No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARDONE CAPITAL, LLC; GRANT CARDONE;
CARDONE EQUITY FUND V, LLC; CARDONE EQUITY FUND VI, LLC,
Petitioners,

v.

CHRISTINE PINO,
on behalf of herself and all others similarly situated,
Respondent.

On Petition for Permission to Appeal from the United States District Court for the Central District of California, No. 2:20-cv-08499-JFW-KS
Hon. John F. Walter, U.S. District Judge

PETITION FOR PERMISSION TO APPEAL CLASS CERTIFICATION DECISION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

Rule 23(f) was created to promote immediate appellate review of class certification decisions like the one presented here. The district court's order granting certification (i) conflicts with the governing statute, (ii) creates conflicts both within this Circuit and with the law outside of it, and (iii) improperly relies on class members' ability to opt-out *post-certification* to resolve conflicts between the interests of Plaintiff and the class she seeks to represent that must be addressed *before* certifying a class. These are important issues with implications well beyond this case. The Court should grant this petition to correct the district court's errors and resolve the conflicts it created.

This is a securities class action in which Plaintiff Christine Pino alleges that Defendants[1] violated Section 12(a)(2) of the Securities Act by making false or misleading statements when marketing two real estate investment funds, Cardone Equity Fund V and Fund VI. By its plain language, Section 12(a)(2) requires a plaintiff to prove that he/she did not have "actual knowledge" of the alleged misstatements or omissions when

[1] Defendants are Cardone Capital, LLC, Grant Cardone, Cardone Equity Fund V, LLC, and Cardone Equity Fund VI, LLC.

acquiring the securities at issue. *See New Jersey Carpenters Health Fund v. Rali Series 2006-QO1 Tr.*, 477 F. App'x 809, 813 n.1 (2d Cir. 2012). To obtain class certification under Rule 23(b)(3) in a Section 12 case, the plaintiff must also show that it can satisfy this requirement for all class members with common proof that would predominate over individualized inquiries. *See Vignola v. Fat Brands, Inc.*, 2020 WL 1934976, at *4 (C.D. Cal. Mar. 13, 2020). That poses an insurmountable hurdle to class certification where, as here, the allegedly omitted or misstated information was widely and publicly available at the time of the investments. *Id.* at *4-5.

Plaintiff alleges that Defendants violated Section 12(a)(2) by, among other things, (i) failing to disclose an SEC comment letter asking Cardone Capital to remove from the offering circular for Fund V a projected 15% internal rate of return ("IRR"); and (ii) purportedly misrepresenting on social media that Grant Cardone would personally be responsible for paying service on the Funds' debt. *See* Dkt.127. But the "truth" of those purported misstatements was widely available to investors before investing. The SEC's comment letter, and Cardone Capital's response agreeing to remove the 15% projection, were publicly

available on the SEC's free website.[2] And, as Plaintiff admits, the offering circulars for Funds V and VI accurately disclosed that income from the properties would be used to pay the service on any debt. Dkt.173-38 at 24.[3] Thus, any investor who read the publicly available SEC letter or the offering circulars would have had "actual knowledge" of these alleged misstatements or omissions, negating any claim under Section 12(a)(2).

As this Court has acknowledged, the standard under Section 12(a)(2) is "'actual knowledge,'" not "constructive knowledge" of the allegedly omitted information. *Pino v. Cardone Cap., LLC* (*Pino II*), 139 F.4th 1102, 1111 (9th Cir. 2025) (quotation omitted). This Court thus previously held that the mere public existence of the SEC letter would not bar Plaintiff's individual claim under Section 12(a)(2), *id.*, but Plaintiff could not proceed on any claim alleging that the letter was omitted if she, in fact, had "actual knowledge" of it at the time of

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[2] *See* Cardone Equity Fund V, LLC, SEC Staff No-Action Letter (July 30, 2018), *available at* http://www.sec.gov/Archives/edgar/data/1741665/000000000018023480/filename1.pdf; *see also* Cardone Equity Fund V, LLC, Amendment No. 1 (Form 1-A) (Aug. 1, 2018), http://edgar.secdatabase.com/1712/147793218003767/filing-main.htm.

