CASE NOS. 99-3476, 99-3477, 99-3478, 99-3479, and 99-3480

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: TELECTRONICS PACING SYSTEMS, INC., ACCUFIX "J"
LEADS PRODUCTS LIABILITY LITIGATION

HAROLD S. BECHERT, et al.,
Class Member Plaintiffs-Appellees,

HAROLD REED, et al.,
Class Member Objectors-Appellants,

v.

TPLC HOLDINGS, INCORPORATED, formerly known as
Telectronics Pacing Systems, Inc.; ACCUFIX RESEARCH INSTITUTE, INC., TELECTRONICS HOLDINGS, LTD; TELECTRONICS PTY., LTD; PACIFIC DUNLOP, LTD.; NUCLEUS LTD.
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division

BRIEF OF APPELLANTS REED AND HOPKINS OBJECTORS, ET AL.
(List of all Appellants on Reverse)

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September 30, 1999 ORAL ARGUMENT REQUESTED

STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 25, appellants Harold Reed and the Hopkins Objectors, et al., make the following disclosures.

1. Are said parties subsidiaries or affiliates of a publicly-owned corporation? No.

2. Are there publicly-owned corporations, not parties to this appeal, that have financial interests in the outcome? Cordis Corporation has a financial interest in the outcome of this appeal, because it is released from liability by the class action settlement at issue in this appeal. Appellants Harold Reed and the Hopkins Objectors are unaware of any other publicly-owned corporations that may have a financial interest in the outcome of the appeal.

_____
Amanda Frost, Counsel

Date:_____

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal challenges the district court's approval of a class action settlement certified pursuant to Rule 23(b)(1)(B). This case has a complex procedural history and factual background. Oral argument will assist the court in reaching a full understanding of the procedural posture and the underlying facts.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal is from a decision of the district court approving a class action settlement. The plaintiff class asserted diversity jurisdiction under 28 U.S.C. § 1332. (Joint Appendix ("JA") 1729; R. 37 Amended and Consolidated Master Class Action Complaint, July 20, 1995 ("Complaint") ¶ 11). The district court's judgment was entered on March 5, 1999, and disposed of all claims of all parties. (JA 126; R. 711 Dist. Op.). In a separate ruling, the district court denied all motions to intervene filed by unnamed class members. (JA 121; R. 710 Intervention Order). Appellant Harold Reed filed his notice of appeal on March 22, 1999. (JA 199; R. 725). Appellants Hopkins Objectors filed their notice of appeal on March 30, 1999. (JA 202; R. 728). This Court has jurisdiction under 28 U.S.C. § 1291 and § 1292(a)(1).

STATEMENT OF ISSUES FOR REVIEW

I. Whether a non-opt out settlement class action that releases three solvent and potentially liable companies can be certified under Federal Rule of Civil Procedure 23(b)(1)(B)?

II. Whether due process requires that class members with in personam claims for money damages be given an opportunity to opt out of a settlement that releases three solvent and potentially liable companies?

III. Whether the district court erred in awarding class counsel fees of 28% on a fund of over $50 million when fee awards on a fund of that size typically range between 13-20%, and when class members are being awarded only a fraction of what their claims are worth?

IV. Whether the district court erred in denying the motion to intervene of a class member who has properly objected to a class action settlement on the ground that the motion was untimely, where the class member moved to intervene prior to the hearing at which his objections were heard and the motion was filed solely for the purpose of preserving his right to appeal?

STATEMENT OF THE CASE

This appeal challenges the legality of the district court's approval of a non-opt out settlement of a class action seeking money damages on behalf of

approximately 17,000 people implanted with a defective pacemaker lead.

Defendant TPLC, Inc. ("TPLC"), which manufactured and distributed the defective lead at issue in this case, sold all of its assets to another company and is no longer an ongoing concern.[1] TPLC's only asset is a fund of approximately $78 million, which is all that remains of the money generated from the sale. However, the class action settlement at issue here, which does not allow the class members to opt out and pursue their own litigation, not only grants a full release to TPLC, but also to three other solvent and potentially liable companies, solely on the ground that TPLC refused to settle unless these other companies were also released. As demonstrated below, the release of these three companies requires reversal of the district court's order.

1. The Parties

Appellant Harold Reed is a seventy-nine year old resident of New York who had been implanted with the TPLC lead, and thus is a member of the class forced to accept the terms of this mandatory settlement. (JA 630; R. 592 Supplemental Memorandum in Support of Objections of Harold Reed to Class Action Settlement

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[1] Defendant TPLC Holdings, Inc. (formerly Telectronics Pacing Systems, Ltd.) is a holding company that owns 100% of the stock of TPLC. See In re Telectronics Pacing Systems, Inc., 172 F.R.D. 271, 276 (S.D. Ohio 1997). For the purposes of this appeal, TPLC Holdings, Inc. and TPLC, Inc. will be referred to collectively as TPLC.

("Reed Objections") at 1). When he learned of the possibility of injury from the defective lead, he arranged to receive medical monitoring of his condition. In January 1999, Mr. Reed had his lead surgically removed, without complications. Mr. Reed filed objections to the proposed class action settlement in district court and participated, through counsel, at the fairness hearing. (JA 630; R. 592 Reed Objections). Prior to the fairness hearing, Mr. Reed moved to intervene for the purpose of protecting his right to appeal an order approving the settlement. (JA 1287-90; R. 617 Motion to Intervene of Class Member Harold Reed ("Reed Intervention Motion")).

Appellants Hopkins Objectors are sixty-seven class members who, prior to the settlement at issue here, filed suit against TPLC, Pacific Dunlop, Nucleus, and Cordis in the Southern District of New York. (JA 589; R. 562 Memorandum to Court Concerning Proposed Settlement on Behalf of 67 Class Members ("Hopkins Objections"), at 1). Some of these class members still have their leads implanted, while others have had their leads surgically removed. (JA 590; R. 562 Hopkins Objections at 2). The Hopkins Objectors filed written objections to the proposed class action settlement and appeared, through counsel, at the fairness hearing. (JA

588-601; R. 562 Hopkins Objections).[2]

Defendants Nucleus Limited ("Nucleus"), Pacific Dunlop Limited ("Pacific Dunlop"), and TPLC are closely related companies. Before the sale of its assets, TPLC, a Delaware corporation, was engaged in the business of designing, manufacturing, and marketing medical devices. See In re Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 276 (S.D. Ohio 1997). TPLC manufactured the "J" shaped pacemaker lead at issue in this case. See id. The "J" lead, which is implanted in the atrium of the heart as part of a pacemaker device used to restore normal heartbeat, contains a wire, encased in polyurethane insulation, that bends back and forth as the heart beats. (JA 1744; R. 37 Complaint ¶ 50); see also In re Telectronics, 172 F.R.D. at 276. Some of the lead wires have a tendency to break, causing serious injury to the heart or blood vessels of the recipient. See In re Telectronics, 172 F.R.D. at 276-77. Between 1987 and 1994, physicians implanted TPLC's leads in approximately 40,500 patients, including 17,000 persons currently living in the United States. (JA 1744; R. 37 Complaint ¶ 51; JA 128; R. 711 Dist. Op. 3).

Nucleus is an Australian-based company that owns companies that design,

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[2] The names of each of the Hopkins Objectors are listed on the inside front cover of this brief.

manufacture, and sell pacemakers and defibrillators around the world. See In re Telectronics, 172 F.R.D. at 276. Before the sale of its assets, TPLC was one of the companies owned by Nucleus. See id. In 1988, Pacific Dunlop, a publicly-held Australian Company, purchased Nucleus and thus became the beneficial owner of TPLC. See id. Pacific Dunlop consists of over 225 separate corporate affiliates and subsidiaries and has annual worldwide sales of approximately $5.5 billion. See id. Pacific Dunlop and Nucleus are defendants on the ground that they are alter egos, or agents, of their subsidiary, TPLC. (JA 1734-35; R. 37 Complaint ¶¶ 28, 29).

Cordis is a not a defendant in this class action, but was named as a defendant in various lawsuits filed throughout the United States and Canada seeking recovery for damages resulting from fracture of "J" leads. (JA 985; R. 605 Indemnity Agreement ¶ 1, attached as exhibit to TPLC's Memorandum in Support of Settlement). In 1987, TPLC purchased assets from Cordis, including the right to sell leads incorporating a "J" shaped wire of the type used in the "J" leads at issue in this case. (JA 986; R. 605 Indemnity Agreement ¶ 5). Cordis was also responsible for testing the lead for Food and Drug Administration ("FDA") approval, and made certain express representations necessary to permit the product's sale. (JA 1741; R. 37 Complaint ¶ 43). Cordis and TPLC dispute which

of them is responsible for the lead design at issue in this case. (JA 986; R. 605 Indemnity Agreement ¶ 5).

2. Procedural History

By October 1994, TPLC had learned of several cases in which the "J" lead wire had fractured, breaking through the wire's insulation and lacerating the patient's heart. In re Telectronics, 172 F.R.D. at 277. TPLC notified the FDA that it was recalling all non-implanted "J" leads. Id. Shortly thereafter, TPLC sent letters to physicians informing them of the recall and providing them with information regarding fractures. Id. TPLC documents indicate that the fracture rate is somewhere between 12 and 20 percent. Id.

