No. 07-56650

Consolidated with Nos. 07-56643, 07-56645, 07-56646, 07-56647, 07-56649, 07-56651, and 07-56833

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN RODRIGUEZ, et al.,

Plaintiffs-Appellees,

and

ROBERT GAUDET, JR., ANDREA BOGGIO, SANDEEP GOPALAN, and ELIZABETH DeLONG,

Objectors-Appellants,

v.

WEST PUBLISHING CORPORATION, a Minnesota corporation dba BAR/BRI, et al.

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of California (No. CV 05-3222 R(MCx), Hon. Manuel L. Real)

REPLY BRIEF FOR OBJECTORS-APPELLANTS ROBERT GAUDET, JR., ET AL.

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SUMMARY OF ARGUMENT

Class counsel make little effort to defend the two rulings of the district court challenged by the Gaudet objectors—the court's refusal to consider the potential treble damages recovery in assessing the adequacy of the settlement, and its denial of the Gaudet objectors' request for access to the almost completely sealed record of the litigation. The defendants, by contrast, attempt to rationalize both rulings, but their arguments fail to supply a reasoned basis for either one.

The defendants' effort to support the district court's holding that treble damages may not be considered in determining the adequacy of an antitrust class action settlement is doomed to incoherence by their own acknowledgment that the district court's evaluation of a settlement necessarily encompasses consideration of the plaintiffs' likelihood of success, including the extent of damages they may receive if they prevail. Def. Br. 34. It is impossible, however, to consider the extent of damages that plaintiffs will receive if they prevail in an antitrust action without recognizing that, as a matter of law, the damages must be trebled. Contrary to the defendants' assertion, there is nothing remotely "speculative" about recognizing that the possible success of the plaintiffs' claims would carry with it an entitlement to treble damages.

The defendants' assertion that the district court's error in this respect was harmless because the settlement would be found adequate even if compared to a

possible treble damages recovery is even more unfounded. Here, it is the defendants who engage in rank speculation about what the district court would have done had it applied the proper standard. That speculation falls far short of the demonstration required by this Court's precedents defining harmless error—that is, a showing that it is *probable* that the error had no effect on the decision.

With respect to the sealing of the record, the defendants acknowledge that the district court never made any of the findings necessary under this Court's precedents to justify the sealing of each filing to which the Gaudet objectors sought access—neither a finding of "good cause" for protection of any particular document, nor the more demanding showing of "compelling reasons" for the sealing of dispositive motions. *See* Def. Br. 51. Nor are the appellees' arguments that the objectors had no need for access persuasive. Indeed, the defendants' defense of the settlement in their brief rests to a great extent on analysis of the sealed reports of the plaintiffs' and defendants' damages experts—materials that were denied the Gaudet objectors. Finally, the appellees' arguments that the Gaudet objectors proceeded improperly in raising the sealing issue are meritless and were, in any event, not the reasons relied on by the district court in denying the relief the objectors sought.

ARGUMENT

I. The District Court's Refusal to Consider Treble Damages Requires Reversal.

A. The District Court's Categorical Rule Barring Consideration of the Availability of Treble Damages Is Legally Unsupportable.

Class counsel and the defendants do not take issue with the proposition that it is an abuse of discretion for a district court to rely on an erroneous principle of law in approving a class action settlement. *See* Gaudet Br. 16. Nor are they able to contest that the district court's assessment of the adequacy of this settlement rested, in significant part, on its adoption and application of a legal rule, based on the court's reading of the Second Circuit's decision in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), that a district court *cannot* consider the availability of treble damages in assessing the adequacy of the settlement of an antitrust class action. If that rule is legally erroneous, the district court's application of it was an abuse of discretion requiring reversal unless it was harmless error.

The defendants argue that the district court's application of the *Grinnell* rule cannot have been "legal error" because it is supported by *Grinnell* and district court decisions following it, and because this Court has not yet directly rejected this aspect of *Grinnell*. Def. Br. 30-31. The defendants' suggestion that a district court's ruling can only constitute legal error if it violates a *preexisting* decision of

this Court cannot be taken seriously. Common-law courts, including appellate courts, articulate legal principles in considering cases brought before them for review, and they can, and in most cases must, apply their rulings to the cases before them even when elaborating legal rules that have not previously been clearly established, "in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991).[1] If the defendants' view were correct, a district court could never be found to have committed a reversible legal error in ruling on an issue not specifically addressed by an appellate court.