[3] Page references in citations to the record refer to the document's timestamp pagination.

investing. Accordingly, in the presence of such widely and publicly available information, class certification for a Section 12 case is improper because individualized inquiries into which investors had "actual knowledge" of that information would overwhelm any evidence common to the class, as another court in the same district held. *See Vignola*, 2020 WL 1934976, at *4-5.

Here, however, the district court nonetheless granted class certification, committing multiple manifest errors in doing so. *First*, the court incorrectly determined that "actual knowledge is an affirmative defense for which Defendants must present evidence to defeat predominance." Dkt.229 at 12. That conflicts with the plain language of the statute and with Second Circuit authority, which has held that lack of investor knowledge is part of Plaintiff's claim under Section 12(a)(2). *New Jersey Carpenters*, 477 F. App'x at 813 n.1. *Second*, the court imposed a standard which would require defendants in Section 12(a)(2) cases to prove that absent class members viewed the public disclosures in question to defeat predominance. That goes beyond what other courts have required in denying class certification on similar grounds, including in *Vignola*, creating an intra-9th Circuit split.

Finally, in addition to those errors, the district court erred in finding that conflicts between Plaintiff's interests and those of the class could be resolved through a post-certification opt-out process. A class member's ability to opt-out *after* the class is certified cannot resolve conflicts that must be addressed *before* the class is certified. Moreover, the conflicts here were irreconcilable.

Defendants presented unrefuted evidence showing that the relief Plaintiff seeks—a refund of investments, minus distributions to date—would make class members worse off than they would be if they retained their investments. That is why 226 of 283 investors contacted—representing approximately 30% of all invested capital in the Funds—submitted sworn declarations saying that they want nothing to do with Plaintiff's lawsuit and believe it is contrary to their interests. Dkt.195-14. Instead of grappling with this conflict, the district court disregarded it, treating class opposition as irrelevant and concluding that conflicts can be resolved through opt-out procedures. By doing so, the district court effectively absolved Plaintiff of her burden under Rule 23(a)(4).

For each reason, Defendants ask the Court to grant this petition.

BACKGROUND

A. Factual Background

Grant Cardone is a real estate entrepreneur with decades of industry experience. His firm, Cardone Capital, provides "everyday" investors access to real-estate deals that are typically reserved only for the wealthy, by allowing people to invest in this market through purchasing securities in real estate funds. In exchange for their investments, investors receive cash returns derived from the income generated by the Funds' properties and proceeds from the eventual sale of the properties at appreciated values. Dkt.195-4 ¶¶ 32, 40.

Funds V and VI were formed in 2018 and made offerings pursuant to Regulation A of the Securities Act. Dkts.195-2 at 2, 5; 195-3 at 2, 5; Dkt.127 ¶ 3. Under Regulation A, the issuer must file an offering statement/circular with the SEC and can then sell securities after the SEC qualifies that statement. *Id.* ¶¶ 43-45.

The Funds followed that process, filing preliminary offering circulars with the SEC. One of those circulars for Fund V stated the Fund would "attempt to achieve an overall Company [IRR] of fifteen (15%) percent per year." Dkt.127 ¶ 53(b). That was a projection based on a combination of the cash distributions provided from the operating

income, plus the appreciation of the properties. Dkt.195-4 ¶ 34 n.42.

In July 2018, the SEC issued a comment letter for Fund V, asking Cardone Capital to remove the 15% projection from the offering circular given Fund V's "limited operations" at the time. Dkt.130-5. The SEC did not investigate or make a finding regarding the reasonableness of the projection, which Cardone Capital had calculated based on a track record spanning decades. Cardone Capital responded to the SEC and agreed to remove the IRR projection. Dkt.66-8 at 3. Both communications are publicly available on EDGAR.

The offering circulars for Fund V and VI became final in December 2018 and September 2019, respectively. Dkts.195-2; 195-3. The circulars explained how the Funds would work, including that the Funds' debts would be paid using the properties' income, and warned of the risks for the investment, including cautioning that there was no guarantee of any return.[4] Dkt.195-2 at 16, 48; 195-3 at 16, 48.

Plaintiff, Ms. Pino, did not invest in Funds V or VI but rather inherited this lawsuit from her father, Luis Pino, after he passed. Mr.

[4] Mr. Cardone is also a personal guarantor on all financing for the Funds that required a guarantee. Dkt.195-4 ¶ 69.