After TPLC announced the recall, a number of "J" lead patients, including the Hopkins Objectors, filed suit. On June 2, 1995, the Judicial Panel on Multi-District Litigation consolidated the cases in the Southern District of Ohio. See In re Telectronics, 172 F.R.D. at 277. Shortly thereafter, the district court appointed a 17-member Plaintiffs' Steering Committee ("PSC") to coordinate discovery and other pretrial proceedings on behalf of the plaintiffs in the transferred cases. See id. On July 20, 1995, the PSC filed an Amended and Consolidated Master Class Action Complaint ("Complaint") asserting claims against TPLC, Nucleus, and Pacific Dunlop for negligence, strict liability, failure to warn, breach of

implied and express warranty, fraud, medical monitoring, fear of future product failure, intentional and negligent infliction of emotional distress, loss of consortium, misrepresentation, and punitive damages. (JA 1754-69; R. 37 Complaint ¶¶ 78-150). The Complaint sought to certify the class pursuant to Federal Rules of Civil Procedure 23(b)(1), (b)(2) and/or (b)(3). (JA 1736-1739-40; R. 37 Complaint ¶¶ 31, 38-41).

In the fall of 1995, Pacific Dunlop and Nucleus moved to dismiss the action against them for lack of personal jurisdiction. (R. 42). The district court denied the motion, because it determined that Pacific Dunlop's and Nucleus' interactions with TPLC -- their United States subsidiary -- were sufficient to establish jurisdiction. (JA 352-57; R. 333 Order Denying Motion To Dismiss, at 26-31). After examining the relationship between these three companies, the court concluded that the "Australian Defendants exercised a great deal of control over" TPLC, creating an "inference 'that the absent parent and the subsidiary are in fact a single legal entity'" for the purposes of exercising jurisdiction. (JA 352, 355; R. 333 Order Denying Motion To Dismiss at 26, 29).

In November 1996, TPLC sold all of its assets, but not its liabilities, to Pacesetter, Inc. for $100.8 million. (JA 945; R. 605 Declaration of Larry Allen Wettlaufer ("Wettlaufer Decl.") ¶ 7, attached as exhibit to TPLC's Memorandum

in Support of Settlement).[3]

On March 29, 1996, TPLC filed a motion for leave to file a third-party complaint against Cordis, alleging that TPLC had purchased from Cordis the design for the "J" leads at issue here. (JA 261; R. 155 Motion by Defendants' TPLC, Inc., Telectronics Holding, and Telectronics Pty. Ltd. for Leave to File Third Party Complaint). Thereafter, Cordis and TPLC entered into an agreement under which TPLC withdrew, with prejudice, its motion for leave to file a third-party claim against Cordis and promised to indemnify Cordis against suit in all cases concerning the "J" lead in return for $6 million. (JA 985-98; R. 605 Indemnity Agreement; JA 948; R. 605 Wettlaufer Decl. ¶ 13).

On April 2, 1997, the district court granted the PSC's renewed motion for class certification, pursuant to Rule 23(b)(1)(A) and (b)(3), against TPLC. In re Telectronics, 172 F.R.D. 271. On December 18, 1997, the court tentatively certified the class with respect to Pacific Dunlop and Nucleus pursuant to Federal Rule of Civil Procedure 23(c)(4). (JA 424; R. 477). In February 1998, the district court presided over a one-week non-binding summary jury trial. (JA 133; R. 711 Dist. Op. 8). The jury found TPLC liable under theories of strict liability,

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[3] Accufix Research Institute is the successor company to TPLC. For ease of reference, this brief will continue to use the name TPLC.

negligence, and negligence per se, and awarded class members between $150,000 and $3 million each, depending on the extent of their injuries. (JA 134-36; R. 711 Dist. Op. 9-11 & n.6). Although the summary jury did not award monetary damages to class members whose leads had not fractured, it did find that TPLC should pay $265 million for the costs of medical monitoring. Id. The jury did not hold Pacific Dunlop or Nucleus liable as the alter egos or agents of TPLC. Id. Because Cordis was not a defendant at the summary jury trial, no evidence was presented regarding its potential liability.

3. Settlement

Defendants and the PSC entered into settlement negotiations shortly after the summary jury trial, and on July 22, 1998, the court preliminarily approved the class action settlement proposed by the parties. (R. 522). The class is defined as all persons in the United States who had been implanted with the "J" lead. (JA 467-68; R. 520 Agreement of Compromise and Settlement § 1, attached as exhibit to Joint Motion for Order Provisionally Certifying a Mandatory Class Action, July 22, 1998). The settlement divides the assets of TPLC into four funds: 1) a Patient Benefit Fund of approximately $47 million out of which class members are to be compensated, (JA 138; R. 711 Dist. Op. 13); 2) an Operating Fund of approximately $20 million that TPLC will use to pay its operating expenses, (JA

146; R. 711 Dist. Op. 21); 3) a Litigation Fund of approximately $7 million that TPLC will use to pay expenses related to non-Accufix Atrial "J" leads-related litigation, (JA 146; R. 711 Dist. Op. 21); and 4) a Reserve Fund of $4 million that will be used by the Defendants to pay expenses of Accufix Atrial "J" lead-related litigation, (JA 147; R. 711 Dist. Op. 22). Pacific Dunlop agreed to contribute $10 million to the Patient Benefit Fund, bringing that fund's total to $57 million. (JA 138; R. 711 Dist. Op. 13). In addition, the settling parties agreed that any money left over in the Operating, Litigation, or Reserve Funds would revert to the Patient Benefit Fund. (JA 146-47; R. 711 Dist. Op. 21-22).

The settlement divides class members into five categories, according to whether their leads are still implanted, or whether they suffered any complications from lead rupture or surgical explantation of the leads. (JA 138-48; R. 711 Dist. Op. 13-23). Compensation varies according to the extent of injury. Class members in categories 1 and 2, which cover those whose leads are still implanted or whose leads were explanted without complications, will receive their recoveries shortly after final approval of the settlement. (JA 144; R. 711 Dist. Op. 19). Class members in categories 3, 4 and 5, which cover those who suffered injury or death from explantation or rupture, will receive only 50% of their recoveries at that time. (JA 144-45; R. 711 Dist. Op. 19-20). If there are sufficient funds available, they

will receive the remainder within five years. (JA 144-45; R. 711 Dist. Op. 19-20).

The settlement contains a provision expressly releasing Cordis from liability for "J" lead-related litigation. (JA 468-496; R. 520 Agreement of Compromise and Settlement §§ 1, 7.2). In addition, the Defendants agreed not to oppose a fee request by the PSC for up to 28% of the fund. (JA 499; R. 520 Agreement of Compromise and Settlement § 8.2).

In early October of 1998, notice was sent to the class describing the proposed settlement and inviting class members to submit objections and appear at the November 19, 1998 fairness hearing. (JA 137; R. 711 Dist. Op. 12). Harold Reed and the Hopkins Objectors, among others, filed objections to the proposed settlement. Harold Reed also filed a motion to intervene on November 16, 1998. (JA 1287; R. 617). In all, there were fifty-three objections to the settlement filed on behalf of several hundred class members, a number of whom appeared at the fairness hearing. (JA 138; R. 711 Dist. Op. 13). Objector Harold Reed joined several others in arguing that the class could not be certified under Federal Rule of Civil Procedure 23(b)(1)(B) as a non-opt out class because neither Pacific Dunlop nor Nucleus constituted a limited fund. (JA 630-35; R. 592 Reed Objections 1-6). For similar reasons, the Hopkins Objectors argued that the settlement should not release Cordis, which had not even been named as a defendant. (JA 590-91; R.

562 Hopkins Objections). In addition, Mr. Reed argued that, because he has a potential cause of action for monetary damages, and because Rule 23(b)(1)(B) is not satisfied, due process requires that he be permitted to opt out of the class. (JA 635-37; R. 592 Reed Objections 6-8).

4. PSC's Fee Request

At a separate hearing held on December 10, 1998, the court addressed the issue of fees and expenses to be paid to the PSC and to the individual counsel who had brought suit prior to class certification. The PSC originally moved for a fee award of 28% of the Patient Benefit Fund and Reserve Fund, or $17,157,083.16, and for expenses totaling $2,243,771.93. (JA 180; R. 711 Dist. Op. 55). However, in its response to objections to its fee request, the PSC agreed that its award should be limited to 28% of the Patient Benefit Fund, and that it would then apply for an additional fee award if the Operating Fund, Litigation Fund, or Reserve Fund reverted to the Patient Benefit Fund. (JA 1373; R. 681 Response at 4). The district court, however, never addressed the objections to the PSC's request for fees on the Reserve Fund, or the PSC's subsequent acknowledgment that it should not now be awarded fees on that Fund.

To support its fee request, the PSC provided the court with general affidavits from lawyers and billing records specifying the activities performed and

the time spent on each activity. (JA 1293; R. 640 Joint Fee Petition, Dec. 7, 1998). Although the PSC served objectors with the affidavits, it failed to provide them with the billing records.

The PSC also sought $441,991.79 to reimburse the individual private contingency attorneys for their out-of-pocket expenses. (JA 180; R. 711 Dist. Op. 55). Finally, the PSC requested $141,000 to be paid to individual plaintiffs who assisted in the litigation by filling out questionnaires, having their depositions taken, testifying at the summary jury trial, and testifying at the fairness hearing. (JA 181; R. 711 Dist. Op. 56 & n.17). As they had promised in the settlement agreement, the Defendants did not oppose any of the fees or expenses requested. (JA 181; R. 711 Dist. Op. 56).

Mr. Reed opposed the PSC's fee request on the ground that the PSC's lodestar was too high because it was based on inflated hourly rates, duplicative work, and improper billing of clerical work and other costs of overhead. (JA 1348-55; R. 678 Class Member Harold Reed's Objections to Fee Application, ("Reed's Fee Objections"), at 12-19). He also opposed the PSC's request for 28% of the fund as being too great a percentage to take from a fund of this size. (JA 1338-48; Reed's Fee Objections at 2-12). Finally, Mr. Reed argued that the PSC should only receive a percentage of the money actually distributed to class

members in any given year, rather than an up-front award of fees on money that may never reach class members. (JA 1343-46; Reed's Fee Objections at 10-12).

