No. 13-56964

In the United States Court of Appeals for the Ninth Circuit

MICHAEL KOBY, MICHAEL SIMONS, and JONATHAN W. SUPLER,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

BERNADETTE M. HELMUTH.
Objector-Appellant,

v.

ARS NATIONAL SERVICES, INC., a California corporation,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California

BRIEF FOR OBJECTOR-APPELLANT BERNADETTE M. HELMUTH

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INTRODUCTION

Class actions are a powerful tool for securing justice. The prospect of a contingent fee may make it possible for a lawyer to vindicate the rights of an entire class of people whose claims would otherwise lie dormant. But like any powerful tool, class actions can also be abused. The lawyer who is supposed to represent the class may instead team up with the alleged wrongdoer and collude to sell the class down the river: The lawyer gets his fees, the defendant gets its classwide release, and the class members get little or no relief. Federal courts should be on guard against such class-action abuse.

This appeal presents an extreme example: Under the settlement here—which seeks to resolve the damages claims of four million consumers under the Fair Debt Collection Practices Act—the defendant gets a nationwide release of class liability; the class lawyers get their fees; the three named representatives receive the maximum allowable damages; and a local non-profit organization having nothing to do with the case receives cash. Everyone, it seems, gets *something*. But the absent class members—on whose behalf the case was supposedly brought—get *nothing*.

This unusually bad settlement is a virtual carbon copy of one negotiated by the same defense lawyer a decade ago and rejected by the Seventh Circuit. There, as here, the named representatives and their "attorney were paid handsomely to go away; the other class members received nothing … and lost the right to pursue

class relief." *Crawford v. Equifax*, 201 F.3d 877, 882 (7th Cir. 2000). There, as here, the only claimed "relief" is a temporary and hollow promise that the defendant will refrain from conduct it had already stopped, was "not apt to employ … no matter what the settlement provides," and that class members are unlikely to experience again. *Id.* For the class, "only damages matter, yet all the settlement does for (to?) them is cut them off at the knees. They gain nothing, yet lose the right to the benefits of aggregation in a class." *Id.*

Other than fees for the lawyers who sold out their ostensible clients, the settlement here allocates money in two ways, both of which underscore its impropriety. First, it gives $35,000 for veterans' services at San Diego Nice Guys—presumably a worthwhile local charity, but not one whose activities "address the objectives of the underlying statute," "target the plaintiff class," or "provide reasonable certainty that any member will be benefited," as this Court's cases require. *Nachsin v. AOL*, 663 F.3d 1034, 1040 (9th Cir. 2011). Second, it gives $1,000 each to the class representatives and zero to the rest of the class. This "significant disparity between the incentive awards and the payments to the rest of the class members" is an obvious instance of inadequate representation. *Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013).

To add insult to injury, the class was not even notified or given an opportunity to walk away from this raw deal. Under both Rule 23 and the Due

Process Clause, class members are "entitled to personal notice and an opportunity to opt out of representative actions for money damages." *Crawford*, 201 F.3d at 882. That right should have been honored here because "all private actions under the Fair Debt Collection Practices Act are for damages"—even where, as here, most of the money goes to the lawyers. *Id.*; *see also Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218 (2d Cir. 2012) (sustaining a collateral attack, on due-process grounds, to an FDCPA class action settled without individual notice). The lack of notice had jurisdictional consequences as well: Before certification, the named plaintiffs consented to final judgment by the magistrate judge who oversaw the negotiations, but they failed to notify the absent class members or seek their consent. Because the named plaintiffs lacked authority to give up the absent class members' right to an Article III tribunal, the magistrate judge lacked jurisdiction to give final approval.

In sum, a settlement like this—one that leaves class members *worse off than if the case had never been brought*—should never have been approved as "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23. *See Molsi v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) (relying on *Crawford* to reject another settlement under which "the class members received nothing" and "class counsel received compensation"). The magistrate judge's class-certification and approval order should be reversed in its entirety.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over the plaintiffs' FDCPA claims under 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d). On November 19, 2013, Objector Bernadette M. Helmuth filed a timely notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) (ER 21-22) from the magistrate judge's final order of October 21, 2013 (ER 1-20), which certified a settlement class, approved the parties' proposed class-action settlement, entered final judgment, and dismissed the action on the merits with prejudice in accordance with the settlement.

The magistrate judge, however, lacked jurisdiction to give final approval to the settlement in the first place. The requirement that litigants in federal court must give consent before their dispute is submitted for final decision by a magistrate, 28 U.S.C. § 636(c)(1), is both "essential to the validity of the statutory system that allows a magistrate judge to make binding adjudications," *N.Y. Chinese TV Programs, Inc. v. U.EU. Enters.*, 996 F.2d 21, 24-25 (2d Cir. 1993), and grounded in the constitutional rule that federal litigants have a "personal right" to "demand Article III adjudication of a civil suit." *Pacemaker Diagnostic Clinic v. Instromedix,* 725 F.2d 537, 541 (9th Cir. 1984) (en banc). By limiting the authority of magistrate judges in this way, "Congress meant to preserve a litigant's right to insist on trial before an Article III district judge insulated from interference with his obligation to ignore

everything but the merits of a case." *Roell v. Withrow*, 538 U.S. 580, 588 (2003). The absentees, including Objector Helmuth, were denied that right.

The only litigants who gave their consent to final adjudication by the magistrate judge were the class representatives and ARS—and they both did so before class certification, without notice to the class. DN 70-72. But "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." *Standard Fire Insurance Company v. Knowles*, 133 S. Ct. 1345, 1349 (2013). And because "unnamed class members become 'parties' upon class certification," their "consent is required under 28 U.S.C. § 636(c)(1) for a magistrate judge to exercise jurisdiction." *Day v. Persels & Assocs.*, 729 F.3d 1309, 1328 (11th Cir. 2013) (Pro, J., dissenting in part and concurring in part).[1] Without voluntary consent from the absentees, moreover, a magistrate judge's entry of a final judgment approving a class-action settlement is unconstitutional because the absentees have not freely relinquished their rights to an Article III judge. In any

[1] To be sure, *Devlin v. Scardelleti*, 536 U.S. 1, 10 (2002), holds that unnamed class members "may be parties for some purposes and not for others." But *Devlin* supplies two important criteria for determining whether objectors should be deemed parties without having to intervene—both of which are satisfied here. The first is the binding effect of the settlement on the objector. 536 U.S. 10. The second is whether the objectors' interests diverge from the class representative, which is ordinarily evidenced by their objection at the fairness hearing. *Id.* Unless they are given an independent right to withhold consent, objectors have no ability to contest the class representatives' decision to waive adjudication by an Article III district judge—a decision by which they are bound, and which they believe is divergent from their interests. *Devlin* holds that when these criteria are satisfied, as they are here, there is no need to require formal intervention. *Id.* at 12.

event, the settlement cannot bind the class because the absentees lacked *notice* that they would be giving up that constitutional right. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

This Court's appellate jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 636(c)(3) is, in turn, premised on the magistrate judge's authority (or lack thereof) to render a final decision. *See Day*, 729 F.3d at 1330-31.

