No. 11-16097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: HP INKJET PRINTER LITIGATION

NICKLOS CIOLINO, et al.,
Plaintiffs-Appellees,
v.
THEODORE FRANK, et al.,
Objectors-Appellants,
v.
HEWLETT-PACKARD COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CASE NO. 05-CV-03580-JF
BEFORE THE HONORABLE JEREMY FOGEL

DEFENDANT-APPELLEE HEWLETT-PACKARD COMPANY'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1), Defendant-Appellee Hewlett-Packard Company ("HP") makes the following disclosures: HP has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Defendant-Appellee Hewlett-Packard Company ("HP") concurs with the jurisdictional statement of Objectors Theodore H. Frank and Kimberly Schratwieser ("Objectors").

STATEMENT OF THE ISSUES

1. The class settlement in this case provided injunctive relief and up to $5 million in monetary benefits to class members. Did the District Court abuse its discretion when it approved the settlement after carefully balancing the approval factors in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), applying enhanced scrutiny required for coupon and pre-certification settlements, and determining that the settlement was fair, reasonable, and adequate?

2. Although the Objectors raised a number of legal challenges in the District Court, they did not contend that a class settlement is *per se* invalid under Rule 23(e)(2) of the Federal Rules of Civil Procedure if it does not provide that the excess amount of attorneys' fees requested by class counsel but not awarded by the court is provided to the class. Did the Objectors fail to preserve, and thereby waive, this argument?

3. The injunctive relief provided in the settlement addresses the alleged non-disclosures and misrepresentations challenged by plaintiffs. Did the District

Court abuse its discretion in finding that the injunctive relief in the settlement provided valuable benefits to the class?

4. This Court's precedent requires that a court must analyze the fairness, reasonableness, and adequacy of a class settlement as a whole. Should a settlement that was negotiated at arm's length and in good faith and that provides meaningful benefits be rejected as a matter of law even where there is no evidence of "self-dealing" by class counsel?

5. The notice to the settlement class explicitly provided that all objections had to be "filed with the Court" and that class members who "fail to file and serve timely written objections . . . shall be deemed to have waived all objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement." Did this notice satisfy due process and Rule 23?

PRIMARY AUTHORITY STATEMENT

Objectors' Brief includes the applicable statutes and rules, except that they omit the following pertinent provisions of 28 U.S.C. § 1712(b)-(c) (which are relevant to the discussion *infra* pp. 40-41, regarding the basis for the attorneys' fee award):

28 U.S.C. § 1712.

(b) Other attorney's fee awards in coupon settlements.

(1) In general. If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the

coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

(2) Court approval. Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

(c) Attorney's fee awards calculated on a mixed basis in coupon settlements.

If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief

(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

I. INTRODUCTION

The three class action lawsuits that are the subject of the settlement in this appeal challenge certain features of HP's inkjet printers. At their core, the lawsuits contend that HP should have disclosed certain technical features regarding how the inkjet printers operate. These actions were fiercely contested for more than five years, and plaintiffs suffered several significant setbacks during the litigation—including a dismissal of several claims on the pleadings, the denial of nationwide class certification, and a determination by the respected District Court Judge presiding over all of the lawsuits that plaintiffs' evidence was "weak" and that it would be very difficult to prove injury, causation, and damages.

Despite the substantial obstacles to any class-wide recovery if they continued to litigate these claims, plaintiffs' counsel negotiated a settlement that provides meaningful benefits to the class. The settlement includes injunctive relief that addresses the nondisclosure claims at the heart of these actions by requiring enhanced disclosures about the inkjet printers, plus up to $5 million in monetary benefits through e-credits redeemable for purchases of inkjet printers and supplies from HP. The District Court carefully considered all of the relevant factors governing the approval of class settlements, applied heightened scrutiny to this precertification and "coupon" settlement, and approved the settlement as fair,

reasonable, and adequate—but not before he substantially reduced class counsel's fee request (which was separate from the settlement) by 35%.

Objectors Theodore H. Frank and Kimberly Schratwieser are all that stand in the way of the class receiving these benefits. Their arguments do not contest the benefits to the class; to the contrary, they concede that the class received a fair, reasonable, and adequate benefit. Instead, Objectors focus on the alleged indicia—but no specific evidence—of "self-dealing" as a result of class counsel's allegedly excessive fee request. Objectors freely admit that their appeal is more about creating a new legal precedent than addressing any alleged demerits of this class settlement. Their assorted challenges are legally and factually without merit, and they do not provide a valid basis for rejecting the settlement. Because the District Court did not abuse its discretion or commit any legal error in approving the settlement, HP respectfully requests that this Court affirm the judgment.

II. STATEMENT OF FACTS

This settlement involves three separate putative class actions involving HP's inkjet printers in the United States District Court for the Northern District of California: (1) *In re: HP Inkjet Printer Litigation*, Case No. C05-3580 JF ("*Ciolino*"); (2) *Rich v. Hewlett-Packard Co.*, Case No. C06-03361 JF ("*Rich*"); and (3) *Blennis v. Hewlett-Packard Co.*, Case No. C07-00333 JF ("*Blennis*"). (Excerpts of Record ("ER") 159-63.)

A. The Procedural History Of The Actions

1. *Ciolino*. This consolidated class action case was initially filed on June 16, 2005, and captioned *In re: HP Inkjet Printer Litigation*, Case No. C05-3580 JF. (ER 159.) The plaintiffs in *Ciolino* alleged that HP failed to disclose and misrepresented to consumers that it programmed "Smart Chips" or used other low-on-ink ("LOI") messaging technology in its inkjet printers and cartridges to indicate that replacement of a cartridge is needed when the cartridge is not empty and is capable of additional printing. (*Id.*; Supplemental Excerpts of Record ("SER") 1017-18, 1021-25, 1127, 1131-33.) They also contended that as a result of the supposedly deceptive LOI messages and warnings, consumers prematurely replaced their inkjet cartridges and were deprived of the ability to use all of the ink. (*Id.*) Plaintiffs brought claims on behalf of a nationwide class of consumers for (a) alleged violations of California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*; the "UCL"), False Advertising Law (*id*. § 17500 *et seq.*), and Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq*.); (b) unjust enrichment; and (c) breach of express and implied warranties. (ER 159-60; SER 1019, 1025-31, 1128-29, 1133-39.)

Before reaching the settlement, the parties engaged in extensive pretrial discovery and motions practice before U.S. District Court Judge Jeremy Fogel. (ER 160-61, 275-304; SER 103-04, 114, 123-24.) The motions highlighted many

of the legal and factual challenges faced by plaintiffs in pursuing the *Ciolino* action and substantially narrowed plaintiffs' claims. (SER 984-91, 1002-14, 1046-64, 1088-1114, 1115-24.) In ruling on HP's Rule 12 motions, Judge Fogel dismissed for lack of standing plaintiffs' initial allegations that HP concealed that the Smart Chip was programmed to render the inkjet cartridges unusable based on an undisclosed expiration date. (SER 43-46, 51-52, 1034-44.) These dismissed allegations later were reasserted in the *Blennis* action, discussed below. (ER 160-61; SER 796, 798-801.)

Following extensive discovery over several years (including multiple depositions, written discovery requests and responses, and thousands of documents produced), plaintiffs moved to certify a nationwide class. (SER 726, 727-29, 740-55.) In opposing the motion, HP argued that a nationwide class action was unmanageable due to the choice of law analysis for each class member. (SER 611, 638-43.) HP also demonstrated that there was no actual or potential deception because the messages do not tell consumers that their ink cartridges are empty or that they should be discarded; instead, they simply explain that the ink cartridge is low. (SER 609-11, 619-20, 631-39.) But even if the messages were deceptive, HP argued that class members were not injured because there was no reliable method to determine the amount of ink remaining in each cartridge. (*Id.*)

HP also moved for summary judgment against the named plaintiffs because they could not prove that they received an allegedly deceptive LOI message, and thus they could not establish injury-in-fact or causation. (SER 645-46, 651-52, 659-72.)