The defendants' defense of the district court's adoption of its *Grinnell*-based rule is no more convincing. The defendants contend that the district court's holding that it could not permissibly consider the availability of treble damages is consistent with this Court's multifactor approach to assessing the adequacy of a class action settlement, but their own description of the nature of that approach disproves their point. As the defendants themselves put it, this Court requires

[1] Decisions that represent clear departures from established rules need not always be applied retroactively either to the cases in which the new rules are established or other pending matters, *see id.* at 534 (noting that retroactivity issue arises when there is a question "whether the court should apply the old rule or the new one"); *see also Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), but there is no such issue here, because no one argues that the district court's reading of *Grinnell* was established as the "old rule" in this Circuit.

district courts to consider, among other factors, "probability of success on the merits, a factor which subsumes the question of the extent of damages that might be awarded." Def. Br. 34. Defendants do not explain how a district court could accurately consider "the extent of the damages that might be awarded" without taking into account that, in a federal antitrust case, the only form of damages available are *treble* damages.

Even while acknowledging that the district court is required to consider how likely it is that the plaintiffs would succeed on the merits, and the extent of damages that might be awarded if they did, the defendants illogically assert that "[t]he District Court was not required to take treble damages expressly into account for the reason that Congress chose to make treble damages automatically available to plaintiffs prevailing at trial (Gaudet at 18), because the Class did not prevail at trial." Def. Br. 31. If that reasoning were correct, it would also mean that the court should not consider possible damages at all, because damages are never awarded unless the plaintiff prevails. The point the defendants miss, and that the district court missed as well, is that assessing a settlement's fairness requires the district court, among other things, to compare the settlement to the possible outcomes at trial—one of which is that the plaintiffs will prevail. *See Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995). Because

it is undisputed that the plaintiffs would be entitled to treble damages if they were to prevail, it is impossible to consider the upside potential of the case without taking treble damages into consideration. That does not mean that considering treble damages "assumes" the plaintiffs will prevail (as the district court wrongly stated); rather, the district court must also assess the strength of the plaintiffs' case and other risk factors contributing to the possibility that they will not prevail at trial, *Staton*, 327 F.3d at 959, and discount the potential recovery accordingly. *See Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

Nor is it the case that considering treble damages would require "a mechanical, rigid additional requirement that the District Court specify the precise probability that the Class would prevail and the treble damages that might be won." Def. Br. 36. No court has required such false precision in the district court's exercise of judgment; rather, what is called for is a determination of a "range of reasonableness," considering both likelihood of success and possible recovery, against which the settlement can be assessed. *GM*, 55 F.3d at 806; *see also In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981) ("range of possible recovery"). What the district court may *not* do is truncate that range by arbitrarily lopping off the top two-thirds.

The defendants' contention that rejecting the district court's application of *Grinnell* would require district courts to "speculate" about damages is similarly off the mark. Again, the defendants acknowledge that this Court's approach (and *every* circuit's approach) already requires the district court to consider the possible damages a class may prove if it prevails (Def. Br. 34). Indeed, the district court did just that in this case, when it compared the settlement amount to the range of *actual* damages estimates presented by the experts for the plaintiffs and defendants. ER 41. Moreover, the defendants themselves effectively acknowledge the importance of analysis of possible damages amounts to the fairness of the settlement by basing their defense of the settlement amount principally on their view of the weight of the expert opinions concerning damages and the relationship of the settlement amount to the damages estimates offered. *See* Def. Br. 20-23, 24-26. In short, the defendants acknowledge that the district court can and must consider the potential damages recovery in the case, even though that consideration inherently involves some element of speculation. No *additional* speculation is entailed in recognizing that those potential damages would, as a matter of law, have to be trebled if the class prevailed. Put another way, there is nothing speculative about multiplying by three.

