No. 09-56683

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: BLUETOOTH HEADSET PRODUCTS LIABILITY LITIGATION

MICHAEL JONES, et al.,
Plaintiffs-Appellees,

and

WILLIAM J. BRENNAN, et al.,
Objectors-Appellants,

v.

GN NETCOM, INC., et al.,
Defendants-Appellees.

Appeal from the U.S. District Court for the
Central District of California, Western Division, No. 2:07-ML-1822-DSF-E

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STATEMENT OF ISSUES

Did the District Court clearly abuse its discretion in approving a class settlement that requires Defendants to provide meaningful warnings about a potential serious health risk posed by their products, to pay $100,000 to non-profit organizations that directly advance the goals of the case, and to pay the cost of notifying the nationwide Class?

Did the District Court clearly abuse its discretion in awarding attorneys' fees to Class Counsel in an amount substantially less than their combined lodestar, where Class Counsel achieved a settlement that was more beneficial to the Class than the relief likely to be achieved at trial and where those fees do not diminish the recovery of the Class?

STANDARD OF REVIEW

Appellate review of a district court's approval of a class settlement is "extremely limited." *In re Mego Financial Corp. Securities Litig*., 213 F.3d 454, 458 (9th Cir. 2000) ("*Mego*"). "The district court's final determination to approve the settlement should be reversed only upon a strong showing that the district court's decision was a clear abuse of discretion." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1027 (9th Cir. 1998) (internal quotations omitted). A "decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof." *Id.* at 1026 (internal quotations omitted). So long as a district court applies the "proper legal standard" and its "findings of fact are not clearly erroneous," approval of a class settlement will be affirmed. *Mego*, 213 F.3d at 458. The abuse of discretion standard is also used when reviewing a district court's approval of an application for attorneys' fees. *Hanlon*, 150 F.3d at 1029.

SUMMARY OF THE ARGUMENT

Contrary to Appellants' claims of "self-dealing" and breaches of fiduciary duty, the record shows that the settlement in this case is the product of arm's-length negotiations conducted under the close supervision of a respected mediator. By requiring disclosures of the risk of hearing loss posed by Defendants' products, the settlement directly addresses the false advertising claims that are at the heart of this case.

The District Court, which is familiar with the strengths and weaknesses of the case, including arguments made by Defendants attacking Plaintiffs' standing, carefully evaluated the settlement before approving it. Additionally, the District Court requested and reviewed detailed billing records before awarding attorneys' fees to Class Counsel (fees that amounted to less than half of their lodestar). The District Court's detailed orders show that it applied the proper legal standard and reached factual conclusions supported by the record. The court also gave consideration to each of the arguments raised by Appellants. This record clearly belies Appellants' argument that the District Court "abdicate[d]" its responsibilities to the Class. (Appellants' Br. 10.) Accordingly, the District Court's orders should be affirmed.

STATEMENT OF THE FACTS

I. This Litigation Arises From Alleged Misrepresentations and Concealments Regarding the Safety of Bluetooth Headsets

Over two dozen putative class actions were filed against Motorola, Inc., Plantronics, Inc., and GN Netcom, Inc., in various courts across the country concerning the marketing of wireless headsets commonly known as "Bluetooth Headsets." (ER 113.) On February 20, 2007, the Judicial Panel on Multidistrict Litigation coordinated the cases and denominated them *In Re Bluetooth Headset Products Liability Litigation*, MDL No. 1822 (the "MDL"). (ER 113.)

The operative complaint in this MDL is the Second Amended Consolidated Complaint ("SACC") that was filed on September 25, 2007. (ER 93.) In their SACC, Plaintiffs allege that use of Defendants' Bluetooth Headsets puts users at risk for noise induced hearing loss and that Defendants' marketing of their products was misleading to consumers. (Supplemental Excerpts of Record "SER" 2-3.) Plaintiffs allege that Defendants failed to disclose or warn of the risk of hearing loss and marketed their Bluetooth Headsets with misleading representations concerning audio performance, comfort, security, and "talk-times." (SER 2-3.) The SACC seeks injunctive relief and economic damages. (SER 26.) The SACC does not assert claims for personal injuries. (SER 21-25.)

