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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

REPLY BRIEF FOR OBJECTORS-APPELLANTS

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INTRODUCTION

The district court approved as "fair, adequate, and reasonable" a settlement that provided for zero direct relief to the class, injunctive relief with no evidence of benefit to the class, $100,000 in *cy pres* awards, and up to $850,000 in attorneys' fees and costs. As best the Brennan Objectors can tell, it would be unprecedented for this Court to affirm the settlement approval: no appellate court has ever affirmed a class action settlement this self-serving of class attorneys and lacking in benefits to their putative clients. Plaintiffs' and Defendants' response to the Brennan Objectors' appellate brief is remarkable for what is missing.

Neither Plaintiffs nor Defendants cite to a single case where an appellate court has affirmed an approval of a class action settlement that provided so little to the class and so much to the attorneys.

The Brennan Objectors argued that the district court's finding of class benefit was clearly erroneous because "the parties presented no evidence that the injunctive relief—additional warnings—benefitted the class, or even future consumers." Obj. Br. 25. Neither brief identifies or attempts to identify ***anything*** in the record below that supports the district court's factual finding that the settlement's injunctive relief is a benefit to the class, even as neither brief contests the obvious principle that the settling parties have the burden of proof on that issue. (Plaintiffs do assert *ipse dixit* that the district court's finding was not an abuse of

discretion.) Nevertheless Plaintiffs base nearly every single one of their arguments for affirming the decision below on the unsupported premise that the injunctive relief benefits the class.

The Brennan Objectors argued, citing precedent from the Ninth Circuit and around the nation, that treating attorneys' fees as severable from the underlying settlement is a pure economic fiction that should have no legal consequence, and the district court committed legal error by holding otherwise. Obj. Br. 19-25. Neither Plaintiffs nor Defendants provide any reasoning for a legal distinction for this economic fiction; nevertheless, Defendants repeatedly assert *ipse dixit* that the economic fiction of severable attorneys' fees distinguishes this case from other precedents overturning court approvals of higher-quality settlements for abuse of discretion.

Each of these ***three*** issues provides ***independent*** grounds for reversing the settlement as an abuse of discretion—yet neither Plaintiffs nor Defendants addressed the shortcomings in their briefs.[1] And remarkably, neither Plaintiffs nor Defendants contest the Brennan Objectors' arguments (Obj. Br. 29) that it would

[1] Brennan is mystified why Defendants assert that 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." Def. Br. 10-11. Both these assertions are false. *See* Obj. Br. 11-25, 27-28 (district court applied wrong legal standard); *id.* at 25-27 (district court made clearly erroneous factual finding).

be pernicious as a matter of public policy to affirm the district court's approval of the settlement.

The Brennan Objectors provided another three independent reasons for reversing the decision below; while the parties do address these arguments, their responses are not sound.

* The Brennan Objectors argued that the Class Counsel's negotiation of the settlement to provide for a reversion to the Defendants—rather than their putative clients—of any denied attorneys' fees, was a breach of their fiduciary duty to the class that meant that the settlement could not be approved under Rule 23(a)(4). Neither Plaintiffs nor Defendants mention Rule 23(a)(4) in their response briefs; the one case cited by Plaintiffs in defense of their arrangement does not address this question.

* The Brennan Objectors argued that the district court's "more than plaintiffs might have achieved at trial" test was legally erroneous. Obj. Br. 27-28. Defendants try to shoehorn the district court's reasoning into *Churchill Village v. General Electric*, 361 F.3d 566 (9th Cir. 2004). Def. Br. 20 n.9. Plaintiffs attempt to sidestep the issue by affirmatively misrepresenting the district court's holding as "more beneficial to the Class than the relief likely to be achieved at trial," Pl. Br. 1,

and then ignoring the Brennan Objectors' arguments. But neither argument suffices to defend what the district court actually said.

* Brennan argued that the Ninth Circuit should apply the reasoning of the Seventh Circuit in *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006). (Obj. Br. 13-17.) Neither Plaintiffs nor Defendants argue that the legal reasoning in *Murray* is erroneous or flawed; rather, they try to find excuses for this Court to ignore a precedent fatal to their settlement. As the Brennan Objectors discuss below, there is no reason for this Court to create a gratuitous circuit split or to distinguish *Murray* from this case.

