Appeal Nos. 03-4294, 03-4316, 03-4837, and 03-4838

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re: COMMUNITY BANK OF NORTHERN VIRGINIA AND GUARANTY NATIONAL BANK OF TALLAHASSEE SECOND MORTGAGE LOAN LITIGATION

Appeal No. 03-4294
Scott C. Borison, Appellant
Appeal No. 03-4316
Badeaux Class Member Opt-Outs, Appellants
Appeal No. 03-4837
Michael Lane, Marcos Escalante, Cheryl White-Berry,
William P. Gorny, Rinaldo Swayne
Appeal No. 03-4838
Badeaux Class Member Opt-Outs, Appellants

COMBINED OPENING BRIEF OF APPELLANTS BADEAUX CLASS MEMBER OPT-OUTS, SCOTT C. BORISON, AND MICHAEL LANE, ET AL.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

These appeals concern the propriety of several orders issued in conjunction with the district court's approval of a class action settlement. The district court purported to exercise federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367. Joint Consolidated Supplemental Appendix ("SA") Vol. I 157.[1]

One of the groups of appellants filing this brief — the Badeaux Class Member Opt-Outs — timely filed opt-out forms in the district court, indicating their desire to exclude themselves from the class action settlement. By ex parte order dated October 14, 2003, and entered the next day, the district court invalidated the Badeaux class members' opt-outs, established a second opt-out period, and forbade their lawyer, appellant Scott C. Borison, from communicating with them, absent court permission, until the end of the second opt-out period. SA

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[1] The district court expressed serious doubt that it had subject matter jurisdiction over the case, which, as of October 31, 2003, just 15 days prior to the fairness hearing, involved only state-law claims. At a status conference on that day, the court suggested that class counsel amend the complaint to assert federal claims and that the parties stipulate that the amendment would relate back to the original filing. SA Vol. III 1069-72. Taking the court's cue, the plaintiffs then filed an amended complaint asserting claims under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2607(a), (b) and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c), (d), and the parties stipulated to its retroactive effect. The appellants filing this brief maintain that the district court lacked subject matter jurisdiction and join in the motions on that topic filed by other appellants.

Vol. I 143 ("October 14 Order").

Pursuant to that ruling, on October 16, 2003, Scott Borison filed a motion asking the district court for permission to mail a proposed letter to the Badeaux class members. SA Vol. III 775. The district court treated that motion as a request for reconsideration of its October 14 ruling and denied it the next day. SA Vol. I 145. On October 29 and October 30, 2003, respectively, Borison and the Badeaux opt-outs appealed the invalidation of their opt-out requests and the order barring Borison from communicating with his clients. SA Vol. I 13 (Appeal No. 03-4294), SA Vol. I 17 (Appeal No. 03-4316).

Thereafter, on December 4, 2003, the district court certified this class action pursuant to Fed. R. Civ. P. 23(b)(3), approved the class action settlement, and issued a final judgment. SA Vol I 174, 157. On December 23, 2004, both Borison and the Badeaux opt-outs filed notices of appeal from these orders as well as from the earlier orders abrogating the opt-outs and denying Borison the right to communicate with his clients. SA Vol. I 33 (Appeal No. 03-4837). In addition, also on December 23, 2004, the other group of appellants filing this brief — Michael Lane, Marcos Escalante, Cheryl White Berry, William P. Gorney, and Rinaldo Swayne, who had not opted out and objected to approval of the proposed settlement, *see* SA Vol. II 499 — filed a notice of appeal from the order approving

the settlement and the final judgment. SA Vol. I 36 (Appeal No. 03-4838).

This Court has jurisdiction over these appeals under 28 U.S.C. § 1291. In addition, because the district court enjoined appellant Borison from communicating with his clients, this Court also has jurisdiction over the appeals filed by the Badeaux opt-outs and Borison under 28 U.S.C. § 1292(a)(1). Because this Court indisputably has jurisdiction over the appeals from the final judgment, into which the district court's earlier orders nullifying the opt-out requests merged, it need not consider whether it also has jurisdiction over the first set of appeals.

STATEMENT OF ISSUES

1. Whether the district court's order invalidating the Badeaux class members' opt-outs, establishing a new opt-out period, and ordering appellant Scott Borison not to communicate with the Badeaux class members violated Federal Rule of Civil Procedure 23 and due process, where:

(a) the district court made no factual findings supporting the conclusion that the order was necessary or that it was tailored to address specific harms;

(b) the large majority of the settling parties' allegations made to support the invalidation of the opt-outs and the communications ban did not apply to Borison's conduct with regard to his clients; and

(c) the district court's order was issued ex parte without input from the

adversely affected parties.

2. Whether the district court's order banning Borison from communicating with the Badeaux class members was an unconstitutional prior restraint of speech that abridged the First Amendment rights of both the Badeaux class members and Borison.

3. Whether the court erred in concluding that the class action settlement is fair, adequate, and reasonable.

STATEMENT OF THE CASE

A. Introduction and Overview

This appeal arises from a class action brought by consumers who alleged that they had been defrauded by their mortgage lenders. As explained below, more than 400 of these consumers were denied access to the counsel of their choice by the district court.

Following the district court's preliminary approval of a settlement that would provide small monetary payments to the class members, SA Vol. III 316-18, Scott Borison, an attorney with over 15 years' experience handling hundreds of consumer lending cases, wrote to potential class members to offer free, individualized assessments of their claims. Affidavit of Scott C. Borison ("Third Cir. Aff.") ¶ 10 & Exhs. 7-8; Declaration of Scott C. Borison, ¶ 12, SA Vol. V

2056, 2062-65 Borison had previously handled litigation against these particular defendants, and, in a case involving circumstances similar to those involved in the class action, he had obtained a $21,000 settlement for his client. SA Vol. V 2054, 2086-87. That recovery was at least 20 times greater than any class member could expect from the class settlement.

Borison reviewed approximately 100 sets of loan documents from class members responding to his letter. *See* Third Cir. Aff. ¶ 13. He then recommended that approximately half stay in the class and the other half opt out and pursue their claims individually. *Id*. In the end, 44 class members — the "Badeaux opt-outs" — retained Borison to represent them and opted out of the settlement. SA Vol. II 651.

Borison's clients were soon surprised to receive a letter and a "Supplemental Legal Notice" from the district court stating that their opt outs may have resulted from improper solicitation and thus had been invalidated pending a second opt-out period. SA Vol V 2062, 2064. Among other important omissions, this communication left out one crucial piece of information — that Borison had been banned from communicating with his clients, except via written communications that would have to be pre-approved by the court. Thus, when Borison's clients called him to ask what to do about the second opt-out notice, they either received

no response at all or else a cursory statement from Borison's office personnel that their lawyer could no longer speak with them. Third Cir. Aff. ¶ 12 & Exh. 10; SA Vol. V 2056-57, 2091. Borison then attempted to fulfill his ethical obligation by moving the district court for permission to communicate with his clients by submitting to the judge a proposed client letter explaining what had happened (following the procedure that the court had established). Motion for Approval of Correspondence, SA Vol. III 775. However, without explanation, the district judge treated the letter as a motion for reconsideration, which he promptly denied, without any analysis or reference to Borison's proposed letter. October 17, 2003 Order, SA Vol. I 145.

It should cause little wonder, then, that very few, if any, of the Badeaux class members opted out again after receiving the second notice, which accused Borison of misleading the class members as to the value of their claims, these class members got the message: "Don't bother trying to opt out; just stay in the class and accept the settlement, however paltry it may be."

As explained below, the district courts orders violated Rule 23, due process, and the First Amendment. The district court's ultimate approval of the settlement was also unlawful.

B. The Underlying Action

This action was brought on behalf of 44,000 consumers who took out second mortgage loans with Community Bank of Northern Virginia ("CBNV") or Guaranty National Bank of Tallahassee ("GNBT"), and whose loans were then purchased by Residential Funding Corporation ("RFC"). The Consolidated Amended Class Action Complaint (Dkt. Entry 68) ("Amended Complaint") alleged that these consumers was charged fraudulent "loan origination" and "title service" fees through a complex scheme designed to hide the identity of the true lender. Amended Complaint at 1. Without the consumers' knowledge, CBNV and GNBT were working with two companies, EquityPlus and EquityGuaranty, which, by law, were subject to strict caps on the fees and interest that they could charge consumers. These companies, which were not banks, were actually approving and disbursing the consumers' loans. *Id.* at 6-7. By creating the illusion that the loans were being held by state-chartered or national banks, which are not subject to the same fee and interest caps, EquityPlus and EquityGuaranty were able to charge unlawfully high fees, which they then shared with GNBT, CBNV, and RFC. Furthermore, EquityPlus and EquityGuaranty sometimes closed on these loans without providing consumers federally mandated notices and disclosures. *Id.* at 8. These and other abuses were documented in a report from the Office of the

Comptroller of the Currency, which investigated and eventually entered into an agreement with GNBT to place tight controls on the bank. *Id.* at 22. Ultimately, the Defendants' subterfuge allowed them to fleece consumers to the tune of forty million dollars. *Id.* at 13.

