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

REPLY BRIEF FOR OBJECTOR-APPELLANT HELMUTH

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REPLY BRIEF OF OBJECTOR-APPELLANT HELMUTH

Throughout their briefs, the parties dance around the stubborn, undeniable facts: The class-action settlement in this case, if approved, would take away something of value from four million consumers nationwide—their ability to band together and seek damages from the defendant under the Fair Debt Collection Practices Act—and give them nothing in return. And it would do so without even a semblance of the notice required by Rule 23 or the Due Process Clause. Such a settlement cannot stand.

The parties never offer meaningful answers to the central points raised in our brief. Instead, they fall back on irrelevant boilerplate recitals of law and parrot the magistrate judge's unanalyzed assertions. Indeed, ARS's brief goes so far as to assert that the settlement, "taken as a whole," is "*unquestionably* fair, reasonable and adequate to all concerned." ARS Br. 16 (emphasis added). We question that.

1. Notice is required. For starters, consider the obligation to provide notice. From a procedural perspective, this settlement is a strange animal. Often, the question on appeal is whether notice of a class-action settlement is sufficient. (How to ensure that far-flung class members will be reached? Email or snail mail? Are postcards okay? Should a second letter be mailed to those who don't respond? Do people really read those ads in the back of newspapers?) This settlement is a different: The parties affirmatively dispensed with *any notice* at all, and they didn't

even try to hide it. Defense counsel, summarizing the settlement to the magistrate judge below, claimed that "no notice of any kind to the class members will be required." ER 121.

But the federal rules—not to mention due-process principles—require just the opposite: "The court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1); *see Rodriguez v. West Publishing*, 563 F.3d 948, 962 (9th Cir. 2009); *Doe v. Lexington-Fayette Urban Cnty. Gov't*, 407 F.3d 755, 764 (6th Cir. 2005). At a minimum, this means that the class must be given "sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class." *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013). No circuit has permitted a class-action settlement with "no notice of any kind to the class members." ER 121. This Court shouldn't become the first.

2. The defendant's gain necessarily comes at the expense of the class. The plaintiffs' brief (at 5) at least acknowledges the requirement that "[w]hen the settlement would bind class members, there must be notice to the class," but says the requirement is inapplicable here because "nothing in the settlement binds any class member with respect to any legal right or protectable interest." Nonsense. If the approval of the settlement is affirmed today and an

absent class member tries to bring the same class action tomorrow, would the defendant take the position that the settlement has no preclusive effect, that it did not deprive the consumer of any "legal right or protectable interest"? To ask that question is to answer it.

The parties' unprecedented suggestion that a class settlement can be approved without notice or fundamental guarantees of fairness if it deprives the absent class of only "procedural" rather than "substantive" rights is meritless, and lacks any supporting authority. A nationwide class-action ban, like this one, cannot be cast aside "as being merely [about] what 'procedural mode' [is] available." *Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, 140 S. Ct. 1758, 1776 (2010); *see also id.* at 1783 (Ginsburg, J. dissenting) ("[W]hen adjudication is costly and individual claims are no more than modest in size, class proceedings may be 'the thing'—i.e. without them, potential claimants will have little, if any incentive to seek vindication of their rights."). The lack of availability of class procedures, more so than the availability of "most procedural rules," obviously "affects a litigant's substantive rights," *Shady Grove Orthopedic Assocs., P.A. v. Allstate, Ins. Co.*, 130 S. Ct. 1431, 1442 (2010)—in this case, by making any recovery unrealistic. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

Despite its lack of support, this theme—that "[b]y shielding Defendant from such actions, nothing has been taken from any class member" (Pls' Br. 6)—pervades both parties' briefs. They overlook the fact that litigation is a zero sum game: The class members, as the Seventh Circuit put it in *Crawford v. Equifax*, "gain nothing, yet lose the right to the benefits of aggregation in a class," 201 F.3d 877, 882 (7th Cir. 2000).

