No. 11-56397
(Consolidated with 11-56376, 11-56387, 11-56389, 11-56400, 11-56440, and 11-56482)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES JUNTIKKA,

Attorney-Appellant

v.

JOSE HERNANDEZ, ROBERT RANDALL, BERTRAM ROBISON, and KATHRYN PIKE;

Plaintiffs-Appellees,

and

EXPERIAN INFORMATION SOLUTIONS INC., TRANSUNION, LLC, and EQUIFAX INFORMATION SERVICES LLC;

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

REPLY BRIEF OF APPELLANT CHARLES JUNTIKKA

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INTRODUCTION

The parties agree on the standard governing review of the district court's order restricting appellant Charles Juntikka's communication with class members under *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981). As the settling parties acknowledge,[1] any such order "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." Pls.-Appellees' Br. 17. Moreover, the order "should be restricted to the minimum necessary to correct the effects of improper conduct under Rule 23." *Id.*

The settling parties' effort to satisfy that standard is based on two incorrect assumptions. First, the settling parties wrongly assume that "the district court found the letter misleading." *Id.* at 1. In fact, the court found only that the letter presented Juntikka's "views of the unfairness of the settlement." RA 127-28.[2] *Gulf Oil* does not protect only communications that correspond to the views of the settling parties and district court, and Juntikka's proposed letter thus cannot properly be barred just because it expresses his own opinions about the proposed

[1] The defendants adopt the arguments of the settling plaintiffs but without raising additional points relevant to the issues in Juntikka's appeal. Defs.-Appellees Br. 2. This brief will refer to the settling plaintiffs and defendants jointly as the "settling parties."

[2] The abbreviation "RA" refers to the joint Excerpts of Record in the appeals consolidated with this case. The abbreviation "Supp. RA" refers to Juntikka's Supplemental Excerpts of Record.

settlement. Second, the settling parties assume that the district court's order was narrowly drawn because the court would have allowed Juntikka to send a "more neutral communication." Pls.-Appellees' Br. 19. But restricting Juntikka to a "neutral" assessment of the settlement he opposed is not a narrow restriction on his speech—it is a complete prohibition of the message he sought to communicate. The settling parties' claimed interest in protecting class members from exposure to opposing viewpoints does not justify a restriction on Juntikka's communications with class members.

ARGUMENT

I. The District Court's Conclusion that Juntikka's Communication Is Not "Neutral" Does Not Justify Restricting Communications with His Former Clients.

A. The district court's only stated reason for prohibiting Juntikka's proposed letter was that the letter did not present a "neutral" view of the settlement. RA 127-28.[3] In support of the district court's reasoning, the settling parties rely on

[3] Although the settling parties are correct (at 9-10) that the district court's restriction on communications with class members is reviewed for abuse of discretion, the district court's discretion is "bounded by the relevant provisions of the Federal Rules." *Gulf Oil*, 452 U.S. at 102. The question whether a lack of neutrality is a reason for restricting communications that is "consistent with the policies of Rule 23" as required by *Gulf Oil*, *id.*, is a question of law reviewed de novo. *See Koon v. United States*, 518 U.S. 81, 100 (1996) ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."); *see also Parra v. Bashas'*, *Inc.*, 536 F.3d 975, 977 (9th Cir. 2008) ("An abuse of discretion occurs when the district court, in

Rodriguez v. West Publishing Corp., 563 F.3d 948 (9th Cir. 2009). But as explained in Juntikka's opening brief (at 21), *Rodriguez* is about the importance of neutrality in a *court-ordered* notice. *Rodriguez* held that, because "[s]ettlement notices are supposed to present information about a proposed settlement neutrally," they need not include "the adversarial positions of objectors." *Id.* at 962-63. Nothing in *Rodriguez* suggests that objectors may not communicate their positions *outside* the notice process.

Nor is there any risk that recipients would mistake Juntikka's letter as a court-approved notice. Juntikka never asked the district court, as the settling parties assert, to "stamp its imprimatur" on his proposed letter. Pls.-Appellees' Br. 3-4, 6-7, 9. In fact, Juntikka expressly disclaimed any request to convey the district court's approval of his message. Supp. RA 74 ("We are not asking for the imprimatur of the Court, and a letter from Mr. Juntikka would not bear the imprimatur of the Court."). Nothing in Juntikka's proposed letter suggests to the contrary. The first paragraph of the letter states that the recipient "should have received a court-approved notice" about the settlement, and immediately informs the reader that Juntikka is "*against* this settlement." Supp. RA 2. The letter then states that "a federal court gave preliminary approval to the settlement I am

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making a discretionary ruling, relies upon an improper factor." (internal quotation marks omitted)).

opposing," advises recipients that the "court-approved notice … contains information about your rights and responsibilities concerning the lawsuit," and "urge[s]" the reader "to refer to that notice when considering what action, if any" to take. *Id.* No reasonable person could believe that Juntikka's letter is an official notice from the court, or even a "competing class notice," as its expression of Juntikka's views served an entirely different function from the court-approved notice.