STATEMENT OF THE ISSUES

1. Fairness of the Settlement. Federal Rule of Civil Procedure 23(e) provides that a class-action settlement may not be approved unless it is "fair, adequate, and reasonable." Did the magistrate judge err in approving a nationwide settlement of Fair Debt Collection Practices Act damages claims under which (a) the absent class members would receive nothing, (b) the plaintiffs' attorneys would receive fees, (c) the named plaintiffs would receive $1,000 each in incentive awards, (d) a local non-profit organization would receive a cy pres award for veterans' services, and (e) the defendant would receive a global release from class damages liability?

2. Lack of Notice. Did the parties' failure to provide notice to the class before extinguishing the defendant's classwide liability for damages independently violate Rule 23 and the Due Process Clause?

STATEMENT OF THE FACTS AND OF THE CASE

A. Statutory Background

This case arises under The Fair Debt Collection Practices Act (FDCPA), the key federal statute protecting consumers from abuses by debt collectors. Among other things, the Act prohibits a debt collector from "the placement of telephone calls without meaningful disclosure of the caller's identity." 15 U.S.C. § 1692d(6). More broadly, the Act requires disclosure, in any initial oral communications, "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose," as well as disclosure "in subsequent communications that the communication is from a debt collector." 15 U.S.C. § 1692e(11).

The FDCPA is a strict-liability statute that permits consumers to recover actual damages or statutory damages of up to $1,000. *See* 15 U.S.C. § 1692k. Class actions are permitted but a class's statutory-damages recovery may not "exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector." 15 U.S.C. § 1692k(a)(2)(B). The Act does not provide for injunctive relief in private civil actions.

B. The Underlying Litigation

This case is one of at least five putative class actions filed against ARS National Services, each alleging that the collection agency systematically violated the FDCPA by leaving voicemail messages for consumers and failing to properly

disclose the nature, purpose, or origin of its calls. This case (*Koby*) was filed in federal court in San Diego, as were two other cases challenging the same conduct (*Cedeno* and *Felix*); the fourth and fifth cases were filed in federal court in New York (*Ryan*) and West Palm Beach (*Helmuth*).[2] *Koby* was settled on a class basis and the remaining cases—except for *Helmuth*—were settled on an individual basis.

The *Koby* complaint was filed on behalf of a putative national class of consumers who received voicemails from ARS, to be represented by three representatives: Michael Koby of Texas; Michael Simmons of Washington State; and Jonathan Supler of North Carolina. DN 1 at 1-2. They alleged that ARS left them voice messages that "fail[ed] to provide meaningful disclosure" of ARS's identity," "fail[ed] to disclose that a call [was] from a debt collector"; and "fail[ed] to disclose the purpose or nature of the communications (i.e. an attempt to collect a debt)." DN 1 at 3.

Following motions practice at the pleadings stage that left most of the plaintiffs' claims standing (DN 19) and a failed attempt by ARS to take an interlocutory appeal to this Court (DN 42), ARS changed its practices and adopted

[2] *See Cedeno v. ARS National Services*, No. 3:11-cv-01281-KSC (S.D. Cal.); *Felix v. ARS National Services*, No. 3:11-cv-00859-KSC (S.D. Cal.); *Ryan v. ARS National Services*, No. 1:11-cv-04995-RF (S.D.N.Y.); *Helmuth v. ARS National Services*, No. 11-cv-81044 (S.D. Fla.). The *Cedeno* case was originally filed the Central District of California but transferred to the Southern District expressly for the purpose of coordinating the litigation in all three California cases. *See* Doc. 33 (motion to transfer case) in *Cedeno v. ARS National Services, Inc*., No. 10-01245 (C.D. Cal.).

uniform national voice messages for consumer calls. ER 94. The new messages, the parties agree, properly disclose the nature, purpose, and origin of the calls in a manner consistent with the FDCPA. ER 94.

C. The Settlement

The parties then began settlement discussions, including several settlement conferences presided over by a magistrate judge. DN 64. Soon after the discussions commenced, the three law firms acting as putative class counsel in the *Cedeno* and *Felix* cases withdrew from their representation, for reasons that were not explained, and were replaced by a San Diego solo practitioner named Christopher Saldaña. Mr. Saldaña then appeared at a settlement conference before the magistrate judge at which the three California cases (*Koby*, *Cedeno*, and *Felix*), together with the New York case (*Ryan*), were settled in principle. ER 119-129.

Following that conference, the parties went on the record to memorialize their agreement. David Hartsell, counsel for ARS, described a proposed nationwide class settlement in *Koby* with five components. ER 120-122.

- **Nationwide Settlement Class:** First, "the parties agree[d] to certify a Rule 23(b)(2) nationwide settlement class," encompassing "in excess of four million persons." ER 120.
- **No Notice.** Second, "[s]ince this will be a Rule 23(b)(2) settlement, no notice of any kind to the class members will be required." ER 121. The class

members would give up any claim to classwide damages but retain the possibility of suing individually. *Id.*

- **Maintenance of Status Quo, With Exceptions:** Third, ARS would "agree to a two-year injunction where ARS agrees to maintain its current … voicemail messaging practices provided, however, that ARS may seek to dissolve the injunction earlier if there's a change in the law or circumstances otherwise present a basis for doing so," and ARS reserves its right to assert statutory good-faith immunity if it violates the injunction. ER 121.
- **Payments to Class Representatives and Cy Pres:** Fourth, ARS will "pay $1,000 to the three named plaintiffs in *Koby* to resolve their individual claims" and $35,000 "on a cy-pres basis." ER 122.
- **Fees.** Fifth, class counsel get $67,500 in attorneys' fees. ER 122.

