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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE INTUIT FREE FILE LITIGATION

This Document Relates to: All Actions

Master File No.: 3:19-cv-02546-CRB

DEFENDANT INTUIT INC.'S OPPOSITION TO MOTION TO INTERVENE AND MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Date: December 17, 2020
Time: 10:00 a.m.
Ctrm: 6, 17th Floor
Judge: Hon. Charles R. Breyer

Date Action Filed: May 1, 2019

SUMMARY OF ARGUMENT

Court-appointed Interim Class Counsel and Defendant Intuit Inc. ("Intuit") have reached an arm's-length, negotiated resolution after hard-fought litigation that provides substantial monetary and non-monetary relief to a class of over 19 million customers. The settlement is therefore entitled to a presumption of fairness. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 672820, at *10 (N.D. Cal. Feb. 16, 2017).

There is no basis for non-parties Keller Lenkner, purportedly on behalf of nine individual intervenors ("Nine Movants"), and the Los Angeles City Attorney ("LACA") and the Santa Clara County Counsel (together, "*Amici*") to attempt to insert themselves in the settlement approval proceedings to advance their own interests at the expense of the broader settlement class. The Nine Movants' intervention is unnecessary because the Court, Class Counsel, and Federal Rule of Civil Procedure 23 (including the objection and opt-out processes) already ensure that their interests (like those of the rest of the class) will be adequately represented and protected. *See Raquedan v. Centerplate of Del. Inc.*, 376 F. Supp. 3d 1038, 1041-42 (N.D. Cal. 2019) (quoting *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015)). Likewise, *Amici* are not parties to the Settlement and may continue to seek relief against Intuit in their own state court action.

The opt-out process—the primary focus of the Nine Movants' intervention—is fair to all class members. Keller Lenkner's principal complaint about the settlement seems to be that it requires that law firm to provide each of its clients with the opportunity to make an individualized, informed decision about the settlement, consistent with federal law and the rules of professional conduct. *See In re CenturyLink Sales Practices & Sec. Litig.*, 2020 WL 3513547, at *7 (D. Minn. June 29, 2020). Similarly, the temporary stay of parallel proceedings by class members against Intuit is authorized by the All Writs Act and protects absent class members from unknowingly waiving their rights before they have had an opportunity to consider the terms of the Settlement and decide whether to opt out. 28 U.S.C. § 1651(a).

Amici and the Nine Movants provide no basis for denying relief to over 19 million settlement class members.

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INTRODUCTION

After extensive hard-fought litigation, negotiation, and multiple mediations between Intuit's counsel and Court-appointed interim class counsel ("Class Counsel," and, together with Intuit, the "Parties"), the Parties reached a settlement that will provide substantial monetary and non-monetary relief to over 19 million Intuit customers (the "Settlement"). As the result of arm's-length negotiations with Class Counsel, the Settlement is "entitled to an initial presumption of fairness." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 672820, at *10 (N.D. Cal. Feb. 16, 2017) (citation and quotation marks omitted). Yet three non-parties now attack this Settlement at the preliminary approval stage in the interests of their own deeply flawed actions against Intuit and with no regard for the interests of the broader settlement class. Their attack poses an existential threat to relief for over 19 million class members, as the Parties have agreed that the Settlement cannot proceed *unless* Keller Lenkner's ability to conduct mass opt outs—which is unethical—is constrained *and* this Court temporarily enjoins parallel proceedings against Intuit to ensure orderly settlement proceedings.

Keller Lenkner purports to intervene on behalf of nine individual intervenors ("Nine Movants")[1] cherry-picked from among its 125,000 purported clients—whom it treats as a *de facto* class despite never having been appointed class counsel—and seeks to protect the law firm's interests in pursuing arbitration proceedings so that it may collect exorbitant attorneys' fees. Keller Lenkner hardly appears before this Court as an honest broker. This intervention comes on the heels of Keller Lenkner's unsuccessful attempt in state court to enjoin the Parties from agreeing to any settlement, which the state court dismissed as inappropriate interference with this Court's authority. *See* Cole Decl. ¶¶ 25-34. Professor Stephen Bundy, a noted expert on legal ethics, has opined that Keller Lenkner's attempts to avoid settling *any* of its 125,000 clients' claims at all costs—whether through an injunction or by now contemplating mass opt outs—breach fundamental rules of professional conduct. *See* Bundy Decl. ¶¶ 9-15. Likewise, a district

[1] Keller Lenkner cites no authority in support of its attempt to proffer these nine cherry-picked intervenors to represent the purported "rights" of its 125,000 purported clients who apparently had no interest in intervening in this action. The fact that Keller Lenkner seeks to intervene in this action with just nine of the 125,000 people they purport to represent underscores the self-serving motivation behind their interference with the Settlement.

court in Minnesota recently found that "[t]he sheer number of Keller's clients given the size of the law firm and the strong financial incentive that Keller faces in recommending opt outs raise questions about whether each of its client's opt-out requests were made individually and intelligently." *In re CenturyLink Sales Practices & Sec. Litig.* ("*CenturyLink*"), 2020 WL 3512807, at *4 (D. Minn. June 29, 2020).

Amici seek to act in parallel to their own actions against Intuit, which face the prospect of dismissal on the merits in a matter of months and, even should they survive, will drag on for several years before any relief could conceivably issue. *See* Gringer Decl. ¶¶ 15-20. *Amici* attempt to torpedo relief for a *nationwide* class purportedly to serve the interests of only California residents, who account for a fraction of the over 19 million class members who could benefit from the Settlement. *See* Cole Decl. ¶ 7; Gringer Decl. ¶¶ 6-7; *see also* Dkt. No. 176 ("Am. Prop. Br.").

For all their bluster, Keller Lenkner and *Amici* provide no valid basis for their intrusion on the preliminary approval proceedings or for their contention that the Settlement—negotiated at arm's length with Class Counsel and providing significant relief to a class of over 19 million taxpayers—is inadequate and unfair.

Keller Lenkner's intervention is unnecessary and disruptive because the Court, Class Counsel, and Federal Rule of Civil Procedure 23 already ensure that the interests of the class, including the Nine Movants, will be adequately represented and protected throughout the settlement approval process. As courts in this circuit consistently recognize, "in the class action settlement context, a putative intervenor's concerns may 'largely be addressed through the normal objection process.'" *Raquedan v. Centerplate of Del. Inc.*, 376 F. Supp. 3d 1038, 1041-42 (N.D. Cal. 2019) (quoting *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015)).

Amici's and the Nine Movants' criticisms of the Settlement read as a self-interested declaration that they can achieve better litigation results (for themselves) than the agreement reached by Class Counsel. So be it. *Amici* are not parties to the Settlement and may continue to seek relief against Intuit, including additional injunctive relief and statutory penalties. Likewise, the Nine Movants may, of course, opt out of the Settlement pursuant to the Federal Rules and

pursue their claims against Intuit in arbitration. The Settlement also does not foreclose the Federal Trade Commission or State Attorneys General from bringing actions against Intuit—although no such claims have been filed to date and none of these agencies or officials have sought to intervene in this action.