B. The district court's prohibition on non-neutral communications about the settlement is incompatible with Rule 23's premise that class members have the right to consult with outside counsel and to form their own views about whether to join or opt out of a settlement. *See* Fed. R. Civ. P. 23(c)(2)(B); *In re Cmty. Bank*, 418 F.3d 277, 312-13 (3d Cir. 2005).

If a lack of neutrality were a sufficient reason to ban communications with class members, *Gulf Oil* itself would have been differently decided. Class counsel in *Gulf Oil* sought and were denied approval by the district court to send a proposed notice warning class members that they "may be giving up very important civil rights" by settling their claims, and promising to "vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil." *Gulf Oil*, 452 U.S. at 96 n.6. The proposed notice included none of the information that the settling parties here insist is essential to a "neutral"

communication—it did not discuss the views of the defendants, the benefits of the settlement, the weaknesses in plaintiffs' claims, or the risks inherent in litigation. *See* Pls.-Appellees' Br. 13-14. The Supreme Court described the notice as "intended to encourage employees to rely on the class action for relief, rather than accepting Gulf's offer." *Gulf Oil*, 452 U.S. at 103. Yet the Court held that the district court erred in restricting the notice, concluding that it was "not appropriate" to promote settlement over litigation by "restricting information relevant to the employee's choice." *Id.* at 101 n.14.

Similarly, this Court in *Domingo v. New England Fish Co.* rejected concerns "that counsel would be overzealous in the pursuit of claims" as a valid basis for restricting communications with class members, writing that "[t]he advocacy system is designed to correct for excesses through response from opposing counsel, rather than through court-imposed restrictions which interfere with legal assistance to class members." 727 F.2d 1429, 1441 (9th Cir. 1984). And the Third Circuit in *Community Bank* rejected the settling parties' complaints that objecting counsel had "improperly solicited and misled class members" into opting out of the settlement. 418 F.3d at 313 n.30. The court held that Rule 23 "affords class members the right to contact their own attorneys to determine whether joining a proposed class-wide settlement is in their best interests," *id.* at 312, and stressed

the importance of outside counsel to "ensuring that class members make an informed decision whether to remain in a prospective class." *Id.* at 313 n.30.[4]

Although the settling parties ignore *Domingo*, they attempt to distinguish *Community Bank* on the ground that the district court there "gave no reasons for its ruling," while the court here found that Juntikka's proposed letter was not neutral in tone. Pls.-Appellees' Br. 21. But the district court's reasoning cannot be reconciled with the rationale of *Community Bank*. If outside counsel were limited to communicating a "neutral" view of the settlement, they could not "play [their] important role in helping absent class members evaluate the decision of whether to opt-out of the settlement class." *Id.* at 311 n.26. Thus, although the settling parties in *Community Bank* argued that the letters improperly urged class members to opt out of the settlement, the Third Circuit remanded to the district court with instructions to "specify the *misleading* statements (if any)" in the letters, not to determine whether the letters criticized the settlement or urged class members to

[4] *See also In re Sch. Asbestos Litig.*, 842 F.2d 671, 681 (3d Cir. 1988) (permitting distribution of a booklet to class members that lacked "objectivity and neutrality" on the subject of the litigation, but requiring disclosure of relationship with the defendant); *Warnell v. Ford Motor Co.*, 189 F.R.D. 383, 391 (N.D. Ill. 1999) (finding "nothing improper" about a proposed communication to class members that, while accurate, "represent[ed] the plaintiffs' perspective" and did not tell "Ford's side of the story"); *Babbitt v. Albertson's Inc.*, No. 92-1883, 1993 WL 150300 (N.D. Cal. Mar. 31, 1993) (holding that the "need for neutral and objective language is not present" outside the court-ordered notice, and thus that "use of advocacy language" is permissible).

opt out. *Id.* at 312. Absent findings that the letters were "materially misleading," the court held that the district court could not prohibit them. *Id.* at 313 n.30.

