

Docket Nos. 09-56278 (L), 09-56314, 09-56500

In the
United States Court of Appeals
For the
Ninth Circuit

RYAN RODRIGUEZ, on behalf of himself and all others similarly situated,
REENA B. FRAILICH, on behalf of herself and all others similarly situated,
JENNIFER BRAZEAL, LISA GINTZ, LOREDANA NESCI,
LORRAINE RIMSON and KARI BREWER,

Plaintiffs-Appellees,

v.

SARAH SIEGEL, EVANS & MULLINIX, P.A.,
JENNIFER BROWN McELROY, DANIEL M. SCHAFER,
DAVID ORIOL, Unnamed Classmember, and JASON TINGLE,

Objectors-Appellants.

*Appeal from a Decision of the United States District Court for the Central District of California,
No. 05-CV-03222 · Honorable Manuel L. Real*

BRIEF OF APPELLANTS

EDWARD F. SIEGEL, ESQ.
LAW OFFICES OF EDWARD F. SIEGEL
27600 Chagrin Boulevard, Suite 340
Cleveland, Ohio 44122
(216) 831-3424 Telephone

J. DARRELL PALMER, ESQ.
LAW OFFICES OF DARRELL PALMER
603 North Highway 101, Suite A
Solana Beach, California 92075
(858) 792-5600 Telephone
(858) 792-5655 Facsimile

Attorneys for Objectors-Appellants Sarah Siegel, et al.



CORPORATE DISCLOSURE STATEMENT

Evans & Mullinix, P.A. asserts that there is no parent corporation and there is no publicly held corporation that owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF JURISDICTION.....1

STATEMENT OF THE ISSUES.....2

STATEMENT OF THE CASE AND FACTS3

STANDARD OF REVIEW5

SUMMARY OF ARGUMENT6

ARGUMENT7

 OBJECTORS' COUNSEL SHOULD BE AWARDED
 ATTORNEYS' FEES.....7

CONCLUSION14

CERTIFICATE OF COMPLIANCE.....14

STATEMENT OF RELATED CASES15

CERTIFICATE OF SERVICE16

In re AOL Time Warner ERISA Litig.,
No. 02 Cv. 8853 (SWK), 2007 U.S. Dist. LEXIS 79545,
2007 WL 4225486 (S.D.N.Y. Nov. 28, 2007)12

In re Domestic Air Transp. Antitrust Litig.,
148 F.R.D. 257 (N.D.Ga. 1993)9, 11

In re Indep. Energy Holdings,
2003 U.S. Distr. LEXIS 21322, 2003 WL 2280172412

In re Pacific Enter. Sec Litig.,
47 F.3d 373 (9th Cir.1995)5

In re Prudential Insurance Co America Sales Practice Litigation Agent Actions,
278 F.3d 175 (3d Cir. 2002)10

Park v. The Thomson Corporation,
2009 Lexis 37617 (April 2, 2009)11

Reynolds v. Beneficial National Bank,
288 F.3d 277 (7th Cir. 2002)10, 11

Rodriguez v. West Publishing Corp.,
563 F.3d 948 (9th Cir. 2009)3, 4, 15

White v. Auerbach,
500 F.2d 822 (2d Cir. 1974)9

Whittemore v. Sun Oil Co.,
58 F.R.D. 64, 627 (S.D.N.Y. 1973)9

STATUTES

28 U.S.C. § 12911

OTHER AUTHORITIES

Alba Conte, *Attorney Fee Awards* (1986)8

Edward H. Cooper, *The (Cloudy) Future of Class Actions*,
40 Ariz.L.Rev. 923 (1998).....10

STATEMENT OF JURISDICTION

This Court has jurisdiction as a result of an appeal from a final order approving this class action settlement. 28 U.S.C. § 1291. The final order denying Objectors' counsels' fees was entered by the trial court on August 7, 2009.

(Excerpt of Record, 1) (Hereinafter "E.R. 1"). Timely appeals were taken by objectors Sarah Siegel, Evans & Mullinix, P.A., Jennifer Brown McElroy, Daniel Schafer, David Oriol and Jason Tingle from the United States District Court for the Central District of California which had jurisdiction based on a federal question as a result of the claim being pled under the Clayton Act and the Sherman Anti-Trust Act (E.R. 3, 6).