Amici and the Nine Movants' criticism of the Settlement's relief ignores the fact that experienced Class Counsel agreed to the Settlement after discovery and lengthy negotiations with Intuit, including exploration of Intuit's defenses. Motion for Preliminary Approval of Class Action Settlement at 15. The Nine Movants contend that the monetary relief is inadequate and could be bested in arbitration, but merely saying that does not make it true. In fact, participating class members are expected to recover 20% to 50% of the average fees a taxpayer paid to use TurboTax online in a year they were eligible to file for free with the TurboTax Free File Program, without incurring the risk or burdens of arbitration. Remarkably, the Nine Movants suggest that no "rational" class member who has initiated arbitration against Intuit "would settle for $28 a claim that she paid $200 to initiate." Mot. to Intervene at 23. In fact, the arbitration filing fees were paid not by any individual arbitration claimant but rather were advanced by Keller Lenkner, which can only recoup its investment by recovering in arbitration, rather than through the present proceedings. Cole Decl. ¶ 17.

Moreover, the Settlement's non-monetary relief addresses in detail the conduct underlying the Nine Movants' and *Amici*'s claims against Intuit. It also overlaps with injunctive relief that *Amici* have themselves sought. Gringer Decl. ¶¶ 8-14. This relief will also enter into effect in time for the upcoming tax season, whereas the relief sought by *Amici* will only be issued, if at all, several years into the future. *Id.* ¶¶ 15-16.

The opt-out process set forth in the Settlement is consistent with processes routinely approved by courts and, moreover, protects individual class members by preventing Keller Lenkner from opting out all its clients without providing them with individualized legal advice and seeking their informed consent—as Keller Lenkner has an established track record of doing. *See, e.g.*, Cole Decl. ¶¶ 25-26; Bundy Decl. ¶ 4(i). As the court in the *CenturyLink* case held, after noting that Keller Lenkner "gave the same blanket advice to opt out to all 22,000 of its

clients," requirements such as personal signatures on opt-out requests "avoid[] a third party or lawyer representing that they have [a] class member's authority, without the class member making an informed, individual decision." *CenturyLink*, 2020 WL 3512807, at *3. In any event, it is difficult to understand how the Nine Movants can argue that sending a signed opt-out request containing basic identifying information would be "unduly burdensome" for them, given that they have shouldered the much greater burden of intervening in federal class action proceedings to attack the Settlement. *See* Mot. to Intervene at 16.

The Nine Movants are also wrong to imply that the potential value of the arbitration claims justifies opting all of Keller Lenkner's clients out of the Settlement. As a threshold matter, the Nine Movants can only speak as to their own interests because they do not represent Keller Lenkner's approximately 125,000 other clients in any legal capacity. And their own interests with respect to the Settlement are already adequately protected by the opt-out process, of which they are clearly able to avail themselves. At bottom, the Nine Movants are advocating for *Keller Lenkner's financial interest* in opting out its clients, yet this interest is entirely irrelevant to the fairness and adequacy of the Settlement.

As a substantive matter, Keller Lenkner's clients have claims that are no more valuable than those of other class members, whether in terms of their susceptibility to Intuit's strong defenses or the relative modesty of the alleged damages. And the purportedly superior value of the claims of Keller Lenkner's clients derives not from the claims themselves, but purely from the assumed success of Keller Lenkner's ethically dubious plan to deluge Intuit with as many claims as it can possibly harvest through social media and other means. There is also no small irony in the fact that the Nine Movants complain of a "one-size-fits-all proposed settlement" (Mot. to Intervene at 23), while Keller Lenkner seeks a "one-size-fits-all" opt out for its clients, in breach of its ethical obligations. Bundy Decl. ¶ 4(i).

Separately, there is no merit to the Nine Movants' argument that the All Writs Act does not authorize this Court to issue a temporary stay of all parallel proceedings by class members against Intuit—a stay *without which Intuit retains the right to withdraw from the Settlement*, as the Parties have agreed. The All Writs Act provides that federal courts may "issue all writs

necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). A proposed class settlement is the paradigmatic case for this Court's exercise of its authority under the All Writs Act. It protects absent class members from unknowingly waiving their rights before they have had an opportunity to consider the terms of the Settlement and decide whether to opt out. It also protects Intuit from the possibility of improper double recoveries while the opt-out process is ongoing. Lastly, it prevents the parties from unnecessarily incurring millions of dollars in arbitration fees while class members consider whether to proceed in arbitration or instead participate in the Settlement.

Finally, the Nine Movants' argument that the Settlement violates the TurboTax Terms of Service ("Terms") is simply wrong. Courts routinely approve class action settlements where the parties have agreed to arbitration and a class action waiver. *See, e.g.*, *Wilson v. Tesla, Inc.*, 2019 WL 2929988 (N.D. Cal. July 8, 2019); *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 999 (N.D. Cal. 2015). And the Settlement does not preclude the Nine Movants from continuing to exercise their right to arbitrate pursuant to the Terms, as they may simply opt out.

In sum, *Amici* and the Nine Movants provide no basis for denying relief to over 19 million settlement class members. Intuit respectfully requests that this Court approve the Motion for Preliminary Approval of Class Action Settlement (the "Motion").

FACTUAL BACKGROUND

A. The Settlement And Motion For Preliminary Approval

The Settlement Agreement is the product of the extensive negotiations between Intuit's counsel and Class Counsel beginning in September 2019 and continuing through November 2020. Cole Decl. ¶¶ 3-6. The parties first met and discussed settlement at their Rule 26(f) conference on September 25, 2019, and then pursued settlement discussions, including factual presentations and exchanges of information, on an ongoing basis. *Id.* ¶ 3. They held an initial mediation with the Honorable Edward A. Infante (Ret.) on June 22, 2020. *Id.* ¶ 4. The parties did not settle at the first mediation, but they continued to exchange factual presentations and written submissions and discussed potential approaches to a class settlement, both informally and during multiple joint and individual conferences with Judge Infante. *Id.* ¶¶ 5-6. On November 11, 2020, the parties

held a second formal mediation with Judge Infante and agreed to terms. *Id.* ¶ 6.

As outlined in the Motion, Plaintiffs seek preliminary approval of a $40 million settlement with Intuit to compensate taxpayers who were eligible to file a federal return for free under the IRS Free File Program but paid to use Intuit's TurboTax services and products. *See* Dkt. No. 162 at 1, 6. All class members may participate by completing a simple claim form, which requires only that they attest that they understood they could file for free under the Free File Program but nevertheless paid a fee to use TurboTax. *Id.* at 1. Considering customary claim rates, Class Counsel estimate that the recoveries provided will afford compensation in an amount that equates to 20% to 50% of the average TurboTax fees paid by participating settlement class members to use TurboTax online in a year they were eligible to file for free. *Id.* at 17. The Settlement also provides significant non-monetary relief to the settlement class, including but not limited to, Intuit's agreement to ensure its marketing practices related to its Free Edition product conform to the Federal Trade Commission's ("FTC") online marketing guidelines and to continue disclosing the Free File Program—along with taxpayer qualifications to file for free—on the TurboTax website. *See* Dkt. No. 162-1 at § III (a). The proposed notice to the settlement class also prominently discloses that taxpayers with incomes of $69,000 or less can file for free and provides a link to the IRS Free File portal. *Id.*

B. Keller Lenkner's Mass Arbitrations

Keller Lenkner has developed a business model of trawling behind class actions like this one. Cole Decl. ¶¶ 14-18. After harvesting tens of thousands of individual clients through social media, the firm threatens to file thousands of arbitration demands—triggering millions of dollars in potential arbitration fees—unless the defendant agrees to a huge payment to Keller Lenkner, some of which will go to their clients. *Id.* ¶ 16. Keller Lenkner invests in these arbitrations by "advanc[ing] arbitration filing fees on behalf of its clients," and it "does not recover the filing fees and collects no attorney's fees unless it obtains recovery for its clients." *CenturyLink*, 2020 WL 3513547, at *2. In the event of a class settlement, Keller Lenkner likewise "earns no attorney's fees if clients fail to opt out." *Id.* at *1. As a result, Keller Lenkner has a strong financial incentive to undermine *any* class settlement and instead obtain a separate settlement for its clients

to recoup its sunk costs and maximize the return on its investment—regardless of what is in each of its individual clients' best interests. Keller Lenkner has followed the same playbook here.

