Nos. 24-3585
Consolidated with Nos. 24-3444, 24-3450, 24-3451, 24-3527, 24-3619, 24-3621

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Rhonda Burnett, et al.,

Plaintiff-Appellees,

v.

National Association of Realtors, et al.,

Defendants-Appellees,

v.

Brown Harris Stevens, et al.,

Intervenors-Appellees

v.

Tanya Monestier,

Interested party-Appellant

Appeal from the United States District Court
for the Western District of Missouri – Kansas City
(Case No. 19-cv-00332 (SRB), Stephen R. Bough, U.S. District Judge)

OPENING BRIEF OF TANYA MONESTIER

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Objector-Appellant

SUMMARY OF THE CASE

After securing a $1.8 billion jury verdict for a class of Missouri home sellers against the National Association of Realtors and other defendants, plaintiffs settled on a nationwide basis. The settlement provides minimal monetary relief to class members—approximately 0.1% of actual damages—and includes injunctive relief that largely preserves the challenged conduct in a different form.

The district court lacked authority to approve the settlement because plaintiffs did not establish Article III standing to seek, or to settle for, injunctive relief. In approving the settlement, the court did not exercise independent judgment. It adopted, almost verbatim, a proposed order that it had instructed plaintiffs to draft before the fairness hearing. Plaintiffs submitted the draft by email without notifying Monestier or giving her an opportunity to respond. The court then entered the order without offering a reasoned response to Monestier's arguments—including her contention that the injunctive relief conferred no real benefit on the class and that awarding 33 percent of the fund in fees was excessive. Monestier does not request oral argument.

CORPORATE DISCLOSURE STATEMENT

Appellant Tanya Monestier is an individual.

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JURISDICTIONAL STATEMENT

To the extent the complaint sought damages under the Sherman Act, 15 U.S.C. § 1 *et seq*., the district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1337. R. Doc. 759. However, the district court lacked jurisdiction over claims or settlements involving injunctive relief because plaintiffs failed to plead or prove that named plaintiffs—or the class as a whole—had Article III standing to seek prospective injunctive relief.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. On November 27, 2024, the district court issued an order approving the settlement and attorneys' fee request and deeming Monestier's objection waived. App. 295; Add., at 17; R. Doc. 1622, at 17. It also denied her motion for reconsideration of an order to appear in person the same day. App. 367; R. Doc. 1623. On December 3, 2024, the court denied Monestier's motion to intervene because it said she had standing to appeal without intervening. App. 368; R. Doc. 1636. It entered two Rule 54(b) judgments on January 15, 2025, and issued a corrected judgment on January 30, 2025. App. 568-71; Add. 90-3; R. Doc. 1673, 1674, 1678.

Monestier timely filed her notice of appeal on December 19, 2024, and amended it on February 14, 2025. R. Doc. 1656; R. Doc. 1681.

Monestier has standing to appeal the settlement approval and the district court's finding that she "waived" her objection, even without intervening. *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *In re T-Mobile Customer Data Sec. Breach Litig.*, 111 F.4th 849, 856 (8th Cir. 2024). Alternatively, she has appellate standing to challenge the denial of her motion to intervene.

STATEMENT OF ISSUES

1. Did the district court have Article III jurisdiction to approve a settlement that included injunctive relief when named plaintiffs failed to plead or prove standing to seek such relief?

U.S. CONST. ART. III.

TransUnion LLC v. Ramirez, 594 U.S. 413 (2021).

Williams v. Reckitt Benckiser LLC, 65 F.4th 1243 (11th Cir. 2023).

Davis v. Hanna Holdings, Inc., No. 24CV2374, 2025 WL 845918 (E.D. Pa. Mar. 18, 2025).

2. Did the district court abuse its discretion and violate Monestier's due process rights when, without notice to her, it instructed plaintiffs to submit a proposed approval order before the fairness hearing and then adopted that order nearly verbatim without exercising independent judgment?

U.S. CONST. AMEND. V.

In re Community Bank of N. Virginia, 418 F.3d 277 (3d Cir. 2005).

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985).

Bright v. Westmoreland Cnty., 380 F.3d 729 (3d Cir. 2004).

In re Colony Square, 819 F.2d 272 (11th Cir. 1987).

3. Did the district court err in approving the settlement as fair, adequate, and reasonable without addressing Monestier's arguments that the practice changes provide no benefit to the class?

Johnson v. NPAS Sols., LLC, 975 F.3d 1244 (11th Cir. 2020).

Koby v. ARS Nat'l Servs., Inc., 846 F.3d 1071 (9th Cir. 2017).

Angela R. v. Clinton, 999 F.2d 320 (8th Cir. 1993).

4. Did the district court err in awarding approximately $333 million in attorneys' fees when class members will recover about a tenth-of-a-penny on the dollar—and less if damages are trebled?

In re T-Mobile Customer Data Sec. Breach Litig., 111 F.4th 849 (8th Cir. 2024).

Hensley v. Eckerhart, 461 U.S. 424 (1983).

Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014).

5. Class notice stated that class members did not need to appear in person to have their objections considered. After class members relied on that notice, the court ordered objectors to appear in person and struck objections of class members who did not appear in person. Did the court err in striking Monestier's objection on this basis, and is reassignment required on remand?

U.S. CONST. AMEND. V.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

Litwin v. iRenew Bio Energy Sols., LLC, 226 Cal. App. 4th 877 (2014).

In re T-Mobile Customer Data Sec. Breach Litig., 111 F.4th 849 (8th Cir. 2024).

Sentis Grp. v. Shell Oil Co., 559 F.3d 888 (8th Cir. 2009).

STATEMENT OF THE CASE

A. Plaintiffs Win a $1.8 Billion Verdict for 500,000 Missouri Home Sellers and Then Settle Claims of 40 Million Home Sellers Nationwide for $998 Million.

The plaintiff class consists of past home sellers who paid inflated commissions to a buyer-broker in connection with the sale of their homes. A jury found the National Association of Realtors (NAR) and certain other defendants liable under antitrust laws and awarded Missouri plaintiffs $1.8 billion, pre-trebling. The core of the complaint was that sellers were forced to pay inflated commissions to buyer-brokers because of NAR's "cooperative compensation rule," which required listing brokers to make a unilateral offer of compensation to buyer-brokers, usually half of the commission. R. Doc. 759, at 2. This maintained a consistent, seller-paid, 5-6% commission structure across the industry. *Id.*, at 5-7, 33.

Shortly after the verdict, plaintiffs brought an identical antitrust action against additional defendants in *Gibson v. National Association of Realtors*, No. 23-cv-00788 (W.D. Mo.) ("Gibson").

In March 2024, plaintiffs settled both *Burnett* and *Gibson*. R. Doc. 1535, at 1. Certain brokerage defendants had already settled before trial. R. Doc. 1487 ("Re/Max").

Through these settlements (*Burnett*, *Gibson*, and *Re/Max*), plaintiffs expanded the class definition from 500,000 Missouri home sellers to 40 million home sellers nationwide. App. 281; Add. 3; R. Doc. 1622, at 3 (noting that almost 40 million notices were mailed). The settlements released a large portion of the real estate industry for $998 million, plus the promise to implement certain practice changes. R. Doc. 1535, at 1. The settlement amount represents about 0.1% of home sellers' actual damages. *See* Section IV.

B. Defendants Agree to Practice Changes and Industry Participants Find "Workarounds."

The NAR settlement expressly preserved the core anticompetitive conduct complained of in the lawsuit: a listing agent or a seller offering compensation to a buyer-broker in advance. App. 35; R. Doc. 1458-1, at 30 ("the practice changes . . . shall not prevent. . . offers of compensation to buyer brokers or other buyer representatives").

Instead, NAR and other defendants agreed to implement two basic practice changes:

1. To take offers of compensation to a buyer-broker off the Multiple Listing Service (MLS) and to not create an MLS-surrogate;

2. To require a buyer-broker to sign a written agreement with a buyer prior to touring any properties. The agreement must state how much the broker will be paid; the amount must be clearly ascertainable and not open-ended. The broker may not collect more than the amount agreed to.

App. 33-34; R. Doc. 1458-1, at 28-29.

NAR agreed to abide by the practice changes for seven years. Opt-in brokerages, however, agreed to abide by the changes for five years. *See* App. 36; R. Doc. 1458-1, at 31; App. 329; Add. 51; R. Doc. 1622, at 51.

Between March 2024 and November 2024, there was evidence of what industry participants called "workarounds"—attempts to find loopholes or ways around the settlement. App. 77-101; R. Doc. 1552, at 18-42. One of the most talked-about workarounds was modifying the buyer agreement upward once seller-offered compensation was known. App. 77-92; R. Doc. 1552, at 18-33. For instance, the buyer might have agreed to pay his broker 2%. But if the seller offered a 3% commission, the buyer and his broker would modify the agreement upward and the broker would collect 3%. The President of NAR confirmed publicly that

realtors could amend their buyer agreements to collect a higher commission than originally agreed to. App. 81; R. Doc. 1552, at 22.

In anticipation of the new practice changes going into effect, realtor organizations created new forms to facilitate various workarounds and conducted training sessions on how to ensure that any offers of excess commissions or bonuses could be captured by buyer-brokers. App. 77-101; R. Doc. 1552, at 18-42.

