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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CHAD BRAZIL and STEVEN SEICK, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

DELL INC. and DOES 1-10,
Defendants.

Kenneth Brown,
Objector.

Case No. C 07-01700 RMW

OBJECTION TO PROPOSED SETTLEMENT

Date: October 28, 2011
Time: 9:00 a.m.
Courtroom: 6
Judge: Hon. Ronald M. Whyte

CLASS ACTION

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INTRODUCTION

This settlement was made for the benefit of class counsel rather than the class. As such, it cannot be approved.

Under this "claims-made" settlement, class counsel requests $6 million in fees, a figure that will easily outstrip the 25% benchmark for attorneys' fees in the Ninth Circuit unless an improbable 90% of the class makes valid claims for recovery. If the claims rate is in the more-likely one to ten percent range, the fee request would be an impermissible 75% to 95% of total recovery.

This would be bad enough by itself, but the class counsel has negotiated clauses to prevent the court from rectifying the imbalance. The settlement contains both a "clear sailing" and "kicker" agreement: class counsel has sacrificed class interests to obtain the defendant's agreement not to object to a request for attorneys' fees that are provided by defendant from a dedicated, separate fund, with the defendant is allowed to recoup the remainder of that account if any portion is not awarded. Just weeks ago, the Ninth Circuit held that such settlement provisions constitute signs of tacit collusion between settling parties: signs that signal that self-interest on the part of class counsel may have outweighed the interests of the class. Provisions such as these are simply unfair unless they provide additional benefits to the class. Here, where the class counsel will obtain the lion's share of the settlement benefits, the results are inherently unfair. Because any reversion of the oversized fee will go to the defendant rather than the class, this Court cannot resolve the unfairness by reducing the fee, and must reject the settlement.

Moreover, this settlement's defects extend beyond the self-dealing fee structure. The settling parties have induced this Court to schedule a fairness hearing that denies the class any opportunity to exercise informed consent. Furthermore, the required methods of objecting and opting out are comparatively burdensome. In short, this is a settlement that does not deserve to be approved.

Even if this Court were to disregard Ninth Circuit precedent and approve the settlement, the Court should not be misled by class counsel's reliance on an inapposite body of law in order to request an inappropriate fee. Class counsel has provided a bloated estimate of the benefits of this settlement, and this estimate risks further inflating class counsel's fee. In concert with defendants, class counsel has induced this Court to produce a hearing schedule that will obscure the value of the benefit to the class. This Court should not award fees until the value of the class's claims can be known, and any fees

awarded should be based on the actual benefit to the class.

I. The Objector is a Member of the Class.

Objector Kenneth Brown purchased a Dell Inspiron 1501 notebook computer in March of 2007 that was advertised online with an instant-off discount. Brown is a member of the settlement class; he therefore has standing to object to the settlement. The Center for Class Action represents Brown *pro bono*; through his counsel, Brown intends to appear at the fairness hearing on October 28, 2011.

Brown has filed a separate, contemporaneous notice of his counsel's intention to appear at the fairness hearing; in that notice, he requested the opportunity for counsel to be heard as well as the opportunity to cross-examine any witnesses who testify at the hearing in support of settlement approval.

Brown's mailing address is 743 Woodhaven Court, Santa Maria, California, 93455. His telephone number is (805) 938-5898. Attached to this objection is a declaration and receipt from Dell demonstrating Brown's class membership.

II. Under Rule 23, Preventing an Unfair Settlement Is This Court's Duty.

"Both the United States Supreme Court and the Courts of Appeals have repeatedly emphasized the important duties and responsibilities that devolve upon a district court pursuant to Rule 23(e) prior to final adjudication and settlement of a class action suit." *In re Relafen Antitrust Litigation*, 360 F. Supp. 2d 166, 192-94 (D. Mass. 2005), *citing inter alia Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 623 (1997) ("Rule 23(e) protects unnamed class members from 'unjust or unfair settlements' agreed to by 'fainthearted' or self-interested class 'representatives.'"); *see also Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 279-80 (7th Cir. 2002) ("district judges [are] to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions" prior to settlement).

"Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.... [T]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.,* 55 F. 3d 768, 785 (3d. Cir. 1995) (quoting *Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir. 1975)). *See also Riker v. Gibbons,* 2010 WL 4366012, at *2 (D. Nev. Oct. 28, 2010).

"A trial court has a continuing duty in a class action case to scrutinize the class attorney to see that he or she is adequately protecting the interests of the class." Herbert Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 13:20 (4th ed. 2002). "Both the class representative and the courts have a duty to protect the interests of absent class members." *Silber v. Mabon,* 957 F.2d 697 (9th Cir. 1992), at 701. *Accord Diaz v. Trust Territory of Pacific Islands,* 876 F.2d 1401, 1408 (9th Cir. 1989).

There should be no presumption in favor of settlement approval: "[t]he proponents of a settlement bear the burden of proving its fairness." *True v. American Honda Co.*, 749 F. Supp. 1052, 1080 (C.D. Cal. 2010) (*citing* 4 NEWBERG ON CLASS ACTIONS § 11:42 (4th ed. 2009)). *Accord* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.05(c) (2010) ("*ALI Principles*").