Based on the same underlying allegations at issue in this case, Keller Lenkner has submitted successive waves of arbitration demands against Intuit with the American Arbitration Association ("AAA") since October 2019. Cole Decl. ¶ 18. Keller Lenkner "advanced" the initial arbitration fees for the claimants, paying more than $8 million so far to the AAA. *Id.* ¶ 17. Of the first three waves totaling more than 45,000 demands, Keller Lenkner has withdrawn roughly 8,300 demands that were shown to be patently frivolous. *Id.* ¶ 21. Keller Lenkner recently filed two additional waves of demands on behalf of 88,786 clients, but without paying the filing fees for those claims. *Id.* ¶ 19.

C. Keller Lenkner's Attempts To Interfere With The Settlement

In the last several months, Keller Lenkner has made several unsuccessful attempts to interfere with the Parties' settlement negotiations. *Id.* ¶¶ 25-34. Many of those attempts occurred before settlement was even reached, much less before Keller Lenkner knew the terms of the Settlement, underscoring that the Keller Lenkner law firm objects to the existence of *any* class settlement here, likely because it threatens the law firm's ability to recover on its investment. *Id.*

In an effort to halt proceedings in this Court, on October 1, 2020, Keller Lenkner filed a complaint in Los Angeles County Superior Court. The complaint sought an order "prevent[ing] Intuit from entering into a class-action settlement that would resolve the claims of customers … who have filed individual arbitration demands, without those customers' affirmative consent." Compl. (Prayer for Relief), *31,011 Individuals v. Intuit, Inc., et al.*, No: 20STCV37714 (L.A. Super. Ct. Oct. 1, 2020). On October 19, 2020, Keller Lenkner filed an *ex parte* request for a temporary restraining order ("TRO") to enjoin Intuit from concluding a settlement with Class Counsel that would "resolve the claims of customers who . . . have initiated arbitrations against Intuit . . ." Cole Decl. ¶ 26.

On October 20, 2020, Judge Green of the Los Angeles Superior Court denied the TRO request. *Id.* ¶ 27. Undeterred, on October 28, 2020, Keller Lenkner filed a motion for preliminary injunction seeking to "enjoin Intuit from including Keller Lenkner Clients in a class-

wide settlement in court." *Id.* Following the filing of the Motion and the Settlement Agreement, Keller Lenkner changed its request for relief in its reply brief to a "declaration that the KL Clients have a contractual right not to be included in the class settlement. . . ." *Id.* ¶¶ 32-34.

On November 20, 2020, Judge Green held a hearing and, as with the TRO, denied Keller Lenkner's request for a preliminary injunction. *Id.* at ¶ 33. In his Order denying the injunction, Judge Green specifically deferred to this Court and noted that Keller Lenkner's request for declaratory relief was "odd" because Keller Lenkner's clients both "have a right to decline a settlement offer" and, "on the flip side of the coin," "have a right to *accept* a settlement." *Id.*, Ex. 10 at 6 (emphasis in original).

ARGUMENT

I. THE MOTION TO INTERVENE SHOULD BE DENIED BECAUSE THE NINE MOVANTS' INTERESTS ARE ADEQUATELY REPRESENTED

The Nine Movants seek to intervene and disrupt the Settlement to the detriment of approximately 19 million settlement class members, in order to enable Keller Lenkner to opt out its clients *en masse* and continue executing on its mass arbitration business strategy. But the Nine Movants may raise any concerns they have with the Settlement under the Federal Rules by filing an objection to the Settlement at the appropriate time. And the Nine Movants may also simply opt-out of the Settlement, which they seem well equipped to do when the time comes. *See Zepeda v. PayPal, Inc.*, 2014 WL 1653246, at *2-3 (N.D. Cal. Apr. 23, 2014) (holding that intervention was not warranted because putative interveners may object to the settlement or opt out of the class), *objections overruled*, 2014 WL 4354386 (N.D. Cal. Sept. 2, 2014); *see also Cody v. SoulCycle, Inc.*, 2017 WL 8811114, at *4 (C.D. Cal. Sept. 20, 2017) (denying intervention of a putative class member where he failed to show that his interests would be impaired and intervention risked compromising the final settlement).

A party seeking to intervene under Rule 24(a)(2) must show it "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." *Sterrett v. Sonim Techs., Inc.*, 2020

WL 6342941, at *1 (N.D. Cal. Oct. 29, 2020).

Here, the Nine Movants simply cannot show that their protectable interests are not adequately represented by Class Counsel or that their interests will be in any material way impaired. This Court appointed Class Counsel to represent the putative class after carefully considering six applications for appointment and Class Counsel has acquired intimate knowledge of the facts of this case through discovery. *See* Order Appointing Interim Class Counsel (Dkt. No. 72) ("The Court is confident that Mr. Girard's and Mr. Siegel's experience in cases with similar claims and their work thus far in this matter will enable them to effectively represent and guide the plaintiffs at this stage of litigation."). Moreover, the Rule 23 settlement process itself is designed to protect the Nine Movants' interests, including through the objection and opt-out processes. *See Raquedan*, 376 F. Supp. 3d at 1041-42.

The Nine Movants share an "ultimate objective" with Plaintiffs—*i.e.*, receiving monetary relief for their use of paid Intuit products despite their eligibility for the IRS Free File program—and, as such, their interests are presumed to be adequately represented by Plaintiffs. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 951 (9th Cir. 2009) (applying a presumption of adequate representation where, although intervenors claimed "broader" interests than Plaintiffs, they shared the same objective of "defending the constitutionality of Prop. 8. . ."). [2] The Nine Movants argue that the Parties' request to temporarily enjoin arbitrations demonstrates that the Parties are "directly adverse" to the Nine Movants. Mot. to Intervene at 9. [3] But, as in *Perry*, "[t]o the extent that there is disagreement [between intervenors and Plaintiffs]. . . it is best characterized as a dispute over litigation strategy or tactics." *Id*. at 954. Here, the Nine Movants

[2] The Nine Movants contend that, pursuant to *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011), their burden to show inadequacy of representation is "minimal." Mot. to Intervene at 9. However, the *Citizens* case states that, "[i]f an applicant for intervention and an existing party share the same ultimate objective, a presumption of adequacy of representation arises. To rebut the presumption, an applicant must make a 'compelling showing' of inadequacy of representation." 647 F.3d at 898 (citations omitted).