5. District Court Opinion

The district court concluded that the class was properly certified under Rule 23(b)(1)(B), which provides that a case may be maintained as a class action if "the prosecution of separate actions by or against individual members of the class would create a risk of adjudications" that would "as a practical matter be dispositive of the interests of other members . . . or substantially impair or impede their ability to protect their interests." The district court noted that "[g]enerally" a class action is certified under Rule 23(b)(1)(B) when the defendants' assets constitute a "limited fund" -- that is, when the fund is insufficient to satisfy all claims against them. (JA 157-160; R. 711 Dist. Op. 32-33). The court acknowledged that two of the three Defendants did not qualify as "limited funds," but concluded that Rule 23(b)(1)(B) is not restricted to "limited fund cases in the most literal sense." (JA 157-160; R. 711 Dist. Op. 32-35).

According to the court, "the loss of a settlement can constitute a ‘risk’ within the meaning of Rule 23(b)(1)(B)." (JA 159; R. 711 Dist. Op. 34). The court found that such a risk existed because TPLC had asserted that it would not settle unless Pacific Dunlop and Nucleus were also released from liability. (JA

161; R 711 Dist. Op. 36). Without a settlement, the court worried that some class members might be unable to recover against TPLC, since TPLC's limited funds could run out before all class members could be compensated for their injuries. (JA 163; R. 711 Dist. Op. 38). The court also gave three reasons to support its conclusions that class members were unlikely to receive any compensation from Pacific Dunlop or Nucleus without a settlement, even though these two Defendants admittedly have sufficient funds to compensate all class members to the full extent of their injuries. (JA 162; R. 711 Dist. Op. 37). First, although the court "believe[d] it would be inappropriate to prejudge the issues surrounding the case," it nevertheless expressed doubts about whether these two Defendants could be held liable for the activities of their subsidiary, TPLC. (JA 162; R. 711 Dist. Op. 37). Second, the court questioned whether it had jurisdiction over Pacific Dunlop and Nucleus, despite its earlier ruling that it did. (JA 162-63; R. 711 Dist. Op. 37-38). Third, assuming that it did not have jurisdiction, the court wondered whether the time and costs of litigating in Australia might make lawsuits against these Defendants unfeasible. (JA 164; R. 711 Dist. Op. 39).

Alternatively, the court concluded that certification could be justified as long as at least one defendant satisfied the Rule 23(b)(1)(B) criteria. The court stated that "this case could be seen as a 'limited fund' case in regards to TPLC's

finite assets and adjudged in accordance to the fairness and reasonableness of the settlement in regards to [Pacific Dunlop] and Nucleus." (JA 176; R. 711 Dist. Op. 51). Reviewing the settlement for fairness, reasonableness, and adequacy, as required by Rule 23(e), the court found that it satisfied those standards, commenting that, because settlements are favored, objectors "have a heavy burden of proving the unreasonableness of the settlement." (JA 167; R. 711 Dist. Op. 42). Thus, the court held that because Rule 23(b)(1)(B)'s standards were satisfied as to TPLC, and because the settlement as a whole satisfied Rule 23(e), the class could be certified under Rule 23(b)(1)(B) as to all Defendants. (JA 176; R. 711 Dist. Op. 51).

The court then turned its attention to the attorneys' fees, expenses, and special payments to certain class members. The court granted the PSC's request for expenses of $2,243,771.93, and also granted the request on behalf of the private individual counsel for reimbursement of expenses totaling $441,991.79. (JA 181, 183; R. 711 Dist. Op. 56, 58). The court also agreed with the PSC that the individual class members who assisted the PSC in prosecuting the case should be paid incentive awards totaling $141,000. (JA 183; R. 711 Dist. Op. 58).

The district court used the percentage-of-the-fund method in awarding the PSC attorneys' fees. The court stated that in common fund cases, the fee

percentage generally ranges from 10 to 30 percent of the fund created. (JA 188; R. 711 Dist. Op. 63). After analyzing the settlement under the six factors identified in Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188 (6th Cir. 1974), the court found that the PSC's request for fees of 28% of the Patient Benefit Fund and Reserve Fund was reasonable. (JA 189-93; R. 711 Dist. Op. 64-68). The court noted, but dismissed, objectors' argument that the PSC's award be reduced to 13% in light of the fact that there is only a "limited fund" available to compensate the class members, forcing class members to accept only a fraction of the value of their claims. (JA 192; R. 711 Dist. Op. 67). However, the court did conclude that the PSC should be awarded a percentage only of the net Patient Benefit Fund and Reserve Fund -- that is, a percentage of the amount left in those funds after subtracting the expenses and incentive payments. (JA 193; R. 711 Dist. Op. 68). Thus, the court awarded the PSC a total of $16,365,589.26 in fees. (JA 193; R. 711 Dist. Op. 68).

The district court specifically noted that it was not approving the hourly rates of counsel, commenting that "some of the hourly rates appear to be unreasonably high." (JA 187; R. 711 Dist. Op. 62 n.19). Nevertheless, the district court relied on the PSC's lodestar as confirmation that its percentage fee award was reasonable. (JA 193; R. 711 Dist. Op. 68).

Finally, the district court rejected the PSC's request for up-front payment of its entire fee award, noting that under the settlement class members received only 50% of the payments due to them up front, with the other 50% to be distributed within five years to ensure that every class member received some payment before the fund was depleted. (JA 194; R. 711 Dist. Op. 69). The district court ordered 60% of the PSC's fees to be paid immediately, with the remaining 40% dispersed in four annual installments. (JA 194; R. 711 Dist. Op. 69).

In a separate order, the district court also denied the motions to intervene filed by Mr. Reed and other objectors. (JA 121; R. 710 Intervention Order). The court based its ruling on its belief that the motions to intervene were untimely and that allowing intervention would create needless delay, prejudicing the Defendants and the class. (JA 123-24; R. 710 Intervention Order at 3-4).

SUMMARY OF ARGUMENT

I. The district court erred in certifying this class under Federal Rule of Civil Procedure 23(b)(1)(B). To meet the requirements for certifying a mandatory class under Rule 23(b)(1)(B), the settling parties must demonstrate that separate actions by individual class members would either be "dispositive" of other class members' interests or would "substantially impair or impede their ability to protect their interests." No such showing was made here, because there is no "limited fund" out

of which all class members must share recovery. Except for TPLC, all parties released by the settlement have sufficient funds to compensate class members. Without a preexisting limited fund out of which all class members must be compensated, the class cannot be certified under Rule 23(b)(1)(B).

The district court acknowledged that only TPLC was a limited fund, but held that, because TPLC would not settle unless Pacific Dunlop, Nucleus, and Cordis were also released, the "risk" of losing the settlement with TPLC justified certification of the class under Rule 23(b)(1)(B) with respect to these parties as well. However, the risk of losing a settlement with one "limited fund" defendant cannot justify a settlement that releases three other wealthy and potentially culpable companies. If it did, then any defendant's settlement demands would be grounds for Rule 23(b)(1)(B) certification. Nor can the fact that some plaintiffs might lose in individual litigation qualify as an "impairment" of class members' interests under Rule 23(b)(1)(B). Again, if it could, then every settlement would qualify for certification under Rule 23(b)(1)(B).

Alternatively, the district court justified release of the three Defendants on the ground that TPLC qualified as a limited fund, and that the release of Pacific Dunlop and Nucleus could be justified as being fair and reasonable, as required by Rule 23(e). However, as Rule 23's text demonstrates, and as the Supreme Court

confirmed in Amchem v. Windsor, 521 U.S. 591, 621 (1997), the requirement that a settlement be "fair and reasonable" under Rule 23(e) is in addition to, not in place of, the certification requirements of Rule 23(b). Moreover, the district court's alternative explanation failed to justify the release of Cordis.

II. In class actions seeking monetary relief, due process requires that class members be given an opportunity to opt out. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). The only possible exception is where all the class members' claims must be satisfied out of a "limited fund" that pre-exists the settlement. Here, Pacific Dunlop, Nucleus, and Cordis all have sufficient funds to compensate all class members in individual litigation. Thus, the district court's erroneous application of Rule 23(b)(1)(B) in these circumstances violates due process.

III. The PSC's fee award of 28% of the Patient Benefit Fund and Reserve Fund is far too high, and should be reduced to an award of 13% of the fund. Fee awards on funds of this size ordinarily range between 13 and 20 percent of the fund, in recognition of the economies of scale enjoyed by counsel negotiating such a large settlement. Here, a reasonable percentage award should be at the bottom of that range, because the settlement forces class members to release three wealthy and potentially liable companies for little in return.

The lodestar calculated by the PSC is inflated, and thus cannot serve as an

accurate cross-check of the percentage-of-the-fund award. The hourly rates claimed by some of the attorneys and paralegals are extraordinarily high, clerical work is improperly charged on an hourly basis rather than included in overhead, and hours are not reduced for the considerable duplication of work. To compensate for this overbilling, the PSC should be awarded less, not more, than their lodestar.

Finally, the PSC's fee should be limited to a percentage of the money actually received by the class each year. Thus, the district court abused its discretion in awarding the PSC 28% of the Reserve Fund, when that fund may never be distributed to class members. Likewise, the PSC should not be automatically awarded fees in annual installments, but rather should receive fees based only on the amount actually disbursed to class members.

IV. The district court erred in denying Harold Reed's motion to intervene, which he filed solely to protect his right to appeal. He filed that motion prior to the fairness hearing, and thus his motion was timely. The class will not be prejudiced by any unnecessary delays if Mr. Reed's motion to intervene is granted; with or without intervention, this appeal will go forward.

