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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GAIL MEDEIROS, et al.,
Plaintiffs,

v.

HSBC CARE SERVICES, INC. et al.,
Defendants.

TERRY FANNING, et al.,
Plaintiffs,

v.

HSBC CARE SERVICES, INC. et al.,
Defendants.

STEFAN O. LINDGREN,
Plaintiff,

v.
HSBC CARD & RETAIL SERVICES.,
INC., et al.
Defendants

Case Nos. 2:15-cv-09093 JVS (AFMx)
8:12-cv-00885-JVS-RNB
Case No. 14-cv-05615-JVS-RNBx

Relates to: *Medeiros, Fanning, and Lindgren*

REPLY OF CHRISTINE A. CHAVEZ TO RESPONSE OF DEFENDANTS HSBC CARD SERVICES INC. AND HSBC TECHNOLOGY & SERVICES (USA) INC. TO OBJECTION OF CHRISTINE CHAVEZ; AND RESPONSE TO PLAINTTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT

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INTRODUCTION

In response to Christine Chavez's challenge to the settlement and class counsels' 33% fee request, the parties attempt to flip the burdens and skew the appropriate perspective for this Court. The Court should not simply conclude that the settlement is fair, reasonable, and adequate because it did so in its preliminary order. Rather, the burden is on class counsel to establish the settlement is fair, reasonable, adequate, and within the range of possible approval; it is not Ms. Chavez's evidentiary burden to negate it. *See Ybarrondo v. NCO Fin. Sys., Inc.*, CIV. 05CV2057-L JMA, 2008 WL 183714, at *2 (S.D. Cal. Jan. 18, 2008) ("[t]he settlement proponents ultimately have the burden to show the proposed settlement is fundamentally fair, adequate, and reasonable") (citing *Stanton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003)). In this respect, the parties have failed to substantiate their claim that the settlement or 33% fee request satisfies Rule 23.

I. The Figures Disclosed in Class Counsels' Motion for Final Approval Underscore that $7.5 Million is Still Patently Inadequate.

Class counsel now acknowledge that if they were successful in prosecuting the class actions, the potential aggregate damages would allow the class to "recover more than $8.5 billion." ECF Doc. 96-1, at 12. Still, they discount this number based on the risks of litigation. And while class counsel describe these risks associated with this CIPA class action again in detail, what they fail to do is explain how they have changed in any respect, since the three firms who opposed the earlier proposed settlement[1] in October,

[1] Altshuler Berzon LLP, Arleo Law Firm PLC, and Mehdi Law Firm, PC, representing *Terry J. Fanning and Stefan O. Lindgren.*

1 2015 argued the risks were "overstated" and "fail to justify the wide discrepancy between
2 statutory damages and the settlement amount."[2]
3
4 As these three firms would have likely argued had they not been a part of the
5 proposed 33% fee recovery, the $7.6 million that will likely reach the class after fees and
6 notice/administration expenses simply does not fall within the range of reasonableness
7 in this context. Predictably, class counsel ask for this Court to disregard potential
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9 damages even though the three firms who objected to the previous settlement urged that
10 potential damages should be considered. *Compare* 2:15-cv-09093-JVS-AFM, ECF Doc.
11 49, at i, and 2 ("Overall, the amount of the settlement is grossly inadequate compared to
12
13 the potential recovery and the disparity is not justified by the risks of litigation.") *with*
14 ECF Doc. 96-1, at 19 ("proposed settlement should not be judged against a hypothetical
15 or speculative measure of what might have been achieved"). But, the settlement amount
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17 is not just "less than the potential damages" here. ECF Doc. 96-1, at 20. It is
18 astonishingly less.
19 Class counsel cite ECF Doc. No. 79 from *Knell v. FIA Card Services*, No. 12-cv-
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21 00426 WVG (S.D. Cal. Aug. 15, 2014) for the proposition that it involved a far lower
22 $0.75 per class member recovery. Nowhere in that document is the per-class member
23 recovery mentioned; nor is class size described. Significantly, however, that case involved
24
25 a far superior $1,353.46 per-class member recovery after the claims process. *Id.* at ECF
26 Doc. 73-1, at 5. Likewise, the order cited by class counsel in *Hoffman v. Bank of America,*
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[2] 2:15-cv-09093-JVS-AFM, ECF Doc. 49, at 20. Ms. Chavez's objection describes these risks in her objection, and also specifically incorporated by reference in her objection the discussion of the risks from Plaintiffs-Intervenors' Opposition to Motion for Preliminary Approval of Settlement, ECF Doc. 49.