What ultimately became the Community Bank class action began as seven separate class actions, the first of which was filed on May 1, 2001. SA Vol. I 89, 98, 108, 113, 123. Thereafter, the cases were consolidated in the Court of Common Pleas of Allegheny County, Pennsylvania. The Plaintiffs alleged only state-law causes of action, and, as all parties conceded, diversity jurisdiction did not exist.

Nevertheless, Defendants removed the case to the Western District of Pennsylvania claiming federal question jurisdiction based on a complete preemption defense. SA Vol III 1069-70. Just before the fairness hearing, and at the district judge's behest, SA Vol. III 1071, in an attempt to create federal jurisdiction, Plaintiffs amended their complaint to allege violations of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(c), (d), in addition to state common-law and statutory claims. Proposed Findings 57-74, SA Vol. I 188; *see supra* note 1. Plaintiffs did not allege claims under the Truth in

Lending Act ("TILA") or the Home Ownership and Equity Protection Act ("HOEPA"), although class members' rights under those statutes were later extinguished by the class action settlement. Final Order Approving Class Action Settlement, SA Vol. I 164-66 (¶8).

Class counsel quickly negotiated a $33 million settlement, under which each class member would receive between $250 and $925. The district court preliminarily approved the settlement on July 17, 2003, and ordered that notice be sent to absent class members. SA Vol. I 131. The notice established an opt-out deadline of October 1, 2003, and stated that class members were free to consult with their own attorneys or ask questions of Bruce Carlson, the named plaintiffs' counsel. SA Vol. II 355.

C. Borison's Communications With Absent Class Members

Scott Borison, an experienced consumer lending lawyer, first learned of the Community Bank class action when one of his existing clients asked for advice about whether to participate in the settlement. Shortly thereafter, another person, referred by a different client, came in for the same reason. Third Cir. Aff. ¶¶ 6-8; SA Vol. V 2054-55 (¶¶ 8-10). After reviewing these two sets of loan documents and researching the proposed settlement, Borison and his associate, Mary Szeluga, wrote to class members residing in Maryland and Florida offering a consultation,

because they believed that many class members were giving up their claims too cheaply. Third Cir. Aff. ¶ 10; SA Vol. V 2056 (¶ 12). These letters explained that some class members may have TILA claims worth substantially more than what was offered in the settlement, and that these claims would be forfeited if class members participated in the settlement. SA Vol. V 2089. The letters did not make any assertion that any particular recipient had a valuable TILA claim; rather, Borison offered to review each recipient's mortgage papers and stated that "[i]f we find a violation, then we would agree to proceed against Community on a one-third contingency basis." *Id*. Thus, Borison did not make a concrete offer of his services; rather, he offered only to evaluate whether it would be in potential class members' best interests to remain in the class, after which both the class member and Borison would decide whether to enter into an attorney-client relationship. Shortly thereafter, Borison mailed a second letter to the Maryland and Florida class members stating the opt-out deadline, which had been misstated in the initial letter. Borison Second Letter to Class Members, SA Vol. V 2088.

Ultimately, of the approximately 1,200 letters that Borison mailed to potential class members, about 100 people asked Borison to assess their cases. After reviewing the loan documents of all these class members, Borison recommended that most class members remain in the settlement (although some of

these class members filed objections to the settlement). However, 44 class members, collectively known in this Court as the Badeaux opt-outs, ultimately decided not to participate in the class settlement and to retain Borison as their counsel in individual actions against Community Bank. Borison advised each of these class members against participating in the settlement because, based on his experience handling hundreds of similar cases, and his individualized review of their personal loan documents, it was his judgment that these clients had an excellent chance of winning damages under TILA and/or HOEPA. Third Cir. Aff. ¶¶ 4-6, 9, 13-14; SA Vol. V 2853 (¶ 6), 2057-58 (¶¶ 16-18).

Over the course of the opt-out period, other lawyers also advised class members from different states to opt out of the settlement. Although he was aware that other lawyers were working on the same case, Borison was not working in an alliance with these lawyers, nor did he accept any responsibility for their actions. Various lawyers' agreements to represent class members differed as to what information was given in advance, how much individual cases were estimated to be worth, which course of action was recommended, and the fee plans offered for those who retained the soliciting lawyers for representation in individual actions. Ultimately, 435 people filed opt-out requests, nearly all with the help of lawyers. SA Vol. II 665.

D. The Invalidation of the Badeaux Opt-Outs

On October 6, 2003, class counsel and Defendants (the "settling parties") jointly moved the district judge to invalidate 419 of the opt outs, claiming that they were induced by improper lawyer solicitations. SA Vol. II 665. Although the settling parties' joint motion made numerous specific complaints about many of the lawyers who were representing opt outs, its allegations about Borison's correspondence with class members all fell into just one category — that Borison's letter failed adequately to disclose all of the potential costs and risks associated with opting out of the class. SA Vol. II 673-75. The joint motion neglected to note, however, that Borison's letter only offered to discuss the relative merits of opting out with class members based on their individual cases; he did not recommend that *anyone* opt out of the class blindly, nor did he offer to represent all Maryland or Florida class members who wanted counsel.

The joint motion was served on October 8, 2003, and four business days later, on October 14, 2003, the district court granted the motion ex parte. Despite the significant differences between various "outside" lawyers' communications with potential class members, the district court simply adopted the parties' proposed order wholesale, without stating *any* rationale or making *any* factual or legal findings. SA Vol. I 143. The order invalidated all the opt-out requests filed

by class members residing in the six states to which lawyers had sent letters. The order also established a second opt-out period for the class members whose decision to opt out had been overridden, *id*. (¶ 3), and directed the settlement administrator to "promptly" mail "curative notices" to the class members whose opt-outs had been invalidated. *Id*. (¶ 2). Additionally, the court enjoined the "soliciting" lawyers from having any contact with their clients, except for written communications that had been pre-approved by the court. *Id*. (¶4).[2]

Following the district court's procedure, in a motion filed October 16, 2003, Borison submitted a proposed letter to his clients for the district court's approval. SA Vol. III 775. Borison's letter explained that he was not permitted to communicate with his clients, absent the court's permission, and that his advice to opt out, based on a review of each client's case and his previous experience litigating consumer lending cases, still stood. *Id*. Simultaneously, some of the other lawyers whose clients' opt-outs had been invalidated filed motions in the district court to stay or reconsider the order. Borison also filed an opposition to the

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[2]The order was entered on October 15, 2003, and required that any renewed opt-outs be *received* by the settlement administrator by November 3, 2003. Even assuming optimistically that the new notice was mailed by the end of the business week (October 17), the order provided scarcely two weeks for the notice to be received all over the country and for class members to read the voluminous materials, come to a decision, and get the opt-out request into the hands of the settlement administrator.

settling parties' joint motion. SA Vol. III 888.

On October 17, 2003, the district court ruled on Borison's motion for approval of his proposed letter and the various motions to stay or reconsider, in a total of four sentences. Inexplicably treating all of the papers before him as motions for reconsideration, the district court judge summarily denied them all, stating:

> [L]etters mailed by each of the firms named in the October 14, 2003 Order of Court to plaintiff class members in this case were direct solicitations for prospective clients whom they knew to be represented by another lawyer. If there is not a rule of professional conduct that prohibits such activity in the jurisdictions where these lawyers practice, there should be.

SA Vol. I 145. The district court made no effort to square this apparent reference to class counsel's representation of the absentees with the standard provision in the class action notice stating that class members were, in fact, free to retain their own counsel. SA Vol. II 360.

On October 29, 2003, Borison filed notices of appeal from the October 14 and 17 orders on behalf of himself and the Badeaux class members. SA Vol. I 17, 36. Along with the other lawyers whose clients had been invalidated, Borison also filed an emergency motion for a stay of the district court's order in this Court. That motion was denied on October 31, 2003, with this Court expressing no view on the merits of the appeals.

E. The Second Opt-Out Notice

As noted above, during the second opt-out period, while Borison was barred from communicating with his clients, the court sent out a second notice indicating to class members that if they did not want to be part of the class action, they had to opt out again. Clerk's Second Letter to Class Members, SA Vol. V 2062; Supplemental Legal Notice, SA Vol. V 2064. The letter sent to Florida and Maryland class members stated that Scott Borison's initial solicitation had been "misleading and inaccurate." SA Vol. V 2062. Although the letter said that class members who "have any questions about their Supplemental Legal Notice, the enclosed materials, or this class action and settlement, . . . *should contact your own attorney* or the Court-appointed attorney for the class," SA Vol. V 2065 (¶ 7) (emphasis added), incredibly, it did not explain that the class members' "own attorney" was forbidden to speak with them during the second opt-out period.

