UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MIRANDA L. DAY, for herself and all persons similarly situated, Plaintiff, v. PERSELS & ASSOCIATES, LLC, *et al.*, Defendants.	Case No.: 8:10-cv-02463-T-TGW

OBJECTOR RAYMOND GUNN'S RESPONSE IN OPPOSITION TO THE SETTLING PARTIES' MOTION FOR FINAL APPROVAL, SUPPLEMENTAL OBJECTIONS, AND NOTICE OF INTENT TO APPEAR

On March 12, 2012, this Court entered an order certifying the class and granting final approval of a settlement of this class action. Doc. 157. On September 10, 2013, the Eleventh Circuit vacated that order and remanded the case for further proceedings. *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1328 (11th Cir. 2013). The settling parties have now filed a joint motion seeking final approval of the same settlement agreement that was the subject of the first fairness hearing and the appeal, and this Court has set "a final hearing concerning the settlement" for January 22, 2014. The settling parties base their renewed motion for final approval on a supplemented record with regard to the defendants' ability to pay, and on renewed arguments that this Court's order denying defendant CareOne's motion to compel arbitration with respect to claims related to CareOne's activities as administrative staff to the Law Firm Defendants is vulnerable to reversal should CareOne appeal.

As explained in detail below, the settling parties have failed to meet their burden of showing that the proposed settlement is "fair, reasonable, and adequate," as required by Federal Rule of Civil Procedure 23(e)(2). Therefore, this Court should deny final approval.

PROCEDURAL POSTURE

On appeal to the Eleventh Circuit, Objector Gunn argued for reversal of the final approval order on multiple alternate grounds. Specifically, Gunn argued that 1) the settlement is not fair because it releases valuable claims but provides no benefit to the class; 2) the ability to opt out cannot cure the unfairness of a settlement; 3) the reactions of the class and the state attorneys general do not support approval; 4) the claim that defendants are unable to fund a meaningful settlement lacks adequate evidentiary support; and 5) deference to the views of class counsel is inappropriate under the circumstances of this case. The Eleventh Circuit reached only one of Gunn's arguments, holding that "the magistrate judge abused his discretion when he found, without adequate evidentiary support, that the defendants could not satisfy a significant judgment." *Day*, 729 F.3d at 1312.

At a scheduling conference on December 3, 2013, the settling parties indicated that they would submit evidence on the issue of the defendants' ability to pay and again seek final approval of the same proposed settlement. Doc. 172. The Court set a final hearing for January 22, 2014. *Id.* On January 6, counsel for the Law Firm Defendants filed the Fourth Declaration of Neil J. Ruther and the Declaration of Jimmy B. Persels. Doc. 174. The following day, counsel for the Law Firm Defendants filed the Declaration of Robyn Freedman. Doc. 175. On January 15, the settling parties filed a joint motion for final approval. Doc. 176.

Because a district court may approve a proposed class action settlement "only after a hearing and on finding that it is fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and because "[a]ny

class member may object to the proposal," class member Raymond Gunn renews and supplements his previous objections to the proposed class settlement, *see* Docs. 133, 149, 153, and responds to the settling parties' renewed motion for final approval. Objector Gunn intends to appear at the final hearing through counsel and present argument in opposition to final approval.

OBJECTIONS AND ARGUMENT

I. The New Evidence Regarding The Defendants' Ability to Pay Does Not Justify Approval of The Proposed Settlement.

The Eleventh Circuit has identified six nonexclusive factors to guide a district court in assessing the fairness of a class action settlement.[1] The defendants' ability to satisfy a judgment or fund a meaningful settlement is relevant to the third factor: the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable. *Day*, 729 F.3d at 1326. The new evidence submitted in support of the proposed settlement does not justify final approval for several reasons.

A. The settling parties have offered no evidence that CareOne is unable to satisfy a judgment or fund a significant settlement.