Beyond their policy arguments, the defendants invoke "precedent," Def. Br. 30, by which they mean nothing more than *Grinnell* itself, the handful of district

courts that have followed it, and a single treatise that descriptively cites *Grinnell*'s nonsensical appeal to "tradition." Def. Br. 30-31. Aside from those citations, however, the defendants make no effort to defend *Grinnell*'s fallacious reasoning that parties settling antitrust cases "traditionally" do not weigh the possibility of treble damages and that consideration of treble damages would require the defendants to concede guilt and make settlement impossible. *See* Gaudet Br. 23-25. Indeed, virtually all the defendants have to say on behalf of *Grinnell* is that "this Court has followed *Grinnell*'s teachings." Def. Br. 31 (citing *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir 1998)). They neglect to mention, however, that the point for which this Court cited *Grinnell* favorably in *Linney* was *not* that treble damages should be disregarded in assessing the fairness of an antitrust settlement, but the entirely uncontroversial, black-letter point that the small size of a settlement in relation to the potential recovery in a case does not, "in and of itself," mean that the settlement is inadequate. *Linney*, 151 F.3d at 1242.[2]

[2] As our opening brief observed, *Linney* agreed with *Grinnell* on that point while also noting that on other issues *Grinnell* had been repudiated and was no longer good law. *See* Gaudet Br. 18-19 n.10. That this Court has both criticized and followed *Grinnell*'s holdings on other issues has little bearing on whether *Grinnell* was correct in stating that district courts should not consider treble damages in assessing antitrust settlements, other than to suggest what is apparent anyway: This Court need not accept everything *Grinnell* said as gospel.

Nor are defendants correct in asserting that this Court's decision in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), "has nothing to do with this case." Def. Br. 32. The defendants' argument is based on the contention that "the legal issue decided by the *Molski* court was, contrary to Gaudet's assertions, limited to the invalidity of a mandatory class that includes treble damages." Def. Br. 32-33 (citing *Molski*, 318 F.3d at 950). The defendants' description of *Molski*'s holding is wrong. Although *Molski* did reverse the district court's certification of a mandatory class, the Court went on to hold as well that the settlement agreement in the case "was unfair and did not adequately protect the interests of the absent class members." *Molski*, 318 F.3d at 955. Central to that holding was that the settlement gave inadequate consideration to absent class members for the release of their substantial *treble damages* claims. *See id.* at 953-55.

It may be that, having reversed the certification of the class, the *Molski* Court need not have proceeded to address the fairness and adequacy of the settlement, but it did. And the law of this Circuit is clear that an issue so addressed is "law of the circuit, regardless of whether it was in some technical sense 'necessary' to our disposition of the case." *Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005). *Molski* thus cannot be dismissed as a case that addresses only the certification of a mandatory class. Its holding that a court assessing the fairness of a class action settlement must consider that class members possess substantial

treble damages claims obviously "bears on this case," Def. Br. 31, even if it falls (just) short of deciding it. When combined with authority such as *Staton,* which even the defendants acknowledge indicates that a district court must consider the "extent of damages that might be awarded," Def. Br. 34, *Molski* leaves no room for the adoption of a rule that arbitrarily excludes treble damages from consideration.

The defendants' response to the district court opinions in *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003), and *In re Auction Houses Antitrust Litig.*, 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001), *aff'd*, 42 Fed. Appx. 511 (2d Cir. 2002), is equally unpersuasive. To be sure, in *Compact Disc* the district judge felt constrained to follow *Grinnell*, and in *Auction Houses*, the court, which was within the Second Circuit, *was* not free to disregard it. And, in both cases, the courts concluded that the settlements were reasonable whether treble damages were considered or not. The point of the citations, however, is not their ultimate holdings—which, like *Grinnell* itself, would lack *precedential* weight in this Court in any event—but their reasoning. Whether "dicta" or not (Def. Br. 34), their analysis is surely not "irrelevant" (*id*.) to whether this Court should adopt the rule that treble damages should not be considered, and the defendants offer no response to these courts' withering critique of *Grinnell* other than to say that it is "interesting." *Id.* at 33. The fact of the matter is that neither *Grinnell*'s observations about treble damages nor those of the

district courts in *Compact Disc* or *Auction Houses* are binding on this Court. The question is which reasoning is more persuasive, and the defendants have offered no substantial reasons for this Circuit to adopt a rule that treble damages should be ignored.

