

In the
Supreme Court of the United States

XANADU CORPORATION AND DAVID GOULD,
Petitioners,

v.

MEOR ADLIN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Class Counsel and the claims administrator must turn over undelivered or uncashed checks payable to approved claimants in federal class action cases to state unclaimed property agencies or if Class Counsel can instead convert the money to additional attorney fees with the remaining amounts redistributed to other class members?
2. Whether due process allows Class Counsel, who were concurrently seeking to convert undelivered checks into attorney fees, to cause a class action claimant's approved claim to be reopened and audited over a year after its approval, subjected to a heightened and different standard of review than other claimants, but not provide any meaningful judicial review mechanism for the new decision?

PARTIES TO THE PROCEEDINGS

Petitioners and Objectors-Appellants below

- Xanadu Corporation
- David Gould

Respondents and Plaintiffs-Appellees below

- Meor Adlin
- Franklin Ajaye
- Andrew Barton
- Rachel Diller
- Scott Frederick
- David Kuo
- Dickson Leung
- Brenden G. Maloof
- Donald Wortman
- Harley Oda
- Roy Onomura
- Shinsuke Kobayashi
- Patricia Lee
- Nancy Kajiyama
- Della Ewing Chow
- James Kawaguchi
- Sharon Christian

CORPORATE DISCLOSURE STATEMENT

The Petitioners are David Gould, an individual, and Xanadu Corp., a Colorado corporation that is not public and has no parent company. No publicly held company owns 10% or more of the corporation's stock.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Ninth circuit
No. 23-15118

In re Transpacific Passenger Air Transportation
Antitrust Litigation

Meor Adlin; et al., Plaintiffs-Appellees, v.
Xanadu Corp.; David Gould, *Objectors-Appellants*, v.
All Nippon Airways, *Defendant*.

Date of Final Opinion: February 27, 2024

U.S. District Court, Northern District of California
No. 07-cv-05634-CRB

In re Transpacific Passenger Air Transportation
Antitrust Litigation

Date of Final Order: January 19, 2023

Date of Rehearing Denial: January 25, 2023

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	iii
LIST OF PROCEEDINGS	iv
TABLE OF AUTHORITIES	vii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
JUDICIAL RULES INVOLVED	2
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE PETITION	20
I. This Court Should Provide Guidance as to Whether State Unclaimed Property Laws Require the Escheatment of Undelivered and Uncashed Checks in Federal Class Action Cases or If Class Counsel Can Instead Convert the Check Money to Attorney Fees and/or a Second Distribution to Class Members That Cashed Their Initial Checks	20
II. This Court Needs to Address the Lack of Due Process in Class Action Cases in the Ninth Circuit	24
CONCLUSION AND PRAYER FOR RELIEF	27

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS**OPINIONS AND ORDERS**

Memorandum Opinion, U.S. Court of Appeals for the Ninth Circuit (February 27, 2024)	2a
Order Granting Secondary Distribution of Funds, U.S. District Court for the Northern District of California (January 19, 2023)	7a
Order Setting Hearing, U.S. District Court for the Northern District of California (September 28, 2022).....	20a
Order, U.S. District Court for the Northern District of California (February 3, 2022).....	22a

REHEARING ORDERS

Order Denying Motion for Reconsideration, U.S. District Court for the Northern District of California (January 25, 2023)	27a
--	-----

TABLE OF AUTHORITIES

	Page
CASES	
<i>All Plaintiffs v. All Defendants</i> , 645 F.3d 329 (5th Cir. 2011)	22
<i>Conn. Mut. Life Ins. Co. v. Moore</i> , 333 U.S. 541 (1948)	23
<i>Delaware v. New York</i> , 507 U.S. 490 (1993)	24
<i>Feldman v. Star Tribune Media Company LLC</i> , 2024 WL 3026556 (D. Minn. June 17, 2024).....	21
<i>Kelley v. Willamette Valley Medical Center, LLC</i> , 2024 WL 2956956 (D. Or. June 12, 2024)	21
<i>Klier v. Elf Atochem</i> , 658 F3d 468 (5th Cir. 2011)	26
<i>Marathon Petroleum Corp. v. Sec'y of Fin. for Delaware</i> , 876 F.3d 481 (3d Cir. 2017)	23
<i>Pennsylvania v. New York</i> , 407 U.S. 206 (1972)	24
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	26
<i>Six (6) Mexican Workers v. Ariz. Citrus Growers</i> , 904 F.2d 1301 (9th Cir. 1990)	19, 21
<i>Texas v. New Jersey</i> , 379 U.S. 674 (1965)	23
<i>Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	26

