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.

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

BRIEF FOR OBJECTORS-APPELLANTS

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JURISDICTIONAL STATEMENT

The district court had diversity jurisdiction under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d)(2)(A) and 1332(d)(2)(C), because the case is a class action filed under Fed. R. Civ. Proc. 23 involving allegations of violations of state consumer fraud law, at least one member of the proposed class is a citizen of a state different from one defendant, one defendant is a citizen of a foreign state, the number of members of all proposed plaintiff classes in the aggregate is at least 100, the aggregate amount in controversy exceeds $5 million, exclusive of interest and costs, and no statutory exception to 28 U.S.C. § 1332(d)(2) applies. The putative class consists of citizens of all fifty states; named plaintiff Evan Nass and objector and putative class member William J. Brennan, *inter alia*, are citizens of the state of New York. Defendant Plantronics, Inc., is a Delaware corporation with its principal place of business in California; Defendant GN Netcom, Inc., is a foreign corporation; Defendant Motorola, Inc., is a Delaware corporation with its principal place of business in Illinois. *See* 28 U.S.C. § 1332(d).

The court's final judgment pursuant to Fed. R. Civ. Proc. 58 issued on September 25, 2009, and the court awarded attorneys' fees in an order dated October 22, 2009. Appellants filed a timely notice of appeal on October 23, 2009, and amended the notice of appeal on Monday, November 23, 2009, to explicitly include an appeal of the attorneys' fee order to ensure unambiguous compliance with Fed. R. App. Proc. 3(c)(1)(B). Fed. R. App. Proc. 4(a)(4)(B)(ii); *Whitaker v. Garcetti*, 486 F.3d 572, 585 (9th Cir. 2007).

This court has appellate jurisdiction because this is a timely-filed appeal from a final judgment under 28 U.S.C. § 1291. The Brennan objectors have standing to appeal a final approval of a class action settlement without the need to formally intervene in the case. *Devlin v. Scardeletti*, 536 U.S. 1 (2002).

STATEMENT OF ISSUES

Fed. R. Civ. Proc. 23(e)(2) states that a class action settlement may only be approved by a court if it is "fair, adequate, and reasonable." Was it an abuse of discretion for the district court to approve a settlement that provided zero relief to the class, $100,000 in *cy pres* awards, and $850,000 in attorneys' fees and costs?

Standard of Review: A district court decision to approve a class action settlement is reviewed for abuse of discretion. *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (reversing settlement approval where "the class members received nothing; the named plaintiff and class counsel received compensation for his injury and their time; and the defendant escaped paying any punitive or almost any compensatory damages").

RELEVANT RULES

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: …

(4) the representative parties will fairly and adequately protect the interests of the class.

…

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise: …

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. …

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 wireless headsets commonly known as "Bluetooth headsets." They were consolidated in a multi-district litigation in February 2007. (Dkt. No. 1.) On September 25, 2007, lead plaintiffs filed their Second Amended Consolidated Complaint; as in *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009) (iPods), the plaintiffs alleged that the supposed failure to disclose risk of hearing loss from extended use of headsets at high volume constituted consumer fraud. (Dkt. No. 13.) After proceedings were stayed for over six months, Defendants filed a motion to dismiss on May 7, 2008. (Dkt. Nos. 33-39.)

Before the court heard oral argument on the pending motion to dismiss, and before any motion was made to certify a class, the parties reached settlement, which provided zero dollars to the class, $12,000 to the representative plaintiff, $100,000 in *cy pres* awards, and injunctive relief requiring additional warnings about the risk of hearing loss; the attorneys would request $800,000 in fees and $50,000 in costs. (Excerpts of Record ("ER") 110-84.) On February 19, 2009, the court granted preliminary approval of the settlement and ordered notice to the settlement class. (Dkt. No. 64.)

Dozens of class members wrote the court to object to the settlement. (Dkt. Nos. 80-105, 108-119, 198-207.) Seven class members, the appellants in this matter, filed a formal objection and a response to the plaintiffs' motion for settlement approval and attorneys' fees, objecting that the settlement's benefit to the attorneys and class representatives dramatically outweighed any benefit to the class, making the settlement *per se* unfair and unreasonable. (ER 185-211.)