C. Monestier Files an Objection to the Settlement and Fee Request.

Appellant Tanya Monestier is a class member who sold her home during the class period. She is also a law professor at the University at Buffalo School of Law with knowledge of contract law, real estate contracting, consumer protection, and class actions. Acting *pro se*, Monestier submitted a 136-page objection challenging the monetary and injunctive relief, and the proposed fee award. App. 59-195; R. Doc. 1552. *See also* App. 262-78; R. Doc. 1600 (additional 17-page response).

Monestier argued that the settlement's injunctive relief does not prohibit the core antitrust violation complained of—advance offers of compensation—but merely takes them off the MLS and moves them to other forums. App. 64, 101-01, 106; R. Doc. 1552, at 5, 41-42, 47. She

argued that without actual "decoupling" (where the seller pays the listing broker and the buyer pays the buyer-broker), all the same antitrust problems remain. App. 64; R. Doc. 1552, at 5.

Monestier presented evidence that workarounds were widespread and endorsed by NAR, realtor organizations, and private brokerages. App. 77-101; R. Doc. 1552, at 18-42. She argued that these workarounds undermined the settlement and preserved the pre-NAR settlement status quo of seller-paid 5-6% commissions. *Id.*

Monestier further argued that the settlement has no viable enforcement mechanism because it delegates compliance oversight to NAR, the very party alleged to have orchestrated the unlawful practices. App. 146-49; R. Doc. 1552, at 87-90. Monestier warned that once the settlement was approved and fees paid, no party would have incentives to ensure compliance. *Id.*

Finally, Monestier objected to the requested $333 million fee award on the basis that it bore no rational relationship to the minimal class benefit. App. 160-61; R. Doc. 1552, at 101-02. She argued that a settlement that provides the average class member with not "enough money to buy a pizza" when they suffered over $10,000 in losses does not

justify an award of hundreds of millions of dollars in fees to plaintiffs' attorneys. App. 155; R. Doc. 1552, at 96. She argued that the purported 3.62 multiplier was artificially low, in part because plaintiffs calculated the lodestar using current rates, which resulted in a skewed multiplier. App. 166-77; R. Doc. 1552, at 107-18. She also presented evidence that recovery in mega-fund cases was generally about 10-15%, far lower than plaintiffs' 33% fee request. App. 161-66; R. Doc. 1552, at 102-07.

D. The Court Orders Monestier to Appear in Person at the Fairness Hearing Scheduled for Two Days Before Thanksgiving.

In preparing her objection, Monestier relied on the class notice which said "[i]f you send any objection, you do not have to come to Court to talk about it" and "the Court will consider your view." App. 2-3; R. Doc. 1371-4, at 9-10. Monestier spent at least fifty hours preparing the objection and relied on the court-approved assurance that she would not need to appear in person for her objection to be considered. App. 201; R. Doc. 1575, at 2.

Three weeks before the final fairness hearing, the district court put a minute entry on the docket ordering all objectors and their attorneys to appear in person to argue their objections. App. 196; R. Doc. 1566. The

hearing was scheduled for the Tuesday before Thanksgiving. Monestier only learned of the order when she was checking the docket for other case-related developments. App. 203; R. Doc. 1575, at 4. She did not receive notice of the in-person order by mail, email, or phone even though she had been required to provide all her contact information as part of the objection.

The district court put its rationale for ordering objectors to appear in person in the *Burnett* case on the record at the *Gibson* fairness hearing held on October 31, 2024.[1] The court said it received unwelcome correspondence from an individual accusing the court of ethical misconduct, which made the court "suspect about objectors in this case."[2] Although the district court appeared to characterize this correspondence as coming from an "objector," it did not. It came from a member of NAR who described himself in a filing as a "real estate practitioner and concerned citizen." App. 205-06; R. Doc. 1575, at 6-7.

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[1] Exhibit 2, at 3-4 to the Motion to Supplement the Record filed by Monestier on 5/5/2025 ("Motion to Supplement").

[2] *Id*.

Monestier moved for reconsideration, arguing that the order conflicted with the notice, imposed an undue burden, and violated her due process rights. App. 197-261; R. Doc. 1575. Monestier attached Harvard law professor William Rubenstein's declaration in another case opining that such a requirement would be unconstitutional even when disclosed in advance. App. 220-257; R. Doc. 1575, Appendix A. Monestier noted that she had contacted "five of the most prominent class action experts in the country" who had "over 180 years of combined experience" and none had ever seen an in-person requirement imposed when not specified in the class notice. App. 204; R. Doc. 1575, at 5. She argued that requiring in-person appearance at a fairness hearing would deter future objectors and put a "price tag" on the ability of objectors to exercise their constitutional rights. App. 214; R. Doc. 1575, at 15.

Other objectors joined Monestier's motion or filed their own request to be excused from attendance. *E.g.*, R. Docs. 1578-79, 1585, 1589, 1594. The court did not timely rule on her motion. Instead, it denied her motion in a minute entry the day after the fairness hearing, when the issue was moot. App. 367; R. Doc. 1623.

Monestier did not attend the fairness hearing. She explained in her motion that she could not cancel her classes right before final exams to travel 1,700 miles to and from Missouri at her own personal expense—all to convince a court to give her zero dollars. App. 212-13; R. Doc. 1575, at 13-14.

The district court struck Monestier's objection, along with 33 others (out of 36), because she did not appear in person at the fairness hearing. App. 296; Add. 18; R. Doc. 1622, at 18.

E. Monestier Learns that Prior to the Fairness Hearing, the Court Instructed Plaintiffs to Email a Proposed Order to the Court Approving the Settlement and Fee Request.

After settlement approval, Monestier learned that the district court had privately solicited proposed orders by email specifically from plaintiffs' counsel. App. 369-567; R. Doc. 1654.

In the days before the final *Burnett* fairness hearing, the district court emailed class counsel twice through its courtroom deputy instructing counsel to prepare and submit "your" proposed final approval order. App. 373-77; R. Doc. 1654, at Exhibit A (requesting order on November 22 and November 25). The first email was marked "high"

importance, and the second gave plaintiffs a deadline to submit the proposed order. *Id.*

The court's request was sent off the public docket, and Monestier was not notified or copied. Plaintiffs emailed the court their proposed final approval and fee order the day before the fairness hearing. *Id.*

Monestier independently obtained some of these communications and proposed orders and moved to place them on the public docket. App. 369-567; R. Doc. 1654. She argued that the court's off-the-record request and plaintiffs' proposed orders formed part of the record considered by the court in granting final approval. App. 370-71; R. Doc. 1654, at 2-3. She asked that all proposed orders and revisions to proposed orders in *Burnett* and related litigation be publicly disclosed. *Id.* The district court has not ruled on this motion.

When plaintiffs publicly filed a proposed final judgment so that all parties would have access to it, the court struck it from the docket. *See* Notice of Docket Modification (Jan. 13, 2025).

F. The Department of Justice Flags Antitrust Concerns, But the District Court Does Not Address Them at the Fairness Hearing or in the Order.

Two days before the fairness hearing, the Department of Justice filed a Statement of Interest in the case. R. Doc. 1603. The DOJ reiterated the position it took in a related antitrust action that the "pervasive industry practice" of unilateral offers of compensation to buyer-brokers "harms both sellers and buyers." *Id.*, at 2. This is because "[s]ellers feel tremendous pressure to offer the 'customary' rate of 2.5-3% to buyer brokers, lest those buyer brokers 'steer' their clients to higher-commission properties." *Id.* The DOJ noted that "[u]nder the proposed settlement, NAR would prohibit brokers from making these offers on the MLS itself. The proposed settlement, however, expressly allows offers of compensation to continue and for them to be posted publicly; it simply prohibits making these offers on an MLS." *Id.*

The DOJ expressed specific concern that "the new provision that requires buyers and brokers to make written agreements before home tours may harm buyers and limit how brokers compete for clients." *Id.*, at 4. The DOJ requested that either the parties "eliminate the provision" or "disclaim that the settlement creates any immunity or defense under

the antitrust laws," or that the court "clarify that approval of the settlement affords no immunity or defense for the buyer-agreement provision." *Id.*, at 1.

At the fairness hearing, the court did not address the DOJ's concerns about advance offers of compensation or the buyer agreement requirement. *Burnett* Tr., at 19-26. Nor did it ask counsel for plaintiffs or defendants to respond to any of the DOJ's substantive concerns. *Id.*

The district court did not mention the DOJ's filing at all in its final order. App. 279-366; Add. 1-88; R. Doc. 1622.

G. The District Court Holds a Fairness Hearing While in Possession of the Order it Would Ultimately Adopt Almost Verbatim.

The district court held a fairness hearing on November 26, 2024. During this hearing, the court did not ask substantive questions of objectors or ask plaintiffs or defendants to respond to issues raised by objectors. For each objector, the court either asked counsel whether their client was physically present, or counsel volunteered that information. *See, e.g.*, *Burnett* Tr., at 36, 45, 48. Immediately after the submissions of the final objector, the court approved the settlement from the bench. *Id.*, at 64.

Early in the fairness hearing, the court signaled that it already considered the matter resolved, referring to plaintiffs' draft approval as "my order here." This was before it heard from any objector. *Id.*, at 5.