II. Class Counsel Vigorously Prosecuted this Litigation

Both before and after initiating this litigation, Class Counsel investigated the scientific evidence supporting Plaintiffs' claim that users of Bluetooth Headsets are at an increased risk of hearing loss, as well as Defendants' failure to provide adequate warnings. (SER 149-150.) This investigation included review and analysis of numerous studies relied upon by the National Institute for Occupational Safety and Health, the United States Environmental Protection Agency, the Occupation Safety and Health Administration, and the World Health Organization. (SER 149-150.) Class Counsel also reviewed industrial hygiene studies and the approved methods of evaluating and assessing noise exposures in materials published by the American National Standards Institute, the American Conference of Governmental Industrial Hygienists, and the United States Department of Defense. (SER 149-150.) Additionally, Class Counsel investigated the warnings that accompany other audio devices, and retained experts on noise induced hearing loss. (SER 150.)

Once litigation was underway, Class Counsel obtained from Defendants thousands of pages of acoustic test results and related documents for each of the Bluetooth Headset models identified in the SACC. (SER 151.) Class Counsel and their experts spent hundreds of hours evaluating this data. (SER 150.) Further,

Class Counsel facilitated efforts by the experts in producing a report evaluating the risk of noise induced hearing loss posed by Bluetooth Headsets. (SER 150.)

Armed with this information, the parties commenced a formal mediation in February, 2008, under the supervision of the Honorable Steven J. Stone, Presiding Justice of the California Court of Appeal (Retired). (SER 151.) The parties were unable to reach a settlement at that time. Accordingly, on May 7, 2008, Defendants filed a motion to dismiss the SACC. (SER 32-63.) Plaintiffs filed an opposition on June 6, 2008. (SER 64-98.) Defendants filed a reply brief on June 30, 2008. (SER 99-115.) While the motion to dismiss remained pending, Justice Stone helped the parties reach a class settlement of the claims asserted in the SACC. Subsequently, Justice Stone assisted the parties in reaching an agreement on attorneys' fees. (SER 133.) Importantly, the parties agreed that the settlement of the class claims was not contingent on the payment of any attorneys' fees to Class Counsel or the award of incentive payments to the Plaintiffs. (ER 117.) As the District Court would later conclude, there was no collusion in reaching the settlement. (ER 13.)

III. The Settlement Provides Meaningful Benefits to the Class

The terms of the proposed settlement are set forth fully in the Settlement Agreement. (ER 110-184.) It requires Defendants to post warnings containing acoustic safety information on their websites and to include additional acoustic

safety information in product manuals for their new Bluetooth Headsets. (ER 115.) The settlement requires the following warning to consumers, which was approved by Plaintiffs' experts:

> /!\ WARNINGS:
>
> Exposure to high volume sound levels or excessive sound pressure may cause temporary or permanent damage to your hearing. Although there is no single volume setting that is appropriate for everyone, you should always use your headset or headphones with the volume set at moderate levels and avoid prolonged exposure to high volume sound levels. The louder the volume, the less time is required before your hearing could be affected. You may experience different sound levels when using your headset or headphones with different devices. The device you use and its settings affect the level of sound you hear. If you experience hearing discomfort, you should stop listening to the device through your headset or headphones and have your hearing checked by your doctor.

(ER 176.)

In addition to new warnings, the settlement requires Defendants to pay $100,000 to the following organizations dedicated to preventing hearing loss and helping the hearing impaired: (1) the University of Tennessee College of Medicine, Center for Independent Living Research; (2) the National Hearing Conservation Association; (3) the American Speech and Hearing Association; and (4) the Greater Los Angeles Agency on Deafness. (ER 19, 115-116.)

