Docket No. 14-72745

In the

United States Court of Appeals

for the

Ninth Circuit

IN RE: ADOBE SYSTEMS, INC., APPLE, INC.,
GOOGLE, INC. and INTEL CORPORATION,

ADOBE SYSTEMS, INC., APPLE, INC.,
GOOGLE, INC. and INTEL CORPORATION,

Defendants and Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE,

Respondent,

SIDDHARTH HARIHARAN, BRANDON MARSHALL,
MICHAEL DEVINE, MARK FICHTNER and DANIEL STOVER,

Plaintiffs and Real Parties in Interest.

From the United States District Court for the Northern District of California (San Jose), No. 5:11-cv-02509-LHK · Honorable Lucy H. Koh

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF THE PETITION FOR WRIT OF MANDAMUS

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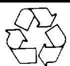

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(c)(1) and 26.1, *amici curiae* the Chamber of Commerce of the United States of America and the California Chamber of Commerce state that they are not subsidiaries of any corporation, and no publicly held corporation owns 10% or more of their stock.

Dated: October 24, 2014

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INTEREST OF *AMICI CURIAE*[1]

As set forth in the accompanying Motion for Leave to File, *amici* the Chamber of Commerce of the United States of America and the California Chamber of Commerce have a direct interest in this important case. Between them, *amici* represent hundreds of thousands of businesses across the nation, and more than 13,000 in California alone. They regularly represent the interests of their members by filing *amicus* briefs in cases involving issues of vital concern to the business community. The district court's ruling threatens serious injury to the business community by disrupting the longstanding federal policy favoring settlements of complex class actions. As frequent class-action defendants, *amici's* members are deeply interested in the continuing viability of class settlements and in the proper application of Federal Rule of Civil Procedure 23.

SUMMARY OF THE ARGUMENT

Litigation is a costly and time-consuming endeavor that imposes burdens on both the judicial system and the parties. In appropriate cases, settlement can present an efficient way to end litigation, benefiting courts and litigants alike. Public policy thus encourages settlement when possible. *See, e.g.*, *Van Bronkhorst*

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[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976). Indeed, the federal policy encouraging settlement is now embodied in governing precedent and the Federal Rules. The district court's refusal to preliminarily approve the arms-length settlement in this case runs afoul of this policy.

Worse still, the district court's primary rationale for disapproving of the settlement was that the class members would "recover less on a proportional basis from the instant settlement with Remaining Defendants than from the settlement with the Settled Defendants." Op. 6:21-7:1. This approach was clear error. Settlements must not be judged by any strict formulaic approach because the concerns that animate settlement vary at different stages of litigation. Thus, it was error for the court to tie its formulaic approach to an earlier settlement in this case, especially because requiring later-settling defendants to pay at least the same proportionate amount as earlier settling defendants is akin to adding a most-favored-nation clause. Effectively rewriting judicially an earlier settlement agreement is bad enough; doing so by adding a requirement that mirrors a clause known to "inhibit compromise and settlement" compounded the problem. *Cintech Indus. Coatings, Inc. v. Bennett Indus., Inc.*, 85 F.3d 1198, 1203 (6th Cir. 1996).

Finally, courts reviewing a proposed settlement for preliminary approval should do so with the overriding goal of determining whether the settlement falls "within the range of possible approval." Newberg on Class Actions § 13:13 (5th

ed. 2014). This settlement meets that standard because it is non-collusive and was negotiated at arms' length. Accordingly, the district court clearly erred in refusing to preliminarily approve the settlement agreement. This Court should grant the mandamus petition.

ARGUMENT

I. Federal Policy Encourages Settlements Because They Can Benefit Courts and Litigants Alike.

This petition implicates a well-established federal policy: settlements are to be encouraged. It is an unfortunate truth that litigation is both time- and resource-intensive. In appropriate cases, settlement can become a mutually agreeable (and more efficient) way for the parties to allocate their time and resources and resolve their disputes. Appropriately ending unnecessary litigation through settlement thus benefits both courts and litigants. Accordingly, public policy "favor[s] the amicable adjustment of disputes and the concomitant avoidance of costly and time consuming litigation." *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978).

