Case No. 09-56683

In The United States Court of Appeals
For The Ninth Circuit

IN RE: BLUETOOTH HEADSET PRODUCTS LIABILITY LITIGATION

MICHAEL JONES; AMY KARLE; LORI RAINES; KIMBERLY RYAN; BETTY DUMAS; BETSEE FINLEE; EVAN NASS; ALEKSANDRA SPEVACEK,

Plaintiffs-Appellees,

—and—

WILLIAM J. BRENNAN; BILL CLENDINENG; WILLIAM E. GERKEN; BENJAMIN T. RITTGERS; HENRY TOWSNER; SCOTT M. UNIVER; AARON J. WALKER,

Objectors-Appellants,

—v.—

GN NETCOM, INC.; MOTOROLA, INC.; PLANTRONICS, INC.,

Defendants-Appellees.

Appeal from Orders Entered by the United States District Court for the Central District of California

RESPONSE BRIEF ON BEHALF OF DEFENDANTS-APPELLEES

Terrence J. Dee (IL Bar No. 6215953)
Michael B. Slade (IL Bar No. 6274231)
Daniel R. Lombard (IL Bar No. 6290071)
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654
(312) 862-2000
Counsel for Defendant-Appellee Motorola, Inc.

(Additional Counsel Listed on Signature Page)

June 9, 2010

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1), Defendants-Appellees make the following disclosures:

GN Netcom, Inc. is a wholly owned subsidiary of GN Netcom A/S, a Danish business organization. GN Netcom A/S is 100% owned by GN Store Nord A/S, a publicly listed company on the Copenhagen Stock Exchange.

Motorola, Inc. has no parent corporation and no publicly held company holds 10% or more of its stock.

Plantronics, Inc. has no parent corporation and no publicly held company holds 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Defendants agree with the jurisdictional statement of the Objectors. (Objectors-Appellants' Brief ("Ob. Br.") 1-2.)

STATEMENT OF ISSUES

Whether the district court committed a clear abuse of discretion in approving the settlement agreement as fair, adequate, and reasonable where the court applied the proper legal standard by analyzing each factor explained by this Court in *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004), and the court did not make any clearly erroneous findings of fact.

Standard of Review. A district court's "decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he [or she] is 'exposed to the litigants, and their strategies, positions, and proof.'" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (internal citation omitted). Therefore, a district court's decision to approve a class action settlement is reviewed for "clear abuse of discretion." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009). Such a review is "extremely limited," and the Appellate Court should "affirm if the district court judge applies the proper legal standard and his [or her] findings of fact are not clearly erroneous." *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 458 (9th Cir. 2000).

RELEVANT RULES

All applicable statutes are contained in the brief of the Objectors.

(Ob. Br. 3.)

STATEMENT OF THE CASE

Plaintiffs filed twenty-six putative class actions against Motorola, Inc., Plantronics, Inc., and GN Netcom, Inc. (collectively "Defendants") in various courts across the country concerning the marketing of their Bluetooth headsets. The Judicial Panel on Multidistrict Litigation coordinated the cases for pretrial proceedings before Judge Dale S. Fischer in the Central District of California. (Excerpts of Record ("ER") 89-90.) On August 26, 2007, a lawsuit raising similar questions of law and fact, entitled *Kirkpatrick v. Motorola*, No. 07-5570 (DSF) (Ex), was filed in the Central District of California and transferred to Judge Fischer. (ER 9.)

Plaintiffs filed their Second Amended Consolidated Class Action Complaint on September 25, 2007. (ER 93.) Plaintiffs alleged that Defendants' headsets had the potential to cause hearing loss after extended use at high volumes, and claimed that the failure to disclose this purported risk constituted consumer fraud. (Supplemental Excerpts of Record ("SER") 2-3.); *cf. Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009) (affirming dismissal of a similar case involving

iPods). Defendants strongly assert that their Bluetooth headsets are safe and deny that they have done anything wrong. (ER 10.)

