appointed counsel self-described his

practice as one devoted to representing clients in SEC investigations and litigation (R. 2431). Furthermore, the order of appointment did not appoint counsel to "fairly and adequately represent the interests of the class" in the litigation, as required by Rule 23(g)(4). The order made clear that class counsel was temporarily appointed to represent the class during the liability phase and should not expect to be reengaged to represent the class during the damages phase. Counsel was not reengaged to provide representation during the damages phase. As far as the appointment to represent the class during the liability phase, class counsel was only authorized to perform discrete defined tasks.

Although the Fourth Circuit correctly determined that Rule 23's constitutional safeguards were not followed, it reversibly erred by failing to apply *Hansberry*, 311 U.S. at 40, *Richards*, 517 U.S. at 798, and *Ortiz*, 527 U.S. at 846, which clearly establish that the judgment against the unnamed defendant class members was constitutionally invalid because their interests were not adequately represented. This plain and obvious conflict with *Hansberry* is reason enough to grant certiorari in this case.

But the Fourth Circuit's erroneous decision also created circuit conflict by its departure from controlling decisions of the Third Circuit. Prevailing Third Circuit case law holds that the requirements of Rule 23(c)(1)(B) are substantive and a certification order that does not follow Rule 23(c)(1)(B) constitutes an abuse of discretion that cannot be affirmed on appeal. *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*,

453 F.3d 179, 188 (3d Cir. 2006) (reversing certification order that failed to satisfy Rule 23(c)(1)(B)); *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 127 (3d Cir. 2018) (same); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 369 (3d Cir. 2015) (same). That conflict presents another significant reason for this Court's review.

This Court should grant review to resolve the tension created by the Fourth Circuit's departure from clear precedent and its creation of a new rule that conflicts with the prevailing Third Circuit rule.

B. The Fourth Circuit's waiver analysis did not justify an exception to the general rule that such judgments are constitutionally invalid.

The Fourth Circuit's determination that the absent class members waived their claims is erroneous for several reasons. First, the failure to appoint class counsel was raised shortly after entry of the certification order by counsel for the purported class representatives. As the representative of the absent class members, the objection by the present class members preserved the issue for the absent class members.

Second, upon moving to intervene, the absent class members presented the due process claim to the district court. On appeal, they raised the same claim, supplementing it with additional argument as permitted by *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992), which provides that "Once a federal *claim* is properly presented, a party can make any *argument* in

support of that claim; parties are not limited to the precise arguments they made below."

Finally, because the court owes a duty to absent class members, the same waiver rules did not apply once it became clear the absent class members were denied due process.

a. The named representatives' objection to the failure to appoint class counsel preserved the claim for the absent class members.

First, the Fourth Circuit erroneously determined that no class member objected to the failure to appoint class counsel. The record is clear that counsel for three of the purported class representatives twice informed the district court of its failure to appoint class counsel after entry of the class certification order.

Since the named class members were purportedly representing the interests of the unnamed class members, any objection by the named representatives necessarily preserved the issue for an appeal by the unnamed members. The very purpose of class action litigation is to allow as few as one member to defend or prosecute a claim for the benefit of the class. The purpose of Rule 23 would be subverted if absent class members may not rely on the objections of the named representatives.

Still, the Fourth Circuit's underlying premise that the district court was denied the opportunity to first

correct the error is unsupported by the record. The district court was twice informed of its Rule 23(g) failure to appoint class counsel, yet in each circumstance it failed to correct the error.

b. Under *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992), the petitioners could present new arguments in support of the due process claim presented to the district court.

Second, the appellate claim, that the unnamed class members were inadequately represented in the district court proceeding, was sufficiently preserved in the district court. The absent class members filed various pleadings contending that the absent class members were denied due process because their interests were not adequately represented by class counsel (App. 140, 191, 205). The district court adjudicated that claim, and the absent members raised the exact same *claim* on appeal, buttressing it with better-developed *arguments*. The Fourth Circuit erroneously determined that preservation of error principles prohibit the presentation of new *arguments* on appeal. That analysis significantly departed from this Court's precedent and is in conflict with decisions from other Circuit Courts of Appeals.