3. *Crawford* is on all fours with this case. The parties' attempts to distinguish *Crawford* on its facts are baseless. They argue that *Crawford* is different because there had already been certified competing classes in that litigation, as if that makes a difference; but nothing in the Seventh Circuit's analysis turned on that fact and the parties never explain why anything should. Pls' Br. 6-7; ARS Br. 22-23. And although the Seventh Circuit did not specifically address Rule 23(e)'s notice requirements, it did hold that absent class members, under both the Due Process Clause and Rule 23(b)(2), are "entitled to personal notice and an opportunity to opt out of representative actions for money damages." *Crawford*, 201 F.3d at 882. The parties never really deny that general rule, and never confront the fact that "all private actions under the Fair Debt Collection Practices Act are for damages." *Id.* Nor, aside from a fleeting mention in ARS's brief (at 23), do the parties confront the holding in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557

(2011), that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.*

4. The injunction is worthless. The best ARS can manage is the suggestion (without authority) that the injunction in this case "clearly" has value to the class members, even though they may never face collection again, because it gives them peace of mind. ARS Br. 23. As we discussed in our opening brief, the worthlessness of the injunction here is yet another way in which this case mirrors *Crawford*. In fact, the injunction here is worse: It requires only what the law requires anyway, expires in two years, can be dissolved if "circumstances otherwise present a basis for doing so," is subject to a blanket good-faith immunity defense, and it is unlikely to make any difference in the lives of the vast majority (perhaps 100%) of the class. Given all of that, it is no wonder that ARS finds itself claiming that the principal value of the settlement to class members is the peace of mind they get from knowing that it exists.

5. The parties' reliance on the certification of a nationwide class is circular. Just as they did in the district court, the parties again invoke the FDCPA's damages cap, arguing that it was okay to settle away the classwide damages claims for nothing because "it would be impossible to provide any kind of meaningful monetary relief to the class members given the size of the class." ARS Br. 19. But that argument, as we explained in our opening brief, assumes

certification of the very nationwide class in question. Neither party offers any response to that basic point of logic. They also brush aside the possibility that a smaller class could recover meaningful damages, the fact that 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 the likelihood that insistence on nationwide no-damages settlement classes would gut the FDCPA's private-enforcement scheme. *Id.*

6. The incentive, cy pres, and fee awards cannot salvage this settlement. Finally, the parties have little to say in defense of the three allocations of money in the settlement—to attorneys' fees, to the named representatives, and to veterans' services at San Diego Nice Guys.

As to the first, it is notable that the plaintiffs' counsel do not even *attempt* to defend their own fee award. And ARS (at 26-27) just parrots the magistrate judge's boilerplate, even though the magistrate judge admitted she had no evidentiary basis (not even rudimentary time records) on which to which to base her award, and even though the lawyers achieved nothing for their clients.

As to the second, ARS tries to deny that the incentive awards are in fact incentive awards—even though that's precisely what the magistrate judge said they were when she approved them. *See* ER 19. In any event, it's not the nomenclature that matters but the fact that the money induced the only people who were supposed to represent the interests of the class as a whole to accept a deal they

otherwise had no incentive to accept. That money "fatally alter[ed] the calculus for the class members, 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." *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2003) (internal quotation marks and alterations omitted). Quibbling about the labels can't change the economics.

Third, despite their acknowledgment elsewhere that the issue on appeal is the fairness of the settlement "as a whole" (ARS Br. 16), the parties contend that this Court may not consider the propriety of the cy pres award because, in their view, it was not adequately raised below. But the cy pres award is integral to the settlement that Ms. Helmuth has challenged as unfair across the board, and neither party denies that she has preserved that challenge. The parties' resort to a meritless waiver argument is understandable on one level, however: They have no other response. They do not even attempt to show that San Diego Nice Guys, whatever the value of its undoubtedly worthwhile charitable work, is an organization 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).

* * *

Ultimately, this is not a settlement that fails because of one or two minor defects or wrinkles; it is a settlement that is rotten to its core—a veritable poster child for class-action abuse. If the federal courts' obligation to police settlements for fairness means anything at all, it means that worthless settlements like this one cannot and should not be approved. Anything less risks undermining public confidence in the class-action device as the indispensible tool for justice that is has always been—from the days of *Brown v. Board*, 347 U.S. 483 (1954), to today.

CONCLUSION

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

Respectfully submitted,

/s/ Deepak Gupta

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August 21, 2014

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

I hereby certify that my word processing program, Microsoft Word, counted 1,847 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

Deepak Gupta

August 21, 2014

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2014, I filed the forgoing reply brief with the Clerk of the U.S. Court of Appeals for the Ninth Circuit via the CM/ECF system.

Dated: August 21, 2014

/s/ Deepak Gupta

Deepak Gupta