STATEMENT OF THE ISSUES

Whether Objectors' counsel are entitled to fees for their services on this case.

STATEMENT OF THE CASE AND FACTS

At the June 18, 2007 hearing, and in the minutes of that hearing (E.R. 416---Doc. 350), and at the July 9, 2007 hearing, and in the minutes of that hearing (E.R. 416---Doc. 399), and in the Final Order and Judgment Approving Settlement (E.R. 392), and in the Order Granting Class Counsel Attorneys' Fees (E.R. 386), and Order Denying Incentive Awards to Class Representatives (E.R. 384), and in the Order Granting Motion to Approve Settlement, Granting Motion for Attorneys' Fees, and Denying Motion for Incentive Awards (E.R. 347), and in the Findings of Fact and Conclusions of Law (E.R. 289), the Court expressed concern about the same issues raised by Objectors Evans, Siegel, Brown, Schafer, Oriol and Tingle. The Court then took precisely the action that was urged by such Objectors in that it denied the request for incentive awards and awarded attorneys' fees of less than the requested amount.

Nevertheless, the District Court rejected the request by these Objectors for attorneys' fees, thereby leaving their counsel unpaid for the hard work which ultimately bore fruit, holding that Objectors contributed nothing. On appeal, this Honorable Court reversed the finding that objectors contributed nothing: "This seems clearly erroneous to us." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). The District Court was directed ". . . to reconsider the extent

to which Objectors added value that increased the fund or substantially benefited the class members, and to award attorney's fees accordingly." Id.

Notwithstanding this Court's Opinion dated April 23, 2009, the District Court denied Objectors' counsels' renewed request for fees (E.R. 1).

This appeal is from a final judgment denying Objectors counsels' fees. Counsel for Objectors Sarah Siegel, Evans & Mullinix, P.A., Jennifer Brown McElroy, Daniel Schafer, David Oriol and Jason Tingle filed their Joint Request for Attorneys' Fees on June 30, 2009. (E.R. 416 - Document 550). The Order Granting and Denying Objector's Applications for Attorney's Fees was entered on August 7, 2009. (E.R. 1).

Objectors Sarah Siegel, Evans & Mullinix, P.A., Jennifer Brown McElroy, Daniel Schafer, David Oriol, and Jason Tingle filed their timely Notice of Appeal on August 17, 2009 (E.R. 3, 6).

STANDARD OF REVIEW

The District Court's decision is subject to review for an abuse of discretion. Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998); In Re Pacific Enter. Sec Litig., 47 F.3d 373, 377 (9th Cir.1995).

SUMMARY OF ARGUMENT

The District Court erred in denying Objectors' Joint Motion for Attorneys' Fees. Objectors' Counsel provided substantial benefit to the Class and the Court by identifying critical problems with the provisions concerning *cy pres*, incentive awards, and the size of Class Counsel's fee. The law is well-settled that Objectors should be paid for their hard work in preserving the adversary process, assisting the Court, identifying deficiencies and, in many instances, improving the quality of the Settlement.

ARGUMENT

OBJECTORS' COUNSEL SHOULD BE AWARDED ATTORNEYS' FEES.

Despite the benefits provided to the Class by Objectors' Counsel in calling the court's attention to the *cy pres* and incentive award as issues critical to the Court's decision as to whether the Settlement was fair, reasonable, and adequate, and the objection that the \$12,750,016 fee to be paid to Class Counsel was excessive, the Court denied Objector Counsels' reasonable request for Attorneys' fees. (E.R. 1). The enormous volume of briefing by the settling parties, obviously, did not provide enough information to enable the Court to make a determination without more briefing. The settling parties did not identify those points as potential problems. Indeed, the obvious mission of the settling parties is to obtain approval of the Settlement as submitted. The settling parties cannot, should not, and will not, be expected to expose the deficiencies, weaknesses, and failures of the Settlement. That duty falls to counsel for Class Members who file objections.

Accordingly, Class Members were invited to register their objections, to appear at the Fairness Hearing, and to provide independent information which otherwise would not be available to the Court. They did so through counsel. Objectors' Counsel also preserved the adversary process, which otherwise would have vanished after the opposing parties settled, provided confidence that the Settlement was free of collusion, and assisted the Court in understanding this

complex case so a fully informed decision could be made about whether to approve the Settlement. Ample case law, described below, establishes that participation of objectors in class actions to provide these essential, if intangible, benefits should be encouraged by compensating counsel for objectors.