Moreover, an absent class member who timely objects to a proposed class action settlement should be permitted to intervene as a matter of course. Denying

intervention is illogical and unfair, because unnamed class members already are parties to the class action. Like any other party, they are bound to the terms of the settlement, and thus, like any other party, they should be allowed to appeal a class action settlement that they oppose.

STANDARD OF REVIEW

I. The question whether the district court erred in certifying this class action settlement under Rule 23(b)(1)(B) is a question of law subject to de novo review by this Court. See United States v. Moore, 131 F.3d 595, 598 (6th Cir. 1997).

II. The question whether due process requires that absent class members with in personam claims for money damages be given an opportunity to opt out of a settlement that releases three solvent and potentially liable companies is a question of law subject to de novo review. See Moore, 131 F.3d at 598.

III. The district court's approval of the PSC's fee request is subject to abuse of discretion review. See Bowling v. Pfizer, Inc., 102 F.3d 777, 779 (6th Cir. 1996). Under that standard, "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

Applying the abuse of discretion standard, the question whether the district

court should have considered the size of the fund when determining the percentage of the fund that the PSC should receive as a fee award is an issue of law subject to plenary review. See Moore, 131 F.3d at 598. In addition, the district court offered no reason for awarding the PSC fees on a percentage of the Reserve Fund. Without having a rationale before it, and thus no indication of whether or how the district court exercised its discretion, this Court has no basis for deferring to the district court.

IV. The district court's denial of Harold Reed's motion to intervene is subject to abuse of discretion review. See, e.g., Bradley v. Milliken, 828 F.2d 1186, 1191 (6th Cir. 1987). The question whether the standard for intervention by an objecting class members seeking to preserve his ability to appeal approval of a class action settlement to which he is bound should be lower than the standard for intervention by a non-party is a question of law, subject to plenary review. See Moore, 131 F.3d at 598.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CERTIFYING THIS CLASS AS A NON-OPT OUT CLASS ACTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(b)(1)(B).

The district court certified this class under Federal Rule of Civil Procedure 23(b)(1)(B), which provides for certification of a mandatory class where

> the prosecution of separate actions would create a risk of
>
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.[4]

Rule 23(b)(1)(B) is a mechanism for equitably distributing funds to persons whose claims, collectively, total more than the amount available to compensate them. See Amendments to Rules of Civil Procedure, Advisory Committee's Notes to Amended Rule 23 ("Advisory Cmte's Notes"), 39 F.R.D. 69, 101 (1966); In re Bendectin Prods. Liab. Litig., 749 F.2d 300, 305-06 (6th Cir. 1984). Class members cannot opt out of a Rule 23(b)(1)(B) class action and pursue individual actions against the defendants, as they can under Rule 23(b)(3), because opt outs would only serve to deplete an insufficient fund, undermining Rule 23(b)(1)(B)'s purpose of ensuring that the class members receive their pro rata shares of that

[4] Rule 23 is laid out in its entirety in the addendum to this brief.

fund. Certification under Rule 23(b)(1)(B) has thus been restricted to cases in which the defendant is a "limited fund" and cannot fully compensate all class members. See, e.g., Bendectin, 749 F.3d at 305-06; In re Dennis Greenman Securities Litig. v. Merrill, Lynch, Pierce, Fenner & Smith, 829 F.2d 1539, 1546 (11th Cir. 1987); Hum v. Dericks, 162 F.R.D. 628, 641 (E.D. Hawaii 1995); see also Advisory Cmte's Notes, 39 F.R.D. at 101.[5]

The settling parties concede that neither Pacific Dunlop nor Nucleus constitutes a "limited fund," and it is undisputed that these Defendants have ample funds with which to compensate class members. Nor have the settling parties presented any evidence regarding the available assets of Cordis, another company released from liability under this settlement. Because there is concededly no "limited fund" that would prevent latecomers from pursuing their own claims against Pacific Dunlop, Nucleus, or Cordis, there is no "risk" that separate actions against these Defendants would be dispositive of, or would impair, other class members' interests, as is required for certification under Rule 23(b)(1)(B). See In re Bendectin, 749 F.2d at 306; In re Dennis Greenman, 829 F.2d at 1546 (rejecting

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[5] It is possible that Rule 23(b)(1)(B) can never be used to certify a class of in personam personal-injury claims, in which case this class cannot be certified even with respect to TPLC. This issue is currently before the Supreme Court in Ortiz v. Fibreboard Corp., 134 F.3d 668 (5th Cir. 1997), cert. granted, 118 S. Ct. 2339 (1998) (argued Dec. 18, 1998).

certification under Rule 23(b)(1)(B) because limited fund was not the "sole source of recovery for plaintiffs"). Class members therefore cannot be bound to a settlement that releases these three potentially liable companies from further litigation.

The only "risk" to class members' interests raised by the settling parties, or recognized by the district court, is the risk of "loss of [the] settlement." (JA 159; R. 711 Dist. Op. 34). TPLC has asserted that it would not settle this litigation unless all the Defendants, and Cordis, are released. Unlike the other potentially liable companies, TPLC has limited funds with which to compensate class members. Because TPLC said that it would not settle without releasing the others, the district court feared that, absent the settlement, many class members would lose out in the race to obtain judgment against TPLC. (JA159-62; R. 711 Dist. Op. 34-37).

One defendant's threatened refusal to settle unless other parties are also released cannot qualify those parties for inclusion in a Rule 23(b)(1)(B) mandatory class action. The plain language of Rule 23(b)(1)(B) does not allow such a result: The "risk" to which Rule 23(b)(1)(B) refers is the risk that "<u>prosecution of separate actions</u>" would be "dispositive of" or would "substantially impair" the ability of other class members to protect their interests. However, if a settlement

does not materialize, and class members "prosecut[e]" "separate actions" against Pacific Dunlop, Nucleus, and Cordis, there is no danger that class members who sue those entities first will deprive latecomers of the ability to win recoveries for themselves against those same entities.

The district court attempted to justify its novel holding by arguing that class members might have difficulty prevailing against Pacific Dunlop and Nucleus. The court feared that courts in the United States would be unable to establish personal jurisdiction over Pacific Dunlop and Nucleus, despite the fact that it had earlier ruled that it did have jurisdiction over these Defendants. (JA 162; R. 711 Dist. Op. 37). In addition, the district court pointed to the summary jury's verdict that Pacific Dunlop and Nucleus were not liable to support its argument that class members might lose their cases against these two Defendants. (JA 162-64; R. 711 Dist. Op. 37-39).[6]

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[6] Although the results of the summary jury trial may be relevant to a Rule 23(e) fairness determination -- although even that is questionable, since it provides only one result -- it cannot serve as the basis for certifying a class action settlement. See Eisen v. Carlisle and Jacqueline, 417 U.S. 156, 176-78 (1974) (merits of the case are completely separate from question of class certification). Moreover, the summary jury trial was non-binding, lasted only five days, and focused primarily on TPLC's liability, not the liability of Pacific Dunlop and Nucleus. In any case, TPLC's subsequent insistence that any settlement release Pacific Dunlop and Nucleus strongly supports the conclusion that TPLC was an agent for, or the alter ego of, its parent companies.

It is true that lawsuits against Pacific Dunlop and Nucleus, like any other litigation, carry a risk that the plaintiffs will not prevail. However, the risk of losing a lawsuit is not a "risk" arising from the "prosecution of separate actions" by individual class members, but rather the risk of prosecuting any action, at any time, against any defendant. Cf. In re Dennis Greenman, 829 F.2d at 1546 (rejecting the possibility that an action will have precedential or stare decisis effect on later cases as grounds for certification under Rule 23(b)(1)(B)). The district court previously rejected Pacific Dunlop's and Nucleus' motions to dismiss. (JA 357; R. 333 Order Denying Motion To Dismiss at 31). Neither company has filed a motion for summary judgment. Yet, through approval of this settlement, the district court granted these Defendants summary judgment through the back door by releasing them from all further lawsuits on the ground that class members might not win in individual litigation.

Moreover, even on its own terms, the "loss of settlement" rationale makes no sense. TPLC was not in a position to make such settlement demands. As TPLC's current President and Chief Executive Officer, Larry Wettlaufer, stated in his declaration, if no settlement was reached, TPLC had only two other options: It would either continue to litigate suits against it, incurring substantial costs, or else would declare bankruptcy. (JA 946; R. 605 Wettlaufer Decl. ¶ 10). Under both

options TPLC would lose control over its remaining assets. Thus, there is no reason to think that TPLC would choose these two, obviously less preferable, options over the option of settlement had the PSC refused to accept its settlement demands.

In fact, the only evidence that TPLC refused to settle without release of Pacific Dunlop, Nucleus, and Cordis comes from Mr. Wettlaufer's self-interested assertion, in his declaration, that the release was a condition of settlement. (JA 947; R. 605 Wettlaufer Decl. ¶ 12). Mr. Wettlaufer's explanation for this demand was that a "settlement which did not effectuate a full release of each of these parties would not, in [TPLC's] judgment, provide a full and final termination of the litigation." (JA 947; R. 605 Wettlaufer Decl. ¶ 12). In short, TPLC has improperly used its asserted status as a "limited fund" to provide three other wealthy parties the benefit of a non-opt out settlement under Rule 23(b)(1)(B). If TPLC could dictate the release of three wealthy and potentially liable companies, then any defendant with limited assets could insist on the release of any other entity -- regardless of that entity's wealth or culpability -- and bind all class members to the agreement.

Apparently recognizing the potential for a defendant simply to assert that it was conditioning settlement on release of any and all interested parties, the district

court gave an alternative justification for its certification of the class. The district court explained that, in the alternative, "this case could be seen as a 'limited fund' case in regards to TPLC's finite assets and adjudged in accordance to the fairness and reasonableness of the settlement in regards to Pacific Dunlop and Nucleus." (JA 176; R. 711 Dist. Op. 51). According to the district court, class members were unlikely to prevail against these Defendants, and thus Pacific Dunlop's contribution of $10 million to the settlement fund satisfied Rule 23(e)'s requirement that the settlement be "fair and reasonable." The district court concluded that "looking to the best interests of the class 'as a whole,' we believe that the Class should be certified as a non-opt out class under Rule 23(b)(1)(B)." (JA 176; R. 711 Dist. Op. 51).