It is insufficient that the settlement happened to be at "arm's length" without express collusion between the settling parties; because of the danger of conflicts of interest, third parties must monitor the reasonableness of the settlement as well. "If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003). "Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs." *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1052 (9th Cir. 2002) (quoting *In Re Washington Public Power Supply Syst. Lit.,* 19 F.3d 1291 (9th Cir. 1994)). "Accordingly, fee applications must be closely scrutinized." *Vizcaino*, 290 F. 3d at 1052.

A. Courts Should Adopt *ALI Principles* § 3.05 for Reviewing Settlements.

Standards for reviewing settlements differ from circuit to circuit: the "current case law on the criteria for evaluating settlements is in disarray." *ALI Principles* § 3.05, comment a at 205. The Ninth Circuit has asked courts to follow an eight-factor test. *E.g.*, *Churchill Village v. General Elec.*, 361 F.3d 566, 575-76 (9th Cir. 2004). But the Ninth Circuit has also reversed settlement approvals without reference to the eight-factor test. *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003) (reversing settlement approval without reference to eight-factor test).

Some of the *Churchill Village* factors are not helpful in evaluating a settlement, not least because

the cases give no guidance to how to weigh the various factors. One possible method of resolving this concern and rationalizing the law would be for courts to follow § 3.05 of the American Law Institute's *Principles of the Law of Aggregate Litigation*. The ALI *Principles* provide more than an indeterminate balancing test of multiple factors; rather, they suggest that courts should examine settlements to see if they pass several specific tests of fairness. Under § 3.05(a), there is an initial four-part test that all settlements must meet: the court must consider whether

> (1) the class representatives and class counsel have been and currently are adequately representing the class;
> (2) the relief offered to the class… is fair and reasonable given the costs, risks, probability of success, and delays of trial and appeal;
> (3) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and
> (4) the settlement was negotiated at arm's length and was not the product of collusion.

In addition to these four requirements, a "settlement may also be found to be unfair for any other significant reason that may arise from the facts and circumstances of the particular case." *Id.* § 3.05(b).

B. The Court Can Apply § 3.05 of the ALI Principles Consistently With Ninth Circuit Precedent.

It is within this court's discretion to use the § 3.05 standards as a consistent complement to the *Churchill Village* eight-factor test—which also asks courts to examine the risks of the case and the reasonableness of the settlement fund in relation to those risks—and to *Molski v. Gleich*, which supplied more general standards of fairness. Ninth Circuit precedent on the question is compatible with the use of ALI's *Principles* § 3.05 in evaluating this settlement; furthermore, appropriate use of the *Principles* could rationalize the somewhat untethered *Churchill Village* factors, thus solving the problem of a multi-factor test that provides little guidance in distinguishing good settlements from bad ones. (*Cf.* the discussion of judicial fee-setting in *Nilsen v. York County,* 400 F.Supp.2d 266, 277 (D. Me. 2005) (a multi-factor approach "offers little predictability" to lawyers and judges. and its "highly subjective approach" "allows uncabined discretion").) That said, this settlement demands even more heightened scrutiny than the typical settlement requires because of its "clear sailing" clause.

III. The "Clear Sailing" and "Kicker" Provisions Benefit Class Counsel at the Expense of the Class.

The settling parties elected to segregate payment of class counsel's fees and expenses, subject to court approval, from the funds available to compensate the class. "Dell will not oppose a request for attorneys' fees, expenses, and costs in an amount up to $7 million … The payment by Dell of any Class Counsels' fees, expenses and costs is separate from and in addition to the other relief afforded the class members in this Agreement." Settlement Agreement and Release, pp. 15-16. "Thus, the payment of attorneys' fees and costs will not affect the recovery for Class Members." *See* Motion for Preliminary Approval, at 14. Any recovery of fees under $7 million will leave the remainder in the pockets of the defendants. It is unclear what problem the settling parties believe they are solving with this arrangement; what is quite clear is that they are creating one.

Class action settlements that release defendants from liability in exchange for the creation of a common fund "create an inevitable conflict of interest" between class counsel and class members. *In re Fine Paper Antitrust Litig.,* 751 F.2d 562, 583 (3rd Cir. 1984). Attorney fee requests from the resultant fund "must be subjected to heightened judicial scrutiny." *Id.* To "avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Staton v. Boeing Co.*, 327 F.3d at 963. The Court's already sizable duty of scrutiny is necessarily magnified by the settling parties' insertion of a "clear sailing" clause into the settlement agreement, which provides "for the payment of attorneys' fees separate and apart from class funds, which carries 'the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class.' " *In re Bluetooth Headset Prods. Liab. Litig.*, __ F.3d__, 2011 U.S. App. LEXIS 17224, *29 (9th Cir. Aug. 19, 2011) (quoting *Lobatz v. U.S. W. Cellular of Cal., Inc.,* 222 F.3d 1142, 1148-49 (9th Cir. 2000)).