[3] The Nine Movants' citation of *Gomes v. Eventbrite, Inc.*, 2020 WL 6381343, at *3 (N.D. Cal. Oct. 30, 2020) on that point (Mot. to Intervene at 9) is inapposite. That case involved intervenors who were seeking to intervene for "the limited purpose of requesting a continuance [of] the hearing on the [Preliminary Settlement] Motion." *Id.* at *2. They did so because they were awaiting a pending decision in state court, which would determine whether they would want to join the federal court action. *Id.*

may disagree over the strategic or tactical reasons why Class Counsel seeks relief in federal court on behalf of over 19 million Intuit customers, versus pursuing mass-generated arbitrations, but the "ultimate objective" remains the same. Thus, the Nine Movants' interests are presumed to be adequately represented by Plaintiffs. Since the Nine Movants have not made a "compelling showing" of inadequacy of representation to overcome this presumption, *see id.* at 951, this Court should deny intervention.

II. THE COURT SHOULD DENY THE NINE MOVANTS' REQUESTED RELIEF BECAUSE THE SETTLEMENT MEETS THE STANDARDS FOR PRELIMINARY APPROVAL

A. The Terms Of The Settlement Are Fair, Reasonable, And Adequate

The Settlement is the product of hard-fought, arm's-length negotiations with court-appointed Class Counsel, Cole Decl. ¶ 3, "and thus is 'entitled to an initial presumption of fairness.'" *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 672820, at *10 (internal quotation marks and citation omitted); *see also Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (noting that the Ninth Circuit "put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution"). While the Nine Movants imply that Class Counsel colluded with Intuit (*see, e.g.*, Mot. to Intervene at 13, 14), that assertion is reckless and unsubstantiated, and the record is to the contrary. Indeed, Judge Infante, a well-respected former magistrate judge, declared that the parties were well-represented by "zealous and able counsel" who reached a "fair and practical solution" after a series of intensive arm's-length negotiations. Decl. of the Hon. Edward A. Infante (Ret.) in Support of Preliminary Approval of Settlement (Dkt. No. 162-3) at ¶ 9. The Nine Movants' only purported indicator of collusion is the "clear-sailing" provision in the Settlement (Mot. to Intervene at 13), but the Ninth Circuit has expressly noted that clear-sailing provisions do not signal collusion where payments are to be made from a capped settlement fund. *See Rodriguez*, 563 F.3d at 961 n.5. And the fact that Class Counsel negotiated a settlement after losing a significant motion does not impugn the Settlement's fairness or adequacy (Mot. to Intervene at 13, 15), as litigation setbacks form the backdrop against which all settlements are negotiated.

The Settlement provides $40 million in compensation, which the Parties estimate will

result in recovery for participating class members equal to 20% to 50% of the average fees that they paid to use TurboTax online in a year they were eligible to file for free. *See* Motion at 17. The Settlement also provides for injunctive relief that will, *inter alia*, create a legal obligation on Intuit to continue to refrain from "de-indexing" the TurboTax Free File product from internet search results, to take a series of measures alerting taxpayers that they may be eligible to file for free, and to adhere to the FTC's guidelines setting forth best practices for online marketing. *See* Dkt. No. 162-1 at § III (a).

The Nine Movants and *Amici* contend that the Settlement's monetary and non-monetary relief are inadequate, which amounts to a self-serving and highly speculative assertion that they can do better than Class Counsel. *See* Mot. to Intervene at 20-23; Am. Prop. Br. at 7-10.

1. The Settlement Provides Significant Monetary Relief

First, the criticisms of the monetary relief ignore that Class Counsel carefully weighed the class members' litigation risk. *See* Motion at 15-16; *see also G. F. v. Contra Costa Cty.*, 2015 WL 7571789, at *8 (N.D. Cal. Nov. 25, 2015) ("Approval of a class settlement is appropriate when plaintiffs must overcome significant barriers to make their case." (citation omitted)). Following extensive discovery and communication with Intuit, Class Counsel concluded that class members must overcome "a robust set of defenses." Motion at 15-16.

The Nine Movants nevertheless assert that an average recovery of $28 for participating class members is "not adequate . . . for any individual who is willing to pursue claims in arbitration." *See* Mot. to Intervene at 21. Of course, that presupposes success in arbitration, which is uncertain at best. *See* Chandrasekher & Horton, *Arbitration Nation*, 107 Cal. L. Rev. 1, 55-56 (2019) (noting 33% success rate for consumers in AAA cases). It also conveniently overlooks that any recovery achieved through arbitration will be subject to reimbursement of the initial AAA filing fees and to Keller Lenkner's significant attorneys' fees (which in *CenturyLink* were set at $750 per client for claims settled *before* arbitration). *See* Cole Decl. ¶ 15; *see also In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 229 F.Supp.3d 1052, 1066 (N.D. Cal. 2017) (Breyer, J.) ("[E]ven if Plaintiffs were to prevail, they would be required to expend considerable additional time and resources potentially outweighing any

additional recovery obtained through successful litigation."). The fact remains that upwards of 19 million class members will have the opportunity to obtain a recovery that equals 20% to 50% of their TurboTax expenditures in a year they were eligible to file for free with the TurboTax Free File Program, without incurring the risk or burden of initiating an arbitration.

Relatedly, the Nine Movants state that "[n]o rational class member would settle for $28 a claim that she paid $200 to initiate where, as here, she is likely to recover far more than $28 in her individual case."[4] *See* Mot. to Intervene at 23; *see also id.* at 22. But the filing fees are irrelevant to the "rational" calculus of class members who brought AAA arbitrations because Keller Lenkner invested those filing fees themselves and can only recoup them from the claimants *from recoveries achieved through arbitration*.[5] *See* Cole Decl. ¶ 17.

Additionally, *Amici* suggest that case law establishes some objective economic benchmark for what constitutes adequate recovery (*see* Am. Prop. Br. at 8-9), but it is well-established law that a settlement representing only a portion of the potential recovery sought by class plaintiffs may be adequate and fair. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000), as amended (June 19, 2000). Ultimately, Class Counsel fulfilled its role by evaluating the reasonableness of the Settlement's monetary relief in light of the case's litigation challenges. *See Rodriguez*, 563 F.3d at 965 ("In reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value.")

The Nine Movants also make much of the fact that Intuit "offered settlements of six to 15

[4] The Nine Movants conveniently omit that, under the Terms, "Intuit will reimburse all [filing, administration, and arbitrator] fees and costs for claims totaling less than $75,000 unless the arbitrator determines the claims are frivolous." *See* Cole Decl. ¶ 35, Ex. 11.

[5] The Nine Movants are also incorrect in suggesting that class members who have pursued (or will pursue) arbitration may have more valuable claims than other class members. *See* Mot. to Intervene at 13, 22. The option to opt-out of the Settlement and pursue claims in arbitration is equally available to all class members. And to the extent that there is variation among class members in the expected value of their claims, the Ninth Circuit has held that such variability is a natural feature of any class action that does not preclude settlement approval. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 824 (9th Cir. 2012) ("It is an inherent feature of the class-action device that individual class members will often claim differing amounts of damages—that is why due process requires that individual members . . . be given an opportunity to opt out of the settlement class to pursue their claims separately, as were the class members in this case.")

times as much as the proposed class settlement" to certain arbitration claimants. Mot. to Intervene at 23. These settlement offers were made to 105 claimants, *see* Cole Decl. ¶ 23, and are in no way indicative or predictive of the settlement amounts that a group of 125,000 claimants, many with deficient claims, could hope to receive. And, in all events, if individual arbitration claimants believe that they will obtain a better outcome in arbitration with Intuit, they are free to opt out of the Settlement at the appropriate time.

