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)

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

Scott L. Nelson
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

Attorneys for Objectors-Appellants

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Rules:

JURISDICTION

The district court had jurisdiction over this antitrust class action under 28 U.S.C. §§ 1331 and 1337. This district court's final order and judgment approving the settlement of the class action, which resolved all claims of all parties, is an appealable final decision under 28 U.S.C. § 1291. *See Devlin v. Scardelletti*, 536 U.S. 1, 9 (2005).

The final judgment was entered September 11, 2007. DE 429; ER 5.[1] Appellants, objecting class members Robert Gaudet, Jr., Andrea Boggio, Sandeep Gopalan, and Elizabeth DeLong (the Gaudet objectors), filed their timely notice of appeal on October 10, 2007. DE 456; ER 1. A timely motion for additional findings of fact under Fed. R. Civ. P. 52(b) was filed by other parties on September 20, 2007. DE 441. After that motion was denied on October 23, 2007, DE 457, the Gaudet objectors' notice of appeal became effective under Fed. R. App. P. 4(a)(4)(B)(i). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court's refusal, in determining the adequacy of the settlement of this antitrust class action, to consider that the plaintiff class would

[1] The abbreviation "DE" refers to the docket entries in the district court record; the abbreviation "ER" refers to the Excerpts of Record filed by the Gaudet objectors-appellants.

be entitled to treble damages if it prevailed was an error of law and rendered the court's approval of the settlement an abuse of discretion.

2. Whether the district court erred in refusing to unseal records, including papers relating to summary judgment and class certification, that were filed under seal pursuant to a blanket protective order, and in proceeding to approve the settlement in the face of a substantially sealed record.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an order of the United States District Court for the Central District of California approving the settlement of a nationwide antitrust class action alleging that the defendants—West Publishing Company (doing business as BAR/BRI), and Kaplan, Inc.—conspired together to prevent competition in the market for full-service bar-review classes. After certifying the class and denying defendant Kaplan's motion for summary judgment, the district court (Real, J.) found that the settlement amount was adequate in light of the possible risks and benefits of litigation, but did so on the premise that the court could not, as a matter of law, consider the class's entitlement to treble damages from the defendants if the class prevailed. The district court also dismissed objections to the settlement based on the fact that much of the record—including the summary judgment and class certification briefing—was improperly filed under seal, holding that the court's own ability to inspect the record was sufficient

to ensure that the settlement adequately protected the interests of objecting class members.

The class complaint was filed on April 29, 2005. In substance, it alleged that BAR/BRI had conspired with Kaplan to divide the markets for LSAT preparation courses (assigned to Kaplan) and bar preparation courses (assigned to BAR/BRI). The complaint asserted claims under Sections 1 and 2 of the Sherman Act as well as Section 7 of the Clayton Act.

Following some preliminary procedural skirmishing including an unsuccessful motion to transfer venue to the Southern District of New York, the parties submitted a stipulated protective order on January 10, 2006, which Judge Real signed unaltered three days later without holding a hearing, receiving any supporting briefing, or making any findings concerning the need for a protective order. DE 58; ER 186. The protective order allows any party producing information in discovery in the action to designate it as confidential, and it requires that any filings that include or refer to any designated materials be filed under seal, with no requirement of approval of the sealed filing by the court, and no provision for the filing of redacted, public versions of materials filed under seal.

Following the entry of the protective order, virtually every substantive paper filed with the district court in this case was filed under seal. Sealed filings include not only motions on discovery-related matters, such as a motion for appointment of

a special master and motions to compel discovery, but also the motion to certify the class and the responses thereto, the parties' memoranda of "contentions of fact and law," and Kaplan's motion for summary judgment and the class's opposition to the motion and supporting declarations.[2] In short, virtually the entire litigation was conducted under seal once the protective order was entered.

Based on the sealed motion for class certification, Judge Real entered an order on May 16, 2006 (DE 114), certifying a nationwide class consisting of all persons who had taken a bar review course from BAR/BRI between August 1997 and the date of the order.[3] DE 114. Beyond stating that the basic requirements of Fed. R. Civ. P. 23 were satisfied, the brief order provided no analysis of the size or nature of the class or the considerations that made class treatment appropriate, nor did it address any of the arguments made in the sealed briefing on the class certification motion.

Following the certification of the class, Kaplan moved for summary judgment on count two of the complaint, which alleged a conspiracy in violation of Sherman Act Section 1 between Kaplan and West. After extensive sealed briefing,

[2] A listing of items filed under seal to which the Gaudet objectors later sought access in connection with their objections is at ER181-82; the full extent of the sealing is revealed by examining the docket entries at ER 210-30.

[3] The ending date for the class period was subsequently set at July 31, 2006.

the court entered a minute order denying the motion, without explanation, on September 20, 2006. DE 219.

Shortly before a pretrial conference scheduled for February 2007, the parties informed the court that they had arrived at a mediated proposed settlement of all claims asserted in the class action. The court then vacated the existing schedule for the case and directed the parties to submit a schedule for preliminary approval of the settlement. DE 238. On March 5, 2007, the court entered a stipulated scheduling order providing that a preliminary approval hearing would be held on March 19, 2007, and that an order preliminarily approving the settlement would be issued by March 22, 2007. DE 240. The court orally granted the motion for preliminary approval at the hearing on March 19, 2007. DE 258. On March 27, 2007, the court entered its written order preliminarily approving the settlement and directing mailed notice to the class. DE 259.

As explained in the notice mailed to the class in early April 2007, ER 130, and elaborated at greater length in the proposed settlement agreement itself, ER 134, the heart of the proposed settlement was a $49 million payment to the class in full satisfaction of all claims for monetary relief asserted in the complaint. The agreement provided that class counsel could apply for a fee (not exceeding 25% of the settlement amount) to be paid from the settlement fund, and that the named plaintiffs could apply for court approval of "incentive awards" to be paid from the

fund. The remaining proceeds (net of costs of administration) would be distributed among class members who submitted claims in proportion to the amount they paid for their bar review courses, but no claimant would be entitled to receive more than 30% of the amount he or she paid for bar review courses during the class period. If, as a result of the 30% cap, there were undistributed proceeds remaining after all claimants were paid, the agreement provided that there would be a "suitable" *cy pres* distribution.

The class notice informed the class that the court would hold a final settlement approval hearing on June 18, 2007, and that any class member who objected to the proposed settlement must file a "a notice of intention to appear and a statement of the position to be asserted and the grounds therefore, together with copies of any supporting papers or briefs" by May 21, 2007. ER 133. Neither the settlement notice nor the website established to disseminate information about the settlement, http://www.barbri-classaction.com/barbri/default.htm, provided class members with any information about how to seek access to sealed materials in the record or suggested that there was any separate deadline for doing so.