When several of Borison's clients sought his advice or an explanation of the notice, the gag order forced Borison to leave them wondering why their lawyer had disappeared. Vol. V 2056-57 (¶ 15). Moreover, the second notice contained several factual inaccuracies regarding Borison's letter and tacitly conveyed the view that Borison advised clients to opt out of the settlement without first reviewing their individual cases. For example, the district court's letter

introducing the second notice asserts that "the Legg Letter contained a number of misleading and inaccurate statements."[3] SA Vol. V 2062. The second notice itself states that class members may have been "confused and subjected . . . to improper influence" by the letter, and then lists five ways in which Borison's letter was deficient. SA Vol. V 2064. Three of the listed items are potential obstacles to individual lawsuits for *some* class members, which were the kinds of things that Borison considered when reviewing his clients' individual loan documents. *See generally* Third Cir. Aff. ¶¶ 4, 11-14; SA Vol. V 2053-55 (¶¶ 16-17); SA Vol. III 775 (Motion for Approval of Correspondence) (explaining case-by-case review of class members' claims). The fourth item noted that "[t]he Legg law firm has a financial interest in convincing you to opt-out or exclude yourself from the settlement," but did not mention that Borison was working on a contingency-fee arrangement and would get no financial benefit from unsuccessful lawsuits. *See* Third Cir. Aff ¶ 15; SA Vol. V 2058-59 (¶18). Finally, the supplemental notice took issue with Borison's characterization of the settlement as "little if anything to lose," SA Vol. V 2065, but failed to mention that Borison's letters had in fact stated the range of class action settlement recovery and offered an individual review of each class member's situation. SA Vol. V 2089. The second notice then

[3] "Legg letter" is a reference to Borison's law firm, the "Legg Law Firm."

directed class members to decide whether or not to opt out a second time based on "all relevant information," which it defined in the next paragraph as "this Court's notice of August 1, 2003 . . ., this supplemental notice, and any knowledge of the proceedings you may have developed on your own." SA Vol. V 2065.

Following the second opt-out notice, only two of Borison's clients managed to re-opt-out properly. However, once the opt-out period concluded, and Borison was again allowed to communicate with his clients, Borison learned that most of his clients wanted to pursue legal action and avoid the preclusive effect of the class settlement. Based on that knowledge, Borison appealed on their behalf.

F. The District Court's Settlement Approval

The district court approved the settlement on December 4, 2003, despite the protests of objectors, including five of Borison's clients — appellants Michael Lane, Marcos Escalante, Cheryl White Berry, William P. Gorney, and Rinaldo Swayne — who had elected to stay in the class. SA Vol. II 499. Among other things, the objectors claimed that the wholesale release of all state or federal claims arising from the lending transactions was unfair because some of those claims — such as HOEPA and TILA claims — were quite valuable, but class members had not received any consideration for their release. SA Vol. V 2049.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Multiple appeals arising from the district court's invalidation of the opt-outs filed during the initial opt-out period are before this Court. In addition, class members have challenged the fairness of the class settlement and the district court's certification of a settlement class. All appeals have been consolidated for disposition by this Court.

STANDARD OF REVIEW

Regarding Appeals by the Badeaux Opt-outs and Scott Borison (Argument Sections I and II)

District court orders issued under Federal Rule of Civil Procedure 23(d) to structure and oversee class actions are reviewed for abuse of discretion. *Gulf Oil v. Bernard*, 452 U.S. 89, 101, 104 (1981); *In re School Asbestos Litig*., 842 F.2d 671, 679 (3d Cir. 1988). "A district court by definition abuses its discretion when it makes an error of law." *Koons v. U.S.*, 518 U.S. 81, 100 (1996); *see also Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 136 (3d Cir. 2000) (district court abuses its discretion when the "'decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.'") (citation omitted).

Because the facts regarding Borison's letters and his interactions with his

clients, and the district court's responses thereto, are not in dispute, the Rule 23 issues before this Court involve pure questions of law regarding the right to opt out, or applications of law to undisputed fact, which are subject to de novo review. *In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 292 (3d Cir. 2004); *Dam Things From Denmark v. Russ Berrie & Co., Inc.*, 290 F.3d 548, 556 (3d Cir. 2002); *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 458 (3d Cir. 2000). Moreover, because the district court's abrogation of appellants' opt-out rights arose in the context of a settlement class action, in which this Court must be concerned about the non-adversarial relationship between the settling parties and the Defendants' effort to "purchase res judicata," *Bolin v. Sears*, 231 F.3d 970, 976 (5th Cir. 2000), "heightened" appellate scrutiny is required. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see generally In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 785 (3d Cir. 1995).

In addition, because the First Amendment rights of both the Badeaux opt-outs and Borison are at stake, "it is the responsibility of the appellate court to 'make an independent examination of the whole record.'" *Zold v. Township of Mantua*, 935 F.2d 633, 636 (3d Cir. 1991) (citations omitted). Under this standard, "constitutional facts" are subject to de novo review, "to make sure that the [district

court's order] does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (citations omitted). Furthermore, de novo review is particularly appropriate when the court is considering documentary evidence, because its interpretation does not turn on questions of credibility, as would the interpretation of live testimony. *Id.* at 500-01.

Regarding Appeals By Michael Lane, et al. (Argument Section III)

The approval of a proposed class action settlement is reviewed for an abuse of discretion. *Eichenholtz v. Brennan*, 52 F.3d 478, 488 (3d Cir. 1995). In approving a settlement, it is "essential that the district court set forth the reasoning supporting its conclusion in sufficient detail to make meaningful review possible; use of 'mere boilerplate' language will not suffice." *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 804 (3d Cir. 1974).

SUMMARY OF ARGUMENT[4]

I. Rule 23 and the Due Process Clause guarantee absent class members the right to exclude themselves from damages class actions to pursue their individual "day in court." *See Oritz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). However, this right is often meaningless to an unsophisticated class member, who receives a form class action notice in the mail, unless he or she is able to consult a knowledgeable attorney, such Borison here, who can review class members' individual circumstances and help them make an informed decision about whether to accept the settlement or opt out.

Rule 23 empowers courts overseeing class settlements to help assure that absent class members have truthful information about the class action and can exercise their right to opt out voluntarily and knowledgeably. Specifically, under the Rule, courts approve the class notice and oversee communications between the named parties and their counsel, on the one hand, and the putative class, on the other. Absent extreme circumstances, however, courts may not go beyond these

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[3] Parts I and II of both the Summary of Argument and the Argument are presented by appellants Badeaux Class Member Opt-Outs and Scott C. Borison, who challenge the district court's orders that invalidated class members' opt-out requests and prohibited Borison from future communications with his clients. Part III of the Summary of Argument and the Argument are presented by appellants Michael Lane, et al., who challenge the district court's approval of the class action settlement.

tools and, as occurred here, nullify the class members' opt-out requests and impose a second opt-out period, while prohibiting the absentees' attorney from communicating with his clients. These measures imposed insurmountable obstacles to opting out and effectively forced the Badeaux opt-outs to participate in a settlement from which they affirmatively sought exclusion.

The undisputed record shows that no extreme circumstances were present here that remotely justified the district court's ruling. Rather, Borison's communications with the Badeaux opt-outs were non-misleading and ethically sound because, rather than coercing his prospective clients to opt out of the settlement, as the settling parties assert, Borison simply offered to consult with class members about their individual circumstances and thereafter make an opt-out/stay-in recommendation. Indeed, after reviewing the loan documents of dozens of class members, Borison recommended that about half of the class members stay in the class, demonstrating both that Borison acted in good faith and that he gave individualized attention to each prospective client who responded to his letter. In sum, the district court's decision abrogating the Badeaux class members' opt-out requests, and its gag order effectively preventing Borison from advising his clients during the second opt-out period, violated both Rule 23 and due process.

II. In addition, the district court's restriction on Borison's future

communications with his clients violated the First Amendment rights of both the Badeaux opt-outs and Borison. As noted above, Borison provided truthful, non-misleading advice that, under the First Amendment, the Badeaux opt-outs were fully protected in receiving and that Borison was fully protected in providing. The First Amendment violation is clear even assuming (incorrectly) that Borison's solicitations letters were potentially misleading. "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity," *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), and the circumstances here do not come close to justifying a prior restraint. Indeed, even in situations of serious attorney misconduct seeking improperly to influence absent class members en masse, courts have rejected prior restraints on attorney-client communications, but instead have crafted limited remedies that have left the "outside" lawyers and putative class members free to communicate with one another.

III. The district court abused its discretion in approving the class action settlement as fair, adequate, and reasonable. The class action settlement released, without any compensation, valuable claims under the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639 ("HOEPA"), and the Truth in Lending Act, 15 U.S.C. § 1601 *et seq*. ("TILA"). For instance, the objectors showed that certain

class members had viable HOEPA claims worth far more than settlement provides, but that class counsel neglected to include a HOEPA claim in the class complaint (though the district court mistakenly believed otherwise) and did not consider the value of such claims in agreeing to the settlement. The district court's approval of a settlement that released these valuable claims therefore constituted an abuse of discretion.

ARGUMENT

I. RULE 23 AND THE DUE PROCESS CLAUSE GUARANTEE ABSENT CLASS MEMBERS THE RIGHT TO CONSULT WITH COUNSEL OF THEIR CHOICE, UNFETTERED BY INTERFERENCE FROM CLASS COUNSEL, DEFENDANTS, OR THE DISTRICT COURT.

Both Federal Rule of Civil Procedure 23 and due process protected the Badeaux class members' rights to communicate with counsel of their choice, as well as Borison's right to solicit and then communicate with clients. Although judges may curtail speech to counter grave harms to class members in narrow circumstances, "[o]rders regulating communications between litigants . . . pose a grave threat to first amendment freedom of speech. Accordingly, a district court's discretion to issue such orders must be exercised within the bounds of the first amendment and the Federal Rules." *In re School Asbestos Litig.*, 842 F.2d 671,

680 (3d Cir. 1988).[5] Because Borison's communications with prospective clients actually helped those clients evaluate their own best interests and act accordingly, the invalidation of the Badeaux opt-outs and the imposition of a prior restraint on Borison's future communications with his clients violated Rule 23 and due process.

