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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

IN RE IPOD CASES	)	Judicial Council Coordination Proceeding No. 4355
	)	CLASS ACTION
	)	
	)	
	)	PRELIMINARY OBJECTIONS OF TERRELL
	)	FRAZIER TO THE PROPOSED SETTLEMENT,
	)	ATTORNEYS' FEES, AND INCENTIVE PAYMENTS,
	)	AND REQUEST TO POSTPONE FINAL
_____	)	SETTLEMENT HEARING AND OTHER RELIEF

Class Member Terrell Frazier hereby submits these preliminary objections through his undersigned counsel to the proposed settlement, attorneys' fees and costs, and incentive payments in this class action case.[1] Objector Frazier further reserves the right, or in the

[1] Objector Frazier bought or obtained a First Generation iPOD in December 2003, and is therefore a class member. The iPOD serial number is JQ410FQYPNRT. Mr. Frazier's address is 680 Bay St., Pontiac, MI 48342. For privacy reasons, his telephone number will be provided only on his Claim Form.

alternative, requests that he be able to file additional and supplemental objections following the submission of the yet-to-be-filed motions by the parties to approve the settlement, attorneys' fees and costs, and incentive payments. Objector Frazier also requests that the Fairness Hearing currently scheduled for August 25, 2005, be postponed for at least 30 days after the parties have filed their respective motions for approval of the settlement and attorneys' fees. He further reserves his right to attend any such hearing through his counsel.

INTRODUCTION

This is a consumer class action case brought on behalf of all persons who purchased or obtained an Apple iPod Digital Music Player ("iPod") before May 31, 2004, claiming that the battery's capacity to take and hold a charge substantially diminished over time. The proposed settlement benefits differ depending upon whether the Class Member owns a First, Second, or Third Generation iPod. In brief, purchasers of a Third Generation iPod will receive an extended limited one-year warranty, and if the owner experiences a battery failure during that extended period, the owner has the option of either 1) returning the iPod to Apple, which in turn will have the sole discretion of sending the owner a battery replacement or a replacement iPod, or 2) receiving Store Credit of $50.00 (except for iTune products and services). Those who own a First or Second Generation iPod and experienced battery failure within two years of purchase will receive at their option, either 1) Store Credit for $50, or 2) a check for $25.00. Claims must be made by September 30, 2005.

Although it is unknown at this time how many members of the class there are, how many claims will be made, or the value of the total benefits conferred upon the class, plaintiffs' counsel is seeking attorneys fees and cost of up to $2.768 million which the defendant has

agreed not to oppose. In addition, counsel will ask the Court to award a $1,500 incentive payment for each of the nine Representative Plaintiffs which amount is in addition to the benefits they will share with the class. Pursuant to the Notice and Court Order of May 12, 2005, Objectors are required to file and serve their objections to the settlement and fees by July 29, 2005; yet counsel and parties are not required to file their motions and applications justifying the settlement, fees, costs, and incentive payments as fair and reasonable until August 12, 2005, which is well after the due date for filing objections, and only eight business days before the Final Hearing currently scheduled for August 25, 2005.

OBJECTIONS AND REQUEST FOR RELIEF

I. The Court Should Adjourn the Final Settlement Hearing Date of August 25, 2005 For at Least 30 Days After Class Counsel Have Filed Their Motions for Final Approval of the Settlement, Attorneys' Fees and Costs, and Incentive Payments.

The Court should adjourn the currently scheduled final hearing date of August 25, 2005, and reschedule it at least 30 days after class counsel file their motions for final approval, attorneys' fees and costs, and incentive payments which are due on August 12, 2005.[2] Because Objectors were required to submit their objections to the settlement and fees by July 29, 2005, they did not have a meaningful opportunity to comment on the settlement and the fees. By filing their motions and applications on August 12, 2005, the parties leave Objectors and this Court with only eight business days within which to review the submissions before the

[2] "The Court reserves the right to adjourn the date of the Fairness Hearing without further notice to the members of the Class, and retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement." Order Granting Preliminary Approval of Class Action Settlement, Paragraph L.

day of the hearing. The parties could easily have filed their motions and applications well before July 29, 2005, the date that objections were due. Instead, they submitted a proposed order to this Court that required objectors to file their objections well before the time the parties are to file their submissions. Why the rush to judgment? One reason readily comes to mind, namely, to disadvantage members of the class from fully evaluating the settlement. The fact that this time schedule may be similar to that used in other class action cases should not accepted by this Court as fair or proper.