A long line of governing decisions sets forth a strong federal policy in favor of settlements. *See, e.g.*, *St. Louis Mng. & Milling Co. v. Montana Mng. Co.*, 171 U.S. 650, 656 (1898) ("[S]ettlements of matters in litigation or in dispute without recourse to litigation are generally favored."); *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir. 1992)

(noting "the strong judicial policy in favor of settlements"). In short, this Court "is firmly committed to the rule that the law favors and encourages compromise settlements." *Ahern v. Cent. Pac. Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988) (citations and quotations omitted); *Nat'l Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762, 768 (9th Cir. 1989) ("[W]e favor the policy of encouraging settlement.").

For good reason. Settlement agreements confer benefits upon the court system. They "conserve judicial time and limit expensive litigation," *Speed Shore Corp. v. Denda*, 605 F.2d 469, 473 (9th Cir. 1979) (citation omitted), thus preserving scarce resources and alleviating the pressure on increasingly clogged dockets, *see Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976) ("With today's burgeoning dockets and the absolute impossibility of Courts ever beginning to think that they might even be able to hear every case, the cause of justice is advanced by settlement compromises…."); *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 650 (9th Cir. 1980) ("[Settlement agreements] lessen the burden on courts.").

Settlements also benefit litigants by saving them time and resources. Settlements can be a more expeditious and less expensive means of dispute resolution than litigating to judgment. *See* 15B Am. Jur. 2d Compromise & Settlement § 3. They allow parties to save resources that would otherwise be expended on the back and forth of discovery, experts, and attorneys' fees, not to

mention their own costs of preparing for trial. *See, e.g.*, *Janneh v. GAF Corp.*, 887 F.2d 432, 435 (2d Cir. 1989) ("Foregoing formal courtroom procedures, including discovery, trial, briefs and arguments, brings substantial benefits to the parties."). In this Court's words, "[s]ettlement is attractive to parties because it reduces litigation costs," *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1230 (9th Cir. 1989), and it has the potential to "mitigate[] the antagonism and hostility that protracted litigation leading to judgment may cause." *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1050 (Fed. Cir. 1986).

For all of these reasons, the federal policy in favor of settlements has been engrafted into the Federal Rules. For example, "[s]ettlement conferences are incorporated by rule into pretrial conferences." *Franklin*, 884 F.2d at 1225 (citing Fed. R. Civ. P. 16(c)); *see also* Fed. R. Civ. P. 16(c), advisory comm. note ("Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible.").[2] In addition, the "plain purpose" of Federal Rule of Civil Procedure 68, which concerns offers of judgment, is "to encourage settlement and avoid litigation." *Marek v. Chesny*, 473 U.S. 1, 5 (1985). The "public policy

[2] Notably, federal courts can direct parties in civil litigation to attend a settlement conference, *see* Fed. R. Civ. P. 16(a)(5); Fed. R. App. P. 33, and even have imposed sanctions for a failure to obey such an order, *see, e.g.*, *Guillory v. Domtar Indus. Inc.*, 95 F.3d 1320, 1334-35 (5th Cir. 1996).

favoring the compromise and settlement of disputes" also animates Federal Rule of Evidence 408, which generally renders such offers inadmissible at trial. Fed. R. Evid. 408, advisory comm. note.

The benefits of settlement can be magnified in the context of complex class actions like this one. *See* 15B Am. Jur. 2d Compromise & Settlement § 3. As the number of parties to a dispute increases, so too do the complexities and costs of litigation. Settlement gives parties an alternative to years—perhaps even decades—of complicated litigation, permitting the quick and efficient resolution of large-scale disputes when warranted. *See Van Bronkhorst*, 529 F.2d at 950. Thus, the "overriding public interest in settling and quieting litigation" can take on heightened importance in the class-action context. *Id.* The district court failed to give due weight to this federal policy when it denied preliminary approval of the complex class-action settlement negotiated at arms' length between these sophisticated parties. Pet. 11-12.