Judge Fogel denied the motion for class certification and held that "the proposed nationwide class would be unmanageable" because of the choice of law issues that arise from certifying a nationwide class. (SER 8-12.) Although the court also determined that plaintiffs' evidence was sufficient to defeat HP's motion for summary judgment, it noted that this evidence was "weak." (SER 5-8.) At the hearing, Judge Fogel also observed that "[n]one of us understand what the actual claim is. . . . What is the actual misrepresentation that the basis of this massive class claim has." (SER 492-93.) After plaintiffs' counsel discussed the LOI messages, Judge Fogel remarked that the message "also says, 'consider having a replacement cartridge available.' That's hardly saying 'replace cartridge immediately . . . .' Why would you replace the cartridge if it doesn't tell you to replace the cartridge?" (SER 499-501.) He also asked, "[w]hat are your damages? . . . . [A]re we talking about a coupon, or are we talking about everybody who owns an HP printer gets .25 cents?" (SER 515-16.) And even if plaintiffs could determine damages, "decid[ing] who gets the money" was a significant problem for plaintiffs. (SER 519-21.)

Following this order denying their motion, plaintiffs conducted additional discovery and sought certification of substantially the same claims on behalf of California-only damages and injunctive subclasses. (SER 428-29, 436-39, 450-63.) HP opposed the motion (SER 355-58, 374-89), and the plaintiffs replied (SER 333-34, 339-46), but the parties settled the case before the District Court issued any ruling (SER 115).

2. *Rich*. On May 22, 2006, Carl Rich filed a class action complaint that alleged that HP failed to disclose that its color inkjet printers use color ink in addition to black ink when printing black text and images, a common process in the printing industry that is known as "underprinting." (ER 160; SER 972, 974-75.) In an amended complaint, Mr. Rich and new plaintiff David Duran also alleged that HP failed to disclose, or misrepresented, the actual page yield customers would receive, including the basis for the page yield and cost-per-page information, and the actual costs of printing black text and images. (ER 160; SER 818, 820-26.) They also claimed that HP failed to provide an option for disabling underprinting. (ER 160; SER 818, 820-26.) Plaintiffs brought claims on behalf of a nationwide class for alleged violations of the UCL, unjust enrichment, fraudulent concealment, and other claims. (ER 160; SER 828, 830-34.)

Before reaching the settlement, the parties filed several pretrial motions that revealed the significant factual and legal hurdles facing plaintiffs in the *Rich* action

as well. (ER 305-15; SER 1115-16, 848-67, 869-99, 901-21.) For example, the District Court granted HP's motion to dismiss and expressed skepticism that plaintiffs could assert warranty claims in *Rich*. (SER 837-46.) In response to the ruling, plaintiffs withdrew all of their contract and warranty claims. (SER 26, 29-39, 830-34.) Thereafter, the parties conducted extensive discovery, including several depositions (including two Rule 30(b)(6) witnesses of HP on the core printing technology at issue), written discovery requests and responses, and the production of thousands of pages of documents. (*See* ER 161-62; SER 73, 81, 103-04, 114, 123-24.)

Plaintiffs also filed a motion to certify a California-only damages class and a nationwide injunctive relief class, and HP filed a motion for summary judgment against the named plaintiffs. (SER 259-60, 265-66, 274-86, 295-98, 309-29, 401-02, 403-05, 411-25.) Although the District Court did not decide these motions in light of the settlement, as in the *Ciolino* action, this briefing exposed the legal and factual deficiencies of plaintiffs' claims. (SER 115-16, 259-60, 265-66, 274-86, 295-98, 309-29.) For example, HP demonstrated that: (a) there was no legal basis requiring HP to disclose every technical detail regarding the operation of its inkjet printers (such as underprinting); (b) this printing process only occurred in certain circumstances and the determination of whether it occurred required individualized inquiry into each class member's printing experience; (c) HP disclosed

underprinting and several options to disable this process; and (d) because underprinting improves print quality and benefits customers, plaintiffs suffered no injury. (*Id.*)

3. *Blennis*. On January 17, 2007, Jackie Blennis and David Brickner initiated a class action lawsuit that alleged that HP concealed that its inkjet printers and cartridges would "shut down" on an undisclosed expiration date. (ER 160-61; SER 795-96, 798-804.) Plaintiffs claimed that HP interfered with the right of the class to possess and use all of the ink in the HP print cartridges that they purchased. (ER 160-61; SER 795-96, 798-804.) Plaintiffs asserted claims for alleged violations of the UCL, fraudulent concealment, and unjust enrichment on behalf of a putative nationwide class. (ER 160-61; SER 807-14.)

Before reaching the settlement, the parties fully briefed HP's motion to dismiss, which substantially narrowed the claims in the case. (SER 674-91, 692-719, 756-79.) Specifically, the district court dismissed their claims for breach of express and implied warranty, trespass, and conversion. (SER 17-20, 23, 116-17.) Although plaintiffs filed a motion to certify a nationwide class, it was taken off calendar in light of the settlement. (SER 246-58.) As Judge Fogel recognized, however, many of the same factual and legal challenges that the plaintiffs faced in *Ciolino* and *Rich* also applied to *Blennis*. (ER 27.)

B. The Parties Agree To A Global Settlement

In August 2010, the parties reached a global settlement of these cases and related litigation involving HP LaserJet printers. (ER 158-210.) The settlement occurred only after a thorough investigation into the facts underlying the claims, extensive pretrial discovery, and legal research regarding the claims and defenses. (ER 161-62; SER 73, 81, 98-104, 114, 123-24, 202, 227.) In all of the cases, there were 17 fact depositions, 2 expert depositions, 250,000 pages of documents produced, and more than 100 written discovery requests and responses. (ER 161-62; SER 73, 81, 103-04, 114, 123-24, 193, 202, 227.) The parties also inspected the relevant printers, consulted with industry personnel, retained experts, and interviewed witnesses and putative class members. (ER 161-62; SER 73, 81, 103-04, 114, 123-24, 193, 202, 227.) As a result of the extensive discovery, the parties were able to intelligently assess the risks of protracted litigation. (ER 161-62; SER 73, 81, 103-04, 114, 123-24, 193, 202, 227.)

In addition, the settlement was the product of extensive arm's-length negotiations between plaintiffs' counsel and HP's counsel occurring over several years through dozens of in-person meetings and telephone calls. (SER 69, 73, 77-78, 104-05, 106-07, 113-14, 123-24, 132-33, 135-37, 193, 202, 227, 231-33.) The negotiations included multiple mediation sessions and conference calls with three respected mediators—the Hon. Daniel Weinstein (Ret.), the Hon. James L. Warren

(Ret.), and Alexander S. Polsky, Esq. (*Id.*) During one of the in-person sessions, an HP engineer and an expert retained by plaintiffs gave presentations on the technology at issue. (SER 136.) Judge Warren described the negotiations as "long and arduous" and stated that "[a]ll counsel vigorously asserted their positions and negotiated in good-faith and at arm's-length to reach an appropriate compromise for the class." (*Id.*)

The settlement provides meaningful relief to the class in the form of injunctive relief and monetary benefits. (ER 171-77.) The injunctive relief is in the form of enhanced disclosures that will provide class members with additional information regarding certain features of HP's printers that relate to the claims raised in each of the lawsuits:

(a) To address the claims in *Ciolino*, HP agreed to make additional disclosures on its website, user manuals, and/or software interfaces to explain that the LOI messages are only *estimates* and that actual ink levels may vary. HP also will explain that replacing the cartridge is not necessary when the LOI message appears, and that the user may continue printing until the print quality becomes unacceptable or (for certain models) there is a "replace cartridge" message.