TABLE OF AUTHORITIES – Continued

Page

STATUTES

15 U.S.C. § 1, Sherman Act	6
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2041.....	19
28 U.S.C. § 2042.....	19

JUDICIAL RULES

Cal. Code of Civil Procedure, Part 3, Title 10, Chap. 7. § 1520(a)-(b)	22
Fed. R. Civ. P. 23	2
Fed. R. Civ. P. 23(d)(1)(B)(i)	12
Fed. R. Civ. P. 23(e)(2)(D).....	16, 20, 26
Fed. R. Civ. P. 23(g)(4).....	20
Fed. R. Civ. P. 23(h)(1)	10, 16, 18, 21
Fed. R. Civ. P. 23(h)(2)	18
Fed. R. Civ. P. 60	13



PETITION FOR A WRIT OF CERTIORARI

Xanadu Corp. and David Gould petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.



OPINIONS BELOW

The Ninth Circuit's February 27, 2024, unpublished opinion affirming the district court is available at 2024 WL 810703. (App.2a). The district court's February 3, 2020, opinion and Order authorizing the first distribution of funds to class members is not reported. (App.22a). The district court's unreported September 28, 2022, Order allowing Class Counsel and the claims administrator to "audit/re-examine [Petitioner Xanadu Corp.'s] claim" is available at 2022 WL 14725248. (App.20a). The District Court's unreported Order of January 19, 2023 allowing the second distribution of funds and outlining the claims administrator's denial of Xanadu's claim is available at 2023 WL 1428565. (App.7a). The district court's order and opinion of January 25, 2023, denying reconsideration is unreported, but available at 2023 WL 1428564. (App.27a).



JURISDICTION

The judgment of the court of appeals was entered on February 27, 2024. (App.2a). On May 14, 2024, granting application 23A1010, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 26, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



JUDICIAL RULES INVOLVED

Federal Rule of Civil Procedure 23:

- (a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
 - (1) the class is so numerous that joinder of all members is impracticable;
 - (2) there are questions of law or fact common to the class;
 - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
 - (4) the representative parties will fairly and adequately protect the interests of the class.

* * *

- (d) CONDUCTING THE ACTION.

- (1) *In General.* In conducting an action under this rule, the court may issue orders that:

- (A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
 - (B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:
 - (i) any step in the action;
 - (ii) the proposed extent of the judgment; or
 - (iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;
 - (C) impose conditions on the representative parties or on intervenors;
 - (D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or
 - (E) deal with similar procedural matters.
- (2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.
- (e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPRO-MISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily

dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class.

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

- (i) approve the proposal under Rule 23(e)(2); and
- (ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;

- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

* * *

(g) CLASS COUNSEL.

* * *

- (4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.
- (h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
 - (1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on

all parties and, for motions by class counsel, directed to class members in a reasonable manner.

- (2) A class member, or a party from whom payment is sought, may object to the motion.
- (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).
- (4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).



STATEMENT OF THE CASE

In 2009, class members brought a litigation against various airlines alleging violations of Section 1 of the *Sherman Act*, 15 U.S.C. § 1. The crux of the action involved price fixing of international transpacific flights taken. Through various settlements, the airlines agreed to pay money for distribution to the class. Each settlement contained a provision that, “All terms of this Settlement Agreement shall be governed by and interpreted according to the substantive laws of the State of California, without regard to its choice of law or conflicts of laws principles.”

After all of the settlements, approximately \$104 Million became available for distribution to the class members. (App.23a). Because the case involved class members in Asia and the United States, a claims admin-

istration website was created in English, Japanese, and Traditional Chinese.

According to a declaration submitted by the claims administrator, it audited all of the claims where businesses had over 1,000 tickets or consumers had over 125 tickets. The following standard applied in approving claimants:

[The claims administrator] reviewed all responses supplied by the claimants from the “Request for More Information” letters and determined responses to be acceptable support for the number of tickets claimed if any of the following documentation was provided: (a) Receipts showing ticket purchases; (b) Cancelled checks; (c) Credit card statements; (d) Travel itineraries; (e) Email confirmation of ticket purchases; and/or (f) Affidavit or declaration attesting to the number of tickets claimed is accurate.