Perhaps uncomfortable with the implications of the district court's view that treble damages may not be considered, the defendants eventually suggest that "[i]t should be well within the district court's sound discretion to consider if and to what extent the availability of treble damages influences evaluation of the adequacy and fairness of a class settlement." Def. Br. 34-35. The district court's decision cannot be defended on the basis of "discretion," however, because the court did not purport to exercise discretion not to consider the availability of treble damages; rather, the court held that it was legally barred from considering them based on *Grinnell* and the handful of district cases following it. And, as this Court has repeatedly held, when a district court fails to exercise discretion, its action cannot be sustained under the abuse of discretion standard. *See, e.g., Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1178 (9th Cir. 2006); *Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987);

United States v. Miller, 722 F.2d 562, 565 (9th Cir. 1983) ("[a]s a general rule, the existence of discretion requires its exercise.").[3]

B. The District Court's Refusal to Consider Treble Damages Cannot Be Brushed Aside as "Harmless Error."

The defendants fall back on the argument that even if the district court erred by not considering the potential treble damages recovery in this case when assessing the fairness of the settlement amount, the error was harmless because the district court would have approved the settlement anyway. To establish harmless error, the defendants must carry the burden of demonstrating that the district court's error was more likely harmless than not, *Obrey v. Johnson*, 400 F.3d 691, 699-701 (9th Cir. 2005), which in this case requires a demonstration that it is more likely than not that the district court would have reached the same conclusion about the settlement's adequacy had it properly considered that a favorable outcome for the plaintiffs would have carried with it a treble damages recovery.[4]

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[3] Even if the district court's decision could somehow be interpreted as an exercise of discretion, it would be an abuse of discretion, because the explanation the court gave for not considering treble damages would apply equally to all antitrust class action settlements and thus would not constitute a rational basis for not considering treble damages in this case in particular.

[4] Class counsel, who do not contend that district court's refusal to consider treble damages was proper, essentially argue for harmless error as well when they assert that the settlement is adequate even when measured against treble damages. Rodriguez Br. 26. Class counsel fail to acknowledge that they are arguing for affirmance of a ruling the district court never actually made. Even if the district court *could* have permissibly found the settlement adequate as compared to the

The defendants have not carried their burden. Indeed, their only argument is that in some *other* cases, settlements representing very low percentages of potential recoveries have been held to be fair and adequate.[5] Because—as the defendants themselves repeatedly point out—a fair settlement amount in any particular case represents a weighing of considerations unique to the case, such as the court's perception of the likelihood that the plaintiffs will succeed and the defendants' ability to pay a higher amount, the fact that a court in some other case may have accepted a settlement amounting to 16%, or 6%, of the plaintiffs' damages estimate says nothing about whether the district court would find a similar figure acceptable in this case.

Moreover, as explained in our opening brief (Gaudet Br. 31-34) it is likely that consideration of treble damages would have made a significant difference to the district court's assessment of this settlement. *First*, unlike the courts in the

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potential treble damages recovery, there is no way of knowing whether it actually *would* have, so unless the district court's ruling qualifies as harmless error, a remand, at a minimum, is necessary for a proper exercise of discretion by the district court. *Cf. Silber v. Mabon*, 18 F.3d 1449, 1455 (9th Cir. 1994) (remand necessary when district court failed to consider proper factors in making discretionary judgment).

[5] In making the argument, the defendants mischaracterize one of the cases, *In re Plastic Tableware Antitrust Litig*., No. Civ. A. 9403564, 1995 WL 678663 (E.D. Pa. Nov. 13, 1995), which they say upheld a settlement reflecting 3.5% of the class's potential recovery and cited other similar settlements; in fact, the court in that case upheld a settlement that provided a recovery of 3.5% of the defendants' *total sales*; the court did not say what percentage of the plaintiffs' potential damages recovery this amounted to.