Like the district court in *Community Bank*, the district court here made no finding that any specific statements were misleading. Its conclusion that the letter was not "neutral" is insufficient reason to restrict it.

C. In the absence of a finding that the letter was false or misleading, the district court's prohibition of the letter on the ground that it states Juntikka's viewpoint about the settlement violates the First Amendment. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011). "A government has no legitimate interest in restricting solicitation to suppress a disfavored message." *Id.* at 2668.

The settling parties' characterization of the letter as "biased" and "incomplete" does not change the result under the First Amendment. Pls.-Appellees' Br. 7. The Supreme Court has consistently rejected attempts to restrict commercial speech based on the assumption that the public is "better kept in ignorance than trusted with correct but incomplete information." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980) ("Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all."). As the Supreme Court wrote in *Virginia Board of Pharmacy v. Virginia*

Citizens Consumer Council, there is "an alternative to this highly paternalistic approach":

> That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests, if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them … . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

425 U.S. 748, 770 (1976). The district court's attempt to shield class members from a dissenting viewpoint about the settlement adopts precisely the sort of "paternalistic approach" that the Supreme Court has condemned.

D. In support of their argument that a letter to class members must be neutral, the settling parties rely on *Georgine v. Amchem Products*, 160 F.R.D. 478 (E.D. Pa. 1995). But *Georgine rejected* the proposition that "communications disseminated by lawyers opposing the settlement must be subject to the same neutrality requirements that apply to court-approved Rule 23 notices" and that the official court notice "place[s] a cap on the amount of information that class members may receive." 60 F.R.D. at 496 n.31. On the contrary, the court stressed the importance of the "free flow of ideas relating to the advantages and disadvantages of the settlement," *id.* at 495, and held that "class members rightfully can be informed" about "negative aspects of the settlement" not discussed in the court's official notice materials, *id.* at 496 n.29. The court

concluded that, as long as the communications were not misleading, "individuals are welcome to share their opinions with class members." *Id.* at 507 n.56.

Georgine held the communications at issue to be improper not because they were insufficiently neutral, but because the court found the communications to be, "on their face, clearly materially false and misleading in several respects." *Id.* at 490. Unlike the district court here, the court carefully examined the communications, identifying numerous "specific statements that were misleading, misrepresentations of fact or falsehoods." *Id.* at 492. To be sure, *Georgine* also stated that the "effect of the misleading aspects of the communications was compounded" by the communications' "one-sided attacks, and the failure to discuss the notice materials or the drafters' interests." *Id.* at 490, 496. But the court was careful to note that those were "not factors that when taken alone or even together contaminate the notice process" and were relevant only "when considered in conjunction with the misleading statements and omissions of counsel." *Id.* at 469. As the court explained, "if one-sidedness were the only issue here, the communications at issue would not be actionable." *Id.* at 496 n.29.

In any event, the concerns identified in *Georgine* are not present here. Juntikka's proposed letter, unlike the communications in *Georgine*, stated the benefits of the settlement, Supp. RA 2 ("[A] total of about $28 million will be available for distribution to class members"); informed recipients about the court-

approved notice, *id.* at 2 ("[Y]ou should have received a court-approved notice that contains information about your rights and responsibilities concerning the lawsuit. I urge you to refer to that notice when considering what action, if any, you might take."); and disclosed Juntikka's "interests" in the case, *id.* at 3 ("If I do bring such a suit on your behalf and it is successful … I would be entitled to an attorneys' fee.").

The only other case on which the settling parties rely is *Hernandez v. Vitamin Shoppe Industries*, which applied California law to prohibit communication between outside counsel and members of a settlement class during the opt-out period. 174 Cal. App. 4th 1441 (2009). Like the court in *Georgine* but unlike the district court here, the court in *Hernandez* concluded that the communication at issue was misleading, concluding that the letter wrongly stated that settling class members would be unable to recover compensation for their claims. *Hernandez*, 174 Cal. App. 4th at 1455. The court also found the letter misleading based on what it "did not state," criticizing the drafting lawyer for "ignoring the numerous risks and uncertainties of litigation," "remaining silent about defendant's arguments," "leaving unsaid that the court had reviewed and preliminarily approved the settlement and would again review the matter before giving final approval," and failing to "disclose [the attorney's] financial interest" in class members joining a rival class action. *Id.* Even assuming that those concerns

are valid reasons for finding a letter to be misleading, none of them would apply to Juntikka's proposed letter. Juntikka's letter explains the settling parties' view that the settlement is fair based on "a substantial risk that [plaintiffs] will lose this case if it proceeds in court." Supp. RA 2. It states that the court preliminarily approved the settlement and "will not finally approve the settlement unless, after hearing arguments on both sides, it finds that the settlement is fair and reasonable." *Id.* And, contrary to the settling parties' assertions, it discloses to recipients Juntikka's financial interest in an award of attorneys' fees if he were to bring a successful action on their behalf. *Id.* at 3.