N.A., No. 12-cv-00539 DHB, Dkt. No. 67 (S.D. Cal. Nov. 6, 2014) does not say anything about a "$1.86 per class member" recovery suggested by class counsel. The order does explain, however, that each of the consumers who filed claims received $1,763.63. ECF Doc. 67, at 5.[3] By comparison, the class members who filed claims here would appear to be entitled to just upward of $41.[4]

Regardless, the $7.6 million net or $13 million gross recovery cannot be sustained given the prodigious discount off the $8.5 billion in potential damages released.

II. The Collusion Inquiry is Not Satisfied by Mere Reference to a Neutral Mediation or a Declaration Alleging Arms-Length Negotiations.

Defendants' vigorous opposition to Ms. Chavez's objection does nothing to dispel the notion that this settlement, which awards a token of potential relief, bears indicia of collusion. As Ms. Chavez observed, this was precisely the argument laid out by the three firms who previously contested the *Medeiros* settlement. ECF Doc. 49, at 12-13.

Though the parties removed the clear-sailing clause, they agreed that class counsel would take a disproportionate $4.3 million (or 33% of $13 million) where the class is only likely to receive $7.6 million. That is *half* of the class recovery. Meanwhile, HSBC's response confirms it will not contest fees while aggressively challenging Ms. Chavez's objection.

There is no reason to think this settlement is any less a product of collusion than the first given the $4.3 million fee relative to the diminutive $7.6 million class recovery,

[3] Neither does the cite referenced in the class counsels' motion, *Nader v. Capital One Bank, N.A.*, opinion, i.e., No. 12-cv-01265 DSF, 2014 WL 12584442 (C.D. Cal. Nov. 17, 2014) specify a $2.73 per class member recovery as claimed by class counsel.

[4] $7.6 million % 183,430 claimants = $41.43

or relative to the represented per capita recovery of $7.50 per class member. When Defendants go so far as to seemingly advocate in favor of class counsels' 33% fee request (significantly above the Ninth Circuit's benchmark), a red flag would appear to rise. ECF Doc. 97, at 13 (suggesting there is no collusion because "counsel for Plaintiffs seek no more than thirty-three (33%) of the Settlement Fund").

Certainly, just because the agreement was the result of mediation does not dispense with the need for careful scrutiny. *See In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011). Indeed, "the mere presence of a neutral mediator, though a factor weighing in favor of a finding of non-collusiveness, is not on its own dispositive of whether the end product is a fair, adequate, and reasonable settlement agreement." *Bluetooth*, 654 F.3d at 948. "[T]he Rule 23(e) reasonableness inquiry is designed precisely to capture instances of unfairness not apparent on the face of the negotiations." *Bluetooth*, 654 F.3d at 948 (9th Cir. 2011).

III. Class members who received phone calls on cell phones like Ms. Chavez should have been appointed separate counsel.

Contrary to class counsels' assertion, Ms. Chavez's objection specifically referenced that Ms. Chavez was a class member who was "called on her cell phone[.]" ECF Doc. 95, at 8. The class notice did not require that class members seeking to object specify by declaration whether they were called on landline or cell phone; thus her failure to submit a declaration in that respect is immaterial. Ms. Chavez clearly has standing to complain of the inadequate representation for members called on cell phones.

Penal Code §632.7 allows class members called on a cell phone to recover without proof that the conversations were "confidential," which in turn, reduces the risk of litigation. This reduced risk "should be reflected in the settlement by a higher payment."[5]

And while class counsel reference the named plaintiff Lindgren as a representative who received a call on a cell phone, they neglect to address a key component of Ms. Chavez's argument—that these members were entitled to separate counsel.