The claims administrator explained, “An integral part of all of Rust’s settlement administration projects is its Quality Assurance review. Rust’s project team and quality assurance personnel worked throughout the administration process to ensure that Proof of Claim forms and supplemental information were processed properly.”

Both David Gould and Xanadu Corp. filed timely claims and, applying the above standards, the claims administrator approved their claims.

On February 3, 2020, the district court disallowed late filed claims finding that the court enforces deadlines “when claimants are aware of the deadlines miss them without explanation.” (App.25a).

The district court granted the motion to authorize “distribution of the net settlement funds, consistent with the process outlined in the declaration. The claims administrator, in consultation with class counsel, shall distribute the net settlement funds *pro rata.*” (App.25a).

The claims administrator distributed the funds.

David Gould received his check in Costa Rica. Xanadu Corp. did not receive their check.

Moneywise, approximately \$99 Million reached class members from the \$104 Million.¹ At first blush, that sounds successful, but the smaller claimants did not fare so well. Over 16,000 of 61,770 claimants, which represents over 26% of claimants, did not receive their payment either because it was returned by the postal service or because the checks went uncashed. For people whose checks were returned to the claims administrator, the only action taken was that the claims administrator ran their address through something called a TRACE database to see if there was a corrected address.

Because of the 16,000 uncashed or undeliverable checks, about \$5.5 Million remained.

On August 8, 2022, Class Counsel filed a motion for secondary distribution. In that motion, they proposed a solution as to what to do with the money that belonged to the claimants who did not receive their checks or did not cash them. First, Class Counsel wanted to be awarded \$1 Million in additional attorney fees for post-settlement work. Second, after certain expenses for

¹ Most larger claimants use a third-party claims management enterprise that monitors the litigation then distributes the money to their clients. Class Counsel never disclosed the percentage of money that it distributed via these third-parties.

the claims administrator, the remaining funds would be distributed to Class Members who cashed their initial checks. The people who had approved claims but did not receive their checks, and those who did not cash them, were simply out of luck.

The district court's Case Management/Electronic Case Files system automatically set an August 22, 2022, deadline to respond and object to the motion.

As if people viewed Class Counsel's website on a daily basis notwithstanding the time between the settlement and the 2020 distribution of funds, the only notice to the class consisted of the following language placed solely on the English language version of the website:

Status Update as of August 9, 2022: The Transpacific Passenger Air Transportation Antitrust Litigation involves thirteen Defendants. Please note that all deadlines to submit claims and supplemental information for all Settlements have passed. The Settlement Administrator, in consultation with Class Counsel, dispersed the net settlement fund to qualified claimants per the terms of the Distribution Order on March 17, 2022. Checks that have not been cashed by the void date on the checks are no longer being honored. Plaintiffs filed a Motion for Secondary Distribution of the Remaining Settlement Fund with the Court on August 8, 2022. The Motion and supporting declarations are located on the COURT DOCUMENTS page of this website. No hearing has been scheduled. The opposition date is 8/22/2022. The reply date is 8/29/2022. Additional information about the

secondary distribution will be available after the Court issues the Order Granting Plaintiffs' Motion for Secondary Distribution.

Class Counsel did not mention in the website post that they sought \$1 Million in attorney fees from other people's money, so class members would have to see the English notice and then actually click on and read the motion to even know what was happening. *But see* Fed. R. Civ. Proc. 23(h)(1) and (2) (directing reasonable notice to class members and allowing objections to attorney fee requests).

Neither David Gould nor Xanadu knew about this.

However, Xanadu communicated with the claims administrator because it did not receive its check. The claims administrator simply ignored Xanadu's messages without providing any response. Therefore, Xanadu had its foreign counsel contact Class Counsel to inquire about the check, which exceeded \$500,000.²

Reissuing Xanadu's check necessarily would have altered the plan to expropriate \$1 million in attorney fees and distribute \$4.5 million to the class.

