87 F.4th 994
United States Court of Appeals, Ninth Circuit.

Lisa KIM, individually and on behalf of all others similarly situated, Plaintiff-Appellee,
v.
Rich ALLISON and Steve Frye, Objectors-Appellants,
v.
Tinder, Inc., a Delaware corporation; Match Group, LLC, a Delaware limited liability company and Match Group, Inc., a Delaware corporation, Defendants-Appellees.
Lisa Kim, individually and on behalf of all others similarly situated, Plaintiff-Appellant,
v.
Tinder, Inc., a Delaware corporation; Match Group, LLC, a Delaware limited liability company and Match Group, Inc., a Delaware corporation, Defendants-Appellees.
and
Rich Allison and Steve Frye, Objectors

No. 22-55345, No. 22-55346
|
Argued and Submitted September 11, 2023 Pasadena, California
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Filed December 5, 2023

Synopsis

Background: Mobile dating application subscriber who was over 30 years old brought putative class action against owner of application alleging that reduced pricing for application's premium services for subscribers under 30 years old violated California's Unruh Civil Rights Act and unfair competition statute. After grant of motion to compel arbitration of subscriber's claims, the United States District Court for the Central District of California, John F. Walter, J., 2019 WL 2576367, certified class for settlement purposes and approved class action settlement. Objectors appealed. The Court of Appeals, 8 F.4th 1170, reversed and remanded. The District Court, 2022 WL 1051851, certified class and approved settlement. Objectors appealed.

Holdings: The Court of Appeals, Smith, Circuit Judge, held that:

[1] subscriber had conflict of interest precluding adequate representation of class based on her being subject to binding arbitration, and

[2] subscriber did not vigorously litigate case on behalf of class as a component of adequate representation.

Order vacated; reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Final Approval of Class Action Settlement; Motion to Certify Class; Motion to Take Judicial Notice; Motion for Attorney's Fees.

West Headnotes (17)

[1] Evidence Particular Cases

Court of Appeals would take judicial notice of publicly-filed documents in parallel class action litigation, on

appeal of approval of class action settlement in action alleging that reduced pricing for mobile dating application's premium services for subscribers under 30 years old violated California's Unruh Civil Rights Act and unfair competition statute. Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Civ. Code § 51 et seq.

[2] **Federal Courts** Particular cases

Plaintiff's appeal of award of attorney fees to objectors upon approval of class action settlement of a pricing dispute with owner of mobile dating application was moot, where Court of Appeals vacated the district court's approval of the settlement.

[3] **Federal Courts** Class actions

Court of Appeals reviews class certification for an abuse of discretion. Fed. R. Civ. P. 23.

[4] **Federal Courts** Class actions

Court of Appeals pays heightened attention when reviewing class certification where the district court certified a class for settlement purposes only. Fed. R. Civ. P. 23.

[5] **Federal Civil Procedure** Factors, grounds, objections, and considerations in general

Federal Civil Procedure Representation of class; typicality; standing in general

Before certifying a class, a district court must ensure that the class satisfies the prerequisites of class action rule, including that the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4).

[6] **Compromise, Settlement, and Release** Adequacy of representation

Adequacy-of-representation requirement for class certification is relevant to the court's inquiry into whether a proposed class settlement is fair. Fed. R. Civ. P. 23(a)(4), 23(e).

[7] **Federal Civil Procedure** Representation of class; typicality; standing in general

Adequacy-of-representation requirement for class certification is addressed by asking (1) whether the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) whether the named plaintiffs and their counsel

prosecute the action vigorously on behalf of the class. Fed. R. Civ. P. 23(a)(4).

[8] **Federal Civil Procedure** Representation of class; typicality; standing in general

Initial inquiry in assessing adequacy-of-representation requirement for class certification is whether the named plaintiffs and their counsel have any conflicts of interest with other class members. Fed. R. Civ. P. 23(a)(4).

[9] **Federal Civil Procedure** Representation of class; typicality; standing in general

General standard for assessing adequacy-of-representation requirement for class certification, asking whether named plaintiffs and their counsel have any conflicts of interest with other class members, must be broken down for specific application; conflicts within classes come in many guises. Fed. R. Civ. P. 23(a)(4).

[10] **Federal Civil Procedure** Representation of class; typicality; standing in general

Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the adequacy-of-representation requirement for class certification. Fed. R. Civ. P. 23(a)(4).