It is true that *Hernandez* also criticized the letter's "biased view of the settlement" and characterized it as a "competing and argumentative notice." 174 Cal. App. 4th at 1455. To the extent that the decision was based on an assertion of authority to restrict any post-certification communications that differ from the official class notice, rather than on specific statements and omissions that the court found misleading, the decision is inconsistent with *Gulf Oil* and with this Court's holding in *Domingo* that, "[i]f anything, the policies weighing in favor of communications restrictions after the class has been certified are much less compelling than before certification." 727 F.2d at 1441.

II. Juntikka's Proposed Letter Is Not Misleading.

The settling parties attempt to equate the district court's conclusion that Juntikka's letter was not "neutral" with a finding that the letter was misleading. *See* Pls.-Appellees' Br. 18 (claiming that the district court "found that the one-sided and misleading statements in Mr. Juntikka's proposed letter would interfere with the neutral class notice process").[5] But the parties' arguments cannot remedy the district court's failure to make a finding that the letter was misleading. *See Gulf Oil*, 452 U.S. at 103-04 (holding that an order restricting communications with class members "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties"). In any event, none of the aspects of the letter that the settling parties identify as "misleading" would have supported such a finding.

A. The settling parties argue (at 14-15) that Juntikka's proposed letter was misleading because it did not include a complete explanation of the benefits of the settlement, the risks of litigation, and other details about the case. The settling parties, however, provide no authority for the proposition that, to be permissible, a lawyer's communication to prospective clients must explain every legal argument that is likely to arise in a case. Requiring Juntikka to include details such as "what

[5] *See also* Pls.-Appellees Br. 7 (claiming that the district court found the letter "incomplete, biased, and misleading"); *id.* at 9 n.5 (claiming that the district court found that the letter was "'unbalanced,' and therefore had the capacity to be misleading").

it means when a judge has issued a tentative decision saying the case cannot proceed as a class action," "the difficulty of proving willfulness," and "the case law trending against the Plaintiffs" would only bury Juntikka's intended message and undermine the purpose of protecting lawyer solicitation as free speech: helping prospective clients receive clear and accurate information about their rights. *See Bates*, 433 U.S. at 374 (rejecting argument against lawyer advertising on ground that it "does not provide a complete foundation on which to select an attorney" and noting that "it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision.").

If the settling parties' were correct that the lack of such details renders Juntikka's letter misleading, the court-approved class notice would be misleading for the same reasons. Even the long-form class notice available on the class website explains the claims and defenses in the case in less detail than Juntikka's two-page letter. The notice describes the cause of action in only vague terms, without mentioning the legal standards or amount of statutory damages that would be available in a successful claim. RA 441. As to the weaknesses in the claims, the notice states only that "[d]efendants disagree with the allegations and say that they have many defenses, that they are not liable to Plaintiffs, and that Plaintiffs are not entitled to any benefits from this litigation." *Id.* And the notice does not contain

any mention of the district court's tentative decision, the willfulness standard, or the case law that the settling parties' claim would be essential to the accuracy of Juntikka's proposed letter. Based on the court-approved notice alone, a reasonable class member would have no way, without advice of counsel, to assess whether to accept the settlement's terms or to opt out.

Even if the district court had found that any of the omissions identified by the settling parties rendered the letter misleading—which it did not—it could have remedied that problem with a more narrowly tailored restriction on Juntikka's speech by requiring Juntikka to include any necessary clarifying information in the letter. Or the district court could have accepted Juntikka's offer to allow the settling parties to include with his letter a counter-statement setting forth their views. *See* Supp. RA 89. Such a finding, however, would not have justified the court's total prohibition of Juntikka's letter. *See Gulf Oil*, 452 U.S. at 101-02 (holding that even if supported with sufficient findings, an order must be "carefully drawn" and must limit speech "as little as possible").