Finally, the settlement requires Defendants to pay the cost of providing notice of the settlement to the Class. (ER 116.) This notice included publication in several national magazines and newspapers, internet notice on a specially maintained website, and direct mail to over 240,000 putative class members whose addresses were known to Defendants. (ER 14; SER 273-276.) The cost of providing print and online notice to the Class was $999,189.[1] (SER 277.)

IV. The District Court Carefully Deliberated on the Fairness, Adequacy, and Reasonableness of the Settlement

On January 16, 2009, Plaintiffs moved for preliminary approval of a class settlement that would resolve all claims raised in the MDL. (ER 97.) After the District Court granted preliminary approval on February 9, 2009, notice was provided to the Class. (ER 10.) The notice described the terms of the settlement and Class Counsel's proposed attorneys' fees, and Class members were given the opportunity to object to the settlement or opt out. (SER 216-223.) Out of the millions of Class members, only 21 timely objected to the settlement, and only 715 properly opted out of the Class. (SER 212.)

On July 6, 2009, the District Court conducted a Fairness Hearing. At that hearing, the District Court heard nearly 45 minutes of argument, including

[1] This excludes the cost of printing and mailing the class notice to 246,236 putative Class members via First Class mail. (SER 211, 277.)

argument from counsel for Appellants.[2] (ER 50-81.) On September 8, 2009, more than two months after the Fairness Hearing, the District Court issued a 21-page opinion granting final approval of the settlement. (ER 8-28.) The District Court considered, then overruled, each of the arguments raised by Appellants in this appeal. (ER 18-20, 24.) The District Court found that the consideration provided by the settlement is adequate because it is "more than Plaintiffs might have achieved at trial, and it does not do the Class any harm." (ER 21.)

The District Court did not award any attorneys' fees at the time of final approval. Instead, another month and a half passed before the District Court issued its order regarding attorneys' fees. (ER 43.) Prior to ruling, the District Court ordered, and Class Counsel provided, contemporaneous records of all professional services rendered in this case. (ER 78-80, 102-105.) The District Court reviewed these supplemental filings before awarding any attorneys' fees or costs. (ER 45-

[2] Appellants are represented by attorney Theodore H. Frank, who by his own admission, "focuses" on objecting to class action settlements. (Appellants' Br. 10.) It appears attorney Frank is using this appeal to further his personal agenda against class actions. For example, on June 3, 2009, attorney Frank posted a message on his website announcing that he had filed an objection to this settlement and invited others to do the same. (SER 151-152, 155-194.) He further stated: "And anyone in Los Angeles July 6 who wants to watch the hearing, please join in the fun." (SER 151-152, 168.) Of course, his bias against class actions is contrary to the stated policy of this Court, which is to encourage the settlement of class actions. *See, e.g., Class Plaintiffs v. Seattle*, 955 F. 2d 1268, 1276 (9th Cir. 1992) (there is a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.")

46.) The District Court's 7-page attorneys' fee order addressed the objections presented by Appellants. (ER 47-48.) The District Court found that contrary to the objections, "there is no evidence of collusion" and "the fees do not detract from the relief that might otherwise have been negotiated for the class members . . . ." (ER 48.) The District Court approved the requested attorneys' fees, which are "substantially" less than Class Counsel's lodestar. (ER 46.)

ARGUMENT

I. The District Court did not Clearly Abuse its Discretion in Approving the Settlement

Appellants and their attorney did not participate in this litigation prior to filing their objections. They are not privy to the investigation and analysis undertaken by Class Counsel in this case, nor to the presentations made by Defendants during mediation to defend against Plaintiffs' claims. Nonetheless, they accuse Class Counsel, the mediator, and the District Court of breaching their duties to the Class, and question the integrity of this entirely arm's-length settlement process. But as stated above, a district court's decision to approve the settlement must be affirmed unless there was a clear abuse of discretion. Here, the District Court did not clearly abuse its discretion in finding the settlement to be fair, reasonable, and adequate, nor did the Court clearly abuse its discretion in awarding attorneys' fees.