Federal appellate courts, applying the preservation rules, have distinguished between new *claims* presented on appeal and new *arguments* presented on appeal. "Parties can most assuredly waive *positions*

and *issues* on appeal, but not individual *arguments*." *Sec'y, U.S. Dep't of Labor v. Preston*, 873 F.3d 877, 883-85 n.5 (11th Cir. 2017) (emphasis added). "Once a federal *claim* is properly presented, a party can make any *argument* in support of that claim; parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534 (emphasis added). So long as the new argument addresses the same legal issue presented to the district court and raises pure questions of law that do not require additional factual development, the new argument is permissible. *Bristol-Myers Squibb Co. v. Matrix Labs. Ltd.*, 586 F. App'x 747, 750 (2d Cir. 2014). And appellate courts may "entertain additional support that a party provides for a proposition presented below." *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 221 (2d Cir. 2006) (citing *Yee*, 503 U.S. at 534). *See also United States v. Robinson*, 744 F.3d 293, 300 n.6 (4th Cir. 2014) ("Although he did not make this precise argument before the district court, Robinson did challenge his criminal history score, and thus preserved his claim."); *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013) ("Thus, we may consider new legal arguments raised by the parties relating to claims previously raised in the litigation.").

The Eleventh Circuit has consistently followed *Yee* by authorizing new arguments on appeal in support of the same claim brought in the district court. *See Barr v. Johnson*, No. 18-12981, 2019 WL 2396716, at *4 (11th Cir. June 6, 2019) (concluding that appellant "is free to make new arguments – at least, new ones advancing the same claim."); *In re Home Depot Inc.*, 931

F.3d 1065, 1086 (11th Cir. 2019) ("Nevertheless, in the final analysis, we think this is a new argument, not a new issue. Home Depot asked the District Court not to apply a multiplier. On appeal, Home Depot makes the same request, albeit for different (and contradictory) reasons. The issue was not waived."); *Secretary, U.S. Department of Labor*, 873 F.3d at 883-85 n.5 (applying *Yee* and rejecting the appellee's claim that appellant waived various appellate arguments and authorities cited by failing to make or cite them in the district court proceeding).

Describing the principle's rationale, the Eleventh Circuit has explained that it is not just permissible to present new arguments in support of a position advanced in the district court, but it is actually "advisable." *Id*. at 883-85 n.5. The Eleventh Circuit reasoned that "[w]ere the rule otherwise, we could never expect the quality and depth of argument to improve on appeal – an unfortunate result." *Id*.

This is precisely what occurred in the underlying appeal. In the district court proceeding, the absent class members argued "class counsel's failure to represent the class at important stages of the proceedings," highlighting counsel's absence during the damages phase and inattention during the liability phase (R. 2224). After an opportunity to compile and review the complete record[5] of what transpired before their

[5] Until preparation of the appellate record, no one transcribed the hearings discussing the absence of class counsel (R. 725, 855).

motion to intervene, their appellate claim emphasized the genesis of that inadequate representation: the district court's failure to appoint class counsel after entry of the certification order, failure to conduct a Rule 23(g) inquiry when it finally selected counsel, and failure to reappoint class counsel after the liability determination. But the claim that they were denied due process because of the absence of adequate representation by class counsel was not new and never changed.

The Fourth Circuit's contrary decision, prohibiting the presentation of the new arguments on appeal in support of the same claim, is a departure from clear Supreme Court precedent and its application of preservation rules conflicts with the prevailing Eleventh Circuit rule.

c. Because courts owe a duty to absent class members, the same waiver rules do not apply to class action litigation.

Third, the Fourth Circuit's determination that the absent class members could waive their due process claim conflicts with the Third and Seventh Circuits regarding the role of courts when confronted with undeniable defects in class certification.

Third Circuit. The Third Circuit has explained that "the court plays the important role of protector of the absentees' interests, in a sort of fiduciary capacity, by approving appropriate representative plaintiffs and class counsel." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir.