A. The District Court's Abrogation of the Badeaux Class Members' Independent Decisions to Opt Out Violated the Text and Purpose of Rule 23.

Federal Rule of Civil Procedure 23(d) gives district courts authority to structure class actions, including opt-out periods, and Rule 23(c) requires district courts to oversee the issuance of notice to putative class members. However, neither of these rules empowered the district court to punish permissible communications between lawyers and clients by simultaneously invalidating Borison's clients' decision to opt out of the class action and prohibiting future communications between Borison and his clients. Quite the opposite, Rule 23 specifically states that absent class members must be notified of the right to retain counsel and to opt out of damages class actions, such as the one at issue here. Rule 23(c)(2)(B) requires that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances . .

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[4]The First Amendment issues implicated by the district court's orders are discussed in Part II below.

. The notice must concisely and clearly state in plain, easily understood language: . . . that a class member may enter an appearance through counsel if the member so desires [and] that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded." The district court violated this text in two respects: (1) it effectively denied the Badeaux opt-outs the opportunity to obtain outside counsel; and (2) it all but forced the Badeaux opt-outs to remain in the class despite their clearly expressed wishes to the contrary.

Other aspects of Rule 23 underscores its core purpose of ensuring that the court and the named parties to the class action do not trample the rights of the absent class members by binding them to an unfair outcome. Thus, for example, Rule 23(c) requires the district court to include detailed information in its order certifying the class, delineating exactly which claims are included, and also permits the district court to revisit its ruling at any time during the pendency of the action, in case it becomes apparent that a class action is an inappropriate vehicle for the members' claims. Rule 23(d) further emphasizes the importance of keeping class members informed by allowing the district court to order notice at various stages of the litigation and structure the class action to protect the rights of absent class members.

However, nothing in Rule 23 suggests that the district court has the power to prohibit future communications between an "outside" lawyer and absent class members, especially when the outside lawyer is advising an absent class member on his or her constitutional right to opt out. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985). Quite the opposite, as discussed above, one key purpose of the Rule is to give district courts the power to ensure that absent class members who may wish to pursue their claims individually are not subsumed by the class action. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-46 (1999); *see also Hansberry v. Lee*, 311 U.S. 32, 41 (1940). Taken together, then, the provisions of Rule 23 simply do not authorize the court to ban communications between absent class members and their lawyers, although, as explained below, they do authorize the issuance of a corrective notice or the establishment of a second opt-out period in limited circumstances.

In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the Supreme Court addressed the intersection between absent class members' right to receive information about pending class actions from lawyers of their own choosing, and district judges' duty under Rule 23 to structure the litigation and provide notice to protect the interests of absent class members. In that case, the district judge had forbidden the named plaintiffs and their lawyers (*i.e.*, putative class counsel) from

communicating with potential class members without first obtaining court permission. The district court also set forth limited exceptions, including one for communications that plaintiffs claimed were constitutionally protected (although plaintiffs were required to submit a copy of these communications within five days after their distribution), and attorney-client communications initiated by the client. *Id.* at 95.

Reviewing this order, the Supreme Court held that, although the potential for communication abuses with absent class members exists in any class action, *id.* at 100, the district court had abused its discretion under Rule 23 when it issued a blanket ban on future communications without first making careful factual findings about the specific harms associated with the communications and the effect of the proposed limitation. *Id.* at 103-04. Specifically, the Court determined that before limiting communications with class members, district courts must find that (i) the text and policies of Rule 23 support the limitation, (ii) there has been a clear showing of the need for the limitation, and (iii) the limitation is narrowly tailored to address specific class-action abuses. *Id.* at 101-02.

In this case, the district court's order establishing a second opt-out period and banning all unapproved communications between Borison and his clients is exactly the type of broad-brush order that the Supreme Court feared, and thus

forbade, in *Gulf Oil* (though the order reversed in *Gulf Oil* was less sweeping that the one at issue here). The district court here failed to make any independent findings regarding the need for its purportedly remedial actions. Moreover, its order undermined the policies of Rule 23 by placing needless encumbrances on the absent class members' right to exclude themselves from the class settlement, as shown further below.

1. There Was No Need to Impose a Limitation on Borison's Communications With Absent Class Members, and, in any Event, the District Court Did Not Make Factual Findings to Support Such a Need.

The district court's October 14 and October 17 orders did nothing more than imply that the court was imposing the second opt-out period and the communications ban because Borison's initial solicitations were unethical or misleading. In its first order, the district court adopted verbatim the proposed order submitted by the settling parties without any independent fact finding or even an opportunity for the Badeaux class members or Scott Borison to be heard. *Compare* SA Vol. II 541 (settling parties' proposed order) *with* SA Vol. I 143 (district court's October 14 order). In its second order, and after presumably reviewing the opt-outs' submissions for the first time, the district court's rationale consisted of one brief paragraph. SA Vol. I 145. The order contained no factual or legal findings nor any recognition that Borison had followed the procedure laid out by

the court three days earlier and requested the court's permission to contact his clients. SA Vol. III 775. However, if the district court had evaluated Borison's communications with the absent class members, it would have seen that they were both ethical and straightforward.

(a) Borison's Communications With Absent Class Members Were Ethical, and the District Court Erred by Imposing Communication Constraints Applicable to Communications From Defendants and Class Counsel, Which Involve Wholly Different Considerations.

Courts considering the effects of allegedly improper communications with absent class members have frequently considered whether those communications complied with relevant ethical rules when deciding whether to send out a corrective notice or take some other ameliorative action. *Dondore v. NGK Metals Corp.*, 152 F. Supp.2d 662, 666 (E.D. Pa. 2001); *Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478, 495 (E.D. PA. 1995); *Kleiner v. First Nat. Bank of Atlanta*, 102 F.R.D. 754, 769 (N.D. Ga. 1983), *aff'd in relevant part*, 751 F.2d 1193 (11th Cir. 1985). But here, rather than considering the relevant rules, the district court only noted that "[i]f there is not a rule of professional conduct that prohibits such activity in the jurisdictions where these lawyers practice, there should be." SA Vol. I 145. If the district court had seriously evaluated the ethics of Scott Borison's communications with class members, it would have realized that they

were constitutionally protected and ethically proper. *See, e.g. Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988) (truthful written solicitations by lawyers protected by the First Amendment, even if they were mailed for the lawyer's pecuniary gain).

States may, of course, regulate the content of written solicitations to ensure that they are non-misleading. Borison's communications complied with all of Florida's and Maryland's ethical requirements. As required in Maryland and Florida, Borison and his co-counsel, Mary Szeluga, labeled their original solicitation an "advertisement" in bold letters at the top of the mailing, stated up front that they worked on a one-third contingency basis, and explained that they would review the class member's case for free before deciding whether to offer the firm's legal services. *See* Fla. R. Prof. Conduct 4-7.1, 4-7.4; Md. R. Prof. Conduct R. 7.1, 7.3.

Further, even if the Badeaux opt-outs had an attorney-client relationship with the named plaintiffs' lawyer, which they did not, Maryland's disciplinary rules do not prohibit soliciting clients who are known to be represented by another lawyer. *Id.* Rule 7.3. Florida's Rules 4-7.4(b)(1)(B) and 4-4.7(b)(2)(H) prohibit solicitation of clients who the lawyer knows already have another lawyer, and thus requires all solicitation letters to begin with the sentence "[i]f you have already

retained a lawyer for this matter, please disregard this letter." Mary Szeluga's letters to the Florida class members complied with this Rule. SA Vol. V 2089. Moreover, the Szeluga letter mailed to Florida class members — which expressly stated that the matter involved a class action settlement — was deemed by the Florida Bar to have complied with the Bar's advertising rules. SA Vol. V 2090.[6]

In any event, Judge Lancaster's suggestion that Borison's communications were improper because the absent class members were "represented by another lawyer," apparently referring to the named plaintiffs' counsel, *see* SA Vol. I 145, was flatly incorrect. As noted earlier, the class action notice here, SA Vol. II 360, like all class certification and settlement notices, explicitly invited class members to retain their own lawyers. *See* Fed. R. Civ. P. 23(c)(2)(B); *Manual for Complex Litigation Fourth* § 21.311, at 289 (Fed. Jud. Ctr. 2004). That practice would make little sense if the drafters of Rule 23 already thought the absentees to be represented in the traditional sense by putative class counsel. In fact, courts have recognized that attorneys for named plaintiffs in class actions do not have a attorney-client relationship with absent class members, at least while class members are still free to opt out. *See, e.g., Cobell v. Norton*, 212 F.R.D. 14, 17

[6] The Florida Bar did not consider whether the advertisement was or was not misleading, an issue discussed in depth below.

(D.D.C. 2002) (citing *Newberg on Class Actions* § 15.18 (3d ed. 1992)); *cf. Greenfield v. Village Inds. Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) (class counsel have "fiduciary" relationship with absent class members that imposes less onerous responsibilities than would a traditional attorney-client relationship); *In re Shell Oil Refinery*, 152 F.R.D. 526, 528 (E.D. La. 1989) ("constructive" attorney-client relationship exists once opt-out period has closed).