Rule 23 does not permit the approach taken by the district court. Before considering whether a settlement is fair, adequate, and reasonable under Rule 23(e), courts must first determine whether the requirements of Rule 23(a) have been met, and then whether the class can be certified under Rule 23(b). See Amchem, 521 U.S. at 621. Each step of the review for compliance with Rule 23 occurs independently. See id. Rule 23(e) "was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)." Id.

Likewise, the prerequisites of Rule 23(b)(1)(B) cannot be satisfied by skipping ahead to a Rule 23(e) determination.

This reading of Rule 23 -- that its commands are consecutive, not alternative -- is confirmed by the Supreme Court's rejection of class actions that fail to meet the threshhold requirements in Rule 23(a), (b), and (c). In Amchem, the Court made clear that the adequacy of representation requirement of Rule 23(a)(4) and the issue predominance requirement of Rule 23(b)(3) cannot be satisfied by a determination that a class action settlement is fair and reasonable under Rule 23(e). Likewise, in Eisen v. Carlisle and Jacqueline, the Court rejected the named plaintiffs' argument that, because the district court had found that they were "more than likely" to prevail on their claims, they should be excepted from notice requirement of Rule 23(c). 417 U.S. 156, 176-78 (1974). The Court made clear that the requirements of Rule 23 must be satisfied independently of the merits of the case, stating: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Id. at 177.

In any case, the settlement is not "fair and reasonable" in regard to Pacific Dunlop and Nucleus. In return for contributing only $10 million to the settlement

fund, these Defendants bought themselves freedom from all future personal injury claims concerning defects in the "J" leads. Moreover, the means by which Pacific Dunlop and Nucleus bought their peace is suspect. These two companies faced liability on the grounds that they were TPLC's alter ego, or alternatively that TPLC acted as their agent. If vicarious liability were proven, they would be responsible for satisfying the liabilities of TPLC, which has only a limited pool of money with which to compensate class members. Pacific Dunlop and Nucleus were thus potentially liable for all claims that exceeded TPLC's available funds -- that is, for hundreds of millions of dollars in damages. (JA 154; R. 711 Dist. Op. 29). Yet Pacific Dunlop is contributing only $10 million, a minuscule amount on a per plaintiff basis, and Nucleus is contributing nothing. Ironically, the settlement that allows these Defendants to evade lawsuits claiming that they are liable as TPLC's agent or alter ego is premised on TPLC's refusal to settle without their release -- a fact that strongly suggests that TPLC was working on their behalf.

In addition, the settlement releases Cordis -- the company that allegedly designed the "J" lead at issue, and shepherded that design through the FDA approval process. (JA 986; R. 605 Indemnity Agreement ¶ 5; JA 263; R. 155 Motion by Defendants' TPLC, Inc., Telectronics Holding, and Telectronics Pty.

Ltd. for Leave to File Third Party Complaint). If proven true, Cordis faces considerable potential liability. Prior to entering into the indemnity agreement with Cordis, TPLC was preparing to file a third-party complaint against Cordis that would have drawn it into the class action litigation. (JA 263; R. 155; JA 995; R. 605 Indemnity Agreement ¶ 23). Despite the evidence of Cordis' culpability for the defectively designed "J" lead, and despite the fact that it was not even named as a defendant in this class action, it has been released from all liability.

Thus, this class cannot be certified under Rule 23(b)(1)(B) because there is no risk that individual adjudication by class members would impair other class members' ability to recover from Pacific Dunlop, Nucleus or Cordis. Neither the language nor the history of Rule 23 permits certification of a non-opt out class under such circumstances. Moreover, as explained below, even if Rule 2-3(b)(1)(B) could be read to apply to this class action settlement, the constitutional questions that would arise should class members here be forbidden from opting out counsels against such an interpretation. Cf. Gulf Oil Co. v. Bernard, 452 U.S. 89, 103-04 (1981) (holding that the district court's order forbidding communication between counsel and absent class members violated Rule 23, and thus declining to decide whether such a ban violated the First Amendment); Califano v. Yamasaki, 442 U.S. 682, 693 (1979) (holding that if "a construction of

the statute is fairly possible by which [a serious doubt of constitutionality may be avoided]" a court "should adopt that construction." (alteration in original) (citations omitted)).

II. DUE PROCESS REQUIRES THAT CLASS MEMBERS WITH CLAIMS FOR MONEY DAMAGES BE GIVEN AN OPPORTUNITY TO OPT OUT

The district court's certification of this mandatory class in the absence of a limited fund violates due process in two ways. First, it releases individual monetary claims for particularized tort damages without granting plaintiffs a right to opt out of the settlement. Second, the court purported to exercise personal jurisdiction over many individuals lacking any contacts with the forum state of Ohio who were not permitted to opt out.

In class actions seeking to bind plaintiffs bringing "claims wholly or predominantly for money damages," as is the case here, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." Shutts, 472 U.S. at 811-12 & n.3; see also Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring in part and dissenting in part); see also 3 Newberg on Class Actions, § 17.16, at 17- 44-45 (3d ed. 1992) ("[W]hen unliquidated damages are involved,

the exclusion right must be afforded as a constitutional matter, regardless under which Rule 23(b) category the class may be certified.").

Rule 23 codified the constitutional right to opt out for class members with damages claims. As the Advisory Committee explained, Rule 23(b)(3) was drafted to accommodate the compelling due process interests of such class members. 39 F.R.D. at 104-05. The opt out right provided by Rule 23(b)(3) is an essential safeguard of the constitutional rights of absent class members claiming monetary damages. See Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (per curiam) (there is "at least a substantial possibility" that "actions seeking monetary damages . . . can only be certified only under Rule 23(b)(3), which permits opt outs").

The only exception to this rule occurs when the court has in rem jurisdiction over a pre-existing fund or other res. There is no right to opt out in such cases, because opting out would accomplish nothing; whether plaintiffs remain in the class action or opt out and pursue individual litigation, they must all be compensated out of the same limited fund. The only question is how much of that fund each class member gets, and it is therefore not a due process violation to decide all class members' rights to that fund at once. Such is not the case here, where the settlement fund is not the sum total of the moneys available to class

members. Pacific Dunlop, Nucleus, and Cordis all have sufficient funds to compensate class members in individual litigation. Thus, opting out is a meaningful choice for class members, and due process demands that they be afforded that right.

Most of the claims at issue here are for damages for injury suffered by patients implanted with the "J" lead manufactured by TPLC. The settlement agreement itself acknowledges that many class members have or will suffer disabling injury or death. Undeniably, the plaintiffs making up this class each "has a significant interest in individually controlling the prosecution of [his case]" for each "ha[s] a substantial stake in making individual decisions on whether and when to settle." Amchem, 521 U.S. at 616 (citations and quotations omitted). This mandatory class action denies class members their "own day in court" in contravention of due process of law. Richards v. Jefferson County, 517 U.S. 793, 798 (1996). If possible, this Court should interpret statutes to avoid constitutional questions, and thus it should find that Rule 23(b)(1)(B) does not permit certification under these circumstances. Cf. Gulf Oil, 452 U.S. at 103-04; Yamasaki, 442 U.S. at 692. However, even if certification here were permitted by Rule 23, it is forbidden by the Constitution.

In addition, prohibiting out-of-state class members from opting out of the settlement raises questions concerning this court's jurisdiction over absent class members. Mr. Reed and the Hopkins Objectors are not residents of Ohio. They have not had regular or consistent contacts with Ohio, nor have they had any contact with Ohio concerning the subject matter of this case, and therefore this Court lacks jurisdiction over them.

Although Shutts itself involved a state court, this principle of personal jurisdiction is not limited to state courts, nor are "[t]he disadvantages of [a] distant forum [] mitigated by the forum's federal rather than state character." Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum v. Shutts, 96 Yale L. J. 1, 31 (1986). At the very least, the class members who have no contacts with Ohio should not be bound by the judgment because the court could not require them to submit to its jurisdiction.

III. A FEE AWARD OF 28% OF THE FUND IS GROSSLY EXCESSIVE.

If this Court affirms the approval of the settlement, it should reduce the PSC's grossly excessive fee award. The district court awarded the PSC fees of $16,365,589.26, or 28% of the Patient Benefit and Reserve Funds, after subtracting the lawyers' expenses and incentive payments to individual class members. (JA 193; R. 711 Dist. Op. 68). Together, the fees and expenses paid to

the lawyers amounted to $19,051,352.98, decreasing the Patient Benefit Fund by 33%, from $57,275,297 to $38,223,944.02.

The district court abused its discretion in failing to take into consideration the size of the fund, and the poor result for class members, in awarding the PSC 28% of the fund. In addition, the district court erred in ignoring the PSC's own acknowledgment that it should not receive a percentage of the $4 million Reserve Fund until after that fund reverts to the Patient Benefit Fund, where it would then be available to compensate class members. Finally, the district court improperly awarded the PSC a percentage of the entire fund, to be received in automatic installments over four years, instead of awarding the PSC an annual percentage of the funds actually disbursed to class members during the preceding year.