Appellants argue that this case has no merit (which, if true, necessarily means that the settlement provides a favorable recovery to the Class), while also claiming that the District Court erred in considering the substantial litigation risks associated with the continued prosecution of the case. Appellants cannot have it both ways. It is undisputed that litigation risk is an important part of the settlement approval decision, and yet, Appellants argue that this factor should be ignored because every case has a chance of resulting in a zero recovery. The entire premise of Appellants' argument is therefore flawed.

This case does have merit, but it is also subject to some very strong defenses. It is exactly the type of case that is suitable for alternative dispute resolution, and were this Court to reverse on the basis argued by Appellants, no injunctive relief settlement would pass muster. It is simply bad policy to discourage early dispute resolution in this way.

A. The Settlement is Fair, Reasonable, and Adequate

In determining whether to approve a class action settlement, a district court must conclude that it is fair, reasonable, and adequate. In doing so, the district court must weigh the following factors:

> (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7)

> the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Churchill Village, LLC v. General Electric Co., 361 F.3d 566, 575 (9th Cir. 2004). This list of factors is not exclusive, and the court may balance and weigh these factors depending on the circumstances of the case. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). Appellants do not dispute that this is the standard.

The record in this case establishes that the District Court followed the *Churchill* test and weighed the above factors before concluding that the settlement is fair, reasonable, and adequate. (ER 16-24.) In reaching its decision, the District Court considered the risk of litigation against the settlement:

> . . . Defendants have significant defenses and . . . Plaintiffs face the risk of obtaining nothing if they continue to pursue this litigation.
>
> * * *
>
> Defendants are confident that they have a strong case on the merits and will vigorously challenge Plaintiffs' claims. Thus, even if the Court were to decide the Motion to Dismiss in favor of Plaintiffs, there is no question that there would be contested Class certification briefing, likely cross-motions for summary judgment, and challenges to expert testimony under *Daubert*. If the case goes to trial, there is no dispute that it would be a long, contested trial with likely appeals by the losing party or parties. In short, if the settlement were not approved, further litigation before this Court would be time-consuming, complex, and expensive.

(ER 17-18.)

The District Court's order goes on to address each of the other *Churchill* factors and the arguments raised by Appellants. (ER 8-28.) The District Court correctly held that each of the applicable factors supports a finding that the settlement is fair, reasonable, and adequate.

B. The Settlement Provides Valuable Injunctive Relief

Plaintiffs' claims are based upon credible scientific evidence that Bluetooth Headsets put users at risk of developing hearing loss, a serious condition that adversely impacts every aspect of life. (SER 149-150.) Appellants do not dispute this, but instead, make the generalized statement that the case has no merit. Appellants do not dispute that one of the key objectives sought by Plaintiffs was injunctive relief. Instead, Appellants dismiss the value of the injunctive relief by arguing that the warnings are not the result of the settlement and by claiming that even if the warnings did result from the settlement, they are "counterproductive 'overwarnings.'" (Appellants' Br. 26.) Neither argument supports a finding that the District Court clearly abused its discretion.

First, Appellants claim that warnings were already in place before the settlement. However, they cite warnings for products purchased *after* Plaintiffs' settlement demand. (Appellants' Br. 7-8; ER 196-197.) Before this case was filed, Defendants provided inadequate, if any, warnings to consumers about the risk of

hearing loss. (SER 10.) Therefore, the District Court did not clearly abuse its discretion in finding that the warnings resulted from the settlement.

Appellants' second claim, that the warnings required by the settlement are "counterproductive," is equally meritless. They selectively cite criticisms of warnings required for prescription medications and medical devices. (Appellants' Br. 26-27.) Aside from the obvious fact that an individual's decision to follow his or her physician's advice and use a prescription medication is not analogous to an individual's purchase of a Bluetooth Headset, there is no reason to think that the warnings required by the settlement here would confuse, or otherwise harm, consumers.