Instead of informing Xanadu's counsel as to why its check was returned and helping Xanadu receive payment for its timely approved claim, Class Counsel took an adversarial stance and demanded Xanadu provide its corporate documents, participate in a video

² Xanadu's payment exceeded \$500,000 not because it had a large number of tickets—it had claimed only 1,337 of them over nearly a decade—but because the class of tickets that it claimed under had a very small number of claims resulting in a high payment per ticket while more popular tickets only paid a dollar or less.

Zoom call with Class Counsel and the claims administrator to justify its claim, and provide other data.

Xanadu originally declined to cooperate on the basis that the claims administrator approved its claim and there existed no authority to demand this type of data at the late juncture.

On August 28, 2022, Xanadu filed a motion to extend the time to object to the motion for secondary distribution (and attorney fees) until September 7, 2022, because it did not receive notice of the motion and the only public disclosure was the post on the English version of the website.

On September 7, 2022, Gould and Xanadu filed objections to the motion for secondary distribution. As to Xanadu, it stated that it did not receive its check on its approved claim. In addition, Gould and Xanadu objected because the claims administrator and Class Counsel took no action—such as sending emails—to notify the 16,000 claimants whose checks were returned or uncashed. Xanadu and Gould also objected on the basis that a person who does not receive or cash their check should not lose their money, but that the claims administrator must follow state unclaimed property (escheat) laws. Xanadu and Gould objected to the proposal to allow Class Counsel to take new attorney fees from the money that the claims administrator and Class Counsel failed to distribute to approved claimants. Finally, Xanadu argued that Class Counsel cannot relitigate approved claims especially when there exists a conflict of interest in their attempting to take those funds for their own fees.

On September 14, 2022, a *pro se* objector appeared and filed similar objections that they received a check

in early September 2022 that expired on August 30, 2022, preventing them from being able to cash the check. The objector noted that the check, when purportedly sent, only had a thirty-two day validity period, but was not actually received until after this period.

On September 15, 2022, Class Counsel filed a response to the objections. Class Counsel asserted that if the Court approved a secondary distribution, it would be amenable to reissuing the *pro se* objector's check. This, of course, says nothing as to the other 16,000 people who did not receive or cash their check. Class counsel suggested there existed no obligation to notify class members, by email or mail, of the redistribution of their payments, that they did not have email addresses for *all* claimants, that the posting of the motion on the website provided sufficient notice and time to object. *But see* Fed. R. Civ. Proc. 23(d)(1)(B)(i) (court may issue orders that "require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of any step in the action").

As to Xanadu's claim, Class Counsel argued it should be able to reopen and audit the claim and that it sought "company formation documents showing that it is a bona fide company along with [Xanadu's officer's] availability by Zoom to discuss Xanadu's business and claims to the settlements in this action." Class Counsel advised the Court that the claim now appeared suspicious because Xanadu used postal services to receive its mail, that the telephone number was a landline, that the email address did not contain the corporate name within it, that Xanadu retained a foreign attorney, and that Xanadu did not register as a corporation with the California Secretary of State.

On September 28, 2022, the district court set a hearing on the matter for October 28, 2022. In addition, the court allowed Class Counsel and the claims administrator to “audit/re-examine [Petitioner Xanadu Corp.’s] claim.”³ (App.20a).

Neither Class Counsel, the claims administrator, nor the court provided notice to the class about the new hearing date.

The district court *sua sponte* changed the date of the hearing from October 28, 2022, to November 4, 2022. Again, nobody notified the class members of this hearing date change.

At the hearing on November 4, 2022, Xanadu stood by its legal objections and the district court stated that the objections were overruled.

In the interim, Xanadu fully cooperated with Class Counsel and the claims administrator. It participated in an hour long Zoom call with Class Counsel and the claims administrator, provided its corporate paperwork from Colorado and history. (The non-transcribed “meeting” consisted of Class Counsel interrogating Xanadu for approximately 45 minutes and the claims administrator asking a few questions for about 15 minutes). Xanadu provided a sampling of hundreds of more recent 2015 airline tickets to show the amount of travel it generally engaged in, provided a more detailed declaration, explained that it owned the domain name xanaducorp(dot)net, but used the other email because

³ Xanadu, believing the Order to be similar to the grant of a Fed. R. Civ. Proc. 60 motion, attempted to appeal this Order to the United States Court of Appeals for the Ninth Circuit, but that court deemed it interlocutory and dismissed the appeal. *Adlin v. Xanadu Corp.*, 2022 WL 19569845 (9th Cir. Dec. 8, 2022).

of SPAM to the corporate domain, that the telephone number it provided has been valid for multiple years, along with other details that well exceeded the requirements found in the standards that were used to approve claims. Xanadu provided an explanation of its address history and its location and history in Central America, along with a description of its business practices.