The notice prompted objections from over 50 members of the class, including three of the named plaintiffs, who invoked the support of one of the attorneys representing the class, Eliot Disner. *See* ER 6-8 (listing objectors). Among the objecting non-named class members were the appellants here, Robert

Gaudet, Jr., Andrea Boggio, Sandeep Gopalan, and Elizabeth DeLong. On May 21, 2007, they submitted their objections to the court (DE 310), together with a motion to unseal the class action and summary judgment briefing and other sealed materials in the record, including materials submitted by the parties' damages experts, which were referred to by the proponents of the settlement but remained under seal. *See* DE 377, 378.[4] The motion to unseal pointed out that the sealing of vast swaths of the record, including dispositive motions, was inconsistent with this Court's case law requiring specific findings of "compelling reasons" for the sealing of dispositive motions and "good cause" for the sealing of other filings. The Gaudet objectors also argued that the sealing of the record made it virtually impossible to evaluate and present arguments concerning the adequacy of the settlement in light of the strength of the plaintiffs' case, which was largely hidden from view.[5]

[4] The motion to unseal was returned unfiled by the clerk's office because of technical noncompliance with the local rules, *see* ER 178-80, but defendants had already responded to it on the merits, *see* ER 166-67; DE 354, 355, 358. It was refiled on June 14, 2007 (DE 377, 378), and ultimately treated by the district court as having been filed on the deadline for filing objections. *See* ER 47.

[5] After the Gaudet objectors submitted their motion to unseal, counsel for defendant Kaplan wrote to them offering to make some, but not all, of the materials they requested available to them, with redactions made by counsel. Even as redacted, the materials offered would remain subject to the protective order, and the Gaudet objectors would have been required by the terms of the offer to agree to abide by the protective order and to file any papers incorporating or describing the protected materials under seal. *See* ER 168-69. The Gaudet objectors did not

With respect to the settlement itself, the Gaudet objectors argued, among other things, that the settlement fund of $49 million was inadequate in relation to the possible recovery of treble damages should the plaintiff class prevail in the litigation, particularly in light of class counsel's own assertion that their damages expert supported a claim of actual damages for the class as a whole of $158 to $168 million, which would yield a treble damages award of $474 to $500 million. The Gaudet objectors also opposed the 30% cap on individual recoveries under the settlement and the diversion of any remaining settlement amount to a *cy pres* award; they pointed out that given that the 30% figure fell far short of a treble damages recovery under plaintiffs' experts damages estimate, a *cy pres* component would be improper as long as identifiable class members were receiving less than a complete recovery.[6]

In orders entered on September 11, 2007, the district court overruled all objections to the settlement, entered a final judgment approving the settlement and dismissing the antitrust claims, and awarded a fee of up to 25% of the $49 million

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accept this proposal, pointing out in a letter to defense counsel that the offer did not include access to all the requested materials and that it would continue to shield the materials from the view of the class as a whole and impose unwarranted restrictions on the Gaudet objectors' own ability to make use of them. ER 174-77. Defense counsel never responded to the Gaudet objectors' letter, and never offered complete and unencumbered access to the requested materials.

[6] The Gaudet objectors also opposed the named plaintiffs' requests for incentive awards of $25,000 to $75,000, and argued that the attorneys' fees sought by class counsel were excessive and insufficiently documented.

settlement amount to class counsel.[7] The court set forth its reasoning in a 37-page opinion. ER 29. With respect to the adequacy of the settlement in relation to the possible risks and benefits of continued litigation, the court recited in largely conclusory fashion the costs and risks of proceeding to trial, the possibility that class certification might not be maintained throughout the litigation, and the possibility that the class might not prevail on the merits of its claims. ER 39-40. As to the settlement amount, the court rejected the Gaudet objectors' view that the court should consider that if the class were to prevail it would be entitled to treble damages. Relying principally on language from the Second Circuit's decision in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 458-59 (2d Cir. 1974), *overruled on other grounds, Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), the court held that, as a matter of law, only the amount of actual damages could be considered in the assessment of the settlement's adequacy. ER 44. Based on that yardstick, the court held that the $49 million settlement amount was sufficient because it amounted to approximately 30% of the plaintiff class's damages estimate. ER 41. The court further rejected the challenge to the cap and *cy pres* feature of the settlement on the ground that it was necessary to prevent

[7] *See* ER 5 (final judgment); ER 29 (opinion); ER 66 (findings of fact and conclusions of law); ER 124 (attorneys' fee order).

class members from receiving a "windfall" in the form of a recovery in excess of their estimated actual damages. ER 35-36.[8]

With respect to the motion to unseal, the court held that it was "irrelevant" to approval of the settlement because the court itself had had access to the sealed records and, as "guardian" for the interests of the class members, independently assessed the settlement based on its privileged access to the record. ER 46. The court also stated that the motion was "untimely" because, in the court's view, it should have been filed at some unspecified time between the date the objectors received notice of the proposed settlement and the deadline provided in the class notice for submission of objections and all supporting papers. ER 46. The court did not address the propriety of the sealing and made no findings that it was justified under any standard.

[8] While purporting to reject all objections to the settlement, the court also, consistent with the Gaudet objectors' contentions, properly rejected the named class representatives' claims for extremely large incentive awards, holding that their efforts did not justify the tens of thousands of dollars they claimed. The court adopted the Gaudet objectors' estimate that the incentive amounts were approximately 200 to 600 times the recovery individual class members would likely receive from the settlement, which the court characterized as "inherently suspicious." ER 54. The court also agreed with the Gaudet objectors that it was improper for class representatives to receive compensation calculated as if they had served as counsel, that the amounts claimed did not correspond to any demonstrated benefit that the class representatives efforts had conferred on the class and were disproportionate to any risks or expenses that they had incurred, and that the incentive requests were ethically dubious and created conflicts of interest between the class and the class representatives. ER 51-64.

SUMMARY OF ARGUMENT

The district court's responsibility in assessing the settlement's fairness and adequacy was to weigh the advantages of settlement against the risks and possible benefits of continued litigation. The court's failure to consider that the principal possible benefit of continued litigation (and, indeed, the *only* possible outcome if the class were to prevail on the merits of its claims) was a potential treble damages recovery inevitably skewed the court's analysis toward approval of the settlement. The reasons the court offered for excluding the potential for treble damages from its settlement calculus were wholly inadequate, consisting solely of reliance on a precedent, *Grinnell*, that is at odds with the teachings of this Court, including its decision in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), which explicitly took account of the possibility of a treble damages recovery in analyzing the fairness of a class action settlement. Moreover, *Grinnell*'s statements about treble damages are devoid of support in logic or sound policy. In short, the district court's holding that it could not consider the potential for a treble damages recovery constituted legal error, and rendered its approval of the settlement an abuse of discretion.

The district court's holding that it could not consider the possibility of a treble damages recovery had a profound, and in fact determinative, effect on its assessment of the settlement. Only by excluding from view the prospect that success for the class would mean a treble damages award was the court able to

conclude that the settlement amount constituted approximately 30% of the possible recovery in the case, which in turn was the premise of the court's holding that the amount was adequate. Had the court considered that a successful outcome for the plaintiff class would have included a treble damages recovery, it would have had to conclude that the net benefit of the settlement to the class was only about 7-8% of the potential recovery in the case. The district court never considered whether that outcome was fair and adequate, and nothing in its analysis suggests that it would, or even could, have found that the settlement was reasonable in relation to a potential treble damages recovery if the litigation were to continue to judgment.

The district court's refusal to unseal the record in this case to allow all class members unfettered access to the materials that would enable them meaningfully to assess and present arguments concerning the fairness of the settlement was equally erroneous. A long line of this Court's precedents, perhaps foremost among them *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003), are clear in their rejection of the use of blanket protective orders to deny public access to litigation records for which neither good cause nor compelling reasons for secrecy have been shown. Those precedents, which protect the right of even uninterested members of the public to have access to judicial records of the type sealed here, apply a fortiori when access to litigation records is needed by class members in a case where they have substantial interests protected by due process.