After a fairness hearing, the court approved the settlement, holding that the "[c]oncerns about the fairness of Class Counsel's fees and incentive awards to the Class representatives are minimal in the Court's analysis of the reasonableness of the settlement because the settlement is not conditioned on any minimum awards to Counsel or the Class representatives," and because "the awards are severable from the rest of the settlement." (ER 20.) The court found that consideration was "adequate" because the "settlement provides more than Plaintiffs might have achieved at trial, and it does not do the Class any harm." (ER 21.) The court then went on to approve the entirety of the attorneys' fee request because of the "minimal benefit" obtained. (ER 47.) The court took the position that it did not have the authority to reject an extortionate settlement that provided "minimal benefit" to the class and disproportionate sums to the class attorneys. (ER 47 ("objectors' argument is more appropriately addressed to the legislature"); ER 75-76.)

This timely appeal followed. (ER 212-14.) The original notice of appeal was filed before the Brennan objectors were aware of the order awarding fees; the Brennan objectors timely amended their notice of appeal to explicitly include an appeal of the order awarding fees. (ER 215-17.)

STATEMENT OF THE FACTS

The parties' settlement provided:

- Up to $12,000 to the representative plaintiffs (ER 116);
- $0 to the unnamed members of the class (ER 110-84);
- $100,000 in *cy pres* awards to four charities relating to the hearing-impaired (ER 115-16);
- "injunctive" relief requiring warnings about hearing loss (ER 115, 168-77); and
- that the defendants would not object to a fee request of up to $800,000 and cost request of up to $50,000.[1] (ER 116-17.)

The settlement provided a general release of class members' claims, but did not release personal injury claims. (ER 117-19.)

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[1] "Clear sailing" for $12,000 of the $50,000 cost request was contingent upon notice costs being no more than $1,188,000. (ER 117.) The contingency was met. (Dkt. No. 154 at ¶ 25.)

Before the settlement, manufacturers already provided extensive warnings about hearing loss in their manuals. (ER 196-97.) For example, objector Aaron J. Walker's BT2040 headset manual contains the following warning:

> ***WARNING!***
> Headsets are capable of delivering sounds at loud volumes and high-pitched tones. Exposure to such sounds can result in permanent hearing loss damage. The volume level may vary based on conditions such as the phone you are using, its reception and volume settings, and the environment. Please read the safety guidelines below prior to using this headset.
>
> ***SAFETY GUIDELINES***
> **1. Prior to using this product**
> Before putting on the headset, turn the volume control to its lowest level, put the headset on, and then slowly adjust the volume control to a comfortable level.
>
> **2. During the use of this product:**
> Keep the volume at the lowest level possible and avoid using the headset in noisy environments where you may be inclined to turn up the volume;
> If increased volume is necessary, adjust the volume control slowly; *and*
> If you experience discomfort or ringing in your ears, immediately discontinue using the headset and consult a physician.
>
> With continued use at high volume, your ears may become accustomed to the sound level, which may result in permanent damage to your hearing without any noticeable discomfort.

(ER 196-97.) Similarly, objector Bill Clendineng's manual contains the more concise warning "Do not use headphones/headsets at high volumes for an extended period of time. Doing so can cause hearing loss. Always listen at moderate levels." (ER 197.) The settling parties presented no evidence that the lengthier warnings required as part of the settlement materially improved existing warnings or provided any marginal benefit to anyone. The district court found that the injunctive relief in conjunction with the *cy pres* award provided "minimal benefit" to the class (ER 47), but did not provide any basis for rejecting the objectors' contention that the injunctive relief was worthless to the class or make any findings quantifying the value of the injunctive relief.

There is no dispute that the seven Brennan objectors are class members with standing to object. (ER 190-91.)