The National Institute for Occupational Safety and Health ("NIOSH") is the federal agency responsible for conducting research and making recommendations for the prevention of work-related injury and illness. NIOSH was established to help assure safe working conditions by providing research, information, education, and training in the field of occupational safety and health. As part of its mandate, NIOSH publishes standards to protect employees from noise induced hearing loss. Section 1.7 of NIOSH Publication No. 98-126 *requires warning signs* be placed in areas where exposure to noise may lead to noise induced hearing loss:

> A warning sign shall be clearly visible at the entrance to or the periphery of areas where noise exposures routinely equal or exceed 85 dBA as an 8-hr TWA [Time-Weighted Average]. All warning signs shall be in

> English and, where applicable, in the predominant language of workers who do not read English.[3]

Appellants' argument that warning signs are ineffective and not valuable contradicts the research and recommendations made by the federal agency bestowed with the responsibility to protect against injuries such as noise induced hearing loss. The warnings required by the settlement are written in plain English, include the input of experts, and contain an appropriate level of detail given the nature of the potential noise induced hearing loss alleged in the SACC.

Based on the foregoing, the District Court did not clearly abuse its discretion in finding that the injunctive relief provided by the settlement is valuable.

C. Defendants' *Cy Pres* Payment Benefits the Class

As part of the settlement, Defendants agreed to pay $100,000 to four organizations committed to the study and prevention of hearing loss. Although the money does not go directly to Class members, there is a strong nexus between the charitable organizations approved by the District Court and the goals of this litigation. In addition, the payment of a *cy pres* award disgorges some of Defendants' profits, promotes the enforcement of consumer protection laws, and deters future violations of those laws.

[3] This publication is available at <http://www.cdc.gov/niosh/docs/98-126/chap1.html#17> (last accessed June 8, 2010).

Appellants argue that the charitable contribution cannot be credited as a benefit to the Class, citing *Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 617 (9th Cir. 2010). (Appellants' Br. 15-16.) However, their reliance on *Molski* is misplaced. *Molski* commented on the use of *cy pres* awards in lieu of statutory damages. In *Molski*, the plaintiff alleged denial of equal access as required by the Americans with Disabilities Act and the California Unruh Civil Rights Act, the latter of which provides *minimum* statutory damages of $1,000 and $4,000 for each denial of equal access, even in the absence of actual damages. *Id*. at 942, 945. The defendant's potential liability was estimated at $500 million. *Id*. at 954, n.23. The settlement released these minimum statutory damages, and the only monetary relief to the class was a *cy pres* fund. *Id*. at 942, 946. Under those particular facts, this Court held that a *cy pres* award was inappropriate. *Id*. at 954.

In this case, however, Plaintiffs and the Class do not have the benefit of a statute that provides for minimum damages, and Defendants vigorously dispute that any Plaintiff or Class member has sustained economic injury.[4] (SER 41-42,

[4] While taking the position that this case has no merit, Appellants inconsistently argue that class claims are worth $100 million because of the prayer for punitive damages. As this Court knows, however, a proposed settlement should not "be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Service Com'n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

76-80, 108-109.) Thus, the concerns regarding *cy pres* awards expressed in *Molski* are completely inapplicable to this case. Moreover, the use of *cy pres* awards in cases where it is impractical to allocate and distribute funds to class members is well recognized. *See* 4 Newberg on Class Actions § 11:20 (4th ed.) ("[i]n a settlement context, when an aggregate class recovery cannot economically be distributed to individual class members, or when a balance of the recovery fund remains after individual distribution, the parties, subject to court approval, may agree that undistributed funds be distributed or disposed of for the indirect benefit of the class.") (citing *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990)). Here, the District Court correctly concluded that a *cy pres* is appropriate because "[t]here is no purpose in requiring a payment to the Class that could not possibly be more than pennies." (ER 19-20.)