This "allow[s] for adequate structural protections to assure the differently situated plaintiffs negotiate for their own unique interests[.]" *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 327 (3d Cir. 2011) (quotation omitted); *see also Sandoval v. M1 Auto Collisions Centers*, 309 F.R.D. 549, 569–70 (N.D. Cal. 2015) ("[c]lass counsel may be inadequate under Rule 23 if they seek to represent class members with different interests"); *In re Southeastern Milk Antitrust Litig.*, 2:07-CV 208, 2011 WL 3878332, at *4 (E.D. Tenn. Aug. 31, 2011) (rejecting settlement in the face of a conflict of interest that required subclass represented by separate counsel).

The idea that all class members should treated equally, while facially appealing, is not an argument against separate counsel. To the contrary, one of the:

> fatal deficienc[ies] in the *Ortiz* settlement was that all present claimants were treated equally, notwithstanding that some had claims that were more valuable. 'It is no answer to say . . . that these conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes' for the very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that [the disparate claimants] would have chosen.

[5] *Id.* at 18.

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223, 232 (2d Cir. 2016) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999)).

Accordingly, without separate counsel taking into account disparate recovery between class members like Ms. Chavez called on her cell phone, and those with greater obstacles to recovery who received calls on landlines, the settlement and plan of allocation should not be approved.

IV. Class Counsel Failed to Justify their Proposed Rise Above the 25% Benchmark.

Class counsel are manifestly incorrect when they claim that their "interests are aligned, rather than in conflict with, those of the Class[.]" As the Ninth Circuit has explained, because "the relationship between plaintiffs and their attorneys turns *adversarial* at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (emphasis added). "As a fiduciary for the class, the district court must 'act with a jealous regard to the rights of those who are interested in the fund' in determining what a proper fee award is." *Id.*

Again, to the extent $1.6 million in *Medeiros* was excessive for "the disproportionately small percentage of potential damages that will be paid to class members," the same is true of class counsels' proposed $4.3 million. Certainly, nothing about the $7.6 million recovery relative to the $8.5 billion in potential damages represents an exceptional recovery.

Class counsel rely on the *Batmanghelich v. Sirius XM Radio, Inc.*, No. 09-cv-9190 VBF, 2011 U.S. Dist. LEXIS 155710 (C.D. Cal. Sept. 15, 2011) in their motion for final approval. Yet, the $5.77 per class member recovery (with a $9.48 million common fund), allowed for no more than a 21% fee. CMECF Doc. 72-1, at ; 89, at 4. The claimed $7.54 per member recovery here cannot support a fee eight percentage points above the 25% benchmark here when a comparable recovery in *Batmanghelich* supported a fee four percentage points below it. *See also Bayat v. Bank of the W.*, C-13-2376 EMC, 2015 WL 1744342, at *5 (N.D. Cal. Apr. 15, 2015) ("99.5% discount from the theoretical verdict value" could not be "credibly called an 'outstanding' result"); *see also Rinky Dink, Inc., v. World Business Lenders, LLC*, No. C14-0268, 2016 WL 3087073, at *3 (W.D. Wa. May 31, 2016) (awarding 25% in fees where the class members would receive $150).

Class counsel should be held to the Ninth Circuit benchmark or less, even in the context of California law. *Lealao v. Beneficial California, Inc.*, (2000), 82 Cal. App.4th 19, 52 n.1; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311; (9th Cir.1990). To the extent this Court is inclined to apply the lodestar method, a negative multiplier should be employed based on the grossly inadequate recovery relative to potential damages. *Cf. Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358, at *6 (N.D. Cal. Aug. 29, 2014) (citing *Hensley*, 461 U.S. at 436, 440).

V. Class Counsels' *Ad Hominem* Attacks are not Legal Argument.

In the absence of any real justification for the inadequate return on the class members' claims, or a 33% recovery, class counsel turn to personal attacks.