SUMMARY OF ARGUMENT

The district court approved an extraordinary settlement that will pay zero to the millions of class members for extinguishing their claims, yet over $800,000 to the attorneys. The only benefit to the class was non-economic: a $100,000 payment to charities that are neither class members nor have suffered any injury and additional warning language in manuals for future purchasers; the parties provided no evidence that the additional warning language would benefit, rather than harm, the class. Meanwhile, the representative plaintiffs received $12,000 for themselves, several hundred times the value of the headset that they purchased.

The case is a veritable poster-child for class action abuse. *See* Daniel Fisher, "A Lawyer Who Tries to Block Settlements," *Forbes Magazine* (September 21, 2009) (discussing the case in article about controversial class action settlements).

The district court committed a number of legal errors.

First, the district court committed clear legal error by mistakenly distinguishing this settlement from other settlements whose approval appellate courts reversed as an abuse of discretion on a ground that was not a distinction at all.

Second, the district court erred by failing to evaluate the share of the settlement taken up by attorneys' fees in considering either the fairness of the settlement or the fee request. Worse, the court treated the decision of the plaintiffs' attorneys to negotiate the attorneys' fee as a separate payment rather than as part of a common fund not as a breach of the attorneys' fiduciary duty to their clients, but as a reason to grant the entirety of the fee request.

Third, the district court reasoned that, because the defendants might win the underlying case, even the token relief indirectly offered to the class in this case was sufficient to be "fair." But this is far too lenient a standard: barring sheer incompetence by a plaintiffs' attorney, ***every*** class action settlement involves a case where the class could conceivably lose the case and be shut out of recovery.

The district court's legal reasoning effectively abdicates the responsibilities of a district court in a fairness hearing, and ignores precedent to the contrary.

When evaluating the fairness of a settlement, district courts have a fiduciary duty to unrepresented class members. If the fairness hearing that Fed. R. Civ. Proc. 23(e)(2) requires is to be more than a rubber-stamp formality, then this court must reverse the lower court's decision to approve the settlement.

PRELIMINARY STATEMENT

The Center for Class Action Fairness, founded by legal academic and attorney Theodore H. Frank in 2009, is a non-profit public-interest law firm that represents consumers *pro bono* as part of the 501(c)(3), DonorsTrust. A number of "professional objectors" are for-profit attorneys that attempt to or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees; thus, some courts presume that the objector's legal arguments are not made in good faith. But this is not the business model of the Center for Class Action Fairness. While the Center focuses on bringing objections to unfair class action settlements, it makes no effort to engage in *quid pro quo* settlements to extort attorneys, and has never settled an objection. The Center analyzes complaints from consumers aggrieved by class action settlement notices to determine whether a settlement is objectionable under the law because the settlement favors attorneys at the expense of class members. The Center's litigation on behalf of consumers has been covered by the *ABA Journal*, *Forbes*, and the *National Law Journal*, among others.

ARGUMENT

I. The Settlement Is Impermissibly Self-Dealing.

Ninth Circuit precedent calls upon courts to consider an eight-factor test to evaluate the fairness of a settlement: "the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (*quoting Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) *and Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)).

But the Ninth Circuit has repeatedly looked beyond these eight factors and made holistic evaluations of settlements. "[W]here the court is '[c]onfronted with a request for settlement-only class certification,' the court must look to the factors 'designed to protect absentees.'" *Molski*, 318 F.3d at 953 (*quoting Amchem Prods.*, *Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). "[S]ettlements that take place prior to formal class certification require a higher standard of fairness." *Molski*, 318 F.3d at 953 (*quoting Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir. 2000) *and citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

Other circuits agree. A "district court ha[s] a fiduciary responsibility to the silent class members." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987). It is not enough that the settlement happened to be at "arm's length" without explicit collusion; the settlement must be objectively reasonable as well. "Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

"These concerns warrant special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998).