H. The Court Adopts Plaintiffs' Proposed Order Substantially Verbatim, Including Errors and Mischaracterizations.

The court issued its final approval order the day after the fairness hearing. The court adopted plaintiffs' proposed order substantially verbatim. The only major additions not found in plaintiffs' proposed order are a short section declaring all objections waived for objectors who did not appear in person, App. 294-95; Add. 16-17; R. Doc. 1622, at 16-17, and several pages of material rejecting last-minute objections or requests for intervention, and rejecting objections for failure to establish standing. App. 311-19; Add. 33-41; R. Doc. 1622, at 33-41. Much of this language is boilerplate and repeated half a dozen times. *Id*. It is not clear whether the court or the plaintiffs drafted these revisions. App. 370-71; R. Doc. 1654, at 2-3 (motion requesting that plaintiffs disclose whether they supplied "revisions" to proposed order).

The court's order contains factual errors directly traceable to plaintiffs' proposed order. The court declared the lodestar multiplier to be "3.63" despite plaintiffs' expert repeatedly citing a multiplier of 3.62.

App. 305-06; Add. 27-28; R. Doc. 1622, at 27-28. In its *Gibson* order issued a couple weeks prior, the court misstated the multiplier as "1.17."[3] The order contains other typos and errors carried over from plaintiffs' draft. *See, infra*, Section II, n. 6.

I. Monestier Timely Appeals.

Monestier timely appealed the judgment. R. Doc. 1656; R. Doc. 1681. Monestier also filed a motion to intervene, but the district court denied it, ruling that she had standing to appeal without intervening. App. 368; R. Doc. 1636.

[3] Exhibit 1, at 56 to the Motion to Supplement.

SUMMARY OF THE ARGUMENT

Approval of this class action settlement was premised on the supposed "meaningful" and "substantial" injunctive relief at the heart of it. *E.g.*, App. 288-89; Add. 10-11; R. Doc. 1622, at 10-11. The problem is that plaintiffs lacked Article III standing to seek that relief. And so, the settlement must fall.

Named plaintiffs, *past* home sellers, did not allege a concrete, cognizable future harm redressable by the injunctive relief—much less an "imminent" one. Named plaintiffs have no ongoing relationship with defendants. Named plaintiffs do not allege that they will sell their homes again while the practice changes are in effect, that they will do so through a realtor, or that they are otherwise at risk of being harmed absent injunctive relief. The district court approved a settlement it had no authority to approve.

Even if plaintiffs could somehow establish that they have Article III standing, the fact remains that the injunctive relief provides no benefit to class members since it does not prohibit the core anticompetitive conduct at issue, industry participants have found ways around it, and enforcement is largely delegated to NAR itself. There is no evidence in

the record that actual class members—past home sellers—stand to benefit in any way from this injunctive relief.

The monetary relief secured for class members is paltry: about a tenth-of-a-penny on the dollar. And for this, class counsel was awarded $333 million in fees. This award exceeds any permissible range of reasonableness by a long margin.

The district court did not treat objectors fairly. It violated class members' due process rights by instructing plaintiffs' counsel to ghostwrite its approval order prior to the fairness hearing, without notice to *pro se* objectors. And it issued an unprecedented order requiring all objectors to appear at the Missouri fairness hearing in person, even though the class notice said otherwise. The district court did this because it was "suspect" of objectors. When 34 of the 36 objectors failed to appear in person, the court struck their objections.

This Court should vacate settlement approval.

ARGUMENT

I. THE SETTLEMENT CANNOT STAND BECAUSE PLAINTIFFS FAILED TO, AND CANNOT, DEMONSTRATE ARTICLE III STANDING TO SEEK OR SETTLE FOR INJUNCTIVE RELIEF.

Standard of Review: Federal subject-matter jurisdiction is a question of law that is reviewed *de novo*, even if not raised in the district court. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Meuir v. Greene Cnty. Jail Emps.*, 487 F.3d 1115, 1119 (8th Cir. 2007).

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The district court did not have the authority to approve the injunctive relief in this case because plaintiffs lacked Article III standing. "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Plaintiffs must demonstrate standing at all stages of litigation, including when asking a court to approve a class settlement. *Frank v. Gaos*, 586 U.S. 485, 492 (2019). "And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

A. Plaintiffs Alleged Only Past Harm, Not Imminent Future Harm.

In *Williams v. Reckitt Benckiser LLC*, the Eleventh Circuit vacated a class action settlement approval because plaintiffs lacked standing to seek injunctive relief. 65 F.4th 1243, 1256 (11th Cir. 2023). In *Williams*, past purchasers of brain performance supplements sought both monetary damages and injunctive relief to change the defendant's marketing practices. *Id.*, at 1247. But without asserting "any description of concrete plans to purchase [the supplements] again in the future," plaintiffs lacked standing to seek injunctive relief. *Id.,* at 1255 (cleaned up). And the district court was "without jurisdiction to grant the [ ] requested injunctive relief[.]" *Id.,* at 1256. *Accord Smith v. Miorelli*, 93 F.4th 1206, 1212 (11th Cir. 2024).

Past exposure to illegal conduct does not itself create a present case or controversy supporting prospective injunctive relief if a plaintiff cannot demonstrate a "real and immediate" threat of future injury; a "conjectural or hypothetical" one is insufficient. *City of Los Angeles v. Lyons*, 461 U.S. 95, 95 (1983); *Lujan*, 504 U.S. at 564. The future injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). This is no less true for plaintiffs seeking class action

settlement approval. *Williams*, 65 F.4th at 1253. "That a suit may be a class action . . . adds nothing to the question of standing." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (internal quotation omitted).

The class here consists of home sellers overcharged in connection with *past* home sales. App. 282-83; Add. 4-5; R. Doc. 1622, at 4-5. The complaint alleges only past harm from homes "sold" and commissions "paid." R. Doc. 759, at 13-15. *Smith v. Miorelli*, 93 F.4th 1206, 1210 (11th Cir. 2024) (no standing where complaint "reference[d] only past, not future, injuries").

When plaintiffs engage defendants for discrete consumer transactions without an ongoing relationship, they must show concrete, *prospective* harm if they wish to pursue injunctive relief. There is nothing in the complaint or the record establishing that named plaintiffs, or the class, have standing to seek injunctive relief for "certainly impending" future harm. *Clapper*, 568 U.S. at 414.

When a plaintiff does "not allege or present evidence of likely future injury," he does not have standing to pursue injunctive relief. *Rinne v. Camden Cnty.*, 65 F.4th 378, 386 (8th Cir. 2023). Named plaintiffs have not alleged that they will ever sell their homes again—much less that

they will do so "imminent[ly]." *Davis v. Fed. Election Comm'n,* 554 U.S. 724, 733 (2008). Named plaintiffs have not so much as alleged that they will sell their homes prior to 2029 or 2031, when the injunctive relief ends. Home sales occur, on average, once every twelve years.[4]

Named plaintiffs have not alleged that—*if* they sell their homes—they will use a member of NAR to assist with the sale. Some home sellers do not use agents at all. R. Doc. 759, at 18. And only "[a]bout half of licensed real estate agents belong to NAR; about half do not." R. Doc. 1323, at 82. One named plaintiff specifically testified she "would not be opposed to [doing for sale by owner]. I would investigate it." R. Doc. 1324, at 51.

Plaintiffs, past home sellers, have no forward-looking relationship with NAR or other defendants. A home sale is a one-off and "infrequent occurrence." R. Doc. 1535-13, at 6. Once complete, the home seller does not continue to suffer harm or potential harm at the hands of the defendant. *Cf. Berni v. Barilla S.p.A.*, 964 F.3d 141, 147 (2d Cir. 2020) ("Past purchasers do not have the sort of perpetual relationship with the

[4] The typical U.S. homeowner has spent 11.8 years in their home. https://www.redfin.com/news/homeowner-tenure-california-longest/.

producer of a consumer good that is typical" of plaintiffs seeking injunctive relief).

A federal court in Pennsylvania adjudicating similar antitrust claims involving home buyers reached this same conclusion on Article III standing. *Davis v. Hanna Holdings, Inc.*, No. 24CV2374, 2025 WL 845918 (E.D. Pa. Mar. 18, 2025). In *Davis*, plaintiff home buyers did not specifically plead in their complaint that they "plan[ned] to purchase another home with the help of a NAR-member broker in the future." *Davis*, 2025 WL 845918 at *7. The court found this fatal to Article III standing for injunctive relief. General averments that "most people purchase homes more than once in their lifetime" were nothing more than "argument-by-probability." *Id.*, at *8. Rather, plaintiffs must "plead something more specific and concrete to establish 'actual or imminent injury-in-fact under Article III.'" *Id*. Home buyers failed to do so in *Davis* and plaintiffs failed to do so here.

B. Plaintiffs Do Not Have Article III Standing Because They Now Have Knowledge of Defendants' Antitrust Conspiracy.

Even if named plaintiffs had alleged that they would sell their homes again "imminently," and would engage a NAR member to do so,

they would still not have Article III standing given their current knowledge of defendants' anticompetitive conduct.

A plaintiff does not have standing to pursue injunctive relief where, by virtue of his participation in the action, he is not likely to suffer the same harm in the future. *Animal Legal Def. Fund, Inc. v. Vilsack,* 111 F.4th 1219, 1228 (D.C. Cir. 2024) (no standing to seek injunctive relief given knowledge of defendants' practices).