Pino invested $5,000 in each of the Funds in 2019. Dkt.195-12 ¶¶ 4, 7. Approximately one year later, Mr. Pino filed this putative class action, seeking rescission for all investors in the Funds. Dkt.1.

Mr. Pino did so despite the Funds having performed consistent with Cardone Capital's projections. For example, the crux of the lawsuit challenges projections of a 15% IRR and annual cash returns of 5%, yet the Funds have performed consistently with those projections. *See* Dkt.195 at 13-15. And currently the value of the Funds' properties are approximately 2X their total equity investment, with investors standing to benefit from that appreciation. *Id*.

B. Procedural Background

This case has been before this Court on two prior occasions. After the district court dismissed Mr. Pino's complaint, Dkt.94, this Court reversed in part, allowing Mr. Pino to replead his claims under the standard for opinion statements. *Pino v. Cardone Cap., LLC*, 55 F.4th 1253 (9th Cir. 2022).

After Mr. Pino later passed away, Ms. Pino was substituted in his place, Dkt.124, and filed the operative second amended complaint ("SAC"), Dkt.127, alleging three categories of misstatements. *First*,

Plaintiff challenges projections that the Funds would have IRRs of 15% after ten years—a time period that has not yet been reached for either Fund. *Id.* ¶¶ 56-57. Plaintiff alleges that such statement was misleading, at least in part, for failing to disclose the SEC comment letter mentioned above. *Id.* ¶¶ 66-67, 69. *Second*, Plaintiff challenges projections that annualized cash distributions would be approximately 5%. *Id.* ¶¶ 72-73. *Third*, Plaintiff challenges one statement about the Funds' debt, made on Instagram, which said, in part, "[W]ho is responsible for the debt? The answer is, Grant!" *Id.* ¶ 86.

The district court dismissed the SAC, Dkt.137, but this Court again reversed on appeal. *Pino II*, 139 F.4th at 1110. Plaintiff later moved for class certification, which Defendants opposed.

Defendants argued that Ms. Pino failed to satisfy (i) Rule 23(b)(3)'s predominance requirement because the information she alleges was withheld from investors was widely, publicly available such that individualized inquiries into "actual knowledge" would be necessary, and (ii) Rule 23(a)(4)'s adequacy requirement because the relief she seeks is contrary to the interests of the class. In support of the latter, Defendants submitted sworn declarations from 226 investors—representing

approximately 30% of the Funds' invested capital—attesting that the Funds have "paid returns consistent with [their] expectations," the investors are "fully satisfied with the performance of [their] investment(s)," the investors want to "maintain [their] investment(s) until the end date of the fund" "to realize the increase in value in the real estate underlying each fund," and the investors "would be harmed by, and would therefore oppose, any result in this lawsuit that would terminate [their] investment(s) ...." *See* Dkt.195-14.

The district court, however, certified the class. Despite the plain language of Section 12(a)(2) and authority from the Second Circuit to the contrary, the court held that "actual knowledge is an affirmative defense for which Defendants must present evidence to defeat predominance." Dkt.229 at 12. The court then held that Defendants failed to present evidence showing that absent class members viewed the public disclosures in question and could not defeat predominance without doing so. *See id.* The court also held that investor declarations were not relevant to the adequacy analysis because they reflected the views of a "small" subset of investors who merely desired to maintain an "'allegedly unlawful status quo,'" *id.* at 6 (quoting *Anderson v. Boyne USA, Inc.*, 2023

WL 4235827, at *9 (D. Mont. June 28, 2023)), and that any conflict could be "'remedied by the standard opt-out procedure,'" *id.* (quoting *Zakinov v. Ripple Labs*, 2023 WL 4303644, at *4 (N.D. Cal. June 30, 2023)).

QUESTIONS PRESENTED

1. Did the district court err in holding that "actual knowledge" is an affirmative defense to a Section 12(a)(2) claim rather than a required element of Plaintiff's prima facie case, thus improperly shifting the burden of proof to Defendants for purposes of the predominance inquiry?

2. Did the district court err by requiring Defendants to provide evidence that absent class members viewed the public disclosures in question to show that individualized inquiries into investor knowledge would be necessary to resolve the claims and thus defeat predominance?

3. Did the district court err by holding that the opt-out mechanism post-certification is sufficient to cure conflicts between the interests of Plaintiff and those of the class?