(b) To address the claims in *Rich*, HP agreed to include additional disclosures via its website and/or user manuals to: (i) disclose that certain color inkjet printers may use underprinting; (ii) explain why underprinting is used;

(iii) identify further options for disabling or minimizing its use; and (iv) provide further details on HP's page-yield testing.

(c) To address the claims in *Blennis*, HP agreed to incorporate disclosures explaining that HP may use built-in dates on which certain inkjet cartridges will stop working. HP also will explain how and why ink expiration works and identify the printers and cartridges that use this technology.

The settlement also provides eligible class members up to $5 million in e-credits redeemable for printers and printer supplies offered on HP's website. (ER 174-77.) Eligible class members will receive the following e-credits for each affected model—$5.00 for *Ciolino* class members, $2.00 for *Rich* class members, and $6.00 for *Blennis* class members. (*Id.*) Class members may "stack" the e-credits if they have printers that fall into multiple categories. (*Id.*) For example, a class member who purchased a printer that is subject to claims in both the *Ciolino* and *Rich* cases may receive an e-credit with a combined value of $7.00. (*Id.*) HP also agreed to pay $950,000 for class notice and settlement administration costs. (ER 180-82.)

As consideration for these benefits, participating class members release HP from all claims that relate to the actions. (ER 10-13, 179-80; SER 125-30.)

After the parties negotiated the class benefits, they then discussed plaintiffs' counsel's request for fees. (ER 177; SER 75, 105, 123-24, 133, 135-36, 206, 230.)

The parties did not agree that HP would pay any specific amount of fees. (ER 177; SER 133, 230.) Instead, the agreement provided that HP would only pay the amount of fees and costs that were awarded by the District Court, although plaintiffs' counsel agreed not to seek more than $2.9 million in fees and expenses. (ER 177; SER 133, 230.) The agreement further provided that the payment of attorneys' fees is not part of the settlement with the class members and must be considered by the District Court separately from its analysis of whether the settlement is fair, reasonable, and adequate. (ER 177-78.)

After considering the parties' written submissions and arguments at the hearing, Judge Fogel granted preliminary approval, consolidated the cases, conditionally certified a nationwide class for settlement purposes, and directed that the parties provide notice of the settlement. (ER 33-42; *see also* SER 187-245.)

In compliance with the court's order, the parties provided notice via: e-mail to more than 13 million individuals who had provided their e-mail addresses to HP and opted to receive communications; publication in PARADE, USA WEEKEND, PEOPLE, and CHIEF INFORMATION OFFICER MAGAZINE; and online banner advertisements over a thirty-day period on Yahoo.com and 24•7 Real Media. (SER 139-43.) In total, the notice reached approximately 74% of its target audience (more than 40 million class members). (SER 143-45, 148.) The parties

also provided the appropriate notice to state and federal officials pursuant to 28 U.S.C. § 1715. (SER 185-86.)

Of the tens of millions of class members who received notice, there were only five objections (including Objectors), 458 non-filed comments (many of which were critical of plaintiffs' claims and favorable to HP, *see* SER 122-23), and 810 timely opt-outs. (ER 2, 20, 28.) Objectors raised the following issues: (1) the settlement provided only "illusory benefits" to the class through coupons, which benefited HP more than the class; (2) the injunctive relief is valueless because it does not remedy past injuries and plaintiffs' valuation of the injunctive relief should be disregarded; (3) class counsel put their interests ahead of the interests of the class by requesting an excessive fee award; (4) the release was overly broad and the parties did not disclose whether other pending actions would be extinguished as a result of the settlement; and (5) the class notice was deficient because numerous class members were confused regarding the procedure to object. (ER 103-21, 136-55.)

The District Court held a fairness hearing on January 28, 2011. (ER 51.) In addition to class counsel and counsel for HP, counsel for three objectors appeared (including counsel for Objectors). (ER 51-52.) During the hearing, Judge Fogel noted that the *Ciolino*, *Rich*, and *Blennis* actions had been heavily litigated and that there were several motions "where the Court had an opportunity to evaluate the

strength of the claims." (ER 58.) Based on its previous evaluation, the court concluded that "[t]he claims are not particularly strong, and it's simply because the whole idea that a consumer would be damaged by a false low ink warning is a problematic concept." (*Id.*) The court then took the matter under submission.

As of March 10, 2011, there were 122,348 claims eligible for settlement benefits. (SER 62.) In the *Ciolino* action, there were 148,479 e-credits equaling $5.00 each for a total of $742,395.00. In the *Rich* action, there were 202,176 e-credits equaling $2.00 each for a total of $404,352.00. In the *Blennis* action, there were 53,147 e-credits equaling $6.00 each for a total of $318,882.00. (*Id.*)

On March 29, 2011, the District Court granted final approval to the settlement. (ER 1-16.) It certified a nationwide settlement class of "all individual or entity end-users located in the United States who purchased or received as a gift an Affected Model from September 6, 2001, to September 1, 2010." (ER 4.) The court also found that the e-mailed and published notice to the class satisfied Rule 23(c)(2) and (e) of the Federal Rules of Civil Procedure and the United States Constitution. (ER 3-4.)

The District Court determined that the settlement was fair, reasonable, and adequate because: (1) "[t]here [was] no fraud or collusion" and the settlement was "reached after good faith, arm's-length negotiations"; (2) due to the complexity, expense and duration of the litigation, class members would receive "meaningful

benefits on a much shorter time frame than otherwise possible"; (3) class counsel supported the settlement; (4) meaningful relief within the range of possible recoveries at trial will be provided to the class including injunctive and monetary relief; and (5) the number of class members disapproving of the settlement is "miniscule by any measure." (ER 6-7.)

The District Court also issued a separate ruling on class counsel's request for fees and expenses, which included additional findings of fact in support of the adequacy of the settlement. (ER 17, 24-28.) The court applied the heightened scrutiny required by the Class Action Fairness Act ("CAFA") to the terms of the settlement, and concluded that while the value of the e-credits is less than face value and the injunctive relief has value to some class members, the class benefits must be weighed against the weaknesses of the class claims—an issue the "objectors uniformly fail to address." (*Id.*) Plaintiffs' cases were weak and the evidence regarding injury involved a "great deal of speculation." (ER 27.) The court further noted that even if plaintiffs could prove their claims at trial, "the damages recoverable by each class member still would be very modest." (ER 28.) Judge Fogel also considered the sworn declaration of the Hon. James L. Warren and concluded that there was no evidence of fraud or collusion, class counsel who actively litigated the matter for years were in favor of the settlement, and the reaction of the class was in favor of approval of the settlement. (*Id.*) In sum, "the

settlement was arrived at as a result of arms-length, non-collusive negotiations, and the value of the settlement is reasonable in light of the evident weakness of the case and the modest value of plaintiffs' claims." (ER 28.)