With respect to the $1,000 payments to the class representatives, Mr. Hartsell explained that they were *not* to be regarded as "any kind of incentive or service award," but rather as "statutory damages for their individual claim." ER 122. The magistrate judge's order, however, "approves a payment of $1,000.00 to the Class Representatives *for the initiation of this action, work performed, and risks undertaken in this matter*." ER 19 (emphasis added).

With respect to the cy pres award, the putative class counsel in *Koby* expressed his understanding that law requires any award to be germane to the class action:

> Just for point of clarification on the recipients of the cy-pres, I think—this is attorney Robert Schroth speaking. It just needs—it needs to go to a consumer law group with—with—which represents underprivileged consumers. You know that there could be an issue if it goes to a—an agency that's not involved in consumer protection.

ER 123. By stating that "there could be an issue," Mr. Schroth apparently did not mean that he would object on behalf of his clients but rather that the cy pres could create a problem on appeal if it had no nexus to the subject matter of the lawsuit. The magistrate judge acknowledged "recent Ninth Circuit case law" on this point. ER 123. Nevertheless, for reasons that are unclear from the record, the parties ended up agreeing to give the money to a local charity (San Diego Nice Guys) that has no connection to debt-collection issues or consumer protection work. ER 3.

Before concluding the hearing, the magistrate judge invited Mr. Schroth to memorialize an apparent side agreement to purchase the silence of counsel for the individual plaintiffs in the parallel cases other than *Helmuth*:

> THE COURT: Fine. I think—one other matter you wanted to put on the record?
>
> MR. SCHROTH: Did you cover that the attorneys in the *Felix*, *Cedeno*, and *Ryan* case consent to the settlement in the *Koby* case and that **you'll agree not to object to our settlement?**
>
> MR. SALDANA: Did we cover it? No, I don't think we did cover it.

> MR. SCHROTH: Do we have that agreement?
>
> MR. SALDANA: I think we do. **That's sort of the linchpin to all of this, so yeah.**

ER 127 (emphasis added). It is unclear from the record what Mr. Saldaña and others received in exchange for their agreement "not to object" to the settlement.

Following this hearing, ARS and the named representatives (Koby, Simmons, and Supler) filed their consent to refer the case to the magistrate judge for all purposes, thus ensuring that the only judicial official with authority to finally approve the settlement would be the one who helped craft it. DN 70, 71 74. After additional discussion and hearings, including an all-day session with the magistrate judge, the parties filed the proposed settlement on February 12, 2013. ER 89-111.

ARS then moved to stay all proceedings in *Helmuth*—which sought damages for a narrowly drawn Florida statewide class—pending approval of the nationwide *Koby* settlement. *See Helmuth v. ARS National Services, Inc.*, No. 11-81044 (S.D. Fla.), Doc. No. 110 (March 6, 2013). The district judge in Florida held a hearing on the motion, at which he questioned ARS's counsel, David Hartsell, about the propriety of the no-notice settlement class:

> THE COURT: I guess what I find somewhat concerning is the argument – and I want to hear your response to it – that you're proceeding under (b)(2). Is that what you said, (b)(2)?
>
> MR. HARTSELL: Correct.

* * *

> THE COURT: So you're proceeding under a subsection of the rule which deals with relief that the statute doesn't authorize. So by consent, by agreement of the parties you're saying, okay, we're going to agree to injunctive relief in this case even though the statute doesn't provide for it. Then we don't have to give notice to anybody, and then we can get our settlement approved without anybody ever knowing the case is here. That's somewhat troubling to me.

Transcript in *Helmuth*, Doc. 117 at 23-24. Mr. Hartsell explained his objective—to bring an end to the litigation "once and for all." *Id.* at 26. The Court continued:

> THE COURT: Well, I can understand that you want to try and bring an end to it, but I guess you haven't really explained why, if you've got a statute that doesn't provide for injunctive relief, and then if you're bringing a class action under the statute, it would seem that that class action has to be for monetary relief primarily, not injunctive relief if the statute doesn't even provide for injunctive relief. And then you would have to certify the class under a subsection that would give notice to everyone, but you're casting the action as one primarily for injunctive relief so you can go under a rule that doesn't provide notice. That's the thing that kind of makes – doesn't sit well with me.

Id.

Despite its reservations, the Florida court stayed the *Helmuth* litigation pending approval of the settlement in California. *See Helmuth v. ARS National Services, Inc.*, No. 11-81044 (S.D. Fla.), Doc. No. 118 (May 24, 2013). About a month later, Ms. Helmuth appeared in this case, on behalf of herself and the class she seeks to represent, to object to the *Koby* settlement. DN 86. Among other things, she argued that (1) the settlement is "patently unfair to the class" because it "affords no monetary relief to the class, provides no notice to class members, no mechanism for

putative class-members to opt-out, and improperly settles this class action as a Rule 23(b)(2) injunctive relief class, even though the [FDCPA] does not provide for injunctive relief." *Id.* at 2. She also asked that the court, at a minimum, carve out Florida class members and allow them to proceed in the *Helmuth* action. ER 59.

D. The Magistrate Judge's Certification and Approval Order

Following a hearing to consider Ms. Helmuth's objections, at which Mr. Hartsell again appeared for ARS (ER 24-87), the magistrate judge issued an order certifying the class and giving final approval to the settlement. ER 1-20.

1. Class certification. Acknowledging that injunctive relief must be "the predominant form of relief sought by the class," and that "injunctive relief is not expressly available under FDCPA," the magistrate judge nevertheless concluded that certification of a settlement class under Rule 23(b)(2) was appropriate. Her principal justification for this conclusion was circular: Because certification of a sprawling nationwide class taken together with the FDCPA's statutory damages cap would produce infinitesimal individual damages awards, she reasoned, injunctive relief predominated over damages (notwithstanding the fact that injunctive relief is unavailable under the statute). ER 14. "Although this action initially sought money damages only," she reasoned, "the landscape of the litigation changed" during settlement discussions. ER 14-15.

The magistrate judge certified the class without attempting to distinguish (or even address) the Supreme Court's recent holding that "individualized monetary claims belong in Rule 23(b)(3)" rather than 23(b)(2), and thus require notice and opportunity to opt out. *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2577 (2011).