RELIEF SOUGHT

The Court should grant permission to appeal the district court's class certification order.

STANDARD OF REVIEW

This Court has "broad discretion" in deciding whether to grant permission to pursue a Rule 23(f) appeal. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 960 (9th Cir. 2005) (per curiam). Review is "most appropriate" in three scenarios: (1) when "the district court's class certification decision is manifestly erroneous"; (2) when "the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review"; or (3) when the district court issues a questionable class certification decision that will likely sound the death knell for the litigation "independent of the merits of the underlying claim." *Id.* at 959. All three are present here.

REASONS FOR PERMITTING AN APPEAL

I. The District Court's Predominance Analysis Is Flawed and Creates Conflicts Between Circuits and Within This Circuit.

Defendants showed that predominance could not be satisfied because the very information that Plaintiff claims was withheld from investors—*i.e.*, the SEC's comment letter and how the Funds' debt would be paid—was widely and publicly available to investors. *See* Dkt.195. As a result, it was likely that "before investing, some purchasers came upon,

or discovered or were exposed to this allegedly omitted information." *Id.* at 25 (quoting *Vignola*, 2020 WL 1934976, at *5). And to prove which class members knew about "this publicly available and widely known omitted information would require individualized inquiries" sufficient to defeat predominance. *Id.* (quoting *Vignola*, 2020 WL 1934976, at *5).

The district court erred in rejecting these arguments.

A. Lack of Investor Knowledge Is a Required Element of Plaintiff's Section 12(a)(2) Claim.

Contrary to the district court's finding, "actual knowledge" is not an affirmative defense for which Defendants bear the burden of proof. Section 12(a)(2) allows a plaintiff to proceed against "[a]ny person who ... offers or sells a security ... by means of a prospectus or oral communication, which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements ... not misleading (*the purchaser not knowing of such untruth or omission*)[.]" 15 U.S.C. § 77*l*(a) (emphasis added). This language differs from Section 11, which states that a purchaser may bring a claim "*unless it is proved* that at the time of such acquisition he knew of such untruth or omission." 15 U.S.C. § 77k(a) (emphasis added).

Noting this difference, the Second Circuit has held that plaintiffs in

Section 12(a)(2) cases carry the burden of affirmatively proving that they did not know of the alleged misstatements or omissions at the time of investing. *See New Jersey Carpenters*, 477 F. App'x at 813 n.1 ("Because the language of Section 12 differs as to knowledge, we place the burden on a plaintiff in a Section 12(a)(2) claim to show lack of knowledge."); *see also In re Lehman Bros. Sec. & ERISA Litig.*, 2013 WL 440622, at *3 (S.D.N.Y. Jan. 23, 2013) ("[L]ack of knowledge of an alleged misstatement is part of a plaintiff's affirmative claim for Section 12(a)(2) relief."); *Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings Inc.*, 33 F. Supp. 3d 455, 476 (S.D.N.Y. 2014) ("[U]nder Section 12(a)(2) . . . the burden is on [plaintiff] to prove the absence of [] knowledge as an element of its claims.").

Despite the plain language of the statute and Second Circuit authority, the district court held that investor knowledge "is an affirmative defense for which Defendants must present evidence to defeat predominance." Dkt.229 at 12. The district court thus placed the burden on Defendants to present evidence on a required element of Plaintiff's claim. That was manifest error. It is Plaintiff's burden to identify evidence "common to the class members generally that would

permit or warrant a finding of lack of knowledge," *Lehman*, 2013 WL 440622, at *3, and she has not done so here.

None of the cases cited by the district court support its reading of Section 12(a)(2). The court pointed to *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158, 175 (S.D.N.Y. 2003), which predates the Second Circuit's opinion in *New Jersey Carpenters*, and is thus no longer good law. The district court's reliance on *Boston Retirement System v. Uber Technologies, Inc.*, 2022 WL 2954937, at *3 (N.D. Cal. July 26, 2022), is similarly misplaced. There, the court stated that "[a]ctual knowledge is a defense to claims under Sections 11 and 12," *id.*, but did so without citing any authority and without any analysis of the differing language in the statutes. *See id.*

This Court has not yet addressed the issue. But if left alone, the district court's holding creates a conflict with the Second Circuit. The divergence on the required elements of a commonly asserted federal claim will create confusion and encourage forum shopping among litigants. The Court should exercise its discretion to clarify its position and harmonize it with that of the Second Circuit.