It is well established that an award of fees under either the "common fund" or "common benefit" theories is available to compensate attorneys who participate in class litigation that provides benefit to the class. See, *Feinberg v. Adolf F. Feinberg Hotel Trust*, 922 S.W.2d 21, 26 (Mo. App. 1996); *Alyeska Pipeline Serv. Corp. v. Wilderness Society*, 421 U.S. 249, 257 (1975); see generally *Alba Conte, Attorney Fee Awards* § 2.2 et. seq. (1986). It is further undisputed that any attorney, not just the lead or class counsel, whose efforts materially benefit the class is eligible for a fee award. Id. § 2.24, at 89. With particular relevance to objectors' claim for fees, counsel "who successfully object to a proposed class settlement resulting in an improved settlement . . ." are entitled to an award of fees. Id. at 89, 91. See also, *Duhaime v. John Hancock Mutual Insurance Co.*, 2 F.Supp.2d 175, 176 (D. Mass 1998).

Indeed the case law consistently shows that objectors' counsel must be compensated for efforts which, as "devil's advocate," assist the Court. Howes v. Atkins, 668 F.Supp. 1021, 1027 (E.D. Ky.-Covington Division 1987), citing *Fisher v. Procter & Gamble Manufacturing Company*, 613 F.2d 527, 547 (5th Cir. 1980);

Frankenstein v. McCrory Corporation, 425 F.Supp. 762, 767 (S.D.N.Y. 1977);
White v. Auerbach, 500 F.2d 822, 828 (2nd Cir. 1974); Whittemore v. Sun Oil Co.,
58 F.R.D. 64, 627 (S.D.N.Y. 1973).

Fees have been awarded in cases where objectors appeared, even when the settlement terms were not altered, because courts have recognized their value. Specifically, courts have found that their presence improved the process and assisted the court in its scrutiny of the settlement. See County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1325-27 (2nd Cir. 1990). In Howes, the court made an award to objector's counsel of 10% of the total amount of the settlement "even though the settlement was not improved." 668 F.Supp. 1021, 1026. See also Domestic Air, 148 F.R.D. at 359.

"It is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally It is impossible for a class to select, retain or monitor its lawyers as an individual client would." Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P., 212 F.R.D. 400, 412 (E.D. Wis. 2002). This is particularly appropriate in this case because of the inherent conflict of interest between the Class Representatives and the Class that was exposed by the work of Objectors' Counsel. "Class counsel and defendants' counsel may reach a point where they are cooperating in an effort to consummate

the settlement.” Id. “Courts, too, are often inclined toward favoring the settlement, and the general atmosphere may become largely cooperative.” Id.

“Thus, objectors serve as a highly useful vehicle for class members, for the court and for the public generally.” Great Neck, 212 F.R.D. at 412. “From conflicting points of view come clearer thinking.” Id. at 412-13. “Therefore, a lawyer for an objector who raises pertinent questions about the terms or effects, intended or unintended, of a proposed settlement renders an important service.” Id. at 413. See also, In re Prudential Insurance Co America Sales Practice Litigation Agent Actions, 278 F.3d 175,202 (3rd Cir. 2002), (The "objecting lawyer independently can monitor the proposed settlement" and "not only renders a service to the class, but aids the court.").

“The law generally does not allow good Samaritans to claim a legally enforceable reward for their deeds.” Reynolds v. Beneficial Nat. Bank, 288 F.3d 277, 288 (7th Cir. 2002) (Posner, C.J.). “But when professionals render valuable albeit not bargained-for services in circumstances in which high transaction costs prevent negotiation and voluntary agreement, the law does allow them to claim a reasonable professional fee from the recipient of their services.” Id. “That is the situation of objectors to a class action settlement.” Id. See also, Edward H. Cooper, The (Cloudy) Future of Class Actions, 40 Ariz.L.Rev. 923, 950 (1998)

infra. asserting, "Means should be found to ensure that the costs of objecting are awarded on terms that will encourage reasonable objections."

In other cases, objectors' counsel have been recognized where their efforts have augmented the common fund or otherwise improved a class action settlement. See, e.g., Bowling v. Pfizer, Inc., 922 F.Supp. 1261, 1285 (S.D. Ohio), aff'd, 102 F.3d 777 (6th Cir. 1996); In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 257, 359-60 (N.D.Ga. 1993); In re Anchor Securities Litigation, 1991 WL 53651 (E.D.N.Y.) (citing City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1098 (2nd Cir. 1977)).