A. The District Court Abused Its Discretion In Awarding the PSC 28% Of The Fund.

Courts recognize the need to review carefully the fees requested by class counsel because a large, dispersed class that never entered a contract with class counsel will not be able to monitor fees for themselves. See Rawlings v. Prudential-Bache Properties, Inc., 9 F.3d 513, 516 (6th Cir. 1993); In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig, 55 F.3d 769, 819-20 (3rd Cir. 1995); Court Awarded Attorney Fees, Report of the Third Circuit Task

Force ("Task Force Report") 108 F.R.D. 237, 255 (1985). In this Circuit, courts may use either the lodestar (hourly rate) or the percentage-of-the-fund method to calculate reasonable fees. See Rawlings, 9 F.3d at 517. Either way, reviewing courts must provide a "clear statement" explaining the methodology used and the amount arrived upon. Id. at 516.

Here, the 28% fee is far too high a percentage award from a fund of over $50 million. As the district court recognized, fee awards in common fund cases normally range between 10 and 30% of the fund. (JA 188; R. 711 Dist. Op. 63). However, the district court failed to address the fact that larger funds require relatively smaller percentage awards, because the effort necessary to generate each dollar of the fund decreases as the fund grows in size. See, e.g., Bowling, 102 F.3d at 780 (noting economies of scale enjoyed by the lawyers involved in large class action); In re Washington Public Power Supply Sys. Lit., 19 F.3d 1291, 1297 (9th Cir. 1994); In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 350 (N.D. Ga. 1993); Lachance v. Harrington, 965 F. Supp. 630, 649 (E.D. Pa. 1997); Task Force Report, 108 F.R.D. at 256 & n.63 (recommending that percentage of recovery fee should decrease as size of common fund increases). As explained in Domestic Air:

> [W]hen the fund is extraordinarily large, the application of a normal range of fee awards may result in a fee that is unreasonably large for the benefits conferred. Thus, based on empirical research covering settlements as late as 1991, [Herbert] Newberg notes that percentage awards tend to decline as the size of the recovery increases. Herbert P. Newberg, Attorney Fee Awards § 2.09 (1986). Where the fund recoveries range from $51-$75 million, fee awards usually fall in the 13-20% range.

148 F.R.D. at 350-51. Numerous cases also support awarding a lower percentage fee on a fund of this size. See, e.g., Brown v. Phillips Petroleum Co., 838 F.2d 451 (10th Cir. 1988) (16.5% award on fund of $75 million); Thompson v. Midwest Found. Indep. Physicians Ass'n, 124 F.R.D. 154 (S.D. Ohio 1988) (5% award on fund of $65.5 million). In re Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), modified, 751 F.2d 562 (3d Cir. 1984) (10.8% award on fund of $50.65 million); In re Flight Transp. Corp. Sec. Litig., 685 F. Supp. 1092 (D. Minn. 1987) (15% fee on fund of $52 million); In re Gypsum Cases, 386 F. Supp. 959 (N.D. Cal. 1974) (12.35% award on fund of $75 million).

Professor Newberg's treatise on attorney fees awards, as well as the case law cited above, support a fee award in the 13-20% range on a fund of this size. Here, a reasonable percentage award should be at the bottom of that range -- 13% -- to account for the fact that injured class members are being forced to accept compensation that is far below the true value of their claims. The district court

committed an error of law in failing even to consider lowering the percentage fee award in light of the size of the fund, and thus its approval of the PSC's request for an award of 28% of the fund should be reversed as an abuse of its discretion.

In addition, the district court should also have considered the losses sustained by the class. See Rawlings, 9 F.3d at 517 (noting that the amount received in settlement was low relative to the losses suffered by members of the class); Spicer v. Chicago Bd. Options Exchange, Inc., 844 F. Supp. 1226, 1251, 1256 (N.D. Ill. 1993) ("The results achieved for the class necessarily play an important role in determining what is a fair and reasonable fee for the attorneys who facilitated those results."); see also Selzer v. Fleisher, 629 F.2d 809, 814 (2d Cir. 1980). According to the PSC, it lost its case against Pacific Dunlop and Nucleus, leaving only TPLC -- a limited fund -- to compensate class members. (R. 614; Plaintiffs' Memorandum in Support of Class Action Settlement at 17). Before the district court, the PSC declared that "[a]lthough [it] would like to present a Plan of Allocation that distributes a significant amount of money to each category contained in the Plan of Allocation, the limited funds available for distribution make this goal unattainable." (R. 614; Plaintiffs' Memorandum in Support of Class Action Settlement at 23). As a result, the PSC agreed to a

settlement that awards class members considerably less than what their claims are worth.

This settlement releases Pacific Dunlop, Nucleus, and Cordis -- three wealthy and potentially liable companies. However, except for $10 million from Pacific Dunlop, class members will only recover from TPLC, which has insufficient assets to compensate all class members for the value of their claims. Because all wealthy defendants have been released, and only a "limited fund" defendant remains, class members are forced to accept only a small percentage of the value of their claims. This result cannot be considered a good one for the class, and thus the district court abused its discretion in awarding the PSC a percentage of the fund far above the average for a fund of this size.

B. The Lodestar Is Too High And Therefore Does Not Serve As A Proper Cross-Check On The Requested Percentage Award.

The district court used the PSC's lodestar as a means of cross-checking the fairness of the PSC's request for an award of 28% of the fund. (JA 193; R. 711 Dist. Op. 68). However, the lodestar calculated by the PSC is inflated, and therefore does not serve as a proper check on the fee award. The hourly rates claimed by some of the attorneys and paralegals are extraordinarily high, clerical work such as copying is improperly charged on an hourly basis rather than

included in overhead, and hours are not discounted for the considerable duplication of work by the numerous firms coordinating the case. Even though the district court agreed with objectors that "some of the hourly rates appear to be unreasonably high," it nevertheless relied on this inflated lodestar to justify its fee award. (JA 187; R. 711 Dist. Op. 62 n.19).

In violation of Federal Rule of Civil Procedure 5(a), the PSC did not serve any objectors with Appendix 2 to the Joint Fee Application, which contains the time and expense records of the PSC in support of their joint fee application. Objectors must therefore rely on the affidavits of attorneys in Appendix 1 to the Joint Fee Application, which give a very general description of the services performed and the hours of work rendered, in determining whether the PSC overcharged the class. As discussed below, these affidavits reveal that some attorneys and paralegals billed their time at inflated hourly rates, and that class members were charged for duplication of work and for clerical tasks, which should not be included in the lodestar. Had objectors had the opportunity to review the entire application, many more problems would no doubt have been revealed. The examples discussed below are simply illustrations of the PSC's overbilling and of the need to reverse the district court's fee and expense award.

1. Hourly Rates

The hourly rates claimed for some of the attorneys in this case are extraordinarily high.

• Stanley Chesley claims to bill at $500 per hour. He charged the class $213,375 for 426.75 hours of work on this case. (JA 1774; R. 640 Appendix 1 to Joint Petition ("Appendix 1"), Chesley Aff., Exhibit A). This rate is considerably above market for partners in the major law firms in Washington, D.C., as revealed by a Legal Times article, published November 16, 1998, listing the range of billing rates for associates and partners at 13 of D.C.'s leading firms, and undoubtedly is also higher than the rate for partners in Cincinnati, Ohio. (JA 1367; R. 678 Attachment D to Reed's Fee Objection). Moreover, on November 3, 1998, just a little over a month before he submitted his fee application in this case, Mr. Chesley submitted a fee application to the district court in Bowling v. Pfizer, No. C-1-91-256 (S.D. Ohio), in which he claimed his current rate was $350 per hour. (JA 1366; R. 678 Attachment C to Reed's Fee Objections). Likewise, Fay E. Stilz, an associate at Waite, Schneider, Bayless & Chesley, is billed at $400 per hour, even though she listed her rate as $235 per hour in the same Bowling fee application. Id.

The discrepancy between the fee Mr. Chesley and Ms. Stilz charged the class here and the fee charged in Bowling puts into doubt the billing rates for the

other six lawyers at Waite, Schneider, Bayless & Chesley. (JA 1774; R. 640 Appendix 1, Chesley Aff., Exhibit A). At the very least, Mr. Chesley and Ms. Stilz must explain the discrepancy in their billing rates between this case and Bowling before their lodestar can be used as a cross-check of the percentage fee request.

• The lodestar of Arnzen, Parry & Wentz ("Arnzen, Parry") is too high in light of the astronomical hourly rates charged by its partners, associates, and paralegals. Arnzen, Parry is a law firm of 16 attorneys located in Covington, Kentucky. Ron Parry, a partner in the firm, charged the class members $400 per hour for his services. One associate charged $350 per hour. The other six associates who assisted Mr. Parry in the case all charged $300 per hour, despite the fact that some graduated from law school in the mid-1980s, and the others graduated in 1994, 1995, and 1996. (JA 1785; R. 640 Appendix 1, Parry Aff.).

Comparing these hourly rates with those listed by Milberg, Weiss, Bershad, Hynes & Lerach ("Milberg, Weiss") -- a large law firm in New York City, where hourly rates average considerably more than in Covington, Kentucky -- demonstrates the excessiveness of Arnzens' billing rates. A partner at Milberg, Weiss charged $350 per hour -- the rate charged by one associate at Arnzen. (JA 1795; R. 640 Appendix 1, Congress Aff., Exhibit A). An associate at Milberg,

Weiss who graduated from law school in 1994 bills at $225 per hour, which is 25% less than the rate charged by an associate at Arnzen who graduated from law school two years later. (Compare JA 1795, 1813; R. 640 Appendix 1, Congress Aff., Exhibits A & B with JA 1785, 1789; Appendix 1, Parry Aff.).

In addition, Arnzen charged the class $211,576.75 for the work of eight paralegals, each billing at an astounding $145 per hour. (JA 1785; R. 640 Appendix 1, Parry Aff.). These paralegals are billed at nearly twice the amount of paralegals and law clerks at Mr. Chesley's firm. (JA 1774; R. 640 Appendix 1, Chesley Aff., Exhibit A). Most of the paralegals at Milberg, Weiss are also billed at lower rates. (JA 1795; R. 640 Appendix 1, Congress Aff., Exhibit A).