[11] **Federal Civil Procedure** Representation of class; typicality; standing in general

Inquiry into the adequacy-of-representation requirement for class certification serves to uncover conflicts of interest between named parties and the class they seek to represent. Fed. R. Civ. P. 23(a)(4).

[12] **Federal Civil Procedure** Representation of class; typicality; standing in general

Inquiry into the typicality requirement for class certification involves a more permissive standard than the adequacy-of-representation inquiry, simply asking whether a named representative's claims are reasonably co-extensive with those of absent class members. Fed. R. Civ. P. 23(a)(3, 4).

[13] **Federal Civil Procedure** Representation

of class; typicality; standing in general

While a lack of typicality can indicate that a class representative may be inadequate, the typicality and the adequacy-of-representation requirements for class certification are not the same. Fed. R. Civ. P. 23(a)(3, 4).

[14] **Compromise, Settlement, and Release** Adequacy of representation

Federal Civil Procedure Consumers, purchasers, borrowers, and debtors

Named plaintiff, a mobile dating application subscriber who was subject to a binding arbitration order, had a conflict of interest with putative settlement-only class that precluded her from satisfying adequacy-of-representation requirement for class certification in action alleging that reduced pricing for application's premium services for subscribers under 30 years old violated California's Unruh Civil Rights Act and unfair competition statute, where there was no evidence of an agreement to arbitrate as to over 7,000 members of class that was certified for settlement, plaintiff's entire dispute might have been governed by Texas law, and the limitation on liability in application's terms of use would have limited plaintiff's recovery to an amount that was significantly less than what the Unruh Act provided. Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Civ. Code §§ 51 et seq., 52(a); Fed. R. Civ. P. 23(a)(4).

[15] **Compromise, Settlement, and Release** Adequacy of representation

Federal Civil Procedure Consumers, purchasers, borrowers, and debtors

A percentage-of-the-class formula could not be used to conclude that named plaintiff's conflict of interest with a putative settlement-only class of approximately 7000 members of a class of 240,000 persons, due to her being subject to binding arbitration order, was insignificant so that plaintiff would satisfy the adequacy-of-representation requirement for certification of class for settlement purposes in action alleging that reduced pricing for a mobile dating application's premium services for subscribers under 30 years old violated California's Unruh Civil Rights Act and unfair competition statute, where there might have been even more class members who were not subject to an arbitration agreement, and five percent of a class represented a sizeable number of potential class members. Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Civ. Code § 51 et seq.; Fed. R. Civ. P. 23(a)(4).

[16] Compromise, Settlement, and Release Adequacy of representation

Federal Civil Procedure Representation of class; typicality; standing in general

Although there are no fixed standards by which vigor of representation can be assayed in determining whether to certify class, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation. Fed. R. Civ. P. 23(a)(4).

[17] Compromise, Settlement, and Release Adequacy of representation

Federal Civil Procedure Consumers, purchasers, borrowers, and debtors

Named plaintiff, a mobile dating application subscriber who was subject to a binding arbitration order, did not vigorously litigate case on behalf of the putative settlement-only class, and therefore she did not satisfy the adequacy-of-representation requirement for class certification in action alleging that reduced pricing for application's premium services for subscribers under 30 years old violated California's Unruh Civil Rights Act and unfair competition statute, where plaintiff devoted only six hours to formal and informal discovery before date of first mediation, plaintiff made vague request for unspecified discovery, the only argument plaintiff made in opposing defendant's motion to compel arbitration was that the motion would have prevented imposition of a public injunction, and plaintiff failed to make obvious arguments until after they were forfeited. Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Civ. Code § 51 et seq.; Fed. R. Civ. P. 23(a)(4).

***996** Appeal from the United States District Court for the Central District of California, John F. Walter, District Judge, Presiding, D.C. Nos. 2:18-cv-03093-JFW-AS, 2:18-cv-03093-JFW-AS

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Before: MILAN D. SMITH, JR., MICHELLE T. FRIEDLAND, and ERIC D. MILLER, Circuit Judges.

OPINION

M. SMITH, Circuit Judge:

***997** Objector-Appellants Rich Allison and Steve Frye (Objectors) appeal, for a second time, the district court's final approval of a class action settlement between Defendant-Appellees Tinder, Inc., Match Group, LLC, and Match Group, Inc. (collectively, Tinder) and Plaintiff-Appellee Lisa Kim. In the first appeal, a panel of our court reversed the district court's approval of a settlement between Tinder and Kim because its terms were suggestive of collusion. *Kim v. Allison*, 8 F.4th 1170, 1174–75 (9th Cir. 2021) (*Kim I*). On remand, the parties entered into a revised settlement, which the district court again approved over objections. Because we agree with the Objectors that Kim is not an adequate representative of the putative class, we vacate the district court's order approving the revised settlement, reverse, and remand.