The clear sailing clause stipulates that attorney awards will not be contested by opposing parties. "Such a clause by its very nature deprives the court of the advantages of the adversary process." *Weinberger v. Great Northern Nekoosa Corp.,* 925 F. 2d 518, 525 (1st Cir. 1991). The clause strongly suggests that its associated fee request should go "under the microscope of judicial scrutiny." *Id.*

"Collusion may not always be evident on the face of a settlement, and courts therefore must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Bluetooth,* 2011 U.S. App. LEXIS 17224 at *28.

One of those signs of collusion is the clear sailing clause, which lays the groundwork for lawyers to "urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Id*. at *29 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)). The implication of "absence of adversariness makes heightened judicial oversight of this type of agreement highly desirable. Furthermore, the very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." *Weinberger,* 925 F.2d at 524. It is "self-evident" that a clear sailing clause should "put a court on its guard." *Id.*

Similarly, "a kicker arrangement reverting unpaid attorneys' fees to the defendant rather than to the class amplifies the danger of collusion already suggested by a clear sailing provision." *Bluetooth,* 2011 U.S. App. LEXIS 17224 at *34. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Id.* at *35. Unless this Court decides that "a kicker provision is in the class's best interest as part of the settlement package, the kicker makes it less likely that the settlement can be approved if the district court determines the clear sailing provision authorizes unreasonably high attorneys' fees." *Id*.

A court should give a settlement "special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998). The settlement's "clear sailing" clause makes this record about as suggestive as it can get: class counsel negotiated a provision protecting fees from challenge by the defendant, a clause which placed class counsel's interests ahead of those of the class. Such a provision invites additional scrutiny of the settlement. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 961 n. 5 (9th Cir. 2009).

As part of this settlement, class counsel has secured an unchallenged right to request millions of dollars for itself—whether or not the class secures proportional relief. This provision cannot possibly benefit the class. In a typical common fund settlement, the district court may, at its discretion, reduce the

fees requested by plaintiffs' counsel—when it does so, the class will benefit from the surplus. Under the proposed settlement, if the Court awards less to class counsel than the roughly $14 million that defendants have already agreed to pay, the defendant will be the only beneficiary. The settlement is therefore worse for the class than a traditional common fund, yet plaintiffs have done nothing to improve this inferior settlement structure.

Any court judging the fairness of a class action faces "a responsibility difficult to discharge when the judge confronts a phalanx of colluding counsel. The defendant wants to minimize outflow of expenditures and the class counsel wants to increase inflow of attorneys' fees. Both can achieve their goals if they collude to sacrifice the interests of the class." *Thorogood v. Sears Roebuck & Co.*, 547 F.3d 742, 745 (7th Cir. 2008), *vacated on other grounds by Thorogood v. Sears Roebuck & Co.*, __ S. Ct. __ , 2011 U.S. LEXIS 4939 (2011). This Court should understand the clear-sailing agreement in this settlement as suggestive in the *Hanlon* sense—namely, that such an agreement inherently calls for "special attention" to the facts and circumstances of the settlement agreement. *See Hanlon*, 150 F.3d at 1021. This clause raises stark Fed. R. Civ. Proc. 23(a)(4) concerns: Because class counsel, by failing to negotiate for reversion to the class of any denied fee request, have put their own interests ahead of those they are charged to represent, the settlement deserves a higher level of scrutiny by this Court than the ordinarily high scrutiny that settlement evaluations typically require.

IV. Because the Claims Period Ends After the Fairness Hearing, the Fairness, Reasonableness, and Adequacy of the Attorneys' Fees Is Currently Difficult or Impossible to Judge.

According to the settlement website, class members' claim forms are due on October 28th, the same day on which the fairness hearing is to be held. www.discountsettlement.com, "Important Dates." But this deadline is inconsistent with this Court's preliminary approval order (Dkt. No. 318), which clearly states that the claim form submission deadline is five days after the fairness hearing. Preliminary Approval Order at 4, 5. Both deadlines, however, are legally problematic: they deprive class members of material information even on the day they must decide whether to submit to, object to, or opt out from the settlement. The objection deadline is September 28th, which is at least a month before the deadline to file a claim.

The central function of notice is to give each class member the opportunity to evaluate the settlement and reach an informed decision. *In re Veritas Software Corp. Sec. Litig.,* 496 F.3d 962, 969 (9th Cir. 2007) ("It is clear that the purpose of the notice requirement is to allow class members to evaluate a proposed settlement."). Notice gives class members the opportunity to assess the strengths and weaknesses of the case as well as the merits and demerits of the settlement. 7B Charles Alan Wright et al., *Federal Practice and Procedure,* § 1787 at 220 (2d ed.1986); 2 Newberg on Class Actions, § 8.04 at 8-17 ("[T]he purpose [of notice is] allowing the parties to make conscious choices that affect their rights in a litigation context."). But the date of this deadline leads unavoidably to the question of whether it satisfies Rule 23: in particular, is the class entitled to know the number of valid claims submitted, and is that information material to the fairness of the overall settlement or the attorneys' fee request? If so, then the motion schedule must not deprive objectors of the information they need to make an informed decision. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). Furthermore, the scheduling of the claims deadline, whether on or after the date of the fairness hearing, deprives those who do object of any opportunity to discuss that data at the hearing; unless the Court orders the parties to submit this data as a status report after the deadline passes, the Court itself will lack important information needed to evaluate the fairness of the settlement.