The case was stayed as the parties engaged in settlement negotiations. The negotiations were mediated by the Honorable Steven J. Stone, Presiding Justice, California District Court of Appeal (Ret.). (ER 60.) Defendants then filed a joint motion to dismiss. (ER 94-95.) The motion was fully briefed when the parties informed the district court that, with Justice Stone's assistance and approval, they had reached an agreement in principle to settle the lawsuit. (ER 62, 96.)

On January 16, 2009, the parties filed a proposed Class Action Settlement Agreement that purported to resolve all of Plaintiffs' claims. (ER 97.) After a hearing, the district court preliminarily approved the settlement, certified a nationwide class for settlement purposes only, and directed that notice be provided to the class. (*Id.*)

Pursuant to the district court's order, the parties implemented a comprehensive notice plan that included a mailed notice to 246,236 potential class members, advertisements in national periodicals including *People, Newsweek, Sports Illustrated, National Geographic, Parade*, and *USA Weekend,* and advertisements on Internet websites.

(ER 14.) These various notices reached 80% of potential class members an average of more than 2.5 times each. (*Id.*) Out of the millions of potential class members, 715 people validly elected to opt out of the settlement. (ER 23.) The court and/or settlement administrator received 50 objections to the settlement filed by putative class members. (*Id.*) One of those objections was filed by the seven putative class members who are the Appellants in this case (the "Objectors"). (ER 201-11.)

Defendants also notified the attorneys general of all 50 states of the details of the settlement. (ER 15.) The district court did not receive objections from any of the attorneys general. (*Id.*)

On July 6, 2009, the district court held a fairness hearing to consider whether final approval of the settlement was warranted. Counsel for the Objectors was present at the hearing and was given an opportunity to be heard. (ER 10.) At the hearing, the district court indicated that she intended to grant final approval of the settlement, but needed more information before deciding what amount of attorneys' fees (if any) would be appropriate. (ER 75-79.) She requested such information from class counsel. (ER 79.)

On September 8, 2009, the district court entered an Order Granting Final Approval of the settlement (the "Approval Order"). (ER 8-42.) The Approval Order provides a detailed analysis of why the settlement was "fair, reasonable, and adequate" under Rule 23(e). (ER 16-24.) The court did not set attorneys' fees, costs, or incentive awards, but instead noted that she would address those issues "in a separate order." (ER 20.) The court acknowledged that the settlement agreement vested her with "full discretion concerning what amounts should be awarded, if any." (*Id.*) The court subsequently entered a final judgment dismissing the cases with prejudice. (ER 107.)

On October 22, 2009, the district court entered an Order Setting Class Counsel's Attorneys' Fees and Costs, and Incentive Award (the "Fee Order"). (ER 43-49.) Again, the court acknowledged that the "settlement agreement provided that the Court could award any amount of fees, costs, and incentive payments up to the maximum amounts described in the agreement. . . ." (ER 43.) In the Fee Order, the court awarded $850,000 to class counsel for fees and costs and $12,000 "to be distributed among the representative plaintiffs as an incentive award." (ER 49.)

The Objectors subsequently appealed both the Approval Order and the Fee Order. (ER 215-16.)

STATEMENT OF FACTS

The settlement agreement required Defendants to take the following steps:

- Post acoustic safety information, in substantially the form as attached in Exhibit C to the settlement agreement, on their respective websites (ER 115);
- Provide the additional acoustic safety information set forth in Exhibit D to the settlement agreement in product manuals and/or packaging for new Bluetooth headsets (ER 115);
- Pay a total of $100,000 to fund the following organizations, in the specified amounts: The University of Tennessee College of Medicine, Center for Independent Living Research, $31,666.67; the National Hearing Conservation Association, $31,666.67; the American Speech and Hearing Association, $31,666.66; and the Greater Los Angeles Agency on Deafness, $5,000 (ER 115-116);
- Pay attorneys' fees and costs in an amount set by the district court, up to a total of $850,000 (ER 116-117); and
- Pay incentive awards to the class members in an amount set by the district court, up to a total of $12,000 (ER 116).