Discussing this issue at length, the court in *In re McKesson HBOC, Inc. Sec. Litig.,* 126 F. Supp.2d 1239, 1245 (N.D.Cal. 2000), wrote that "[w]hile lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class. Taken to an extreme, lead plaintiff's logic suggests that putative class members are forever walled off from any effort at solicitation, a proposition that seems unsupportable." Although *McKesson* was discussing a pre-certification class, its reasoning applies with full force here, where the class had been preliminarily certified for settlement purposes to allow class notification, but the opt-out period had yet to close and no final certification had occurred. *See* 4 *Newberg on Class Actions* § 15:16, at 60 (4th ed. 2002) (when opt-out period ends, "[t]he attorneys for the class have assumed fiduciary obligations or constructive attorney-client status with respect to the class," because class

member identities are then fixed).

Moreover, it is only because class counsel does not enjoy a traditional attorney-client relationship with absent class members that the district court has the authority to police their communications. Fed. R. Civ. P. 23(c), (d). Where the typical one-on-one attorney-client relationship exists, such communications would be privileged, and the district court would not have the authority to conduct an independent inquiry into their content. *See Morisky v. Public Serv. Elec. & Gas Co.*, 191 F.R.D. 419, 424 (D.N.J. 2000) (class counsel could not assert attorney-client privilege over questionnaires completed by putative class members, even after class certification). And, of course, if a traditional attorney-client relationship existed, not only would communications be privileged, but class counsel would be required to monitor each client's circumstances and regularly communicate with each client, *see* A.B.A. Model R. of Prof. Conduct 1.4; sending out a court-ordered notice and answering the occasional question from a class member, as is customary in the class action context, would presumably not suffice.

As noted above, courts have traditionally treated named plaintiffs' lawyers as quasi-representatives of absent class members until the end of the opt-out period. This attenuated fiduciary relationship between the attorney and absent class members allows courts to invoke ethical prohibitions on coercive contacts

from *opposing parties* (including *opposing lawyers*) aimed at absentees to protect class members. *See, e.g. Impervious Paint Industries, Inc. v. Ashland Oil*, 508 F. SUPP. 720, 722 (W.D.Ky. 1981). Indeed, most of the cases cited by the parties in their joint motion to invalidate the Badeaux class members' opt-outs concerned communications between *defendants' counsel* and absent class members. *Id*. at 723-24; *In re School Asbestos Litig.*, 842 F.2d 671 (3d Cir. 1988); *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985); *Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630 (N.D.Tex. 1994); *Haffer v. Temple Univ.*, 115 F.R.D. 506 (E.D. PA. 1987). These cases focus on the likelihood that defendants (or their lawyers) might convey misinformation about the class action, or even trick potential class members into giving up their rights, with the goal of minimizing the defendants' liability. In those cases, the named plaintiffs' lawyers, acting as stand-ins for traditional lawyers, are empowered to ask courts to enforce the general ethical prohibition on lawyers having unapproved contact with opposing parties. *See* A.B.A. Model R. Prof. Conduct 4.2. This practice aimed at protecting class members from unscrupulous defendants, unlike this case, is acceptable if accompanied by appropriate safeguards.

However, these "stand-in" situations are poles apart from the situation here, where the absentees interests may be adverse to those of class counsel, and thus

presuming that class counsel has an ordinary attorney-client relationship with the absentees can actually undermine the absentees' individual rights. As is well understood, class action settlements create incentives for plaintiffs' counsel and defendants to collude because plaintiffs' counsel have interests in common with defendants and opposed to the class members. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 801-02 (3d Cir. 1995); *Mars Steel Corp. v. Continental Illinois Nat'l Bank and Trust Co.*, 834 F.2d 677, 681-82 (7th Cir. 1987). Put differently, a settlement class may become "a vehicle for collusive settlements that primarily serve the interests of defendants — by granting expansive protection from law suits — and of plaintiffs' counsel — by generating large fees gladly paid by defendants as a quid pro quo for finally disposing of many troublesome claims." *General Motors*, 55 F.3d at 778. As one court famously put it, "lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991). Thus, it is in large part because of this divergence in interests that district courts must monitor communications between class counsel and absent class members, rather than simply leaving the question of what information to give absent class members to the lawyers and named plaintiffs who brought the case. *See Impervious Paint*

Industries, Inc. 508 F. Supp. at 722 (before opt out period, class counsel must represent interests of absent class members, but may not solicit class members to stay in class).

The general concern about overreaching by class counsel is particularly acute as it applies to the right to opt out of a class. Specifically, class counsel has two independent interests in encouraging class members to remain in the class. First, if too many class members opt out of a settlement, the defendant may withdraw from the settlement, or the court may find it unfair. *General Motors*, 55 F.3d at 812 (when evaluating class's reaction to proposed settlement, courts look to the "number and vociferousness of the objectors"); *Georgine*, 160 F.R.D. at 495 (defendants may abandon settlement or court may find it unfair if too many class members opt-out). Indeed, it is commonplace for defendants to reserve the right to withdraw from a class settlement if the number or potential value of opt-outs is, in the defendant's view, too high. *See* 4 *Newberg on Class Actions* § 12:12, at 304 (4th ed. 2002); *Georgine*, 160 F.R.D. at 495 (referring to relevant settlement provision). The settlement here allowed the defendant to withdraw if a mere .5% of class members opted out. SA Vol. II 326. That may explain why class counsel, as well as Defendants, moved to invalidate virtually all the opt-outs — about one percent of the class — and to gag their lawyers. If the 419 opt-outs had not been

abrogated, defendant could have chosen to abandon the settlement, and the named plaintiffs and their attorney would suddenly be looking at a much more difficult case to settle or litigate before receiving any payment. Thus, both plaintiffs and defendant (who would not want to settle a class action only to face 419 individual lawsuits) had strong incentives to invalidate the opt-outs regardless of the absentees' best interests.

Second, counsel's own fee award will generally be larger when the settlement involves all or nearly all of the class members because the fee is often calculated as a percentage of the actual amount paid to class members, and thus the size of the fee award will vary directly with the number of class participants. *See, e.g., Strong v. Bellsouth Telecommunications, Inc.*, 137 F.3d 844, 851-52 (5th Cir. 1998) *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 378-80 (D. Mass. 1997). Therefore, even the most well-intentioned class counsel may not give completely impartial advice to class members who seek advice about whether to opt out. *Cf. "*Court Awarded Attorney Fees, Report of the Third Circuit Task Force," 108 F.R.D. 237, 266 (1985) ("Even if the plaintiff's attorney does not consciously or explicitly bargain for a higher fee at the expense of the beneficiaries, it is very likely that this situation has indirect or subliminal effects on the negotiations.").

The district court itself seemed to recognize that the absent class members did not have an attorney-client relationship with putative class counsel. In its initial notice, the court listed five possible responses to the proposed settlement available to absent class members. The second option invited the class members to contact "the Named Plaintiff's counsel," and then gave class counsel Bruce Carlson's name and address. SA Vol. II 359. If the district court was of the opinion that Bruce Carlson already represented the entire class, one would assume that it would have indicated as much by telling the class members that Bruce Carlson was their lawyer as well as the "Named Plaintiff's" lawyer. Moreover, later in the notice, the fifth option told class members that they could "discuss this with your own attorney or appear through your own attorney" (emphasis removed). SA Vol. II 360. Clearly, the district court was not referring to class counsel (whom it had already mentioned by name), but rather an outside lawyer who could provide an unbiased assessment of the particular class member's case. Furthermore, if Bruce Carlson was truly expected to act as attorney to each of the absent class members in the ordinary sense, he should have embarked on the impossible task of providing independent, informed advice to each class member about whether to stay in or opt out based in part on a review of each class member's loan documents. *See David B. Lilly Co., Inc. v. Fisher*, 18 F.3d 1112, 1122 (3d Cir. 1994) (attorney

is obligated to give best advice possible based on information received from client) (citation omitted).

In sum, although district courts are empowered to correct misleading communications between class members and either class counsel or the defendant's lawyers, they cannot limit communications between class members and outside lawyers, including client solicitations, on the ground that the class members are already represented by counsel.

(b) In Any Event, Borison's Communications With Absent Class Members Were Not Misleading.

When the settling parties moved to invalidate nearly all of the opt-outs, in the five pages and 24 bullet points detailing the alleged inadequacies of the solicitation letters sent by various law firms, only three were specifically directed at Scott Borison's letter, with most of the remaining points directed at other lawyers' solicitations. SA Vol. II 671-76. The settling parties then attempted to conflate the actions of all of the lawyers who offered advice to class members by claiming that all the firms were working together in an "alliance," and that their letters all suffered from the same defects. SA Vol. II 665. To be clear: Borison was *not* in "alliance" with the other lawyers and no record evidence indicates otherwise. Moreover, the settling parties' complaints about Borison's letters mischaracterized his communications with the Maryland and Florida class

members.