The district court's stated reasons for disregarding those access rights were manifestly erroneous. The Gaudet objectors' motion to unseal records was in no sense untimely, as it was brought within the only deadline applicable to objectors—the deadline for presenting objections and supporting papers established in the settlement notice—and was promptly responded to by the settling parties. And the court's principal reason for denying the motion—its view that its own review of the sealed record was sufficient to protect the interest of objectors—runs counter to the entire notion that objectors have rights to be heard with respect to the fairness and adequacy of a settlement.

ARGUMENT

I. The District Court Erred in Refusing to Assess the Adequacy of the Settlement in Light of the Class's Entitlement to Treble Damages If It Prevailed in the Litigation.

A. A District Court Abuses Its Discretion if It Considers a Class Settlement's Adequacy Under an Incorrect Legal Standard.

A district court may approve a settlement of a class action "only after a hearing and on finding that the settlement … is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(C). The district court must "carefully consider" the adequacy of the settlement, *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003), particularly in light of the inherent tension attributable to class counsel's self-interest in achieving a settlement that, like this one, involves an extremely

substantial fee. *See id.* at 959-60; *see also Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (noting conflict between interests of class and counsel resulting from large award of fees); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) ("the conflict between a class and its attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery"); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) ("The interest of class counsel in obtaining fees is adverse to the interest of the class in obtaining recovery because the fees come out of the common fund set up for the benefit of the class.").

Consideration of the adequacy of a class settlement requires a sensitive assessment of the benefits provided to the class by the settlement as against the costs, risks, and potential recovery if the case were to proceed:

> To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: "the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement."

Staton, 327 F.3d at 959 (quoting *Molski v. Gleich*, 318 F.3d at 953). The essence of the inquiry is whether the settlement reflects a reasonable compromise in light of the prospects of further litigation. *Id.*

A critical element of this analysis, particularly in cases such as this one where the class seeks a monetary recovery and the consideration for settlement is principally monetary, is consideration of the value of the proposed settlement in comparison to an appropriately discounted valuation of the possible recovery if the case were to proceed to judgment. As the U.S. Court of Appeals for the Third Circuit put it in its influential and widely cited opinion in the *GM Truck* litigation:

> In formulaic terms we agree that "in cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." MCL 2d § 30.44, at 252. This figure should generate a range of reasonableness (based on size of the proposed award and the uncertainty inherent in these estimates) within which a district court approving (or rejecting) a settlement will not be set aside. *See Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). The evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution. See *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir.1977). The primary touchstone of this inquiry is the economic valuation of the proposed settlement.

In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 806 (3d Cir. 1995); *see also In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981) (district court must consider likelihood of success and "range of possible recovery that plaintiffs would realize if they prevailed at trial") There is broad agreement among the circuits that assessing the value of continued litigation (discounted by the likelihood of success) is a key element of

the determination of the adequacy of a settlement. *See also, e.g., Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

Although district courts have wide discretion to determine the adequacy of a settlement, *see Staton*, 327 F.3d at 953; *Molski*, 318 F.3d at 953, that discretion is constrained by the requirement that the trial court consider the appropriate factors in weighing the settlement's reasonableness. As this Court has put it, "[t]he district court must show that it has explored these factors comprehensively to survive appellate review." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). The district court's determination may be affirmed only "if the district court judge applies the proper legal standard," *id.*, as "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) (quoted in *In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061, 1065 (9th Cir. 2001)); *see also In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008) ("A district court abuses its discretion if it does not apply the correct law ….") (citation omitted). In particular, where the district court, because of a legal error, fails properly to consider or explain the basis of its conclusions as to the possible recovery by the plaintiff class, its decision that a settlement is adequate cannot stand, but must be reversed and remanded. *See, e.g., In re Corrugated Container Antitrust Litig.*, 643 F.2d at 214-15.

B. The District Court's Reliance on *Grinnell* to Foreclose Consideration of the Class's Possible Recovery of Treble Damages Was Erroneous as a Matter of Law.

In this case, the district court's evaluation of the adequacy of the settlement was premised on the court's view that in considering the amount of the settlement relative to the possible benefit to the class of proceeding with the litigation, it should disregard the fact that the class, if successful on its antitrust claims, would be entitled to treble damages. The court relied on the Second Circuit's decision in *City of Detroit v. Grinnell Corp.*, 495 F.2d at 458-59, as well as a handful of district court decisions following *Grinnell*. ER 44.[9] As a result of its holding, the court considered only the adequacy of the settlement as compared to the actual damages the class might prove if it prevailed, rather than the treble damages it would actually be entitled to recover if it prevailed—a threefold undervaluation of the claims, or a difference of hundreds of millions of dollars.

The district court's reliance on *Grinnell* to limit its consideration of the adequacy of the settlement was a legal error requiring reversal. *Grinnell*'s notion that treble damages should not be considered in the district court's settlement calculus does not reflect the law of this Circuit, nor is it supported by logic or

[9] The court also cited *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 220314, at *24 (D.N.J. Sept. 13, 2005); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 257 (D. Del. 2002); and *In re Lorazepam & Chlorazepate Antitrust Litig.*, 205 F.R.D. 369, 376 (D.D.C. 2002). ER 44.

policy. Rather, if, as this Court and others have held, the objective of the district court's assessment of a settlement is to determine whether it reflects a reasonable compromise in light of the possible risks and benefits of litigation, the fact that success in litigation for the class would carry with it a legal entitlement to treble damages cannot be excluded from the district court's consideration. Indeed, approving settlements without regard to the existence of the statutory treble damages remedy runs directly counter to Congress's choice to make treble damages the sole measure of monetary recovery for federal antitrust claims such as those asserted in this case.

1. This Court Has Not Adopted the *Grinnell* "Rule" and Its Precedents Support Consideration of Treble Damages.

This Court has not adopted the *Grinnell* position that a prevailing antitrust plaintiff's entitlement to treble damages should be disregarded in assessing the fairness of a proposed settlement of an antitrust class action. Indeed, the Court has not explicitly commented on this aspect of the *Grinnell* decision.[10] This Court has,

[10] This Court has noted that *Grinnell* has been discredited in other respects. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (citing *Grinnell* as "overruled on other grounds"). Specifically, *Grinnell*'s holdings that paralegal fees are not compensable was disapproved by the Second Circuit in *U.S. Football League v. National Football League*, 887 F.2d 408, 415 (1989), and its exclusive reliance on the lodestar method of assessing the reasonableness of attorney's fees (to the exclusion of the percentage-of-recovery method) was abrogated by the Second Circuit in *Goldberger*, 209 F.3d at 49-50. On the other hand, this Court has cited *Grinnell* favorably for the general proposition

however, itself expressly emphasized the availability of treble damages in holding a class action settlement to be inadequate and unreasonable. In *Molski v. Gleich*, 318 F.3d at 953-56, the Court prominently referred to the class's entitlement to treble damages if it were to prevail when it found that the settlement—which provided compensatory relief only to the named plaintiff, required *cy pres* payments, and offered only injunctive relief to the class as a whole—was inadequate. As the Court stated, "Intertwined with our finding that the settlement agreement was unfair is the fact that the cy pres award in this case replaced the claims for actual *and treble damages* of potentially thousands of individuals." *Id.* at 954 (emphasis added). More broadly, *Molski*'s determinations as to the due process protections required for the class in both the class certification process and the settlement approval process turned on the fact that the class claims released by the settlement were treble damages claims. *Id.* at 950-51. *Molski*'s statements about the significance of the treble damages claims would be inexplicable if, as the district court held, consideration of the class's entitlement to treble damages were irrelevant to the settlement approval process.