2. The Settlement Provides Significant Non-Monetary Relief

Second, the criticisms of the non-monetary relief fail to recognize that this relief fully addresses the alleged conduct underlying the Nine Movants' and *Amici*'s claims. *See* Mot. to Intervene at 22; Am. Prop. Br. at 10-11. *Amici* themselves have sought injunctive relief against Intuit in their separate actions, but tellingly fail to explain how the injunctive relief they seek is superior to the Settlement's relief. Gringer Decl. ¶¶ 8-14. In fact, the Settlement provides injunctive relief similar or identical to the relief sought by *Amici*. *Id.* Additionally, the Nine Movants and *Amici* emphasize that Intuit has already undertaken or agreed to undertake some of the measures set forth in the Settlement's non-monetary relief. *See* Mot. to Intervene at 22; Am. Prop. Br. at 10-11. It is true that Intuit continually takes measures to ensure that its customers fully understand their tax filing options, which include the IRS Free File program. This has been a longstanding practice of Intuit, including before the ProPublica publications and the present proceedings. However, this practice does not deprive the injunctive relief of value.[6] On the contrary, under the Settlement, Intuit would be bound to the measures by a court-approved settlement, which class members can seek to judicially enforce if necessary. Moreover, the Nine Movants and *Amici* appear to acknowledge that the Settlement's specific, tailored injunctive relief is in many respects different from the measures that Intuit has already undertaken or agreed to undertake. Again, the Intervenors are second-guessing relief that resulted from extensive

[6] The Ninth Circuit recently upheld a lower court's finding that the partially duplicative nature of non-monetary settlement relief did not negate that relief's value for the class, even though the Ninth Circuit suggested that on the particular facts of that case the relief was not very substantial. *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1123 n.12 (9th Cir. 2020) ("Objector argues that this disclosure is duplicative of the change Facebook had already made to the disclosure language in its Data Policy, and therefore that the Help Center disclosure has no marginal value. The district court did not clearly err by concluding otherwise.")

negotiations between the Parties and reflects Class Counsel's judgment regarding the measures necessary to address the conduct giving rise to class members' claims.

Finally, *Amici* state in passing, while criticizing the non-monetary relief, that "the email-only notice contemplated [in the Settlement] is an ineffective mode of outreach even for a class notice." Am. Prop. Br. at 11; *see also id.* at 6-7. *Amici* fail in their duty to mention to this Court that the notice program also provides for notice to be mailed to class members in the event that emails are returned as undeliverable and for publication of the notice on a settlement-dedicated website. *See* Dkt. No. 162-1 at § VI (d)-(e). And while *Amici* take issue with the notice required by the Settlement, they omit the fact that they aggressively pursued—but failed to obtain— a consumer notice similar to the one required by the proposed settlement in their state court action. Gringer Decl. ¶¶ 9-14. In any event, this misleading side-swipe at the notice program is without merit, as courts routinely approve settlements that predominantly provide notice to class members via email. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 941, 954 (9th Cir. 2015) (finding adequate notice was provided where the "[i]nitial e-mail notice of the settlement was provided to some 35 million class members" and "[n]otice was mailed to more than 9 million class members whose email addresses were invalid such that the email notice 'bounced back.'"); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1254-55 (C.D. Cal. 2016) (finding that a program relying predominantly on e-mail notices supplemented by postcards provided adequate notice); *Chinitz v. Intero Real Est. Serv.*, 2020 WL 7042871, at *3 (N.D. Cal. Dec. 1, 2020) (approving a program relying predominantly on e-mail notices). Perhaps more to the point, the class members filed their income taxes through TurboTax *online* and agreed to receive communications about their filings from Intuit via email, which makes email the best means for communicating a notice. Cole Decl. ¶ 9; *id.* at Ex. 11 at § 7.3.

3. The Settlement Agreement Does Not Foreclose All Further Actions

Nor is there any basis for *Amici*'s assertion that the Settlement "could unnecessarily and inappropriately deprive low-income consumers nationwide of further relief by hindering governmental enforcement actions."[7] *See* Am. Prop. Br. at 12; *see also id.* at 14-15. Indeed,

[7] *Amici* may also be overstating the societal value of their actions. In a recent concurring opinion,

Amici are not parties to the Settlement and therefore are not releasing any claims against Intuit. The Settlement does not prohibit *Amici* from attempting to seek additional injunctive relief or statutory penalties against Intuit. *See id.* at 14. Likewise, the Parties do not intend for the Settlement to prohibit consumers from cooperating with *Amici* in the development of *Amici*'s claims. *See* Cole Decl. ¶ 11; *see also* Am. Prop. Br. at 15. Additionally, the Settlement does not prohibit the FTC or State Attorneys General from bringing actions against Intuit—though none of those agencies have done so yet, and none of them have objected to the Settlement. And, of course, the Nine Movants and any other class members are free to opt out of the Settlement.

Contrary to *Amici*'s dire warnings, the Settlement provides relief beyond anything *Amici*'s actions against Intuit can achieve. *Amici*'s actions can only benefit California residents, who represent 8.8% of class members. *See* Cole Decl. ¶ 7; Gringer Decl. ¶¶ 6-7. The Settlement will also provide immediate relief to the settlement class (including injunctive relief that will govern Intuit's conduct during the upcoming tax season), whereas it will take several years, at best, before any relief is issued in *Amici*'s actions. Gringer Decl. ¶¶ 15-20. In any event, *Amici* are unlikely to prevail in their actions, as the majority of their claims can only succeed if the court finds that Intuit had a duty to disclose the existence of the IRS Free File Program. *Id.* ¶¶ 17-20. Under California law, Intuit unambiguously had no duty to disclose the existence of the program. *Id.* ¶¶ 18-19. Intuit has already filed a motion for summary adjudication ("MSA") of the duty to disclose issue in the LACA case and the court has stayed discovery, only allowing narrowly-focused discovery on the facts necessary to respond to the MSA. *Id.* ¶ 18. In short, *Amici*'s actions against Intuit are seriously flawed and unlikely to succeed, making the monetary and non-monetary relief provided in the Settlement all the more valuable to class members.

Justice Kruger of the California Supreme Court observed that, by "empowering scores of local officials to sue in the name of the State of California," California's Unfair Competition Law "creates an incentive for district attorneys to race each other to the courthouse and to enter settlements that maximize their own counties' recoveries, potentially at the expense of consumers elsewhere in the state." *See Abbott Labs. v. Superior Court of Orange Cty.*, 9 Cal. 5th 642, 665 (2020). Here, LACA raced to file its lawsuit with only the most cursory of pre-complaint investigations, relying almost exclusively on a ProPublica story posted online just days before LACA filed its complaint. *See* Gringer Decl. ¶ 3.