First, the settling parties claim that Borison failed to disclose the risks of individual litigation. SA Vol. II 673. This assertion makes no sense because, as the settling parties concede, Borison specifically told absent class members that they "should have someone review [their] settlement papers to determine whether the proposed settlement makes sense." *Id*. There is nothing wrong with suggesting that absent class members seek advice from a lawyer before deciding whether to opt out, which is all that Borison did. Further, a rule that required lawyers to list all of the potential risks of litigation in their initial contacts with potential clients, in addition to running afoul of the First Amendment, *Cochran v. Veneman*, 359 F.3d 263, 275 (3d Cir. 2004) ("[t]he First Amendment protects the right to refrain from speaking . . . ."); *see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (lawyers' solicitations receive First Amendment protection as commercial speech), would do clients a disservice: Offering a laundry list of potential risks, none of which was tailored to the client's particular situation, would hardly be informative and would likely scare off clients with valuable claims. Thus, just as he would have done for any individual client, Borison waited to discuss the risks of litigation until he understood his clients' situations, at which time he helped them make an intelligent decision about whether to stay in the class.

Second, the settling parties' joint motion claimed that none of the solicitations "explain[s] to the borrowers that the Settlement will provide substantial, immediate and certain payments without the risks and uncertainty of additional litigation." SA Vol. II 674. However, on the very next page, the parties complained that Mr. Borison's letter misstated the amount of the potential recovery (by citing a maximum recovery of $900 instead of $925), and also that the letter observed that "ultimately [class members] have little if anything to lose because the settlement offer is so low," without explaining which factors could cause the recovery to vary. SA Vol. II 675. Clearly, then, the letter does explain that class members who opt out will forgo their share of the settlement. The letter allowed class members to decide for themselves whether a maximum of $900 (or $925) was "little if anything to lose." Borison put the potential range of settlement amounts and the fact that the settlement will be lost to class members who opt out front and center in his letter.

Furthermore, in his second letter to class members (which was sent to correct a misstatement of the opt-out deadline in the original letter), Borison explicitly referred to the class notice. SA Vol. V 2088. Unlike the situation in *Georgine*, where many class members received a solicitation to opt out of a class without ever receiving the class notice, 160 F.R.D. at 492 n.17, no evidence here

even suggests that any of the class members whom Borison contacted had not already received the class notice. Furthermore, if Borison had included a copy of the class notice with his letter or recited the terms of the settlement as put forth in the class notice, his letter would have become confusing as well as redundant. Not only might class members have been overwhelmed by the sheer amount of information, they may have believed that Borison was working on behalf of the court or the named plaintiff's counsel, and that his letter was intended to somehow supplement the court-ordered notice. And most importantly, all of the specifics of each class member's situation, including the amount the member would receive under the settlement and the risks of opting out, could be discussed in depth if the member chose to meet with Scott Borison for the offered free consultation.

* * *

For all of these reasons, Borison's communications were neither misleading or coercive, and the district court's order abrogating the Badeaux class members' opt-out requests violated Rule 23.

B. The District Court's Order Violated the Class Members' Due Process Rights to Opt Out.

Because class actions may have a res judicata effect on absent class members, the Supreme Court has repeatedly observed that due process requires that class members be provided a meaningful opportunity to opt out of monetary

settlements. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833-34 (1999); *see also Drelles v. Metro. Life Ins. Co.*, 357 F.3d 344 (3d Cir. 2003); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 199 (3d Cir. 1993); *cf*. 1966 Rules Advisory Committee Notes to Rule 23, 39 F.R.D. 69, 107 (notice in Rule 23(b)(3) class action "designed to fulfill requirements of due process to which the class action procedure is of course subject."). The right to opt out is meaningless to absent class members who do not understand the nature and value of their claims. Thus, the class notice serves as a substitute for the personal advice that an individual litigant would receive from an attorney and is a main component of the constitutionally-mandated process due absent class members. *Shutts*, 472 U.S. at 811; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306 (3d Cir. 1998); *Greenfield*, 483 F.2d at 832-33.

However, in an ideal situation, each absent class member would have his or her case evaluated by an experienced and impartial attorney, who would then advise the class member to stay in or opt out of the settlement. *Greenfield*, 483 F.2d at 831-32 (class actions are the exception to the general rule that only fully participatory parties are bound by judgments, and can only be tolerated if specific due process protections are in place); *see Ortiz*, 527 U.S. at 846 (referring to

individual "day in court" ideal in ordinary litigation) (citing *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). This individualized attention is exactly what Borison provided for the Maryland and Florida absent class members whom he advised. Therefore, when the district court invalidated the Badeaux opt-outs and imposed a communications ban on Scott Borison, it deprived the Badeaux class members of their constitutional right to escape the preclusive effect of the class settlement after obtaining advice about the strengths and weaknesses of their individual cases.

Deciding whether to forgo a potentially valuable individual claim in favor of participating in a class action can be quite stressful for absent class members, who often hear about the existence of the class action for the first time when they receive the court-approved notice. For this reason, the class notice in this case, SA Vol. II 355, following the standard form, *see Manual for Complex Litigation Fourth*, §21.311, at 289 (Fed. Jud. Ctr. 2004), explicitly advised class members that they could either retain their own lawyers or contact the class counsel for advice. However, even armed with this advice, the Badeaux class members likely had no idea what to ask an outside lawyer whose sole credential (for all they knew) was having obtained a law license, and they would reasonably believe that consultation or retention of an individual lawyer would be quite costly, as many class action notices indicate. *See* Federal Judicial Ctr., Model Securities Class

Action Certification and Settlement Notice, at 7 ("If you want to be represented by your own lawyer, you may hire one at your own expense.") (available at www.fjc.gov). Furthermore, class counsel could not possibly have found the time to review each absentee's case before making an assessment of the merits of accepting the settlement or "going it alone."

Thus, it is easy to imagine that many class members in Maryland and Florida were relieved to receive Borison's letter — clearly labeled an advertisement — in which Borison offered to review their cases for free and represent class members with strong independent cases on a contingency basis. The class members would be able to weigh a concrete offer of representation from a lawyer with significant expertise in TILA cases, and they could be confident because the contingency fee arrangement meant that it would be in Borison's best interests to make a thorough evaluation of their individual cases before making a recommendation about class participation, on the one hand, or filing an individual suit, on the other.

By invalidating the Badeaux opt-outs and ordering Borison to refrain from any unapproved contact with his clients, the district court needlessly put up an additional barrier to opting out, effectively preventing Borison's clients from exercising their due process rights to preserve their individual claims against the Defendants. And, although the notice and opt-out provisions of Rule 23 are

designed to "tilt the balance of inertia in favor of class participation," *Kleiner*, 751 F.2d at 1202 n.18, the Badeaux opt-outs were not inert. Rather, they sought expert advice about their potentially valuable claims and made an informed decision to pursue their claims individually, only to receive a second court-ordered notice that their decision to opt out had been invalidated. Then, when the class members tried to contact their lawyer to find out what had happened, they discovered that he suddenly could not take their calls. Unsurprisingly, these would-be opt-outs followed the path of least resistance and did not file a second opt-out notice. Thus, by imposing a "remedy" for alleged improper solicitations, the district court all but forced Borison's clients to remain in the class in contravention of their expressed wishes, since only the most intrepid absent class members would re-opt-out after apparent abandonment by their lawyer, whose ethics the district court has questioned in a letter directed to them.

For these reasons, the district court's order violated the Badeaux opt-outs' rights to due process.

C. The District Court's Chosen Remedy Was Not Narrowly Tailored to Address the Perceived Abuses.

Because the district court simply adopted the parties' proposed order when it invalidated the Badeaux opt-outs on October 14, 2003, SA Vol. I 143, there is no way to know which, if any, specific problems the district court's order was

designed to remedy. This situation was aggravated by the district court's October 17 order, SA Vol. I 145, which treated Borison's attempt to follow the court's previous instructions for contacting his clients as a motion to reconsider (and again offered no rationale), and sent the message that *no* outside lawyers would be permitted to communicate with absent class members. Furthermore, because the district court failed to make factual findings about the need for its chosen remedy to address particular misconduct, future lawyers attempting to comply with the court's order could not draft a letter and be confident that it would meet with the court's approval. Ultimately, though, the district court's order was unlawful because, even if Borison's communications with the absent class members had been improper in all of the ways alleged by the settling parties, the district court's remedy was not carefully tailored to address those perceived improprieties.

Since the *Gulf Oil* decision, district courts have grappled with balancing absent class members' rights to receive accurate information about pending class actions with the rights of others who have an interest in the case. This balancing is easy in this case because Borison's communications actually enhanced the Badeaux opt-outs' abilities to make informed decisions. However, even if Borison's interests had not been aligned with the Badeaux class members, the district court's order would nonetheless constitute a distant outlier among cases

dealing with the appropriate treatment of absent class members and their "outside" lawyers.

Even in egregious cases, in which the *defendant* in a class action contacts class members to convince them to opt out against their best interests, courts have been careful to impose tailored remedies that limit communications as little as possible. *See, e.g., H&R Block v. Haese*, 82 S.W.3d 331, 337 (Tex. App. 2002) (prohibiting defendant only from initiating communications designed to influence plaintiffs' decisions related to the class action); *Haffer v. Temple Univ.*, 115 F.R.D. 506, 512 (E.D. Pa. 1987) (issuing corrective notice, prohibiting defendants from making further "improper communications," assessing fees, and imposing sanction following repeated bad-faith communications from defendant to plaintiff class members). As these cases suggest, courts have been reluctant to forbid all future communication even between *defendants* and absent class members.