(uncontested in this case) that "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Linney*, 151 F.3d at 1242 (quoting *Grinnell*, 495 F.2d at 455).

Indeed, if anything, the need to consider treble damages in a case such as this one is even greater than it was in *Molski*. Under the statutes at issue in *Molski*, treble damages were a discretionary remedy. See 318 F.3d at 945 (quoting statutory provision allowing such additional damages as the court or jury "may" award, "up to a maximum of three times the amount of actual damages"). By contrast, to the extent a federal antitrust plaintiff can prove liability and cognizable damages, an award of treble damages, rather than actual damages, is *mandatory* under the Clayton Act. "15 U.S.C. § 15(a) states in relevant part that a private antitrust plaintiff '*shall* recover threefold the damages by him sustained' (emphasis added). Congress's use of the word 'shall' makes the treble damages remedy a mandatory result if a plaintiff successfully sues an antitrust violator." *Kristian v. Comcast Corp.*, 446 F.3d 25, 47 (1st Cir. 2006). If, as this court held in *Molski*, a merely discretionary entitlement to treble damages is a property interest protected by the Due Process Clause and must be considered in assessing the fairness of a settlement, a mandatory treble damages remedy is surely entitled to at least as much consideration.

Molski's consideration of the fact that the plaintiffs' claims were for treble damages reflects no more than a common-sense approach to the task of reviewing the adequacy of a settlement. That task necessarily requires consideration not only of the risks of proceeding with the litigation, but also of the potential benefits—

that is, as the Third Circuit put it in *GM Truck*, consideration of "the damages plaintiffs would likely recover if successful." 55 F.3d at 806. In a federal antitrust case, where the Clayton Act *requires* a treble damages award to a prevailing plaintiff, *see* 15 U.S.C. § 15(a), consideration of the damages that the class would receive if successful necessarily involves consideration of treble damages, not merely actual damages.

2. *Grinnell*'s Reasoning Is Faulty.

The question posed by the district court's decision is whether the opinion in *Grinnell* and the cited district court decisions adopting its view justify a departure from considering what the class would *actually* be entitled to receive if it were to prevail—treble damages. As shown below, an objective appraisal of *Grinnell*'s reasoning demonstrates that the artificial limitation it would impose on a district court's consideration of the adequacy of an antitrust settlement is not warranted. *Grinnell*'s explanation of why treble damages should not be considered is, on its face, thoroughly illogical:

> While it is true that treble damages are extracted from a defendant who ultimately loses a civil antitrust suit on the merits, there are strong reasons why trebling is improper when computing a base recovery figure which will be used to measure the adequacy of a settlement offer. First, the vast majority of courts which have approved settlements in this type of case, even though they may not have explicitly addressed the issue, have given their approval to settlements which are traditionally based on an estimate of single damages only. See Halper, The Unsettling Problems of Settlement in Antitrust Damage Cases, 32 ABA Section of Antitrust Law 98 (1966); Alioto, The Economics of a Treble Damage

> Case, 32 ABA Section of Antitrust Law 87 (1966). Second, to argue that treble damages ought to be considered in a calculation of a base recovery range is to distort the entire theoretical foundation which underlies the settlement process. It requires defendants to admit their guilt for the purpose of settlement negotiations. One of the underlying premises on which such negotiations are based, however, is that defendants never have to concede their guilt. They can protest their innocence of any wrongdoing and assert that they are settling for purely pragmatic business reasons. To require treble damages to be considered as part of the computation of the base liability figure would force defendants automatically to concede guilt at the outset of negotiations. Such a concession would upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement.

495 F.2d at 458-59.

Setting aside the court's reference to "tradition"—which by itself provides no explanation of why the supposed "tradition" comports with the law or the objectives of the settlement approval process—the *Grinnell* court's rationale identifies only one reason for not considering treble damages: The supposition that considering the availability of treble damages if the class were to prevail on its claims amounts to forcing the defendant to concede its guilt.[11]

Even the most cursory reflection reveals the fallacy of the *Grinnell* court's assertion. Consideration of the fact that the plaintiff class, if it were to prevail in the litigation, would receive a treble damage award no more requires the defendant

[11] As one court has put it, "tradition is hardly compelling" as a reason not to consider treble damages. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 210 n.30 (D. Me. 2003).

to concede guilt than does consideration of the actual damages to which the class would be entitled if it succeeded on its claims (which *Grinnell*, and the district court below, agree is indispensable in assessing the adequacy of settlement). In both cases, what the court is thinking about is what the consequences would be *if* the class were to succeed, but in neither case does it assume that the class *will* succeed, and still less does it assume that the defendant has *conceded* that the class will succeed. Put another way, the court's consideration of a possible successful outcome for the class (discounted by the court's consideration of the likelihood of success, the other risks and costs of proceeding with the litigation, and the resources of the defendant to satisfy a judgment) does not rest on the notion that the defendant has conceded *anything*. The difference between considering treble damages and actual damages is not that one involves a concession that the class will prevail and the other does not; it is that one *accurately* assesses the consequences *if* the class prevails, while the other pretends that success for the class would result in only one third of the recovery to which the class would actually be entitled.

The few courts that have given thoughtful consideration to *Grinnell*'s reasoning have, therefore, rejected as illogical the decision's statement that considering the availability of treble damages would require defendants to "concede" guilt. As one court put it:

> Nor, in this Court's view, does consideration of trebling require a defendant to admit guilt at the outset of settlement negotiations. It requires only that the defendant take into account the undeniable fact that damages will be trebled if the plaintiff prevails at trial. And defendants in fact do take that into account, at least in their private calculations, every day in formulating their settlement positions in antitrust cases.

In re Auction Houses Antitrust Litig., 2001 WL 170792 at *8 (S.D.N.Y. Feb. 22, 2001), *aff'd*, 42 Fed. Appx. 511 (2d Cir. 2002); *see also In re Compact Disc.*, 216 F.R.D. at 210 n.30 (rejecting *Grinnell*'s admission-of-guilt theory on the ground that "the whole premise of a settlement (except settlements only to avoid legal expense) is defendant recognition that liability is a possibility").

Similarly unrealistic is *Grinnell*'s suggestion that considering treble damages in the settlement calculus would somehow make settlements in antitrust cases impossible. To be sure, consideration of the prospect of treble damages in the settlement calculus may, and indeed should, affect the point at which cases settle, but there is no reason to think that it is likely to determine *whether* they settle. To use *Grinnell*'s own words, the "theoretical foundation which underlies the settlement process," 495 F.2d at 459, is that both plaintiffs and defendants will consider settlements in light of the likely downside risks and benefits of litigation. For private antitrust defendants, one of the principal risks to be avoided is treble damages liability, and both a defendant's willingness to settle and the amount for which it is willing to settle will necessarily be based on consideration of that possibility. As the district court explained in *In re Auction Houses*:

> The theoretical foundation that underlies the settlement process is not a tradition that a plaintiff's asking price may not exceed single damages …. Rather, the theoretical foundation of the settlement process is that plaintiffs and defendants all are rational economic actors. Each makes its own assessment of the maximum possible net recovery. Each discounts the maximum possible recovery by the estimated probability of that outcome. Each thereby comes to its own view of what it is prepared to accept or to pay—in the vernacular, its own view of what the case "is worth" or, in the language of some of the decision analysis literature, its expected value. If the ranges of the two sides overlap, a case usually settles. If they do not, a case usually is decided by litigation. To ignore the fact that plaintiffs and defendants both consider the possibility of trebling in coming to their respective assessments is to ignore economic reality. Tradition has nothing to do with it.