Class Members should not be required to file their objections in the abstract; this would be unnecessary, contrary to the interests of justice, and would curtail Class Members' rights. If this were a federal class action, Objectors would have an opportunity to submit comments *after* a fee application is filed.[3] Fed. R. Civ. Proc. 23(h)(1), (2) provide as follows:

> (1) **Motion for Award of Attorney Fees**. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> (2) **Objections to Motion**. A class member, or a party from whom payment is sought, may object to the motion.

This Court should follow the lead of the federal rules and allow Objectors to file written objections if they deem necessary after reviewing the fee application. Accordingly, the hearing should be adjourned to September 12, 2005 or later to provide all Objectors with a reasonable opportunity to evaluate the motions and to prepare and file meaningful objections and

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[3] It should be noted that the related case, *Mosley v. Apple Computer, Inc.*, No. 04-CV-5773 (SCR) (S.D.N.Y.) is pending in federal court in New York and will be dismissed as part of this settlement if it is approved.

comments. More importantly, it would allow this Court sufficient time to evaluate the merits of the motions and the objections. If the Court does not choose to adjourn the August 25 hearing, it should at least defer ruling on the settlement and fees until Objectors have had an opportunity to file further objections for the Court to consider. At a minimum, as will be discussed *infra*, the Court should defer making any award of attorneys' fees until after all claims have been made, and the value of the benefits awarded can be assessed.

In addition, this Court should order the parties to post all the motions for final approval of the Settlement and all applications for attorneys' fees, costs, and incentive payments on the dedicated website for this class action, *www.appleipodsettlement.com*. This has been done in other cases and is particularly warranted in this nationwide class action because the documents in this case are not accessible electronically from this Court as they are in many other cases. Posting the documents on the dedicated website would involve minimal effort and cost, and greatly serve class members' and the public interest.

II. Preliminary Objections to the Proposed Settlement

At this stage of the proceedings, neither the Court nor the Objectors can meaningfully evaluate the fairness, adequacy, and reasonableness of the settlement without first knowing the size of the class, the relative merits of the claim, the risk of litigation, and the estimated amount of benefits in cash and store credits that may be payable under the settlement. Certainly, this information is in the hands of the parties and was used to determine the settlement terms. This information should be provided to the Court and the Class so that Objectors can submit supplemental objections and comments.

III. Attorneys' Fees Objections.

Class Counsel intend to apply for attorneys' fees up to $2.768 million, regardless of the number of claims made and benefits awarded, and all without any objection by Apple Computer, Inc. This so-called "clear sailing" agreement should be reviewed by this Court with great care to ensure that Class Counsel has acted in the best interests of the Class Members to maximize their recovery rather than Class Counsel's fee. As previously noted, no motion for attorneys' fees has yet been filed and Objector Frazier reserves his right to oppose that motion when it is filed. However, some preliminary observations and objections can be made.

1. As this Court's rules clearly provide, "Regardless of the sum agreed upon by the parties, the court will award *only* that amount of fees which it determines to be reasonable." Rule 7.9, Division VII, Pretrial Proceedings in Class Actions (emphasis added). Clearly, the Court is not bound by any agreement between the parties that Apple will not object to an award of fees and expenses that do not exceed $2.768 million. Rather, this Court has an independent and fiduciary duty to absent Class Members to award only those fees which it determines to be reasonable.

An agreement by the parties to pay attorneys' fees directly from the defendant raises questions of fairness and has been criticized by the courts.