In *Murray v. GMAC*, 434 F.3d 948, 952 (7th Cir. 2006), the Seventh Circuit held that a settlement similar to the Bluetooth settlement was "untenabl[y]" beyond the pale of approval:

> This looks like the sort of settlement that we condemned in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), and *Crawford v. Equifax Payment Services*, 201 F.3d 877 (7th Cir. 2000), two appeals arising from the same litigation. That suit had been settled for $2,000 to the named plaintiff, $5,500 to a legal-aid society that had not been injured by the defendant's conduct, and $78,000 in legal fees. We treated the disproportion—$2,000 one class member, nothing for the rest—as proof that the class device had been used to obtain leverage for one person's benefit. [citations omitted] Here the proposed award is $3,000 to the representative while other class members are frozen out. The payment of $3,000 to Murray is three times the statutory maximum, while others don't get even the $100 that the Act specifies as the minimum. …
>
> Such a settlement is untenable. We don't mean by this that all class members must receive $100; risk that the class will lose should the suit go to judgment on the merits justifies a compromise that affords a lower award with certainty. [citation omitted] But if the reason other class members get relief worth about 1% of the minimum statutory award is that the suit has only a 1% chance of success, then how could Murray personally accept 300% of the statutory maximum? And, if the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny? If, however, the chance of success is materially greater than 1%, as the proposed payment to Murray implies, then the failure to afford effectual relief to any other class member makes the deal look like a sellout.

The Bluetooth settlement is even worse than the settlement criticized in *Murray* as "untenable." There was one class representative in *Murray* who received $3,000, three times maximum possible statutory damages; here, there are nine class representatives seeking a total of $12,000 over the purchase of a few hundred dollars worth of headsets without any indication of personal injury. In *Murray*, the 1.2 million unnamed class members were entitled to split a fund of $947,000; here, many more class members will end up with zero. And to top it all off, the Putative Class Attorneys sought attorneys' fees twice as high as those in *Murray*.

As in *Murray*, there are two possibilities. The Putative Class Attorneys have brought either (1) a meritorious case that is being settled for an infinitesimal fraction of the case's real value in a "sellout" of the attorneys' and class representatives' fiduciary duties to the class, or (2) a meritless lawsuit where the "class device had been used to obtain leverage for one person's benefit." *Murray*, 434 F.3d at 952. In either instance, the Putative Class Attorneys' actions should be deterred, rather than rewarded; the court should not approve the settlement and should not award attorneys' fees. If Rule 23(e)(2) is to have any meaning whatsoever, the district court's approval of the settlement must be reversed; few settlement results under the Class Action Fairness Act could be more self-serving of the Putative Class Attorneys.

The settlement approved by the district court is substantially worse than other settlements whose approval was reversed by the Seventh and Ninth Circuits as an abuse of discretion under Rule 23(e). Compare this case with *Murray*, 434 F.3d at 952 ("untenable"); *Mirfasihi*, 356 F.3d 781; *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877 (7th Cir. 2000) ("substantively troubling"); *Molski*, 318 F.3d at 956 ("unfair, inadequate, and unreasonable"):

	Murray	*Mirfasihi*	*Crawford*	*Molski*	*Bluetooth*
Unnamed class recovery	Up to $947,000	Between $243,000 and $2.64 million	$0	$0	$0
Rep. plaintiff payments	$3,000	$250	$2,000	$5,000	$12,000
Attorney fees	~$400,000	$750,000	$78,000	$50,000	$800,000
Approved?	Rejected on appeal; remanded.	Reversed as abuse of discretion.	Reversed as abuse of discretion.	Reversed as abuse of discretion.	?

Here, the unnamed class members recover less money, and the attorneys and named class representatives receive more money. Though plaintiffs claimed to represent and seek to bind a million-member class, they have recovered cash for only themselves. Even if one were to credit the *cy pres* award to unrelated third parties as a benefit to the class,[2] plaintiffs have recovered for the class $100,000 for a claim that they had alleged was worth tens of millions of dollars of restitution plus punitive damages. If we assume treble damages for the punitive component, plaintiffs brought a $100 million lawsuit that they are settling for $100,000, a 0.1% success rate. Meanwhile, the representative class members receive "bonus" payments worth a hundred times their alleged damages despite shutting out all of the unrepresented class members.