- The firm of Ness, Motley, Loadholt, Richardson & Poole ("Ness, Motley") charged $500 per hour for the work of Thomas D. Rogers. (JA 1817; R. 640 Appendix 1, Hahn Aff., Exhibit A). Again, that rate is higher than that charged for partners in the major law firms in Washington, D.C. (JA 1367; R. 678 Attachment D to Reed's Fee Objections). Ness, Motley did not provide a firm profile or attorney biography, as did all the other law firms. Therefore, it is difficult to determine whether Mr. Rogers' high hourly fee is justified. The firm's web site reveals that he graduated from law school in 1980 but does not mention

experience in class actions or product liability cases in his attorney profile. (JA 1368; R. 678 Attachment E to Reed's Fee Objections).

2. Hours

(a) Duplication Of Work

The lodestar for attorney and paralegal time has not been reduced to account for the considerable duplication of work. Twenty-one different law firms submitted individual lodestars for their work over four years preparing a case against TPLC, Pacific Dunlop, and Nucleus. Attorney A. Bruce Jones of the law firm Holland & Hart recognized that the fees of all the attorneys in the case should be discounted to reflect duplication of effort, and he alerted the Steering Committee to this issue. (JA 1829-30; R. 640 Appendix 1, Jones Aff. at 3-4). He also requested that the PSC reduce his own lodestar of $1,341,850.50 to $1 million to account for duplication. Id. Nevertheless, the PSC listed Holland & Hart's lodestar at the full $1.3 million and did not reduce any of the other lodestars, and the district court failed to account for duplication as well.

(b) Billing For Clerical Tasks

As noted earlier, most law firms filing affidavits did not serve objectors with their time records, which were filed with the Court as Appendix 2. However, the law firm of Brosnahan, Joseph, Lockhart & Suggs ("Brosnahan") did include

backup documentation for its attorneys' fees in Appendix 1. (JA 1824-26; R. 640 Appendix 1, Exhibit 13). Those documents reveal that the paralegals billed the class members $60 per hour for clerical tasks such as copying, creating a PSC mailing list, and sending letters and materials to the PSC. Clerical work, however, is part of overhead properly included in attorneys' hourly rates, and is not separately compensable under a lodestar formulation. See Mississippi State Chapter, Operation PUSH v. Mabus, 788 F. Supp. 1406, 1421 (N.D. Miss. 1992); Martin v. Mabus, 734 F. Supp. 1216, 1226 (S.D. Miss. 1990) (also noting that clerical tasks are never separately compensable, even at a minimal rate, even if performed by a lawyer). Lawyers do not charge their clients for their time on an hourly basis and then charge an hourly rate for their secretary's time in answering the phone, typing a brief, organizing the client's files, or delivering a document. To charge separately for such overhead costs in assessing a lodestar fee would therefore constitute double dipping.

Additional evidence of the improper billing of clerical tasks can be found in Exhibit A to Mr. Chesley's affidavit, which reveals that his lodestar includes $1,025.00 for the 168.50 hours of work performed by "clerks," billed at $25 per hour. (JA 1774; R. 640, Appendix 1, Chesley Aff., Exhibit A). Paralegals and law clerks, billed at $75 per hour, are listed separately, which suggests that

"clerks" were performing administrative and clerical work, not legal work. If so, their hours should not be included in the lodestar.

These numbers are very small, and alone do not merit reducing the PSC's requested fee. However, they suggest that the time records submitted to the district court likely show billing for many tasks that should not be charged to the class. In light of the numerous problems visible from the affidavits, the district court should have reduced the lodestar to account for the exorbitant hourly rates, the duplication of work, and the improper billing of clerical tasks. Only after the lodestar is adjusted for these problems could it have served as an accurate cross-check on the PSC's requested percentage fee award. The district court's reliance on this inflated lodestar to justify its percentage fee award constitutes an abuse of its discretion, meriting a reversal by this Court.

C. The PSC Should Only Be Awarded A Percentage Of The Funds That Benefit The Class.

The common fund doctrine is based upon the equitable principle that "persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). If a lawyer "recovers a common fund for the benefit of person other than himself or his client," he or she is entitled to a fee from that

fund. Id. Conversely, funds that do not benefit the class should not be counted as a part of the common fund when calculating class counsel's fee.

1. The PSC Should Not Be Awarded A Percentage Of The Reserve Fund.

In calculating the percentage-of-the-fund award, the district court awarded the PSC 28% of the Patient Benefit Fund and the Reserve Fund (after subtracting expenses and incentive payments), despite the fact that the class may never receive a penny of the money in the $4 million Reserve Fund. (JA 193; R. 711 Dist. Op. 68). The Reserve Fund "will be used by the Defendants to pay expenses associated with other litigation relating to the 'J' lead prosecuted after the date of the Settlement," and thus does not provide any current benefit to the class. (R. 640 Memorandum in Support of Joint Application of Plaintiff's Steering Committee for an Award of Attorneys' Fees and Reimbursement of Expenses, at 1 n.1). At this point in time, the Reserve Fund benefits only TPLC's lawyers, who are guaranteed payment for future services.

In the PSC's Response to Objections To Joint Application for the Award of Attorneys' Fees and Reimbursement of Expenses ("Response"), the PSC agreed with Objectors that its percentage fee award should be based only on the Patient Benefit Fund, stating that it "is prepared to wait to apply for attorneys fees from

the Operating, Litigation, and Reserve Funds until the funds revert to the Patient Benefit Fund." (JA 1373; R. 681 Response at 4). Nevertheless, despite the PSC's own acknowledgment that it should not receive a percentage of the Reserve Fund until it is dedicated to compensating class members, the district court went ahead and awarded the PSC 28% of the Reserve Fund, or $1.12 million. The district court's unexplained award of a percentage of that Fund to the PSC constitutes an abuse of discretion.

2. The PSC Should Be Awarded Fees Annually, Based On A Percentage Of The Funds Actually Disbursed To Class Members In The Preceding Year.

The PSC's fee award should be limited to a percentage of the money that is actually distributed to class members that year. Limiting attorneys' fees to a percentage of the money received by class members each year "assures that the Class only pays for what it gets." See, e.g., Bowling v. Pfizer, 927 F. Supp. 1036, 1044 (S.D. Ohio 1996), aff'd, 102 F.3d 777 (6th Cir. 1996).

In addition, tying payment of the PSC's fees to the amount of money recovered each year by class members will motivate the PSC to maximize the fund and distribute the money expeditiously. See Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375, 378-80 (D. Mass. 1997). As the PSC acknowledges, its responsibilities do not end with final approval of the settlement. The PSC is

obligated by the settlement to review TPLC's annual budgets, resolve issues related to disputed claims, and continue to monitor litigation facing TPLC. (R. 640; Memorandum in Support of Joint Application at 2). Staggering the PSC's fee award so that it receives a percentage each year of the total distributed to class members will provide an incentive to ensure the PSC performs these tasks well.

The district court did agree to hold back some of the PSC's fee award, providing the PSC with 60% of their fees up front, and then providing the rest in four annual installments of 15%, 12%, 8% and 5%. (JA 194; R. 711 Dist. Op. 69). The district court's modification of the PSC's fee request is certainly an improvement over the PSC's original fee request. However, because the district court's installment plan provides automatic, rather than conditional, payments to class counsel, the delay in payment will provide no incentive for the PSC to expeditiously administer the settlement. See Duhaime, 989 F. Supp. at 378-80.

Moreover, deferring the PSC's fee award is fair in light of the significant waiting period forced on many class members. The PSC informed the district court that there is some risk that the fund may be depleted before all claims are paid. As a "safety mechanism" to protect late-filing claimants, the proposed settlement provides that a class member initially will receive only 50% of his or her payment, with the rest deferred for as long as five years. If class members

must wait for payments because the fund may be depleted, class counsel should have to wait as well. The PSC should receive a percentage on no more, and no less, than class members themselves receive each year. See, e.g., Bowling, 922 F. Supp. at 1284 ([T]he future portion of Counsel's award will fairly compensate Counsel for the . . . benefits that they will confer upon the Class at or near the time that . . . these benefits are actually conferred upon the Class).

IV. DISTRICT COURT ERRED IN DENYING HAROLD REED'S MOTION TO INTERVENE.[7]

A. Mr. Reed Is Entitled To Intervene As Of Right Under Federal Rule of Civil Procedure 24(a).

Federal Rule of Civil Procedure 24(a) provides that:

> [u]pon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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[7] The Hopkins Objectors were not required to intervene in order to preserve their right to appeal. The Hopkins Objectors filed suit in federal court in the Southern District of New York, and their case was transferred as part of the MDL to the Southern District of Ohio. As a result, they were parties to the settlement and have standing to appeal. See Shults v. Champion Int'l Corp., 35 F.3d 1056, 1061 (6th Cir. 1994).

Rule 24(a) is to be construed broadly in favor of applicants for intervention. See Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972).

Mr. Reed moved to intervene for the sole purpose of preserving his right to appeal the district court's decision. Intervention by absent class members seeking to challenge approval of a class action settlement should be granted as a matter of course, because unnamed class members are already parties, as illustrated by the fact that they are bound to the terms of the settlement. Adopting this reasoning, the Supreme Court has liberally permitted unnamed class members to intervene. In United Airlines v. McDonald, 432 U.S. 385, 392-96 (1977), the Court held, as a matter of law, that unnamed class members may intervene, after judgment, solely for the purpose of appealing an order denying class certification, even though -- unlike the case here -- those class members would not have been bound by the judgment. If intervention was permitted in United Airlines, it surely should be here, where absent class members sought intervention before judgment and, absent appeal, will be bound to a settlement that they believe unlawfully compromises their rights.