During this process, Xanadu also made additional objections to Class Counsel's involvement in the meeting and interrogation, the apparent application of a higher standard to its claim than the other claimants, and the procedure used.

On December 27, 2022, the claims administrator sent Xanadu an email that, "Xanadu has not provided the documentation needed to support its claim and is therefore due \$0 in settlement benefits." The email stated that because Xanadu destroyed⁴ the records (from years 2002 to 2006) and did not provide it a list of employees who participated in the destruction, did not explain the differences in its record keeping practices from 2002 to 2006 and 2015⁵ because Xanadu made a claim for parking heaters but did not own a vehicle in an unrelated litigation,⁶ and since the 144 tickets

⁴ Xanadu did not assert that the records from 2002 through 2006 were destroyed. Rather, it advised the claims administrator that it performed a diligent search but could not locate them.

⁵ Xanadu repeatedly explained that it retained the 2015 tickets because they were part of a dispute with a client whereas the other ticket data from 2002 to 2006 was not retained.

⁶ Xanadu provided evidence it purchased the parking heaters in connection with an experimental farming operation and that the heaters had applications other than trucking.

provided as a sampling for flights from a single month in 2015 did not provide evidence that Xanadu directly paid the airlines, the administrator denied the claim.

After Xanadu received the email, it provided yet additional explanatory details addressing the assertions.

On January 16, 2023, Class Counsel provided the district court with a notice of it and the claims administrator's denial of Xanadu's claim along with copies of the various correspondence.

In the exhibits filed for the first time on January 16, 2023, Class Counsel provided a copy of the envelope showing the returned check. The envelope makes it clear that the claims administrator sent the check with no visible city, state, or zip code. The post office returned the check noting "Return to Sender, Temporarily Away, Unable to Forward." It is unclear whether the check made it to Xanadu's postal facility or if this was the Postal Service's method to return considering no city, state or zip code existed on the mailing.

Neither the claims administrator nor Class Counsel provided any explanation for the omission of a city, state, or zip code, or why nobody noticed the omission when the Postal Service returned a half-a-million-dollar check.

On January 17, 2023, the district court directed class counsel to file a proposed Order as to Xanadu's claim and the second distribution.

On the same day, Class Counsel submitted more than a proposed Order. Rather, it submitted a seven-page proposed Order finding Xanadu maintained no

standing because it did not prove its claim and restating the reasons for denying the claim.

On the morning of January 19, 2023, without waiting for any response from Xanadu or Gould, the district court signed a *verbatim* copy of Class Counsel's proposed Opinion/Order except that district court reduced the \$1 Million in proposed attorney fees to \$500,000 citing the fact that the leftover money consisted of uncashed checks and checks returned to the claims administrator by the post office. (App.7a).

Within a couple hours of the issuance of the Order, on January 19, 2023, Xanadu and Gould filed objections to the proposed Opinion along with a motion for reconsideration. Petitioners again objected to Class Counsel converting money from approved claimants who did not receive or cash their checks to attorney fees or for redistribution to other claimants. Petitioners noted that if Xanadu's check lacked a city, state, and zip, others might have had the same problem. Petitioners pointed out the requirements of Fed. R. Civ. P. 23(h)(1) that reasonable notice must be provided to class members for attorney fees to be awarded. Petitioners explained that unclaimed property laws applied to uncashed and returned checks and could not be ignored. Petitioners objected to applying a heightened standard to the claim because it violated Fed. R. Civ. P. 23(e)(2)(D) considering that it treated Xanadu equitably different to the other claimants and because Xanadu addressed all of the issues Class Counsel complained about.

On January 25, 2023, the district court denied reconsideration. (App.27a). As to the denial of allowing Xanadu and Gould time to respond to the proposed Opinion/Order, the district court stated, "the Court is

skeptical that a would-be class member indeed has a ‘due process right’ to respond to a status update.” (App.32a). At footnote 9, the district court recognized, “Xanadu complains repeatedly that Rust required more of Xanadu than it did of other claimants. This is likely true.” (App. 33a). At footnote 10, the district court stated, “Xanadu repeatedly states that this Court’s Order made findings of fact and conclusions of law,” and that it appears “as if a full evidentiary hearing occurred and that this Court is making findings. Not so. The Court held that ‘Rust determined ‘there is \$0 due in settlement benefits’ to Corp Xanadu,’ and it listed “numerous factors” upon which Rust based its decision.” (App.36a).