In *Murray*, the 1% ratio of recovery to alleged damages and a 3000-1 ratio of representative-to-individual recovery was enough to call the settlement untenable: "if the reason other class members get relief worth about 1% of the minimum statutory award is that the suit has only a 1% chance of success, then how could Murray personally accept 300% of the statutory maximum? And, if the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny?" 434 F.3d at 952. Here, the "success" of plaintiffs is an abysmal failure of an even larger magnitude than the failure criticized in *Murray*, and representative plaintiffs are seeking $12,000 in rewards after winning

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[2] The Ninth Circuit has "left open the question of whether a *cy pres* award can ever be used as a substitute for actual damages." *Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) (*citing Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990)). The question is further complicated by the passage of the Class Action Fairness Act. For purposes of this appeal, the objectors assume *arguendo* that the *cy pres* award is permissible and do not ask the Court to resolve this legal question.

zero for the average class member. Plaintiffs are either breaching their fiduciary duties by selling the class short or are bringing an extortionate "strike suit" for their own selfish benefit. Neither should be condoned by approving the settlement or attorneys' fees.

The district court rejected this analysis for two reasons. *First*, it distinguished the objectors' cited precedent on the grounds that "the [fee] awards are severable from the rest of the settlement" and that the court "had the ability to determine the fees." (ER 20, 78.) *Second*, it held that consideration was "adequate" because the "settlement provides more than Plaintiffs might have achieved at trial, and it does not do the Class any harm." (ER 21.) But neither of these reasons stands up to scrutiny.

II. It Is Essential to Evaluate Attorneys' Fees When Determining the Fairness of a Settlement, and the District Court Committed Multiple Legal Errors in Failing to Do So.

The district court held that the cases objectors cited holding that a settlement that benefited attorneys at the expense of the class were distinguishable because "the [fee] awards are severable from the rest of the settlement" and that the court "had the ability to determine the fees." (ER 20, 78.) But this argument fails for two reasons. *First*, the district court drew a false distinction: the Brennan objectors cited precedent where courts have reversed similar settlements where the attorney-fee award was determined separately. *Second*, the severability of the fees has no effect on the fairness of the proposed settlement where, as here, any reduction in the fee request reverts to the defendant rather than the class; the district court abused its discretion by failing to ever consider the effect of the proposed fee award on the fairness of the settlement.

A. The District Court's Findings Rest on an Erroneous View of the Law.

The Brennan objectors cited *Mirfasihi* and *Crawford* as precedents demonstrating that the district court should reject the settlement. The only reason the district court gave for not applying those precedents was that "the [fee] awards are severable from the rest of the settlement" and that the court "had the ability to determine the fees." (ER 20, 78.) But that is a bad misreading of the precedent.

In *Crawford*, for example, the settlement provided only for "reasonable attorneys' fees"; the $78,000 award was later fixed by the district court, severable from the settlement. 201 F.3d at 880. Nevertheless, approval of the settlement was an abuse of discretion. In the *Mirfasihi* settlement approval reversed as an abuse of discretion, there is no basis to believe that the settlement was conditioned on a particular fee: indeed, the Seventh Circuit discussed how the district judge "approved a handsome fee for the class lawyers," implying that the fees were determined separately by the court in that case, as well. 356 F.3d at 783.

The severability of the fee award in a "substantively troubling" settlement is thus no reason to approve a settlement, and the district court's mistake is grounds for reversal. "[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (discussing abuse of discretion standard) (*quoting Pullman-Standard v. Swint*, 456 U. S. 273, 287 (1982)). *Accord Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010).

B. The District Court's Failure to Apply the Ninth Circuit's 25% Benchmark or Evaluate the Reasonableness of the Attorneys' Fees Was Reversible Error.

The district court argued that because the amount of attorneys' fees is severable from the rest of the settlement, objections about the fee award are irrelevant. ER 20. But a class action settlement must be judged in totality. "If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits 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). A settlement that would be fair if attorneys are collecting 25% of the pecuniary benefits may well be unfair and tacitly collusive if the attorneys are receiving an 800% contingency fee. For example, *Tarlecki v. Bebe Stores, Inc.*, 2009 WL 1364340 (N.D. Cal. May 14, 2009) criticized a settlement where attorneys received 46% of the total payout; here, the total payout to the attorneys was nearly 89%.