Although the court "conclude[d] that the settlement is reasonable in light of the value of the asserted claims," it "reduce[d] the proposed award of attorneys' fees." (ER 17.) Judge Fogel cited his independent duty to determine whether the fee award was fair, and he conducted a rigorous analysis to determine the fees and expenses to award to class counsel. (ER 29-30.) He held that the lodestar method was applicable under CAFA (*see* 28 U.S.C. § 1712(b)), and that the "key consideration" was whether the fees were reasonable in light of the results achieved. (ER 30.) The court awarded plaintiffs' counsel $1.5 million in fees and $596,990.70 in expenses, reducing class counsel's fee request by 35%. (ER 31.) Judge Fogel explained that "[w]hile there is no question of collusion in this case," and he did not question the amount of time that counsel devoted to the cases, "the extent to which an attorneys' fee award exceeds the value of the settlement to the class is problematic, particularly given the 'coupon' nature of the settlement." (*Id.*) Further, "[t]o allow an award of attorneys' fees to outstrip the benefit to consumers in such cases would undermine the importance of focusing the efforts of class-action counsel on issues that most affect consumers." (*Id.*)

III. SUMMARY OF ARGUMENT

The class settlement in this case is fair, reasonable, and adequate and the District Court neither abused its discretion nor committed any legal error in granting final approval. Objectors admit that the benefit to the class is adequate, but they nevertheless pursue this appeal to contest class counsel's fee award and to establish new precedent to use in future cases. They fail to offer any basis for overturning the settlement benefits to the class.

Judge Fogel applied this Court's precedents and made well-supported findings of fact in approving the settlement and reducing class counsel's fee award. Objectors entirely ignore that Judge Fogel—who, given his years of experience in presiding over these cases, is intimately familiar with the challenges of plaintiffs' claims—evaluated and balanced all relevant settlement approval factors identified in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998). These factors overwhelmingly support final approval here.

In addition, Judge Fogel applied heightened scrutiny under both CAFA and Ninth Circuit precedents regarding precertification settlements, and this scrutiny ensured that absent class members were protected from potential conflicts of interest. In conducting this enhanced analysis, the District Court made factual findings that demonstrate that the settlement negotiations were not infected by class counsel's alleged self-interest. For instance, Judge Fogel found that the

settlement benefits to the class were fair, and that class counsel adequately represented the interests of the class. The court also relied on the testimony of a well-respected mediator, Judge Warren, who declared that the settlement was negotiated in good faith and at arm's length. At the end of this process—and in stark contrast to the principal case upon which Objectors rely (*In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011))—Judge Fogel specifically *reduced* class counsel's fee request by 35% in part to match the value of the settlement benefits to the class.

Each of Objectors' assorted challenges fails for several reasons:

First, Objectors waived their claim that a settlement is unfair "as a matter of law" when the terms of the settlement permit any excess fees requested by class counsel (but not awarded by the district court) to be retained by the defendant and not funneled to the class. Objectors never challenged in the District Court the purported "reverter" or "kicker" provision, and they have therefore waived their ability to raise this challenge on appeal. Nevertheless, even if the Court considers their argument, *Bluetooth* recently concluded that a "kicker" provision should be considered as part of a court's analysis of the settlement, and not (as Objectors contend) that this clause renders the settlement *per se* unfair as a matter of law.

Second, the District Court did not commit error by finding that the injunctive relief provided a benefit to the class. The central issues in the actions are alleged

non-disclosure and misleading representations. The injunctive relief was specifically directed to remedy those core claims. Further, given the speculative nature of plaintiffs' damage claims, injunctive relief is the primary relief the class could have obtained if it had prevailed at trial. Objectors assert that the injunctive relief is "valueless" because it does not remedy the injuries suffered by past class members, but courts (and CAFA itself) recognize that injunctive relief has value in class settlements, particularly in a case such as this where the alleged harm is a lack of disclosure. The fact of injury also was sharply disputed in this case, and prospective injunctive relief by its very nature cannot "remedy" past "injuries."

Third, Objectors' contention that class counsel engaged in improper self-dealing is not supported by the record. While Objectors freely admit that the class here received a fair, reasonable, and adequate benefit, they seek to establish a broad rule that would invalidate all settlements that contain any "indicia of self-dealing." But that is not the law, and Objectors' argument disregards this Court's long-standing precedent that the entire settlement, not just one component (here, attorneys' fees), should be considered. At its core, this argument theorizes that the settlement could have been "better" had class counsel requested less in attorneys' fees, and had HP agreed to pay any excess in additional benefit to the class. This second-guessing is not a sufficient basis to challenge the settlement. Moreover, Objectors' assertion that class counsel received more than the class is factually

incorrect. The District Court thoroughly analyzed class counsel's attorneys' fees request and awarded fees to class counsel in an amount that it found was commensurate to the results achieved.

Fourth, Objectors' claim that the class notice was "confusing" ignores the plain text of the e-mail and publication notices. Contrary to Objectors' argument, the notices specifically instructed all class members that they had to *file their objections with the District Court* in order to have them considered by Judge Fogel. The notices also provided instructions to class members who were confused by the notice in any way on how to obtain additional information, which defeats any finding that the notice was inadequate. Finally, Objectors' own conduct belies this challenge, because they understood that they were required to file their objection.

IV. STANDARD OF REVIEW

This Court's review of a district court's determination to approve a class action settlement as fair, reasonable, and adequate under Rule 23 is "extremely limited." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009) (quoting *Hanlon*, 150 F.3d at 1026). An appellate court should affirm the decision of a district court to approve a settlement "if the district court judge applies the proper legal standard and his findings of fact are not clearly erroneous." *Id.* at 963-64 (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)).

A district court's "'decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants and their strategies, positions, and proof.'" *Mego Fin. Corp.*, 213 F.3d at 458 (quoting *Hanlon*, 150 F.3d at 1026). Thus, a district court's approval of a settlement should be affirmed unless there is a "strong showing that the district court's decision was a clear abuse of discretion." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 626 (1982) (internal citations omitted); *see also Rodriguez*, 563 F.3d at 963.

Similarly, a district court's award of fees and costs to class counsel, and its method of calculation, is reviewed for abuse of discretion. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011) (citing *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000)). Any finding of fact supporting an attorneys' fee award is reviewed for clear error. *Id.*

The determination of whether notice of a proposed settlement satisfies due process is reviewed *de novo*. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993) (citing *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435, 1440 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 93 (1989)).

V. ARGUMENT

A. The District Court Applied The Correct Legal Standards And Carefully Scrutinized And Approved The Settlement

1. *The* Hanlon *Factors Overwhelmingly Support Approval Of The Settlement.*

In approving the settlement as fair, reasonable, and adequate, Judge Fogel evaluated and balanced all relevant factors required by *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998):

> [a] the strength of the plaintiffs' case; [b] the risk, expense, complexity, and likely duration of further litigation; [c] the risk of maintaining class action status throughout the trial; [d] the amount offered in settlement; [e] the extent of discovery completed and the stage of the proceedings; [f] the experience and views of counsel; [g] the presence of a governmental participant; and [h] the reaction of the class members to the proposed settlement.

Id. at 1026 (internal citations omitted).

Objectors ignored the *Hanlon* factors in the District Court and in their Opening Brief, but these factors overwhelmingly supported Judge Fogel's order approving the parties' settlement:

(a) Strength of Plaintiffs' Case. Judge Fogel was uniquely well-positioned to evaluate the strength of plaintiffs' claims in the *Ciolino*, *Rich*, and *Blennis* actions, because he presided over the actions for more than five years and he had extensive knowledge of the legal and factual issues presented by plaintiffs' claims. At the final approval hearing, Judge Fogel described the cases as "weak" and having "problems . . . on the merits." (ER 60-62.) He recognized that "you can't

expect the defendant in a case like this to pay more than the case is worth." (*Id.*) In his order approving the settlement, Judge Fogel explained that proving whether consumers were injured as a result of HP's alleged conduct "involved a great deal of speculation," and that there were "serious questions as to whether consumers actually incurred significant injury from HP's actions." (ER 27, 31.)