FACTS AND PROCEDURAL BACKGROUND

I. Tinder's Pricing Model

Tinder is a mobile dating application that allows users in geographical proximity to view and "like" each other's profiles. Users also can send one another a "Super Like," which they can purchase for $1.59 each. *Kim I*, 8 F.4th at 1175. [1]

1 The price of a Super Like has increased from $1 each to $1.59 each during the course of this litigation. *Cf. Kim I*, 8 F.4th at 1175 (discussing $1 Super Likes).

The Tinder app is free for anyone who downloads the basic version, but users can pay extra to access certain premium features. In March 2015, Tinder unveiled "Tinder Plus," which offered purchasers a variety of premium features. *Kim I*, 8 F.4th at 1175. In 2017, Tinder launched a similar premium service called "Tinder Gold." *Id.*

Until February 2019, Tinder Plus and Tinder Gold operated on a two-tiered pricing model based on age. Specifically, Tinder charged customers over thirty around ten dollars more per month for Tinder Plus than it charged younger customers, and it charged them around fifteen dollars more per month for Tinder Gold. *Id.* (explaining that, for Tinder Plus, subscribers aged thirty years and younger paid $9.99 a month, and subscribers over thirty paid $19.99). Tinder later lowered the age cutoff from thirty to twenty-nine.

II. The Parallel Litigation

Tinder's pricing model triggered two parallel class actions: (1) *Candelore v. Tinder*, which

was filed in California Superior Court in May 2015, and (2) *Kim v. Tinder*, which was filed in the United States District Court for the Central District of California ***998** in April 2018. Although this case is only an appeal of the latter, assessment of its merits requires an understanding of both actions.

A. The *Candelore* Litigation

In May 2015, Allan Candelore filed a class action lawsuit against Tinder in state court, alleging that its age-discriminatory pricing scheme violated California's Unruh Civil Rights Act, Cal. Civ. Code §§ 51 *et seq*. (Unruh Act), and California's unfair competition law, Cal. Bus. & Prof. Code §§ 17200 *et seq*. *See Candelore v. Tinder, Inc*., 19 Cal.App.5th 1138, 228 Cal. Rptr. 3d 336, 339–40 (2018), *review denied*, No. S247527 (Cal. May 9, 2018).

Shortly after Candelore filed his suit, on July 31, 2015, Tinder began using a "sign-in wrap" method of requiring users to assent to its Terms of Use (TOU) before they could log in. The TOU agreement contained a Texas choice-of-law provision, a limited liability provision, an arbitration clause, and a waiver of participation in class actions.

Tinder never filed a motion to compel arbitration in the *Candelore* action. Instead, Tinder filed a demurrer, which the Superior Court sustained. The California Court of Appeal reversed. The Court of Appeal held that Candelore's allegations stated a claim for age discrimination under the Unruh Act and the unfair competition law, rejecting as a matter of law the argument that discrimination was justified "by public policies that promote (a) increased access to services for the general public and (b) profit maximization by [a] vendor." *Id.* at 348 (quotation marks omitted); *see also Kim I*, 8 F.4th at 1176 (characterizing the *Candelore* opinion as standing for the proposition that "if [Candelore's] allegations were true, Tinder's age-based distinction would not be justified by public policy as a matter of law"). On May 9, 2018, the California Supreme Court denied review of the Court of Appeal's decision. *See Candelore*, 228 Cal. Rptr. 3d at 351. That same day, Tinder issued an updated TOU to its users which purported to retroactively waive users' rights to join pending lawsuits, including the *Candelore* action. [2]

2 The waiver was subject to a 30-day opt-out period.

[1] Having survived demurrer, Candelore continued to litigate his action in the Superior Court. In January 2022, Candelore sought to certify the class, proposing to break the class into subclasses. The subclasses would distinguish between those class members who may have agreed to Tinder's TOU through its July 31, 2015 sign-in wrap process and those who had not, "to facilitate a carveout ... with respect to Tinder's [TOU] defense, if necessary." [3] The Superior Court denied the certification motion, but did so "without prejudice to renewal following the Ninth Circuit's ruling" in this case. [4]

3 We grant the parties' motions to take judicial notice of the publicly filed documents in the *Candalore* litigation. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo,*

Inc., 971 F.2d 244, 248 (9th Cir. 1992) (noting that courts "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" (quoting *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979)); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (noting that courts may take judicial notice of undisputed "matters of public record").