The Eleventh Circuit noted that "no one has argued or introduced any evidence to suggest that CareOne would be unable to satisfy a judgment." *Id.* at 1327. That statement remains true even though the settling parties claim to have "supplemented the record to address the appellate court's concern." Doc. 176 at 1. Without evidence that *none* of the seven defendants can satisfy a judgment

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[1] The factors are: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984).

or fund a meaningful settlement, the settling parties cannot rely on collection risk to justify approval of a settlement that provides *no relief* to any of 125,000 absent class members. *See Day*, 729 F.3d at 1328 (explaining that even if Persels & Associates is primarily liable, "the assets and income of the other defendants could still be used to satisfy a judgment because the defendants would be secondarily liable"). For this reason alone, this Court should deny final approval of the proposed settlement.

Further, the class action settlement in *Bronzich v. Persels & Associates, LLC*, No. 10-0364 (E.D. Wash.), suggests that CareOne has the ability to contribute significant resources to a class settlement, whether from its own assets or from insurance coverage. In *Bronzich*, a class of 2,738 Washington residents settled claims against four of the defendants here (CareOne, Persels & Associates, Jimmy Persels, and Neil Ruther) for a total of $2,200,000, and an insurance company provided $750,000 of the settlement amount. *See* Settlement Agreement, *Bronzich*, No. 10-0364, Doc. 274, Exh. 1 (E.D. Wash. Aug. 10, 2012).

Indeed, the settling parties do not seek to justify the settlement on the basis that CareOne lacks the ability to pay, but rather on speculation that CareOne could prevail on an appeal of the order denying arbitration. Doc. 176 at 3 n.3. The Eleventh Circuit already considered the argument and rejected it:

> Although CareOne stated that it would appeal the denial of its motion to compel arbitration, at this point only speculation supports a finding that CareOne was likely to prevail. This speculation is not sufficient to support the exclusion of the assets of CareOne from "the range of possible recovery."

Day, 729 F.3d at 1327 (quoting *Bennett*, 737 F.2d at 986).

B. The recently-filed declarations identify the assets of the individual defendants but do not establish their value.

Each of the individual defendants declares that he or she owns, jointly with his or her spouse, investment accounts and bank accounts, but there is no evidence in the record regarding the value of those accounts, nor have any of the individual defendants stated whether insurance might cover the claims made in this case. *See* Fourth Declaration of Neil J. Ruther, Doc. 174 at 3; Declaration of Jimmy B. Persels, *id.* at 7; Declaration of Robyn Freedman, Doc. 175 at 3. Even if, as defendants assert, the jointly-held assets are immune from seizure to satisfy a judgment, the defendants here seek to settle and could make those assets available to fund a voluntary settlement. Without knowing the value of the accounts, it is impossible to determine whether the individual defendants have the ability to make a meaningful contribution to a settlement.[2]

C. The declaration concerning the financial position of Persels and Associates lacks sufficient detail to establish the firm's inability to pay.

The Fourth Ruther Declaration states that Persels and Associates sustained net losses during the last four calendar years and has a negative net worth, but the declaration refers for support to an "Exhibit A" that was not attached to the declaration and has not been filed with the Court. Without the supporting documentation, the Fourth Ruther Declaration provides too little detail to support the conclusion that Persels and Associates is unable to contribute to a meaningful settlement.

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[2] The settling parties do mention some specific figures with regard to the value of some of Ms. Freedman's assets, but they cite as support the "Second Declaration of Robyn Freedman" and "other confidential financial and legal records" that have not been made a part of the record in this case. Doc. 176 at 10 n.5. Because there is no evidence in the record with regard to the value of these assets, they cannot form the basis of a factual finding that the individual defendants are unable to contribute to a settlement.

II. The Risk that CareOne Will Prevail on a Potential Appeal of This Court's Order Denying Arbitration Does Not Justify Approval of The Proposed Settlement.