Whether this Court decides to award fees under the percentage-of-recovery method or the lodestar method, the number of claims made is relevant in either case. When assessing a percentage-of-recovery analysis in a settlement like this, where there is no firm maximum or minimum outlay to the class, knowledge of the number of valid claims registered is essential to any evaluation of the proportionality of the $6.2 million fee request. Furthermore, despite class counsel's recent claims that 392,979 class member purchases are included in the class and that the total maximum monetary relief therefore approaches $20 million (Motion for Attorneys' Fees (Dkt. No. 320) at 8), class counsel had previously acknowledged that the class purchases made at the "slash through" price may be indistinguishable from non-class purchases subject to a mail-in rebate. Motion for Preliminary Approval (Dkt. No. 309) at 14 n.10 (citing Snowden Decl. (Dkt. No. 310-2)). The number of class purchases is therefore unknown, and the maximum relief might therefore be less than the nearly $20 million that the plaintiffs have apparently hypothesized.

Nonetheless, even if the plaintiffs are correct and there are actually 392,979 eligible purchases, the fee award should be measured against the value of the claims actually made. The "key consideration in determining a fee award is reasonableness in light of the benefit *actually conferred*" (emphasis in original). *In re HP Inkjet Printer Litig*., No. 5:05-cv-3580 JF, 2011 WL 1158635, at *10 (N.D. Cal. Mar. 29, 2011) (quoting *Create-A-Card Inc., v. Intuit, Inc*., No. C 07-06452 WHA, 2009 WL 3073920, at * 3 (N.D. Cal. Sept. 22, 2009)). *See also ALI Principles* § 3.13; Notes of Advisory Committee on 2003 Amendments to Rule 23(h), *citing* 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class") (Private Securities Litigation Reform Act).

Plaintiffs may argue that some trial courts that have awarded fees on a percentage-of-recovery basis have made this calculation on the basis of the entire fund, not just the amount of the fund that is claimed by the class. *E.g., Boeing v. Van Gemert*, 444 U.S. 572 (1980); *Williams v. MGM-Pathe Communs. Co.*, 129 F.3d 1026 (9th Cir. 1997).[1] But *Boeing* and *Williams* are inapplicable for at least two reasons.

First, the holdings of *Boeing* and *Williams* were superseded by the 2003 amendments to Federal Rule of Civil Procedure 23. *See* Notes of Advisory Committee on 2003 Amendments to Rule 23(h) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest *actually paid* to the class") (emphasis added). *See also* Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 21.71(2004) ("the fee awards should be based only on the benefits actually delivered.") The amendments reflect common-sense intuitions: attorneys' fees should be tied directly to what clients receive, and permitting a class member to fill out a claim form in order to receive a check simply is not equivalent to sending that class member a check directly. *See International Precious Metals Corp v. Waters,* 530 U.S. 1223 (2000) (O'Connor, J) (denying writ of certiorari but noting that fund settlements that allow attorney fees to be based upon the total fund may "potentially

[1] As a threshold matter, even if *Boeing* or *Williams* did apply in full, it would not render the data regarding the number of claims made irrelevant. For example, a court may choose to depart downward from the 25% benchmark, due to the class' apathetic reaction that is demonstrated by the absence of claims. *Tarlecki v. Bebe Stores, Inc.*, 2009 U.S. Dist. LEXIS 102531, at *12 (N.D. Cal. Nov. 3, 2009).

undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class" and, in turn, "could encourage the filing of needless lawsuits").

Second, to whatever extent they remain valid,[2] *Boeing* and *Williams* never applied to a constructive common fund like the one at issue here, where there is no discernible maximum or minimum monetary relief that will go to class members and where the attorneys' fees are paid separately from the class recovery. *See Strong v. Bellsouth Tel. Inc.*, 137 F.3d 844 (5th Cir. 1998); *Lopez v. Youngblood*, 2011 U.S. Dist. LEXIS 99289, at * 32 (E.D. Cal. Sept. 1, 2011) ("[I]n claims made or class reversion cases *where there is a maximum fund*, and unclaimed funds revert to the defendant, it is appropriate to award class fund attorneys' fees based on the gross settlement fund.") (emphasis added). It is therefore not appropriate to award fees based on a speculative, maximized estimate of potential claims. It is in class counsel's interest to inflate this hypothetical number of claims as much as possible, of course, so as to ensure itself the maximum recovery from which to draw its fee. The settlement's claims process is driven by the fact that not everyone who received notice is an eligible class member. Motion for Preliminary Approval at 14 n.10.