On the few occasions when courts have sought to remedy *outside* lawyers' improper client solicitations, the corrective measures have been even more limited, rarely extending beyond issuing an additional notice to class members, and even that remedy has been imposed only after the court made careful and specific findings of wrongdoing. For example, in *In re Worldcom, Inc. Sec. Litig.*, 2003 WL 22701241, *3-5 (S.D.N.Y.), the court made extensive findings regarding a law

firm's solicitation of class members that misled class members as to their representation in the relevant class action. In *Worldcom*, the outside law firm apparently wanted to get as many clients as possible, without regard to the merits of their individual cases, *id*. at *6, which stands in direct contrast to the highly individualized attention that Borison paid to class members, advising many members to remain in the class. Third Cir. Aff. ¶ 13; *see also Worldcom*, 2003 WL 22701241, *6 (finding that law firm was treating its clients as though it was running class action, rather than giving them individualized attention). However, even on those facts, the *Worldcom* court nonetheless carefully surveyed the harm to potential class members and ultimately ordered only that an additional notice be sent to class members to ameliorate the effect of the misleading communications, 2003 WL 22701241, *9, *but it did not bar future attorney-client communications.*

Even in *Georgine v. Amchem Prods., Inc.*, a case in which misleading solicitations received stern treatment, the court-imposed remedy consisted of only a second opt-out period. 160 F.R.D. at 508. There, where the outside lawyers' actions were far more egregious than even the settling parties' characterization of Borison's communication, the court specifically rejected the Defendants' request for an order requiring future communications with class members to include a statement disclosing the lawyer's financial interest in convincing clients to opt out.

Id. at 517.[7]

The only case in which a court responded to a third party's misleading communications during an opt-out period by imposing a remedy as incapacitating as the one imposed on Borison and his clients deals with a firm that sought to usurp the court's role by providing the same general information contained in the class notice via an exorbitantly expensive "1-900" telephone number. *In re Domestic Air Transport. Antitrust Litig.*, 1992 WL 357433, *1 (N.D. Ga. 1992). In that case, not only was there a real risk that class members would think the firm, Advanced Telecom Services (which may not have even employed any lawyers), was associated with the court, but the phone line provided absolutely no value to the class members. *Id.* at *1-2. Thus, the conduct at issue in *Domestic Air* was an unabashed attempt to use the communications themselves to take the clients' money, in sharp contrast to Borison's letter at issue here, which cost the class members' nothing and did nothing to enrich Borison.

* * *

For all of the reasons state above, the district court's invalidation of the Badeaux opt-outs and the imposition of the communications ban should be

[7] Requiring a lawyer to affirmatively include a statement in his or her communications still raises significant First Amendment and Rule 23 problems, but is far less onerous than a total communications ban.

reversed on Rule 23 and due process grounds.

II. THE DISTRICT COURT'S ORDER PROHIBITING FUTURE ATTORNEY-CLIENT COMMUNICATIONS DURING THE SECOND OPT-OUT PERIOD IMPOSED AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SPEECH, INFRINGING BOTH THE BADEAUX CLASS MEMBERS' AND BORISON'S FIRST AMENDMENT RIGHTS.

Although the Supreme Court in *Gulf Oil* did not reach the question whether the district court's prohibition against future attorney-client communications violated the First Amendment, it did observe that "the order involved serious restraints on expression." 452 U.S. 89, 104. In light of the undisputed facts regarding Borison's communications, the ban here — which prevented the Badeaux opt-outs from getting information from their lawyer and prevented their lawyer from speaking to his clients — violated the First Amendment. Moreover, even assuming that the facts could have supported some sort of speech restriction, reversal is required because the district court made no independent factual findings regarding either the necessity of imposing a prior restraint or the scope of the restraint imposed.

A. The First Amendment Protects the Badeaux Class Members' Rights to Receive Information About a Matter of Great Concern to Them

Courts have consistently recognized that the First Amendment "involves not only the right to speak and publish but also the right to hear, to learn, to know."

Presidents Council Dist. 25 v. Cmty School Bd No. 25, 358 U.S. 589, 609 (1972). For example, in *Carey v. Population Services International*, 431 U.S. 678 (1977), the Supreme Court struck down a New York statute that prohibited anyone from advertising contraceptives or distributing them to anyone under age 16, and permitted only licensed pharmacists to distribute contraceptives to people over age 16. The Court reasoned that citizens could not meaningfully exercise their constitutional rights to plan if and when to have children if their access to information about family planning techniques was significantly impeded by the state. *Id.* at 684-85. Notably, the Court was not swayed by the argument that it was theoretically possible to obtain the same information from other sources; it was enough that one significant channel of information was cut off. *Id*. at 688-90.

Just as one cannot make an informed decision about using contraceptives in the absence of information about how to obtain them, citizens cannot exercise their constitutional rights to opt out of a class action or to retain legal counsel of their choice in a vacuum. *Ortiz* 527 U.S. at 845 (right to opt out); *Gates*, 234 F.3d at 227 (fundamental right "to consult counsel of [one's] choice on matters of great concern to them."). Thus, far from being a nuisance, truthful attorney solicitations serve as a necessary aide to consumers who may otherwise be unaware of even the existence of a viable legal claim, *Bates v. State Bar of Arizona*, 433 U.S. 350, 370

(1977), much less of their constitutional right to opt out of a class action. *See also Florida Bar v. Went For It*, 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting).

Importantly, the district court's gag order need not have implicated a constitutional speech right held by Borison to violate the Badeaux opt-outs' First Amendment rights to receive Borison's communications. Thus, even if Borison's right to solicit (discussed below) were to receive somewhat limited First Amendment protection because of its commercial nature, the Badeaux opt-outs' rights as *listeners* should receive the full protections offered by the First Amendment. *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (requirement that recipients of communist pamphlets sign a card, to be filed at post office, indicating their desire to have pamphlets delivered violated recipients' First Amendment rights, even though sender of pamphlets, who was not American, had no First Amendment rights). *See also Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (would-be listeners had independently enforceable First Amendment right, even though would-be speaker had no First Amendment right). Thus, the district court's ban violated the Badeaux opt-outs' independent right to receive information about their cases from Borison, especially because Borison was a significant source of detailed information about their particular claims in the context of the class action that was unavailable from class counsel.

B. The First Amendment Protects Borison's Solicitation of Clients and Subsequent Communications After the Formation of Attorney-Client Relationships.

In *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988), the Supreme Court considered whether Kentucky could prohibit lawyers from sending non-misleading "personalized" solicitation letters to potential clients who were known to face particular legal difficulties. The Court found that even when lawyer solicitation letters contained subjective language designed to influence the recipient, they did not create the same risk of inducing potential clients to act against their own interests as would an in-person solicitation. Furthermore, the Court noted that "[s]uch advertising is constitutionally protected commercial speech, which may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Id.* at 466. Relying on that principle, the Court held that "rules that are designed to prevent the 'potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the' perceived evil," *id.* at 472, and invalidated Kentucky's rule prohibiting attorney solicitation letters. *See also, e.g.*, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 640-42 (1985); *Bates*, 433 U.S. at 370; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (carefully scrutinizing, and ultimately rejecting, proffered

justifications for prior restraint and noting "heavy presumption" against such restraints).

Thus, Borison's solicitation was protected speech even though it was aimed at persuading the class members to take a particular course of action — contacting Borison for a consultation because the settlement might not be in all class members' best interests — because, for the reasons previously explained (in Part I.A.1(a)), the solicitation was not misleading. Moreover, there was absolutely no justification for regulating the kind of communications that Borison had (and desired to have) with the class members after his initial solicitation. Those communications — advising class members of their rights both before and after the district court imposed the prior restraint — constitute "pure" (not commercial) speech that can only be curtailed in the most extraordinary circumstances. In sum, Borison's communications with the absent class members should have received First Amendment protection.

C. Had the District Court Made Factual Findings, the Record Could Not Have Supported the Prior Restraint, Which Imposed Severe Harms on Both the Badeaux Opt-Outs and Borison.

Courts have traditionally defined a prior restraint as a "predetermined judicial prohibition restraining specified expression. . . ." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975); *Nebraska Press Ass'n v.*

Stuart, 427 U.S. 539, 559 (1976). The district court's order forbidding Borison from communicating with his clients constituted a prior restraint, as it functioned to silence Borison in advance to remedy allegedly improper statements that were already made. "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin*, 402 U.S. at 419 (criticism of real estate agent insufficient justification for temporary injunction against pamphleteers, even if agent would suffer economic harm).

This "heavy presumption" applies because, as the Supreme Court has recognized, "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And, indeed, Borison and his clients were irreparably injured by the district court's order. First, the approximately 40 class members who did not opt out during the second opt-out period suffered an injury of constitutional dimensions through their forced inclusion in a class settlement, *see Hansberry v. Lee*, 311 U.S. 32 (1940), which required them to protest their treatment all the way to this Court, lest they be precluded from suing individually and sacrifice all of their claims relating to their Community Bank loans. Second, Borison has been injured both because, as *Elrod* recognized, any loss of one's right to speak

constitutes a severe, irreparable injury, and because his clients' faith in him has undoubtedly been shaken, which could negatively affect his immediate and future revenues. Borison learned of this case from one former client, followed shortly thereafter by one word-of-mouth referral, Third Cir. Aff. ¶¶ 7-8; SA Vol. V 2055 — in other words, because of his positive reputation. After reluctantly complying with the district court's gag order, it is likely that Borison received publicity of a different sort from class members who had no way of knowing that Borison's failure to return their calls was not the result of his negligence or willful disregard of his obligations to his clients.