1995). As a consequence, the Circuit has determined that "the usual waiver rules should not be applied mechanically in class actions." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 429-30 (3d Cir. 2016), *as amended* (May 2, 2016). Because courts "have an independent obligation to protect the interests of the class, and in many instances class members are far removed from the litigation and lack the information and incentive to object," the Third Circuit has declined to apply the penalty of waiver "out of caution," when it comes to class actions. *Id.*

Seventh Circuit. The Seventh Circuit agrees. In *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 714 (7th Cir. 2015), absent class members were permitted to challenge, for the first time on appeal, the certification of a settlement class on grounds that the adequate representation requirement was not satisfied. The absent class members cited an undisclosed relationship between lead counsel and class counsel. The court determined the issue could be raised for the first time on appeal, because the "[c]lass members were not obliged, on penalty of waiver, to search on their own for a conflict of interest on the part of a class representative." *In re Southwest Airlines Voucher Litigation*, 799 F.3d at 714. *See also Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (adjudicating unpreserved adequate representation claim).

The Seventh Circuit has even *sua sponte* addressed the adequacy of representation of a defendant class. *See Ameritech Ben. Plan Committee*, 220 F.3d at 819-20 ("Despite the fact that neither party has

addressed the way that class certification was accomplished in this case, we cannot proceed without considering this problem as well. This is so precisely because classes include not only the parties directly before the court, but absentees, and in some cases the active participants may sell out the interests of the others."). The court in *Ameritech Ben. Plan Comm.*, decided it could not ignore an erroneous certification proceeding. It explained, "The problem with ignoring these issues is that the rights of persons not before the court are necessarily implicated once a class is certified." *Id.* at 821. It accordingly *sua sponte* declined to issue a judgment binding the absent class members. *Id.*

Fourth and Eleventh Circuits. The Eleventh Circuit and even the Fourth Circuit have also determined that the adequacy of class representation may be challenged for the first time on appeal. *See Wallace v. Smith*, 145 F. App'x 300, 302 (11th Cir. 2005) ("It is plain error to permit an imprisoned litigant who is unassisted by counsel to represent his fellow inmates in a class action."); *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) ("Neither Oxendine nor any other prisoner has assigned error to the class aspect of this case, but it is plain error to permit this imprisoned litigant who is unassisted by counsel to represent his fellow inmates in a class action."); *Fowler v. Lee*, 18 F. App'x 164, 165 (4th Cir. 2001) ("It is plain error for a pro se inmate to represent other inmates in a class

action. As Fowler was proceeding pro se, the district court did not err when it failed to certify a class.").[6]

These decisions recognize that absent class members are not required "to monitor th[e] litigation [and] make certain that [their] interests are being protected" upon learning a class action is filed naming them as a potential class member. *Gonzales v. Cassidy*, 474 F.2d 67, 76 (5th Cir. 1973). This particularly applies to absent class members, who are not served with the motion for class certification and are not invited to participate in the certification litigation. They are not parties to the litigation and do not have the same opportunity to make a contemporaneous objection to the manner in which the class is certified as the named parties do.

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[6] The appellate courts' *sua sponte* review of class certification issues is consistent with the authority of district courts. Various circuit courts have long approved *sua sponte* district court intervention in class actions, explaining that the district courts have "an independent obligation to decide whether an action was properly brought as a class action, even where neither party moves for a ruling on class certification." *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 559 (5th Cir. 1981) (affirming *sua sponte* action of the district court in denying certification); *Jones v. Caddo Par. Sch. Bd.*, 735 F.2d 923, 943 (5th Cir. 1984) ("While it was the responsibility of the parties to move for a hearing under Rule 23(c)(1), their failure to do so did not absolve the district court of responsibility. It should have held a hearing *sua sponte*, even if only to determine whether the class representatives would fairly and adequately represent the class."); *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003) (describing the district court's "responsibility of conducting its own inquiry as to whether the requirements of Rule 23 have been satisfied in a particular case").

This case was no exception. The obvious signs that the class was without counsel were not contemporaneously made part of the public record of the district court proceeding. The April 16, 2015, letter, wherein the sole attorney representing a defendant in the case advised the district court that class counsel had not been appointed and that he had not agreed to be class counsel, was not docketed. Likewise, the May 27, 2015, hearing, where counsel again advised the district court that class counsel had not been appointed, was not transcribed until the appeal (R. 855). The absent class members were not contemporaneously made aware of the circumstances supporting an objection to the absence of class counsel. Given the obvious lack of opportunity and ability to object that come with class actions, the various circuit courts have rightfully declined to strictly apply the appellate preservation rules to absent class members.