B. Evidence of Class Members' Actual Knowledge Is Not Required to Defeat Predominance.

The district court further erred by imposing an unreasonably high burden on the evidence defendants must provide to demonstrate that individualized inquiries will be necessary. As noted, Defendants presented evidence showing that the exact information Plaintiff claims was withheld from investors was publicly available through the SEC's website and the Funds' offering circulars. The district court held that this was not enough because Defendants did not show that absent class members viewed those disclosures. Dkt.229 at 13 ("Defendants have not identified a single investor who visited EDGAR and viewed the SEC's finding that Cardone had no basis to project a fifteen-percent IRR."); *id.* ("[T]here [is] no evidence investors knew of the SEC letter[.]").

The district court was wrong to impose such a burden on Defendants (for an issue where Plaintiff bears the burden of proof). A defendant need not present evidence that absent class members viewed public disclosures to show that individualized inquiries will be necessary. Rather, it is sufficient to show—as Defendants did—that the allegedly omitted information was widely, publicly available to investors prior to investing, such that individualized inquiries would be needed to

determine which investors had "actual knowledge" of that information. *See New Jersey Carpenters*, 477 F. App'x at 813 (absent class member discovery not necessary for a finding that individual inquiries would be necessary); *In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133, 151-53 (N.D. Tex. 2014) (finding predominance defeated where evidence of public information about the alleged omissions showed that individual inquiries would be necessary).

On this point, the district court's decision is at odds with *Vignola*, a Section 12(a)(2) case from the same district. In *Vignola*, the court denied class certification because the evidence showed it was "likely that, before investing, some purchasers came upon, or discovered or were exposed to th[e] allegedly omitted information." 2020 WL 1934976, at *5. That evidence included news articles over a span of multiple years discussing the bankruptcy information allegedly withheld from investors. *Id.* Importantly, the *Vignola* court rejected plaintiffs' argument that "Defendants [had] not proffered any evidence of actual knowledge of any putative class members." *Id.* All that mattered was whether the nature of the disclosures made it likely that investors would have come across them, therefore requiring individualized inquiries. *Id.*

The district court attempted to distinguish *Vignola* on the grounds that the allegedly omitted information there was reported in news publications, such as *Forbes* and the *LA Times*, as opposed to being available through the SEC's website and the Funds' offering circulars. Dkt.229 at 13-14. But it makes no difference how the information is published, so long as it is "widely publicly available." *Vignola*, 2020 WL 1934976, at *5. If anything, an investor would have easier access to the SEC's website, which is free and available to the public. Unlike *Forbes* and the *LA Times*, there is no paywall. And it is hard to imagine anything more publicly and widely available to investors than the very offering circulars for the investments at issue.

Instead of following *Vignola*, the district court relied on *In re Lyft Inc. Securities Litigation*, 2021 WL 3711470, at *1 (N.D. Cal. Aug. 20, 2021), but that case is inapposite. *Lyft* involved Section 11 claims, not Section 12(a)(2), so the court was evaluating individual knowledge arguments in the context of an affirmative defense, not the required elements of plaintiffs' claim. Beyond that, *Lyft* rejected defendant's arguments not because of the manner in which the information was published, but because there was a disconnect between the public

disclosures and the information allegedly withheld from investors. *Id.* at *6 ("Defendants' arguments are not based on the relevant misrepresentations and omissions alleged in the complaint, but instead on more general information[.]"). The court noted that *Lyft* was different from *Vignola*, where "there was no dispute" that the publicly available information "concretely describe[d] the purportedly omitted information." *Id.* at *7 n.6. The same is true here. There is no daylight between the allegedly withheld information—the SEC comment letter and the debt servicing—and the public disclosures discussing those items.

The tension between *Vignola* and the district court's holding will confuse courts and litigants moving forward. *Vignola* holds that defendants are not required to proffer "evidence of actual knowledge" of putative class members to defeat class certification. 2020 WL 1934976, at *5. The district court here reached the opposite conclusion, finding that defendants must obtain actual evidence showing that investors were, in fact, aware of widely available public disclosures in order to show that individualized inquiries will be necessary. Dkt.229 at 12-14. The Court should resolve this conflict in favor of *Vignola*.

