

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 SUMMARY ORDER

4 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL
5 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY
6 TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE
7 ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE
8 OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE
9 PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

10 At a stated term of the United States Court of Appeals for the Second Circuit, held
11 at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New
12 York, on the 22nd day of February, two thousand and six.

13 PRESENT:

14 HON. REENA RAGGI,
15 HON. PETER W. HALL,
16 *Circuit Judges,*

17
18 HON. EDWARD R. KORMAN,
19 *District Judge.**

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21 ELIJAH STACKHOUSE,
22
23 *Plaintiff,*

24 TERESA LOPEZ,
25
26 *Plaintiff-Appellee,*

27 ALL STATE CONSULTANTS, INC., ET AL.,
28
29 *Defendants,*

* The Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

1 DELTA FUNDING CORPORATION,
2 DELTA FINANCIAL CORPORATION and
3 DELTA FUNDING HOME EQUITY LOAN TRUST,

4 *Defendants-Appellees,*

5 v.

No. 05-0607-cv

6 BERTHA MCKNIGHT, ET AL.,

7 *Objectors-Appellants.*
8

9 For Appellees:

KARIN E. FISCH,, Abbey & Gardy, LLP, New
York, NY, *for Plaintiff-Appellee.*
MARTIN C. BRYCE, JR., Ballard Spahr
Andrews & Ingersoll, LLP, Philadelphia, PA,
for Defendants-Appellees.

14 For Objectors-Appellants:

NINA F. SIMON, AARP Foundation Litigation,
Washington, DC.

16 Appeal from the United States District Court for the Eastern District of New
17 York (Go, *M.J.*).

18 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,**
19 **AND DECREED** that the judgment of the district court be and it hereby is **VACATED**
20 **AND REMANDED.**

21 This appeal involves a challenge to a class action settlement of claims against Delta
22 Funding Corporation, a mortgage lender alleged to have induced low-income minority and
23 elderly homeowners to enter into oppressive mortgage contracts in violation of state and federal
24 law. Objectors-Appellants, class members who objected to the settlement in the court below,
25 contest the settlement on both substantive and procedural grounds. Substantively, appellants

1 argue that the magistrate judge abused her discretion in certifying the class and approving the
2 settlement. Procedurally, appellants contend that the magistrate judge erred in denying their
3 motions to intervene and to vacate the reference of final decision-making authority to the
4 magistrate judge. We vacate the magistrate judge’s denial of the motion to intervene and remand
5 to the district court for further proceedings in accordance with the instructions provided below.

6 We assume the parties’ familiarity with the underlying facts of this case and here provide
7 only those facts necessary to the disposition of the intervention issue.

8 A. Background

9 In this class action, plaintiffs challenge defendants’ lending practices as violative of the
10 Home Ownership and Equity Protection Act (“HOEPA”), 15 U.S.C. § 1639; the Truth in
11 Lending Act (“TILA”), 15 U.S.C. § 1601 *et seq.*; state laws prohibiting unfair and deceptive
12 trade practices; and the common law of unconscionability. After reaching a tentative agreement
13 to settle the claims, the parties consented to have a magistrate judge adjudicate all further
14 proceedings pursuant to 28 U.S.C. § 636(c). As a result, District Judge Charles P. Sifton referred
15 the entire matter to Magistrate Judge Marilyn D. Go.

16 In a March 1, 2002 order, the magistrate judge preliminarily approved the class settlement
17 and ordered class members to submit objections to the settlement by May 10, 2002. A hearing to
18 assess the fairness of the proposed settlement was scheduled for May 24, 2002. On May 20,
19 2002, objectors-appellants filed motions to intervene and to vacate the reference to the magistrate
20 judge. Although the proposed intervenors initially sought to have both motions heard before
21 Judge Sifton, the matters were referred back to the Magistrate Judge Go. On August 9, 2004, the
22 magistrate judge denied both motions.

1 B. Motion to Intervene Analysis

2 We have jurisdiction to hear appeals only from final judgments. *See* 28 U.S.C. § 1291.

3 A magistrate judge’s decision can constitute a final judgment only on the consent of all parties to
4 the dispute. *See* 28 U.S.C. § 636(c)(1); *cf. Kalan v. City of St. Francis*, 274 F.3d 1150, 1154 (7th
5 Cir. 2001) (*per curiam*) (holding that because the parties had not consented to the reference to the
6 magistrate judge, the court lacked jurisdiction to hear the merits of the appeal). In this case, it
7 does not appear that the objectors-appellants gave their consent, either implicitly or explicitly, to
8 the magistrate judge ruling on their motion to intervene.