1. The District Court Failed to Evaluate the Fairness of the Fees.

The court made no effort to "determine the fees" or evaluate their fairness. After emphasizing its ability to review the fee award as grounds for approving the settlement, the district court granted the entirety of the fee award, notwithstanding the "minimal benefit" to the class, because "the defense has agreed to pay the specified amounts, and because any amount not awarded by the Court would be retained by the defendants rather than benefitting class members." (ER 46.) The circularity is remarkable: the settlement was adjudged fair because the court could reduce the proposed fee award, but the proposed fee award was approved because the settlement was adjudged fair and the fee amount was part of the agreed settlement. At no time did the district court ever consider the fairness of the disproportionate attorneys' fees.

2. The Settlement Should Be Evaluated As If It Were a Constructive Common Fund.

In the Ninth Circuit, the fairness of the attorneys' fees in a common fund settlement is measured against a 25% benchmark. *Torrisi v. Tucson Elec. Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). While there is no common fund here, this is a technicality: the parties could have chosen to create a common fund. Defendants were willing to spend $950,000 (plus $1M in notice costs) to settle this case. The plaintiffs' attorneys and class representatives chose to negotiate the lion's share of that to themselves.

There is, unfortunately, one material difference when there is no common fund: the district court cannot rewrite the settlement agreement to ensure that the class gets its fair share of the award. If the district court reduces the attorneys' fee request in any way, the money reverts to the defendants, rather than to the class. But this merely shows that plaintiffs' attorneys and the putative class representatives were putting their own interests ahead of those of the unnamed class members, and thus fail to meet Rule 23(a)(4) standards for adequacy.

This arrangement has two purposes: (1) to inflate the fee at the class's expense; and (2) to reduce the court's incentive to carefully scrutinize the fee for unreasonableness, since any reduction *only* benefits the defendant. Professor Charles Silver (an opponent of tort reform) has stated that this type of fee arrangement is "a strategic effort to insulate a fee award from attack." *Due Process and the Lodestar Method*, 74 Tulane L. Rev. 1809, 1839 (2000).

That strategic effort succeeded here. The district court chose not to scrutinize the proposed fee request because "any amount not awarded by the Court would be retained by the defendants rather than benefitting class members." (ER 46.) The district court effectively rewarded the attorneys for their bad actions.

Any fee that a defendant agrees to pay directly to class counsel is an amount that it would have been willing to include as part of the payment to the class. Moreover, because the fee thus negotiated is likely to be higher than the amount that class counsel could reasonably seek by way of a percentage of the common fund, the arrangement reduces the recovery that the class would have received.

Therefore the agreed attorneys' fees must be scrutinized when evaluating whether the settlement is fair, reasonable, and adequate. "There is no exception in Rule 23(e) for fee provisions contained in proposed class action settlement agreements. Thus, to avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003). Provisions for attorneys' fees are contained in the settlement agreement, so this Court has a responsibility to review them rather than "sever" these disproportionate fees from consideration. There is good reason for this: "If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Id.* at 964.

"That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief provided to the class in the agreement does not detract from the need carefully to scrutinize the fee award." *Id.* A "defendant is interested only in disposing of the total claim asserted against it." *Id.* "The rationale behind the percentage of recovery method also applies in situations where, although the parties claim that the fee and settlement are independent, they actually come from the same source." *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 820-21 (3rd Cir. 1995). "[P]rivate agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case." *Id.* at 821. *See also id. at* 820 (severable fee structure "is, for practical purposes, a constructive common fund").

"[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal." *Johnson v. Comerica*, 83 F.3d 241 (8th Cir. 1996). "If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees" then "the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class, with the agreed-on fee amount constituting the upper limit on the fees that can be awarded to counsel." *Manual for Complex Litigation* (4th ed. 2008), § 21.71, p. 525.

The Ninth Circuit has recognized that "such an agreement has the potential to enable a defendant to pay class counsel excessive fees and costs, in exchange for counsel accepting an unfair settlement on behalf of the class." *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2002). Even where, as here, there is no explicit collusion against the class, "[e]ven if the plaintiff's attorney does not consciously or explicitly bargain for a higher fee at the expense of the beneficiaries, it is very likely that this situation has indirect or subliminal effects on the negotiations." Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 266 (1985).