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Class counsel suggest this Court should disregard Ms. Chavez's objection based on her attorneys' prior representation of other objecting class members. Yet, Ms. Chavez's attorneys' representation of objectors in other class actions "has no greater bearing on the merits of the objection raised [in this class action] than a plaintiff's counsel's experience in filing class actions speaks to the merits of claims he brings." *True v. American Honda Motor Co.*, 749 F. Supp. 2d. 1052, 1079 (C.D. Cal. 2010). Of course, some courts, and obviously class counsel, have taken issue with objectors and their attorneys; yet, others have recognized the essential role they play in the approval process of class action settlements. *UFCW Loc. 880-Retail Food Employers Jt. Pension Fund v. Newmont Min. Corp.*, 352 Fed. Appx. 232, 236 (10th Cir. 2009) (citation omitted) (objectors "add value to the class-action settlement process by . . . preventing collusion between lead plaintiff and defendants").

While omitting that the *Whirlpool* and *Garber* opinions referenced in class counsels' motion failed to actually enter sanctions, class counsel also neglect to mention that Ms. Chavez's attorneys have repeatedly succeeded in overturning unfair settlements and excessive fee awards. *See, e.g., In re Baby Products Antitrust Litig.*, 708 F.3d 163, 181-82 (3d Cir. 2013) ("We vacate the District Court's orders approving settlement and the fund allocation plan[;] "[w]e vacate the Court's order awarding attorneys' fees and costs because this award was based on the now-vacated settlement"); *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) ("we reverse the district court's order approving the settlement and dismissing the case, vacate the judgment and award of attorneys' fees, and remand for further proceedings"); *Litwin v. iRenew Bio Energy Sols.*, LLC, 172 Cal. Rptr. 3d

328, 333 (Cal. App. 2d Dist. 2014), as modified (May 29, 2014) (in a case in which Mr. Bandas represented the client in the lower court and Mr. Hanigan represented the client on appeal, the appellate court reversed based on inadequate notice).

In Jeffrey A. Thomas v. Dun & Bradstreet Credibility Corp., No. CV 15-03194 BRO (GJSx), ECF Doc. 80 (C.D. Cal. Mar. 23, 2017) Mr. Hanigan and Mr. Bandas succeeded in reducing an excessive request for attorneys' fees. ECF Doc., at 37-42 (rejecting class counsels' request of 30% of $10.5 million, and awarding 27%, with the excess returned to the class). Judge O'Connell specifically rejected this same rhetoric that "the Court should be hesitant in considering [the objector's] arguments," specifically "find[ing] that some of Objector['s] arguments have merit." *Id.* at 37, n. 11.

More recently, one of Mr. Hanigan's and Mr. Bandas' clients assisted in returning $4.3 million in excessive fees to the class members. *See Edwards v. National Milk Prod. Fed.*, 11-04766, ECF Doc. 485, at 12, 19 (N.D. Cal. June 26, 2017); Objection of Ira Conner Erwin, ECF Doc. 441. In *Edwards*, the judge also dismissed similar personal attacks and labeling of litigants as "professional objectors[,]" and admonished class counsel to focus on the substance of the objections. *Id.* at ECF Doc. 485, at 2.

Of course, it is neither logically nor legally permissible to conclude that an objection is valid or invalid from outcomes in other cases, especially when those outcomes are mixed. Only the merits of Ms. Chavez's objections should be of concern to the Court and class counsel.

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Conclusion

Objecting class member Christine A. Chavez renews her requests for relief outlined in her objection filed with this Court on August 28, 2017. This Court should exercise its fiduciary duty on behalf of the absent class members, and not simply accept class counsels' obstinance that the class members' relative silence (when they can expect to receive around $7 if they file a claim) amounts to acquiescence to this unfair settlement and high fee request.

"[W]hile some courts have held that 'silence constitutes tacit consent to the agreement,' '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.'" *Banks v. Nissan N. Am., Inc.*, 11-CV-2022-PJH, 2015 WL 7710297, at *10 (N.D. Cal. Nov. 30, 2015); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (class members' "[a]cquiescence to a bad deal is something quite different than affirmative support").

"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).

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DATED: October 2, 2017

Respectfully submitted,

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2 **Certificate of Service**
3 The undersigned certifies that today he filed the foregoing reply on ECF which
4
5 will send electronic notification to all attorneys registered for ECF-filing.
6 DATED: October 2, 2017
7 /s/ *Timothy R. Hanigan*
8 Timothy R. Hanigan
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