Without requiring either the claims administrator or Class Counsel to explain why the other 16,000 checks were not delivered or were uncashed—26% of all claimants—the district court held, “Xanadu leaps from its own ‘mismailed’ check to’ suggesting that ‘in reality, Rust’s checks’—plural—‘were mismailed and over 25% of claimants did not receive or did not cash their checks.’ This is an unwarranted leap, based on a single check. Moreover, while the envelope for that single check only shows the addressee’s names and street address (cutting off the city, state, and zip code), the envelope also shows that it was stamped ‘RETURN TO SENDER—TEMPORARILY AWAY—UNABLE TO FORWARD,’ suggesting that the missing city, state, and zip code were not the impediment to delivery.” (App.35a).

After a timely appeal, on February 27, 2024, the Ninth Circuit affirmed the decision of the district court. (App.2a). The Ninth Circuit found that neither Gould nor Xanadu maintained standing. As to Xanadu, it held that the district court did not err by *implicitly*

finding that Xanadu had not established any qualifying ticket purchases and, therefore, it is not a class member to object. The court found that Gould received his payment and will receive additional money through the secondary payment, so he could not object.⁷

Regardless of standing issues, the Ninth Circuit stated it had a fiduciary obligation to reach the merits anyway. The Ninth Circuit recognized that, “Notice of a motion for attorneys’ fees ‘must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. Fed. R. Civ. P. 23(h)(1).’” (App.5a). “There is no analogous notice requirement for redistribution or for class members who do not cash their checks. Given the direct notices of prior settlements and fee requests and the small value of most of the uncashed checks, ‘it would be difficult to say that due process requires a personal . . . notice to be mailed to . . . class members who have already received the . . . settlement notice.’ The court’s approval of the website-only notice here was not an abuse of discretion.” (App.5a).

Finally, as to the requirement that uncashed and undelivered checks be delivered to the appropriate state unclaimed property divisions, the court stated,

⁷ It is unclear how the Ninth Circuit found Gould could not object to attorney fees being taken from the pool of money since it would reduce his payment on redistribution. *See Fed. R. Civ. Proc. 23(h)(2)* (allowing objections to attorney fees). As to the uncashed checks, Gould may or may not receive his second distribution and if he does not, he would prefer to be transferred to unclaimed property. With respect to Xanadu, it obviously had standing, being an approved claimant, but only after Class Counsel applied a higher standard to it than other claimants was “standing” able to be removed.

The district court did not abuse its discretion by approving the secondary distribution of settlement funds rather than directing the funds to the state treasuries associated with the last known address of each intended recipient. Because jurisdiction in this case is based on a federal question, federal law governs the disposition of unclaimed funds and the federal custodial escheat statute, 28 U.S.C. §§ 2041-42, would apply were the funds deposited with the court. However, the district court has “broad discretionary powers” in distributing settlement funds, *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990), and the district court did not abuse its discretion by approving the request for supplemental distribution of settlement funds to class members who had participated by cashing their checks. (App.5a).



REASONS FOR GRANTING THE PETITION

I. This Court Should Provide Guidance as to Whether State Unclaimed Property Laws Require the Escheatment of Undelivered and Uncashed Checks in Federal Class Action Cases or If Class Counsel Can Instead Convert the Check Money to Attorney Fees and/or a Second Distribution to Class Members That Cashed Their Initial Checks.

In practically every Class Action case between ten and thirty percent of payments do not reach the approved claimant. Class Counsel maintains no incentive to locate the unpaid approved claimants considering the courts already awarded them their fees. They want the case over, closed, and wrapped up. In the present case, Class Counsel would not even send an email to claimants whose checks were returned or who did not cash their checks. This type of behavior violates Fed. R. Civ. P. 23(g)(4)'s provision that explains, "Class counsel must fairly and adequately represent the interests of the class." It also favors one group of claimants—the ones who received their checks—over the other group of claimants who never received their checks in violation of Fed. R. Civ. Proc. 23(e)(2)(D)'s requirement that settlements treat "class members equitably relative to each other."