Through this lawsuit, named plaintiffs are aware that NAR policy does not (and did not) require a seller to offer buyer-broker compensation. R. Doc. 1328, at 1203 (NAR policy required that *a number* be put on the MLS as a placeholder, even as little as 1 cent; certain MLSs allowed the number to be 0). One named plaintiff testified that she knows negotiating is "an option now" and had she "known at the time what [she] know[s] now" she may not have offered buyer-broker commission. R. Doc. 1324, at 264.

Named plaintiffs currently have knowledge of defendants' antitrust conspiracy and are empowered to avoid it. If they choose to pay inflated commissions to a buyer-broker affiliated with NAR in the future despite this knowledge, that is a "self-inflicted harm or one largely of one's own

making—neither of those amounts to an 'injury' cognizable under Article III." *Animal Legal Def. Fund*, 111 F.4th at 1227–28 (cleaned up).

C. Plaintiffs Admit That the Injunctive Relief Is Not Designed to Prevent Impending Harm to Past Home Sellers.

Tellingly, all named plaintiffs testified that they were suing, not because they had plans to sell a home in the immediate future through a NAR-affiliated broker, but because they wanted to help future home sellers and consumers. *See e.g.,* R. Doc. 1324, at 233 ("And if I can be a part of this process to reverse this unfair practice and to help them, as well as other consumers down the road, you know, if I can help my kids out, I'm going to do it.").

Plaintiffs have referred to the injunctive relief as "significant groundbreaking changes in the real estate marketplace that will provide very substantial benefits to millions of Americans in the future." R. Doc. 1535, at 1. Injunctive relief designed to make "groundbreaking changes" in the real estate marketplace and provide "benefits to millions of Americans in the future" is not the same as injunctive relief designed to redress an imminent harm to past home sellers under Article III.

Here, the district court weighed the injunctive relief in deciding to approve the settlement, characterizing it as a "significant," "substantial,"

and possibly "primary" benefit to the class. *E.g.*, App. 288-89, 293, 344, 362; Add. 10-11, 15, 66, 84; R. Doc. 1622, at 10-11, 15, 66, 84. As the 11th Circuit held in *Williams*: "[B]ecause the value of the Settlement's injunctive relief formed an integral part of the district court's calculus of its overall fairness, the court's approval of the Settlement was premised on a legal error and, as a result, was necessarily an abuse of discretion." 65 F.4th at 1253; *accord Smith,* 93 F.4th at 1212-13. The same is true here. Because the district court lacked the power to grant injunctive relief, its approval of the settlement was premised on a legal error, and this Court must vacate.

II. THE DISTRICT COURT VIOLATED RULE 23 AND MONESTIER'S DUE PROCESS RIGHTS BY ADOPTING NEARLY VERBATIM A PROPOSED ORDER SUBMITTED EX PARTE BY PLAINTIFFS.

Standard of Review: A district court's ruling approving a class action settlement is generally reviewed for abuse of discretion. *Rawa v. Monsanto Co.*, 934 F.3d 862, 868 (8th Cir. 2019). "Failure to follow the procedures required before approving a settlement-only class action," including the exercise of "independent judgment" constitutes an abuse of discretion. *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 298-302 (3d Cir. 2005). "Whether . . . due process rights have been violated is a

constitutional question that [the Court] review[s] *de novo*." *United States v. Finck*, 407 F.3d 908, 916 (8th Cir. 2005).

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At the district court's behest, plaintiffs drafted opinions approving their own settlement and their own request for approximately $333 million in fees. App. 369-567; R. Doc. 1654.

The court's final approval order in *Burnett* duplicated nearly verbatim plaintiffs' proposed order. App. 373-456; R. Doc. 1654, at Exhibit A. So too its order in *Gibson*, and its order in *Re/Max*. App. 457-563; R. Doc. 1654, at Exhibits B-C. And plaintiffs' proposed orders were, themselves, largely cut-and-pasted from their own motions—in effect, legal nesting dolls. *Compare*, *e.g.,* R. Doc. 1535 and App. 279-366; R. Doc. 1622.

In the *Burnett* final order, about eight pages of largely boilerplate language was added to plaintiffs' pre-hearing draft. *Compare* App. 311-19; Add. 33-41; R. Doc. 1622, at 33-41 with App. 373-456; R. Doc. 1654, at Exhibit A. Monestier asked that all proposed orders "including revisions and subsequent drafts of proposed orders, if any" be placed in the record. App. 370-71; R. Doc. 1654, at 2-3. These documents were not

placed in the record, so it is possible that plaintiffs drafted this portion of the court's order as well.

This procedure violated Rule 23 and Monestier's due process rights. There is "no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side." *Chicopee Mfg. Corp. v. Kendall Co.,* 288 F.2d 719, 724-25 (4th Cir. 1961). Not only does the practice involve "the failure of the trial judge to perform his judicial function" but "when it occurs without notice to the opposing side . . . it amounts to a denial of due process." *Id.*

The Supreme Court has sharply "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties," noting the "potential for overreaching and exaggeration on the part of attorneys preparing findings of fact." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985). So has this Court. *See Jones v. Int'l Paper Co.*, 720 F.2d 496, 499 (8th Cir. 1983). More egregious than parties drafting findings of fact is parties drafting judicial opinions or orders: "When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions." *Bright v. Westmoreland Cnty.*, 380 F.3d 729, 732 (3d Cir. 2004).

Whether or not judicial ghostwriting is *per se* reversible error, courts have at least established guardrails on the practice to ensure due process is satisfied. If a court seeks the parties' assistance in drafting, it should "make [the request] of both sides" to allow the court to "pick and choose and temper and select those portions which better fit its own concept of the case." *Bradley v. Maryland Cas. Co.*, 382 F.2d 415, 423-24 (8th Cir. 1967). And "there must be evidence demonstrating that the district court exercised 'independent judgment' in adopting a party's findings." *Cmty. Bank*, 418 F.3d at 300; *see also Alig v. Quicken Loans, Inc.*, 990 F.3d 782, 790 n.8 (4th Cir. 2021) (applying an "independent judgment" standard).

In *Community Bank*, the Third Circuit vacated class settlement approval because the district court failed to exercise "independent judgment in adopting the proposed findings of the settling parties." 418 F.3d at 301-02. *Community Bank* found it "particularly troubling" that in one instance, the district court had "entrusted class counsel to prepare these findings in an *ex parte* closed door session held before the settlement hearing, when counsel for Appellants were not present." *Id.*, at 319. Soliciting a proposed order in advance "suggest[ed] that the

fairness hearing was a mere formality" and that the district court "had pre-determined its approval of the settlement before hearing the arguments of any of the five objectors." *Id.*

Such is the case here. The district court did not exercise independent judgment or give the settlement the appropriate scrutiny required under Rule 23.

First, the scale of ghostwriting in this case belies any argument that the court exercised independent judgment. The court took all 79 pages of plaintiffs' proposed order and adopted them substantially verbatim. *See* App. 373-456; R. Doc. 1654, at Exhibit A. Every substantive claim or assertion in plaintiffs' order found its way into the court's order. *Contrast Anderson*, 470 U.S. 572-73 (findings by district court "vary considerably in organization and content from those submitted by petitioner's counsel."); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999) (district court "rejected several pages of findings, . . . an act that reflects more than just a cursory analysis and interpretation.").

This ghostwritten order was not a one-off. The court seemingly employed the practice of having plaintiffs draft proposed orders for its approval throughout this litigation, and in the related *Gibson* and

Re/Max cases. App. 457-563; R. Doc. 1654, at Exhibits B-D. *See Cmty. Bank*, 418 F.3d at 301 ("nearly *every order* issued by the District Court . . . was a verbatim copy of a proposed order offered by the settling parties"); *Chudasama v. Mazda Motor Corp.,* 123 F.3d 1353, 1373 (11th Cir. 1997) (referring to "judge's practice" of "delegating the task of drafting sensitive, dispositive orders to plaintiffs' counsel").

Second, the timing of the request for proposed orders shows that the court short-circuited the deliberative process. *Compare In re Colony Square*, 819 F.2d 272, 276-77 (11th Cir. 1987) (practice "not fundamentally unfair" in part because the judge "reached a firm decision" before asking counsel to draft the proposed order); *with Bright*, 380 F.3d at 732 (court abused discretion in ordering parties at preliminary case conference to prepare a proposed order).

Here, the court instructed plaintiffs' counsel to draft and submit a proposed order *before* each of three fairness hearings. During the *Burnett* fairness hearing, the district court even referred to the proposed order as "*my* order here," strongly suggesting it had already made up its mind before hearing from objectors. *Burnett* Tr., at 5 (emphasis added).

The *ex-ante* request also appears to contravene Western District rules which permit the court to "order the prevailing party to . . . prepare a draft of the judgment and order embodying the Court's decision" "within 7 days *after* the announcement of the decision." W.D. MO. L. R. 58.2 (emphasis added).

Third, the court did not "pick and choose" among competing orders from opposing sides. *Bradley*, 382 F.2d at 423. The court solicited a single proposed order specifically from class counsel before the fairness hearings. App. 373-77; R. Doc. 1654, at Exhibit A (requesting "your proposed order" and instructing plaintiffs' counsel that the court "would like you to provide a proposed order").