Appellants claim that the settlement here is "substantially worse" than settlements disapproved by other courts, such as the court in *Mirfasihi v. Fleet Mortgage Corp*., 356 F.3d 781 (7th Cir. 2004).[5] In *Mirfasihi*, the Seventh Circuit reversed a settlement award and remanded not because the settlement was unfair, but because the district court did not discuss in its decision "questionable features," such as the reversion of funds to the defendant. *Id*. at 785-87. After the *Mirfasihi*

[5] Appellants also cite *Murray v. GMAC Mortgage Corp*., 434 F.3d 948 (7th Cir. 2006). (Appellants' Br. 13-14.) But the appellate court in that case was reviewing *denial* of class certification, not approval of a class settlement.

case was remanded, a settlement was approved by the district court and affirmed by the Seventh Circuit, where one of the plaintiff classes that alleged its privacy rights had been violated would receive no monetary award and release its claims, but the defendant would make a $243,000 charitable contribution to a public interest research center specializing in the education and protection of privacy rights. *See Mirfasihi v. Fleet Mortgage Corp.*, 2007 U.S. Dist. LEXIS 51474, *5-6, 24 (N.D. Ill. July 17, 2007); *Mirfasihi v. Fleet Mortgage Corp.*, 2007 U.S. Dist. LEXIS 65906 (N.D. Ill. Sept. 6, 2007), *aff'd*, 551 F.3d 682 (7th Cir. Ill. 2008), *cert. denied*, *Perry v. Mirfasihi*, 129 S.Ct. 2767 (2009).

The *Mirfasihi* court held that the defendant's payment to the research center "is likely to provide a benefit to the members of the class" and that the settlement was fair, reasonable, and adequate. *Mirfasihi*, 2007 U.S. Dist. LEXIS 51474 at *24. The Seventh Circuit also left intact the award of $750,000 in attorneys' fees to class counsel. *Mirfasihi*, 551 F.3d at 682. Thus, even Appellants' own legal authority demonstrates that there was no clear abuse of discretion here.

D. Defendants' Payment of Notice Costs Benefits the Class

As part of the settlement, Defendants have paid approximately $1 million in costs to provide notice to the Class. (SER 277.) Ordinarily, the cost of providing notice to a class is borne by plaintiffs. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 178 (1974). Consequently, the payment of notice costs by a defendant is a

benefit to the class. *Stanton v. Boeing Co*., 327 F.3d 938 (9th Cir. 2003). In *Stanton*, this Court held:

> The district court also did not abuse its discretion by including the cost of providing notice to the class of the proposed consent decree as part of its putative fund valuation . . . . The post-settlement cost of providing notice to the class can reasonably be considered a benefit to the class.

Id. at 975. Appellants completely ignore the substantial benefit conferred by Defendants' payment of class notice, which not only saved the Class from incurring that cost, but further alerted consumers to the risks posed by Bluetooth Headsets. The multi-faceted notice program provided important information to the Class and was necessary given the enormous marketing done by Defendants to sell their Bluetooth Headsets, and the widespread use of the products.

II. The District Court did not Clearly Abuse its Discretion in Approving the Settlement Before Approving the Attorneys' Fees

Appellants claim that the District Court abused its discretion by applying "an [e]rroneous [v]iew of the law." (Appellants' Br. 18.) Specifically, they argue that attorneys' fees must be evaluated when determining the fairness of a settlement, even when the settlement is not contingent on the approval of attorneys' fees. (Appellants' Br. 17.) However, they cite no legal authority that supports that proposition, and in fact, Plaintiffs are not aware of any such case.