In the present case, 16000 of 61000 approved claimants never received their money. This constitutes over 25% of the claimants. As to Xanadu, the claims administrator omitted the city, state, and zip on the check even though it exceeded \$500,000. In the case of

the *pro se* objector, the check had a rushed 30-day window to cash it and it arrived after the deadline. Yet Class Counsel argued that even trying to send an email to these unpaid claimants constituted too much of a burden. Unfortunately, this appears to be the *status quo* in class action suits.

The Ninth Circuit standard is that the courts maintain “broad discretionary powers” for distributing unclaimed class action funds. The district court has “broad discretionary powers” in distributing settlement funds. *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

However, considering that \$500,000 of the fund went to Class Counsel to reward them for not getting the money into the hands of the approved claimants—yet the only notice was a small blurb on the class website that a redistribution motion was pending, the actions stretch the limits of discretion especially considering that Fed. R. Civ. P. 23(h)(1) required attorney fee motions to be reasonably provided to the class members.

The rest of the money would be redistributed to the class members without any inquiry for the non-delivery of the checks or notice that the checks were outstanding. This is common and in some cases, Class Counsel even adds it to the settlement agreement that uncashed checks will be redistributed. *See, e.g., Feldman v. Star Tribune Media Company LLC*, 2024 WL 3026556, *6 (D. Minn. June 17, 2024) (agreement states uncashed checks will be redistributed to class members then to a charitable organization); *Kelley v. Willamette Valley Medical Center, LLC*, 2024 WL 2956956 (D. Or. June 12, 2024) (uncashed checks to be redistributed to claimants who cashed their checks). While the courts

quote the language, they neither analyze the legality of the procedure, the lack of notice to people who did not receive the checks, nor consider that the funds should be turned over to the states for the benefit of the claimant. In the present case, the district court dismissed the concept out of hand and the appellate court found the state laws inapplicable to federal statute-based class actions. The Fifth Circuit, however, found these laws compatible with federal antitrust class actions. *All Plaintiffs v. All Defendants*, 645 F.3d 329 (5th Cir. 2011).

The problem with taking funds from uncashed and undelivered checks for attorney fees or for redistribution is that the money belongs to other people, not to Class Counsel or the court. These are not people who waived their right to file a claim, but people who took the time out to preserve their rights and are now having their money given to Class Counsel and other people. Sometimes checks are not delivered through no fault of the claimant. For example, in this case, the claims administrator left off the city, state, and zip code on Xanadu's envelope.

Every state enacted unclaimed property laws that deal with uncashed and non-delivered checks that exceed a certain amount, usually between \$25 and \$50. Under California law, which governs the settlement agreements, all money must be turned over to the state. *See Unclaimed Property Law, Code of Civil Procedure Part 3, Title 10, Chapter 7.* Under Section 1520(a), all money must be turned over to the state. Section 1520(b) requires notice to the owner if the holder knows the address and the amount exceeds \$50. Other state laws, which apply based on the last known address of the check recipient, often only require

transfer of funds when the money exceeds \$25 or \$50. Petitioners provided the district court with a grid of the applicable state laws.

Unclaimed property laws are not discretionary and courts do not have “broad discretionary powers” to allow Class Counsel and class action settlement administrators to violate or ignore these laws—especially with zero analysis by the courts.

“Every state and the District of Columbia has a set of escheat laws, under which holders of abandoned property must turn such property over to the State ‘to provide for the safekeeping of abandoned property and then to reunite the abandoned property with its owner.’” *Marathon Petroleum Corp. v. Sec'y of Fin. for Delaware*, 876 F.3d 481, 488 (3d Cir. 2017) (quoting *N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 383 (3d Cir. 2012)).