As the Eleventh Circuit noted when it rejected the argument that CareOne's assets should not be considered when determining the range of possible recovery, "only speculation supports" the claim that CareOne is likely to prevail on an appeal of this Court's decision denying arbitration. *Day*, 729 F.3d at 1327. Nevertheless, the settling parties repeat their arguments in favor of arbitration and assert that the risk that CareOne will prevail on a potential appeal of this Court's decision justifies a paltry settlement. Doc. 176 at 11-15. Because this Court has already rejected the arguments in favor of arbitration, Gunn will not brief those issues here, other than to note that other courts have rejected similar arguments where debt settlement companies have attempted to avoid litigation by invoking arbitration provisions. *See*, *e.g.*, *Smith v. JEM Group, Inc.*, 737 F.3d 636, 638 (9th Cir. 2013) (affirming district court's denial of motion to compel arbitration in class action challenging lawyer model of debt settlement).

Even if CareOne could establish a likelihood of success on appeal of the arbitration issue, the proposed settlement should not be approved. If CareOne succeeded on appeal and was dismissed from the case, the class would be better off than if this settlement were approved because retaining the ability to bring individual claims against CareOne is better than releasing those claims for nothing. Indeed, CareOne has not asserted that it has a binding arbitration clause with a class action ban in agreements with each of the 125,000 class members. Thus, even if Plaintiff Miranda Day is precluded from litigating claims against CareOne, other class members not subject to an arbitration provision could litigate claims against CareOne, either individually or as a class. As described in

section IV.A below, both individual cases and class actions against debt settlement companies like CareOne often result in significant monetary relief.

If CareOne is confident that it will prevail on a potential appeal of the order denying arbitration, it could have walked away from the proposed settlement after the Eleventh Circuit vacated the final approval order, *see* Doc. 150-3 at 21, ¶ 33, and saved the $405,000 it agreed to pay under the terms of the agreement, *see* Doc. 176-2 at 2, ¶ 3. CareOne chose not to do so, either because it lacks confidence in its likelihood of success on appeal, or because it views $405,000 as a small price to pay to discharge all of its liability to 125,000 class members nationwide.

III. Gunn's Arguments Not Reached by The Eleventh Circuit Remain Live and Should Be Considered by This Court.

Objector Gunn raised multiple arguments against final approval of the proposed settlement both in this Court and on appeal. This Court rejected all of Gunn's objections, and the Eleventh Circuit reached only one of them before vacating the approval order and remanding the case for further proceedings. Gunn renews and supplements his other objections in section IV below, both for this Court's further consideration and to preserve them for appeal.

Arguing that the objections cannot be renewed, the settling parties misinterpret the Eleventh Circuit's decision and misconstrue the law of the case doctrine. The settling parties suggest that by remanding the case on the ground that there was insufficient evidence to support a finding that defendants cannot pay a meaningful award, the Eleventh Circuit implicitly and necessarily rejected all of Gunn's other arguments. Doc. 176 at 8. To the contrary, once the Eleventh Circuit concluded that the decision had to be vacated because of an erroneous factual finding, the Court had no need to decide the other issues one way or the other.

An issue can become law of the case either by explicit resolution or by "necessary implication." *United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005). The Eleventh Circuit did not explicitly address any of Gunn's arguments other than the sufficiency of the evidence on ability to pay, the issue on which Gunn prevailed. "An argument is rejected by necessary implication when the holding stated or result reached is inconsistent with the argument." *Id*. When a party makes multiple alternative arguments and *loses*, and the court does not expressly address every argument, the unaddressed arguments are inconsistent with the outcome and may be considered to have been rejected by necessary implication. But where—as here—a party makes several alternative arguments and *wins*, nothing is implied about the issues not reached. Because the Eleventh Circuit needed to reach only one of Gunn's arguments for Gunn to prevail, the rest of his arguments are live. "The law of the case doctrine clearly does not extend to issues an appellate court did not address." *Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir. 1991) (citing *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985)).

IV. The Proposed Settlement Should Not Be Approved for Reasons Unrelated to The Defendants' Ability to Pay or CareOne's Potential Appeal of The Order Denying Arbitration.