2. Fairness of the settlement. The approval order devotes just three pages to the fairness of the settlement and the fee award. ER 16-18. And even those three pages consist largely of a mechanical, boilerplate recitation of such factors as the "risk of continued litigation" and the "views of counsel." ER 16-17. Indeed, the order contains a single, conclusory paragraph addressing the fairness of each of the key features of the settlement—the lack of monetary relief, the class release, the lack of notice and improper certification, the incentive awards, cy pres, attorneys' fees, and so on. ER 17. After summarizing the objections, the magistrate judge offered this analysis:

> The parties persuasively demonstrated in their responses [Doc. Nos. 88, 92] to the Helmuth Objection that none of these objections are justified. Specifically, individualized notice and an opportunity to opt-out are not required under Rule 23(b)(2), and many FDCPA classes have been certified under Rule 23(b)(2) even though the FDCPA does not expressly provide for injunctive relief.

Based on that analysis, the magistrate judge concluded that the settlement was "fundamentally" fair, adequate and reasonable. ER 18.

STANDARDS OF REVIEW

The inherent conflict between the interests of the class and those of the lawyers requires that courts "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002). The court acts as "a fiduciary of the class," subject to "the high duty of care that the law requires of fiduciaries." *Id.*; *see also Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1348 (9th Cir. 1980) ("Particularly at the settlement stage, the Court must be keenly aware of its role as a fiduciary serving as a guardian of the rights of absent class members." (internal quotation marks omitted)).

This Court reviews a district court's decision to approve a class-action settlement as "fair, adequate, and reasonable" for abuse of discretion. *See Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (reversing approval of a settlement where "the class members received nothing; the named plaintiff and class counsel received compensation for his injury and their time; and the defendant escaped paying any punitive or almost any compensatory damages"). This Court also "review[s] a district court's class-certification decision for an abuse of discretion." *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 946 (9th Cir. 2011).

A district court necessarily abuses its discretion if its decision is "premised on a legal error." *Id.* (internal quotation marks omitted); *see also Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) ("[W]e accord the decisions

of district courts no deference when reviewing their determinations of questions of law."). A district court also abuses its discretion if it relies on an improper factor, omits a substantial factor, or commits a "clear error of judgment in weighing the correct mix of factors." *In re Wells Fargo Home Mortg.*, 571 F.3d 953, 957 (9th Cir. 2009).

This Court "review[s] de novo whether notice of a proposed settlement satisfies due process." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993). The same standard applies to the question whether notice satisfies Rule 23. *See DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 943 (10th Cir. 2005).

SUMMARY OF ARGUMENT

I.

A. A class-action settlement in which class members are left *worse off* than if the case had never been brought cannot be approved as "fair, adequate, and reasonable." Fed. R. Civ. P. 23(e). This is such a case. It is indistinguishable from *Crawford v. Equifax*, 201 F.3d 877, 882 (7th Cir. 2000): For the class members, "only damages matter, yet all the settlement does for (to?) them is cut them off at the knees. They gain nothing, yet lose the right to the benefits of aggregation in a class." *Id.* Such a settlement should not have been approved. *See Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003).

B. To justify this worthless settlement, the parties invoked the FDCPA's damages cap, arguing that it would be impossible to provide meaningful damages. But that assumes certification of the very nationwide class in question. It also ignores the possibility that a smaller class could recover meaningful damages. No authority requires certification of the broadest possible class. *See Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 341 (7th Cir. 1997). And there are good policy reasons for rejecting such an approach: Insisting on nationwide classes with no damages relief would significantly curtail the FDPCA's effectiveness. *Id.*

C. The parties also agreed to an injunction under which ARS will disclose its identity to future consumers, as the FDCPA requires. But it expires in two years, can be dissolved if "circumstances otherwise present a basis for doing so," and is subject to a blanket good-faith immunity defense. In any event, it has no value *for the class members*; it could only benefit consumers contacted by ARS in the future.

II.

A. The settlement includes a cy pres award for veterans' services at San Diego Nice Guys. Whatever the merits of taking the class members' property and giving it to someone else, at the very least it must go to a charity whose activities "address the objectives of the underlying statute," "target the plaintiff class," or "provide reasonable certainty that any member will be benefited." *Nachsin v. AOL*, 663 F.3d 1034, 1040 (9th Cir. 2011). The award here flunks that test.

B. The settlement also gives $1,000 to each class representative. The "significant disparity between the incentive awards and the payments to the rest of the class members" is a hallmark of inadequate representation. *Radcliffe v. Experian Info. Solutions Inc*., 715 F.3d 1157, 1165 (9th Cir. 2013).

C. Given the clear-sailing clause (under which ARS agreed not to contest the fee award) and the disparity between the benefits to the class lawyers and the benefits to the class, the attorneys' fee award further confirms the lack of adequate representation and required the magistrate judge, at the very least, to provide some explanation. *See In re Bluetooth Headset Products Liab. Litig*., 654 F.3d 935, 946 (9th Cir. 2011).

III.

Finally, the settlement is procedurally flawed. Under due process and Rule 23, class members are "entitled to personal notice and an opportunity to opt out of representative actions for money damages." *Crawford*, 201 F.3d at 882. That rule should have been honored because "all private actions under the Fair Debt Collection Practices Act are for damages." *Id*. The magistrate judge, however, allowed the parties to avoid notice by certifying a class under Rule 23(b)(2). Among other things, that approach runs afoul of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011), which held that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award

of monetary damages"—the very relief sought in any FDCPA action. *Id.* At a minimum, our legal system demands that people receive notice and opportunity to be heard before their rights are released in exchange for nothing.

ARGUMENT

The Ninth Circuit has historically asked district courts to consider an eight-factor test to evaluate the fairness of a settlement: "the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Molski*, 318 F.3d at 953.

But in cases like this, where a settlement is negotiated prior to class certification, this Court has made clear that "consideration of these eight … factors alone is not enough to survive appellate review." *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Given the "even greater potential for a breach of fiduciary duty owed the class during settlement," "such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *Id.* at 946-947; *see also Mars Steel Corp. v. Continental Ill. Nat'l*

Bank & Trust Co. of Chicago, 834 F.2d 677, 681 (7th Cir. 1987) (Posner, J.) ("a more careful scrutiny of the fairness of the settlement is required"); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (Friendly, J.) ("even more than the usual care").

But the magistrate judge's approval order just mechanically recited the eight factors, offering virtually no independent analysis of the settlement's fairness or the merits of Ms. Helmuth's arguments. ER 16-18. The only clues as to the magistrate judge's reasoning are the following two sentences: "The parties persuasively demonstrated in their responses … to the Helmuth Objections that none of these objections are justified. Specifically, individualized notice and an opportunity to opt out are not required under Rule 23(b)(2), and many FDCPA classes have been certified under Rule 23(b)(2), even though the FDCPA does not expressly provide for injunctive relief." ER 17-18. Without grappling with the serious issues raised in the objections, the magistrate judge pronounced the settlement "fundamentally" fair. ER 18. That was error.