The court did not include Monestier or other *pro se* objectors on its communications with class counsel. This denied them the opportunity to respond to the proposed order, or to question the propriety of plaintiffs drafting approvals of their own settlement and fees in a context where the court is obligated to act as a fiduciary for absent class members. *Contra* W.D. MO. L. R. 58.2 (contemplating filing of proposed draft orders with opportunity for the other parties to "file a statement of approval or disapproval as to the form of the draft"); *contrast Anderson*, 470 U.S. at

572 ("respondent was provided, and availed itself of the opportunity to respond at length to the proposed findings").

Fourth, the court did not provide the framework for, and specifics of, the order. *Contrast Anderson,* 470 U.S. at 572 ("The court itself provided the framework for the proposed findings . . . which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them"); *Colony Square*, 819 F.2d at 276 (court directed counsel to draft orders which "discussed specific points."). Instead, the district court ceded full drafting authority to plaintiffs. It was "a blank check" to write whatever they saw fit. *Cf In re Equifax Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1269–70 (11th Cir. 2021).

Fifth, the court's final orders copied errors from plaintiffs' proposed orders, suggesting the court did not carefully review the orders before issuing them. In its *Gibson* order, the court described the lodestar multiplier as 1.17, citing Klonoff's declaration.[5] Klonoff, however, calculated the multiplier as 3.62 and referenced this number nine times in his declaration. R. Doc. 1535-1. In the *Burnett* order, the court again

[5] Exhibit 1, at 56 to the Motion to Supplement.

misstated the multiplier—this time saying it was 3.63. App. 305-06; Add. 27-28; R. Doc. 1622, at 27-28 (no indication how this number was calculated). Other typos and errors demonstrate a lack of thorough review.[6]

Sixth, the court issued the order only two days after receiving it from plaintiffs and less than 24 hours after the hearing. This timeframe left insufficient opportunity for the district court to proofread, cite-check, or verify the legal and factual authority in its order, let alone fully consider the issues at hand. *State v. Riley*, 2024-Ohio-5712, *530 (Ohio. 2024) (verbatim adoption of party's submission after only three days suggests court did not engage in "independent and thorough review").

Seventh, there is reason to question whether the district court had access to the source material in its order to be able to read it. The order devotes half a page to discussing a survey by a trade publication that is

[6] *See* App. 335, 337, 350, 355, 361, 362; Add. 57, 59, 72, 77, 83, 84; R. Doc. 1622, at 59 ("do not a [sic.] create a distinct factual predicate"); at 72 ("where those claims are plead [sic.] under a different legal theory"); at 77 ("Mr. Wang [*sic*.] objection . . . is overruled"); at 83 ("Class representative [*sic*.] in *Moehrl* . . . "); at 84 ("valuable relief on [*sic*.] these Settlements"); *Id.* ("industry-wide rules mandating compensation offers to cooperating broker [sic]"); at 57, n.14 (improperly citing "*Wal-Mart Stores*. 396 F.3d 96").

inaccessible without a paid subscription. App. 303; Add. 25; R. Doc. 1622, at 25. It appears that the district court took plaintiffs' proposed order—what was in effect "an additional brief," *Colony Square*, 819 F.2d at 275, n. 8—and signed off on it without so much as verifying its contents.

Eighth, for four months the district court has not ruled on Monestier's motion to correct the record to include all the proposed orders plaintiffs submitted to the district court. App. 369-567; R. Doc. 1654. When plaintiffs attempted to be responsive to Monestier's motion by filing a proposed order for final judgment publicly, the district court promptly struck it from the record. *See* Notice of Docket Modification (Jan. 13, 2025). Refusal to publicly acknowledge the ghostwritten orders "adds to the appearance of impropriety." *In re Wisconsin Steel Corp*., 48 B.R. 753, 761 (N.D. Ill. 1985).

Ninth, and perhaps most importantly, the proposed opinion that the court adopted does not fairly or comprehensively engage with Monestier's objection. *See* Section III. Parties have an "undeniable right . . . to be assured that [their] position has been thoroughly considered." *Askew v. United States*, 680 F.2d 1206, 1209 (8th Cir. 1982), quoting *In re Las Colinas, Inc.,* 426 F.2d 1005, 1008-09 (1st Cir. 1970).

Based on the court's order, it is not clear that the court carefully read—much less "thoroughly considered,"—Monestier's objection. *See, e.g.*, App. 303-04; Add. 25-26; R. Doc. 1622, at 25-26 (court faulting Monestier for not "offer[ing] a realistic alternative to the Settlement Agreement's practice changes" when Monestier plainly placed this "realistic alternative" in her response motion under the heading: "Plaintiffs' Contention that Professor Monestier Fails to Offer Any Realistic and Constructive Alternative to the NAR Settlement Practice Changes."). App. 264; R. Doc. 1600, at 3. *See also* App. 304; Add. 26; R. Doc. 1622, at 26 (characterizing Monestier as "rel[ying] on the megafund doctrine" when she clearly stated, "I did not rely on any sort of megafund doctrine; I simply argued that the size of the settlement and the reality of economies of scale involving megafunds need to be considered."). App. 277; R. Doc. 1600, at 16.

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A court cannot act as a fiduciary of the class while secretly outsourcing the task of justifying why the settlement is fair, adequate, and reasonable to the party advocating for it. Because the "process by

which the judge arrived at [the order] was fundamentally unfair," this Court must vacate. *Colony Square Co.*, 819 F.2d at 276.

III. THE DISTRICT COURT ERRED IN FINDING THE SETTLEMENT FAIR, ADEQUATE, AND REASONABLE UNDER RULE 23 AND IN FAILING TO ADDRESS MONESTIER'S ARGUMENTS THAT THE PRACTICE CHANGES DO NOT BENEFIT THE CLASS.

Standard of Review: A district court's ruling approving a class action settlement is generally reviewed for abuse of discretion. *Rawa v. Monsanto Co.*, 934 F.3d 862, 868 (8th Cir. 2019). The court abuses its discretion by, among other things, failing to "consider all relevant factors," allowing "irrelevant factors" to influence the judgment, or committing a clear error in weighing factors. *Id.*

While findings of fact are reviewed for clear error, "[t]he adequacy of findings is more apt to be called into question when the trial judge . . . adopts verbatim the proposed findings and conclusions of prevailing counsel[.]" *Askew v. United States*, 680 F.2d 1206, 1208–09 (8th Cir. 1982).

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Monestier presented substantial evidence demonstrating that the practice changes provided no benefit to past home sellers like her. She

argued that the settlement does nothing to change the core anti-competitive dynamics complained of, allows realtors to employ workarounds to evade the settlement, and delegates enforcement to the party to be enjoined. The district court failed to provide a "reasoned response" to any of Monestier's arguments about the injunctive relief. *Johnson v. NPAS Sols.,* LLC, 975 F.3d 1244, 1262 (11th Cir. 2020).

A. The Court Erred When It Considered the Value of the Practice Changes to "Consumers" Rather Than to Class Members.

The district court erred in holding that the practice changes provided unspecified, but "substantial benefits to the class." App. 293; Add. 15; R. Doc. 1622, at 15. The only evidence in the record was that injunctive relief could be of value to future "consumers" generally, App. 308; Add. 30; R. Doc. 1622, at 30, or could "substantially lower the overall cost of housing transactions." App. 362; Add. 84; R. Doc. 1622, at 84. And even those changes, if they ever materialized, could take "several years." App. 302; Add. 24; R. Doc. 1622, at 24.

The district court relied on Dr. Economides' projection that future "U.S. home sellers and buyers" could save billions of dollars per year. App. 52; R. Doc. 1535-13, at 2. But future home sellers and buyers are

not members of the class. "The fairness of the settlement must be evaluated primarily based on how it compensates class members—not on whether it provides relief to other people." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 720 (6th Cir. 2013), quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.,* 463 F.3d 646, 654 (7th Cir. 2006). *See also Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1079 (9th Cir. 2017) (reversing settlement approval where there was "no evidence that the relief afforded by the settlement ha[d] any value to the class members" and noting an "obvious mismatch between the injunctive relief provided and the definition of the proposed class."); *Synfuel Techs.,* 463 F.3d at 654 (reversing settlement approval where "[i]t is future customers who are not plaintiffs in this suit who will reap most of the benefit from these changes.").

There was nothing in the court's order, or the record, showing that actual class members—*past* home sellers—would benefit from forward-looking injunctive relief. Thus, it was error to ascribe any value to it. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014) (injunctive relief properly valued at "zero" dollars where economist testified as to "the

aggregate benefit" of injunctive relief "to both class members and future purchasers" because "future purchasers are not members of the class.").

This Court has recently recognized the importance of ensuring that injunctive relief is valued based on its benefit to actual class members: "The question here . . . is whether [defendant] has established . . . that the injunction would have value of at least $1.7 million to members of the putative class. That class is not defined as all customers *who will* make qualifying purchases . . . in the future, but rather as a group of customers *who made* qualifying purchases." *Lizama v. Victoria's Secret Stores*, LLC, 36 F.4th 762, 765–66 (8th Cir. 2022) (emphasis added) (discussing injunctive relief in context of amount-in-controversy).

Because the court failed to consider the value of the injunctive relief to actual class members, settlement approval must be vacated.