A. The proposed settlement is not fair because it provides no benefit to the class, but extinguishes claims totaling more than $125 million.

The Court should not approve the proposed settlement. Where the interests of the class as a whole are not better served by the proposed settlement than by the alternatives (*i.e.*, further litigation or dismissal), the settlement cannot satisfy Rule 23(e)'s requirement that a class settlement be "fair, reasonable, and adequate."

The proposed settlement in this case is not a reasonable compromise because defendants get a windfall release from liability, class counsel gets $300,000 in attorney fees, two charities get $50,000 *cy pres* awards, and the representative plaintiff gets an incentive payment of $5,000, but the 125,000 absent class members get nothing. A settlement that provides no benefit to the class is not a fair deal. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 221 (D. Me. 2003) ("[A] settlement is not fair where all the cash goes to expenses and lawyers."); *Clement v. Am. Honda Fin. Corp.*, 176 F.R.D. 15, 28 (D. Conn. 1997) (disapproving settlement where "there is a strong danger that the settlement will have absolutely no value to the class"); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, No. MDL-991, 1995 WL 222177, *6 (E.D. La. Mar. 15, 1995) (rejecting proposed settlement that would release claims "for no or highly speculative consideration" even where "plaintiffs may face serious and significant barriers to recovery").

The decision of the Fifth Circuit in *In re Katrina Canal Breaches Litigation*, 628 F.3d 185 (5th Cir. 2010), is particularly apposite. In that case, the district court approved a settlement of a class action against certain governmental entities and their insurer for the limit of the available insurance, about $21 million plus interest, which represented the maximum amount that the class could expect to receive because the governmental entities' assets were statutorily exempt from seizure to satisfy a judgment. *Id.* at 199 (citations omitted). Although the plaintiffs were settling for the maximum amount they could win through litigation, the Fifth Circuit reversed the district court's approval of the settlement because there was no assurance that the class would receive any benefit from the settlement after administrative costs were paid. *Id.* at 196. Thus, the Fifth Circuit held that "the settlement is not fair, reasonable and adequate because its proponents fail to show that the class

members will receive some benefit in exchange for the divestment of their due process rights." *Id.* at 189.

In this case, the proposed settlement should not be approved because defendants have provided nothing to the class in exchange for the surrender of their claims. Although this would be true even if the claims were of minimal value, in fact, the released claims have substantial economic value. During the first fairness hearing, this Court found that full restitution to the class would likely total $125 million or more. Doc. 161 at 38:12; *see also* Doc. 157 at 22 ("[I]f each of the Class members were awarded $1,000—and the average claim appears to be more than that—the judgment would amount to $125 million.").

Class action settlements in other cases challenging the lawyer model of debt settlement have resulted in substantial monetary benefits to the class members and stand in stark contrast to the proposed settlement in this case. For example, in *Bronzich*, a class of 2,738 consumers settled with CareOne, Persels & Associates, Neil Ruther, and Jimmy Persels, for a total of $2,200,000, of which $1,540,000 was paid directly to the class members pursuant to a formula that reimbursed each class member about 33 percent of the total fees paid to defendants. *See* Settlement Agreement, *Bronzich*, No. 10-0364, Doc. 274, Exh. 1 (E.D. Wash. Aug. 10, 2012) (final approval granted Jan. 25, 2013 (Doc. 311)). Thus, each class member in *Bronzich* received a payment, on average, of about $562. In *Brown v. Consumer Law Associates, LLC*, 2013 WL 2285368 (E.D. Wash. May 23, 2013), a class of 712 consumers settled claims against Neil Ruther, Jimmy Persels, and others for $1,155,000, of which $776,332 was distributed directly to class members pursuant to a formula that resulted "in each member of the settlement class recovering approximately thirty percent of the total debt adjusting fees he or she paid to Defendants." *Id.* at *3. Thus, each class member in *Brown* received payments, on

average, of about $1,090. In *Smith v. Legal Helpers Debt Resolution, LLC*, No. 11-5054 (W.D. Wash.), a challenge to abusive debt-settlement practices resulted in three separate settlement agreements with three different groups of defendants totaling $2,235,000. *See* Settlement Agreements, *Smith*, No. 11-5054, Doc. 144 at 12, 34; Doc. 180. Again, each class member recovered approximately 30 percent of the total debt-adjusting fees paid.