B. The settling parties also identify six specific statements in Juntikka's letter that they argue are "biased and incomplete and therefore misleading." Pls.-Appellees' Br. 15. But most of the settling parties' complaints relate to a version of the letter that the district court did not consider, and that Juntikka no longer proposes to send. Although none of the statements that the settling parties identify

are in fact misleading, Juntikka resolved the settling parties' objections to four of the six statements by voluntarily amending the letter either before or at the district court's hearing on his motion. *See* Supp. RE 2 (final version of letter submitted to the court, with handwritten amendments from the hearing). The settling parties' claim that "Mr. Juntikka rejected every form of proposed letter suggested by the court or by the settling parties" is thus wrong. Pls.-Appellees' Br. 5.

First, the settling parties complain about Juntikka's prediction in the first draft of his proposed letter that more than "90% of Class Members will be 'forced to release their claims in exchange for nothing.'" Pls.-Appellees' Br. 15. The settling parties object to the statement on the ground that, "in reality every Class Member has the opportunity to fill out his or her claim form and none will be 'forced' to do anything." *Id.* That statement, even if included in the letter, would not have been misleading. The settling parties do not dispute that, as Juntikka explained in his opening brief, most class members in this case neither made a claim nor opted out, and thus received no benefit from the settlement. Indeed, an even higher percentage of the class than Juntikka predicted (about 95%) ultimately ended up in that category. RA 24. In the context of discussing that issue, no reasonable person would read Juntikka's use of the word "forced" as meaning that class members were literally compelled not to participate in the settlement. Nevertheless, Juntikka disposed of any arguable issue by replacing the original

statement with language stating that "at least 90% of class members would *end up* releasing their claims in exchange for nothing." RA 2 (emphasis added). Thus, the proposed letter Juntikka filed with the district court fully satisfied the settling parties' purported concerns on this point.

Second, Juntikka also amended his proposed letter at the hearing in response to the settling parties' argument that the letter "conflat[ed] the group of persons who received the Notice with the persons who are Class Members, since not everyone who received the Notice is a Class Member." Pls.-Appellees' Br. 15. The letter was never misleading on that point because Juntikka's letter stated only that the defendants "*may* have falsely stated that [the recipients] owed debts that had been eliminated by [their] bankruptcy." Supp. RA 2 (emphasis added). Moreover, as explained in Juntikka's opening brief (at 19), the district court itself recognized that at least the vast majority of recipients of the notice were, in fact, class members. Nevertheless, Juntikka added language to the proposed letter at the district court hearing to limit the letter's application to those who "are a member of the class of such persons." *Id.* ¶ 1 (handwritten insertion); *see also id.* ¶ 2 (handwritten insertion limiting application of the paragraph to those who "received the court-ordered notice").

Third, in response to the settling parties' complaint that he failed to "acknowledge[] that an individual lawsuit by any Class Member is impractical,"

Juntikka agreed to add that "[a]n individual action may well not be financially practical and there is no guarantee of success." *Id.* ¶ 3 (handwritten insertion).

Fourth, Juntikka amended his proposed letter in response to the settling parties' complaint that Juntikka "fail[ed] to inform Class Members of the potential pecuniary benefit he stands to gain from initiating an 'opt-out action.'" Pls.-Appellees' Br. 16. Before the hearing, Juntikka voluntarily amended the letter to add that he would be "entitled to an attorneys' fee" if he were to prevail in a suit on the recipients' behalf. RA 3.

C. The two remaining "biased" or "incomplete" statements that the settling parties identify are not misleading as written, but *would* be misleading if replaced with the language demanded by the settling parties.

First, the settling parties complain (at 15) that Juntikka's letter "fail[ed] to inform Class Members that some of his objections to the settlement have already been considered and rejected by this Court." The settling parties are apparently referring to this Court's denial of an earlier petition for mandamus, but the Court's denial of the "extraordinary remedy of mandamus" was "without prejudice to issues being raised again" and was therefore not a "rejection" of any objection on the merits. RA 141-42. This Court's procedural decision on the issue of mandamus is not a material fact to class members, and the language that the settling parties

demand would misleadingly suggest that the objections were rejected on the merits.