II. District Court's Reliance on Opt-Out Procedures to Cure Class Conflicts Is Manifestly Erroneous.

Rule 23(a)(4) serves an important gatekeeping function by ensuring that, before a class is certified, the court has confirmed that the representative's interests are aligned with the class. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 895 F.3d 597, 606 (9th Cir. 2018). Here, the evidence established an irreparable conflict between Ms. Pino and the class members she purports to represent. The district court erred in discarding that conflict.

A. Ms. Pino Seeks Relief that Is Contrary to the Class's Interests.

Plaintiff's requested remedy in this case—rescission of class members' investments—would require investors to surrender their investments in exchange for a refund of their invested capital, minus distributions to date (and attorneys' fees). 15 U.S.C. § 77*l*(a). That relief would injure every putative class member by putting them in a worse financial position than if they retained their investments. Dkt.195 at 13-17. The fact that Ms. Pino seeks a remedy at odds with the interests of the class renders her an inadequate representative. *Alberghetti v. Corbis Corp.*, 263 F.R.D. 571, 577-78 (C.D. Cal. 2010) ("It is well-established that

class representatives are inadequate if they seek relief that putative class members do not wish to seek."), *aff'd*, 476 F. App'x 154 (9th Cir. 2012).

Despite this evidence, the district court held that the investor declarations supporting a conflict were irrelevant to the class certification analysis, relying on *Laumann v. NHL*, 105 F. Supp. 3d 384 (S.D.N.Y. 2015), for the proposition that a representative is not inadequate where "some putative class members prefer an allegedly unlawful status quo." Dkt.229 at 6 (quoting *Anderson*, 2023 WL 4235827, at *9). But Defendants did not argue—nor do the declarations suggest—that this is a case where "some putative class members prefer an allegedly unlawful status quo." *Id.* Rather, Defendants presented evidence showing that the relief Plaintiff seeks would make class members worse off than they are without this case. Dkt.195 at 13-17. That was shown from the basic metrics of the relief Plaintiff seeks and the value of the investments to date. And it was shown from investors representing 30% of invested capital in the Funds, who attested that (i) the Funds have "paid returns consistent with [their] expectations," (ii) the investors are "fully satisfied with the performance of [their] investment(s)," (iii) the investors want to "maintain [their] investment(s)

until the end date of the fund" "to realize the increase in value in the real estate underlying each fund," and (iv) the investors "would be harmed by, and would therefore oppose" rescission. *See* Dkt.195-14.

The district court's reliance on *Laumann*, 105 F. Supp. 3d 384, mischaracterizes the nature of the conflict here. Unlike *Laumann*, where the alleged unlawful conduct operated to help certain class members and harm others, the relief sought here is directly at odds with the financial interests of all class members. 105 F. Supp. 3d at 400.

The district court's reliance on *Anderson* and *Martinez* is equally misguided. Dkt.229 at 6 (citing *Anderson*, 2023 WL 4235827, at *8-9 and *Martinez v. Flower Foods, Inc.*, 2016 WL 10746664, at *9 (C.D. Cal. Feb. 1, 2016)). In *Anderson*, defendants submitted declarations from only four putative class members who opposed relief, and the declarants all had conflicts of interest that undermined their credibility. 2023 WL 4235827, at *8. Similarly, in *Martinez*, the declarants comprised less than 4% of the potential class, and "did not even express unequivocal objection to the current lawsuit." 2016 WL 10746664, at *9. The 226 investor declarations submitted in this case, by contrast, account for nearly 30% of the invested capital and unequivocally express the investors' fundamental opposition

to this lawsuit. There is nothing about the declarations that indicates they are not a trustworthy representation of the class as a whole. The district court's conclusion to the contrary is manifestly erroneous.