Individual cases against debt-settlement companies also result in substantial recoveries. In his original objections, Gunn explained that the abusive debt-settlement practices challenged in this case are remediable under numerous state and federal consumer-protection statutes and common law causes of action, *see* Doc. 133 at 11-12, and individual plaintiffs routinely recover significant monetary relief from debt-settlement companies, including law firms, *see id.* at 12 (citing cases). Further, Gunn submitted with his original objections the declarations of three attorneys with knowledge of the value of the type of claims released by the settlement. Docs. 133-2, 133-3, & 133-4. Since the filing of Gunn's original objections, plaintiffs have continued to obtain significant monetary relief for the types of claims released under the settlement. *See* Second Declarations of attorneys Gregory S. Reichenbach and Andrew G. Pizor, attached as Exhibits 1 & 2, respectively. Indeed, the fact that class members can obtain relief by individual lawsuits suggests that a class action is not "superior to other available methods for fairly and efficiently adjudicating the controversy" as required for certification under Rule 23(b)(3).

B. This case presents none of the circumstances that might justify a *cy pres* award in lieu of payments to class members.

In the class action context, *cy pres* awards are used in two situations. First, and most typically, *cy pres* is used to distribute residual settlement funds after payments have been made to class

members and where further distribution to class members is not economically feasible. *See*, *e.g.*, *Powell v. Ga.-Pac. Corp.*, 119 F.3d 703, 706-07 (8th Cir. 1997) (approving *cy pres* distribution of unclaimed settlement funds where locating individual class members for an additional distribution would be very difficult and costly); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (holding that a district court may properly consider *cy pres* for the purpose of distributing unclaimed funds). The *cy pres* distribution in this case does not involve money remaining after distributions to individual class members; indeed, the settlement here includes no compensation for the class.

Second, *cy pres* is used in class actions when it is economically infeasible to distribute settlement funds to individual members of the class, either because the class members cannot be identified or located, or because the class members' individual damages—although substantial in the aggregate—are too small to justify the expense of individual distributions. For example, in *Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, the court allowed funds collected as restitution to overcharged bus riders to be used to purchase new buses for the benefit of current bus riders in the same service region, because "identifying, locating, and notifying all those overcharged after so much time would be very difficult, if not impossible." 84 F.3d 451, 455 (D.C. Cir. 1996). Similarly, in a class action where the maximum recovery at trial would have been two million dollars and the class had more than 66 million members, a *cy pres* distribution was permissible—if a suitable beneficiary could be located—because the cost of distributing individual payments "would far exceed the maximum potential recovery" of about three cents per class member. *Nachshin v. AOL*, 663 F.3d 1034, 1037 (9th Cir. 2011). In contrast, several courts have rejected the use of *cy pres* where distribution to the class was economically feasible. *See*, *e.g.*, *Masters*

v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007) (refusing to affirm *cy pres* distribution where neither side contended that "it would be onerous or impossible to locate class members or [that] each class member's recovery would be so small as to make an individual distribution economically impracticable"); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting *cy pres* distribution where potential damages were sufficient to make individual payments feasible).

Here, a *cy pres* distribution cannot be justified under the theory that the size of the potential recovery is too small on a per-class-member basis to allow for individual payments. Rather, individual payments are not feasible under the settlement only because the settlement amount is grossly inadequate in comparison to the value of the claims released. Because the released claims have substantial economic value and defendants know the identity of the class members, how they can be contacted, and the amount of fees that each class member paid defendants, it would be feasible to divide an *appropriate* settlement fund among the class members based on the amount of each class member's loss, as was done in the five class action settlements discussed above.