Remarkably, Objectors completely ignored this critical factor—a point that Judge Fogel noted in his order: "The objectors uniformly failed to address [the weakness of plaintiffs' case]." (ER 27.) Similarly, at the hearing on the fairness of the settlement, he stated that "none of the objections really address[ed] the merits of the claims." (ER 57-58.) Objectors admit as much in their Opening Brief, explaining that "their objection was not based on the question of the size of the settlement relative to the strength of the case." (Objectors' Opening Brief ("Br.") at 17.) But that evaluation goes to the heart of the cases. *Yeagley v. Wells Fargo & Co.*, No. 05-3403, 2008 U.S. Dist. LEXIS 5040, at *11 (N.D. Cal. Jan. 18, 2008) ("Basic to [analyzing a proposed settlement] in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." (quoting *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v.*

Anderson, 390 U.S. 414, 424-25 (1968)) (alterations in original)), *rev'd on other grounds*, 365 F. App'x 886 (9th Cir. 2010).[1]

(b) Risk, Expense, Complexity, and Likely Duration of Further Litigation. Next, "[t]he complexity, expense and likely duration of the litigation favor settlement." (ER 6.) As a result of this settlement and given the weakness of plaintiffs' claims, the class received "meaningful benefits on a much shorter time frame than otherwise possible." (*Id.*) In finding that this factor weighed in favor of approving the settlement, Judge Fogel relied on *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992), which recognized "the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." (ER 5.)

(c) Risk of Maintaining Class Action Status. Plaintiffs faced substantial hurdles in certifying any class for litigation purposes. The District Court previously denied plaintiffs' motion for nationwide class certification in *Ciolino*. (ER 27.) At the time of the settlement, the parties had briefed the plaintiffs'

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[1] Objectors alternatively request that this Court remand the case to the District Court to consider the issue of self-dealing. (Br. at 14.) While such relief is not warranted because the District Court already considered any potential self-dealing (*see infra* pp. 39-40), Judge Fogel left the Northern District of California in October 2011 to become the Director of the Federal Judicial Center. If this Court were to remand this appeal, the case would have to be assigned to a new judge who will not possess the same history with the actions.

motion to certify a California-only class in *Ciolino* and a motion for nationwide class certification in *Rich*. (SER 288-464.) HP raised several defenses to class certification, including that proof of injury-in-fact and causation could not be determined on a class-wide basis, if at all. (SER 295-98, 309-29, 355-58, 374-89.) Moreover, the very nature of the technology at issue in *Rich* required an individualized inquiry to determine whether the consumer even used underprinting. (SER 317-18.)

(d) Amount Offered in Settlement. Even if plaintiffs successfully proved their claims at trial, "the damages recoverable by each individual class member still would be modest." (ER 28.) In *Ciolino*, it would be "virtually impossible to determine" the amount of ink a consumer prematurely discarded. (*Id.*) As Judge Fogel noted during the hearing on plaintiffs' motion for a nationwide class in *Ciolino*, "[w]hat are your damages? . . . [A]re we talking about a coupon, or are we talking about everybody who owns an HP printer gets .25 cents?" (SER 515-16.)

The court correctly concluded that the amount offered in settlement provides "meaningful relief to the Settlement Class" and "certainly falls within the range of possible recoveries by the Settlement Class." (ER 7.) Judge Fogel also held that there was no "fraud or collusion underlying the settlement, and it was reached after good-faith, arm's-length negotiations" (ER 6), and a district court can "put a good deal of stock in [class settlements that are] the product of an arms-length, non-

collusive, negotiated resolution." *Rodriguez*, 563 F.3d at 965 (citing *Hanlon*, 150 F.3d at 1027; *Officers for Justice*, 688 F.2d at 625).

(e) Extent of Discovery Completed and the Stage of the Proceedings. The parties "engaged in intensive motion practice and extensive discovery" and they "developed a sufficient factual record to evaluate their chances of success at trial and the proposed settlement." (ER 6, 27); *see also Rodriguez*, 563 F.3d at 967 (finding that the substantial discovery provided the plaintiffs with "a good grasp on the merits of [their] case before settlement talks began"). Indeed, the parties conducted seventeen fact depositions and two expert depositions, produced 250,000 pages of documents, and provided more than 100 written responses to discovery requests. (ER 161-62; SER 103-04, 227.) The parties also inspected a number of the relevant printers, consulted with industry personnel, hired experts, and conducted numerous interviews of witnesses and putative class members. (ER 161-62; SER 103-04, 227.) As Judge Fogel concluded, "there is no reason to believe that the posture of any of the cases would improve through further litigation." (ER 27.)

(f) Experience and Views of Counsel. Judge Fogel noted that counsel for the parties were "experienced in class action litigation" and have an "intimate acquaintance" with the facts and issues in the case after "vigorously litigating the case over several years." (ER 7, 28.) *See also In re Omnivision Techs., Inc.*, 559

F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)).

(g) The Presence of a Governmental Participant. HP notified state and federal officials of the settlement pursuant to 28 U.S.C. § 1715 (SER 185-86), and no governmental official objected or intervened in the actions. *See Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08-1365, 2010 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010) ("CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures.").

(h) Reaction of the Class Members to the Proposed Settlement. Judge Fogel correctly held that the class members' reactions to the proposed settlement supported approval. (ER 7, 28.) Of the tens of millions of class members who received notice, only a "miniscule" percentage—*less than four-thousandths of 1%* of the class members—expressed some dissatisfaction with the settlement, and approximately 122,000 class members filed claims (which was *95 times* the number of objections, opt-outs, and comments). (ER 7.) This extremely low objection and opt-out percentage is comfortably within rates that this Court has interpreted to strongly favor settlement and to provide persuasive evidence that the settlement is fair and adequate. *See*, *e.g.*, *Churchill Vill., L.L.C. v. Gen. Elec.*, 361

F.3d 566, 577 (9th Cir. 2004) (affirming approval of class action settlement where the objection and opt-out rate was 6%). Thus, the "low objection and opt-out numbers weigh in favor of the settlement." (ER 7.)[2]

Next, Objectors claim that the parties should have filed the 458 comments because some of these may represent dissatisfied class members who failed to follow the explicit instructions to file all objections with the District Court. (Br. at 29-31.) But this argument mistakenly assumes that all non-filed comments were hostile to the settlement, when in fact many of them simply reinforced the weaknesses of plaintiffs' claims and expressed frustration that HP had to defend a frivolous lawsuit. (SER 122-23.)[3] Further, even if these comments were "objections," it is not true (as Objectors contend, *see* Br. at 31) that the District

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[2] Objectors contend that Judge Fogel improperly considered the number of objections relative to the size of the class (Br. at 4, 41-44), but this Court's precedents required this comparison. *See*, *e.g.*, *Rodriguez*, 563 F.3d at 967 (finding that the reaction of the class favored approval when only 54 of 376,301 class members filed objections and 52,000 filed claims); *Churchill Vill.*, 361 F.3d at 577 (finding that the reaction of the class favored approval of the settlement when only 45 of 90,000 class members objected and 500 opted out). Objectors concede that this argument does not relate to the facts of this appeal, and that they are attempting to "clarify" the law on the issue. (Br. at 41.)