4 The *Candelore* action is currently stayed "until a ruling by [our court] as to whether the settlement" in this action "was properly approved."

B. This Action: *Kim v. Tinder*

In April 2018, approximately three years after Candelore filed his action in state ***999** court, Kim sued Tinder in the Central District of California, alleging the same Unruh Act and Unfair Competition claims as had Candelore in his state court case. Unlike in the *Candelore* litigation, however, Tinder did move to compel arbitration of Kim's claims. The district court granted the motion, because Kim had "on multiple occasions after [Tinder implemented its sign-in wrap method on] July 31, 2015, [ ] logged in to her Tinder account." The district court stayed the case pending the outcome of the arbitration.

Kim appealed the arbitration order. While the appeal was pending, however, Kim and Tinder reached a settlement, and the district court lifted the stay so that the parties could submit their settlement papers. Unlike the proposed class in *Candelore*, the proposed settlement class in *Kim* was not (and is not) divided into any subclasses. The single class is defined to include "every California subscriber to Tinder Plus or Tinder Gold during the Class Period who at the time of the subscription was at least 29 years old and was charged a higher rate than younger subscribers ...." The settlement agreement defines the Class Period as starting on March 2, 2015—almost two months before the *Candelore* litigation began.

Allison and Frye—whose counsel also represents Candelore—objected to the settlement. The district court approved the settlement over their objections, and the Objectors appealed. A panel of our court reversed the district court's order. *Kim I*, 8 F.4th at 1175. Without reaching the Objectors' challenges to class certification, the panel held that the district court had erred in evaluating the settlement. *Id.* at 1179. Our court explained that "while the district court correctly recited the fairness factors under Fed. R. Civ. P. 23(e)(2), it materially underrated the strength of the plaintiff's claims, substantially overstated the settlement's worth, and failed to take the required hard look at indicia of collusion, including a request for attorneys' fees that dwarfed the anticipated monetary payout to the class." *Id.* at 1174–75. The panel therefore remanded the case back to the district court to "conduct the 'more probing inquiry' that a pre-certification class settlement demands." *Id.* at 1175 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

[2] On remand, Kim and Tinder again settled, and entered into an Amended Class Action Settlement Agreement. Candelore and another

978 members of the class opted out; Allison and Frye again objected. Among other things, the Objectors argued that Kim was an inadequate class representative because, unlike the remainder of the class, she was subject to a binding arbitration order. The district court nonetheless certified the class and approved the settlement. The Objectors now appeal. [5]

5 The district court also awarded attorneys' fees to the Objectors' counsel, and Kim appeals that award. Because we vacate the district court's approval of the settlement, Kim's appeal regarding fees is dismissed as moot.

JURISDICTION AND STANDARD OF REVIEW

[3] **[4]** We have jurisdiction pursuant to 28 U.S.C. § 1291. While we review class certification for an abuse of discretion, *Castillo v. Bank of Am., NA*, 980 F.3d 723, 728 (9th Cir. 2020), we pay "heightened attention" where, as here, the district court certified a class for settlement purposes only. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999).

ANALYSIS

[5] **[6]** **[7]** Before certifying a class, a district court must ensure that the class satisfies ***1000** the prerequisites of Rule 23, including that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 895 F.3d 597, 606 (9th Cir. 2018). In addition, adequacy of representation is relevant to the court's inquiry into whether a proposed class settlement is fair under the revised Rule 23(e). *See* Fed. R. Civ. P. 23(e)(2)(A). The adequacy inquiry is addressed by answering two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. Here, both inquiries lead to the conclusion that Kim is not an adequate class representative.

I. Conflict of Interest

[8] **[9]** **[10]** The initial inquiry in assessing adequacy of representation is whether "the named plaintiffs and their counsel have any conflicts of interest with other class members." *Id.* "That general standard must be broken down for specific application; conflicts within classes come in many guises." *Volkswagen*, 895 F.3d at 607. "Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (quoting 1 William B. Rubenstein et al., *Newberg on Class Actions* § 3:58 (5th ed. 2011)).