2001 WL 170792 at *8. Thus, there is nothing about considering treble damages that is incompatible with the premise of settlement or would discourage settlement. On the contrary, requiring a court to consider the possibility of treble damages in reviewing a settlement merely forces the court to weigh the same factors that, necessarily, would go into the private calculations of rational participants in the settlement process.

3. Consideration of Treble Damages Is Not "Speculative."

Beyond the facially inadequate rationales offered by *Grinnell* itself for not considering that a prevailing plaintiff would be entitled to treble damages, some of the district courts that have followed *Grinnell* have offered a different explanation for the rule—the assertion that consideration of treble damages is somehow unduly "speculative." The *Warfarin* decision cited by Judge Real is perhaps most explicit

in offering this gloss on *Grinnell*: "Recovery of [treble] damages is purely speculative, however, and need not be taken into account when calculating the reasonable range of recovery." *In re Warfarin Sodium Antitrust Litig*., 212 F.R.D. at 257. Similarly, Judge Real's opinion below adopted this rationale for excluding consideration of treble damages, stating that "[e]valuating the Settlement in light of the treble damages available at the end of a successful trial is purely speculative." ER 44.

There is nothing speculative, however, about the prospect that a prevailing plaintiff in a federal antitrust action will receive treble damages. As explained above, trebling of damages is mandatory under the Clayton Act. *See supra* at 20; *see also In re Compact Disc*, ("Trebling is automatic if antitrust damages are assessed at all, unlike other forms of punitive damages that require additional proof or that may be left to court discretion."). By contrast, in two of the cases cited by the district court, the prospect of treble damages even if the plaintiffs prevailed was in fact uncertain, because the claims were based on state laws that did not necessarily provide for treble damage recoveries. *See Remeron*, 2005 WL 220314, at *24; *Lorazepam & Chlorazepate*, 205 F.R.D. at 376 n.12. In such circumstances, it might be appropriate not to consider trebling, but that uncertainty rationale does not apply in a case, such as this one, where the plaintiffs'

entitlement to treble damages if successful is established unambiguously by applicable federal law.

To be sure, there is always some uncertainty involved in assessing the likelihood of the plaintiffs' prevailing, and the range of *actual* damages that they are likely to be able to prove, but once those hurdles (which do not themselves appear to have fazed the courts that have followed *Grinnell*) are surmounted, considering that the damages will be trebled if the plaintiffs prevail does not, by definition, add any additional element of uncertainty or speculation. If, as all the courts agree, consideration of likelihood of success and the range of actual damages is not unduly speculative, and, indeed, is mandatory, adding to the mix the consideration that damages will be multiplied by three will increase the range of likely recovery, but it will not increase in the slightest degree the uncertainty or speculativeness of the court's estimate of the probable result if the case is litigated to conclusion. Rather, assuming that the court has accurately assessed the probability of success and the range of actual damages, trebling will only enhance the accuracy of the court's estimation of the possible benefits of further litigation, and thus of the court's assessment of the adequacy of the proposed settlement.

4. Excluding Consideration of Treble Damages Distorts the Assessment of the Relative Risks and Benefits of Settlement.

For all the reasons set forth above, there are, as one court has put it, "few perceptible justifications of the single damages standard for the determination of the fairness of antitrust class actions." *In re Auction Houses*, 2001 WL 170792 at *8. On the other hand, to the extent that the objective of the courts' consideration of the fairness and adequacy of class settlements is to help ensure that they reflect a truly arms' length and rational compromise of the potentially valuable claims of absent class members, pretending that the class would not receive treble damages if it prevailed has a substantial cost. In an arms' length negotiation between an individual antitrust plaintiff and a defendant, the parties would both have foremost in their minds that the claims were treble damages claims, and any settlement would reflect that consideration, together with all others that bear on the value of the claims (including likelihood of success, costs and other risks of litigation, and the defendant's ability to satisfy a judgment). Permitting class settlements to be considered without regard to the defendant's potential liability for treble damages means that class plaintiffs' antitrust claims will be systematically undervalued in the settlement process relative to those of non-class plaintiffs:

> In nonrepresentative private antitrust cases, no one is prohibited from considering the prospect of treble damages in determining whether to settle a case. In other words, a non-representative plaintiff will determine what the case is worth, having full regard to the possible recovery of

> treble damages. The single damage standard for class action settlements, however, places the settlement court, which acts as a fiduciary for the absent class members, in a position in which it may be forced to approve a settlement that no non-representative plaintiff would accept in similar circumstances. And it does not suffice to say that counsel for a plaintiff class will guard against such a result. The agency costs of class actions are too well established to permit such a broad conclusion.

Id.

Moreover, by skewing the process in favor of approval of lower settlement amounts, adoption of the policy of not considering treble damages in assessing the adequacy of class settlements will undermine the policies that led Congress to adopt the mandatory treble damages remedy for antitrust violations. As the Supreme Court has stated, "the Clayton Act [is] designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. [The] statut[e] bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in … the Clayton Act … is the carrot of treble damages." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 151 (1987). Permitting antitrust defendants in class actions to resolve claims against them through settlements that undervalue the claims by failing to reflect the likelihood that litigation would lead to treble damages liability will seriously undermine the statutory goal of using the weapon of treble damages to deter violations and motivate prosecution of cases. Ignoring

the availability of treble damages in considering the settlement of an antitrust case is just as contrary to Congress's remedial policy choice as it would be to ignore the availability of damages in a Title VII case after Congress afforded that remedy in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072.

That the district court's decision is inconsistent with the congressional directive that treble damages be the sole monetary remedy in cases of this sort is confirmed by the court's approval of the part of the settlement agreement that caps awards to individual class members and directs a *cy pres* distribution of any resulting excess settlement amounts. The court explained that, in its view, it was necessary to limit individual class members to an amount roughly equal to their estimated actual damages in order to prevent a "windfall." ER 17-18.[12] The

[12] Under this Court's decision in *Molski v. Gleich*, the district court's approval of a *cy pres* recovery in a case where identifiable class members have treble damages claims that have not been fully satisfied was itself a clear abuse of discretion. See 318 F.3d 954-55 (rejecting *cy pres* award where proof of individual class members' treble damages claims would be neither burdensome nor costly). However, the Gaudet objectors do not now seek vacatur of the district court's approval of the settlement on this ground, because class counsel have represented to them that the number and amount of claims made by class members are such that the cap and *cy pres* provisions will not come into play: Class members' payments will be substantially less than the cap, and the settlement amount will be fully exhausted by those payments. Thus, in practice, the cap and *cy pres* features of the settlement will not likely contribute to its inadequacy. Should the settlement ultimately be disapproved and replaced by a settlement with a more adequate settlement amount, the Gaudet objectors would continue to assert their position that a cap on individual recoveries and a *cy pres* distribution of "excess" settlement amounts would be improper.

court's view that recovery of anything beyond actual damages in an antitrust case would constitute a "windfall" is directly contrary to Congress's decision that treble damages are the only available monetary remedy for antitrust violations such as those alleged in this case; indeed, an "actual damages" recovery for the class would not even be a *possible* outcome of this case if it were litigated to conclusion. The district court's apparent disapproval of an award to individual claimants in excess of their actual damages cannot justify its adoption of a yardstick for assessing the adequacy of the settlement that disregards their statutory entitlement to that remedy, in derogation of the significant policies Congress believed would be served by antitrust treble damages.