I. Because the settlement leaves absent class members worse off than if this suit had never been brought, it should not have been approved.

Given the risk calculus inherent in litigation, there will be many cases in which the decision to approve a class-action settlement as "fair, reasonable, and adequate" under Rule 23(e) will appropriately be left to the district judge's sound discretion. Courts must frequently assess, for example, whether the relief under a

settlement is a good enough recovery in light of the risks and complexity of further litigation. Those can be tough calls.

But whatever else may true of Rule 23(e), surely it does not permit a settlement in which class members are left *worse off* than if the case had never been brought. Unfortunately, this is such a case, and its unfairness could hardly be more stark: Without so much as a postcard or email informing them of the fact, the damages claims of millions of consumers nationwide would be wiped out—in exchange for no benefit to them whatsoever.

A. As bad as this settlement is, it is not unprecedented. In fact, it is indistinguishable from one condemned by the Seventh Circuit in *Crawford v. Equifax*, 201 F.3d 877, 882 (7th Cir. 2000), and *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999)—also a settlement of claims brought under the Fair Debt Collection Practices Act, negotiated by the same defense lawyer as the settlement here. There, too, the "attorneys were paid handsomely to go away" and, while the named representatives received money, "the other class members received nothing … and lost the right to pursue class relief." *Crawford*, 201 F.3d at 882. For class members, who are unlikely to receive voice messages from the same debt collector again, "only damages matter, yet all the settlement does for (to?) them is cut them off at the knees. They gain nothing, yet lose the right to the benefits of aggregation in a class." *Id.* The two settlements can be compared as follows:

	Crawford	***Koby***
Monetary relief for class members	$0.00	$0.00
Notice to class members	No notice	No notice
Release of class claims	All class claims released	All class claims released
"Injunctive relief"	Defendant agrees to "never again" use the form collection letters at issue	Defendant maintains the status quo for two years; reserves right to dissolve injunction "at any time" for changed "circumstances"; "reserve[s] the right" to assert immunity for "bona fide errors"
Incentive award to class representative	$1,500	$1,000
Cy pres	Donation to law school legal clinic "for use in protecting consumers' rights"	Donation to local non-profit organization for veterans' services
Attorneys' fees	$78,000	$67,500

If anything, the settlement here is worse than in *Crawford*. It is cut from the same cloth, but the injunctive relief is even less meaningful (because it is temporary, with exceptions that swallow the whole); the cy pres award is even less germane to the subject matter of the case (because it goes to veterans' services instead of a consumer law clinic); and the number of claims released is far larger. The Seventh Circuit's bottom line was this: "the fact that one class member receives $2,000 and the other 200,000+ nothing is quite enough to demonstrate that the terms should

not have been approved under Rule 23(e)." *Id.* at 882. That is no less true here, where three class members receive $1,000 and the other 4,000,000 receive nothing.

This Court has not confronted an FDCPA settlement along these lines, but it did rely heavily on *Crawford* in *Molsi v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003), rejecting a settlement in which "the class members received nothing" and "class counsel received compensation." In that case, brought under the Americans with Disabilities Act, the named representatives received $5,000 each, class counsel was paid $50,000, and "the corporation was required to make tax-deductible donations to third parties" and "simply meet its legal obligations." *Id.* Likening the case to *Crawford*, the Court concluded that the settlement in *Molski* was unfair because "the class members received nothing; the named plaintiff and class counsel received compensation for his injury and their time; and the defendant escaped paying … damages." *Id.; see id.* at 955 ("Because the consent decree released almost all of the absent class members' claims with little or no compensation, the settlement agreement was unfair and did not adequately protect the interests of the absent class members."). So too here.

B. The parties' argument below was that this deal may not be great, but it's the best the four million class members can hope for. Because of the FDCPA's statutory damages cap, which limits total recovery to $500,000 or one percent of

the defendant's net worth, they reasoned, "it would be impossible to provide any kind of meaningful monetary relief to the class members." ER 5.

Not so. That analysis assumes certification of the very nationwide settlement class at issue, ignoring the possibility that a smaller class (like the one Ms. Helmuth sought to represent in Florida) *could* recover meaningful relief. "By agreeing to a class definition so broad," the class representatives here, as in *Crawford*, "consented to a class" that "ensured that none could recover much" in light of the FDCPA's damages cap—despite the possibility that "smaller classes" (like the classes represented by the objectors there) held out the possibility of real relief. *Crawford,* 201 F.3d at 882 *see also Zimmerman v. Zwicker & Associates, P.C.*, 2011 WL 65912, at *6 (D.N.J. 2011) ("If there is even a fair possibility that consumers in other states can obtain a monetary recovery from defendant arising from the [same collection practices], they should have the right to pursue their claims. The phantom benefit from the proposed settlement is not adequate consideration for the release of tens of thousands of potential FDCPA claims."). If the class members could have recovered meaningful monetary relief in smaller class actions (such as statewide class actions, or class actions based on a more limited set of facts, or limited to collection activity on behalf of a particular creditor), then it is by definition unfair to sell away their claims for nothing through a worthless nationwide settlement.

Nor did the FDCPA's damages cap compel the certification of a broad nationwide class at the expense of the class members' prospects of recovering damages, as the magistrate judge seemed to suggest. Indeed, Rule 23 compels just the opposite approach. *See Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 341 (7th Cir. 1997) ("[W]e know of no authority requiring the participation of the broadest possible class [under the FDCPA]. On the contrary, the class requirements found in the Federal Rules of Civil Procedure encourage rather specific and limited classes."); *cf. Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011) (condemning a sprawling nationwide class action). *Mace* rejected just such reasoning. There, a district court had reasoned, like the parties here, that the FDCPA's "damage cap was intended to place a limit on total liability," and because "allowing state-by-state suits to proceed would nullify the damage cap," "a nation-wide class was required." 109 F.3d at 342. But, as the Seventh Circuit explained, that view not only makes for bad policy, by thwarting the ability of consumers to recover class damages and inhibiting enforcement, but is also contrary to the text of the statute. *Id.* at 342-44. Unlike the Truth in Lending Act, which specifically limits the total recovery "in any class action *or series of class actions* arising out of the same failure to comply by the same creditor," 15 U.S.C. § 1640(a)(2)(B), the FDCPA contains no reference to a "series of class actions." Congress instead limited aggregate recovery "in the case of *a* class action," 15 U.S.C. § 1692k(a)(2)(B)—meaning *one* class action. Thus, "the

plain meaning of the FDCPA does not require that the largest potential class be certified." *D'Alauro v. GC Servs. Ltd. P'ship,* 168 F.R.D. 451, 455 (E.D.N.Y. 1996); *see also Sanders v. Jackson*, 209 F.3d 998, 1002 (7th Cir. 2000) ("[T]here is no provision that limits defendants being exposed to more than one FDCPA class action lawsuit.").