Compact Disc and *Auction Houses* cases, the district court in this case did *not* state, or even suggest, that it would find this settlement fair and adequate without regard to its reliance on *Grinnell* to foreclose consideration of treble damages. Rather, the court went out of its way to issue a legal ruling that would have been unnecessary had it believed that the settlement would be adequate even if measured against the potential for a treble damages recovery. *Second*, the principal comparator that the court used to justify its conclusion as to the adequacy of the settlement amount was another case that had held a recovery of approximately 33% of estimated damages to be adequate. ER 41. The court's conclusion that a 30% recovery (as compared to the plaintiffs' damages estimate) represented a reasonable resolution of this case provides no reason to think that it would have found a less-than-10% recovery—the figure that results when the class's net recovery is compared to treble damages based on the plaintiffs' estimate—to be within the zone of reasonableness.[6]

Finally, the defendants' lengthy attack on the plaintiffs' damages calculation (Def. Br. 19-23), which cites only the defendants' own self-serving arguments in their district court brief as opposed to the actual expert evidence on damages—all

[6] There is nothing outlandish about the possibility of a 30% settlement recovery in an antitrust case. The recovery found reasonable in *Auction Houses*, for example, was more than 50% of the plaintiffs' maximum treble damages estimate.

of which is under seal—should have no place in this Court's consideration of the harmless error issue because there is no indication that the district court credited these arguments in its own assessment of the possible damages. Rather, the district court's opinion reflects its view that, notwithstanding the defendants' vociferous arguments against the plaintiffs' damages estimate, the range of damages in the case fell in the range between the estimates of the defendants' and plaintiffs' experts, and the court, in fact, used the relationship between the settlement amount and the plaintiffs' estimate as the principal basis for its adequacy ruling. *See* ER 41. The court's refusal to consider treble damages thus cannot be sustained as harmless error on the counterfactual assumption that the district court would have accepted the defendants' attacks on the plaintiffs' damages estimate had it properly considered plaintiffs' potential treble damages recovery.

Similarly, there is no reason to believe that the district court accepted the defendants' views about the extreme weakness of the plaintiffs' case on the merits (Def. Br. 11-17). Indeed, the district court's findings of fact and conclusions of law reflect that it saw approximately equal chances of success and failure for plaintiffs' Section 1 claim (ER 89) and that the court thought it was "not inconceivable" that defendant BAR/BRI might prevail on plaintiffs' Section 2 claim. ER 90. These findings, too, strongly suggest that, on the district court's

own assessment of the strength of the case, the settlement could not have been sustained if measured against a potential treble damages recovery.

II. The Settlement Approval Process Was Tainted by the Sealed Record.

A. The Sealing of the Record Cannot Be Squared With This Court's Precedents.

Class counsel and the defendants do not dispute that virtually all the substantive papers in the district court were filed under seal pursuant to a protective order (ER 186) that (1) allowed the parties to designate discovery materials as confidential with no review by the court; and (2) allowed filing under seal of all papers (including dispositive motions) that made reference to any materials so designated, again without review by the court of either the justification for or extent of the sealing. Class counsel make no effort whatsoever to defend the extent of the sealing of the record other than to say that some protective order was justifiable in this case (Cl. Couns. Br. 36), but defendants halfheartedly attempt to square it with this Court's precedents by arguing that the sealing was not the result of the type of "blanket protective order" that this Court has condemned in such cases as *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003), because it did not cover all materials produced in discovery, but only those designated in "good faith" by the parties. Def. Br. 50.

Contrary to defendants' assertion, the protective order here shares precisely the features that *Foltz* identifies as defining an improper "blanket" order: It

applied to "all … 'confidential material' produced by the parties in discovery and/or filed with the court," 331 F.3d at 1128, and it permitted (and even required) filing of documents under seal without any determination by the district court that there was either good cause for protection of the documents or justification for sealing them once they were referred to in court filings. *See id.* at 1131.

Moreover, the defendants concede that "'good cause' must justify the sealing of each and every document designated as 'confidential' under a protective order," Def. Br. 51, and they do not contest that the district court utterly defaulted in determining whether there was good cause for the sealing of particular materials here—let alone in considering whether the sealing of *dispositive motions* could be justified under *Foltz*'s much higher "compelling reasons" standard (331 F.3d at 1136). Moreover, the defendants acknowledge that when, as here, a litigant seeks to have specific record materials unsealed, "the district court must require [the proponent of sealing] to make an actual showing of good cause for their continuing protection under Federal Rule of Civil Procedure 26(c)." Def. Br. 51 (quoting *Foltz*, 331 F.3d at 1131). The district court neither required such a showing nor found the existence of good cause.