Negotiating a settlement that elevates an attorney's financial interests over that of the class—no matter how much money is involved—should not be a "fair" or "adequate" settlement under Rule 23(e)(2); at a minimum, it is a breach of the Rule 23(a)(4) requirement that "the representative parties … fairly and adequately protect the interests of the class." *See also* Lester Brickman, *The Rent Seekers: Lawyers, Torts and Contingency Fees* (forthcoming Cambridge University Press 2010) (arguing that such arrangements are *per se* unethical under the Model Rules of Professional Conduct).

Even if this court is willing to condone the act of attorneys putting their own interests ahead of their putative clients, the failure to create a common fund hardly means that a district court should ignore the 25% benchmark. If regular settlements are treated differently than common-fund settlements, plaintiffs' attorneys will simply evade the benchmark and avoid creating common-fund settlements—a sort of judicial arbitrage, an inevitable result when form trumps substance. Under the 25% benchmark, the attorneys' fee award should be no more than $33,333 if the *cy pres* is fully valued as a $100,000 benefit to the class.

Note that had the plaintiffs' attorneys not breached their duty to the class of creating a common fund, the 25% benchmark would have meant that $575,000 more would have been provided to the class, or, at worst, to a *cy pres* beneficiary.

3. The Injunctive Relief Is of No Benefit to the Class.

If the settlement provided for quantifiable injunctive relief, it might provide grounds for the claiming that the settlement and attorneys' fees were fair. But there is no basis for claiming that there was quantifiable injunctive relief. *First*, the district court's finding was that the ***combination*** of injunctive relief and *cy pres* relief were of "minimal benefit" to the class. (ER 47.) *Second*, the parties presented no evidence that the injunctive relief—additional warnings—benefitted the class, or even future consumers. Because additional warnings can be a detriment, as well as a benefit, a court has no basis to assume that the injunctive relief is beneficial to the class without material evidence of that benefit. The parties chose not to present any such evidence (despite the fact that the inadequacy of existing warnings was a *prima facie* element of the plaintiffs' case); the only appropriate inference is that no such evidence exists.

It is readily apparent that warnings provided to ***new*** purchasers of Bluetooth headsets are of no benefit to existing class members. But even if existing class members were to happen to surf the web and dig deep enough within the website menus of Defendants' websites to find the new warnings, there is no reason to think that they would be of material benefit to the class, even at the margin. The class members' existing manuals already contain warnings about hearing loss, and the open and obvious nature of the danger to mature adults means that the additional warnings have a substantial danger of overwarning, with counterproductive results on public safety.

And there is more than slight reason to believe that such warnings are counterproductive "overwarnings." When consumers are confronted with multiple warnings for the obscure or obvious, they suffer warning overload and are unable to process important warnings because of the volume of trivial warnings they are confronted with. *See* Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability Design Defect Litigation Comes of Age*, 61 Cornell L.Rev. 495, 513 (1976); Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. Mich. J.L. Reform 309, 310 (1997); Hearing Before the H. Comm. on Oversight & Gov't Reform (testimony of Randall Lutter) (May 14, 2008) (FDA commissioner discussing problem of overwarning); Final Rule, Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3968 (Jan. 24, 2006) (discussing problem of overwarning); *cf. also Larkin v. Pfizer, Inc.*, 153 S.W.3d 758, 764 (Ky. 2004); Aaron Smith, "Consumers tune out FDA warnings," CNNMoney.com, Feb. 25, 2008.[3]

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.

III. The District Court's "More Than Plaintiffs Might Have Achieved at Trial" Test Is Legally Erroneous.

Plaintiffs deny that their lawsuit is meritless, as they must to comply with Fed. R. Civ. Proc. 11 and 28 U.S.C. § 1927. (ER 71-72.) Under principles of judicial estoppel, the parties cannot have it both ways by simultaneously claiming that the underlying litigation is meritorious and thus should not be dismissed, but that the zero recovery to the class is acceptable because the underlying litigation is meritless. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (judicial estoppel protects "the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment").