II. The District Court's Reliance On A Comparative Mathematical Formula To Deny Preliminary Approval Under Rule 23 To This Arms-Length Settlement Was Clear Legal Error.

The district court's decision threatens this important federal policy by making settlement of complex class actions (including this one) more difficult to secure than Rule 23 contemplates. In particular, the district court hinged its denial of preliminary approval on a comparison of the relative amounts of "the instant

settlement with Remaining Defendants" and "the settlements with the Settled Defendants." Op. 7:7-8; Op. 7:13-14 (finding that the earlier agreements "provide a useful benchmark against which to analyze the reasonableness of the instant settlement"). Using that benchmark, the court found that the "Class members [would] recover less on a proportional basis from the instant settlement with Remaining Defendants than from the settlement with the Settled Defendants[.]" Op. 6:21-7:1. And, in light of that finding, Petitioners were made to shoulder the burden of disproving the district court's determination that this settlement would excuse them from "pay[ing] their fair share as compared to the Settled Defendants[.]" Op. 31:25. This mode of analysis is clear legal error warranting mandamus relief.

As an initial matter, no legal authority supports evaluating the reasonableness of a class-action settlement using such a comparative mathematical formula. *See* Pet. 10-18. There can be no one-size-fits-all measure of whether a class action settlement "is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e); *see Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) ("As the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes, review of the substantive terms … is often not productive.") (internal quotations and citation omitted)). Rather, the settlement must be judged based on "the unique facts and circumstances presented by each individual case."

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982). For that reason, this Court "put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution, and [has] never prescribed a particular formula by which that outcome must be tested." *Rodriguez v. West Pub'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (citations omitted). The notion that this kind of context-specific inquiry can be reduced to a simple comparison of two settlements is untenable. *See In re Michael Milken & Assocs. Sec. Litig.,* 150 F.R.D. 57, 66 (S.D.N.Y. 1993) ("The determination of what constitutes a 'reasonable' settlement is not susceptible of a mathematical equation yielding a particularized sum.").

Using the amount of an early settlement reached by certain defendants as the benchmark for a formulaic approach to Rule 23 review of later settlements in that same case, as the district court did here, is especially problematic. The settlements Lucasfilm, Pixar, and Intuit reached cannot be the measure of whether the instant settlement is fair and reasonable. Indeed, in most cases involving many plaintiffs and many defendants, any number of factors could drive varying settlements among the parties. To cite just one example, some plaintiffs may be risk averse and elect to settle a dispute early—or to settle at all—while other plaintiffs might eschew settlement in the hope of obtaining a favorable (and presumably larger-than-settlement) trial judgment. *See, e.g.*, *Franklin*, 884 F.2d at 1225 ("The plaintiffs and the class they represent may view some recovery by way of

settlement more favorably than the risk of recovering nothing. Even if liability is considered certain, the present value of money received in settlement may be greater than the value of a judgment entered at some future date."). As another example, in any given case, "the early-settling defendants may well be those whose liability is clearest." Manual for Complex Litig. § 1.46 (1977). Still other factors may contribute to differences between early and later settlements. *See, e.g.*, 1 Successful Partnering Between Inside & Outside Counsel § 10:23 ("In formulating a settlement plan, counsel should consider all of the costs and benefits associated with the settlement, including … the cost of an early settlement at a higher amount measured against incurring continuing litigation costs and settling later at a lower amount (or the risk of settling later at the same or a higher amount).").

The essential point is that there really is no way to know the precise reasons why different parties settle at different times on different terms. *See Staton*, 327 F.3d at 959 ("Courts cannot know the strength of *ex ante* legal claims and so are not privy to the relative strengths of the parties at the bargaining table. Nor can courts judge with confidence the value of the terms of a settlement agreement…."). "Ultimately, the district court's" review of a class-action settlement "is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (citation and quotation omitted). That is why, "[i]n evaluating a settlement agreement, it is not the Court's role to

second-guess the agreement's terms." *Ma v. Covidien Holding, Inc.,* No. 12-02161, 2014 WL 360196, *4 (C.D. Cal. Jan. 31, 2014).