B. The Opt-Out Process Ensures Individualized Decisions By Class Members And Orderly Administration Of The Claims Process

1. The Process Acts As A Bulwark Against Keller Lenkner Prioritizing Its Own Financial Interests Over Those Of Its Clients

The Nine Movants' attacks on the Settlement's opt-out process are a thinly veiled attempt to protect Keller Lenkner's business model, at the expense of the interests of Keller Lenkner's individual clients. Mot. to Intervene at 16-20. The opt-out process, like the claims process, is designed to ensure that each class member engages with the settlement information sent to her and makes an individualized, informed decision about whether to accept the settlement. The opt-out process is similar to many other commonplace transactions: class members must provide, by way of written request, certain basic identifying information, including their address and a unique identification number ("ID") assigned by the settlement administrator, a statement of their status as a class member and desire to opt out, and the name and case number of the class member's pending arbitration against Intuit (if such is the case). Dkt. No. 162-1 at § VII(a)(i). The opt-out request must bear an original or PDF copy of the class member's signature. *Id.*

The Nine Movants and *Amici* contend that the process of opting out through a personally signed request sent via mail is designed to suppress opt outs. Mot. to Intervene at 16-20; Am. Prop. Br. at 7. Additionally, the Nine Movants claim that opting out should instead occur electronically "through counsel," with class member consent evidenced through "electronic signatures." Mot. to Intervene at 16-20. These criticisms deliberately ignore that courts have frequently approved settlements with similar opt-out processes, and that Keller Lenkner's behavior and business model make the Settlement's opt-out process particularly appropriate to ensure individual, informed decisions by class members regarding their opt-out rights. In the *CenturyLink* matter, where Keller Lenkner "gave the same blanket advice to opt out to all 22,000 of its clients," the court emphasized that

> [i]n this case, the requirement that a class member must individually sign is vital, because it ***ensures that the class member is individually consenting to opt out***, and avoids a third party or lawyer representing that they have that class member's authority, without the class member making an informed, individual decision. Acceptance of an attorney-signed opt out is not required in a case involving more than 16,000 purported [] opt outs ***represented by a single small law firm*** [*i.e.*, Keller Lenkner] ***when there exist questions regarding the informed decision of each***

client . . .

CenturyLink, 2020 WL 3512807, at *3 (emphasis added).

Given its business model and track record (*see* Cole Decl. ¶¶ 14-17), Keller Lenkner is strongly incentivized to execute a mass opt out of all its clients without assessing their individual circumstances, providing individuated legal advice, or taking steps to obtain meaningful client consent. *See* Bundy Decl. ¶¶ 6-9; *see also, e.g.*, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, 910 F. Supp. 2d 891, 939 (E.D. La. 2012), *aff'd*, *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (noting that mass, unsigned opt outs "are highly indicative of a conclusion that such counsel did not spend very much time evaluating the merits of whether or not to opt-out in light of the individual circumstances of each of their clients and in consultation with them"); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *26 (N.D. Ga. Mar. 17, 2020) (noting that technology "makes it easier for third parties and their counsel to file unauthorized mass opt-outs, which are sometimes highly indicative of a conclusion that such counsel did not spend much time evaluating the merits of whether or not to opt-out. . .") (internal quotation marks and citation omitted). Having failed in its gambit to enjoin the Parties from entering into any settlement whatsoever (Cole Decl. ¶¶ 25-34), Keller Lenkner is all but certain to take another bite at the apple by attempting a mass opt out.

Under these ethically fraught circumstances (*see* Bundy Decl. ¶¶ 6-9), the requirement for a personally signed, mailed opt-out request ensures that class members are personally making individual settlement decisions and that their consent is not usurped by Keller Lenkner in pursuit of its own attorneys' fees.[8] *See, e.g.*, *CenturyLink*, 2020 WL 3512807, at *3-4; *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *26 ("[T]he personal signature requirement is not burdensome, and is of particular importance in this case, to ensure that the objection is made in the objector's personal capacity, and not at the behest of others."); *Hallie v. Wells Fargo Bank, N.A.*, 2015 WL 1914864, at *4 (N.D. Ind. Apr. 27, 2015) ("Requiring a

[8] The Nine Movants' assurance that "[c]ounsel will not make any settlement decision for any client" (Mot. to Intervene at 24) amounts to saying "just trust us." Keller Lenkner's insistence on an opt-out process where its clients' true level of involvement remains opaque, coupled with its efforts to enjoin the Settlement and its track record of reflexive mass opt outs, suggests that this Court's trust would be misplaced.

personally signed, individual request for exclusion from class settlement heightens the likelihood that each class plaintiff will make an informed, individualized decision whether to opt out. . ."); *In re Syngenta Ag Mir 162 Corn Litig.*, 2018 WL 1726345, at *7 (D. Kan. Apr. 10, 2018) ("To ensure that those who actually may possess a potential claim are in fact the decision-makers, it is more than reasonable to require that they take the very minimal effort required to sign and mail an opt out.") (citation omitted).

2. The Potential Value Of Arbitration Claims Does Not Justify Allowing Keller Lenkner To Reflexively Opt Out All Its Clients

The gravamen of the Nine Movants' criticisms of the Settlement is that mass opt outs are justified because Keller Lenkner's clients have more valuable claims than other class members by virtue of their decision to pursue arbitration. Mot. to Intervene at 22-23.

As a threshold matter, the Nine Movants have no standing to speak for Keller Lenkner's approximately 125,000 other clients, whom they do not represent. Moreover, the Nine Movants' intervention in the proceedings makes clear that they have the ability to opt out individually. Thus, the Nine Movants are really just advocating for Keller Lenkner's financial interest in conducting mass opt outs—an interest that has no bearing on whether this Court should approve the Settlement.

This said, the contention that mass opt outs are justified here, which amounts to an attempt by Keller Lenkner to create its own *de facto* class action untethered from the procedural protections of Rule 23 and free from court supervision, fails for at least two reasons.

First, the Keller Lenkner clients that belong to the settlement class[9] are not situated differently from other class members in any meaningful way. Indeed, *all* are vulnerable to the same set of legal defenses as other class members and their damages are similar, if not identical, in nature to those of other class members. *See* Motion at 19-20; Bundy Decl. ¶ 4(c). Likewise, class members who are not represented by Keller Lenkner also agreed to the Terms containing the

[9] The *only* meaningful difference between Keller Lenkner's clients and other settlement class members is that a substantial number of Keller Lenkner's clients have filed frivolous demands, leading Keller Lenkner to withdraw over 8,000 arbitration demands to date. Cole Decl. ¶ 21. A number of the clients with frivolous claims were never even TurboTax customers and, as such, are not actually class members. *Id.*

arbitration agreement and theoretically have the ability to initiate arbitration against Intuit, which makes them no different from Keller Lenkner's clients.[10] And as many as 88,785 of Keller Lenkner's clients are not in fact differentiated by the pursuit of claims in arbitration, since Keller Lenkner has failed to pay initial filing fees for those clients and, as such, their demands are not "considered properly filed" under AAA rules. Cole Decl. ¶ 19; AAA Consumer Arb. R-2. Moreover, the purported superior value of the claims of Keller Lenkner's clients hinges not on any facts specific to those claims or even on the procedural decision to individually pursue arbitration, but rather on the implied assumption that Keller Lenkner's threat of deluging Intuit with claims triggering a cascade of AAA fees will successfully extract a lucrative settlement. The assumed success of a scheme that is entirely external to the substance of class members' claims—and whose ethical propriety is dubious—is not a cognizable differentiating factor between claims.

Second, the claims of Keller Lenkner's clients are sufficiently differentiated from one another in terms of potential settlement value that a mass opt out would be contrary to Keller Lenkner's ethical obligation to provide individualized advice to its clients. *See* Bundy Decl. ¶¶ 6-9. For example, some of Keller Lenkner's clients are susceptible to particularly strong defenses given their TurboTax history (see Motion at 15-16) and some clients are at an earlier stage of their arbitrations than others. *See* Bundy Decl. ¶ 4(e). Ironically, the Nine Movants complain of a "one-size-fits-all proposed settlement" (Mot. to Intervene at 23), yet Keller Lenkner seeks a "one-size-fits-all" opt out for its clients, contrary to its ethical obligations.