> We join the *Norman* court [*Norman v. McKee*, 290 F. Supp. 29 (D.C. Cal. 1968)] in admonishing counsel that *it is inappropriate for a proposed settlement to provide for direct payment of attorneys' fees to counsel for the class representatives*. (citations omitted). Rather, the issue of attorneys' fees is more properly reserved for judicial consideration after the settlement of the gross amount to be paid to the class. The present arrangement leaves the unfortunate impression that defendants are buying themselves out of a lawsuit by direct compensation to plaintiff's counsel.

Jamison v. Butcher & Sherrerd, 68 F.R.D. 479, 484 (E.D. Pa. 1975) (emphasis added). *See*

also In re Chambers Develop. Sec. Litig., 912 F. Supp. 852, 865 (W.D. Pa. 1995) (so-called "red carpet treatment" of fees where fees are paid by an adversary from its own funds who does not object, raises conflicts and demands special scrutiny for "indicia of collusion"). As one noted commentator put it:

> If the defendant agrees not to object to the plaintiff's fee request, there is little prospect that the court will engage in an elaborate inquiry into the reasonableness of the hours expended by the plaintiff's attorney. Not only does the court have little incentive to undertake such an inquiry, but when the defendants agree not to oppose the plaintiff's fee request they deprive the court of the only adversary who truly knows if the time was reasonably expended. Put simply, it is the adversary and not the court who best understands the justifications (or lack thereof) for the work the plaintiff's attorney has done. Denied this information by the de facto settlement agreement, the court is itself a relatively poor and undermotivated monitor of the plaintiff attorney's performance.

John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW AND CONTEMP. PROBS. 5, 35 (Summer 1985).

2. The Court should not award attorneys' fees until it has determined how many Class Members will participate in the settlement and the value of the benefits provided to the Class. Many courts have used this precondition for awarding reasonable attorneys' fees in class actions:

> The relevant inquiry . . . focuses a court's attention on the benefits *actually received* and caused by plaintiffs, [and] will determine not only the often evident threshold question of eligibility for fees, but it will also be critical in determining the amount of a reasonable fee award, in that the final award must depend on a full assessment of the extent of the benefits received by plaintiffs.

In re Prudential Ins. Co. America Sales Practice Litig., 148 F.3d 283 n.116 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (emphasis added). *See also Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1049 (Del. Supr. 1996) ("By conditioning the award of attorney's fees upon the claims *actually submitted*, the Court of Chancery exercised its

discretion equitably, to correlate the attorneys' compensation with the structure of the settlement benefits the attorney had negotiated for the class.") (emphasis added); *Wise v. Popoff*, 835 F. Supp. 977, 981 (E.D. Mich. 1993) ("[O]ne should nevertheless ask whether a rule of law that would hold that there is an entitlement, on the part of class counsel, to a legal fee fixed in relation to a maximum available fund rather than *benefits actually realized* by class members, would be a desirable general rule . . . . In my opinion, the answer is certainly no.") (emphasis added); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) ("Class counsel may withdraw half of the money immediately and the other half after the court has determined that the claims process is complete.").

As one commentator explained, "The application, briefing and hearing on the fee request should not take place until *after* all claims are filed, and the judge should be required to take into account the *actual benefit conferred* on the class (as demonstrated by the claims made) . . . ." Janet Cooper Alexander, *Contingent Fees in Class Actions*, 47 DEPAUL L. REV. 347, 360 (1998) (emphasis added). This Court has both the authority and the duty to pass upon the fairness of the attorneys' fee agreement independently of whether there was objection.

> When a court evaluates the settlement of a class action . . . , it should be reluctant to rely heavily on the lack of opposition by alleged class members. Such parties typically do not have the time, money or knowledge to safeguard their interests by presenting evidence or advancing arguments objecting to the settlement.

In re Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1137 (7th Cir. 1979). This is particularly true in cases such as this one where the fees are being paid separately by the defendants rather than coming from a common fund, and thus, any reduction of the fee requested would not inure to the benefit of the class unless so ordered by the court. In any

event, the Court should be concerned about the quality of the objections to the fees rather than the quantity.