Perhaps sensing that the district court's opinion cannot be defended on its own terms, the parties introduce additional arguments that the district court did not consider in support of its decision. But these fail as well.

Defendants argue that the district court could ignore the Seventh Circuit precedents because it was "not persuaded by the analysis." Perhaps the district court could have chosen that route—but that is not what the district court did. The district court did not say that it disagreed with the Seventh Circuit opinions; rather, the district court erroneously held that the Seventh Circuit opinions were distinguishable on a particular ground that was both factually incorrect and legally irrelevant. There is no reason to disregard the Seventh Circuit precedent, which is

entirely consistent with Ninth Circuit precedent for approving class action settlements—as the Ninth Circuit itself has previously held.

Plaintiffs argue that this court should include the million dollars spent on class-wide notice as a "benefit" rationalizing both the settlement and disproportionate attorneys' fees. But, while this argument is supported by Ninth Circuit dicta, it is not supported by any reasoning, and, if followed, would lead to absurd results. The million dollars spent on class notice of an unfair settlement certainly does not bootstrap the settlement into fairness.

The absurdity of this settlement has received nationwide attention. Given that federal courts have an affirmative obligation to scrutinize the fairness of class action settlements, and given the numerous legal and factual errors below, it would be disgraceful for the Ninth Circuit to affirm the settlement approval below. Rule 23(e) means something, and this Court should not accept the settling parties' invitation to turn the fairness hearing procedure into a perfunctory rubber stamp.

I. There Is No Evidence of Class Benefit From the Injunctive Relief.

Brennan previously argued that the "parties presented no evidence about the relative merits of the warning required by the injunction. There is no legal basis to find that the injunction had value to the class, and the injunction cannot be grounds for finding the settlement fair." Obj. Br. 27. In response, Plaintiffs make

arguments for why the injunction is beneficial, but do not challenge the lack of any support in the record for that proposition. Pl. Br. 13-15.

The premise is not so obvious that this Court can take the judicial notice Plaintiffs implicitly request. *Cf. also* Omri Ben-Shahar and Carl E. Schneider, *The Failure of Mandated Disclosure*, U. CHI. L. & ECON. OLIN WORKING PAPER No. 516 (2010) (available at http://ssrn.com/abstract=1567284). The burden of proof was with the settling parties, who make opposite assertions about the merits of the injunctive relief. *E.g.*, Def. Br. 5.

The district court had no factual basis to make a finding that the injunctive relief was beneficial to the class. As such, the only class benefit was the pecuniary relief: $100,000 of which went to *cy pres*, and $850,000 to attorneys, a plainly unfair and inadequate ratio. It was clearly erroneous for the district court to decide otherwise. Plaintiffs' arguments to the contrary (*e.g.*, Pl. Br. 22-25) rest on the premise, unsupported by evidence in the record, that the injunctive relief had a beneficial effect for the class.

This alone provides grounds for reversal of the approval of the settlement.[2]

[2] Plaintiffs claim that the Brennan Objectors' standard would mean that "no injunctive relief settlement would pass muster." Pl. Br. 11. This is wrong. An injunctive relief settlement could potentially pass muster under the Brennan Objectors' standard (which is also the Ninth Circuit's standard in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003)) where the district court made a factual finding

II. There Is No Reason to Treat the Attorneys' Fees as a Separate Component Part Severable From the Settlement.

As the Ninth Circuit has noted repeatedly, "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Rodriguez v. West Publishing Co.*, 563 F.3d 948, 964 (9th Cir. 2009) (*quoting Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

A. Severability Is Not a Grounds for Settlement Approval.

The parties, repeating the district court, repeatedly emphasize that the attorneys' fee award decision was "severable" from the settlement (*e.g.*, ER 20; Pl. Br. 21; Def. Br. 9), but never provide any legal reasoning or cite any valid precedent for why this economic fiction is remotely relevant. And an economic fiction it is: "If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits

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supported by record evidence that the injunctive relief provided affirmative benefit to the class.