3. The Settlement Identification Number Helps Ensure Orderly Administration Of The Settlement

Finally, the Nine Movants also object to the requirement that class members opting out provide the ID assigned to them by the settlement administrator. *Id.* at 18-19. Yet the ID is

[10] California courts routinely approve settlements where class members had a colorable right to pursue arbitration against defendants. *See, e.g.*, *Lee v. JPMorgan Chase & Co.*, 2014 WL 12580237 (C.D. Cal. Nov. 24, 2014) at *1, 7-9; *Wilson*, 2019 WL 2929988, at *7; *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d at 999. The fact that putative class members can potentially pursue arbitration has thus not prevented settlement approval nor has it given rise to unique settlement structures favoring mass opt outs of class members. To the extent that Keller Lenkner wishes to reform class action law to favor individuals with arbitration claims, it would be more appropriate to lobby for legislative reform than to seek *ad hoc* special treatment for its clients before the courts.

necessary for orderly distribution of the settlement funds, as it allows the settlement administrator to prevent mistakes that could arise by relying solely on other identifying information. Intuit uses a unique number for each TurboTax account and the same customer may have more than one account associated with the same (or more than one) email address across several tax years. Cole Decl. ¶ 10. Intuit will provide the settlement administrator with identifying information for all class members and an ID will be created for each class member. *See id.*; Dkt. No. 162-1 at § VI(c). The ID will allow the settlement administrator to identify a class member opting out even if that member's address or legal name have changed and no longer match the information in Intuit's records. Cole Decl. ¶ 10. The ID also ensures that customers with multiple account numbers will not erroneously be counted as more than one class member. *Id*. The court in *CenturyLink* found that the use of IDs was particularly important when, as may occur here, a large number of class members opted out. 2020 WL 3512807, at *5 ("The failure to include . . . settlement identification numbers increases the likelihood of future confusion and litigation regarding who is and is not in the class.") Thus, the ID number is not some nefarious means for suppressing opt outs, but rather a legitimate tool for orderly settlement administration.

C. Enjoining Parallel Proceedings Pending A Valid Opt-Out Will Protect The Settlement Class Without Impairing Class Members' Right To Arbitration

The Nine Movants object to preliminary approval on the ground that it would stay proceedings by class members who have not yet opted out. However, as the *CenturyLink* court reasoned when staying mass arbitrations orchestrated by Keller Lenkner, a stay is "necessary to properly manage the disposition of this case and enforce the Court's Preliminary Approval Order, including avoiding confusion among class members, ensuring proper notice, and preserving resources." *CenturyLink*, 2020 WL 869980, at *5 (D. Minn. Feb. 21, 2020). All of that is equally true in this case. Specifically, a stay serves several important purposes. *First*, it avoids inadvertent waiver of rights and facilitates class members' individualized decision-making by requiring a conscious choice between participating in the Settlement and prosecuting a claim separately. *Second*, it protects Intuit from the possibility of improper double recoveries while the opt-out process is ongoing. And, *third*, it prevents parties from unnecessarily incurring the costs

of arbitration while class members consider whether to participate in the Settlement or proceed in arbitration. Those costs include millions of dollars in arbitrations fees for cases the Settlement may well resolve. The Nine Movants offer no persuasive response to any of those points, each of which is sufficient to justify this Court's exercise of its authority under the All Writs Act to enter a stay "in aid of" its jurisdiction. 28 U.S.C. § 1651(a).

Indeed, as the Nine Movants ignore, a class settlement is the paradigmatic case for staying parallel actions under the All Writs Act, which confers broad authority to enjoin "persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1974); *see also, e.g.*, *Makekau v. State*, 943 F.3d 1200, 1205 (9th Cir. 2019). That includes the power to enjoin proceedings that would "interfere, derogate, or conflict with federal judgments, orders, or settlements." *In re Volkswagen "Clean Diesel" Mktg., Sales Prac. and Prods. Liab. Litig.*, 229 F. Supp. 3d at 1073 (quoting *Keith v. Volpe*, 118 F.3d 1386, 1390 (9th Cir. 1997)). As courts have repeatedly held, the risk of such interference is especially high in class settlements: "In complex cases where certification or settlement has received conditional approval, or … where settlement is pending, the challenges facing the overseeing court are such that it is likely that almost any parallel litigation in other fora presents a genuine threat to the jurisdiction of the federal court." *In re Diet Drugs*, 282 F.3d 220, 236 (3d Cir. 2002). For that reason, "[t]his type of injunctive relief is commonly granted in preliminary approvals of class-action settlements." *In re Uponor, Inc., F1807 Plumbing Fitting Prods. Liab. Litig.*, 2012 WL 13065005, at *8 (D. Minn. Jan. 19, 2012); *see also, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998) (affirming "temporary approval" of "nationwide settlement" that "stayed … state class actions"), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Diet Drugs*, 282 F.3d at 236 (collecting examples).

Here, the Nine Movants are members of the proposed settlement class who also have pending arbitrations. If their actions—and those of other Keller Lenkner clients—proceed during the opt-out period, Intuit may be subject to conflicting determinations and improper duplicative recoveries as well as substantial arbitration fees for cases that could ultimately be abandoned.

Without a stay, class members may also fail to consider the tradeoffs of settling versus proceeding in arbitration and fail to make an informed, individual choice based on their personal circumstances.

The Nine Movants contend that a stay would violate the FAA. Mot. to Intervene at 10-11. But the FAA requires only that agreements to arbitrate be enforced "according to their terms." *Volt Info. Scis. Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *see also* 9 U.S.C. § 2.[11] The Terms authorize the Nine Movants to assert claims in individual arbitration (or small claims court) if they so choose. Nothing in the Terms or the FAA gives the Nine Movants the right to be excluded from a class settlement without affirmatively opting out.

Nor have the Nine Movants identified *any* actual prejudice to their "contractual and statutory rights." Mot. to Intervene at 9. To the contrary, their right "to arbitrate can be fulfilled, even if it is deferred in light of the issuance of a temporary stay." *Allstate Ins. Co. v. Elzanaty*, 929 F. Supp. 2d 199, 217 (E.D.N.Y. 2013). As the Nine Movants concede, the stay "would be temporary" (Mot. to Intervene at 10), lifting as soon as they opt out if they so choose. That is much more limited than the stay in *CenturyLink*, which did not terminate until the court's final approval order. 2020 WL 869980, at *1. Here, the Nine Movants would be enjoined from arbitrating only until they decide *not* to participate in the settlement by submitting a valid opt-out, at which point they are free to immediately proceed in arbitration. The stay thus poses no risk of delaying the Nine Movants' arbitrations beyond the time needed for them to make informed choices about *whether* to forgo the proposed settlement and proceed in arbitration.

The Nine Movants note that many stays under the All Writs Act involve litigation rather than arbitration (Mot. to Intervene at 11), but they offer no reason why the right to litigate is less important than the right to arbitrate. As countless cases show, courts can and do just as readily stay parallel arbitrations under the All Writs Act. *See, e.g.*, *Bank of Am., N.A. v. UMB Fin. Servs., Inc.*, 618 F.3d 906, 914-15 (8th Cir. 2010); *CenturyLink*, 2020 WL 869980, at *6-7; *Uponor*, 2012 WL 13065005, at *8-9; *Allstate*, 929 F. Supp. 2d at 219-20; *Stott v. Capital Fin. Servs., Inc.*,

[11] Acting consistently with this law, the AAA has stated that it will "abide by any court order directed to the parties specifying the manner in which the underlying arbitrations should, or should not, proceed." Cole Decl. ¶ 24.