The defendants nonetheless assert that many of the materials produced in discovery involved "competitively sensitive information" that "undoubtedly justified the sealing of great portions of the record in this case." Def. Br. 51. That

assertion, however, fails to come to grips with the factthat *the district court never made any such determination*. Moreover, even if some of the discovery materials produced in this case may have contained "sensitive information" that might have provided good cause for a protective order applicable to those particular documents, that alone would not provide good cause for the blanket sealing (without even public filing of redacted versions) of all court filings that referenced any document designated confidential; and still less would it justify the sealing of dispositive motions. *See Kamekana v. City & County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) ("A 'good cause' showing will not, without more, satisfy a 'compelling reasons' test."). Indeed, *Foltz* rejected precisely the argument that the defendants now make when it held that the existence of good cause for protection of *some* documents could not justify the *wholesale* sealing of dispositive or even non-dispositive court filings. *See Foltz*, 331 F.3d. at 1137.

Because the wholesale sealing of the record in this case is so difficult to square with this Court's precedents, the appellees fall back on the argument, also advanced in the district court's opinion, that the overbroad sealing is irrelevant to the settlement's approval because the judge had access to all the sealed materials and reviewed them as a fiduciary for the class. Def. Br. 45.[7] As explained in our

[7] The defendants also stress that former class counsel Eliot Disner, who opposed the settlement, also had access to the sealed materials, Def. Br. but given that Mr. Disner labored under conflicts of interest that ultimately prevented him

opening brief, however, that reasoning is fundamentally incompatible with the recognition of class members' due process right to be heard on their own objections to a settlement. Gaudet Br. 41-45. The appellees' principal response is to cite an Eighth Circuit case, *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 930-31 (8th Cir. 2005), in which the court held that a district court's review of some sealed information did not provide a basis for overturning the court's approval of a settlement.

The differences between this case and *Wireless* are more instructive than the similarities. There, the Eighth Circuit stressed that "the documents reviewed by the district court *in camera* contained only limited information used to support the declarations already revealed in the public docket." *Id.* at 931. Moreover, the "objectors were given all the underlying critical information used by the parties to reach a settlement." *Id.* Even so, the Eighth Circuit acknowledged that "the better practice would have been to allow opposing counsel access to the information." *Id.*[8].

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from representing any objectors at the fairness hearing, it is unclear how his access could in any way substitute for access by the Gaudet objectors. It is interesting to note, however, that Mr. Disner expressed the view that "[t]he era of the parties shrouding virtually all the pleadings in this case with ersatz claims of 'confidentiality' must end," and that "far less than one percent" of the materials in the case "would contain even an arguable trade secret to protect." ER 175.

[8] *See also* Cl. Couns. Br. 37 ("unfettered access to the entire record may be preferable"); Manual for Complex Litigation § 21.643 (4th ed. 2004) ("Parties to

Here, by contrast, the documents under seal comprised the bulk of the record, including all the materials submitted in connection with class certification and summary judgment, as well as the expert materials concerning the defendants' and plaintiffs' respective damages estimates. Here, tt was the materials available in the public record that "contained only limited information," and the Gaudet objectors, unlike the objectors in *Wireless*, were given virtually *none* of the "critical information" used to arrive at the settlement. Indeed, because the most that can be drawn from *Wireless* is that it exemplifies a practice that, while less than perfect, is not quite bad enough to compromise a district court's approval of a settlement, the sealing in this case went far beyond the line set by *Wireless* itself.

Nor can it be said here, as it was in *Wireless*, that the sealed materials were not important to the objectors' ability to evaluate and comment on the fairness of the settlement. The defendants' brief proves the point: Its principal affirmative argument for the adequacy of the settlement amount is based on a lengthy and detailed analysis of the opinions of the respective damages experts of the class and the defendants. See Def. Br. 19-23.[9] The expert materials the defendants refer to, however, are entirely under seal, *see* SER 224, and thus the defendants' brief in

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the settlement agreement should generally provide access to discovery produced during the litigation phases of the class action (if any) as a means of facilitating appraisal of the strengths of the class positions on the merits.").