[3] For example, one comment stated that "I found the low ink messages to be a nice reminder that I needed to purchase ink. I do not think they made me change the cartridge early or buy more ink . . . I'm not filing a claim for any of this." (SER 123.) Another stated, "HP did nothing wrong and was just trying to help the consumer manage his or her office with these messages." (*Id.*)

Court failed to take them into account. In fact, Judge Fogel specifically considered them when analyzing the reaction of the class. (ER 7 ["The portion of the settlement class taking issue with the settlement (whether by objection, *comment/complaint*, or opt-out) is miniscule by any measure."] (emphasis added).) Even if all 458 comments were negative (which is not the case), the total number of objections would still constitute *less than four-thousandths of 1%* of all class members. This is well below the threshold in other cases in which the Court has approved settlements.

2. *The District Court Applied Heightened Scrutiny To The Settlement.*

In addition to evaluating each *Hanlon* factor, Judge Fogel applied heightened scrutiny pursuant to CAFA's provisions governing coupon settlements and this Court's precedent regarding precertification settlements. (ER 4, 24-29.) This enhanced scrutiny is required to ensure that absent members of the class are protected from class counsel's potential conflicts of interest. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(3) (2005), *available at* PL 109–2, 2005 S 5 (Westlaw); *Hanlon*, 150 F.3d at 1026. Accordingly, Judge Fogel already applied heightened scrutiny for two separate reasons—both of which ensured the absent class members were protected during the settlement process. Objectors fail to explain what more he should have done.

The Objectors essentially claim that the class would have received a *greater* benefit had class counsel requested *less* in attorneys' fees. (*See* Br. at 2-3, 13-14, 16-27, 31-41.) This amounts to an after-the-fact contention that the settlement could have been "better." Judge Fogel noted during the final approval hearing that all of the objectors essentially argued that "there are other ways this [settlement] could have been structured that would have benefited the class more, the ratio [of the] benefit to the class versus benefit to the attorneys and the defendant could be made better." (ER 62.) But as this Court has stated:

> Of course it is possible, as many of the objectors' affidavits imply, that the settlement could have been better. But this possibility does not mean the settlement presented was not fair, reasonable or adequate. Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.

Hanlon, 150 F.3d at 1027.

B. Objectors' Challenge To The Fairness, Reasonableness, And Adequacy Of The Settlement Is Legally And Factually Without Merit.

1. *Objectors Waived Their Challenge That The Settlement Is Per Se Unfair Because The Parties Did Not Agree To A Specific Amount Of Attorneys' Fees Or A "Reversion" To The Class.*

In their appellate brief, Objectors assert for the first time that a class settlement is *per se* unfair where the fees requested by class counsel but not awarded by the District Court are not used to enhance the monetary benefits to the

class. (*See* Br. at 2, 13-14.) Because they did not present this issue to the District Court, Objectors have waived this argument.

The Ninth Circuit "appl[ies] a 'general rule' against entertaining arguments on appeal that were not presented or developed before the district court." *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998) (citing *Bolker v. Comm'r of Internal Revenue*, 760 F.2d 1039 (9th Cir. 1985)). "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). An issue is usually deemed waived if it was not "raised sufficiently for the trial court to rule on it." *Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1108-09 (9th Cir. 2001) (quoting *Arizona v. Components Inc.*, 66 F.3d 213, 217 (9th Cir. 1995)).

Here, the settlement agreement and notices specifically apprised the class that HP would only pay fees and costs *"approved" or "awarded" by the District Court*. (ER 177-78, 223.) Further, the agreement and notices did *not* provide that any amount sought by plaintiffs and not awarded by the District Court would increase the monetary benefits to the class. Accordingly, it was apparent that the class would not receive any portion of the $2.9 million figure, even if the District

Court did not award class counsel *any* fees. (*Id.*)[4] Although Objectors claim that they raised this issue before the District Court, their citations to the record involve a challenge to the "clear sailing provision" and the adequacy of class counsel. (Br. at 3 (citing ER 59-63, 149).) Objectors' general challenge to the amount of attorneys' fees in comparison to the class benefits also is not sufficient to preserve Objectors' argument. *See Yeti By Molly*, *Ltd.*, 259 F.3d at 1108-09.

Even if this Court considered this issue, it does not warrant a reversal of the District Court's orders. This Court recently held that a reversion clause should be considered as part of the District Court's overall analysis of the fairness of the settlement but is not—as Objectors contend (Br. at 2, 13-14, 26)—a *per se* basis to reject the settlement. *See Bluetooth*, 654 F.3d at 947-50.

2. *The District Court Did Not Abuse Its Discretion In Determining That The Class Would Benefit From The Injunctive Relief Provided By The Settlement.*

Objectors contend that the injunctive relief "delivers no value to the class" because "[p]rospective injunctive relief does not compensate class members for

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[4] For this reason, it is inaccurate to describe the settlement as providing a "kicker" or "reversion" to HP. (*See* Br. at 2-3, 8, 13, 17, 23, 24.) The only agreement was to pay the amount awarded by the District Court, and to this day HP has paid nothing. (ER 177-78.) Accordingly, there is nothing to "revert" or "kick back" to HP. In addition, the fee award was separate from the settlement benefits provided to class members. (*Id.*) Thus, the settlement would still go forward even if the District Court awarded no fees.

past injuries." (Br. at 36.) But this argument ignores that the central dispute in these lawsuits involved alleged non-disclosures and alleged misleading representations, and that the parties vigorously disputed whether class members suffered any injury. (ER 26-27, 31.) The District Court determined that "serious questions" remain "as to whether consumers actually incurred significant injury from HP's actions." (ER 27, 31.) Thus, it acted well within its discretion in concluding that the settlement's injunctive relief provided value (ER 26-27), particularly given plaintiffs' argument that the injunctive relief addressed the "principal problem in this case—customer confusion caused by misleading warnings" (ER 26). *See In re Lifelock, Inc. Mktg. & Sales Prac. Litig.*, MDL No. 08-1977, 2010 WL 3715138, at *5 (D. Ariz. Aug. 31, 2010) ("The [injunctive] relief afforded here is what was explicitly sought in the actions, as it responds directly to the challenges raised in the complaints in these cases."); *see also Hanlon*, 150 F.3d at 1026-27.[5]

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[5] Objectors argue that in *Hanlon* (unlike here), class members continued to own vehicles that would benefit from the injunctive relief (e.g., replacement of latches, free of charge). (Br. at 36-38.) But they ignore that these actions center on disclosures in connection with the use of HP *printers* and their ink cartridges (both of which are "a tangible good"), and that the prospective relief offered would "fix" the alleged defects in disclosure relating to these tangible goods. *See Hanlon*, 150 F.3d at 1027. Both here and in *Hanlon*, class members must continue to use their "tangible good" in order to obtain the benefit of the injunctive relief.

[Footnote continued on next page]

In advancing their argument that the injunctive relief provided by the settlement here does not compensate for past injuries, Objectors rely primarily on non-binding authority outside of this Circuit. (Br. at 36-37 (citing *Synfuel Techs. v. DHL Express (USA), Inc.*, 463 F.3d 646 (7th Cir. 2006).) This also is a universal attack against any injunctive relief in a settlement. By its nature, prospective injunctive relief cannot "compensate" for past injuries, yet courts have repeatedly approved settlements providing *only* injunctive relief to the class (which is not the case here) and have found no conflict among class members or with class counsel.[6]

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Similarly, Objectors' two alleged "hypothetical settlements" from *Seinfeld* and *The Great Gatsby* (Br. at 38-39) are distinguishable. These hypotheticals involve alleged misrepresentations (non-fat yogurt; missing eggs) where the alleged damages would be much easier to calculate than here, where the District Court cited the substantial problems of proof facing plaintiffs long before the settlement. (SER 5-8, 499-501, 515-16, 519-21.)