The district court disposed of the Objectors' adequacy argument in the following two sentences: "Plaintiff and Class Counsel have no conflicts of interest with other Class Members because, for purposes of the Settlement, Plaintiff's claims are typical of those of other Class Members. Plaintiff and other Class

Members share the common goal of protecting and improving consumer and privacy rights throughout California, and there is no conflict among them."

[11] **[12]** **[13]** As a threshold matter, the district court conflated a class representative's adequacy with her typicality. "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The typicality inquiry, on the other hand, involves a more "permissive standard," simply asking whether a representative's claims "are reasonably co-extensive with those of absent class members." *See Castillo*, 980 F.3d at 729 (quoting *Hanlon*, 150 F.3d at 1120). While a lack of typicality can indicate that a class representative may be inadequate, *see Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010), the two inquiries are not the same.

The landmark case discussing adequacy and conflicts of interest is *Amchem Products*. In that case, the Supreme Court held that a group of named plaintiffs who included those with present injuries from their exposure to asbestos could not adequately represent a class that included members who could not yet show injury, but who might develop exposure-related injuries in the future. 521 U.S. at 625–27, 117 S.Ct. 2231. The interests of the presently injured plaintiffs conflicted with those of the exposure-only class members because the former had an interest in maximizing immediate payouts, while the latter had an interest in preserving the settlement funds for future claims. *Id.* at 626, 117 S.Ct. 2231. Thus, by maximizing their own interests, the putative representatives who already had injuries would necessarily undercut the interests of another portion of the class. *Id.*

Similarly, in *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010), we held that a ***1001** class representative who had settled his Kansas state and federal regulatory claims with Sprint could not adequately represent class members who alleged that Sprint violated Washington state laws in a follow-on suit in federal court. *Id.* at 585, 588–89. The settlement in the Kansas state court action, which preceded the federal court action, purported to release Sprint from future, broader claims such as the Washington claims. *Id.* at 586. We explained that interpreting the Kansas judgment to encompass the Washington plaintiffs' claims would violate Rule 23(a)(4) as well as due process, because the Kansas plaintiff's "interest in settling his federal [ ] claims, even at the cost of a broad release of other claims he did not possess, was in conflict with the Washington [p]laintiffs' unrepresented interest in prosecuting their [state law] claims." *Id.* at 589. We therefore held that the Kansas plaintiff's representation of the Washington plaintiffs was inadequate as to those claims. *Id.* at 588.

[14] In this case, Kim faces a conflict of interest similar to those found in *Amchem* and *Hesse*. As discussed above, the district court already held that Kim is subject to arbitration because there was evidence that she signed into her Tinder account multiple times after Tinder began using its sign-in wrap method of notifying users of the TOU. However, Tinder concedes that—at least at this point in the litigation—it lacks any evidence of

an agreement to arbitrate as to over 7,000 members of the class that was certified for settlement. Therefore, like the Kansas Plaintiff in *Hesse*, Kim has a strong "interest in settling" her claim, "even at the cost of a broad release of other claims" that are not subject to arbitration, because unlike the 7,000 or more members who may not be bound by arbitration at all, she has no chance of going to trial. *See id.* at 589.

Kim's conflict is exacerbated by other provisions of the TOU. Not only is Kim's claim subject to arbitration; her entire dispute may be governed by Texas law, in which case she may not be able to assert an Unruh Act claim at all. And even if she could assert such a claim, the TOU's limitation on liability would limit her recovery to "the amount paid, if any, by [Kim] to Tinder" during the twenty-four-month period prior to this litigation, which no one disputes is significantly less than what the Unruh Act provides. *See* Cal. Civ. Code § 52(a) (providing for damages "in no case less than four thousand dollars" for each count). [6]

6 At the same time, Kim (and only Kim) would receive a $5,000 incentive award for her role as class representative, pursuant to the revised agreement approved by the district court.

[15] Kim argues that any conflict between herself and the class is insignificant because the district court concluded that the 7,000-plus members for which there is no evidence of an agreement to arbitrate would only constitute five percent of the 240,000-member class. But there may be even more class members who are not subject to an arbitration agreement. As the Objectors note, an additional 24,000 members agreed to the May 9, 2018 version of the TOU —a retroactive waiver of rights that may be invalid under California law. [7] But even if the district court's estimate ***1002** is correct, we have never determined adequacy by deferring to a percentage-of-the-class formula. And even assuming that could be a proper approach in some case, it does not make sense to adopt that approach for the first time here, where five percent of a class represents a sizeable number of potential class members. Ultimately, Kim and her counsel's willingness to put even a minority of class members' claims at risk for a fee is precisely the kind of conflict Rule 23(a)(4) was designed to avoid.