And there are good policy reasons for reading the statute this way. To use the statutory cap to justify nationwide classes with no damages relief would significantly curtail the effectiveness of the FDCPA. And it would encourage under-enforcement; "if a debt collector is sued in one state, but continues to violate the statute in another, it ought to be possible to challenge such continuing violations." *Mace*, 109 F.3d at 344. To be sure, there are policy considerations on both sides—ensuring relief for consumers, on the one hand, while limiting liability, on the other—but resolving such concerns is better left to Congress. "Given the uncertainty of those policy considerations, there is no compelling reason to ignore the plain words of the statute." *Id.*

In any event, nothing in the record justifies this paltry settlement. Below, ARS relied on representations about its net worth to support its claims about the total damages that could be recovered, but never introduced competent evidence into the record to back up those representations. ER 33. In the settlement agreement itself, the parties simply agreed that the amount of the cy pres award

was "a fair approximation of the maximum statutory damages recoverable." ER 97. Moreover, even if ARS's unsubstantiated estimate were taken at face value, the *Helmuth* action, for example, would be capable of generating meaningful damages relief: That case concerns 5,565 phone calls to an unknown number of consumers;[3] assuming ten calls per consumer would yield a class of approximately 500 consumers and damages of $100 each, which would undoubtedly end up being significantly higher in the real world, given a less-than-100% claims rate.

C. As already noted, the "injunctive relief" in the proposed settlement is at least as bad as the relief in *Crawford* and *Molski*, if not worse. In an effort to justify a settlement under which the class receives no relief whatsoever, the parties agreed to a stipulated injunction under which ARS agrees to continue to do what it is already doing: comply with the law by disclosing its identity to consumers for whom it leaves voicemails in the future. ER 96-96. And even that worthless injunction "expire[s] on its own terms no later than two years" from final approval. ER 96. ARS, moreover, retains the right to seek to "dissolve" the injunction "at any time if there is a change in the law or circumstances otherwise present a basis for doing so," an exception so vague that it is effectively boundless. ER 97. As if that isn't open-ended enough, ARS "reserve[s] the right to invoke the FDCPA's *bona fide* error defense" in response to any claim that it has actually violated the injunction. *Id.*; *see*

[3] *See Helmuth v. ARS Nat'l Servs.*, No. 11-cv-80144 (S.D. Fla.), Docs. 86 and 103.

15 U.S.C. § 1692k(c) (providing debt collectors with a complete defense to a liability for any violation due to a "bona fide error" made despite the maintenance of preventive procedures).

And even if this swiss-cheese injunction had any value as a general matter, it would not have any value *for the class members*. The class consists of "all natural persons in the United States who received a telephone voicemail message" from ARS within the relevant time period. ER 90. "Absent from this retrospective class definition is any forward-looking requirement—that, for example, the class members' debt remained outstanding, they were at risk of incurring future debt, [ARS] might again be engaged to collect from them, or even that they feared [ARS] would again attempt to collect from them—even though the injunctive order was solely addressed to [ARS]'s future conduct." *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 223 (2d Cir. 2012); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (injunctions are generally "unavailable where there is no showing of any real or immediate threat that the plaintiff will be wronged again").

Once again, the resemblance with *Crawford* is striking. There, the court expressed skepticism that the "prospective part of the deal" was "valuable to the class" because the defendant, Equifax, had already stopped using the challenged collection letters. 201 F.3d at 882. "Given the litigation risk, Equifax [was] not apt to employ them again no matter the settlement provide[d]." *Id.* And even if the

change were useful to some consumers in the future, "the change in form letters is useful to *class members* only if they again write bad checks that Equifax has verified." *Id.*; *see also Molski*, 318 F.3d at 953-54 (finding settlement inadequate in part because the defendants agree to "simply meet its legal obligations (or perhaps even less than that required)"). That is just as true here: The "injunction," assuming it would benefit anyone, could only benefit people who would be contacted by ARS in the future. As a legal matter, that future group includes no one in the *Koby* class (which claimed only past injury) and, as a factual matter, there is no reason to believe that there will be any significant overlap between the two groups.

II. The cy pres, incentive, and fee awards all underscore the settlement's unfairness and the inadequacy of representation.

Although the proposed settlement confers zero benefits upon the class, it does send money to three other destinations—a local charity, the named representatives, and the plaintiffs' lawyers' pockets. In light of the nonexistent relief for the class, these awards only highlight the lack of adequate representation and unfairness of the settlement itself.

A. Cy pres. The parties have agreed to give $35,000, through a cy pres award, to a local organization known as San Diego Nice Guys. The district court's only apparent justification for approving this award was "for the purpose of ensuring that defendant is not *perceived* as evading FDCPA's remedial purpose," ER 14 (emphasis added); *see also* ER 34 (AR's counsel justifying cy pres: "so … nobody

thinks that the defendant is getting away with anything"). In other words, the stated purpose of the cy pres award was to put lipstick on an otherwise porcine settlement.

Taken from the Norman French expression *cy pres comme possible* ("as near as possible"), cy pres is a charitable-trust-law doctrine under which a court directs that trust property be used for a purpose that carries out the settlor's intention after a distribution specified in the trust becomes impossible or unlawful. *See Restatement (Second) of Trusts* § 399 (1959). The doctrine's use in the class-action context has become increasingly controversial, and raises fundamental, unresolved questions. *See Marek v. Lane,* 134 S. Ct. 8 (2013) (Roberts, C.J., respecting the denial of certiorari); Redish, et al. *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis,* 62 Fla. L. Rev. 617, 653–656 (2010).