This Court has affirmed approval of settlement agreements that provide for the independent payment of attorneys' fees by a defendant to class counsel in an amount subject to court approval. *See, e.g., Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323 (9th Cir. 1999) (affirming award of attorneys' fees). In fact, it is a common and accepted practice to structure class settlements so that attorneys' fees are negotiated after the class claims and submitted for separate court approval. This eliminates the opportunity for a defendant to pay a premium to the plaintiff's counsel to minimize the class recovery, thereby removing any incentive for the plaintiff's counsel to settle for less than the maximum recovery. The *Manual for Complex Litigation* states:

> In class actions whose primary objective is to recover money damages, settlement may be negotiated on the basis of a lump sum that covers both class claims and attorney fees. Although there is no bar to such arrangements, the simultaneous negotiation of class relief and attorney fees creates a potential conflict. *Separate negotiation of the class settlement before an agreement on fees is generally preferable*.

Manual for Complex Litigation (4th ed. 2004), § 21.7 (emphasis added).

Here, Class Counsel negotiated the settlement without knowing what position Defendants would take on Class Counsel's fee application. Once the claims of the Class were settled, Defendants could have refused to pay any attorneys' fees to Class Counsel. With the assistance of the mediator, the parties did reach an agreement on fees, but that agreement can hardly be called a windfall

to Class Counsel. As the District Court concluded after its review of Class Counsel's detailed billing records, "the lodestar substantially exceeds the $800,000 negotiated by the parties." (ER 46.)

Contrary to Appellants' argument, 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. As this Court previously stated, the "'evil feared in some settlements – unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate settlement for the client – can best be met by a careful district judge, sensitive to the problem, properly evaluating the adequacy of the settlement for the class and determining and setting a reasonable attorney's fee.'" *Zucker*, 192 F.3d at 1329 n.20, *citing Parker v. Anderson*, 667 F.2d 1204, 1214 (5th Cir. 1982). That sort of careful evaluation is exactly what occurred here. The District Court conducted a thorough Fairness Hearing, then had the settlement under submission for two months before granting final approval. With regard to attorneys' fees, the District Court demanded even more detailed records than what other courts have required, before issuing an award. There is nothing in the 21-page final approval order or the 7-

page attorneys' fee order that suggests the matter would have turned out any differently had the two issues been decided together.[6]

III. The District Court did not Clearly Abuse its Discretion in Awarding Attorneys' Fees

In addition to challenging the structure of the settlement, Appellants challenge the amount of attorneys' fees awarded by the District Court. They argue that Class Counsel should have been awarded only 25% of the $100,000 *cy pres* fund. This argument is based upon the faulty premise that the injunctive relief portion of the settlement has no value. As detailed above, however, the injunctive relief here confers a valuable benefit to Class members, and the District Court did not clearly abuse its discretion.

A. The 25% Benchmark Cannot be Applied in this Case

Appellants state that the attorneys' fees in this case must be measured against a 25% benchmark. However, the authority cited in support of that assertion – *Torrisi*, 8 F.3d at 1370 – was a common fund case that did not include any form of injunctive relief. Typically, in cases involving injunctive relief, attorneys' fees are calculated using the lodestar plus multiplier method. *See Hanlon*, 150 F.3d at

[6] In fact, it is likely that Appellants would have argued that the consideration of the settlement and attorneys' fees together in one order and judgment would have been inappropriate as well. One can easily imagine an objector arguing that the approval of a settlement should be separate from an award of attorneys' fees. That way, an appeal of the attorneys' fee award would not delay the class relief.

1029. The reason is that "there is no way to gauge the net value of the settlement or any percentage thereof." *Id*. Indeed, the Class Action Fairness Act of 2005 mandates the use of the lodestar method of calculating attorneys' fees in class settlements that involve injunctive relief. *See* 28 U.S.C. § 1712(c) (providing that attorneys' fees that are paid to class counsel for injunctive relief shall be based upon the amount of time class counsel reasonably expended). Here, the primary component of the settlement was injunctive relief in the form of new and improved warnings regarding the risk of hearing loss. Therefore, the District Court did not abuse its discretion in not using the percentage method of calculating attorneys' fees.