The settlement agreement made clear that the settlement was not conditioned on any "minimum attorneys' fee award, minimum costs award, or upon the payment of any incentive award to any Plaintiff." (ER 117:9-11.)

SUMMARY OF THE ARGUMENT

The Objectors concede that "the underlying case is likely meritless." (Ob. Br. 28.) Therefore, they do not argue that the settlement deprives the settlement class of any valuable right (economic or otherwise). Nor do the Objectors argue that the settlement class was improperly certified, that the notice to the class was defective, or that the nationwide notice plan was insufficient. The Objectors nonetheless ask this Court to reverse the lower court and reject the settlement, forcing the parties to proceed through dispositive motions where, the Objectors argue, the case should be dismissed. (*Id.*)

The Objectors suggest that such an approach is necessary because the district court's awards of attorneys' fees and incentive payments were large enough to violate the Rule 23(e) requirement that a settlement be fair, adequate, and reasonable. *See* Fed. R. Civ. P. 23(e). But the Objectors' invitation to throw the baby out with the bathwater is unjustified and unnecessary for at least three reasons.

First, the district court's analysis of the settlement in the Approval Order was entirely appropriate under Ninth Circuit law. The Objectors agree that the district court applied the proper legal standard

in the Approval Order, and they do not suggest that the court made any clear factual error that would justify reversal. *Dunleavy*, 213 F.3d at 458. Therefore, the Objectors do not establish a "clear abuse of discretion" by the district court and the Approval Order should be affirmed. *Id.*

Second, the cases the Objectors rely on to argue that reversal is justified are readily distinguishable, as the lower court properly concluded. (ER 20.) And the Objectors are simply wrong in arguing that the district court committed "legal error" in distinguishing those cases. (Ob. Br. 9.)

Third, the settlement was not conditioned on any award of attorneys' fees, as the district court explained in the Approval Order. (ER 117.) Therefore, even if this Court were to find error with the district court's subsequent award of fees and incentive awards (in the Fee Order), the Approval Order can still stand. *Rodriguez*, 563 F.3d at 969.

In sum, the district court correctly granted approval of the settlement and entered judgment dismissing the cases. This Court should affirm.

ARGUMENT

I. The Objectors Do Not Provide Any Reason to Reverse the Approval Order.

The Objectors appeal two separate orders: (1) the Approval Order and (2) the Fee Order. (ER 216.) The Objectors devote nearly all of their opening brief to attacking the attorneys' fees awarded in the Fee Order. They do not identify any issue that would justify reversal of the Approval Order. *Dunleavy*, 213 F.3d at 458 (holding that in reviewing a district court's approval of a settlement agreement, the Appellate Court should "affirm if the district court judge applies the proper legal standard and his [or her] findings of fact are not clearly erroneous").

In fact, the Objectors concede that the eight-factor balancing test applied by the district court in the Approval Order (as explained by this Court in *Churchill Village*, 361 F.3d at 575), is the proper legal standard for considering whether a settlement satisfies the requirements of Rule 23(e).[1] (Ob. Br. 11.)[2] The district court devoted

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[1] The Objectors suggest the district court should pay "special attention," give "careful scrutiny," and make a "holistic evaluation[]" of any settlement involving "settlement-only class certification." (Ob. Br. 11-12.) But the Objectors do not identify any way that the district court's analysis of the *Churchill* factors fell short of those standards—nor could they. The district court engaged in a detailed, individual analysis of the relevant factors. (ER 16-24.)

distinct sections of its Approval Order to each of the *Churchill* factors, ultimately concluding: "After weighing the *Churchill* factors, the Court approves the settlement of these Actions on the terms and conditions set forth in the Settlement Agreement as being fair, reasonable, adequate, and in the best interests of the Class as a whole." (ER 24.)