But whatever one thinks of the doctrine's propriety, it can be justified only when it serves as the next-best option for advancing the class members' interests. *See generally* Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972). The doctrine therefore cannot be used to justify a settlement that results in no damages where the alternative—smaller class actions—could have delivered real damages. "[A] class settlement generates property interests. Each class member has a constitutionally recognized property right in the claim or cause of action that the class action resolves. The settlement-fund proceeds, having been generated by the value of the class members' claims,

belong solely to the class members." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). And given its rationale, if the doctrine is invoked at all (in a case where distribution to the class is impossible), the money must at a minimum go to charities whose missions have a tight nexus with the class members' claims and the purposes of the class action. *See Principles of the Law of Aggregate Litigation* § 3.07(c), at 217 (Am. Law Inst. 2010).

The settlement agreement here required only that the parties "work in good faith to identify an appropriate recipient, consistent with controlling case law." ER 97. It is unclear from the record how or why the parties ultimately decided to designate San Diego Nice Guys for the *cy pres* award. In her approval order, the magistrate judge described the recipient as a "local veteran's organization designed to promote financial literacy." ER 3. An examination of the group's website indicates that it serves many needy people—not just veterans—and is indeed local, with its activities limited to "the San Diego community."[4]

San Diego Nice Guys is no doubt a worthwhile local charity. But what do its activities have to do with curbing illegal practices by debt collectors nationwide (let phone calls that fail to identify the debt collector's identity or purpose)? Why did the parties decide not to allocate the money to the National Consumer Law Center,

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[4] *See* San Diego Nice Guys website, http://www.sdniceguys.com/who-we-help ("Requests come from individuals who might be temporarily unable to work, are caretakers for a special needs family member, or have had some unexpected life changing experience that require one time assistance.").

the National Association for Consumer Advocates, or U.S. Public Interest Research Group—all organizations that perform significant advocacy and research on consumer protection in the debt-collection context, and do so nationwide?[5] Was it because ARS would prefer not to support organizations that actually work on these issues? Or is San Diego Nice Guys simply the pet charity of one of the lawyers? ER 73.

"[A]s a growing number of scholars and courts have observed, the cy pres doctrine—unbridled by a driving nexus between the plaintiff class and the cy pres beneficiaries—poses many nascent dangers to the fairness of the distribution process." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). This Court has recently criticized "cy pres distributions to myriad charities which, though no doubt pursuing virtuous goals, have little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved." *Id.* at 1039. The Court warned that "[w]hen selection of cy pres beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process

[5] *See, e.g.,* http://www.nclc.org/issues/debt-collection.html (documenting National Consumer Law Center's work on debt-collection practices, including research reports and advocacy); http://www.naca.net/issues/debt-collection-abuse (information on consumers' rights with respect to debt-collection at National Association of Consumer Advocates website); http://www.uspirg.org/reports/usf/debt-collectors-debt-complaints (U.S. PIRG report on debt-collection complaints).

may answer to the whims and self interests of the parties, their counsel, or the court." *Id.* That appears to be what has occurred here.

Whatever the parties' reasons, there is no basis in the record or common sense to conclude that the award to San Diego Nice Guys will, as this Court's cases require, (1) "address the objectives of the underlying statute" (compensating consumers for debt-collection abuse), (2) "target the plaintiff class" (those who received illegal voicemails from ARS in the past), or (3) "provide reasonable certainty that any member will be benefited" (since there is no reason to believe that the beneficiaries of San Diego Nice Guys have anything in common with the nationwide class). *Id.* at 1040 (rejecting, in a nationwide privacy class action, a cy pres distribution to local Los Angeles charities because it did not "account for the broad geographic distribution of the class," did not "have anything to do with the objectives of the underlying statutes," and would not clearly "benefit the plaintiff class"); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311–12 (9th Cir. 1990) (invalidating a cy pres distribution to the Inter–American Fun, for indirect distribution in Mexico, in a class action brought by undocumented Mexican workers regarding violations of the Farm Labor Contractor Registration Act, because the distribution was "inadequate to serve the goals of the statute and protect the interests of the silent class members"); *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (invalidating settlement agreement, in a

national antitrust class action, that made a cy pres distribution to local law schools, and directing the district court to "consider to some degree a broader nationwide use of its cy pres discretion").

It should go without saying that class-member property arising from nationwide violations of a statute meant to curb collection-agency abuse should not be appropriated to veterans' services in San Diego. In other words, a doctrine meant to serve as a surrogate for the class members' interests may not be used as a means to fund the settling parties' pet projects or the court's favorite charity. *Nachsin*, 663 F.3d at 1038. In sum, taking Ms. Helmuth's constitutionally protected property interest and converting it into benefits for a charity that has nothing to do with that interest underscores, not undermines, the conclusion that she was not adequately represented here.

B. Incentive awards. Similarly troubling, in the context of a class-action settlement that proposes to give millions of absent class members nothing in exchange for their unknowing release of class claims, is the settlement's provision giving $1,000 in incentive awards to the three class representatives who failed to deliver any benefits to their fellow class members.

Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit. *See* 2 *McLaughlin on Class Actions* § 6:28 (9th ed. 2012). In cases where the class receives a monetary settlement, the awards are often taken

from the class's recovery. *Id.* Although this Court has "approved incentive awards for class representatives in some cases," the Court has also "told district courts to scrutinize carefully the awards so that they do not undermine the adequacy of the class representatives." *Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013).

In this case, it is plain that the "significant disparity between the incentive awards and the payments to the rest of the class members"—a ratio of zero to one thousand—further bespeaks inadequate representation. *Id.* at 1165. The consequence is that the only people who were supposed to represent the interests of the class as a whole, untainted by the prospect of fees, are induced to go along with a deal that they would otherwise have no incentive to accept. Given the disparity in recovery, there is at the very least "a serious question whether class representatives could be expected to fairly evaluate" the fairness of the settlement for everyone else in the class. *Id.* The incentive awards thus "fatally alter the calculus for the class representatives, pushing them to be 'more concerned with maximizing [their own gain] than with judging the adequacy of the settlement as it applies to class members at large.'" *Id.* (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)). Indeed, if the representatives were not receiving $1,000, why would they possibly sign off on this settlement? The magistrate offered no answer below, and neither did the settling parties. The answer surely cannot be the "peace of mind,"

as defendant's counsel put it, of knowing that ARS has agreed to follow the law in its calls to future consumers. ER 7.