Even if this Court exercises its discretion so as to award fees based on a lodestar, the number of claims made remains relevant. As the Ninth Circuit recently concluded in *In re Bluetooth Headset Prods. Liab. Litig.*, when discussing the court's appropriate use of the lodestar method, a central judicial consideration must be "the benefit obtained for the class." 2011 U.S. App. LEXIS 17224 at *12. Under both lodestar and common-fund approaches, it is incumbent upon a district court to determine that "the amount awarded [is] not unreasonably excessive in light of the results achieved." *Id.* at *17. In this case, the benefit obtained and the results achieved must be a function of the number of valid claims submitted.

The possibility of a mismatch between class recovery and attorneys' fees is far from a hypothetical concern. The history of American class action law is littered with examples of parties agreeing to a settlement in which the claims brought the class a small fraction of what the attorneys

[2] If this Court determines that *Boeing* and *Williams* are still good law, Brown wishes to preserve that issue for appeal: he believes that they have been legislatively superseded and that they should, ideally, be judicially reversed.

collected. *See, e.g., Ford Explorer Cases*, J.C.C.P Nos. 4266 & 4270 (Cal. Sup. Ct., Sacramento County 2008) (approximately $37,500 class recovery versus $20 million in attorneys' fees); *In re Grand Theft Auto Video Game Consumer Litig.,* 251 F.R.D. 139 (S.D. N.Y. 2008) ($26,000 class recovery versus $1 million fee request) (class decertified on other grounds); *Moody v. Sears, Roebuck & Co.*, 2007 NCBC 13 (Cook County settlement resulted in $2,402 benefit to class and $1 million in attorneys' fees). To prevent class counsel's receipt of a similar windfall, courts routinely consider the actual amount of funds claimed. *See, e.g., In re Wells Fargo Loan Processor Overtime Pay Litig.,* 2011 U.S. Dist. LEXIS 84541 at *20 (N.D. Cal. Aug. 2, 2011); *Fears v. Wilhelmina Model Agency*, 2009 U.S. Dist. LEXIS 85252 at *37 (S.D.N.Y. Sept. 15, 2009); *Parker v. Time Warner Entm't* Co., L.P., 631 F. Supp. 2d 242, 258 (E.D.N.Y. 2009). Notably absent from the plaintiffs' Motion for Attorneys' Fees was any indication of how many claims had been submitted at the time of its filing, approximately halfway through the claims period.

V. The Methods of Objecting and Opting Out Are Primitive and Unnecessarily Burdensome.

In the year 2011, using electronic media to communicate is the norm. The settling parties have created a website at www.discountsettlement.com which both provides the details of the proposed settlement as well as many of the relevant court documents. That website notes that the settlement administrator, BMC Group/Analytics, Inc., has "specialized in complex information management services" for three decades. *See* http://www.discountsettlement.com/EN/about-administrator. The administrator's own website boasts of its "world-class technology infrastructure." Analytics Incorporated: About Us, http://www.analytics-inc.com/about.html. And, of course, the provision of an email address as part of a lawyer's standard array of contact information is now almost mandatory; class counsel provides theirs on the settlement website at http://www.discountsettlement.com/EN/contact-information.

There is no legitimate reason for the settling parties' failure to establish either a dedicated e-mail address or a dedicated website form allowing class members to object or opt out without jumping through burdensome procedural hoops – especially in a case like this one, in which class notice was conducted via e-mail. For objections and opt-outs, "the ease and cost-efficiency of such direct internet

submissions increases the likelihood of absent class member participation." Robert H. Klonoff, *Making Class Actions Work: The Untapped Potential of the Internet,* 69 U. PITT. L. REV. 727, 766 n. 251 (2008). Given the large electronic footprint that the settling parties have created as part of the settlement process, it is hard to see any reason that objections were not allowed to be made electronically, except for the desire to artificially lower the number of objections made. As discussed in some detail below, the Court should resist any inference that a small number of objectors demonstrates widespread approval of the settlement.

In short, the requirement that objectors print and mail multiple copies of their objection is both expensive and outdated in 2011. Other courts permit the relatively efficient (indeed, close to costless) method of transmitting objections by exactly one email; *see* Class Notice, *In re Classmates.com Consolidated Litig.*, No. 09-cv-0045-RAJ (W.D. Wash 2011), *available at* http://www.cmemailsettlement.com/docs/notice.pdf. The settlement administrator provides an email contact form on its own website for its own customers; curiously, the settlement administrator never made this method of communication available to class members.

Refusing to allow email opt-outs appears even more unjustifiable, given that class members may opt in, by submitting a claim form, online.[3] The only apparent reason to allow online submission of a claim form, while denying class members an electronic method of opting out, is to encourage some choices by class members while discouraging and burdening others. Processing opt-outs and objections is surely no more difficult than processing claim forms; indeed, it is presumably much easier to do so electronically than by paper. Class action settlements should respect the choices and circumstances of class members; providing an Internet option for opt-outs and objections would provide that respect, while appearing to present no serious difficulties of administration.