Since there can be no dispute that the district court applied the proper legal standard in the Approval Order, to justify reversal of that order, the Objectors would have to show that the court's findings of fact were "clearly erroneous." *Dunleavy*, 213 F.3d at 458. But the Objectors make no effort to identify any "clear error" in the district court's analysis of any of the *Churchill* factors. Therefore, the Approval Order should be affirmed. *Dunleavy*, 213 F.3d at 460 ("The district court applied the proper legal standard in assessing the relevant factors and its findings of fact were not clearly erroneous. Therefore, we find that the district court did not err in approving the Settlement."); *see also*

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[2] The Objectors quote the eight factors from *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003), but the factors listed in *Molski* are identical to those set forth in *Churchill*, 361 F.3d at 575. Indeed, the eight *Churchill* factors are well established in the Ninth Circuit as the proper legal standard for the review of a class action settlement under Rule 23(e). *See also Rodriguez*, 563 F.3d at 963-64 (analyzing the same eight factors); (Ob. Br. 11).

Churchill, 361 F.3d at 577 ("Because the record reveals that the district court considered the relevant factors and provided a reasoned response to settlement objections, we conclude that the district court did not abuse its discretion in approving the settlement."); *Hanlon*, 150 F.3d at 1027 ("The judge's decision to approve the settlement was correct on the merits, and reflected the proper deference to the private consensual decision of the parties.").

II. The District Court Did Not Have an "Erroneous View of the Law" in Distinguishing the Cases the Objectors Cited.

While avoiding an attack on the district court's analysis of the *Churchill* factors, the Objectors suggest that the settlement in this case is "untenable" because it is "similar" to settlements rejected by the Seventh[3] and Ninth Circuits.[4] (Ob. Br. 11-19.) But the district court specifically addressed the settlements in these same cases and found them distinguishable. (ER 20.) The Objectors argue that the district court erred in distinguishing the cases, and that this supposed error

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[3] The Objectors point to three Seventh Circuit cases: *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 882 (7th Cir. 2000); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004); and *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 951 (7th Cir. 2006).

[4] The Objectors point to one Ninth Circuit case: *Molski v. Gleich,* 318 F.3d 937 (9th Cir. 2003).

caused the court to approve this settlement. (Ob. Br. 18-19.) This argument fails for two principal reasons: (1) despite the Objectors' arguments to the contrary, the distinction drawn by the district court applies to a number of the cases the Objectors cited, and (2) the Objectors' cited cases are distinguishable on a multitude of other grounds.

First, two of the Objectors' cited cases are distinguishable on the precise ground identified by the district court because, unlike the settlement and fee award in this case, the fee awards in those cases were not "severable from the rest of the settlement. . . ." (ER 20.) For example, in the only case the Objectors cite in which this Court rejected a settlement, *Molski v. Gleich,* 318 F.3d 937, 944 (9th Cir. 2003), the settlement agreement set a specific dollar amount that the defendant would "pay class counsel . . . for the services performed in connection with the case." *Id.* at 944. Because the district court did not have the power to rewrite any aspect of the parties' agreement, the court had no power to set attorneys' fees at a fair level. *Id.* at 946 ("[A] district court cannot unilaterally modify the provisions of a consent decree through its order approving the proposed decree."). For this and a host of other

reasons,[5] the Court concluded that the *Molski* settlement did not meet the requirements of Rule 23(e). *Id.* at 953-955. In contrast, the settlement agreement in this case vested the district court with complete power to set the attorneys' fee award at whatever level the court thought was fair. (ER 117:9-11; ER 20:12-21.)