C. The changes to the Law Firm Defendants' business practices are already required by law, are not a result of this case, and will not benefit the class.

The proposed settlement purports to make three changes to the Law Firm Defendants' business practices. Specifically, the Law Firm Defendants have agreed to (1) stop collecting advance fees for debt settlement services except to the extent permitted by law; (2) disclose an estimate of the amount the client will pay in fees and how long it will take to satisfy the client's debts; and (3) allow their clients to communicate with an attorney within a reasonable period of time. Doc. 150-3 ¶ 19(a).

These business practices are already required by law and legal ethics; thus, adopting them cannot provide consideration for the release of the class members' claims.

Significantly, the changes to the Law Firm Defendants' practice of collecting advance fees, and the disclosures the Law Firm Defendants have agreed to make, are *not* a result of this lawsuit. Rather, the Law Firm Defendants were required to make these changes *before* plaintiff filed her original complaint, pursuant to the debt relief amendments to the Federal Trade Commission's Telemarketing Sales Rule. *See* 16 C.F.R. § 310.3(a)(1)(viii) (disclosure requirements); *id.* § 310.4(a)(5) (advance fee ban). It is beyond dispute that the Law Firm Defendants would have stopped collecting advance fees even if there was no settlement in this case, because they agreed to stop the practice as of October 1, 2010—before this case was filed. Similarly, by agreeing to communicate with their clients within a reasonable amount of time, the Law Firm Defendants have agreed to do nothing more than comply with applicable standards of legal ethics. *See*, *e.g.*, ABA Model R. Prof. Cond. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information.").

Because the Law Firm Defendants are required by law or ethical rules to make the business practice changes set out in the settlement agreement, those changes have no value. With respect to the advance fee ban in particular, the settling parties have made it clear that the agreement requires nothing more than adherence to legal requirements, because the settlement specifically allows the Law Firm Defendants to continue to collect advance fees "to the extent permitted by law." Doc. 150-3, ¶ 19(a)(i)(A).

Further, even if the clients of the Law Firm Defendants were not already entitled to the business practices set forth in the settlement, such practices will not benefit the vast majority of the

class, because the changes apply prospectively and most class members will not have future business with defendants. *See* Doc. 157 at 27 ("[I]t is recognized that the injunctive relief will probably not assist the Class members unless they deal with the law firm again."); *see also True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010) ("The Court is inclined to agree with Plaintiffs and the Objectors that the injunctive relief is of minor, if any, value. . . . No changes to future advertising by [the defendant] will benefit those who already were misled by [the defendant]'s representations . . . .").

D. The ability of class members to opt out cannot cure the unfairness of the settlement.

Federal Rule of Civil Procedure 23(c)(2)(B) requires that members of *every* class certified under Rule 23(b)(3) be provided with notice and an opportunity to opt out. Thus, if the ability to opt out of a class settlement could cure the unfairness of the settlement's terms, then every settlement with an opt out provision would necessarily be considered fair, and there would be no need for Rule 23(e)'s requirement that the court protect absent class members by evaluating proposed class settlements and approving only those that are "fair, reasonable, and adequate." *See In re GM Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 809 (3d Cir. 1995) ("[T]he right of parties to opt out does not relieve the court of its duty to safeguard the interests of the class.")

E. The number of objections and requests for exclusion does not indicate that the settlement is fair.

Opposition to a proposed class action settlement is a factor for a district court to consider in determining whether the settlement meets the requirements of Rule 23(e), but it is the substance of the opposition, rather than the number of objectors, that the court should consider. "[A] low level of vociferous objection is not necessarily synonymous with jubilant support. In many class actions, the