277 F.R.D. 316, 340 (N.D. Tex. 2011).

Finally, the Nine Movants say that "courts have specifically rejected the notion that a district court may enjoin arbitration to facilitate administration of a class-action settlement" (Mot. to Intervene at 10-11), but the sole case they cite—*In re Piper Funds, Inc., Institutional Gov't Income Portfolio Litig.*, 71 F.3d 298 (8th Cir. 1995)—rests on unique facts not present here. There, a large institutional investor filed an arbitration demand irrevocably electing not to participate in a class action, as required by the applicable arbitration rules, but the district court refused to exclude the investor and enjoined the arbitration pending approval of a class settlement. *Id.* at 299-300. The Eighth Circuit reversed, granting the investor's "request for exclusion." *Id*. at 304. Contrary to the Nine Movants' assertion, and in the words of the district court from which the opinion issued, "*Piper Funds* does not stand for the proposition that a settlement class member cannot be temporarily enjoined from arbitration during the notice and opt-out period." *CenturyLink*, 2020 WL 869980, at *6-7. Keller Lenkner in fact made—and the district court flatly rejected—that very argument in *CenturyLink*, where *Piper Funds* is binding. While *Piper Funds* is not binding on this Court, the *CenturyLink* court's rationale for rejecting Keller Lenkner's argument applies here: None of the Nine Movants, much less all 125,000 of Keller Lenkner's clients, is a sophisticated institutional party with a multi-million dollar claim who has irrevocably elected not to participate in the class settlement. To the contrary, they are tens of thousands of individuals who are entitled to make informed, individualized decisions about whether to participate in the Settlement. *See CenturyLink*, 2020 WL 3512807, at *7. A temporary stay to allow that to happen and avoid interference with the Settlement is perfectly consistent with *Piper Funds* and with the numerous analogous cases.

D. The Arbitration Provision Does Not Preclude Preliminary Approval

Finally, the Nine Movants' argument that the arbitration agreements between Intuit and its customers preclude Intuit from entering into a class action settlement is unavailing. *See* Mot. to Intervene at 9-10. Intuit is not advancing any type of new "settlement exception" to an arbitration clause or class action waiver. *Id.* at 9. Rather, the Settlement presents the settlement class with the opportunity to waive any conflicting contractual rights and accept the settlement or opt-out.

"As with any other contractual right, the right to arbitration may be waived." *Serv. Emps. Int'l Union, Local 1021 v. Cnty. of San Joaquin,* 202 Cal. App. 4th 449, 459 (2011). Because a settlement class is not certified until final approval following the opt-out period, any of Keller Lenkner's clients who instead elect to proceed in arbitration "can vindicate that right by opting out of the Settlement Class." *CenturyLink*, 2020 WL 869980, at *7.

Nothing in the Terms provides the Nine Movants a right to block Intuit from entering into a class settlement or a right to be treated as excluded from a class settlement at the outset without affirmatively opting out. The Nine Movants, of course, have the right to bring individual arbitrations (as opposed to mass arbitrations coordinated as a *de facto* class action) in accordance with the Terms. And they have the right—grounded in due process, not the Terms—to opt out of a class settlement to prosecute their claims separately. *See, e.g.*, *Dukes*, 564 U.S. at 363. The notion, however, that the Terms' class-action waiver prohibits a class settlement, or otherwise overrides the notice and opt-out procedures dictated by Rule 23, flies in the face of case after case approving class settlements involving arbitration agreements with similar class-action waivers. *See, e.g.*, *Wilson*, 2019 WL 2929988, at *7 (approving class action settlements where class members were bound by arbitration agreements "that explicitly required arbitration on an individual basis"); *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d at 999 (approving consumer class action settlement where the defendant's terms contained a "contractual arbitration clause … that contains a class action waiver"); *Lee*, 2014 WL 12580237 at *1, 7-9 (same); *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1042 (S.D. Cal. 2015) (same).

The Nine Movants are also wrong to assert that in state court, Intuit "did not dispute that including the Arbitration Claimants in a class settlement breaches the plain meaning of its arbitration agreement." Mot. to Intervene at 9. Intuit made the exact same argument there as here: There is "no case supporting [Movants'] notion that [class-action waivers] confer a right to exclude oneself from a settlement class at the outset to avoid a court-supervised opt-out process." Opp. to Prelim. Inj. at 15, *Intuit Inc. v. 9,933 Individuals*, No. 20STCV22761 (L.A. Super. Ct. Nov. 6, 2020).

Even on its face, the class-action waiver does not bar Intuit from entering into a class

settlement. Of course, by entering into a class settlement, Intuit would waive its right to enforce the arbitration provision, including the class-action waiver. But in so doing Intuit would still be acting as an individual defendant, not "as a plaintiff or class member in any purported class or representative proceeding." Terms § 14 (capitalization omitted). And only consumers, not Intuit, "waive the right to participate in a class action" under the Terms. *Id*. The Nine Movants therefore have it backwards in arguing that the class-action waiver somehow *confers* a right that can be enforced against Intuit. Mot. to Intervene at 9.

The Nine Movants also contend that they "have not waived their right to avoid class proceedings in court," *id.*, but the Settlement does not operate as a waiver of the class members' right to arbitrate since they can simply opt out of the Settlement.[12] As Judge Green put it when denying Keller Lenkner's motion for a preliminary injunction in Los Angeles Superior Court, Keller Lenkner's position that its clients "have a contractual right to *not* settle their case" is "odd." Cole Decl., Ex. 10 at 6 (emphasis in original). "Of course [Keller Lenkner's clients] have a right to decline a settlement offer. . . . The existence of a prior contract has nothing to do with it. And on the flip side of the coin . . . they have a right to *accept* a settlement." *Id.* (emphasis in original). Thus, there is no basis in the Terms, or otherwise, for preventing the Settlement from being presented to each class member in accordance with the procedures of Rule 23, so that she makes her own informed decision.

CONCLUSION

For the foregoing reasons, Intuit respectfully requests that the Court: (1) deny the Motion to Intervene and the relief requested therein; (2) deny *Amici*'s Motion and the relief requested therein, and (3) grant Plaintiffs' Motion for Preliminary Approval of the Parties' Settlement.

[12] The Nine Movants cite to wholly irrelevant case law on this point. Mot. to Intervene at 10. In *Marcotte v. Micros Sys.*, the court had before it competing declarations regarding whether one party had verbally told the other it would not enforce a forum selection clause. 2014 WL 5280875, at *4 (N.D. Cal. Oct. 14, 2014). The court found it "doubtful" the party had "freely abandoned its contractual right," which was insufficient to meet the standard of "clear and convincing" proof of waiver. *Id. United States v. Park Place Assocs., Ltd.* involved a motion to vacate an arbitration award based on the prevailing party's alleged waiver of the right to arbitrate. The Ninth Circuit acknowledged the heavy burden of proof to find waiver of arbitration, while holding that the party had not waived its arbitration rights because it "only moved the battle from one venue to another." 563 F.3d 907, 921 (9th Cir. 2009).

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