Despite the Objectors' argument to the contrary, *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004), is distinguishable for the same reason. (Ob. Br. 18-19.) Although the Objectors suggest that the Seventh Circuit "impl[ied]" that the district court had the power to determine a fee award separately (Ob. Br. 18), an opinion by the *Mirfasihi* district court makes clear that the fee award was not severable from the rest of the settlement: "Plaintiffs have agreed to accept the same amount in attorneys' fees and expenses as the amount

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[5] The *Molski* court also identified the following problems with the settlement in that case, which are not at issue here: (1) inadequate representation by the class representatives and class counsel, (2) a defective notice, (3) an insufficient notice program, and (4) the fact that the class was certified as a mandatory Rule 23(b)(2) class without the right to opt out. 318 F.3d at 952-56. None of these problems is presented by this lawsuit, where the class was certified as a Rule 23(b)(3) class, with a right to opt out, and a comprehensive nationwide notice plan was undertaken that reached 80% of the class, without any objections about the notice itself or the notice plan. (ER 11-15.)

agreed to in the original settlement agreement, $750,000, an amount that FMC has agreed to pay." *Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, 2005 WL 1950386, at *14 (N.D. Ill. Aug. 11, 2005) (awarding fees set by settlement). The Objectors' citation to *Mirfasihi* is further undermined by the fact that the settlement was ultimately approved by the Seventh Circuit with the same purportedly "troubling" hallmarks that the Objectors criticize in their brief (Ob. Br. 15), namely, (1) recovery for the class of up to $2.4 million[6] and (2) attorneys' fees of $750,000. *Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, 2007 WL 2066503, at *2 (N.D. Ill. July 17, 2007), *aff'd*, 551 F.3d 682, 687 (7th Cir. 2008). Therefore, the district court was correct in distinguishing *Molski* and *Mirfasihi* as it did.

Second, the Objectors' cited cases are readily distinguishable for other reasons beyond those explained above.[7] (Ob. Br. 18-19.) For

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[6] The Objectors suggest the *Mirfasihi* class could recover up to $2.64 million, but the district court makes clear that the "maximum" was $2.4 million. *Mirfasihi*, 2007 WL 2066503, at *2.

[7] Even if the other Seventh Circuit cases cited by the Objectors were directly on point, the district court would not have committed "legal error" (Ob. Br. 9) by instead following the Rule 23(e) analysis required by the Ninth Circuit in *Churchill*. *Gardner Constr. Co. v. Assurance Co. of Am.*, No. C99-1810-MJJ ARB, 2000 WL 1677959, at

example, the *Crawford* court rejected a settlement where the class was improperly certified under the wrong provision of Rule 23. *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 881-82 (7th Cir. 2000) (explaining that the class was certified as a mandatory Rule 23(b)(2) class even though the class should have been certified as a Rule 23(b)(3) class with the right to opt out). That is not the case here, where there is no dispute that the settlement class was properly certified under Rule 23(b)(3). (ER 11-14.)

And in the *Murray* case, which the Objectors quote extensively (Ob. Br. 13-16), the lower court actually rejected the settlement without even reading it because the court had already decided that class certification was inappropriate and so a settlement class could not be certified.[8] *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 951 (7th Cir.

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*4 (N.D. Cal. Nov. 3, 2000) ("Given the choice between binding precedent and persuasive precedent from another circuit in open disagreement with this circuit's law, this Court must adhere to the former."); *see also Rodriguez*, 563 F.3d at 965 (identifying differences between Seventh Circuit practice and Ninth Circuit practice when it comes to evaluating class action settlement agreements).

[8] Since the issue on appeal was whether the district court improperly refused to certify a class, *Murray*, 434 F.3d at 951, the Court's analysis of the settlement agreement was dicta. *DeGeorge v. U.S. Dist. Court for Cent. Dist. of Cal.*, 219 F.3d 930, 939 (9th Cir. 2000)

2006). Thus, the Court of Appeals in *Murray* did not have the benefit of any analysis of the proposed settlement (or the case) by the lower court, and could not reliably analyze whether the case was "frivolous" (warranting dismissal) or a case where the class was unfairly giving up a substantive right (such that the settlement was a "sellout"). *Id.* at 952. That is not the case here, where the district court performed an exhaustive review of the settlement agreement, based on the court's familiarity with the case (including a pending, fully briefed motion to dismiss (ER 16-17)), and analyzed each of the *Churchill* factors accordingly. (ER 16-24.)

