

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LISA KIM, individually and on behalf
of all others similarly situated,
Plaintiff-Appellee,

v.

RICH ALLISON; STEVE FRYE,
Objectors-Appellants,

v.

TINDER, INC., a Delaware
corporation; MATCH GROUP, LLC, a
Delaware limited liability company;
MATCH GROUP, INC., a Delaware
corporation,
Defendants-Appellees.

No. 19-55807

D.C. No.
2:18-cv-3093-
JFW-AS

OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted January 15, 2021
Pasadena, California

Filed August 17, 2021

Before: Consuelo M. Callahan and Paul J. Watford, Circuit Judges, and Jed S. Rakoff,* District Judge.

Opinion by Judge Rakoff;
Dissent by Judge Callahan

SUMMARY**

Class Settlement

The panel reversed the district court’s approval of a pre-certification class settlement, vacated the district court’s judgment and attorneys’ fees award, and remanded for the district court to conduct the more probing inquiry required for a pre-certification class settlement.

Plaintiff Lisa Kim brought suit against Tinder, Inc. in federal court pursuant to the Class Action Fairness Act of 2005 (“CAFA”) for violations of California’s Unruh Civil Rights Act and its unfair competition statute. Tinder successfully compelled arbitration, and Kim and Tinder reached a settlement, before class certification, that applied to a putative class. Class members Rich Allison and Steve Frye objected. The district court rejected the objections, certified the class for settlement purposes, granted final approval of the proposed settlement, and awarded Kim a

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

\$5,000 incentive payment and her counsel \$1.2 million in attorneys' fees.

Addressing the district court's approval of the settlement overall, the panel held that the district court correctly recited the fairness factors under Fed. R. Civ. P. 23(e)(2), but that the district court abused its discretion by underrating the strength of the plaintiff's case, overstating the settlement value, and overlooking the suggestions of collusion present.

The panel held that independent of the district court's abuse of discretion in its overall evaluation of the settlement, the approval of the attorneys' fees was itself an abuse of discretion. By adopting without any scrutiny the purported value of the injunctive relief and failing to consider the likely claims rate, the district court shirked its independent duty to assess the value of the settlement

Judge Callahan dissented. She agreed with the majority that the district court's \$24 million valuation of the settlement agreement was to some degree overinflated, but she dissented because the district court nevertheless reasonably evaluated the settlement class's relatively weak claims. Because the settlement provided for fair, reasonable, and adequate value for the release of the class's claims, she would affirm on the ground that the district court did not abuse its discretion in approving the settlement. Judge Callahan also disagreed with the majority's opinion discussion of whether the award of attorneys' fees was an abuse of discretion because the discussion was superfluous, given the majority's holding that the district court's approval of the settlement should vacated, and because the objectors waived any challenge to the district court's lodestar calculations.

COUNSEL

Danielle Leonard (argued) and Michael Rubin, Altshuler Berzon LLP, San Francisco, California; Kimberly A. Kralowec, Kralowec Law P.C., San Francisco, California; Alfred G. Rava, Rava Law Firm, San Diego, California; for Objectors-Appellants.

Adrian R. Bacon (argued) and Todd M. Friedman, Law Offices of Todd M. Friedman P.C., Woodland Hills, California; John P. Kristensen, Kristensen LLP, Los Angeles, California; for Plaintiff-Appellee.

Donald R. Brown (argued), Robert H. Platt, and Benjamin G. Shatz, Manatt Phelps & Phillips LLP, Los Angeles, California, for Defendants-Appellees.

OPINION

RAKOFF, District Judge:

Beginning in 2015, the dating app Tinder began offering reduced pricing for those under 30, later changed to those under 29. In 2017, plaintiff Lisa Kim purchased a premium version of the Tinder app, but because she was already in her thirties, she paid more for her monthly subscription than those in their twenties. Kim brought suit against Tinder in federal district court pursuant to the Class Action Fairness Act of 2005 (“CAFA”) for violations of California’s Unruh Civil Rights Act and its unfair competition statute. Over Kim’s opposition, Tinder successfully compelled arbitration. After a daylong mediation session with a retired judge, Kim and Tinder reached a settlement, before class certification, that applied to a putative class.

Specifically, the settlement class included all California-based Tinder users who were at least 29 years old when they subscribed to Tinder's premium services and were charged a higher price than younger subscribers. As part of the settlement, Tinder agreed to eliminate age-based pricing in California for new subscribers. Class members who maintained or reactivated their Tinder accounts would automatically receive 50 "Super Likes" (described below), for which Tinder would ordinarily have charged \$50. Finally, class members who submitted a valid claim form would also receive their choice of \$25 in cash, 25 Super Likes, or a one-month free subscription to the premium Tinder service previously purchased.

Class members Rich Allison and Steve Frye, whose attorneys represent the lead plaintiff in a competing age-discrimination class action against Tinder in California state court, were among six class members who objected to the proposed settlement. These two objectors, in particular, argued that Tinder offered too paltry a cash payout, as well as Super Likes that premium subscribers did not need and subscriptions that former subscribers did not want, all in exchange for releasing valuable claims that had only been strengthened by recent victories in related California actions. Rejecting these objections, the district court certified the class for settlement purposes, granted final approval of the proposed settlement, and awarded Kim a \$5,000 incentive payment and her counsel \$1.2 million in attorneys' fees. Allison and Frye now appeal.

We conclude 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

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