[3] Brown commends the settling parties and the administrator for establishing an electronic opt-in procedure; his criticism is that allowing for electronic communication from class members should have been systematically implemented.

VI. The Attorneys' Fee Request Is Unjustifiably Large.

A. The Fees Must Be Scrutinized Under Federal, Not State Law.

Class counsel argues that because the plaintiffs asserted claims under California law, the fee award is also governed by state law. Notice of Motion and Motion for Award of Attorneys' Fees and Expenses and Award of Service Awards for Class Representatives, at 10. Class counsel's argument is incorrect. Because this case was brought in federal court, the fee award is governed by Fed. R. Civ. P. 23(h) ("[T]he court may award reasonable attorney's fees…"). Even in cases that bring substantive state law claims to federal court on diversity grounds, the standard of reasonableness under Rule 23(h) is an aspect of federal procedural law, and any state method for awarding attorneys' fees that conflicts with Rule 23(h) is preempted. *Cf. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (holding that the certification standard of Fed. R. Civ. P. 23(a) and (b) preempts a contradictory New York law precluding class certification for certain claims). Likewise, because the portion of Rule 23(h) regarding attorneys' fees is "rationally capable of classification" as a regulation of procedure, *see id.* at 1442, it preempts any countervailing state law that would award fees which would be deemed unreasonable by federal standards. To the extent that *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) and earlier Ninth Circuit precedent holds otherwise, those holdings have been overturned by *Shady Grove*.[4]

Reasonableness under Rule 23(h) is a multi-faceted inquiry conducted against the backdrop of the American Rule, which allows for fees when the governing statute allows for fee shifting; when the opponents acted in bad faith; or when the movant creates a common fund or confers a substantial benefit on a class. *In re Bluetooth Headset Prods. Liab. Litig.*, slip op. at 11105. The federal standard of reasonableness often gives the district court judge discretion to choose either the lodestar or the percentage-of-recovery method of awarding fees, provided that the resulting fee is ultimately reasonable in relation to the success obtained. *Id.* at 11107. The reasonableness of the fee is not determined by the agreement of the settling parties. *Staton v. Boeing Co.*, 327 F.3d at 964; *In re HP Inkjet Printer Litig.,*

[4] Moreover, even if *Vizcaino* remained valid, it does not unequivocally support the application of California law here, because the course of this litigation has encompassed more than merely California claims. *See* Second Amended Complaint ("SAC") (asserting Texas state law claims).

No. 5:05–cv–3580 JF, 2011 WL 1158635 (N.D. Cal. Mar. 29, 2011).

B. With Respect to Fee Awards, the Percentage-of-Recovery Method Is Superior to the Lodestar Method.

1. As a General Matter, Courts Recognize that the Percentage-of-Recovery Method Is Better Policy.

"The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. This interest-alignment device is not perfect. . . . But [an] imperfect alignment of interests is better than a conflict of interests, which hourly fees may create." *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir.1986) (Easterbrook, J.). *See generally* Charles Silver, *Due Process And The Lodestar Method: You Can't Get There From Here*, 74 Tulane L. Rev. 1809 (2000) (citing authorities that show a "broad consensus that percentage-based formulas harmonize the interests of agents and principals better than time-based formulas like the lodestar approach"). The percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). *See also Create-A-Card, Inc. v. Intuit, Inc.,* No. C 07-06452 WHA, 2009 WL 3073920, at *4 (N.D. Cal. Sept. 22, 2009) ("[t]o allow the immediate parties to stipulate to pay class counsel a large sum whether or not a large benefit was conferred on the class—and indeed even when it was not—would encourage collusive settlements.. . . Tethering fees (in part) to benefit will help guard against collusion in the general run of cases."). In contrast, the "lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart Stores,* 396 F.3d at 121.

The Ninth Circuit is a leader in this regard: the established benchmark in this Circuit is that 25% of the fund should be "given in common fund cases." *See, e.g., Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Torrisi v. Tucson Elec. Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993); *Powers v. Eichen,* 229 F.3d 1249, 1256-57 (9th Cir. 2000). Certainly, the Ninth Circuit's benchmark percentage-of-recovery approach has certain limitations (*e.g.,* the common fund should not include inestimable injunctive relief; *see Staton v. Boeing Co.,* 327 F.3d at 973), and the benchmark may

appropriately be adjusted because of special circumstances. *E.g., In re Wash. Pub. Power Supply Sys. Secs. Litig.,* 19 F.3d 1291 (9th Cir. 1994) (court reduced benchmark in megafund case); *Six (6) Mexican Workers v. Arizona Citrus Growers,* 904 F.2d at 1311 (considering the length of litigation, degree of success obtained, and complexity of the issues, court ultimately decided to adhere to the benchmark). The strength and flexibility of this approach provides a superior method of aligning the interests of class counsel and class members. Because this Court has the discretion to select the method for award of attorneys' fees, it should choose the percentage method.