But not only did the decision below overstep the district court's limited role, it did so in a way that essentially added a "most favored nation" clause to the Lucasfilm/Pixar/Intuit settlements under which Petitioners are not permitted to settle on purportedly more favorable terms. Pet. 16-17. Courts have stated that such clauses are "disfavored ... because they often inhibit compromise and settlement. This effect can be particularly disruptive in the orderly disposition of such complex litigation as antitrust class actions, which by their nature involve multiple defendants." *Cintech Indus. Coatings, Inc. v. Bennett Indus., Inc.*, 85 F.3d 1198, 1203 (6th Cir. 1996) (citing Manual for Complex Litigation (Third) § 23.23 at 182 (1995)); *see In re Chicken Antitrust Litig.*, 560 F. Supp. 943 (N.D. Ga. 1979); *see also* Yosef J. Riemer, *Sharing Agreements Among Defendants in Antitrust Cases*, 52 Geo. Wash. L. Rev. 289, 317 n.115 (1984) ("[T]he 'floor' level of damages established by the clause may discourage subsequent settlements with other defendants if the plaintiff is reluctant to settle on any terms that trigger the reduction required by the most-favored-nations clause."). This case illustrates the point. A fair reading of the district court's opinion suggests that its imposition of formula akin to a most-favored-nation provision was the principal reason why it denied preliminary approval of this settlement.

Even if a most-favored-nation clause were not disfavored, however, it was not the district court's place to essentially blue pencil one into the Lucasfilm/Pixar/Intuit agreements. Pet. 17. "Neither the district court nor this court have the ability to delete, modify or substitute certain provisions" of a settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (quotation omitted); *see also Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989) ("[C]ourts are not permitted to modify settlement terms or in any manner to rewrite agreements reached by parties. The court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. It may only approve or disapprove the proposal.") (citations omitted); *San Francisco NAACP v. San Francisco Unified Sch. Dist.,* 59 F. Supp. 2d 1021, 1037 (N.D. Cal. 1999). The district court thus clearly overstepped its bounds by implicitly amending the earlier Lucasfilm/Pixar/Intuit settlement agreements in effect to add a most-favored-nation clause ensuring that the remaining defendants could not later settle on more favorable terms.

Finally, even if using an early settlement as a benchmark comported with Rule 23, it still would be inappropriate at this stage. By design and logic, preliminary approval involves more limited review than final approval. Pet. 10-11; *see also* Newberg on Class Actions § 13:13 (5th ed. 2014) ("[T]he goal of preliminary approval is for a court to determine whether notice of the proposed

settlement should be sent to the class, not to make a final determination of the settlement's fairness."); McLaughlin on Class Actions § 6:7 (10th ed. 2013) ("A preliminary fairness assessment is not to be turned into a trial or rehearsal for trial on the merits, as it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.") (quotations omitted)). As a consequence, such approval ordinarily should be given when "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible judicial approval." Newberg on Class Actions § 13:13 (5th ed. 2014) (quotation and internal brackets omitted)); *see In re Inter-Op Hip Prosthesis Liab. Litig.,* 204 F.R.D. 330, 350 (N.D. Ohio 2001).

The district court's reliance on a mathematical formula thus was clear legal error irrespective of whether the Court adopts a more refined framework for preliminary review under Rule 23 or simply applies this more general standard. There is no question that this settlement passes muster under any proper approach to preliminary review. It is non-collusive, was negotiated at arms' length, mediated by a former federal judge, and appropriately took into account the risks for all parties if the case proceeded to judgment. Pet. 18-22. The Court should grant the mandamus petition and correct the district court's clear legal error.

CONCLUSION

The Court should grant the petition for a writ of mandamus.

Respectfully submitted,

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Dated: October 24, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the page limitations of Fed. R. App. P. 29(d) because it contains no more than one-half the maximum length authorized by this Court's rules for a party's principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: October 24, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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