Second, the settling parties object to Juntikka's statement that "the attestation requirement is 'unfair because most people do not know whether there were errors on their credit reports,' when Class Members are not required to know or have seen their credit reports." Pls.-Appellees' Br. 15. The portion of the letter identified by the settling parties is a statement of Juntikka's opinion, and one of his core objections to the settlement's terms. As explained in his opening brief (at 18-19), the settlement required that payment be made only to class members who certified their belief that errors appeared on their credit reports, and the district court itself expressed concern about the "chilling effect" of this requirement. Juntikka's view that this feature of the settlement renders it "unfair," even though ultimately rejected by the district court, is supported by truthful statements about the settlement's terms and is, at the very least, within the range of reasonable opinion. Moreover, given that class members are required to certify their belief that errors appeared on their credit reports, the settling parties' position that "Class Members are not required to know or have seen their credit report" is itself misleading. Class members could not have made such a certification in good faith if they were unaware of their credit reports' contents.

III. Juntikka's Proposed Communication With Former Clients Was Ethical.

The settling parties argue that Juntikka's proposed letter to former clients would have violated state ethics rules prohibiting communication with represented parties. The district court, however, did not find that Juntikka's proposed letter would violate any ethics rule, and thus did not make the further findings required by *Gulf Oil* to justify restricting communications with class members.

In any event, Rule 23 would have foreclosed any finding that Juntikka's proposed letter was unethical. As Juntikka explained in his opening brief, the Third Circuit in *Community Bank* held that applying ethics rules to prohibit contact between outside counsel and absentee class members would "eviscerate" Rule 23's guarantee of class members' right to retain separate counsel. 418 F.3d at 313. The settling parties make no response to that point. Indeed, the court-approved notice in this case expressly invited class members to retain and consult their own lawyers. RA 443, 444, 446. Such provisions, which Rule 23 requires, would make little sense if outside lawyers needed class counsel's permission to communicate with members of the class. *See* Fed. R. Civ. P. 23(c)(2)(B).

Like *Community Bank*, virtually every court to have considered the issue has concluded that attorneys for named plaintiffs in class actions do not have a traditional attorney-client relationship with absent class members as long as the class members remain free to opt out of the class. Only "[a]fter a court has certified

a case as a class action and the time for exclusions has expired" does a traditional attorney-client relationship arise. 5 *Newberg on Class Actions* § 15:18 (4th ed. 2002); *see, e.g.*, *Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 623 (S.D. Cal. 2005); *Cobell v. Norton*, 212 F.R.D. 14, 17 (D.D.C. 2002); *Morisky v. Pub. Serv. Elec. & Gas Co.*, 191 F.R.D. 419, 424 (D.N.J. 2000); *In re McKesson HBOC, Inc.*, 126 F. Supp. 2d 1239, 1245-46 (N.D. Cal. 2000); *In re Shell Oil Refinery*, 152 F.R.D. 526, 528 (E.D. La. 1989); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982). This near-consensus position is endorsed by the leading treatise on class actions, *see* 5 *Newberg on Class Actions* § 15:18, and the American Bar Association's interpretations of its Model Rules of Professional Conduct, *see* ABA Comm. On Ethics & Prof'l Resp., Formal Op. 07-445, at 3 (Apr. 11, 2007) ("[P]utative class members are not represented parties for purposes of the Model Rules prior to certification of the class and the expiration of the opt-out period.").

After certification, but before the end of the opt-out period, courts have traditionally treated named plaintiffs' lawyers as having a "fiduciary" relationship with absent class members in which "some but not all aspects of the [attorney-client] relationship are present." *Greenfield v. Village Indus.*, 483 F.2d 824, 832 (3d Cir. 1973). This fiduciary relationship allows courts to invoke ethical prohibitions to prohibit coercive contacts from *adverse* parties. *See, e.g.*

Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720, 722 (W.D. Ky. 1981). "However, it cannot truly be said that [a lawyer] fully 'represents' prospective class members until it is determined that they are going to participate in the class action." *Tedesco v. Miskin*, 629 F. Supp. 1474, 1483 (S.D.N.Y.1986).

In response to this great weight of authority, the settling parties rely again on the California Court of Appeal's decision in *Hernandez*, 174 Cal. App. 4th 1441, which held that class counsel "represents" absent members of a conditionally certified settlement class for purposes of California's Rule 2-100's prohibition on contact with represented parties. Treating the question as a matter of first impression, the *Hernandez* court held that there was no reason to distinguish a conditionally certified settlement class from a class certified for litigation, and thus that a full attorney-client relationship arises as soon as a settlement class is conditionally certified. *Id.* The court was apparently unaware of the broad range of cases holding that a full attorney-client relationship between class counsel and absent class members does not begin until the opt-out period has ended.