2. In This Case, to Award Lodestar Would Be to Reward Frustration and Failure.

As noted above, the percentage-of-recovery approach to fee awards is superior judicial policy for reasons of fairness and efficiency. However, an additional consideration in this case is, simply put, that awarding the lodestar amount to class counsel will be rewarding class counsel as if they had won the case outright. *See Sobel v. Hertz*, No. 3:06-CV-00545-LRH-RAM, 2011 U.S. Dist. LEXIS 68984, at *44 (D. Nev. Jun. 27, 2011) ("Class Counsel has requested for itself an uncontested cash award ... with only a modest discount from the claimed lodestar amount. In other words, the class is being asked to 'settle,' yet Class Counsel has applied for fees as if it had won the case outright."). Furthermore, in contrast to *Sobel*, class counsel has not even modestly discounted their lodestar figure in this case.

In fact, this litigation's history demonstrates that the plaintiffs endured a number of setbacks that raise serious questions about the underlying merits of the suit. Dell succeeded in its motion to dismiss the plaintiffs' First Amended Complaint and later won its motion to dismiss plaintiffs' breach of contract and unjust enrichment claims. Dkt. Nos. 74 & 305. The Court then severely circumscribed the breadth of the class which the plaintiffs sought to certify, both denying certification of claims for any post-July 2007 purchases as well as claims for purchases on the small and medium business section of Dell's website. Dkt. No. 306.

Appropriate use of the lodestar method calibrates the award to the degree of success achieved. *In re Bluetooth Headset Prods. Liab. Litig.*, slip op. at 11106-07, 11109-10 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983); *McCown v.City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009)). Even in

civil rights cases, where as a general matter awarding lodestar is more appropriate than it is in consumer class action cases, courts do not hesitate to adjust the lodestar downward when the plaintiffs have achieved less than full success. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

At the very least, if the Court decides to award a lodestar-based fee, Class counsel's lodestar should be significantly reduced for the reasons explained above. Regrettably, the fee declaration and the exhibit submitted to this court (Dkt. No. 320-1, Exhibit A) lacks the specificity necessary for Brown to make concrete recommendations about which hours were expended unreasonably. Furthermore, this Court should not rely on lodestar calculations in isolation; the Ninth Circuit has "encouraged courts to guard against an unreasonable result by cross-checking their calculations against a second method." *Bluetooth,* 2011 U.S. App. LEXIS 17224 at *21. The percentage-of-recovery method can be used as a cross-check "to assure that counsel's fee does not dwarf class recovery." *Id.* at *21-*22 (quoting *In re Gen. Motors Pick-Up Litig.,* 55 F. 3d at 821 n.40). "If the lodestar amount overcompensates the attorneys according to the 25% benchmark standard, then a second look to evaluate the reasonableness of the hours worked and rates claimed is appropriate." *Bluetooth,* 2011 U.S. App. LEXIS 17224 at *22 (quoting *In re Coordinated Trial Proceedings,* 109 F.3d 602, 607 (9th Cir. 1997)).

VII. The Court Should Discount Attempts by the Settling Parties to Infer Class Approval from a Low Number of Objections.

Any given class action settlement, no matter how much it betrays the interests of the class, will produce only a small percentage of objectors. The predominating response will always be apathy, because objectors—unless they can obtain *pro bono* counsel—must expend significant resources on an enterprise that will create little direct benefit for themselves. Another common response from non-lawyers will be the affirmative avoidance, whenever possible, of anything involving a courtroom. Class counsel may argue that this understandable tendency to ignore notices or free-ride on the work of other objectors is best understood as acquiescence in or evidence of support for the settlement. This is wrong. Silence is simply *not* consent. *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001) (*citing In re Gen. Motors Pick-Up Litig.,* 55 F.3d at 789.). "Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely,

silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007).

There is usually little hope that opt-outs can recover for their claims—the entire purpose of class actions is to aggregate claims that would be uneconomical to bring individually. "Almost by definition, most class members have too little at stake to warrant opting out of the class litigation and filing an individual lawsuit. Thus, opting out is probably not a viable option even though a proposed settlement is unfair or inadequate." *Id.* at 109. Without *pro bono* counsel to look out for the interests of the class, filing an objection is economically irrational for any individual. "[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re Gen. Motors Pick-Up Litig.*, 55 F.3d at 812 (*citing In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. 1981)); *cf. Petruzzi's, Inc. v. Darling-Delaware Co.*, 880 F. Supp. 292, 297 (M.D. Pa. 1995) ("'[T]he silence of the overwhelming majority does not necessarily indicate that the class as a whole supports the proposed settlement . . . . '"). "[A] low number of objectors is almost guaranteed by an opt-out regime, especially one in which the putative class members receive notice of the action and notice of the settlement offer simultaneously." *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 446 (W.D. Pa. 2007). "[W]here notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a *fait accompli*." *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 680-681 (7th Cir. 1987). "Acquiescence to a bad deal is something quite different than affirmative support." *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1137 (7th Cir. 1979) (reversing approval of settlement).