[9] *See also GM*, 55 F.3d at 807 (noting importance of thorough analysis of expert reports to evaluation of settlement)

this Court cites only its brief in the district court as support for its assertions about what the sealed expert materials say. *See* Def. Br. 20-22 (citing SER 262-67 ("Combined Response to Objectors")). It should go without saying that defendants cannot both rely on sealed materials to prove the adequacy of the settlement and deny the significance of the sealed materials to the settlement approval process.[10]

Finally, the appellees have virtually no answer to the Fifth Circuit's recent decision in *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220 (5th Cir. 2008), condemning the reliance on sealed submissions that frustrate the ability of interested litigants to participate in class action proceedings. The defendants observe that the issue in that case was the approval of attorneys' fees rather than of a settlement, Def. Br. 47, but they do not explain why secrecy is more acceptable in a settlement process involving the rights of thousands of class members—where, if anything, access to information is even more critical to preserving "public confidence" (517 F.3d at 230) in the judicial process—than in a proceeding to allocate attorneys' fees. Here, as in *High Sulfur*, "litigation with millions at stake … ought to [have] be[en] litigated openly." *Id.*

[10] Class Counsel's brief makes the surprising statement that "there was no relevant information in the record to which the entire Class did not have access." Cl. Couns. Br. 37. The notion that *nothing* in the class certification briefing, summary judgment briefing, and expert reports—none of which was available to the "entire Class," but only to those who raised the issue of access and then agreed to the protective order—was "relevant" is belied by the defendants' extensive reliance on that material to support the fairness of the settlement.

B. The Gaudet Objectors Properly Raised the Sealing Issue.

The defendants rely principally on arguments that, for one reason or another, the Gaudet objectors' challenge to the impropriety of the sealed record should be disregarded because of the manner in which the Gaudet objectors proceeded in the district court. Notably, however, the defendants do *not* endorse the one procedural ground offered by the district court for its ruling—namely, the court's assertion that the request to unseal items in the record was "untimely" because it was submitted at the time objections were due. ER 46. Because the Gaudet objectors had no notice and no reason to believe that the court would consider it untimely to file an objection to the sealed record at the time of objections to the settlement, and because they exercised reasonable diligence in preparing and filing the objection pro se in the limited time available to them, it was an abuse of discretion for the district court to deny their request on that ground. *See* Gaudet Br. 41-42 (citing *Girsh v. Jepson*, 521 F.2d 153, 157-59 (3d Cir. 1975) and *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 882 (6th Cir. 2000)). The defendants do not argue otherwise.

Instead, they conjure up a variety of other reasons—none relied on by the district court—for avoiding the issue of the improperly sealed record. The defendants place most weight on the argument that the Gaudet objectors should have agreed to abide by the terms of the protective order (including its improper

procedures mandating filing under seal) and accepted the defendants' offer to review selected, and selectively redacted, materials from the record subject to the protective order. The defendants cite no authority for the proposition that a party who objects to the impropriety of an overbroad sealing order somehow forfeits that objection by not agreeing to abide by the very terms to which he objects.[11] Nor do they explain how it would be proper for them to dispose of an objection to the settlement based on the sealed record by offering preferential access to the class members who made the objection, while leaving other class members, whose interests were also served by the Gaudet objectors' request for unsealing, in the dark.[12] Moreover, in responding to the defendants' offer, the Gaudet objectors pointed out that it did not include many of the materials to which they had requested access, including the damages experts' reports, which, as the defendants' brief in this Court demonstrates, contained critically important information. *See*

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[11] The appellees cite *Bank of Am. Corp. Sec. Litig.*, 210 F.R.D. 694, 706 (E.D. Mo. 2002), but in that case the objectors *agreed* that the protective order was appropriate and agreed to abide by its terms; the court found that, having done so, the objectors had no due process objection to the settlement.