5. The District Court's Refusal to Consider Treble Damages Requires That Its Approval of the Settlement Be Vacated.

As demonstrated, the district court's invocation of *Grinnell* to foreclose consideration of the defendants' potential treble damages liability in its determination of the adequacy of the settlement was legal error (and hence, necessarily, an abuse of discretion). Moreover, the district court's assessment of the adequacy of the settlement was substantially skewed by its holding that the availability of treble damages must be ignored. The court stressed that the settlement amount "represents approximately thirty-percent (30%) of Plaintiffs' damages, estimated by their expert to be in the range of $158 million to $168

million, and seven times Defendants' expert's [$7 million] estimate of damages." ER 41. Had the court considered that any damages recovered would be trebled, the comparison would have been drastically different. The class's net recovery under the settlement agreement—$36.75 million—is in fact less than twice the $21 million treble damages recovery that would result if defendants' damages estimate were correct, and only about 7.5% of the treble damage recovery of $474-$504 million that the damages calculated by the class's expert would yield.[13]

The court never considered whether, let alone found that, a settlement that amounted to only 7.5% of the class's maximum recovery according to plaintiffs' counsel's estimate would be a fair and adequate resolution of this case. Indeed, the court's explanation of why the settlement amount was adequate relied on another decision finding a *33%* recovery to be reasonable, which would hardly justify accepting a 7-8% recovery. ER 41. Thus, as a result of the district court's use of a legally incorrect yardstick to measure the settlement, this Court does not have the

[13] The net figure used in the text, $36.75 million, represents the settlement amount less the 25% attorney's fee approved by the court. For an apples-to-apples comparison it is the settlement amount net of attorney's fees that should be compared to the treble damages award, because if the class were to prevail in litigation, it would receive its attorneys' fees on top of the treble damages award. "An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory, … and the purpose of the attorney's fees provision is to insulate treble damage recovery from expenditures for legal fees, consistent with section 4's purpose to encourage private persons to undertake enforcement of antitrust laws." *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312 (9th Cir. 1982) (citation omitted).

benefit of the district court's consideration of whether the settlement is adequate in relation to the actual range of potential recoveries for the class in this case. As a result, the court cannot affirm the district court's approval of the settlement, but must vacate it and remand for consideration under the appropriate legal standard. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d at 214, 218.

Indeed, if anything, the district court's analysis strongly suggests that it would not, and could not, have found the settlement amount fair in relation to a treble damages recovery. Nothing in the court's perfunctory analysis of the possibility that the class might be decertified (in a case where the court had certified the class and its opinion offered no reason to think it was likely to reconsider that ruling) or that the class might not succeed on the merits (in a case where the court did not even think the defendant's summary judgment arguments were worthy of addressing in an opinion) provided any indication that such a substantial discount of the potential recovery would be appropriate in this case. Moreover, the court's own statement that a 30% recovery was a fair and reasonable outcome of this case would be hard to square with approval of a 7-8% recovery. And, of course, had the court thought the settlement amount justifiable in relation to the prospect of a treble damages recovery, it would have had no reason to go out of its way to adopt *Grinnell*'s specious logic. Even if it is conceivable that the court might have found the settlement adequate in relation to a potential treble

damages recovery, however, the fact remains that it did not, and this Court cannot uphold a discretionary judgment that the district court never made.

II. The District Court Erred in Permitting Settlement Approval to Proceed Without Unsealing the Record.

Not only was the district court's approval of the settlement based on a legally erroneous limitation on the court's consideration of the settlement's adequacy, but the settlement process was also marred by the court's willingness to proceed in the face of an almost totally sealed record, which prevented class members from having access to court documents necessary to their consideration of the proposed settlement. Although objectors challenged the sealing of the record in connection with their presentation of their objections, the district court neither found that the secret record was legally justifiable nor articulated a plausible rationale for ducking the issue.[14]

A. The Sealing of the Record Cannot Be Justified Under This Court's Precedents.

The filing of documents under seal in this case was the result of the district court's entry of a protective order stipulated to by class counsel and counsel for the

[14] The standard for review of the district court's actions with respect to the sealing of records is abuse of discretion, with de novo review of the question whether the district court applied the proper legal standards. *See Pintos v. Pacific Creditors Ass'n*, 504 F.3d 792, 802 (9th Cir. 2007). "An order that fails to articulate its reasoning must be vacated and remanded because '[m]eaningful appellate review is impossible' when the appellate panel has no way of knowing 'whether relevant factors were considered and given appropriate weight.'" *Id.* (citation omitted).

defendants. The stipulation was apparently submitted to the Court by counsel on January 10, 2006, without a supporting motion or memorandum, and signed and entered by Judge Real on January 13, 2006, without any findings or reasons for its entry. The protective order is of the type this Court has termed a "blanket" protective order, permitting the parties to designate materials they produce as confidential and requiring the filing under seal of any paper that contains information from any confidential materials (without any requirement of court approval of the sealing or of the filing of a public version of the document). *See Foltz v. State Farm*, 331 F.3d at 1131 (describing blanket protective order). As a result of the blanket order, large numbers of filings concerning the class certification motion, Kaplan's summary judgment motion, and various other motions were filed under seal in their entirety, with no separate determination made by the court that sealing was appropriate.

This Court has repeatedly emphasized its disapproval of the entry of blanket protective orders and their use to justify wholesale sealing of motions and other papers filed with the court. In particular, the Court has stressed that a protective order must be based on specific findings of "good cause" for protection of *particular* materials—regardless of whether they are filed in court—and that parties have no right to rely on blanket protective orders entered absent such findings. *Foltz*, 331 F.3d at 1138. The Court has been even stronger in its

condemnation of the use of a blanket protective order to justify the wholesale sealing of papers filed in court merely because they incorporate or mention materials designated as confidential by a party. As the Court has put it, "[t]hese orders often contain provisions that purport to put the entire litigation under lock and key without regard to the actual requirements of Rule 26(c)." *Kamekana v. City & County of Honolulu*, 447 F.3d 1172, 1183 (9th Cir. 2006). To avoid such wholesale sealing of a litigation record, the Court has stressed that filings involving dispositive motions are subject to a presumptive right of public access that can be overcome only by a specific showing of "compelling" reasons for the sealing of particular materials. *Pintos v. Pacific Creditors Ass'n*, 504 F.3d at 801-03; *Kamekana*, 447 F.3d at 1178-80; *Foltz*, 331 F.3d at 1134-36. Even as to non-dispositive motions, such as discovery motions, the Court has required a specific showing of "good cause" to justify sealing. *Kamekana*, 447 F.3d at 1179-80; *Foltz*, 331 F.3d at 1135; *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-13 (9th Cir. 2002). And the Court has emphasized that even where justified, sealing should be limited to specific parts of a filing as to which the applicable standard for sealing (whether "compelling reasons" or "good cause") is met, with redacted versions of the filings available on the public record. *Foltz*, 331 F.3d at 1136-37.