vast majority of class members lack the resources either to object to the settlement or to opt out of the class and litigate their individual cases." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. 1981); *see also In re GM Truck*, 55 F.3d at 812 ("[O]bservations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement."). Thus, because "[t]he vast majority of class members have no ability to evaluate the fairness of the proposed settlement," the court must "rely upon its own investigation and the input of the few objecting class members who do have the resources to provide the court with pertinent information." *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, No. MDL-991, 1994 WL 593998, at *5 (E.D. La. Oct. 28, 1994); *see also Gaddis v. Campbell*, 301 F. Supp. 2d 1310, 1314 (M.D. Ala. 2004) ("[T]he court does not interpret the silence from the remaining class members as indicating their agreement with the terms of the settlement."); *Reynolds v. King*, 790 F. Supp. 1101, 1109 (M.D. Ala. 1990) (explaining that a court should look "beyond the numbers to the total reality of the circumstances presented"); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 543 (S.D. Fla. 1988) ("In handling objections to a proposed class settlement, a court must first realize that the number of objectors has little bearing on whether a settlement is fair.").

There are numerous disincentives to filing objections, including waiver of opt-out rights, the cost of securing legal representation, and the burden of attending the fairness hearing. In contrast, "the benefits of objecting to a proposed settlement often are minimal or negligible." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 104 (2007). Indeed, "where notice of the class action is . . . sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a fait accompli," further

discouraging potential objectors. *Mars Steel Corp. v. Cont'l Ill. Nat. Bank & Trust Co. of Chi.*, 834 F.2d 677, 680-81 (7th Cir. 1987).

Silence in the form of a low rate of opt-outs is no more demonstrative of the settlement's fairness. Several empirical studies have concluded that the rate of opt-outs is a poor indicator of class member satisfaction, because almost every class action settlement experiences very low opt-out rates. *See*, *e.g.*, Thomas E. Willging *et al.*, *Federal Judicial Center, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 10 (1996) (finding that the median percentage of class members who opt out of a settlement is 0.1% or 0.2% of the class); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1534 (2004) (concluding that because opt-out rates are trivially small in most cases, courts should not credit low rates of class dissent as evidence that the settlement receives the affirmative endorsement of the class); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573, 1612 (2007) (criticizing inferences of support drawn from purely passive behavior on the part of the absent class member).

F. Twenty-six state attorneys general are opposed to approval of the proposed settlement.

Before the first fairness hearing, five state attorneys general submitted a letter expressing strong opposition to the approval of the proposed settlement. Doc. 152. On appeal, twenty-six states joined in an amicus brief urging the Eleventh Circuit to reverse the order approving the settlement. Because state attorneys general possess critical knowledge and experience regarding consumer-protection issues and have been empowered by Congress to safeguard the interests of absent class

members in proposed class settlements, *see* 28 U.S.C. § 1715(a), (b), the opposition of attorneys general is an important factor to be considered in determining whether a proposed class settlement is fair. *See*, *e.g.*, *Wilson v. DirectBuy, Inc.*, No. 09-590, 2011 WL 2050537, *9 (D. Conn. May 16, 2011) (finding attorneys general's amicus brief "especially helpful" and viewing it "as a placeholder for many absent class members' objections"); *True*, 749 F. Supp. 2d at 1082 (finding that attorneys general's amicus brief "urging the Court to reject the proposed settlement as unfair" is a factor that "weighs against approval of the settlement"); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007) (finding that "the vigor and substance of the objections presented" by a number of attorneys general "counsels against a finding favorable to the [settling] parties"); *Thompson v. Midwest Found. Indep. Physicians Ass'n*, 124 F.R.D. 154, 161 (S.D. Ohio 1988) (finding that an attorney general's opinion "is an important factor for the court's consideration in determining the fairness of the proposed settlement").

G. The attorney fee and incentive payment cannot be justified in light of the poor result achieved for the class.

The proposed settlement provides for an attorney fee award of up to $300,000, and an incentive payment of $5,000 to the representative plaintiff. Doc. 110-1, ¶¶ 23, 35. Because the agreement includes a "clear sailing" clause, under which defendants agree not to contest these awards, the settlement bears heightened scrutiny. *See Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991) ("We believe it to be self-evident that the inclusion of a clear sailing clause in a fee application should put a court on its guard."). Indeed, as a general matter, all requests for attorney fees and incentive awards are subject to searching scrutiny by the court "'to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class

members.'" *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) (quoting *United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980)).