B. The Award of Attorneys' Fees is Fair, Adequate, and Reasonable Under the Lodestar Method of Calculating Fees

The lodestar method is suitable for calculating attorneys' fees in cases such as this where the value of the settlement is not easily monetized. The lodestar method requires multiplying the number of hours reasonably expended in the litigation by reasonable hourly rates to determine a reasonable attorneys' fee. *Hanlon*, 150 F.3d at 1029, *citing Blum v. Stenson*, 465 U.S. 886, 897 (1984). There is a "strong presumption" that the lodestar is a reasonable fee. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

An attorney seeking fees must "identify the general subject matter of his time expenditures." *Trustees of Directors Guild of America-Producer Pension Benefits v. Tise*, 234 F.3d 415, 427 (9th Cir. 2000). A motion for attorneys' fees does not have to be supported by time records; it is sufficient for such motions to be supported by attorney affidavits. *See Gibson v. Chrysler Corp*., 261 F.3d 927, 950 (9th Cir. 2001).

A district court has discretion in determining the appropriate lodestar for a case. *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983). "There is no precise rule or formula." *Id*. at 436. If a district court decides to reduce the lodestar, it "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id*. at 436-37. A district court does not abuse its discretion so long as it "provide[s] a concise but clear explanation of its reasons for the fee award" and "make[s] clear that it has considered the relationship between the amount of the fee awarded and the results obtained." *See id*. at 437.

In this case, Class Counsel had a combined lodestar of $1,613,399.59 as of June 22, 2009.[7] Unsatisfied with Class Counsel's detailed affidavits describing their work on the case, the District Court ordered counsel to submit their actual contemporaneous time records to justify the number of hours expended, and the

[7] This lodestar has increased substantially with the filing of this appeal.

District Court reviewed those records before awarding fees, evidencing the Court's careful consideration of the motion. Based on its review of the time records and knowledge of the case from its inception, the District Court awarded $800,000 in attorneys' fees and provided a detailed, 7-page analysis of its ruling. The order states that "the Court's analysis reveals that the lodestar substantially exceeds the $800,000 negotiated by the parties." (ER 46.) The order then discusses the results obtained in the litigation: ". . . the Court agrees that the injunctive relief obtained and the *cy pres* payment provided at least minimal benefit, and the settlement preserved for those who might believe they were harmed the ability to pursue such claims." (ER 47.) Pursuant to *Hensley*, *supra*, the District Court's attorneys' fee award is amply supported and does not constitute reversible error.

CONCLUSION

Like every other settlement, the settlement in this case is the product of compromise and reflects the litigation risk that Plaintiffs would have faced if their case had not settled. It provides meaningful benefits to the Class and achieves one of the principal goals of the litigation, that is, to provide warnings to consumers about the risk of hearing loss that is associated with the use of Bluetooth Headsets. The District Court, which presided over this case from its inception, carefully deliberated before granting final approval of the settlement, and deliberated for an additional month and a half before awarding any attorneys' fees. The District Court applied the correct legal standard and did not make any clearly erroneous findings of fact. For the foregoing reasons, this Court should affirm the District Court's approval of the settlement and its award of attorneys' fees.

Dated this 9th day of June, 2010.

Respectfully submitted,

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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 this 9th day of June, 2010.

Respectfully submitted,

/s/ Daniel L. Warshaw

PROOF OF SERVICE

IN RE: BLUETOOTH HEADSET PRODUCTS LIABILITY LITIGATION
Appellate Case No.: 09-56683

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of LOS ANGELES, STATE OF CALIFORNIA. My business address is 15165 Ventura Boulevard, Suite 400, Sherman Oaks, California 91403. I am over the age of eighteen years and am not a party to the within action;

On June 9, 2010, I served the following document(s) entitled: **RESPONSE BRIEF FOR PLAINTIFFS-APPELLEES** on ALL INTERESTED PARTIES in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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Executed on June 9, 2010, at Sherman Oaks, California.

Natalie M. Halpern

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IN RE: BLUETOOTH HEADSET PRODUCTS LIABILITY LITIGATION
Appellate Case No.: 09-56683

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