B. The Practice Changes Do Not Benefit Home Sellers Because They Still Allow Advance Offers of Compensation.

Even if it were appropriate to consider a potential benefit to future consumers in the Rule 23 analysis (which it is not), the billions-per-year valuation by Dr. Economides that the court relied on was based on a flawed assumption. App. 149-52; R. Doc. 1552, at 90-93. Dr. Economides believed that listing agents and sellers would not offer buyer-broker

compensation in advance and that all "requests" would come from the buyer as part of the offer to purchase. App. 53; R. Doc. 1535-13, at 3 (Dr. Economides stating: "buyers may still request buyer-broker compensation as part of the sales negotiation . . ."). But the settlement expressly leaves preemptive offers of compensation intact. App. 35; R. Doc. 1458-1, at 30. Buyers do not need to request buyer-broker compensation as part of the sales negotiation. Instead, sellers or their brokers can, and do, offer compensation to buyer-brokers in advance—just off the MLS. App. 101-10; R. Doc. 1552, at 42-51. As long as this is an option, sellers will continue to offer customary commissions out of fear that not offering compensation in advance will mean that buyers are steered away from their property.

Plaintiffs admit that the settlement "does not prohibit a buyer from considering a particular seller's willingness to cover some part of the already agreed buyer-side broker compensation as part of the home search process." R. Doc. 1595, at 46. NAR itself advises that buyers are

within their rights to skip homes that do not offer buyer-broker compensation in advance.[7]

Post-settlement, realtor associations and brokerages have created buyer-broker contracts that facilitate this form of steering. App. 106; R. Doc. 1552, at 47. In New Jersey, for example, buyers can check a box stating: "Do not introduce buyers to properties where the following conditions exist," and specify: "Seller does not offer at least X% compensation to the buyer's broker." *Id.* Sellers, fearing that buyers will skip their homes, feel compelled to preemptively offer buyer-broker compensation at the going-rate.

Because the core dynamics remain untouched by the practice changes, it is unsurprising that virtually every study since the practice changes went into effect has seen no decrease in commissions. A February 2025 study examined 224,176 transactions and found commission rates have actually "experienced a slight increase compared

[7] https://www.realestatenews.com/2025/01/27/unfiltered-nar-lawyer-on-settlement-dos-donts-and-risks (NAR general counsel confirming that a "buyer can direct their agent" to only show them homes that offer compensation to buyer broker).

to the same period in the prior year."[8] Another study examined approximately "55,000 closed transactions per month" and found "no change in average buyer agent commissions since the settlement took effect in August 2024."[9]

The court did not meaningfully address any of the arguments that Monestier presented calling into question the value of the injunctive relief in its order. The court's failure to do so was error. *Johnson*, 975 F.3d at 1262.

C. The Practice Changes Provide No Benefit to Home Sellers Because Realtors Have Found Workarounds.

The district court did not provide a reasoned response to Monestier's arguments that the settlement contained loopholes that permit realtors to evade the settlement and recreate the status quo. These loopholes became widely known in the industry as "workarounds."[10] These workarounds include:

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[8] https://www.prnewswire.com/news-releases/5-months-after-nar-settlement-commission-rates-recover-302367576.html.

[9] https://www.mikedp.com/articles/2024/11/20/post-settlement-buyer-agent-commissions-remain-unchanged. *See also* https://www.redfin.com/news/agent-commissions-expensive-affordable-q4-2024.

[10] https://www.inman.com/2024/07/02/doj-has-close-eye-on-settlement-workarounds-nar-president-says/.

1. Modifying a buyer agreement after a buyer-broker learns how much compensation the seller is offering, thereby enabling him to collect more in commissions or bonuses than originally agreed to. App. 77-92; R. Doc. 1552, at 18-33.
2. Entering into a 0% "touring" agreement and then supplementing it with a full-commission buyer agreement once the buyer-broker learns how much the seller is offering. App. 93-96; R. Doc. 1552, at 34-37.
3. Tailoring individual buyer agreements to how much compensation a seller is offering. App. 100-01; R. Doc. 1552, at 41-42.

The point of these workarounds is to get around the settlement's limitation that a buyer-broker cannot collect more than the compensation specified in the buyer agreement.

These workarounds are an open secret, with one March 2025 New York Times headline reading: "Home Sellers and Buyers Accuse Realtors of Blocking Lower Fees."[11] A different New York Times article claims:

[11] https://www.nytimes.com/2025/03/15/realestate/sellers-buyers-realtors-high-commissions.html.

"One year after a settlement, sellers and buyers alike say that some agents are using loopholes to resist change" and quotes a former real estate agent as being "horrified by the way [realtors] were skirting the new rule[.]"[12]

Rather than engage with Monestier's objection, the court cursorily dismissed all the evidence of workarounds as "anecdotal and speculative." App. 302; Add. 24; R. Doc. 1622, at 24.[13] This was error. Monestier provided evidence that was far from anecdotal: a statement by the President of NAR, FAQs on NAR's own website, buyer agreements from dozens of realtor associations, videos of official training sessions, statements from general counsel at large realtor associations, and Zillow's touring agreement. App. 77-101; R. Doc. 1552, at 18-42.

Plaintiffs appeared to suggest that some of these practices were not permitted under the settlement. R. Doc. 1595, at 41-45. But NAR believes differently and has endorsed those practices as *fully compliant* with the

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[12] https://www.nytimes.com/2025/03/29/realestate/real-estate-agents-commissions.html.

[13] After refusing to accept what it called "anecdotal" evidence from Monestier, the court proceeded to accept anecdotal evidence from plaintiffs. *See* App. 302; Add. 24; R. Doc. 1622, at 24 (quoting Redfin agent about his recent experience with commissions).

settlement.[14] *See* R. Doc. 1552, at 22-25, 34-36. NAR implicitly rejected plaintiffs' interpretation at the fairness hearing, remarking: "What the plaintiffs say, what the third parties say, what the objectors say, it's all irrelevant. What matters is what the plain language says and what the court's final approval order says." *Burnett* Tr., at 16. And, of course, the court's final approval order says nothing about the "plain" language of the settlement.

Rather than reconcile these conflicting interpretations or make factual findings as to what practices the settlement permits and forbids, the court dodged the issue entirely. When dealing with an industry-wide injunction, "this impasse is unacceptable." *Angela R. v. Clinton*, 999 F.2d 320, 325 (8th Cir. 1993). When an injunction allows conduct that is economically indistinct from the status quo, the court cannot ascribe positive value to it in the Rule 23 analysis. *See In re Subway Footlong*

[14] After the court's approval, NAR again deemed these practices compliant with the settlement. *See* https://www.realestatenews.com/2025/02/03/buyer-agreement-questions-nar-lawyer-has-answers (buyer-brokers *can* enter into a 0% touring agreement and supplement it with a full-commission agreement once seller-offered compensation is known); https://www.realestatenews.com/2025/02/04/want-to-amend-a-buyer-agreement-nar-lawyer-explains-how (buyer-brokers *can* modify agreements to collect more money than originally agreed to, so long as they have a "business justification").

Sandwich Mktg. & Sales Practices Litig., 869 F.3d 551, 556-57 (7th Cir. 2017) (comparing "state of affairs before and after the settlement" to find relief "utterly worthless").

D. Enforcement is Illusory and Largely Delegated to NAR Itself.

The district court either misunderstood or mischaracterized Monestier's objection concerning enforcement. App. 299-301; Add. 21-23; R. Doc. 1622, at 21-23. The crux of her submission was that "Plaintiffs and Defendants have created the functional equivalent to a regulatory scheme with no one to enforce it other than the people who are bound by it and have every interest in finding ways around it." App. 149; R. Doc. 1552, at 90.

Under the terms of the settlement, NAR determines whether released parties are acting in a manner "consistent" with the practice changes. App. 43; R. Doc. 1458-1, at 38. This means that NAR, as a party subject to the injunction, plays a central role in interpreting whether its affiliates are compliant, and thus released from liability. Class members are granted only a narrow right of enforcement: they may inquire of NAR "as to whether a Person . . . has satisfied the conditions for being a

'Released Party.'" App. 12; R. Doc. 1458-1, at 7. This is not enforcement. It is deference to the regulated party's own certification process.

While class counsel has the right to demand "proof of [ ] compliance" from released parties, the settlement does not mandate that class counsel make such a demand, or explain what proof might be required. App. 271; R. Doc. 1600, at 10. Direct proof of compliance would be functionally impossible. For example, one of the core requirements of the settlement is that a buyer-broker obtain a written agreement before showing a home. But a seller—the purported beneficiary of this rule—has no right under the settlement to review that agreement to ensure that the buyer-broker is not collecting more than agreed to in the contract.[15] The seller does not even have the right or ability to verify that the buyer-broker and buyer signed the requisite agreement prior to touring a home. There is no practical way to verify that buyer-brokers are complying with the settlement.

Worse still, plaintiffs have no incentive to pursue enforcement. Once the settlement is finalized and fees awarded, class counsel's

[15] https://www.youtube.com/watch?v=NxPK5KyIT9Q at 29:16 (NAR general counsel instructing buyer-brokers not to share buyer agreement with seller or listing agent).

practical interest vanishes. The settlement creates a regulatory structure without an enforcer—one where the regulated entity polices itself.

The district court abused its discretion in approving a settlement without practical enforcement. The parameters of the injunction were not clearly defined, and it was "impossible to determine the precise benefits class members are receiving." *Angela R.*, 999 F.2d at 325.