[6] *See, e.g., Bolger v. Bell Atl. Corp.*, 2 F.3d 1304, 1311 (3d Cir. 1993) (approving settlement providing no pecuniary relief where probability of plaintiffs' success on the merits was uncertain); *Chin v. RCN Corp.*, No. 08-7349, 2010 WL 3958794, at *4 (S.D.N.Y. Sept. 8, 2010) (rejecting objections that "suggest that injunctive relief—or at least injunctive relief that is temporary—is inadequate, and that only damages will suffice," because the defendant had strong arguments that its actions were lawful and that "the possibility that plaintiffs could do slightly better if the case were to proceed further needs to be counterbalanced against the real possibility that—in addition to running up significantly more costs, potentially over the course of several more years—the Plaintiffs could ultimately do much worse"); *Yong Soon Oh v. AT&T Corp.*, 225 F.R.D. 142, 150 (D.N.J. 2004) (approving settlement that provided only injunctive relief due to the weakness of plaintiffs' case).

3. *Objectors' Assertion That Class Counsel Engaged In Self-Dealing Is False And Belied By The Record.*

Next, Objectors make an unsubstantiated assertion that class counsel engaged in "self-dealing" because counsel allegedly received more in attorneys' fees than the class received in benefits, and that this discrepancy should presumptively invalidate the settlement. (*See* Br. at 13-14, 17-18, 21-22.) This objection is not actually about the benefits received by the class, but a broader policy objection to class settlements and a desire to make new law. Objectors freely admit as much in their Opening Brief, explaining that they do not object to the specific relief to the class in this case, and that "[t]his objection is brought . . . to create precedent deterring future settlements designed to benefit attorneys at the expense of their putative clients." (*See* Br. at 13, 16-17.)

In an attempt to bolster their argument, Objectors rely on an overly expansive reading of this Court's recent decision in *Bluetooth*. As opposed to the broader propositions for which Objectors' counsel advocated in its appeal in *Bluetooth*, this Court's actual decision simply required district courts to examine the record to ensure that class counsel did not engage in impermissible self-dealing in reaching the particular settlement. *Bluetooth*, 654 F.3d at 949. In stark contrast to the orders at issue in this appeal, the district court failed to undertake that analysis in *Bluetooth*, and the existing record did "not adequately dispel the possibility that class counsel bargained away a benefit to the class in exchange for

their own interests." *Id.* at 936. Therefore, the Court remanded to allow the district court to complete its analysis, and it specifically noted that the district court could reapprove the settlement as structured (with an 8-to-1 ratio of attorneys' fees to class benefits). *Id*. at 949.[7]

Here, by contrast, Judge Fogel carefully considered Objectors' arguments about self-dealing. (*See* ER 68, 79-80 [noting that "all of the objectors are saying the same thing in different ways which is that the class really isn't getting much in proportion to what the lawyers are getting," and that the court had to "look at fees and the relative benefit to the class and the lawyers"].) Judge Fogel concluded that the benefits to the class were reasonable (ER 28), that there was "no evidence of fraud or collusion," and that the settlement was a "result of extensive and intensive arm's-length negotiations occurring over several years and multiple mediation sessions with several respected mediators . . . ." (ER 2-3, 6, 28; *see* ER 6.) The

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[7] The other cases upon which Objectors rely stand for the unremarkable (and narrower) proposition that the district court should consider evidence of potential self-dealing as part of its overall analysis of the fairness, reasonableness, and adequacy of the settlement. *See Staton v. Boeing Co.*, 327 F.3d 938, 963-66 (9th Cir. 2003) (reversing an approval order because the district court did not scrutinize the fee award and the parties did not provide sufficient information for the court to conduct such an analysis and to ensure that any excessive fees did not affect the settlement benefits); *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991) (requiring that a court examine the fee request and clear sailing provision in a class settlement agreement to ensure that the request is fair).

District Court also considered the sworn declaration of Judge Warren, who testified that the negotiations were "long and arduous" and that "[a]ll counsel vigorously asserted their positions and negotiated in good-faith and at arm's-length to reach an appropriate compromise for the class." (SER 136.)[8] Objectors neither sought nor obtained any evidence to demonstrate otherwise.

Unable to identify any specific evidence of self-dealing, Objectors rely exclusively on an alleged disproportion between the class benefits and the attorneys' fees. (*See* Br. at 13). But in advancing this argument Objectors misstate several pertinent facts. As an initial matter, they contend that this case should be considered a constructive common fund and that under *Bluetooth*, class counsel received fees that exceeded the benchmark of 25% of the benefit to the class. (Br. at 21-22.) But as Objectors acknowledged in the District Court, "there is no common fund here." (ER 151.) Nor is there any "constructive" common fund, because the parties negotiated a defined monetary benefit for each class member and a total cap on that benefit. (ER 171-77.) Moreover, the fees were separate

[8] Objectors suggest that the use of neutral mediators and the negotiation of fees after class benefits "should make no difference." (Br. at 22 n.1.) But the only case that they offer for this contention, *Bluetooth*, actually held that these factors are not "dispositive" and that the presence of a mediator is "a factor weighing in favor of a finding of non-collusiveness." 654 F.3d at 948. In contrast to the mediator's declaration in this case, the only evidence before the district court in *Bluetooth* was an attorney declaration stating that the settlement was reached during a mediation. *Id.*

from this class benefit, and were dependent on class counsel establishing their entitlement to fees and the district court approving a fee award. Contrary to Objectors' assertion (Br. at 3-4, 14-15, 34-35), CAFA specifically authorizes—in statutory subsections that Objectors inexplicably omit from their brief (Br. at 5, 34)—the use of the lodestar even if there is a coupon component of the settlement. *See* 28 U.S.C. § 1712(b)(1)-(2), (c).

Yet even if this Court were to compare the fee award here to a constructive common fund, the fees awarded are well below the 25% benchmark—at least when using the same inputs from *Bluetooth* and not the incorrect figures used by Objectors in an attempt to inflate this percentage. According to *Bluetooth*, a common fund should be calculated based on "the total amount defendants were willing to spend to settle the case." 654 F.3d at 945 (including fees and costs, *cy pres*, incentive payments to the class representatives, and notice costs). Here, the total amount HP was willing to spend to settle the case was $8.8 million—$5 million in e-credits, $2.9 million in fees and expenses, $950,000 in notice and administration costs, and $6,000 in incentive awards. (ER 174-78, 181.)

As the following chart illustrates, when making an apples-to-apples comparison to the *Bluetooth* inputs, class counsel received ***16.9%*** of the constructive common fund—less than *half* the ***37.0%*** that raised this Court's concerns in *Bluetooth*:

Settlement Benefits and Expenses	HP	Bluetooth
Monetary Benefits (e-credits in *HP*; *cy pres* in *Bluetooth*)	$5,000,000.00	$100,000.00
Notice and Settlement Administration Costs..	$950,000.00	$1,200,000.00
Class Counsel's Fees and Expenses	$2,900,000.00	$850,000.00
Incentive Payments to Named Plaintiffs.....	$6,000.00	$12,000.00
Total Constructive Common Fund	$8,856,000.00	$2,162,000.00
Fee Award as % of Total Constructive Common Fund	**16.9%**	**37.0%**

To derive their inflated 66% figure (Br. at 21), Objectors instead compare the *pre-approval* attorneys' fees request ($2.9 million) to the *post-approval* valuation of the class benefit ($1.5 million), and they completely ignore the notice and administration costs and incentive payments.[9]

Objectors' faulty comparison also ignores that Judge Fogel scrutinized and then reduced the attorneys' fee award by 35% so that the fees were commensurate with the results obtained and to avoid an award that may encourage collusive settlements. (ER 31.) He explained that "[w]hile there is no question of collusion