Indeed, fees are payable to Objectors' counsel even where the Court may have decided separately, prior to seeing objections, to implement a suggestion which appeared later in the objections. That issue arose in Reynolds v. Beneficial National Bank, 288 F.3d 277, 287 (7th Cir. 2002). The Seventh Circuit remanded the case, stating: "The judge denied a fee to the objectors in part on the ground that he had already decided, without telling anybody, not to accept the reversion. But objectors must decide whether to object without knowing what objections may be moot because they have already occurred to the judge." See also, Park v. The Thomson Corporation, 2009 Lexis 37617, p. 1 (April 2, 2009), which is a companion to the instant case¹ wherein the court awarded fees to objectors'

¹ The Thomson Corporation is the parent of West Publishing.

counsel: "Courts in this district have recognized that objectors' counsel are entitled to an award of fees even where the Court would have likely reached the same result, with or without objectors' comments." See, e.g., In re Indep. Energy Holdings, 2003 U.S. Dist. LEXIS 21322, 2003 WL 22801724, at *1; In re AOL Time Warner ERISA Litig., No. 02 Cv. 8853 (SWK), 2007 U.S. Dist. LEXIS 79545, 2007 WL 4225486, at *2 (S.D.N.Y. Nov. 28, 2007).

In this case, the Evans, Siegel, Brown, Schafer, Oriol and Tingle objectors were not the only ones to object to the fees and the other matters. Several sets of objectors, including those represented by C. Benjamin Nutley, John W. Davis, Joshua Furman, Robert Gaudet, Jr., Charles A. Sturm and the undersigned filed similar objections. However, for some unknown reason, the Court below awarded fees in the amount of \$8,125 to Mr. Kendrick and the same amount to Mr. Davis. The court awarded nothing to any of the other objectors' counsel. This is patently unfair and no reason, rational or otherwise, was presented for the discrimination between sets of counsel. All objectors and their counsel who brought up the issues upon which this Honorable Court reversed and remanded the matter should be treated equally and no one person or group should be preferred over another. Furthermore, the amounts awarded should bear some rational relationship to the benefit conferred. Sixteen Thousand Dollars (\$16,000) bears no readily ascertainable relationship to the almost Ten Million Dollar (\$10,000,000) benefit

which was realized due to the combined efforts of objectors' counsel. Up until the time of the hearing on these Objectors' post-appeal application for attorney fees, their attorneys had a total lodestar of \$417,061.25 and expenses of \$8,592.52. (E.R. 416 – Document 550). Therefore, the District Court's award of \$0 is unfair and constitutes an abuse of discretion. Therefore, these Objectors and their counsel pray that this Court award attorneys' fees to all of the counsel who objected to the settlement and to treat them all equally rather than discriminating in favor of a few at the expense of the majority.

CONCLUSION

For the reasons stated above, Appellants' respectfully request that this Court reverse the District Court's denial of Objector's Request for Attorneys' Fees.

Dated: March 8, 2010 Respectfully submitted,

s/ Darrell Palmer

Darrell Palmer
Suite A. 603 North Highway 101
Solana Beach, CA 92075-0000

Edward F. Siegel
27600 Chagrin Blvd., Ste. 340
Cleveland, OH 44122

Kenneth E. Nelson
2900 City Center Sq.
1100 Main St.
Kansas City, MO 64105

David Schafer
7800 IH-10 W, #830
San Antonio, TX 78230

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 2,168 words.

STATEMENT OF RELATED CASES

Appellants are aware of the following appeals pending before this Court that will likely raise similar issues: Appeal numbers 09-56278 and 09-56500. The District Court ruling denying fees to Objectors' counsel and awarding fees to Class Counsel was previously appealed to this Honorable Court and resulted in the published opinion, *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009). The case numbers for the consolidated cases which were the subject of that opinion were: 07-56643, 07-56645, 07-56646, 07-56647, 07-56649, 07-56650, and 07-56651.

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Charles A. Sturm
ROSENGARTEN & LEVEN, LLP
23801 Calabasas Road, Suite 1015
Calabasas, California 91302

s/ Stephen Moore