E. The District Court Erred in Ignoring the Department of Justice's Statement of Interest.

Monestier's objection was reinforced by a Statement of Interest from the DOJ. R. Doc. 1603. The DOJ warned that requiring written buyer-broker agreements—absent real fee decoupling—could harm competition and consumers. *Id.*, at 1.

At the fairness hearing, the district court did not ask counsel for the DOJ to expound on its concern or ask the parties to respond to it. The court was only concerned with two things: how long the DOJ had been "sniffing around" or "investigating" the case; and whether the DOJ would consent to the court's enforcement authority. *Burnett* Tr., at 20-23. The substantive concern about the timing of buyer agreements was not discussed at all, with counsel for NAR even saying, "[i]f there truly was concern with the written buyer agreement, that's long past." *Id.*, at 24.

The district court did not acknowledge or address DOJ's filing at all in its order. *Cf In re Blue Cross Blue Shield Antitrust Litig.*, 2022 WL 4587618, at *23, *39-40 (N.D. Ala. Aug. 9, 2022) (district court addressed the Department of Labor's concerns about the settlement in detail).

Legislators are already choosing to overturn the NAR settlement based on the concern raised by the DOJ. Alabama recently passed a law that forbids brokers from requiring that buyers sign agreements prior to touring properties.[16] And Colorado regulators have stated that a buyer is not obligated to sign an agreement as a precondition to touring a home. App. 117; R. Doc. 1552, at 58. A court cannot credit practice changes as valuable to past home sellers where they can be undone with the stroke of a pen.

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If a tenth-of-a-penny on the dollar is all the monetary relief plaintiffs could possibly achieve on behalf of the class, *see* Section IV, then the practice changes had to provide real and quantifiable value to class members for this settlement to satisfy Rule 23 standards. Because there

[16] https://www.realestatenews.com/2025/03/21/new-alabama-law-buyers-can-tour-homes-without-a-contract.

was no evidence that they did, the court abused its discretion in approving the settlement.

IV. THE DISTRICT COURT ERRED IN AWARDING FEES OF $333 MILLION WHEN THE CLASS RECOVERED A TENTH-OF-A-PENNY ON THE DOLLAR.

Standard of Review: This Court reviews orders awarding attorneys' fees for abuse of discretion. *In re T-Mobile Customer Data Sec. Breach Litig.*, 111 F.4th 849, 859 (8th Cir. 2024). It reviews any legal issues related to that award *de novo*. *Id.*

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In awarding attorneys' fees, "a district court must be vigilant in protecting the rights of absent class members, including the right not to have their recovery reduced by excessive attorneys' fees." *In re T-Mobile*, 111 F.4th at 858. A reasonable fee is one that "compensate[s] the attorneys for their services yet [is] not excessive, arbitrary, or detrimental with respect to the class." *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 127 (8th Cir. 1975).

"The Supreme Court has twice stated that 'degree of success obtained' is 'the most critical factor' in determining the reasonableness of attorneys' fees." *Fessler v. Porcelana Corona De Mexico, S.A. DE C.V.*, 23

F.4th 408, 418–19 (5th Cir. 2022), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). *See also Rodney v. Elliott Sec. Sols., L.L.C.*, 853 F. App'x 922, 925, n. 3 (5th Cir. 2021) ("[A]mong the *Johnson* factors . . . the most critical factor in determining an attorney's fee award is the degree of success obtained") (citations omitted).

The district court failed to properly consider the degree of success obtained in evaluating whether a $333 million fee was reasonable under Rule 23, saying only that the fee "request is supported by both the size of the recovery and the results obtained as compared to the risk of a lesser recovery or none at all." App. 362; Add. 84; R. Doc. 1622, at 84. But "[t]he [total] settlement amount says little about the 'results obtained' in the case. The key inquiry in deciding a fee award is the results achieved for the class. A $15 million settlement may be a tremendous victory or deeply unimpressive." Christine P. Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 IND. L.J. 1315, 1368 (2022).

A district court calculating a reasonable fee "is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992), quoting *Riverside v. Rivera,* 477 U.S. 561, 585 (1986) (Powell, J., concurring). *See*

also Hensley, 461 U.S. at 440 (remanding because court "did not properly consider the relationship between the extent of success and the amount of the fee award").

After deducting fees and expenses, 40 million class members will share about $650 million. App. 281; Add. 3; R. Doc. 1622, at 3 (40 million direct notices mailed); App. 364; Add. 86; R. Doc. 1622, at 86 (awarding 33% fee plus costs to be deducted from $998 million settlement). This amounts to recovery of a little over $16 per class member.

The typical class member's damages are about $11,450, representing the average commission paid to a buyer-broker. App. 54; R. Doc. 1535-13, at 4 (Dr. Economides identifying median sales price of $412,000; average commission of 2.78%); *See also* R. Doc. 759, at 9 ("a class member who sells a house for $400,000 would have paid roughly $10,000 to $12,000 in additional commissions[.]"). This means that class members are recovering about 0.1% of their actual damages—less, if treble damages are factored in. The district court made no reference to

individual class member recovery or actual damages in approving the outsized fee.[17]

The following chart illustrates what class members are giving up, what they are receiving, and what counsel is receiving:

METRIC	**AMOUNT**
Average Class Member Damages	$11,450
Average Class Member Damages (Trebled)	$34,350
Average Class Member Recovery	$16–$17
Recovery as % of Actual Damages	~0.14%
Recovery as % of Trebled Damages	~0.05%
Total Attorneys' Fees Awarded	~$333 million
Hourly Rate for Highest Paid Attorney (after multiplier)	$7,986/hour

A $998 million settlement that puts almost no money in class members' pockets is, to use Professor Bartholomew's words, "deeply unimpressive." *Id.* It is not, as the district court claims, an "exceptional success." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1205 (S.D. Fla. 2006) (settlement an "exceptional success" where . . .

[17] There are multiple ways to calculate the per class member recovery. But even the most generous calculation would not yield any more than 0.2% of actual damages.

"[f]ull and complete recovery was achieved" and action had an "unprecedented" 92% claims rate).

For this meager recovery, class counsel not only obtained their full lodestar, but a handsome multiplier of 3.62 (or 3.63 as recounted by the district court). App. 305-06; Add. 27-28; R. Doc. 1622, at 27-28. The true multiplier was likely much higher because the court did not independently scrutinize counsel's claimed hours or billing rates. App. 167-77; R. Doc. 1552, at 108-18. Nor did the court engage with Monestier's argument that using 2024 rates across five years of billing significantly distorted the multiplier because rates increased dramatically during this time. *See, e.g.*, App. 172; R. Doc. 1552, at 113 (noting a 71% rate increase in paralegal rates in two-year period).

"There is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Shane Grp., Inc. v. BCBS*, 825 F.3d 299, 309 (6th Cir. 2016). The fact is that class counsel benefited from settling this class action, rather than litigating it to judgment.

After the Missouri verdict, counsel's fee stood at less than $92 million because the Sherman Act authorizes attorneys' fees on a lodestar

basis. 5 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS §15:49 (6th ed.) ("courts employ the lodestar method to calculate a 'reasonable fee' in federal fee-shifting cases"). But because counsel settled, they pocketed almost $333 million—far more than they would have earned if the trial verdict stood.

A payday of $3,100/hour blended rate—and nearly $8,000/hour for one attorney—for a settlement providing class members with a tenth-of-a-penny on the dollar shocks the conscience.[18] *Pearson*, 772 F.3d at 787 (reversing 9.6% fee award where settlements conferred "meager benefits" on class members); *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2014 WL 3917126, at *5 (N.D. Cal. Aug. 8, 2014) (reversing settlement and fee award in antitrust action where settlement provided only "11.29% of the single damages" or "3.76% of the treble damages" plaintiffs would have received if they had prevailed at trial).

"The reality is that this settlement benefits class counsel vastly more than it does the consumers who comprise the class." *In re Dry Max Pampers*, 724 F.3d at 721. Awards like this—where individual class

[18] App. 305-06; Add. 27-28; R. Doc. 1622, at 27-28; App. 167; R. Doc. 1552, at 108.

members get virtually nothing, and attorneys get hundreds of millions of dollars—"make the average person shake her head in disbelief" and cannot be permitted to stand. *Lowery v. Rhapsody Int'l, Inc.*, 75 F.4th 985, 988 (9th Cir. 2023).

V. THE DISTRICT COURT VIOLATED MONESTIER'S DUE PROCESS RIGHTS BY STRIKING HER OBJECTION AFTER SHE FAILED TO APPEAR IN PERSON AT THE FAIRNESS HEARING.

Standard of Review: This Court reviews *de novo* whether a notice and objection process comports with due process. *Linn Farms & Timber Ltd. P'ship v. Union Pac. R.R.*, 661 F.3d 354, 357 (8th Cir. 2011). It also reviews *de novo* whether that process comports with Rule 23. *Keil v. Lopez*, 862 F.3d 685, 703-04 (8th Cir. 2017).

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A. This Court Should Reverse the District Court's Decision to Strike Monestier's Objection for Not Appearing in Person.

When parties propose to release the claims of absent class members through a settlement, those class members are entitled to due process: the "best practicable notice" and an opportunity to be heard. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Rule 23 codifies these due process rights, providing that "any class member may object to the

proposal" after the court directs notice to all class members who would be bound. FED. R. CIV. P. 23(e)(1)(B), (e)(5)(A). Courts are instructed to avoid unduly burdening class members who wish to object. NOTES OF ADVISORY COMMITTEE ON 2018 AMENDMENTS TO RULE 23.