3. In order to determine whether the fee request is reasonable, the Court must have a fairly good idea of what the case is worth if it were successfully litigated. At this point, nothing in the documents available to Class Members provides any guidance as to the class size, the worth of this case, or the worth of benefits provided for in the settlement. As previously stated, no fees should be awarded until the Court can determine the value of the settlement after the claims process has been completed. For example, if the value of the benefits for claims actually made amounted to benefits worth only one million dollars, the request for fees for over twice that amount would be unreasonable. In other words, if the fee of approximately $2.5 million is added to the value of claims made of $1 million, then the defendant has effectively paid the class $3.5 million to settle this lawsuit. In such a scenario, the fee request of $2.5 million would constitute an excessive 71 percent of the total recovery. Further, the number of claims made would be directly proportional to the effectiveness of the notice program that plaintiffs' counsel has agreed to. If, in fact, the claim rate is low, that fact demonstrates the weakness of the notice program ,and should therefore be considered in determining the amount of the fee.[4]

4. Class Counsel should not be paid until Class Members are compensated, as they are in the typical class action involving cash awards; otherwise, counsel has no incentive to ensure

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[4] For example, the notice of this class action was not required to be made at Apple Computer retail stores where customers, who may already own iPods covered by this case, are browsing or shopping for a new iPod. Those class members could have easily been informed of this class action by a notice or sign and could have taken advantage of the claim process.

that the compensation program is properly administered, whether it be in form of cash or store credit. Once Counsel have their cash, there is no incentive to care about whether their clients (Class Members) were properly compensated. *Strong v. BellSouth Telcoms, Inc.*, 173 F.R.D. 167, 172 (W.D. La. 1997).

5. As for the amount of fee that should be awarded (once the value of the actual benefits conferred has been determined), the courts have used either the lodestar, a percentage of the recovery, or a combination of the two to determine what fee is reasonable under the circumstances. *See Wersha v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001). Under the lodestar approach, the fees are based on the reasonable hours expended litigating the case times a reasonable hourly fee, which then may be adjusted upward or downward depending upon the facts and circumstances of each case.

At this point, Class Members do not know what the lodestar figure in this case is because the application for fees has yet to be filed. Earlier this week, the undersigned counsel for Objector Frazier contacted Girard Gibbs & DeBartolomeo, the lead counsel firm, to determine their basis for computing the fee and cost award of $2.768 million. Although counsel received an email on Tuesday, July 26, stating that he would receive a call by Wednesday, July 27, it was not until Thursday, July 28 (the day before any objections were due to be filed in court) that a lawyer from Girard Gibbs called to state that the fee represents twice the lodestar figure, although he was not sure what the costs were. There is no reason that this important information had to be hidden from the class; it could easily have been provided weeks ago in the Notice. Nevertheless, until the actual application for the fee is filed, Objectors will not know whether the lodestar figure used is a reasonable one both respect

to the time spent on the case and the reasonable hourly rate. It should be noted that in *Wersha v. Apple Computer*, *supra*, the trial court employed the lodestar method and awarded a multiplier of 1.42. It may very well be that in this case, a multiplier of 1.42 is excessive and only the unadjusted lodestar amount is appropriate (again, assuming the lodestar is not already inflated due to excessive and unproductive hours spent on the case).

IV. Class Counsel Must Submit Their Time Records for Review.

Class Member Frazier objects to any award of attorneys' fees until Class Counsel file with this Court "contemporaneous time records reflecting the amount of time and the nature of each activity undertaken by each individual petitioning attorney and paralegal." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 779 F. Supp. 1063 at 1080 (D. Ariz. 1990). "Counsel who seek fees have the duty to justify the fees with reasonable, organized, and understandable data so that the trial judge may fairly and expeditiously resolve the fee issue . . . . Miscellaneous fee data cannot just be dumped on the bench for the judge to sort through and resolve." *Pfeifer v. Sentry Ins.*, 745 F. Supp. 1434, 1448 (E.D. Wis. 1990) (citations omitted).