Plaintiffs mysteriously argue at length that the *cy pres* award is a benefit to the class. Pl. Br. 15-18. There was no need for them to do so: the Brennan Objectors assumed *arguendo* that the *cy pres* award was a benefit to the class, because the settlement fails as a matter of law with or without counting the $100,000 *cy pres* as a class benefit. Obj. Br. 16 n.2. The Court need not (and should not) reach this unbriefed issue of first impression beyond joining the Brennan Objectors in assuming it *arguendo*. *See Molski*, 318 F.3d at 954 (9th Cir. 2003) (Ninth Circuit has "left open the question of whether a *cy pres* award can ever be used as a substitute for actual damages") (*citing Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990)).

provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003). Neither party's brief cites or attempts to rebut *Staton*.

Defendants argue (Def. Br. 15-16) that the Ninth Circuit found the lack of severability problematic in *Molski v. Gleich*, 318 F.3d 937, 944, 946, 953-55 (9th Cir. 2003). But there is ***no*** language in *Molski* singling out a non-severable attorneys' fee as problematic—and, indeed, no reason to think that the *Molski* settlement involved a non-severable attorneys' fee on which the validity of the settlement rested, given the fact that a district court has the independent power under Rule 23 to determine an attorneys' fee even when "clear sailing" is given. *Zucker v. Occidental Petroleum*, 192 F.3d 1323, 1328 (9th Cir. 1999). Rather, *Molski* repeatedly singled out the fact that "the class members received nothing." 318 F.3d at 954.[3]

[3] As Defendants point out, Def. Br. 16 n.5, there are certainly other reasons that the *Molski* settlement was problematic, but nothing in the opinion itself suggests that the Ninth Circuit would have found the settlement acceptable had those lesser problems been resolved. As the court emphasized, "***Because*** the consent decree released almost all of the absent class members' claims with little or no compensation, the settlement agreement was unfair and did not adequately protect the interests of the absent class members." *Molski*, 318 F.3d at 955 (emphasis added) (*citing Crawford v. Equifax Payment Services, Inc.*, 201 F. 3d 877, 881 (7th Cir. 2003)). Moreover, one of the grounds that Defendants

The reliance of the district court upon the legally irrelevant fiction of the severability of attorneys' fees for approval is legal error that alone provides grounds for reversal of the approval of the settlement.

B. Structuring the Settlement So Attorneys' Fees Would Revert to the Defendant Rather Than the Class Was a Breach of Fiduciary Duty.

The parties negotiated a "clear sailing" arrangement whereby Defendants would not challenge the attorneys' fee request, but any reduction in the fee request would revert to the Defendants rather than the class. The Brennan Objectors argued that, because of this provision, the settlement should not have been approved under Fed. R. Civ. Proc. 23(a)(4): the self-dealing by Class Counsel in structuring the settlement meant that they were not adequate representatives of the class. Obj. Br. 21-24.

The theoretical problem with "clear sailing" combined with the lack of reversion is that a district court will have the incentive to simply award an unfair attorneys' fee without considering the effect of the provision on the class recovery. Charles Silver, *Due Process and the Lodestar Method*, 74 TULANE L. REV. 1809, 1839 (2000). This was more than theoretical here: the district court affirmatively

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identify—inadequate representation under Rule 23(a)(4)—was found to be at issue largely because the settlement "waived practically all of the class members' claims without compensation and allowed the defendants to escape with little penalty." *Molski*, 318 F.3d at 956 (finding abuse of discretion).

admitted that it would not reduce the fee award because "any amount not awarded by the Court would be retained by the defendants rather than benefitting class members." (ER 46.) Neither party defends the district court's reasoning and neither party mentions Rule 23(a)(4) in their briefs.

Plaintiffs instead argue that it is preferable to separately negotiate the class settlement from the attorneys' fees. Pl. Br. 20. This is a red herring: there is absolutely nothing preventing ethical class counsel from ***both*** separately negotiating the class settlement from the attorneys' fees ***and*** providing that any district court reduction of requested attorneys' fees in a "clear sailing" provision will revert to the class, thus avoiding the problem that the Brennan Objectors identify—a problem that actually occurred in this case.