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[3] Available at http://money.cnn.com/2008/02/22/news/companies/fdawarning_fatigue/index.htm.

The district court held that consideration was "adequate" because the "settlement provides more than Plaintiffs might have achieved at trial, and it does not do the Class any harm." (ER 21, 76-77.) This cannot possibly be the legal standard for determining whether a settlement is adequate, because it is a test that every settlement that provides even token relief will meet, and abdicates the district court's responsibility to scrutinize a settlement. The only class action settlements that would not meet this standard would be those where plaintiffs would win on summary judgment: in every other case, it is possible for plaintiffs to come away with zero, and the token indirect relief provided by this settlement would be considered "adequate."

True, the underlying case is likely meritless. *See Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009). But the better approach in such a situation is that taken by Judge Vaughn Walker:

> From the perspective of the class, the worst-case scenario may be realized if following this denial of final settlement approval the case were to fail on dispositive motion. But in that event, class would end up essentially in the same situation it would be if final settlement approval were approved: with nothing. Because the purported benefits to the class do not warrant settlement approval, the court DENIES final approval of the proposed settlement.

In re TD Ameritrade Accountholder Litigation, No. 07-CV-2852, ___ F.R.D. ___, ___, 2009 U.S. Dist. LEXIS 126407 (N.D. Cal. Oct. 23, 2009).

IV. There Are Public Policy Reasons to Reject Bad Class Action Settlements.

When plaintiffs bring low-value litigation with little chance of success on relatively meritless claims, as they appear to have done here, they raise costs to defendants, who have to pay for legal fees and for the extensive and expensive class action notice requirements. Objectors, like the vast majority of class members, receive consumer surplus from their purchase and use of Bluetooth headsets. Self-dealing settlements like those of Putative Class Attorneys raise the costs to the defendants of producing accessories, and raise prices to class members like the Brennan objectors without concomitant benefits, thus reducing their consumer surplus. Consumer welfare would be improved if courts rejected such settlements and deterred socially inefficient rent-seeking litigation that benefits only attorneys. If attorneys knew that they could not profit from bringing litigation that does not actually benefit their clients, they would not bring inefficient lawsuits that cost consumers money. Given that Rule 23(e)(2) requires a showing that a settlement is "fair," this social inefficiency is not, as the district court supposed (ER 18, 77), irrelevant to the judicial determination to approve a class action settlement. At a minimum, this fact is grounds for the Ninth Circuit to ensure that the legal standard for evaluating class action settlements involves meaningful scrutiny of the relative benefits of the settlement for class members and attorneys.

CONCLUSION

The Putative Class Attorneys have brought either (1) a meritorious case that is being settled for an infinitesimal fraction of the case's real value in a "sellout" of the attorneys' and class representatives' fiduciary duties to the class, or (2) a meritless lawsuit where the "class device had been used to obtain leverage for one person's benefit." *Murray*, 434 F.3d at 952. In either instance, the Putative Class Attorneys' actions should be deterred, rather than rewarded; the court should reject the settlement as failing to comply with the requirements of Rule 23(a)(4) and Rule 23(e). The self-dealing is exacerbated by the class attorneys' self-serving decision to structure the settlement to have any denial of fee awards revert to the defendant rather than the class, a plain breach of their fiduciary duties to their clients.

In approving the settlement notwithstanding these issues, the district court committed numerous legal errors that constitute abuse of discretion, resting its analysis on an erroneous view of the law. This Court should reverse and remand, with instructions to reject the settlement, and provide a clear command to district courts to provide searching scrutiny of class action settlements to fulfill their fiduciary duty to absent class members.

Dated: April 26, 2010

Respectfully submitted,

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

The pending Ninth Circuit appeal of *True Communication Inc. v. Yahoo! Inc.*, No. 10-55225, will raise closely related issues.

Dated: April 26, 2010

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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: April 26, 2010

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I, Theodore H. Frank, hereby certify that on April 26, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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