Indeed, in some circuits, absent class members automatically have standing to appeal, and need not file a motion to intervene. See, e.g., Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1308-10 (3d Cir. 1993) (plaintiff-shareholder who attended

settlement hearing and objected had standing to appeal), Dosier v. Miami Valley Broadcasting Corp. 656 F.2d 1295, 1299 (9th Cir. 1981) (same).[8]

Although this Circuit requires unnamed class members to file a motion to intervene in order to have standing to appeal, it does so merely to ensure that the class member has done something "more than merely appear and object." See Shults v. Champion Int'l Corp., 35 F.3d 1056, 1061 (6th Cir. 1994). By filing a motion to intervene, and by appealing that motion's denial, Mr. Reed has standing to appeal. Id.

In any case, Mr. Reed has met all the traditional requirements for intervention as of right under Rule 24(a)(2): 1) his application was timely; 2) he claims an interest relating to the property or transaction that is the subject of the action; 3) the disposition of the action impairs his ability to protect his interests; and 4) his interests are not adequately represented by the existing parties. See Fed.

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[8] We believe that the Circuits that do not require intervention are correct, and, although this Court need not reach that issue in this case, we hereby preserve it for further review. Requiring intervention -- the purpose of which is to grant party status to a non-party -- is unnecessary because unnamed class members are already parties to the action by virtue of their class membership. See Matsushita , 516 U.S. 367; Shutts, 472 U.S. at 811-12. It is particularly unfair to require absent class members to intervene in a class action settlement certified under Rule 23(b)(1)(B), such as this settlement, because absent members are unable to opt out and pursue their own litigation.

R. Civ. P. 24(a); see, e.g., Cuyahoga Valley Ry. Co. v. Tracy, 6 F.3d 389, 395 (6th Cir. 1993); Meyer Goldberg, Inc. of Lorain v. Goldberg, 717 F.2d 290, 292 (6th Cir. 1983).

Contrary to the district court's opinion, Mr. Reed's motion to intervene was timely. Notice of the proposed class action settlement was given in late September of 1998. The notice informed class members that they could submit objections to the proposed settlement and could participate in the fairness hearing, without even suggesting that class members must intervene to preserve their rights to participate. (R. 520 Notice, attached as exhibit to Joint Motion for Order Provisionally Certifying a Mandatory Class Action). Nevertheless, Mr. Reed submitted his motion to intervene prior to the fairness hearing, on November 15, 1998. (JA 1287; R. 617 Motion to Intervene of Class Member Harold Reed). In the motion, he stated that the purpose of his motion to intervene was to "preserve his right to appeal should an appeal become necessary." Id.

In faulting Mr. Reed and the other objecting class members for not intervening earlier, the district court ignored the fact that the first notice of the settlement had been sent out only two months earlier. (JA 121; R. 710 Intervention Order). The district court thought it relevant to the timeliness determination that the case had been ongoing for four years. (JA 122; R. 710

Intervention Order at 2). However, absent class members were not provided with any notice of the prior litigation. In any event, the litigation prior to class certification had no direct effect on Mr. Reed, who would not have been bound by the results in individual lawsuits. Thus, Mr. Reed had neither the grounds nor the opportunity to move to intervene prior to receiving notice of the proposed class action settlement.

Indeed, as stated in Federal Rule of Civil Procedure 23(d)(2), the very purpose of the notice requirement is to enable absent class members to "intervene and present claims or defenses" on their own behalf. To deny motions to intervene by absent class members as untimely because they were not filed before notice of the proposed settlement was issued is at odds with the very purpose of providing absent class members with notice of the proposed class action.

The district court stated that "the Class will [be] prejudiced by the unnecessary delays that will result from the intervention at this point." (JA 124; R. 710 Intervention Order at 4). Mr. Reed, however, filed a motion to intervene for the sole purpose of appealing approval of the settlement. Thus, the only delay that would result from his intervention would be his appeal of the district court's decision. This delay occurs regardless of whether the absent class members' motions to intervene have been granted, since denial of their motions to intervene

is also appealable. See United Airlines, 432 U.S. at 394 (holding that unnamed class members may intervene after judgment solely for the purpose of appealing an order denying class certification, noting that defendant would not be prejudiced because it was in the same situation regardless of whether the appeal was brought by an unnamed plaintiff or by one of the named plaintiffs); see also Shults, 35 F.3d at 1061. Moreover, an appeal is not the kind of "prejudicial delay" that serves as ground for denying a motion to intervene. If it were, then district courts could always insulate their decisions by denying interested parties the right to intervene for purposes of appealing adverse decisions.

Mr. Reed also meets the other three requirements for intervention as of right. Mr. Reed's property interest in bringing his causes of action against defendants will necessarily be directly affected by disposition of this action. Moreover, because this class was certified under Rule 23(b)(1)(B), Mr. Reed is unable to protect his claims by opting out of the settlement. If the settlement is upheld by this Court, Mr. Reed will lose his right to bring his own case against TPLC, Pacific Dunlop, Nucleus, and Cordis for injuries from the defective lead. Nor is Mr. Reed adequately represented by the PSC. To the contrary, Mr. Reed objects to the settlement that was negotiated by the PSC, and he also protests the high fees to be awarded to the PSC under the settlement, which may well have a

direct effect on his recovery. See, e.g., Trbovich, 404 U.S. at 538 & n.10 (requirement for intervention as of right under Rule 24(a) is met where representation "may be" inadequate, and "burden of making that showing should be treated as minimal") (citation omitted); Rawlings, 9 F.3d at 516 (noting that interests of class members and class counsel are directly adverse on issue of fees); Adv. Cmte Notes to Rule 24(a)(2) ("[A] member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.").[9]

In sum, the inadequacy of the PSC's representation is at the heart of Mr. Reed's objections. This Court should review those objections on their merits, and not -- as the PSC would have it -- sidestep the serious illegalities of this class action settlement through the guise of intervention.

CONCLUSION

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[9] The district court also abused its discretion in denying Mr. Reed's motion for permissive intervention under Federal Rule of Civil Procedure 24(b). Intervention should be permitted "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). As a member of the class, Mr. Reed's potential claims against defendants have many questions of fact or law in common with those of the class representatives. Moreover, like any other party, Mr. Reed is bound to the terms of this settlement, and thus it is unfair to deny him the opportunity to challenge that settlement on appeal.

As discussed previously, Mr. Reed's intervention was timely, and will not result in any delay. Thus, there is no prejudice to the existing parties.

For the reasons stated above, the district court's decision approving the mandatory class action settlement should be reversed. In that case, the Court may want to provide guidance to the district court on issues relating to attorneys' fees and expenses, because they will likely arise in proceedings on remand. If this Court affirms the settlement approval, it should reverse the award of fees and expenses for the reasons stated above.

Dated: September 30, 1999

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 23(a)(7)(c), the undersigned certifies this brief complies with the type-volume limitations of Sixth Circuit Rule 32(a)(7)(B).

1. Not including the portions of the brief exempted from the word count requirement in Sixth Circuit Rule 32(a)(7)(B)(iii), the brief contains 13,962 words.

2. The brief has been prepared in proportionately spaced typeface using Word Perfect 6.1. in New Times Roman 14 point font.

3. If the court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the work or line printout.

4. The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Sixth Circuit Rule 32(a)(7), may result in the court's striking the brief and imposing sanctions against the person signing the brief.

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Amanda Frost

APPELLANTS' DESIGNATION OF JOINT APPENDIX CONTENTS

Pursuant to Sixth Circuit Rule 28(d), Appellants Harold Reed and Hopkins Objectors hereby designate the following filings contained in the district court record as items to be included in the joint appendix:

Description of Item	Record Entry No.	Date
Docket Entries	N/A	N/A
Amended and Consolidated Master Class Action Complaint	R. 37	July 20, 1995
Order by Judge Spiegel Denying Defendants Pacific Dunlop and Nucleus Limited Motion to Dismiss for Lack of Jurisdiction	R. 333	Feb. 3, 1997
Order by Judge Spiegel Granting Plaintiff's Motion to Certify Two Issues Against Australian Defendants	R. 477	Dec. 18, 1997
Joint Motion by Steering Committee and Defendants for Order to Certify Class Action; Approving Settlment; Forms of Notice to Class Members; Scheduling Final Fairness Hearing; and Preliminarily Enjoining Accufix Litigation	R. 520	July 22, 1998
Memorandum to Court Concerning Proposed Settlement on Behalf of 67 Class Members	R. 562	Oct. 14, 1998

Supplemental Objections of Harold Reed	R. 592	Nov. 9, 1998
Memorandum by TPLC, Inc. and Telectronics in Support of Settlement Agreement	R. 605	Nov. 13, 1998
Motion to Intervene of Class Member Harold Reed	R. 617	Nov. 17, 1998
Order Granting Plaintiffs' Motion for Class Certification of Issues Asserted Against Pacific Dunlop Limited and Nucleus Limited		Dec. 18, 1997
Application by PSC for Award of Attorney Fees and Reimbursement of Expenses; Exhibits Attached	R. 640	Dec. 7, 1998
Class Member Harold Reed's Objections to Fee Application	R. 678	Dec. 30, 1998
Response by PSC to Objections to Fee Request	R. 681	Jan. 11, 1999
Intervention Order (under review)	R. 710	Mar. 5, 1999
District Court Opinion (under review)	R. 711	Mar. 5, 1999
Notice of Appeal of Harold Reed	R. 725	Mar. 22, 1999
Notice of Appeal of Hopkins Objectors	R. 728	Mar. 30, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellants Hopkins Objectors and Harold Reed was served by first-class mail on this 30th day of September, 1999, on the individuals listed below:

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