The only case that Plaintiffs cite to support their self-dealing is *Zucker*, 192 F.3d 1323 (9th Cir. 1999). But *Zucker* is not about the question of whether it is appropriate for a district court to evaluate the fairness of a settlement separate from the attorneys' fee; nor is it about the propriety of a self-dealing settlement where fees revert to the defendant rather than the class. In *Zucker*, a class counsel appealed from a district court's reduction of attorneys' fees by attempting to argue that the objector did not have standing, and the Ninth Circuit affirmed, holding that the objector's standing was irrelevant because district courts were required to

assess the reasonableness of fees in any event, a contention that the Brennan objectors agree with. *Zucker* did not analyze either of the questions before the Court now, and certainly does not stand for the Plaintiffs' proposition that "there is no reason to think that having the issue of final approval and attorneys' fees decided as one, non-severable ruling provides any additional protection against class action abuses." The Brennan Objectors provided multiple reasons why this was so, and neither Plaintiffs nor Defendants refute that reasoning.

The district court viewed the "clear sailing" provision as grounds to withhold scrutiny of the attorneys' fee award in relation to the size of the relief offered to the class. (ER 46.) This was precisely backwards: "the very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class…. We believe it to be self-evident that the inclusion of a clear sailing clause in a fee application should put a court on its guard, not lull it into aloofness." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991); *see also Rodriguez*, 563 F.3d at 961 n.5 (citing *Weinberger* proposition that it is appropriate to infer collusion from a clear sailing agreement where fees are paid separately on top of settlement fund).

The legal error committed by the district court in not only failing to consider the breach of fiduciary duty, but rewarding that breach, is alone grounds for this Court to reverse the approval of the settlement.

III. The "More Than Plaintiffs Might Have Achieved at Trial" Test Is Legally Erroneous and Inconsistent With *Churchill*.

The district court held that the "minimal" benefit was "adequate" because it was "more than Plaintiffs ***might have*** achieved at trial." (ER 21, 76-77 (emphasis added).) As explained by the Brennan Objectors, this was the wrong standard and legal error by the district court. Obj. Br. 28.

Plaintiffs try to elide the issue by incorrectly characterizing the district court's decision as a finding that the settlement was "more beneficial to the Class than the relief ***likely to be*** achieved at trial." Pl. Br. 1 (emphasis added). But that is a different finding than the one the district court made. A settlement that is better than the "relief likely to be achieved" is (if attorneys' fees are proportionate to the relief achieved) likely to be adequate: the expected value of the settlement is greater than the expected value of proceeding with trial. But testing a settlement for whether it is "more than Plaintiffs ***might have*** achieved at trial" is no test at all: a settlement providing a single peppercorn is more than plaintiffs "might have achieved" at any trial where liability is contested, and any settlement that does not

clearly affirmatively hurt the class would pass this non-existent test. If that were so, there would be no need for a fairness hearing.

Defendants assert that the district court's "might have achieved" test is "required by *Churchill*." Def. Br. 20 n.9. This is simply incorrect. *Churchill* requires an analysis of the "strength of the plaintiffs' case," 361 F.3d at 576. But that involves an analysis of "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 965-66 (*citing* Federal Judicial Center, *Manual for Complex Litigation* § 21.62, at 316 (4th ed. 2004) *and In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995)). Again, this is the difference between "more than Plaintiffs might have achieved"—the legally erroneous standard applied by the district court—and the correct standard of "in a reasonable range of what Plaintiffs are likely to achieve."

The legal error committed by the district court in applying the wrong standard is by itself grounds for this Court to reverse the approval of the settlement.

IV. This Court Should Adopt and Apply the Persuasive *Murray v. GMAC* Precedent.

The Brennan Objectors argue that the settlement at bar does not meet the standard of *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006). Obj.

Br. 13-17. Neither Plaintiffs nor Defendants contest this obvious application; rather, they argue that this Court should create a gratuitous circuit split and ignore *Murray*. But the Ninth Circuit creates a circuit split "only after the most painstaking inquiry." *Zimmerman v. Oregon Dep't. of Justice*, 170 F.3d 1169, 1184 (9th Cir. 1999). None of the reasons the settling parties give rise to meeting the *Zimmerman* standard.