It is no answer to try characterize the awards as individual damages as opposed to incentive awards as the defendant (but not the magistrate judge) did below. *Compare* ER 122 *with* ER 19. Either way, the disparity in relief between the class representatives and the absent class members undermines the representatives' ability to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is rooted in due-process concerns—"absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). And adequate representation depends upon "an absence of antagonism [and] a sharing of interests between representatives and absentees." *Molski*, 318 F.3d at 955. Where, as here, "the class representatives face significantly different financial incentives than the rest of the class because of the conditional incentive awards that are built into the structure of the settlement," *Radcliffe*, 715 F.3d at 1165, the settlement is a compromise "with no structural assurance of fair and adequate representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997).

C. Attorneys' fees. Finally, the settlement gives the plaintiffs' lawyers $67,500 in fees and costs—that is, $67,500 more than any of the absent class members. The magistrate judge's approval order concluded, without explanation,

that these lawyers, "having conferred on benefit on absent Class Members and having expended efforts to secure injunctive relief for the Class," were entitled to the fees. ER 19. The order does not say what "benefit" the judge had in mind. And "efforts" alone, without results, should never be a basis for fees.

Notably, the settlement agreement not only specified the amount of fees, as a separate payment distinct from any recovery to the class, but included a clause making clear that the defendant "agrees not to oppose CLASS COUNSEL's fee petition in that amount." ER 99. This sort of clause, known as a clear-sailing clause, has been cited by this Court and others as a strong sign of collusion and a reason for heightened scrutiny of a settlement. *See In re Bluetooth*, 654 F.3d at 947. "[W]hen confronted with a clear sailing provision, the district court has a heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class." *Id.* at 948; *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991) ("[T]he very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class."). That principle is especially relevant where, as here, the amount of fees appears to have been plucked from the air and simply rubber-stamped by the magistrate judge. *See* ER 18 n.3 (magistrate judge noting that the "Class Counsel never formally submitted a billing statement" indicating hours expended).

Here, the relationship between the fees and the "benefit to the class" is clear: The fees greatly exceed any benefit, many times over, and should have signaled to anyone truly acting as a fiduciary for the class that something was amiss. The district court's failure to provide a "clear explanation of why the disproportionate fee is justified and does not betray the class's interests" was, in itself, reversible error under Circuit precedent. *See In re Bluetooth*, 654 F.3d at 949.

III. The parties' failure to provide class members with notice and an opportunity to opt out before releasing their claims for money damages independently violated both Rule 23 and the Due Process Clause.

Apart from the settlement's irredeemable substantive failings, it also suffers from a fatal procedural flaw: The lack of any notice whatsoever to the class.

Under both Rule 23 and the Due Process Clause, class members are "entitled to personal notice and an opportunity to opt out of representative actions for money damages." *Crawford*, 201 F.3d at 882; *see Phillips Petroleum*, 472 U.S. at 812. The magistrate reasoned that it was okay to wipe out the damages claims of millions of consumers without notice because "individualized notice and opportunity to opt-out are not required under Rule 23(b)(2)," the provision under which the settlement class was certified. ER 17-18. But "certification of a class under (b)(2) does not excuse the due process requirement that unnamed class members in a class action predominantly for money damages receive the best practicable notice." *Hecht*, 691 F.3d at 225.

The right to notice, whether constitutional or rule-based, should have been honored here because "all private actions under the Fair Debt Collection Practices Act are for damages"—even where, as here, most of the money goes to the lawyers. *Crawford*, 201 F.3d at 882. For this reason, the magistrate judge's "(b)(2) certification of the class with respect to the FDCPA was an abuse of discretion. Although much of the monetary relief available under the FDCPA can be easily computed, most of the class does not stand to benefit from any injunctive relief … Thus, whether the monetary relief is incidental to the injunctive relief sought is not an issue, since monetary relief is effectively the sole remedy sought." *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000). Furthermore, every circuit to consider the question has held that the FDCPA does not even provide for injunctive relief, which "automatically make[s] (b)(2) certification an abuse of discretion." *Id.* at 978 n.39.[6]

The magistrate judge's (b)(2) certification, in any event, cannot be reconciled with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011), which held that "at a minimum, claims for individualized relief … do not satisfy the Rule." That is,

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[6] *See, e.g., Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004) ("[I]njunctive and declaratory relief are not available to litigants acting in an individual capacity under the FDCPA."); *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 268 (5th Cir. 2000) ("[C]ourts applying the FDCPA have held that it does not allow private actions for injunctive relief."); *Sibley v. Fulton DeKalb Collection Serv.*, 677 F.2d 830, 834 (11th Cir. 1982) (holding that equitable relief is not available to an individual under this section of the FDCPA);

Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages"—precisely the relief sought in any FDCPA action. *Id.* By contrast, the Court thought it "clear that individualized monetary claims belong in Rule *23(b)(3)*." *Id.* at 2558 (emphasis added). The Court also reiterated its longstanding holding that "[i]n the context of a class action predominantly for money damages," the "absence of notice and opt-out violates due process," and observed that cabining individual damages claims to Rule 23(b)(3), even when they do *not* predominate, avoids "serious" constitutional questions that would otherwise arise. *Id.* Hence, even on the settling parties' wrongheaded theory that individual FDCPA damages do not predominate in this case, the magistrate judge's (b)(2) certification would still have been wrong as a matter of law.

The failure to deal with *Dukes* points up the lack of rigor with which the parties and the court approached class certification. Given the "contrast between the damages available to unnamed class members and those available to individual plaintiffs," it was "all the more important" to ensure that the class members received all the notice to which they were constitutionally entitled. *Hecht*, 691 F.3d at 225-26. Instead, they received none.

The parties' proposed settlement in this case was bad enough. But attempting to sneak it through under cover of darkness was even worse. At the very

least, our legal system demands that people have notice and an opportunity to be heard before their rights are released en masse, in exchange for nothing.

CONCLUSION

The magistrate judge's approval of the settlement should be reversed.

Respectfully submitted,

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ADDENDUM:
Relevant Provisions of Rule 23

Federal Rule of Civil Procedure 23 provides, in relevant part:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

* * * *

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * *

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * *

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;
(ii) the definition of the class certified;
(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;
(v) that the court will exclude from the class any member who requests exclusion;
(vi) the time and manner for requesting exclusion; and
(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

* * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 10,257 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

Deepak Gupta

May 30, 2014

STATEMENT OF RELATED CASES

As required by Circuit Rule 28-2.6, Plaintiffs-Appellants state that they are not aware of any related cases pending before this Court.

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2014, I filed the forgoing Brief of Appellant with the Clerk of the U.S. Court of Appeals for the Ninth Circuit via the CM/ECF system.

Dated: June 2, 2014

/s/ Deepak Gupta

Deepak Gupta