B. Opt-Out Procedures Cannot Cure a Failure to Satisfy Rule 23(a)(4)'s Adequacy Requirement.

Ms. Pino cannot "cure" this conflict by "providing potential class members opt-out rights" because "'the opt out provisions of Rule 23(c)(2) may not be used to achieve compliance with the prerequisites of 23(a).'" *Morris v. Wachovia Sec., Inc.*, 223 F.R.D. 284, 296-99 (E.D. Va. 2004) (quoting *Lukenas v. Bryce's Mountain Resort, Inc.*, 66 F.R.D. 69, 72 (W.D. Va. 1975), *aff'd*, 538 F.2d 594 (4th Cir. 1976)). If opt-out rights could excuse a class representative's fundamental conflict with absent class members, as the district court held here, the adequacy requirement would be rendered a nullity. Any class representative—no matter how antagonistic her interests—could survive scrutiny simply because class members retain the theoretical ability to exit. That is not what Rule 23 contemplates. *See Abercrombie v. Lum's Inc.*, 345 F. Supp. 387, 394 (S.D. Fla. 1972) ("Plaintiffs also argue that any such deficiencies in their case can be overcome by a member's 'opting out' (Rule 23(c) (2)) if he feels his case is better or different. However, the prerequisites set forth in Rule

23(a) and (b) must first be satisfied before the notice provisions of 23(c) even become applicable."); *see also Aamco Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440, 447 (E.D. Pa. 1975) (collecting cases).

The district court's own cited authorities only confirm that opt-out procedures cannot cure this conflict. *See* Dkt.229 at 6 (citing *Zakinov*, 2023 WL 4303644, at *4 and *Alfred v. Pepperidge Farm, Inc.*, 322 F.R.D. 519, 541-42 (C.D. Cal. 2017)). In *Alfred*, the court concluded that the plaintiffs were inadequate representatives because their financial interests diverged from approximately 200 putative class members. 322 F.R.D. at 540. The court remedied this conflict by creating a subclass to represent these putative class members' interests. *Id.* at 540-41. Defendants here have similarly presented evidence that investors oppose the relief sought in this litigation and that their financial interests conflict with Ms. Pino's. Subclasses, however, cannot solve this conflict as these investors do not want the proposed rescissory relief at all. *Alfred* thus confirms that opt-out rights are not a substitute for adequacy, and where conflicts arise in the basic objective of the litigation, certification should be denied.

Zakinov fares no better. There, the plaintiff alleged that the

cryptocurrency issued by the defendants was a "security" and that the failure to register the cryptocurrency violated federal and state law. 2023 WL 4303644, at *1. The defendants argued that plaintiff and the putative class members had an irreconcilable conflict because some putative class members subjectively believed that the cryptocurrency was not a security. *Id.* at *3. The court rightly rejected this argument because the test for a security "is an objective one" and so defendants' arguments about potential class conflicts were "inapposite." *Id.* at *3-4. That reasoning has no application here. The conflict in this case does not turn on subjective understandings of the law. It turns on the economic consequences of the sole remedy Ms. Pino seeks in this litigation.

In sum, the district court certified a class notwithstanding undisputed evidence that Plaintiff seeks relief that is contrary to the interests of the class. That is precisely the type of fundamental conflict Rule 23(a)(4) is designed to prevent. By treating opt-out rights as a cure for a failure of adequacy, the district court inverted Rule 23's gatekeeping requirements and rendered the adequacy inquiry meaningless.

III. Failure to Grant this Petition Could Sound the Death-Knell of this Litigation, Preventing Review of Fundamental Issues of Class Action Law.

Interlocutory review is also necessary because "the damages claimed" in this case may well force Defendants to "settle without relation to the merits of the class's claims" and make it impossible for this Court to address the fundamental issues raised. *Chamberlan*, 402 F.3d at 960 (quotation omitted). Plaintiff seeks to certify a class of several thousand investors, seeking recissions for investments of approximately $80 million. "[W]hen the stakes are large," there is a substantial "risk of a settlement or other disposition that does not reflect the merits of the claim," heightening the need for interlocutory review. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). Litigation of this nature rarely proceeds to trial, meaning this Court will rarely, if ever, have the opportunity to address these critically issues after judgment. Interlocutory review is likely the only path for the Court to provide needed guidance.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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April 10, 2026

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the type-volume limitation of Fed. R. App. P. 5(c)(1) because this petition contains 5,199 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

Date: April 10, 2026

/s/ Joseph N. Akrotirianakis
Joseph N. Akrotirianakis

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2026, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the ACMS system.

I further certify that I have served the foregoing document to the following counsel via email and third-party carrier UPS, postage prepaid, for delivery within 3 calendar days, to the following:

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