[12] Indeed, under Fed. R. Civ. P. 23(e)(5), the district court would have had to approve of the withdrawal of the objection to the settlement based on the sealed record if the Gaudet objectors had agreed to the defendants' proposal, and the commentary to the rule suggests that approval of side deals that result in the withdrawal of objections that are not specific to the objector but, like this one, implicate the interests of the class generally should be disfavored. *See* Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments; *see generally* Manual for Complex Litigation § 21.463 ("Objections also may be made in terms common to class members or that seem to invoke both individual and class interests.").

ER 174. The defendants never expanded their offer to include the full range of materials that the Gaudet objectors sought to unseal. For all these reasons, it is not surprising that the district court, in denying the relief requested by the Gaudet objectors, did not rely on the notion that the defendants' offer to let the Gaudet objectors review some of the sealed material subject to the protective order barred them from raising the issue. Nor should this Court affirm on that basis.

The defendants' assertions that the Gaudet objectors failed properly to file their request that the record be unsealed, or that they should be penalized for failing to "meet and confer" under the district court's local rules, are equally unfounded. The district court did not reject their request on either ground. To begin with, the request for unsealing was contained in the Gaudet objectors' properly filed objections, as well as their separate motion to unseal. And even though the first motion to unseal was returned unfiled—*after* the defendants had fully responded to it—for minor nonconformities with the district court's highly technical local rules (see ER 178-79), and was later refiled with an application to shorten the normal time for noticing a motion (*see* ER 165-82), the district court ultimately treated the request as having been filed at the time objections to the settlement were due (i.e., the time when the motion to unseal was first submitted).

ER 46.[13] And the court did not so much as hint that a failure to meet and confer had anything to do with its denial of the Gaudet objectors' request. This Court should not take it upon itself to enforce claimed technical nonconformities with the district court's local rules when the court itself did not base its ruling on those grounds.[14]

Moreover, the suggestions that the defendants were prejudiced in their ability to respond because of the manner in which the motion was filed, and that there was no good-faith discussion of a possible resolution of the matter, are unfounded. The defendants responded to the motion to unseal after it was first filed (ER 166), and defendants' counsel and the Gaudet objectors engaged in an exchange of telephone calls and correspondence concerning the defendants' offer to make some of the materials available if the objectors would agree to the protective order. *See* ER 168-69, 174-76. After the Gaudet objectors explained that the offer was not sufficient, it was the *defendants* who made no further effort to follow up.

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[13] The application to shorten time was itself properly filed under C.D. Cal. Loc. R. 7-19.

[14] This Court has consistently held that "[c[ourts have a duty to construe pro se pleadings liberally, including pro se motions as well as complaints." *Bernhardt v. Los Angeles County*, 339 F.3d 920, 925 (9th Cir. 2003). Although the Gaudet objectors are all new lawyers, they did not have the benefit of an attorney experienced in practicing before the District Court for the Central District of California, the filing rules of which are quite different from the norm under the Federal Rules of Civil Procedure.

Finally, the defendants' suggestion that the district court did not actually deny the motion to unseal because it was not properly filed (Def. Br. 49) blinks reality. The court's opinion addressed and rejected the substance of the request to unseal (ER 46), and the defendants themselves admit in their brief that "the District Court decided that it did not need to abrogate its valid protective order and post Appellees' competitively sensitive documents to the Internet, as urged by Gaudet." Def. Br. 10; *see also* Def. Br. 47 (referring to "the District Court's refusal to abrogate the protective order before assessing the fairness of the Settlement"). It would elevate form over substance to hold that the district court did not rule on the Gaudet objectors' request that the record be unsealed.

Ultimately, the defendants' efforts to avoid the issue only underscore how indefensible was the indiscriminate sealing of the record in this case under the standards set forth in this Court's precedents. The Court should not sidestep the issue, but once again send the district courts the message that it is serious about its condemnation of orders that "purport to put the entire litigation under lock and key without regard to the actual requirements of Rule 26(c)," *Kamekana*, 447 F.3d at 1183—all the more so where, as here, it is directly interested parties from whom the materials in the record are being hidden.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's order approving the settlement, and remand for unsealing of the record consistent with the standards established in this Court's case law, and for further consideration of the adequacy of the settlement amount in relation to the defendants' potential liability to the class for treble damages.

Respectfully submitted,

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June 16, 2008

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing reply brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 6,825 words.

June 16, 2008

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CERTIFICATE OF SERVICE

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