True, as the settling parties argue, a Seventh Circuit opinion is only "persuasive" authority. But under *Zimmerman*, persuasive authority is indistinguishable from binding authority when, as here, the settling parties provide no reason not to be persuaded by it.

In *Murray*, the parties presented a proposed class action settlement to the district court. The district court decided not to consider the settlement and rejected class certification. 434 F.3d at 951. On appeal, the Seventh Circuit held that the district court's reasoning for rejecting class certification was erroneous and remanded. But, in the process of doing so, it instructed the district court that the proposed settlement was "untenable" and that the district court should newly evaluate the Rule 23(a)(4) adequacy of class counsel for negotiating such a self-serving agreement that "fail[ed] to afford effectual relief" to unrepresented class members. *Id.* at 951-52.

Defendants try to characterize this aspect of the decision as *dicta*, Def. Br. 18 n.8, but *Murray v. GMAC* created a legal standard that the district courts in the Seventh Circuit and the lower court on remand were obliged to follow when evaluating class action settlements: as such, it was surely part of the "disposition" of the case. *Murray*, 434 F.3d at 956 ("the case is remanded for proceedings consistent with this opinion"). Plaintiffs' similar claim that the Seventh Circuit in *Murray* was not establishing standards for evaluating the propriety of a class action settlement, Pl. Br. 17 n.5, is also false. *See, e.g.*, *Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438, 448 (N.D. Ill. 2009) (denying preliminary approval of proposed settlement *inter alia* because incentive awards were "outside the range of possible approval," citing *Murray*).

Note that *Murray* is entirely consistent with *Churchill*. *Churchill* requires a district court to consider the factors of the "amount of settlement," the "strength of the plaintiffs' case," and the "possibility of collusion." 361 F.3d at 576. *Murray* is simply a legal application of these three factors in conjunction with one another. Where a settlement provides no relief (or a miniscule percentage of sought-after relief) to class members, it is "untenable" because it means either that the settlement is not "reasonable" because the case is meritless; or, if the case has merit, it means that the settlement is not "adequate" because the plaintiffs' counsel

has sold out the class. *Murray*, 434 F.3d at 951-52. This is not a case of appellants trying to "have it both ways" (Pl. Br. 11): it is simply a recognition that there are only two possible scenarios that can produce a settlement this bad, and both scenarios are ones where a district court must, as a matter of law under Rule 23(e), reject a class action settlement.

There is no reason for the Ninth Circuit and was no reason for the district court to reject the sound and persuasive reasoning of *Murray v. GMAC*.[4] And *Murray* alone requires this Court to reverse the decision of the district court to approve the settlement.

[4] Similarly, Defendants attempt to persuade this Court that it can ignore *Crawford* because *Crawford* is really about the difference between Rule 23(b)(2) and Rule 23(b)(3). Def. Br. 18. This position is remarkable for its *chutzpah* given that this Court has previously cited *Crawford* for precisely the dispositive proposition that the Brennan Objectors claim should be applied here. *Compare Molski*, 318 F.3d at 955 ("Because the consent decree released almost all of the absent class members' claims with little or no compensation, the settlement agreement was unfair and did not adequately protect the interests of the absent class members.") (*citing Crawford*, 201 F. 3d at 881) *with* Obj. Br. 15-16. *See also Crawford*, 201 F.3d at 882 (settlement is "substantively troubling" where named plaintiff "and his attorney were paid handsomely to go away [but] the other class members received nothing… and lost the right to pursue class relief"). The Ninth Circuit has previously relied upon *Crawford*, and neither party provides any reason to reject this Seventh Circuit authority now. Plaintiffs do not even cite *Crawford*.

V. The Expense of Notice Is Not a Benefit to the Class.

Plaintiffs (though not the district court) argue that Defendants' payment of notice costs benefits the class, and thus proves the settlement is not self-dealing. Pl. Br. 18-19.