When addressing communications restrictions between class members (or potential class members) and lawyers, courts have typically had no need to reach the question whether the restriction was a prior restraint, because that restriction also violated Federal Rule 23. *Gulf Oil,* 452 U.S. at 103-04; *Rodgers v. U.S. Steel Corp.*, 508 F.2d 152, 164-65 (3d Cir. 1975) (invalidating local rule restricting communication between potential class members and would-be class attorneys); *Gates v. Cook*, 234 F.3d 221, 227 (5th Cir. 2000) (applying *Gulf Oil* analysis to class members' motion to substitute counsel); *Williams v. U.S. District Court*, 658 F.2d 430, 434 (6th Cir. 1981). So too, here, as addressed above (at 29 - 43), no interest sufficient under Rule 23 necessitated the district court's order. Thus, all

the reasons that the district court's orders violate Rule 23 apply *a fortiori* in the First Amendment context.

D. In Any Event, The District Court Erred in Imposing a Prior Restraint Because It Did Not Make Factual Findings Demonstrating Both the Existence of a Serious Harm Requiring a Court-Ordered Remedy and That the Remedy Chosen Was No Broader Than Necessary to Redress That Harm.

In *Carroll v. President & Comm'rs. of Princess Anne*, 393 U.S. 175, 184 (1968), the Supreme Court discussed the importance of using factual findings to justify imposing a prior restraint on speech because "the order must be tailored as precisely as possible to the exact needs of the case." The Court found that it was improper to grant a temporary injunction, prohibiting a white supremacist group from holding a rally, in an ex parte hearing, and explained that the ex parte procedure was inadequate because "even where this presumption [against prior restraint] might otherwise be overcome, the Court has insisted upon careful procedural presentation and consideration of the matter which the circumstances permit." *Id*. at 181; *see also U.S. v. Noriega*, 917 F.2d 1543, 1550 (11th Cir. 1990) (district court could not impose prior restraint preventing newscasters from broadcasting Noriega's trial, even though Sixth Amendment rights were potentially threatened, without making factual findings and narrowly tailoring the restraint. "[T]he District Court must *delineate carefully* its reasons for proscribing the

broadcast . . . .") (emphasis in original).

In imposing the communications ban, the district court violated the Supreme Court's directives in nearly every way. In addition to failing to make any factual findings, the district court initially imposed the communications ban ex parte, adopting the settling parties' proposed order wholesale without adding any specific findings of wrongdoing or explanation of how the remedy was narrowly tailored to compensate for those wrongdoings. Indeed, it may not have been able to lawfully articulate its reasons without the Badeaux class members' and Borison's participation, since, as *Carroll* indicates, ex parte proceedings do not allow even the most careful court to make findings that can support a prior restraint.

The need for an in-depth fact finding in this case was underscored by the district court's response to Borison's motion for approval of a proposed letter to class members. *See* SA Vol. III 775. If the district court had taken the motion on its face, rather than inexplicably treating it as a motion for consideration, the court would have been at a loss to evaluate Borison's proposed letter because it had not previously set any standards by which to judge its propriety. The court would have needed to start at square one by evaluating why the previous letters to the absent class members had been improper and, only after making that analysis, could it then judge whether the proposed letter suffered from the same faults. Moreover,

Borison had no guidance in attempting to draft an acceptable letter to his clients because the court's order told him *nothing* about what would constitute a permissible communication. Under Supreme Court precedent discussed above, a district court cannot subject lawyers to a prior restraint that enjoins them from communicating with their clients and fails to explain how to qualify for the court's only exception to the restraint, even assuming there is a sufficiently compelling interest that supports a prior restraint in the first place.

* * *

For all of these reasons, the district court's order violated the First Amendment and should be reversed.

III. THE DISTRICT COURT ERRED IN APPROVING THE SETTLEMENT AS FAIR, ADEQUATE, AND REASONABLE BECAUSE IT RELEASED NON-CLASS HOEPA AND TILA CLAIMS WITHOUT COMPENSATION.

In 1994, Congress learned that several high-rate lenders were using non-purchase money mortgages to take advantage of unsophisticated and low-income homeowners in a "predatory" fashion. *See* S. Rep. 103-169, 1994 U.S.C.C.A.N. 1881, 1907. In response, Congress enacted the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639. A loan is "predatory" and subject to HOEPA if the lender charges over 8% in fees and points. In setting the 8% bright line test, Congress found that the 8% level for points and fees was well above the industry

average. The 8% trigger "prevent[s] unscrupulous creditors from using grossly inflated fees and charges to take advantage of unwitting consumers." S. Rep. 103-169, 1994 U.S.C.C.A.N. 1881, 1908. For example, one class member, Mr. Jones, was sold a predatory loan containing 12% in up-front points and fees. SA Vol. V 2057-58 (¶ 17), 2078-79. Mr. Jones, as well as most of the class members, were the "unwitting consumers," taken advantage of by the Defendants, the "unscrupulous creditors."

The release of the HOEPA claims were the center of the opposition to the class settlement during the objections process and at the fairness hearing. *See* Nov. 14, 2003 Tr., SA Vol. V 2006, 2010, 2014-18. The objectors contended that the HOEPA claims had great value, and yet class counsel had failed to assert any HOEPA claims. The objectors presented evidence that HOEPA claims had resulted in settlements as high as $21,000 to the borrower. SA Vol. V 2054, 2086-87. The details of other HOEPA settlements were subject to confidentiality agreements. *Id*. Notwithstanding that HOEPA claims were never asserted in the class action, the class release covered the class members' HOEPA claims.

Class counsel advised the district court that they had chosen not to assert any HOEPA or TILA claim because they were not susceptible to class treatment. *See* Carlson Declaration, SA Vol. IV 1380-81 (¶ 35); *see also* Nov. 14, 2003 Tr., SA

Vol. V 2011. Even though the failure to assert HOEPA claims (and their subsequent release) was the central issue raised by objectors, the district court erroneously believed that the plaintiffs had alleged claims on behalf of the class under HOEPA, noting in its opinion approving the settlement that "Plaintiffs . . . allege in their consolidated amended complaint that defendants . . . acted in violation of the Home Ownership and Equity Protection Act ("HOEPA")." SA Vol. I 174. This factual error may account for the court's approval of the settlement.

Nor can there be any doubt that an assessment of the HOEPA claims should have been important to a court reviewing the fairness of this settlement. HOEPA requires an additional set of disclosures to be provided to the consumer, at least three business days before the consummation of the loan, in conspicuous type size. The Defendants here used a common loan form that failed to set forth the specific disclosures in conspicuous type size as required under HOEPA, and thus provided a straight forward basis for a class claim under HOEPA. However, no such claims were pursued by class counsel.

Congress imposed statutory damages on lenders who violate HOEPA, which allows borrower to recover *all* of their finance charges as damages. 15 U.S.C. § 1640(a)(4). Finance charges include all points, fees, and interest. 15 U.S.C. §

1605. Moreover, this right may be asserted via recoupment as a defense to any action to enforce the loan. 15 U.S.C. § 1640(e). Given the high interest rates and costs included in the loans, default and corresponding suits against these homeowners was fairly likely, and yet the class settlement releases those claims without compensation.

In addition to the HOEPA claims, the class members have potential claims under TILA. *See* SA Vol. III 787-877 (describing violation involving 41 class members based on review conducted by Borison). Under TILA, a client has the right to cancel the transaction for up to three years after consummation if the consumer is not provided accurate material disclosures, 15 U.S.C. §§ 1635 (a), (f), including an accurate annual percentage rate. If a consumer rescinds a transaction, the consumer is entitled to a return of all finance charges. TILA also provides statutory damages of up to $2,000, which can be raised defensively in a collection action. 15 U.S.C. § 1640(e). These claims, too, were released without compensation.

Class counsel did not adequately investigate the HOEPA and TILA claims. If he had, he would not have consented to the release of these claims in the class settlement. A settlement is not fair, reasonable, or adequate if it allows valuable, un-investigated claims to be gratuitously included in a release. Although the class

counsel did not comprehend the value of the HOEPA or TILA claims, the Defendants, one of which had paid a substantial settlement in a single case, undoubtedly understood the prize they were obtaining by paying a minimal amount to each class member for a release of HOEPA claims (as well as any other potential claim on the class members' loans). In the absence of any meaningful review of the value of the HOEPA and TILA claims, the determination that the settlement is fair, reasonable, and adequate does not withstand scrutiny and should be reversed.

CONCLUSION

For the reasons stated above in Parts I and II, the district court's orders invalidating the Badeaux class members' opt-outs, imposing a second opt-out period, and enjoining Scott Borison from communication with his clients should be reversed, with instructions that the Badeaux class members' requests for exclusion from the class action be reinstated.

For the reasons stated in Part III above, the district court's decision approving the class action settlement should also be reversed.

Respectfully submitted,

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