In this case, the awards agreed to by the settling parties cannot be justified because class counsel and the representative plaintiff obtained no benefit for the class. The amounts of the attorney fee and the incentive award underscore the unfairness of the settlement to the absent class members who will release all of their claims against defendants in exchange for absolutely no value. Class counsel and the representative plaintiff should not be rewarded for selling out the class.

H. Deference to the views of class counsel is inappropriate under the circumstances of this case.

Rule 23 requires that the judge reviewing a proposed class settlement act as a "fiduciary serving as guardian for the unrepresented class members." *City of Miami*, 614 F.2d at 1331; *see also In re GM Truck*, 55 F.3d at 785 (noting that Rule 23(e) requires that a court "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished"). Judicial approval of class settlements is designed to protect the absent class members from settlements that place the interests of the settling parties over the interests of the class as a whole. "The inquiry appropriate under Rule 23(e) . . . protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (internal quotation and citation omitted). "[T]he spectre persists, absent appropriate judicial inquiry, that plaintiffs' attorney may accept an insufficient judgment for the class in trade for immediate and certain compensation for himself in the form of legal fees." *Foster v.*

Boise-Cascade, Inc., 420 F. Supp. 674, 686 (S.D. Tex. 1976). Thus, courts have a "duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class[,]" and courts must "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002); *see also* Sylvia R. Lazos, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 Mich. L. Rev. 308, 315 (1985) ("[E]ven the prospect of a large recovery may not be sufficient to cause the class attorney to forgo a settlement that is unfavorable to the members of the absent class.").

Similarly, a district court must be particularly vigilant where, as here, the settlement favors the representative plaintiff over the absent class. *See*, *e.g.*, *Holmes*, 706 F.2d at 1148 ("[A] disparate distribution favoring the named plaintiffs requires careful judicial scrutiny into whether the settlement allocation is fair to the absent members of the class. Courts have refused to approve settlements on the ground that a disparity in benefits evidenced either substantive unfairness or inadequate representation."); *Plummer v. Chem. Bank*, 91 F.R.D. 434, 441-42 (S.D.N.Y. 1981) ("Where representative plaintiffs obtain more for themselves by settlement than they do for the class for whom they are obligated to act as fiduciaries, serious questions are raised as to the fairness of the settlement to the class.").

In this case, the Court should not defer to the views of class counsel because the settlement, by providing a benefit to all concerned except the absent class members, is precisely the type of settlement that demands independent judicial scrutiny. Once class counsel was offered a generous attorney fee and the representative plaintiff was offered a generous incentive payment, the interests

of class counsel and the representative plaintiff diverged from those of the absent class. Defendants seized the opportunity to use the settlement to discharge their liabilities nationwide, and class counsel allowed the settlement class to expand from the 10,000 Florida residents on whose behalf the case was brought to 125,000 class members whose claims are released for nothing. Under these circumstances, it would be inappropriate for the Court to defer to the judgment of class counsel.

I. Entry of a final judgment approving a class-action settlement by a magistrate judge under 28 U.S.C. § 636(c) is unconstitutional.

Objector Gunn recognizes that the Eleventh Circuit held on appeal in this case that a magistrate judge has subject-matter jurisdiction to enter a final judgment in a class action without first obtaining the consent of the absent members of the class, and this Court is bound by that holding. Although arguments to the contrary are foreclosed by controlling precedent and the law of the case doctrine, Objector Gunn raises the issue to preserve it for possible en banc review or review by the U.S. Supreme Court, and incorporates by reference the arguments raised in the Eleventh Circuit in the briefs of amicus curiae National Association of Consumer Advocates.

CONCLUSION

The Court should deny final approval of the proposed class action settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On January 17, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ *Michael T. Kirkpatrick*
Michael T. Kirkpatrick