The argument is based on *Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003), which asserted "The post-settlement cost of providing notice to the class can reasonably be considered a benefit to the class." *Staton* cited no authority and provided no reasoning for this *dicta*. In the context of the *Staton* opinion—which found the attorneys' fee award in that case impermissibly high even including the costs of notice as a class benefit—it appears that the Ninth Circuit was merely assuming that the costs of notice was a class benefit *arguendo*.

Even if the precedent is valid, this Court should reject the argument (at least in this case) for two reasons: *first*, as a matter of law, post-settlement notice is something that is done for the benefit of *defendants*, rather than the class, and thus should not be double-counted as a class benefit; *second*, the *Staton* holding, carried as far as plaintiffs would, has absurd results that contradict Rule 23(e).

A. Notice Is a Constitutionally Required Prerequisite That Is Primarily a Benefit to Defendants.

The sole consideration that defendants receive for settling a class action is a waiver of all claims by class members. But if an individual class member "later

claims he did not receive adequate notice and therefore should not be bound by the settlement, he can litigate that issue on an individual basis when the settlement is raised as a bar to a lawsuit he has brought." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). Defendants therefore have every incentive to ensure that classwide notice meets constitutional requirements. This is not a hypothetical concern: defendants have found themselves on the end of repeat litigation when class members failed to receive constitutionally-adequate notice. *See, e.g.*, *Besinga v. United States*, 923 F.2d 133, 137 (9th Cir. 1991) (reversing dismissal of plaintiff's case because no notice was given in prior class action) (citing cases); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226-29 (11th Cir. 1998) (permitting relitigation of class action because of inadequacy of class notice). Notice benefits the defendants by creating claim preclusion that would not otherwise exist.[5] As such, the expense of class notice should not be counted as a benefit on the class's side of the ledger. *Cf. also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 28

[5] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974), does not help Plaintiffs' argument. *Eisen* does not require the *class* to pay for class notice; it requires the representative *plaintiff* to pay for class notice. The benefit to the representative plaintiff is not a class-wide benefit.

(1991) (social benefits of class action notice in "the large-scale, small-claim class action" "appear minimal at best").

B. Counting Costs of Notice as a Class Benefit Leads to Absurd Results.

In a case where there is no difference between recovery of class members who participate and those who opt out, the claim preclusion from class notice unambiguously makes class members worse off, rather than better off. (Indeed, one can say that individual class members are surrendering their right to suit without any consideration whatsoever.)

But if the Court adopts the plaintiffs' view about the value of class notice, ***the very act of settlement*** could be considered "consideration"—even if class members get nothing in exchange for waiving their rights—simply because they received a letter in the mail notifying them of the settlement. For example, one could imagine a nationwide zero-dollar settlement where the defendant is entitled to deduct half the cost of notice from individual customers' accounts to pay for attorneys' fees. Such a settlement would normally be prohibited by 28 U.S.C. § 1713.[6] But under plaintiffs' reading of the law, the very act of notice

[6] "The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss."

"substantially outweighs the monetary loss," so the skimming of class members' accounts would be permissible.

This result would be absurd—and only slightly more absurd than the settlement currently before this Court, where the only evidence of class benefit is the $100,000 *cy pres* award for a multi-million-member class. The fact that defendants paid for class notice can not possibly be a material difference between a fair settlement and an unfair settlement.

VI. There Are Substantial Objections to the Settlement.

It is not material to the resolution of this case, but it is worth noting that Plaintiffs, by use of the term "only" to describe the fifty objections (ER 23) and hundreds of opt-outs received, seem to ask the court to infer that the other absent class members *support* the proposed settlement. Pl. Br. 8. There is no reason to draw that inference; Class Counsel has made no effort to poll a representative sample of the putative class members, and they have no basis to claim the class has reacted positively—let alone that millions of class members affirmatively approve the settlement.

Yes, only a few dozen class members objected, but why should class members want to jump through time-consuming procedural hoops to object? The natural predominant response is apathy, because objectors—unless they can obtain

pro bono counsel—must spend time and money to attempt to improve the settlement for millions of fellow class members with little potential gain for themselves. Here, where class members received no consideration, and were entitled to exactly the same relief whether or not they opted out of the settlement, it was economically irrational for class members to even pay for the postage to object or opt out.