The Fourth Circuit's contrary determination that any failure by the absent class members to object could result in the affirmance of an otherwise invalid judgment conflicts with the above cited authorities and cannot be squared with *Hansberry*, 311 U.S. at 40, *Richards*, 517 U.S. at 798, and *Ortiz*, 527 U.S. at 846, which strictly hold that such a judgment is invalid.

Furthermore, the Fourth Circuit's analysis represents a growing trend among the circuit courts, which have declined to address adequate representation claims not raised in the district court proceeding. *See Juris v. Inamed Corp.*, 685 F.3d 1294, 1325-26 (11th Cir. 2012) (absent class member's failure to raise

adequate representation issue in the district court constituted a waiver on appeal); *Sheinberg v. Sorensen*, 606 F.3d 130, 133-34 (3d Cir. 2010) ("Ordinarily, a district court's failure to follow Rule 23(g)'s dictates would be a sufficient basis on which to vacate the denial of recertification as an abuse of discretion. We cannot do so in this case, however, because plaintiffs – whose new counsel was unfamiliar with the rule until we raised it at oral argument – neither objected to the District Court's error below nor raised it in plaintiffs' opening brief on appeal."); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 41 (1st Cir. 2009) ("Any argument the district court did not satisfy Rule 23(g) is waived because Howe raises this claim for the first time on appeal."). The judgments in each of these cases, where the absent class members were not adequately represented, were constitutionally invalid. The affirmance of the final judgments has caused unmitigated Fifth Amendment Due Process violations that are likely to be repeated absent Supreme Court intervention.

In sum, not only is the Fourth Circuit's waiver analysis factually and legally erroneous, its rationale did not justify the admitted departure from clearly established legal precedent of this Court and the majority of circuit courts of appeals. The Court should exercise its discretion to grant the petition for writ of certiorari.

C. Upon settling a claim with the Receiver, the defendant is no longer a member of the class.

The Fourth Circuit determined that affirmance was also necessary because of the number of class members who had settled their claims with the Receiver. This second rationale did not justify a departure from *Hansberry*, 311 U.S. at 40, *Richards*, 517 U.S. at 798, and *Ortiz*, 527 U.S. at 846. The Fourth Circuit overlooked the fact that this appeal does not include the former class members who voluntarily settled their claims with the Receiver (R. 1867). To be sure, the judgment on appeal is against 6,800 class members, not the original class of 9,400 certified by the district court (App. 91).

When a class member consents to entry of a judgment without reserving the right to appeal, the member waives his right to appeal the certification order. *Shores v. Sklar*, 885 F.2d 760, 762-64 (11th Cir. 1989) (en banc). *Toms v. Allied Bond & Collection Agency, Inc.*, 179 F.3d 103, 105 (4th Cir. 1999). The courts are in agreement that by entering into an unqualified settlement agreement, the member "relinquishes not only his interest in his individual claims but also his interest in class certification." *Dugas v. Trans Union Corp.*, 99 F.3d 724, 727-29 (5th Cir. 1996); *Walsh v. Ford Motor Co.*, 945 F.2d 1188, 1191 (D.C. Cir. 1991); *Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986). Accordingly, each of the 2,500 defendants who independently settled their claims with the Receiver are no longer members of the class and by extension

not parties to the relief requested on appeal. Moreover, the absent class members were not parties to the settlements with the Receiver and their right to challenge the class certification order should not be limited by that settlement. This Court should issue a writ of certiorari to resolve the conflict created by the Fourth Circuit's decision.

CONCLUSION

The final judgment entered against the absent class members constituted a denial of due process. The Fourth Circuit's admitted departure from established precedent of this Court and the circuit courts of appeals creates an insoluble conflict on a vitally important question of law and federal jurisprudence requiring the grant of a petition for writ of certiorari.

Respectfully submitted,

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