9 When only the original parties to the case have consented to the jurisdiction of the
10 magistrate judge under § 636(c), we have held that a district judge must rule on a motion to
11 intervene brought by a third party, unless the party making the motion also specifically consents
12 to having the magistrate judge rule on it. *See New York Chinese TV Programs, Inc. v. U.E.*
13 *Enters., Inc.*, 996 F.2d 21, 25 (2d Cir. 1993). In *Chinese TV*, this Court considered “whether the
14 importance of consent in the statutory system for plenary referrals to a magistrate judge under 28
15 U.S.C. § 636(c) requires that a district judge, and not the magistrate judge, make the final
16 determination of applicants’ motion to intervene as of right when the case has been referred for
17 all proceedings to a magistrate judge on the consent of the original parties.” *Id.* at 22. There we
18 noted the “critical role of consent” in permitting a magistrate judge to adjudicate a motion to
19 intervene, *id.* at 23, and concluded that the constitutional right to be heard by an Article III judge
20 may be waived only with the express consent of the intervenors.¹ *Id.* at 24.

¹ The fact that the objectors-appellants may be bound by the named plaintiffs’ decision to consent to the magistrate judge’s § 636(c) jurisdiction, *see, e.g., Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 269 (7th Cir. 1998), does not also establish implied consent to

1 On the record before us, we cannot conclude that the objectors consented to the
2 magistrate judge ruling on their motion to intervene. We note that the objectors filed a motion to
3 vacate the reference on the ground that they had not consented to it. This constitutes compelling
4 evidence of their lack of consent to the magistrate judge ruling upon the motion to intervene.
5 Certainly, the record is barren of any evidence that the objectors expressly consented to be bound
6 by the decision of the magistrate judge on that motion. Although the objectors did not
7 specifically object to the fact that the magistrate judge – rather than the district judge – made
8 findings regarding the motion to intervene, this by itself does not evidence consent. *Cf. Roell v.*
9 *Withrow*, 538 U.S. 580, 586 (2003) (holding that consent to a designation can be inferred when
10 parties “appear before the Magistrate Judge, without expressing any reservation, after being
11 notified on their right to refuse”). At best, then, the evidence is inconclusive with respect to the
12 parties’ intent. This is not enough to demonstrate consent. “Without the consent of the
13 ‘intervenor,’ the magistrate judge’s order has the effect only of a report and recommendation to
14 the district judge, who upon the filing of objections must review *de novo* the recommendation.”
15 *Chinese TV*, 996 F.2d at 25.

16 Based upon the reasoning in *Chinese TV*, therefore, we find that Magistrate Judge Go’s
17 order denying the motion to intervene was the equivalent of a report and recommendation subject
18 to Judge Sifton’s *de novo* review. This Court has jurisdiction only to review final judgments; it

have the magistrate judge be the final adjudicator of their intervention motion. The different interests at stake in the two proceedings justify this distinction. Whereas it is in the nature of class action litigation for class members to be bound by the procedural decisions of their chosen class representatives, when intervenors seek to join the litigation as named parties they are ordinarily seeking to protect interests adverse to the existing parties to the litigation. Therefore, intervenors have the right to have their motion heard in an Article III forum.

1 does not have jurisdiction to review reports and recommendations. We therefore remand for the
2 district judge either to decide the intervention motion in the first instance or deem the magistrate
3 judge's order a report and recommendation. If the latter, then the court should permit the
4 proposed intervenors to file objections in the district court before finally deciding the motion.

5 Upon remand the district court should consider whether the proposed intervenors have (1)
6 filed a timely motion; (2) shown an interest in the litigation; (3) shown that their interest may be
7 impaired by the disposition of the action; and (4) shown that their interest is not adequately
8 protected by the parties to the action. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir.
9 2001). Moreover, if the district court grants the motion to intervene, the intervenors would have
10 the right to have all their objections to the class certification and settlement decided by the
11 district court, which would be free to treat the magistrate judge's decision and order rejecting
12 them as a report and recommendation. *See Williams*, 159 F.3d at 269 ("An unnamed class
13 member who prefers an Article III forum . . . may apply to the district court to intervene under
14 Rule 24(a), become a party to the lawsuit, and then exercise [the] right to withhold . . . consent to
15 proceed before the magistrate.")

16 In taking up the intervention issue, the district court may also wish to consider the terms
17 of the settlement agreement, particularly with respect to the benefits accorded the class
18 representatives and the various subclasses. Specifically, the district court should examine the
19 issue whether, as the proposed intervenors argue with some persuasive force, the settlement
20 delivers greatest relief to a limited number of class members who may not present the strongest
21 claims and whether the class representatives receive a disproportionate share of the settlement
22 benefits as compared to absent class members. *See In re GMC Pick-Up Truck Fuel Tank Prods.*

1 *Liab. Litig.*, 55 F.3d 768, 800-01 (3d Cir. 1995).

2 Accordingly, the judgment of the district court is **VACATED AND REMANDED** for
3 further proceedings consistent with the above instructions.

4
5 For the Court:
6 Roseann B. Mackechnie, Clerk

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8 _____
9 By: Oliva M. George, Deputy Clerk