These requirements were not remotely met here. The court never made a finding that there was good cause for the protective order as to any particular

materials, yet the parties used the protective order as a basis for filing under seal their summary judgment memoranda and supporting materials (dispositive motions under *Pintos*, *Foltz* and *Kamekana*), their class certification briefing and supporting materials, and various discovery motions.[15] At no time did the district court make a finding that the sealing of materials relating to the dispositive motions had a compelling justification, nor did it even find good cause for the sealing of materials concerning non-dispositive motions. Nor did the defendants, in opposing the motion to unseal, even attempt to demonstrate a particularized justification for the sealing of each of the documents sought, but only argued in generic terms that some of the materials referred to or filed with the sealed documents involved trade secrets and other confidential business information.[16]

The extensive sealing of the record in this case thus does not even satisfy the standards developed to protect general public interests in access to judicial records

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[15] This Court has not considered whether class certification motions are subject to the standard applicable to "dispositive motions" or other motions, but their nature is much more analogous to the features of dispositive motions described in *Kamekana*, 447 F.3d at 1179, as justifying the distinction: They are intimately related to the merits of litigation, and they are matters of intense public interest.

[16] Defendant Kaplan's opposition to the motion included a declaration stating that a handful of documents filed along with some of the materials sought by the Gaudet objectors contained trade secrets, but Kaplan provided no explanation or justification for why these few items required wholesale sealing of the record and could not, even if they were legitimately subject to protection, be redacted. *See* ER 170-73.

(interests that are recognized by the "compelling reasons" standard for materials subject to the presumptive right of access to judicial records, and by the Rule 26 "good cause" standard for other materials). That is, there has been no showing that would justify withholding these records even from a person with *no direct interest* in the litigation.

Class members, by contrast, have a direct stake in the litigation, as its settlement extinguishes substantial personal damages claims that they possess. *See Devlin v. Scardelletti*, 536 U.S. at 7-10 (emphasizing that class members are not strangers to the litigation, but parties with legal rights that are directly controlled by a settlement). Such claims give class members, unlike members of the general public, interests in the resolution of the class action that are protected by the Due Process Clause. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847-48 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Class members thus have a right to be heard on the question of the fairness and adequacy of the settlement *see* Fed. R. Civ. P. 23(e)(1)(C), (4)(A)-(B), a right that is meaningful only if they have access to information necessary to address the factors that bear on that question—that is, information sufficient to assess the risks and benefits of litigating the class claims as compared to settling them. As one court has put it, an absent class member is entitled to "an adequate opportunity to test … the strengths and weaknesses of the proposed settlement." *Girsh v. Jepson*, 521 F.2d 153, 157 (3d

Cir. 1975). The sealed record here deprived class members of that opportunity by denying them access to the filings that would have shed light on such matters as the risk that class status would not ultimately be maintained, the likelihood that the antitrust claims against the defendants would ultimately be successful, the basis of the damages estimates in the case, and even the estimated size of the class. Again, the sealing would not even be proper as against an uninterested member of the general public, but it was obviously even more prejudicial to class members whose substantive rights were affected by the proposed settlement and who thus had a direct need to be able to understand the course of proceedings.

B. The District Court's Rationales for Rejecting the Motion to Unseal Were Flawed.

The district court's denial of the Gaudet objectors' request that the record be unsealed rested on two grounds: that the request was "untimely" and, "more importantly," that the "crucial role served by the Court in the class action settlement approval process" obviated the objection. ER 46.[17] The district court's secondary timeliness ground cannot withstand analysis. The settlement notice in this case, which was dated March 26, 2007, and, as the court noted, reached class

[17] The court's opinion also stated that the objection to the sealing of the record was "moot," ER 46, but, unlike its statements that the objection was untimely and that it disregarded the role of the court, the opinion did not explain the one-word reference to mootness, and given that the materials unquestionably remained under seal at the time the court ruled on the proposed settlement, the motion to unseal was in no sense moot.

members in early April, notified class members only that notice of any objections to the settlement, including "a statement of the position to be asserted and the grounds therefore, together with copies of any supporting papers or briefs" must be filed by May 21, 2007. The notice nowhere suggested that procedural objections, such as the Gaudet objectors' motion to unseal, must be filed earlier. As the court acknowledged, the Gaudet objectors presented their motion to unseal within the relatively short time between receipt of the notice and the May 21 date for objections. ER 46.[18]

Not only did the Gaudet objectors have no reason to think that such a submission, which complied with the only deadline for objectors that the settlement notice imposed, would be untimely, but, in light of the well-settled principle that absent class members must be given adequate time to present their objections, *see, e.g.*, *Girsh v. Jepson*, 521 F.2d at 157-59 (3d Cir. 1975), it would be unreasonable to demand that class members familiarize themselves with the

[18] The Gaudet objectors' motion to unseal was initially received by the district court clerk's office on May 21, 2007, and defendants responded to it in memoranda filed on June 4, 2007, and June 6, 2007. DE 354, 358. However, the court had rejected the motion on grounds of a "discrepancy," or failure to comply with the district court's technical rules governing the form of the motion. Accordingly, the motion was refiled on June 14, 2007 (DE 376, 377, 378). The district court's untimeliness ruling was not, however, based on the technical defect and the June 14 filing date; rather, the court acknowledged that the objectors had actually requested unsealing at the time when objections were due, but held that even that was untimely. ER 46.

record and develop their procedural motions in a shorter time.[19] *Cf. In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 882 (6th Cir. 2000) (holding that it was error to deny objectors' motions to intervene as "untimely" where they were filed before the fairness hearing, and where objectors had no reason to believe they had a need to file such motions until they received notice of the proposed settlement). Nor did the timing of the Gaudet objectors' motion prejudice any other parties: The defendants had ample time to respond to the motion, and any delay in the fairness hearing that might have resulted from unsealing the record and giving class members additional time to evaluate it could not have prejudiced the class because the settlement amount had been placed in an interest-bearing escrow account, obviating any potential losses attributable to passage of time.

The district court's "more important" reason for rejecting the motion to unseal—that it disregards the court's "role as guardian for the Class," ER 46—is even wider of the mark. Indeed, it is antithetical to the entire rationale for affording absent class members due process rights in connection with class

[19] For example, in *Girsh*, an objector who sought discovery (a much more potentially burdensome demand than merely a request for access to materials already filed in court) was found to have proceeded reasonably when she made her requests promptly *after* giving notice of her intent to participate in the fairness hearing, about three months after she received notice of the settlement. *See* 521 F.2d at 158 n.9.

settlements that, if approved, will bind them and extinguish rights of action that they possess. As the Supreme Court has emphasized:

> What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing. To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court.

Devlin, 536 U.S. at 11.