The Court should not rubber-stamp Class Counsel's fee request without reliable evidence, including (1) the name, background, education, experience, and hourly rate of all persons seeking fees for work done on this litigation; (2) the amount of time spent on each task performed on behalf of the class; and (3) a description of the task performed sufficient to evaluate its reasonableness. Without this information, no rational assessment can be made as to whether or not the fee being requested is reasonable. These records are often ordered by California courts before any fee can be awarded. Presumably, these records will be submitted

on August 12, 2005, and Objectors and the Court will have an opportunity, albeit an insufficient one, to examine those records before the current hearing date.

V. The Proposed Incentive Payments to the Representative Plaintiffs Should Be Denied or Limited.

Paragraph 10.4 of the Settlement Agreement provides that the Representative Plaintiffs and the Mosley Plaintiff will file an Incentive Award Application seeking an award of no more than $1,500 and that Apple agrees not to oppose such request. In this case, there are eight Representative Plaintiffs. Those eight plaintiffs plus Shannon Mosley are asking this Court to approve payments totalling $13,500. Inasmuch as no such application has been made, neither the Court nor any of the Objectors can meaningfully assess the merits of any such application. Accordingly, Objector Frazier hereby opposes the payment of any such incentive fee and reserves his right to supplement his opposition after application for the payments are made.

In class actions, incentive payments for Class Representatives are sometimes requested and approved by the court. Depending upon the factual circumstances of each case, courts are to determine whether payments are warranted, and if so, the amount that is appropriate. In many cases, class representatives do little if anything to help the entire class other than lend their name as a class representative to the plaintiff's attorney. In addition, courts have been careful to examine the request and the efforts expended by the class representatives. For example, in *In re Carbon Dioxide Antitrust Litig.*, 1996 U.S. Dist. LEXIS 13418 (M.D. Fla.), the Court rejected a request for incentive payments for the class representatives, stating:

> Petitioners seek $20,000 each for six of the class representatives who participated in discovery and $5,000 each for the remaining 12 representatives who are named plaintiffs. Neither the briefs of class counsel nor the record convince the court that such an award is appropriate. *Participating in some discovery or lending a name to the*

> *class action is not a sufficient basis for awarding incentive payments and also raises serious questions about the fiduciary nature of the named plaintiffs as class representatives*. See *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). This court finds that the named representatives are not entitled to preferential treatment and that the common fund should be distributed on an equal basis among the class members. Accordingly, the court deems incentive awards inappropriate in this case and denies that portion of petitioner's fee petition.

Id. at *21 (emphasis added). There is nothing in the Proposed Settlement Agreement, for example, that indicates that any of the eight class representatives in this case or Shannon Mosley in the New York case participated in any discovery, let alone the minimal amount that is already expected of class representatives in any class action case. Accordingly, the Court should deny the yet-to-be filed Incentive Award Payment Application. At a minimum, the Court should carefully review each of the nine Representative Plaintiffs application and determine whether any payment is warranted on a plaintiff-by-plaintiff basis rather than simply award incentive fees collectively. After all, the purpose of awarding an "incentive" fee is to incentivize potential class members to file a class action. However, it is not in the public interest to incentivize copy-cat lawsuits with many lead plaintiffs and duplicate pleadings; that would defeat the whole rationale of a class action which is to reduce costs.

CONCLUSION

For the foregoing reasons, this Court should deny final approval of the proposed settlement, the application for attorney fees, and the application for incentive awards. At a minimum, the Court should (1) defer ruling on the motions until Objectors have had at least 30 days within which to further respond to the motions and applications once they are filed with the Court, and (2) with respect to the application for attorneys' fees, defer ruling on the motion until after all the Claim Forms have been submitted, counted, and a determination is made as

to the aggregate benefits to be awarded to the claimants.

Respectfully submitted,

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Date: July 28, 2005

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing Objections of Class Member Terrell Frazier was sent by UPS overnight delivery this 28th day of July, 2005, to the Clerk Superior Court, County of San Mateo California, and to the following counsel:

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