7 *See Cobb v. Ironwood Country Club*, 233 Cal.App.4th 960, 183 Cal. Rptr. 3d 282, 286–87 (2015). Tinder argues that the TOU is governed by Texas, rather than California, law, but that is not immediately apparent from the TOU's terms, which state only that "the laws of Texas ... shall apply" *unless* "[the] arbitration agreement is prohibited by law." And while the district court noted that Kim logged in to her account "multiple times" after Tinder implemented its sign-in wrap system, it is unclear whether she ever agreed to the May 9, 2018 version of the TOU. Notably, the record does not provide answers because Kim herself never made any formation or unconscionability challenge to the TOU when opposing the motion to compel. *See* Section II *infra*.

II. Vigorous Advocacy

[16] To meet Rule 23's adequacy requirement, "plaintiffs and their counsel [must have also] prosecute[d] the action vigorously on behalf of the class." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 943 (quoting *Hanlon*, 150 F.3d at 1020). "Although there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation." *Hanlon*, 150 F.3d at 1021.

[17] In certifying the class, the district court stated that "Plaintiff and Class Counsel have been prosecuting this action vigorously on behalf of the Class," but did not elaborate. The Objectors argue that the district court erred in reaching this conclusion. We agree.

First, the Objectors argue that although the district court stated that the parties "conducted extensive informal and formal discovery ... prior to engaging in the settlement talks," Kim actually conducted "no discovery." The Objectors argue that the district court's statement to the contrary is not supported by the record evidence, because the entries submitted in support of Kim's proposed fee award "do not contain any entries referring to any review of any documents, discovery, or informational exchange with Tinder before the original mediation" on November 29, 2018.

The Objectors refer to two entries (totaling five and a half hours) for "drafting" and "finalizing" written discovery and one 30-minute entry for "discuss[ing] informal exchange of class data and information for settlement purposes" in June 2018, prior to the date of the first mediation. A month later, in its July 12, 2018 order granting Tinder's motion to compel, the district court rejected Kim's "vague request for unspecified discovery." Although this is not "no discovery," it is certainly not "extensive." *Cf. id.* at 1022 (concluding that "document request[s] and production, interrogatories, and the taking and defending of depositions" supported a determination that "counsel's prosecution was sufficiently vigorous" under Rule 23(a)(4)); Fed. R. Civ. P. 23(e)(2) advisory committee note to 2018 amendment (noting that fairness of a settlement can include consideration of "the nature and amount of discovery," which "may indicate whether counsel negotiating on behalf of the class had an adequate information base"). Kim claims that she did "engage[ ] in discovery," but the portion of her brief asserting that she vigorously litigated the case does not provide any citations to the record and her counsel similarly failed to provide citations at oral argument.

Second, Kim's approach to opposing Tinder's motion to compel is not suggestive of vigor. The only argument Kim made to oppose Tinder's motion to compel is that the motion would have prevented imposition of a public injunction and would therefore violate ***1003** *McGill v. Citibank, N.A.*, 2 Cal.5th 945, 216 Cal.Rptr.3d 627, 393 P.3d 85, 90 (2017). Although Kim and Tinder attribute this briefing to "strategy," that too is not borne out by the record, which shows that Kim belatedly raised formation challenges in a motion to file a supplemental brief. Of course, there is no strategic benefit to waiving objections to arbitration by a plaintiff who desires to maximize her leverage at the negotiating table. Class representatives will often need to choose

which arguments to pursue, and ordinarily they will not be rendered inadequate simply because they failed to raise an argument that appears strong in hindsight. But Kim's failure to make obvious arguments until after they were forfeited calls into question whether she vigorously litigated this case on behalf of the class. In all, it is clear that Kim did not "vigorously" litigate this case on behalf of the putative class.

CONCLUSION

In light of Kim's conflict of interest and failure to vigorously litigate the case, the district court abused its discretion in holding that Kim was an adequate representative of the class. We therefore vacate the district court's order approving the revised settlement, which had certified the class for settlement purposes only. On remand, the only matter before the district court will be Kim's individual action against Tinder, which has been compelled to arbitration.

ORDER VACATED; REVERSED and **REMANDED.**

All Citations

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