This Court should decline to apply *Hernandez*'s interpretation of Rule 2-100 in this case. State ethics rules are imported into federal courts by incorporation through local rules, and state interpretations of those rules "should be relied upon only to the extent that they are compatible with federal law and policy." *Grievance Comm. for S. Dist. of N.Y. v. Simels*, 48 F.3d 640, 645 (2d Cir. 1995). Although

California is free to interpret its own ethics rules, "well-established principles of federalism require that federal courts not be bound by either the interpretations of state courts or opinions of various bar association committees." *Id.* "When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct." *Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964) (declining to follow California's conflict-of-interest rules).

Community Bank makes clear that the rule in *Hernandez* flatly contradicts Rule 23's important policy of allowing contact between class members and outside counsel. "[L]ocal rules or court orders preventing counsel from soliciting potential class members may be struck down as undermining the federal policies underlying Rule 23." *Kennedy v. United Healthcare of Ohio, Inc.*, 206 F.R.D. 191, 197 (S.D. Ohio 2002); *see, e.g.*, *Rand v. Monsanto Co.,* 926 F.2d 596, 600 (7th Cir. 1991) (holding that Rule 23 trumped state ethics rules prohibiting champerty). "Especially in the context of a nationwide class action, requiring a federal court to follow the various and often conflicting state court and bar association interpretations of a disciplinary rule, interpretations that may also contravene important federal policy concerns, threatens to balkanize federal law." *Simels*, 48 F.3d at 645-46. Moreover, because the district court in this case did not find that Juntikka's proposed letter would violate Rule 2-100, and thus did not make the further findings required by *Gulf Oil* balancing the interests advanced by the

restriction against the interests of class members, this case makes a poor vehicle to apply for the first time a new and untested interpretation of California's rule to a federal class action.

Finally, applying *Hernandez* here would violate the First Amendment. The Supreme Court in *Shapero v. Kentucky Bar Association* held unconstitutional a state ethics rule's prohibition on a lawyer's written solicitation in the absence of a finding that the solicitation was false or misleading. 486 U.S. 466, 472 (1988). Because the district court in this case did not find that Juntikka's proposed letter was false or misleading, applying Rule 2-100 to prohibit the letter would be similarly unconstitutional.

IV. The District Court's Order Was Not Narrowly Tailored.

The settling parties argue that the district court's order was a narrowly tailored restriction on Juntikka's speech for two reasons. First, they argue that the district court prohibited only a "*specific* letter," and that Juntikka remained free to send a "more neutral" communication. Pls.-Appellees' Br. 12. Second, they appear to suggest that any restriction on Juntikka's speech was illusory, because "Juntikka himself brought this issue before the district court." *Id.* Each of the settling parties' arguments is both legally irrelevant and factually wrong.

A. The settling parties first argue that "the court's ruling was based on an evaluation of the appropriateness of the content of a *specific* letter for which Mr.

Juntikka expressly sought court approval." *Id.* Thus, they contend, Juntikka would remain free to send a "more neutral letter" to members of the class. *Id.* That contention, even if true, would not render the district court's order consistent with Rule 23 or the First Amendment. As Juntikka explained in his opening brief, a restriction on speech cannot be justified on the ground that the restricted speaker is free to express a different opinion. Indeed, the district court's restriction of a specific message (that is, Juntikka's view of the proposed settlement) makes its order particularly offensive to the First Amendment.

In any event, the settling parties misconstrue the district court's order. Although the order expressly prohibits only Juntikka's proposed letter, it is clear that the court would not permit *any* letter in which Juntikka seeks to "present his views of the unfairness of the settlement." 1-RE-25-26. The order provides that Juntikka is entitled to send, at most, a "neutral" letter to his former clients, "to make sure that they know they may contact him for advice on the merits of opting in or out of the settlement and even to tell them that he now represents people opposing the settlement," but not to "foist his views" on members of the class. RA 129, 139. The court's prohibition of the "particular" letter Juntikka proposed was thus a prohibition on *any* communication to Juntikka's former clients of the views he wants to express.

The settling parties' argument that the district court did not impose a "blanket prohibition" is ironic, Pls.-Appellees' Br. 12, given that they requested precisely that relief. The settling parties asked the district court to "require that all written communications be pre-approved by the Court" and that "any communications Mr. Juntikka has with any of these Class Members regarding this Settlement must occur through counsel for the class." Pls.' Opp. 6, 8 (Doc. 488); *see* Defs.' Opp. 2 (Doc. 495) (joining the settling parties' argument). At the hearing on Juntikka's motion for leave to send the letter, the settling parties argued that Juntikka should be allowed to send, at most, a "simple letter" advising his former clients that "there are other lawyers that have been appointed as class counsel," that "he is not one of the lawyers supporting the settlement," and that "if someone would like to contact him to discuss it, they should feel free to do so." RA 61-62. The defendants agreed. *Id.* at 82-84.