Silence is simply *not* consent:

> There may be many reasons why class members in this case didn't register their concerns about the settlement: lack of interest, time, information, etc. Like the Third Circuit in the *General Motors* case, the Court is unwilling to automatically equate class silence with a showing of "overwhelming" support for the settlement. Therefore, the fact that statistically few people bothered to opt-out or file an objection ultimately counts little in the Court's overall fairness analysis.

Grove v. Principal Mut. Life Ins. Co., 200 F.R.D. 434, 447 (S.D. Iowa 2001), *citing In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 789 (3d Cir. 1995). "Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low."

Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007).

There is usually little hope that opt-outs can recover for their claims—the entire purpose of class actions is to aggregate claims that would be uneconomical to bring individually. "Almost by definition, most class members have too little at stake to warrant opting out of the class litigation and filing an individual lawsuit. Thus, opting out is probably not a viable option even though a proposed settlement is unfair or inadequate." Leslie, *supra*, 59 FLA. L. REV. at 109. Without *pro bono* counsel to look out for the interests of the class, filing an objection is economically irrational for any individual.

"[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re GMC Pick-Up Litig.*, 55 F.3d at 812, *citing In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. 1981); *cf. Petruzzi's, Inc. v. Darling-Delaware Co.*, 880 F. Supp. 292, 297 (M.D. Pa. 1995) ("'[T]he silence of the overwhelming majority does not necessarily indicate that the class as a whole supports the proposed settlement . . . . '"). "[A] low number of objectors is almost guaranteed by an opt-out regime, especially one in which the putative class

members receive notice of the action and notice of the settlement offer simultaneously." *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 446 (W.D. Pa. 2007). "[W]here notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a *fait accompli*." *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 680-681 (7th Cir. 1987). "Acquiescence to a bad deal is something quite different than affirmative support." *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1137 (7th Cir. 1979) (reversing approval of settlement).

When class members have little at stake, as in consumer fraud class actions, the rate of response is famously low. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004). This is especially true when class members have to follow procedures that artificially deter them from objecting or opting out. For example, class members were required to affix postage and mail their opt-outs or objections.

In the twenty-first century, there is absolutely no reason that those who settle a class action cannot establish either a dedicated e-mail address or a dedicated form on a website allowing potential objectors to object or opt out without jumping

through burdensome procedural hoops. For objections and opt-outs, "the ease and cost-efficiency of such direct internet submissions increases the likelihood of absent class member participation." Robert H. Klonoff, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 766 n. 251 (2008). Given that a dedicated website and dedicated email address was established as part of the settlement notice, the only reason *not* to permit objections through costless means is to artificially lower the number of objections made. As such, the Court should draw the adverse inference that a majority of the class objects to the settlement—especially given the unfavorable press coverage of the facial absurdity of the settlement. *Cf. also In re GMC Pick-Up Litig.*, 55 F.3d at 813 (finding that "class reaction factor" does not weigh in favor of approval, even when low number of objectors in large class, when "those who did object did so quite vociferously").

CONCLUSION

The fairness hearing required by Rule 23(e) is not a formality: district courts have an obligation to protect the interests of unrepresented class members and the integrity of the court system by providing meaningful scrutiny of class action settlements and rejecting those that benefit class counsel at the expense of their putative clients. Review for "abuse of discretion" is not the same thing as

discretionary review: there are meaningful legal standards for determining the fairness, adequacy, and reasonableness of class action settlements, as well as standard for determining Rule 23(a)(4) adequacy, and the district court did not apply those legal standards to this settlement, which cannot possibly meet those standards. This Court should reject the invitation of the settling parties to rubber-stamp the multiple legal errors and clearly erroneous findings of fact made by the district court.

Affirming the approval of a settlement that provides no meaningful benefits to the class would be unprecedented. To safeguard the interests of unrepresented class members, and to ensure that Rule 23(e) and Rule 23(a)(4) have any meaning, this Court should reverse and remand with instructions to reject the proposed settlement.

Dated: June 23, 2010

Respectfully submitted,

/s/ Theodore H. Frank

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

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Dated: June 23, 2010

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