When class members have little at stake, as in an action such as this where the maximum recovery is fifty dollars, the rate of response will be predictably low. As such, the response from class members cannot be seen as something akin to an election or a public opinion poll. *See In re Gen. Motors Pick-Up Litig.*, 55 F.3d at 813 (finding that "class reaction factor" does not weigh in favor of approval,

even when low number of objectors in large class, when "those who did object did so quite vociferously"); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004). It is typically not worth the average citizen's time or money to object: the slight likelihood that one additional objection will be decisive, when multiplied by the slight increase in an individual class member's payout that such an objection would produce, makes individually-funded objections a losing proposition.

The Court must act as a guardian for *all* class members—whether or not they have formally entered the case by registering an objection. "[T]he absence or silence of class parties does not relieve the judge of his duty and, in fact, adds to his responsibility." *Amalgamated Meat Cutters & Butcher Workmen v. Safeway Stores, Inc.*, 52 F.R.D. 373, 375 (D. Kan. 1971). The Court should draw no inference in favor of the settlement from the number of objections, especially given the vociferousness of the objectors. *In re Gen. Motors Pick-Up Litig.*, 55 F.3d at 812-13; *ALI Principles* § 3.05, comment *a* at 206.

VIII. Brown's *Pro Bono* Counsel Brings This Objection in Good Faith.

Brown's counsel, the Center for Class Action Fairness LLC ("the Center"), is a non-profit program founded in 2009. The attorneys engaged by the Center represent consumers *pro bono* by, among other things, representing class members aggrieved by class action attorneys THAT negotiate settlements that benefit themselves at the expense of their putative clients. The Center has won millions of dollars for class members since its founding in 2009. *See, e.g.*, Rachel M. Zahorsky, "Unsettling Advocate," ABA J. (Apr. 2010); Allison Frankel, "Legal Activist Ted Frank Cries Conflict of Interest, Forces O'Melveny and Grant & Eisenhofer to Modify Apple Securities Class Action Deal," AMERICAN LAWYER LIT. DAILY (Nov. 30, 2010).

It is perhaps relevant to distinguish the Center's mission from the agenda of those who are often styled "professional objectors." It is understood that "professional objectors" are for-profit attorneys who attempt or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees; thus, some courts presume that the objector's legal arguments are not made in good faith. Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI.

LEGAL F. 403, 437 n. 150 (defining "professional objector" to exclude non-profit public-interest litigators). This is not the business model of the Center for Class Action Fairness, which is funded entirely by charitable donations and court-awarded attorneys' fees. *See* Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, Bureau of National Affairs: Class Action Litigation Report, Aug. 12, 2011 (distinguishing the Center from professional objectors). While the Center focuses on bringing objections to unfair class action settlements, it refuses to engage in *quid pro quo* settlements and does not extort attorneys; the Center has never settled an objection.

Because the Center does not object indiscriminately, it has an excellent track record of success. In 25 cases to date where the Center has objected 26 times, courts have rejected the underlying settlement or materially modified the settlement and fee request thirteen times; on two other occasions, parties responded to the Center's objection before the fairness hearing by modifying settlements so as to provide millions of dollars more cash to the class. The Center has lost three objections with finality and has thirteen objections pending in trial or appellate courts (including five where the objection was upheld in part). In short, Brown brings this objection in good faith to protect the interests of the class. Nonetheless, it is the experience of the Center, based on the conduct of class counsel in other cases, that some attorneys will falsely and unjustifiably accuse the Center of seeking to extort class counsel. If this Court has any doubt whether the Center's objection is brought in good faith, Brown and the Center are willing to stipulate to an injunction prohibiting them from accepting a cash payment in exchange for the settlement of this objection.

CONCLUSION

Class counsel has breached its duty to the class by negotiating a settlement that puts class counsel's interests ahead of its putative clients. The settling parties have included a clear sailing agreement with a reversionary kicker. Such arrangements benefit class counsel and the defendant, but sells out the class and raises the possibility of tacit collusion.

Moreover, the settling parties have asked this court for action on the fee award before the benefits to the class can be determined. This gives the class insufficient notice. The settling parties have created

procedures that make it easy for class members to opt in, but hard to object or opt out. This is unnecessarily burdensome. For these reasons, this Court should reject this settlement.

Should the court nevertheless approve this settlement, it should ensure that any fees it awards are consistent with both the Ninth Circuit's 25% benchmark and the principle that class counsel should be rewarded only for the benefits that it brings the class. The attorneys' fees should be based primarily on a percentage-of-recovery analysis; the use of lodestar analysis should be confined to a cross-check. As such, this Court should delay any ruling on fees until the number of claims is known.

Dated: September 27, 2011

Respectfully submitted,

/s/ Theodore H. Frank
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CERTIFICATE OF SERVICE

I hereby certify that on this day I filed the foregoing with the Clerk of the Court, and served true and correct copies upon class counsel and defendants' counsel via first class mail at the addresses below, per the instructions of the Settlement Notice.

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DATED this 27th day of September, 2011.

(s) Theodore Frank
Theodore Frank