In a paragraph labeled, "Do I have to come to the hearing?" the class notice promised class members that "if [they] send any objection, [they] do not have to come to Court to talk about it." App. 4; R. Doc. 1371-4, at 11. "[A]s long as" an objector files a "written objection on time, the Court will consider it." *Id*.

But this promise was false. Three weeks before the fairness hearing, the district court ordered objectors to appear in person or risk having their objections struck. App. 196; R. Doc. 1566. Monestier promptly sought reconsideration, but the court did not rule on her motion until after the issue was moot. App. 367; R. Doc. 1623. Objectors who did not travel cross-country to appear in person two days before Thanksgiving had their objections deemed "waived." App. 295; Add. 17; R. Doc. 1622, at 17.

The court did not cite any case, nor could Monestier find one, where a court ordered an objector *and* their attorney to attend a fairness

hearing after the class notice assured them that personal attendance was not required. And, for good reason: "Requiring any objector to attend the final approval hearing does not offer a meaningful opportunity to be heard and therefore violates class members' due process rights." *Litwin v. iRenew Bio Energy Sols.*, LLC, 226 Cal. App. 4th 877, 884 (2014). *Accord* 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS §13:30 (6th ed.) ("Class members may file written objections and need not appear at the fairness hearing for their objections to be considered by the court.").

The district court put the "rationale" for its *sua sponte* order on the record "for the Eighth Circuit": it was "suspect" of objectors because it received unwelcome correspondence from a realtor accusing the court of misconduct.[19] App. 204; R. Doc. 1575, at 5. Being "suspect" of one person does not legally justify ordering dozens of *other people* to attend a fairness hearing in person after they relied on class notice that promised otherwise. *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293, 310 (3d Cir. 2004) ("due process considerations counsel against binding absent

[19] Exhibit 2, at 3-4 to the Motion to Supplement.

potential class members to understandings that were not made express in the class notice").

An objection procedure must be "desirous" of allowing class members to exercise their due process rights. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). Thus, burdens on class members' right to be heard must serve a purpose. There was no purpose served by the in-person order; it was simply an improper attempt by the court "to insulate [its] decision from appellate review." *In re T-Mobile*, 111 F.4th at 858 (simplified).

The fairness hearings themselves show that the in-person order served no purpose. As objectors presented their arguments, the court asked virtually no questions. Instead, its focus seemed to be on tallying which class members were physically present. *See Burnett* Tr., at 36, 45, 48 (inquiring four times); *Gibson* (inquiring three times).[20] Objector Bitz, for example, travelled from Pennsylvania to Missouri under the order's compulsion. The district court did not ask to hear from him. It is unclear what purpose the district court had for requiring Bitz to sit silently "in

[20] Exhibit 2, at 13, 20, 24 to the Motion to Supplement.

the back of the courtroom" while his lawyer presented the objection. *Burnett* Tr., at 37.

The court used the in-person order as a docket-clearing device, and in doing so, deprived class members of their due process rights. Because "the Rule 23(e) process seriously malfunctioned in this case," *see Shane Grp.,* 825 F.3d at 309, this Court should reverse the portion of the order deeming Monestier's objection waived. *In re T-Mobile*, 111 F.4th at 857-58.

B. This Court Should Reassign on Remand Because the Court's Conduct Raises the Appearance of Bias.

This Court should reassign the case on remand under its 28 U.S.C. §2106 supervisory power. Among other reasons, "reassignment may be necessary" when the lower court's proceedings, statements, or rulings "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Sentis Grp. v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009) (internal quotation omitted). Reassignment becomes necessary when "an objective review of the record demonstrates a degree of antagonism against [one party] that is higher than that being applied against [the other]." *Tumey v. Mycroft AI, Inc.*, 27 F.4th 657, 668 (8th Cir. 2022).

Reassignment is appropriate because the court issued an unprecedented *sua sponte* in-person order that deprived 34 out of 36 class action objectors of their due process rights. App. 295; Add. 17; R. Doc. 1622, at 17. *See also Gibson* (striking eleven objections).[21] It did not impose any such in-person requirement on the parties moving for settlement approval (named plaintiffs or defendants' corporate representatives). In fact, the court facilitated telephonic participation at the fairness hearing for plaintiffs' and defendants' attorneys.[22] *See, e.g., Gibson* Tr.[23]

The court issued this in-person order because it harbored suspicion of objectors: "I'm somewhat suspect about objectors in this case"; "but forgive me if I'm a little bit suspect in this particular matter"; "So for those reasons and others [sic.] concerned about objectors . . . "[24] *United States v. Est. of Hage*, 810 F.3d 712, 723 (9th Cir. 2016) (reassigning case

[21] Exhibit 2, at 19 to the Motion to Supplement.

[22] One objector sought leave to appear remotely; his request was denied without reasoning. R. Doc. 1585, 1589.

[23] Exhibit 2, at 14 to the Motion to Supplement.

[24] *Id.*, at 3-4.

where "judge's statements . . . reflect . . . bias against the federal agencies.").

In striking almost all of the objections before it, the court was unsympathetic to the financial hardship it imposed on class members. Attorneys for objectors explained that their clients "were simply not able to attend. They're working people and they couldn't get away for this hearing given their finances and other obligations." *Burnett* Tr, at 37. The court was unfazed; it reasoned that if class counsel could spend $13 million litigating, it was fair to make class members spend $1,000 for travel and lodging.[25] *See also Gibson* Tr. ("some of my criticisms of some objectors is they would never be able to float the $13 million in litigation expenses").[26] Of course, this is a *non sequitur*: class counsel is seeking hundreds of millions in fees, while $1,000 outstrips the settlement payout to individual class members many times over.

The court did not care about the legitimate reasons objectors provided for not being able to appear in person: delivering a eulogy at a

[25] Exhibit 1, at 18-19 to the Motion to Supplement.

[26] *Id.*, Exhibit 2, at 28.

funeral, family care responsibilities, and work obligations.[27] The district court called these "excuses" that do not play by "the rules that the district court has set."[28]

Added to this, the "judge's practice of delegating the task of drafting sensitive, dispositive orders to plaintiffs' counsel, and then uncritically adopting [the] proposed orders nearly verbatim, . . . belie[s] the appearance of justice to the average observer" and compels reassignment. *Chudasama*, 123 F.3d at 1373. To this day, the court has not acknowledged the ghostwritten orders or ruled on Monestier's motion for disclosure. *United States v. Peguero*, 367 F. App'x 170, 172 (2d Cir. 2010) (reassigning case where defendant's "request . . . for whatever reason was neither acknowledged nor acted upon").

Finally, reassignment is appropriate because the court placed improper legal and evidentiary burdens on objectors. For example, the court required Monestier to "offer a realistic alternative to the Settlement Agreement's practice changes." App. 303-04; Add. 25-26; R. Doc. 1622, at

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[27] Exhibit 1, at 18 and Exhibit 2, at 13, 25 to the Motion to Supplement.

[28] Exhibit 1, at 18 to the Motion to Supplement. *See also* App. 295; Add. 17; R. Doc. 1622, at 17.

25-26. It imposed this burden on other objectors as well. App. 336; Add. 58; R. Doc. 1622, at 58 (overruling objector who did not articulate "what other practice changes should have been included").

It also placed a burden on objectors to comply with certain Rule 23(e)(5)(A) requirements that were *not* contained in the class notice, *see* App. 216-18; R. Doc. 1575, at 17-19, and imposed additional requirements on objectors retroactively.[29] App. 297; Add. 19; R. Doc. 1622, at 19 (requiring objector to state "whether the homes were listed on an MLS" and "how any broker fees" were allocated). The court used these "requirements" to strike the very same objections it had already stricken for failing to appear in person.

The court discounted Monestier's submissions on attorneys' fees because she "provide[d] no evidence of expertise on attorneys' fees and acknowledges her lack of experience or qualifications." App. 306; Add. 28; R. Doc. 1622, at 28. An objector does not have a burden to establish "expertise" to challenge an attorney fee award in a class action.

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[29] The court made no effort to rectify its errors after they were brought to its attention. Tellingly, class notice has been amended for new settlements seeking court approval. R. Doc. 673-1.

Whether or not the district court is, or can be, truly neutral, "an average person on the street" "might reasonably . . . question[ ]" the court's partiality when told "all the relevant facts of the case." *Sentis*, 559 F.3d at 904-905, quoting *In re Kan. Pub. Emps. Ret. Sys.*, 85 F.3d 1353, 1358 (8th Cir. 1996). This Court should order reassignment on remand.

CONCLUSION

This Court should reverse settlement approval because plaintiffs lacked Article III standing to seek and settle for injunctive relief. At a minimum, it should vacate and remand for consideration of arguments the district court ignored. The Court should require reassignment on remand.

Dated: May 5, 2025

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

1. This brief is 12,952 words long, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief 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). It has been prepared in proportionally spaced typeface using Microsoft Word Century Schoolbook 14-pt font.

This brief complies with 8th Cir. R. 28A(h) because the PDF file has been scanned for viruses by Microsoft Defender Antivirus and is said to be virus-free by that program.

Dated: May 5, 2025

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CERTIFICATION OF SERVICE

I hereby certify that on May 5, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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