The district court reasoned that access to the record by absent class members was unnecessary because "this Court has had access to all of the pleadings filed by the parties, including those under seal pursuant to the Protective Order," and "[t]he Court's access to and review of these documents throughout the pendency of this Action precludes any contention that this Court is incapable of assessing the fairness, adequacy, and reasonableness of the Settlement." ER 46. In short, the court's denial of the motion rested on its view that the court's own analysis of the record, unaided by an adversarial presentation by objectors class members, was a complete and adequate substitute for the ability of class members to assess the reasonableness of the settlement in light of the record and present arguments to the court based on that assessment.[20]

[20] Notably, the district court did *not* rule that the defendants' offer to make some of the documents available to the Gaudet objectors (in redacted form and still

The district court's conception of the court's fiduciary role with respect to the class as a *substitute* for procedures that would give the class a meaningful voice in the approval process puts the matter precisely backwards. Rather, the principal fiduciary responsibility of the trial judge is not to attempt to represent the class's interests himself, but to ensure that the proper procedures are in place to allow protection of the interests of class members—which in this instances means ensuring that objecting class members have an adequate opportunity to develop the record supporting their objections to the settlement, so that the settlement's adequacy can be tested through an appropriate, *adversary* process. *Girsh*, 521 F.2d at 157.[21] Indeed, the entire basis of granting rights of participation to objectors (including rights to appeal) is that the settlement places objectors in an adversarial relationship with respect to the class representatives, necessitating protection of the objectors' "power to preserve *their own interests* in a settlement that will ultimately bind them." *Devlin*, 536 U.S. at 10 (emphasis added).

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subject to the protective order) obviated their objection to the sealing. Any such ruling would itself have been erroneous, not only because the offer did not include all of the documents the Gaudet objectors sought, but also because the materials still would have remained under seal and inaccessible to the vast majority of class members.

[21] Similarly, in *Diaz v. Romer*, 961 F.2d 1508 (10th Cir. 1992), the Tenth Circuit emphasized the trial court's fiduciary responsibility to appoint subclass representatives to represent class members whose interests diverged from those of the named plaintiffs. If the court's fiduciary relationship with the class were such that the court itself could represent their interests, such steps would be unnecessary.

If the court's fiduciary responsibility to class members were a sufficient substitute for procedures allowing them to assert and protect their own interests, the entire structure of Rule 23, with its emphasis on ensuring that class members and their counsel adequately represent the class (*see* Fed. R. Civ. P. 23(a)(4)), and that absent class members receive notice and an opportunity to be heard on the sufficiency of any settlement (*see* Fed. R. Civ. P. 23(e)(1)(A), 23(e)(4)(A)) would be largely superfluous. Moreover, decisions such as *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999), stressing the importance of determinations at the trial and appellate level that absent class members were adequately represented by named class representatives in settlement negotiations, would be inexplicable under the district court's view, because the approval of the fairness of the settlement terms by a disinterested court exercising its fiduciary responsibility would itself be sufficient regardless of any deficiency in the class representatives.

A proper reading of the Rule and the requirements of modern class action practice—that its commands are cumulative, not alternative—flows from the logic of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). There, the named plaintiffs argued that they should be excused from giving class members notice and opt-out rights under Rule 23(c)(2) because "adequate representation, rather than notice, is the touchstone of due process in a class action ...." *Id.* at 176. "[T]his view has little to commend it," the Supreme Court held, because "Rule 23 speaks to notice

as well as to adequacy of representation and requires that both be provided." *Id.*; *see also id*. at 176 n.13 (class members' opt-out rights also protected). So, too, here, neither the settling parties nor the lower court may pick and choose which demands of Rule 23 are applicable. Rather, the multiple protections provided class members under the text of Rules 23 and its jurisprudence serve functions for which one element of those protections—the judge's role in the approval process—does not by itself provide an adequate substitute.

In short, the trial court's fiduciary responsibility to the class, while an indispensable element of class action practice, is not a substitute for an adequate adversary process in which absent class members have an opportunity to appraise a settlement's fairness and present their arguments based on the record to the court. A process in which class members are "deprived of information necessary to contest" a settlement because critical information is under seal is "inherently flawed." *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 232(5th Cir. Feb. 4, 2008).

The flaw here is particularly glaring because, as explained above, the sealing of the record in this case did not even conform to the procedural and substantive standards that protect the access rights of members of the general public with no

direct stake in the litigation.[22] Denying class members access to records of their own litigation, with a material bearing on substantial interests entitled to due process protection, is even less justifiable. As the U.S. Court of Appeals for the Fifth Circuit recently observed in another class action, "[o]n a broad public level, … litigation with millions at stake … ought to be litigated openly," and "'[p]ublic confidence [in our judicial system] cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.'" *High Sulfur*, 517 F.3d at 230 (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir.1978)).

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.

[22] Indeed, the district court failed to explain why, even if the sealing did not justify deferral of settlement approval, the records should not have been unsealed simply as a matter of protection of interests in public access incorporated in the presumptive right of access to dispositive motions and the "good cause" standard of Rule 26 for nondispositive motions.

Respectfully submitted,

Scott L. Nelson
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

Attorneys for Objectors-Appellants
Robert Gaudet, Jr., et al.

March 31, 2008

STATEMENT OF RELATED CASES

Objectors-appellants Robert Gaudet, Jr., et al., are aware of no related cases pending in this Court other than those that have already been consolidated with their appeal—that is, Nos. 07-56643, 07-56645, 07-56646, 07-56647, 07-56649, 07-56651, and 07-56833.

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 brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 12,267 words.

March 31, 2008

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Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on counsel for the parties as follows:

Sidney K. Kanazawa
MCGUIRE WOODS LLP
1800 Century Park East, 8th Floor
Los Angeles, CA 90067-0000

Counsel for Plaintiffs-Appellees Rodriguez, et al.

James P. Tallon, Esq., Attorney
SHEARMAN & STERLING
599 Lexington Avenue
New York, NY 10022-6069

Counsel for Defendant-Appellee West Publishing Corp.

Stuart Senator
MUNGER TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

Counsel for Defendant-Appellee Kaplan, Inc.

J. Garrett Kendrick
KENDRICK & NUTLEY
Fifth Floor
1055 E. Colorado Blvd.
Pasadena, CA 91106-0000

Counsel for Objectors-Appellants Schneider, et al. (Nos. 07-56643, 07-56833)

Steven F. Helfand
HELFAND LAW OFFICES
Suite 1400
582 Market Street
San Francisco, CA 94104-0000

Counsel for Objectors-Appellants Feldman, et al. (No. 07-56645)

Robert C. Chojnacki
LAW OFFICES OF ROBERT C. CHOJNACKI
525 Laurel Avenue
Menlo Park, CA 94025-0000

Counsel for Objectors-Appellants Oriol, et al. (No. 07-56646)

Charles A. Sturm
STEELE STURM PLLC
Wells Fargo Plaza
1000 Louisiana, Suite 3789
Houston, TX 77002

Counsel for Objectors-Appellants Juranek, et al. (No. 07-56647)

Darrell Palmer
LAW OFFICES OF DARRELL PALMER
Suite A
603 North Highway 101
Solana Beach, CA 92075-0000

Counsel for Objectors-Appellants Evans & Mullinix, et al. (No. 07-56649)

Daniel Brown
LAW OFFICES OF DANIEL BROWN
131 Lawnview Circle
Danville, CA 94526-4620

Counsel for Objector-Appellant Dunmore (No. 07-56651)

March 31, 2008

Brian Wolfman