[9] Elsewhere, Objectors cite a 58% figure that they apparently calculate by using the post-approval fees and expenses, although they still exclude the notice, administrative, and incentive payments that *Bluetooth* considered in its analysis. (Br. at 13, 32.) *See Bluetooth*, 654 F.3d at 945 (including fees and costs, *cy pres*, incentive payments, and notice costs).

in this case, and the Court has no reason at all to doubt that counsel put in the hours they claim, the extent to which an attorneys' fee award exceeds the value of the settlement to the class is problematic, particularly given the 'coupon' nature of the settlement." (*Id.*) He also ruled that "[t]o allow an award of attorneys' fees to outstrip the benefit to consumers in such cases would undermine the importance of focusing the efforts of class-action counsel on issues that most affect consumers." (*Id.*) Conversely, in *Bluetooth*, the district court did not assure itself that the amount awarded in attorneys' fees was reasonable and it awarded the full amount requested. 654 F.3d at 940, 943-45, 949. *Bluetooth* also did not involve years of litigation and discovery, briefing and rulings on multiple dispositive and class certification motions, and a determination that plaintiffs' claims are "evident[ly] weak[]" and carry only "modest value." (ER 28.) At the time of the settlement in *Bluetooth*, no formal discovery had been conducted, the district court had issued no dispositive rulings, and the only dispositive briefing to take place was one motion to dismiss. 654 F.3d at 939.[10]

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[10] In the companion cases involving HP's laser printers, the U.S. District Court for the Central District of California analyzed the settlement in those cases after *Bluetooth* and approved the settlement as fair, reasonable, and adequate. *See In re HP Laser Printer Litig.*, No SA CV 07-0667 AG (RNBx), 2011 WL 3861703 (C.D. Cal. Aug. 31, 2011). In the similarly structured settlement in that case, the court found that "there was no collusion between the parties in reaching this settlement, despite the presence of the warning signs identified by

[Footnote continued on next page]

As this Court has held repeatedly, and the District Court ruled, "[i]t is the settlement *taken as a whole*, rather than the individual component parts, that must be examined for overall fairness." *Rodriguez*, 563 F.3d at 964 (emphasis added); *Hanlon*, 150 F.3d at 1026. (*See also* ER 22-23.) There is no reason to invalidate the entire settlement based solely on the allegedly disproportionate fee award.[11]

4. *The Settlement Notices Complied With Due Process And Specifically Informed Class Members How To Object.*

Objectors assert that the class settlement notices did not satisfy due process because they claim some members failed to understand and follow the instructions in the notices. (Br. at 6-7, 10-11, 14, 27-30.) This argument also lacks merit.

In the Ninth Circuit, a class settlement notice satisfies Rule 23 of the Federal Rules of Civil Procedure and due process if the notice "generally describes the

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[Footnote continued from previous page]
In re Bluetooth." *Id.* at *4. In making this finding, the district court relied, in part, on the same declaration from Judge Warren that is in the record here. *Id*.

[11] It is apparent that Objectors' unsupported self-dealing argument seeks to accomplish what they lack standing to achieve directly—a challenge to the fees awarded to class counsel. Because the attorneys' fees to class counsel here are separate from the class benefit, the amount of the fee award to class counsel had no impact on whether the Objectors (or other class members) received more or less as a result of the settlement. After this Court's recent decision in *Glasser v. Volkswagen of America, Inc.*, 645 F.3d 1084 (9th Cir. 2011), Objectors could not establish the requisite injury to demonstrate Article III standing to directly challenge the amount of the fee award. Lacking standing to challenge the amount of the fee award, Objectors are forced to challenge the entire settlement. (*See* Br. at 23 n.2.)

terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill.*, 361 F.3d at 575 (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)). A review of the multiple class settlement notices disseminated to the class demonstrates that this standard has been met.

As an initial matter, the individual long-form notices clearly stated in plain, mandatory language that class members "shall not be entitled . . . to object to the Settlement," unless the objection is filed with the Court:

> You shall not be entitled to be heard at the Fairness Hearing or to object to the Settlement, and no written objections or briefs submitted by you shall be received or considered by the Court at the Fairness Hearing, unless written notice of your intention to appear at the Fairness Hearing and copies of any written objections and/or briefs are filed with the Court and served on Class Counsel and Defense Counsel on or before **December 8, 2010**. If you fail to file and serve timely written objections in the matter specified above, you shall be deemed to have waived all objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement.

(ER 221 (emphasis in original).)

Further, Objectors ignore that, in addition to the long-form individual notices, short-form notices were placed in widely disseminated publications across the country. These notices clearly stated that an objection must be *filed* with the District Court:

> To Object to the Settlement, you must file a written objection with the Clerk of the Court by **December 8, 2010**, and serve copies of your objection on the Settlement Administrator and the parties.

(SER 236 (emphasis in original).)

Objectors' argument that the notice "actually confused nearly 99% of the class members that wished to object" (Br. at 14) is based on pure speculation, as they offer no evidence that the 458 class members who did not file their comments were confused by the notice. Notably, Objectors read and understood the notices to require that their objection needed to be filed with the District Court. (*See* ER 136-55.) That they followed the instructions in the notices and did not challenge the notices as confusing in their original objection demonstrates that the notices adequately informed recipients on how to object and comported with due process.

Finally, courts have held that even if "the Settlement Notice could have been clearer on how to object to the Settlement" (which is not the case here), a notice is not inadequate if it provides instructions to class members on how to obtain answers to any questions they may have regarding any matter in the notice, such as contact information for class counsel. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001). In such cases, "[a] confused class member who wanted to make an objection could have easily [followed the instructions] and clarified the process by which to make it." *Id.*; *see also In re Metro. Life Ins. Co. Sales Prac.*

Litig., No. 96-179, 1999 WL 33957871, at *18 (W.D. Pa. Dec. 28, 1999). Here, all of the notices explained how to obtain additional information. (ER 224; SER 236.)

VI. CONCLUSION

The District Court conducted an extensive and thorough analysis of the terms of the settlement, and it properly applied this Court's precedents in granting final approval. Judge Fogel was uniquely well-positioned through his long history of presiding over the actions to determine that the settlement was fair, reasonable, and adequate. He neither abused his discretion nor committed any reversible error.

Objectors continue to ignore the many weaknesses in plaintiffs' claims, and accepting their contentions here would make it needlessly difficult for parties to settle unmeritorious cases. The District Court properly weighed the risks of continued litigation and potential relief and the other *Hanlon* factors.

For these and all of the foregoing reasons, HP respectfully requests that this Court affirm the District Court's order approving the settlement.

Dated: December 21, 2011 GIBSON, DUNN & CRUTCHER LLP

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 11-16097

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements:

1. This brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. This brief contains 11,361 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: December 21, 2011 GIBSON, DUNN & CRUTCHER LLP

By: /s Daniel L. Weiss
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STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28-2.6 FOR CASE NO. 11-16097

Defendant-Appellee is aware of only one related case, Case No. 11-16675 filed by Objectors Lisa Kahle and Sarah McDonald. On July 12, 2011, Objectors Lisa Kahle and Sarah McDonald filed a notice of appeal from a decision by the District Court denying their Motion for Attorneys' Fees.

Dated: December 21, 2011 GIBSON, DUNN & CRUTCHER LLP

By: /s Daniel L. Weiss
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Defendant-Appellee Hewlett-Packard Company's Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on December 21, 2011.

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 dispatched the foregoing Defendant-Appellee Hewlett-Packard Company's Answering Brief to a third-party commercial carrier for delivery within three calendar days to the following non-CM/ECF participants:

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