Given these distinctions, it is clear that the district court was neither constrained by the single Ninth Circuit case the Objectors cited, nor persuaded by the analysis in the Seventh Circuit cases. *Gardner Constr. Co. v. Assurance Co. of Am.*, No. C99-1810-MJJ ARB, 2000 WL 1677959, at *4 (N.D. Cal. Nov. 3, 2000) (precedent from another circuit has only persuasive value). Therefore, the district court's failure to give these cases as much weight as the Objectors would like is not an

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(analysis that is neither the case's "central holding nor essential to its disposition" is dicta).

indication that the court had an "erroneous view of the law," nor does it provide "grounds for reversal."[9] (Ob. Br. 19.)

III. The Approval Order Is Not Dependent on the Fee Order.

Even if this Court were persuaded by the Objectors' arguments that the attorneys' fee or incentive awards were too high, the Approval Order can still stand. The settlement agreement was not conditioned on any "minimum attorneys' fee award, minimum costs award, or upon the payment of any incentive award to any Plaintiff." (ER 117:9-11.) Rather, the settlement gave the district court the power to set appropriate fee awards, up to the limits agreed to by the parties, based on the court's understanding of the case and the settlement. (ER 116-117.) The district court recognized this power in the Approval Order

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[9] Strangely, the Objectors also argue that the district court erred by examining what the Plaintiffs "might have achieved at trial." (Ob. Br. 28.) But that analysis is required by *Churchill*, which calls for an examination of "the risk, expense, complexity, and likely duration of further litigation" as well as "the amount offered in settlement." *Churchill*, 361 F.3d at 575. Indeed, the Ninth Circuit explicitly recognized that such an analysis is appropriate: "In reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value." *Rodriguez*, 563 F.3d at 965 (citing Federal Judicial Center, Manual for Complex Litigation § 21.62, at 316 (4th ed. 2004)).

(ER 20), and subsequently performed a detailed analysis to determine an appropriate fee award, set forth in the Fee Order. (ER 43 (recognizing that the "settlement agreement provided that the Court could award any amount of fees, costs, and incentive payments up to the maximum amounts described in the agreement").)

Since the settlement provided the district court with the power to grant attorneys' fees of any amount (including zero), the district court's approval of the settlement in the Approval Order is not affected by its subsequent award of fees.[10] Therefore, even if this Court were to believe that the attorneys' fees or incentive awards were too high, the Court can allow the Approval Order to stand while ordering reconsideration of the Fee Order. *See Rodriguez*, 563 F.3d at 969 ("[W]e affirm approval of the settlement. We reverse and remand the award of attorney's fees. . . ."). This approach makes sense given that the Objectors' complaints focus on the awards granted in the Fee Order and, as explained above, the Objectors do not challenge the legal standard

[10] The district court recognized this principle in the Fee Order: "Because the settlement agreement provided that the Court could award any amount of fees, costs, and incentive payments . . . the Court was not required to determine the reasonableness of the amounts before approving the settlement." (ER 43-44.)

utilized in the Approval Order or argue that the district court committed "clear error" in applying that standard.

CONCLUSION

For all the reasons stated above, Defendants respectfully request that this Court affirm the district court's Approval Order.

Dated: June 9, 2010

Respectfully submitted,

/s/ Terrence J. Dee

Terrence J. Dee (IL Bar No. 6215953)
Michael B. Slade (IL Bar No. 6274231)
Daniel R. Lombard (IL Bar No. 6290071)
Kirkland & Ellis LLP
300 North LaSalle Street
Chicago, IL 60654
On Behalf of Motorola, Inc.

Michael E. Baumann
Mark T. Cramer
Kirkland & Ellis LLP
333 South Hope Street
Los Angeles, CA 90071
On Behalf of Plantronics, Inc.

Angel Antonio Garganta
Arnold & Porter LLP
One Embarcadero Center
22nd Floor
San Francisco, CA 94111-3823
On Behalf of GN Netcom, Inc.

STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28-2.6

Defendants are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 09-56683

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements:

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Dated: June 9, 2010

/s/ Terrence J. Dee

Terrence J. Dee
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654
(312) 862-2000

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2010, I electronically filed the foregoing RESPONSE BRIEF ON BEHALF OF DEFENDANTS-APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The following participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system:

Angel Antonio Garganta
Arnold & Porter LLP
One Embarcadero Center
22nd Floor
San Francisco, CA 94111-3823
angel.garganta@aporter.com

Bruce Lee Simon
Pearson, Simon, Warshaw & Penney, LLP
44 Montgomery Street
Suite 1430
San Francisco, CA 94104
bsimon@pswplaw.com

Clifford Harris Pearson
Pearson Simon Warshaw & Penney, LLP
15165 Ventura Boulevard
Suite 400
Sherman Oaks, CA 91403
cpearson@pswplaw.com

Daniel Leon Warshaw
Pearson Simon Warshaw & Penney, LLP
15165 Ventura Boulevard
Suite 400
Sherman Oaks, CA 91403
dwarshaw@pswplaw.com

David B. Casselman
Wasserman, Comden & Casselman
5567 Reseda Boulevard, Suite 330
Tarzana, CA 91357-7033
dcasselman@wcclaw.com

John Robert Mercy
Mercy Carter Tidwell
1724 Galleria Oaks Drive
Texarkana, TX 75503
jmercy@texarkanalawyers.com

Michael E. Baumann
Kirkland & Ellis LLP
333 South Hope Street
Los Angeles, CA 90071
michael.baumann@kirkland.com

Mark T. Cramer
Kirkland & Ellis LLP
333 South Hope Street
Los Angeles, CA 90071
mark.cramer@kirkland.com

Melissa M. Harnett
Wasserman, Comden & Casselman
5567 Reseda Boulevard, Suite 330
Tarzana, CA 91357-7033
mharnett@wcclaw.com

Stephen M. Garcia
The Garcia Law Firm, Suite 1950
One World Trade Center
Long Beach, CA 90 831
sgarcia@lawgarcia.com

Theodore H. Frank
Center for Class Action Fairness
1718 M Street NW, No. 236
Washington, DC 20036
tfrank@gmail.com

Mark Philip Pifko
Initiative Legal Group LLP
1800 Century Park East
2nd Floor
Los Angeles, CA 90067
mpifko@initiativelegal.com

Trenton H. Norris
Arnold & Porter LLP
One Embarcadero Center
22nd Floor, Suite 2700
San Francisco, CA 94111-3823

I further certify that some of the participants in the case are not registered CM/ECF users. I have caused a copy of the foregoing document to be mailed by U.S. First Class Mail, postage prepaid, to the following non-CM/ECF participants:

Esther L. Klisura
Pearson, Simon, Warshaw & Penney, LLP
44 Montgomery Street
Suite 1430
San Francisco, CA 94104

Scott Wesley Henry
Segal McCambridge Singer & Mahoney, Ltd.
Willis Tower, Suite 5500
233 S. Wacker Drive
Chicago, IL 60606

Steven Alan Hart
Segal McCambridge Singer & Mahoney, Ltd.
Willis Tower, Suite 5500
233 S. Wacker Drive
Chicago, IL 60606

Scott Jason Vold
Segal McCambridge Singer & Mahoney, Ltd.
Willis Tower, Suite 5500
233 S. Wacker Drive
Chicago, IL 60606

James B. McHugh
McHugh Fuller Law Group, PLLC
97 Elisa Whiddon Road
Hattiesburg, MS 39402

James Andrew Holmes
James Holmes Law Office
605 South Main Street, Suite 203
Henderson, TX 75654

Michael J. Fuller
McHugh Fuller Law Group, PLLC
97 Elias Whiddon Road
Hattiesburg, MS 39402

Executed June 9, 2010, at Chicago, Illinois.

/s/ Terrence J. Dee

Attorney for Defendant-Appellee
Motorola, Inc.
E-mail: terrence.dee@kirkland.com