The district court's hearing on the motion makes clear that the court accepted these arguments. At the hearing, the district court repeatedly stated that it would not approve *any* letter containing Juntikka's reasons for opposing the settlement, stating that "if any notice is sent … there's going to be a much more balanced approach than Mr. Juntikka initially put forward." RA 86; *see also id.* at 61 ("I want a more balanced letter if I'm going to allow this."). Moreover, the court made clear at the hearing that, "if [it] allow[ed] such a letter to be drafted,"

Juntikka would "have one opportunity" to draft it, "and that's it." *Id.* at 9; *see also id.* at 91 ("I'm going to let the White plaintiffs draft the one and only best letter that you think is possible. If it's not sufficient, I'm going to reject it."); *id.* at 118 ("[T]his is your only chance."). By denying Juntikka his "one opportunity" to draft an acceptable letter, the district court effectively prohibited Juntikka from sending *any* letter to members of the class.

B. The settling parties' second argument is that "Juntikka himself initiated these proceedings when there was no pending attempt to restrict his ability to communicate with class members." Pls.-Appellees' Br. 12. Even assuming that assumption were correct, the settling parties do not explain its legal relevance. Regardless of who initiated the proceedings, the district court indisputably prohibited Juntikka from sending his proposed letter to his former clients. RA 140 ("Juntikka shall … not send the proposed letter to [his] 20,000 former clients."). That the prohibition came about as a result of *Juntikka*'s motion has nothing to do with whether the prohibition complies with Rule 23 or the First Amendment. *See Shapero*, 486 U.S. at 469 & n.1 (holding unconstitutional a state's prohibition of a solicitation letter voluntarily submitted by a lawyer for review).

Moreover, the settling parties' argument ignores the fact that they created the need for Juntikkta to seek court approval in the first place. The settling plaintiffs informed Juntikka that they would not authorize him to communicate

with class members, while at the same time taking the position that it would violate state ethics rules to communicate without their consent. Supp. RA 74. And the settling parties consistently pushed this position in the district court, arguing that "any communications Mr. Juntikka has with any of these Class Members regarding this Settlement must occur through counsel for the class, or Mr. Juntikka will violate the applicable rules of professional conduct." *Id.*

The settling plaintiffs' position left Juntikka with a choice between seeking a determination from the district court before sending his letter or defending against a motion for sanctions after sending it. Juntikka, "in an abundance of caution," chose to seek authorization from the court. *Id.* Because Rule 2-100 does not prohibit communications "otherwise authorized by law," a court's authorization can protect a lawyer who is otherwise unsure about the permissibility of a particular contact. *See United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993) (recognizing that prior judicial approval is an appropriate means to avoid a violation of Rule 2-100); *Hernandez*, 174 Cal. App. 4th at 1454 (noting that a lawyer could "seek[] permission from the trial court to communicate further with any client"); *see also* Model Rule of Professional Conduct 4.2 ("A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order."). That Juntikka chose to seek clarification from the district

court does not render the court's decision to prohibit the communication a less significant restriction of his rights.[6]

CONCLUSION

The district court's order prohibiting Juntikka from communicating with his former clients and final judgment should be reversed and the case remanded with instructions to allow class members an additional opportunity to opt out or object to the settlement.

Respectfully submitted,

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[6] The settling parties also suggest that Juntikka waited too long before asking the court for leave to send his letter. In fact, Juntikka filed his ex parte motion for leave to send the letter on September 11, 2009, more than two and a half months before the opt-out deadline, Doc. 471, but the settling parties opposed the motion on the ground that there was "no urgent need for emergency relief." Doc. 473, at 1; see also Doc. 474, at 1. As a result of the settling parties' opposition, the district court ordered Juntikka to re-file his motion "pursuant to regular motion practice," Doc. 477, which required additional time for briefing and scheduling a hearing. *See* C.D. Cal. L.R. 7-3. The settling parties did not argue in the district court that Juntikka had unnecessarily delayed filing his motion, and the district court did not decide the motion on that basis. The argument is therefore not only factually wrong, but is also waived.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 (A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 11-56397

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,888 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief substantively complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirement of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14 point Times New Roman.

/s/Gregory A. Beck
Gregory A. Beck

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Gregory A. Beck
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