“The *right* of appropriation by the state of abandoned property has existed for centuries in the common law.” *Conn. Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 547 (1948). In *Texas v. New Jersey*, 379 U.S. 674, 677 (1965), this Court first considered the question of when a state has the right and jurisdiction to escheat unclaimed intangible property. Importantly, this Court recognized that unclaimed property is the “debt” that is owed by the debtor to the creditor. *Id* at 680. Reasoning that a debt is the property of the creditor and not the debtor, this Court established a “primary rule” that “the right and power to escheat the debt should be accorded to the State of the creditor’s last known address as shown by the debtor’s books and records.” *Id* at 680-681. This Court chose this primary rule because it “involves a factual issue simple and

easy to resolve, and leaves no legal issue to be decided.” *Id.*

This Court affirmed these rules in *Pennsylvania v. New York*, 407 U.S. 206 (1972) (dispute between states over uncashed money orders) and *Delaware v. New York*, 507 U.S. 490 (1993) (dispute over uncashed dividend checks).

Here, the uncashed checks are no different than the dispute in *Delaware v. New York*, and the unclaimed property laws of the claimant’s last known address apply.

Therefore, this Court should grant certiorari to determine whether the lower courts may allow Class Counsel to take money belonging to approved claimants who did not receive their settlement check or did not cash them and take attorney fees from them and redistribute the remaining amounts, or whether unclaimed property laws compel lodging the payments with the appropriate state unclaimed property agency.⁸

II. This Court Needs to Address the Lack of Due Process in Class Action Cases in the Ninth Circuit.

The Northern District of California administers a large number of class action cases involving consumer law and federal antitrust law. However, as in most cases in the district and the Ninth Circuit, the courts allow Class Counsel and the claims administrator to decide most of the claims and courts do not intervene.

⁸ Petitioners recognize that some checks will be below the amounts required to transmit to the states depending on their laws. These funds, of course, could be used for attorney fees, redistribution, or possibly *cy pres*.

Class Counsel's micromanagement of this procedure, as it did with Xanadu, puts them in an adversarial role with the class members. In the present case, the claims administrator approved Xanadu's claim and mailed it a check. Class Counsel, seeking to convert \$1 Million of uncashed checks into attorney fees, learned of Xanadu's complaint of an undelivered check and began investigating the claim and the methods used by the claims administrator to approve the claim. Class Counsel, not the claims administrator, became concerned because it learned Xanadu had foreign counsel, used a mail service, did not use a corporate domain name, and had a landline telephone number in Oregon. Class Counsel petitioned the court to reopen and audit Xanadu's claim and the Court granted this request. (App.20a).

Xanadu addressed every concern of Class Counsel and participated in a one hour Zoom meeting, but its claim was denied because it was unable to produce records from 20 years ago—something that was specifically not required by the court's February 3, 2022, distribution Order.

Considering that the district court was "skeptical" about the due process rights of claimants to even respond to notices to the court of the denial of their claims, that the court recognized Class Counsel held Xanadu to a higher standard than other claimants, and that the court did not make any findings about Xanadu's claim except to restate the reasons Class Counsel and the claims administrator said they denied them, it does not appear Xanadu received due process or any review by the district court.

In affirming this, the Ninth Circuit referenced the district court's "implicitly" finding that Xanadu

was not a class member and stated no error occurred. (App.4a).

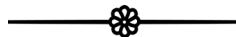
Other circuits, however, recognized generally that “each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves.” *Klier v. Elf Atochem*, 658 F3d 468, 474 (5th Cir. 2011), *citing Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807-08 & 812-13 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-30 (1982).

Here, Class Counsel used its own denial of Xanadu’s claim to assert it had no standing to object to the award of \$500,000 in attorney fees—taken from uncashed check money—with minimal notice to the Class. Class Counsel certainly wagged the tail of the claims administrator as they—not the claims administrator—asked most of the questions during the Zoom call.

Rule 23(e)(2)(D) requires, for a settlement to be approved, that “the proposal treats class members equitably relative to each other.” The district court’s admission that it did not provide a review of the decision of Class Counsel and the claims administrator, its skepticism that due process was required, and its admission that the standards applied to Xanadu probably exceeded what was expected from other claimants demonstrates that no due process occurred and that Xanadu was not treated “equitably relative to” other class members.

The Ninth Circuit’s affirmation of the district court’s “implicitly” finding that Xanadu did not have a valid claim based on Class Counsel’s findings does not comport with due process and creates a dangerous situation.

Considering the millions of people who submit claims in class actions each year, and the lack of guidance or rules as to claim disputes, this Court should grant certiorari to address the extent a claimant has a due process right to obtain review from the district court as to the denial of its claim and any requirement that class members be held to the same evidentiary standards.



CONCLUSION AND PRAYER FOR RELIEF

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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