

No. 09-17380

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CLRB HANSON INDUSTRIES, LLC,
DBA Industrial Printing; HOWARD STERN,
on behalf of themselves and all others similarly
situated,

Plaintiffs - Appellees,

V.

WEISS & ASSOCIATES, PC,

Appellant,

V.

GOOGLE INC.,

Defendant - Appellee.

No. 09-17380

D.C. No. 5:05-cv-03649-JW

Northern District of
California, San Jose

**BRIEF OF APPELLANT
WEISS & ASSOCIATES,
PC**

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**STATEMENT OF APPELLATE
AND SUBJECT MATTER JURISDICTION**

This class action case arises under breach of contract, breach of implied covenant of good faith and fair dealing, California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq., California's False Advertising Law, Cal. Bus. & Prof. Code § 17500, et seq., unjust enrichment, and 28 U.S.C. §1331.

This appeal concerns the district court's Final Judgment approving the settlement agreement, the notice of settlement provided to Class Members, and the Order Approving Award of Attorney's Fees and Expenses, and Class Representative Incentive Compensation Award.

Class Member and Appellant, Weiss & Associates, P.C., (hereinafter "Weiss"), filed this notice of appeal on October 14, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF ISSUES

Weiss submits that the issues for consideration are:

- A. Whether the district court abused its discretion in approving an apparently inadequate settlement agreement without providing a thorough and detailed analysis of fact and law to justify its approval;

- B. Whether the notice provided to absent class members was sufficient under due process standards where the notice failed to inform absent class members of material terms of the settlement agreement;
- C. Whether the district court abused its discretion by awarding attorney's fees prematurely; and
- D. Whether the district court abused its discretion by awarding class counsel attorney's fees without sufficient justification.

STANDARD OF REVIEW

- A. The standard of review for whether the district court erred in approving a proposed settlement agreement is abuse of discretion; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998);
- B. The standard of review for whether the district court erred in approving the notice to class members is *de novo*; *Molski v. Gleich*, 318 F.3d 937, 951 (9th Cir. 2003);
- C. The standard of review for whether notice of a proposed settlement in a class action satisfies due process is *de novo*; *Molski v. Gleich*, 318 F.3d 937, 951 (9th Cir. 2003);

D. The standard of review for whether the district court erred in determining attorney's fees is abuse of discretion; *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) (where the Ninth Circuit reviews the award of fees and costs for abuse of discretion, but will overturn it if it is based on an erroneous determination of law), except that the legal premises used by a district court to determine an award of attorney's fees are reviewed *de novo*; *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008).

STATEMENT OF CASE

On August 3, 2005, Plaintiffs CLRB Hanson Industries, L.L.C., dba Industrial Printing, and Howard Stern ("Plaintiffs") filed their class action complaint against Google, Inc. in California state court. See Excerpts of Record (hereinafter "EOR"), p. 1. Thereafter, Google removed the case to the United States Court for the Northern District of California ("district court") pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). (EOR, p. 7) On November 14, 2005, Plaintiffs filed their First Amended Class Action Complaint alleging claims for breach of contract, breach of implied covenant of good faith and fair dealing, California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq., California's False Advertising Law, Cal. Bus. & Prof. Code § 17500, et seq.,

and unjust enrichment. (EOR, p. 27-32) On May 4, 2006, Plaintiffs filed their Second Amended Class Action Complaint. (EOR, p. 38) Both Plaintiffs and Defendant filed motions for summary judgment; on August 21, 2007, the district court denied Plaintiffs' motion for summary judgment, granted Google's motion for summary judgment as to the claims for breach of implied covenant of good faith and unjust enrichment, and denied Google's motion regarding the claims for breach of contract and violations of Section 17200 and Section 17500. (EOR, p. 61, 62) On February 2, 2009, the parties notified the district court that they had reached a settlement. (EOR, p. 63) On March 26, 2009, Plaintiffs filed Plaintiffs' Notice of Motion and Unopposed Motion for Preliminary Approval of Class Action Settlement, Provisional Certification of Nationwide Settlement Class. (EOR, p. 65) On May 12, 2009, the district court entered an Order certifying a national class for settlement purposes and granting preliminary approval to the Settlement. (EOR, p. 86) On July 14, 2009, Weiss filed its objections to the district court's Order preliminarily approving the Settlement. (EOR, p. 144) Weiss's objections originally misnamed the objector as Matthew Weiss, instead of Weiss & Associates, P.C., which error was amended on August 6, 2009, when Weiss filed its Notice of Scrivener's Errors. (EOR, p. 151) On September 14, 2009, the district court entered its Final Judgment approving the Settlement and

Notice, as well as its Order Approving Award of Attorney's Fees and Expenses, and Class Representative Incentive Compensation Award. (EOR, p. 153); (EOR, p. 165) Weiss filed its Notice of Appeal regarding the district court's Final Judgment and Order Approving Award of Attorney's Fees and Expenses on October 14, 2009. (EOR, p. 168) The Plaintiffs and Defendant filed a Motion to Dismiss the Appeal, which Motion was denied on January 14, 2010. (EOR, p. 113); (EOR, p. 61)

STATEMENT OF FACTS

On March 17, 2009, Plaintiffs and Defendant entered into the Settlement Agreement and Release ("Settlement") which contained a potential coupon component.¹ (EOR, p. 171) At the time of the filing of this Initial Brief, the extent

¹Those Class Members who have an active Adwords account and outstanding balances less than their distribution under the Settlement will potentially receive a coupon settlement unless those Class Members affirmatively elect to receive a cash distribution. The Plan of Allocation contained in the Settlement Agreement and Release states that Google will notify each Class Member with an active Adwords account and a balance that is less than their distribution that they may elect to receive cash in lieu of Adwords Credits by contacting Google via email per the instructions set out in the Notice. Therefore, any Class Member described above who does not elect to receive a cash distribution will receive Adwords Credit, not to apply against an already outstanding balance, but to use for future advertising. The Settlement would in effect be a coupon settlement for those Class Members.

to which the Settlement is or will be a coupon settlement is unknown.² The Settlement provided to Class Members, in exchange for a release of all of their claims against Defendant raised in the action, a settlement fund of \$20 million composed of a combination of cash and Adwords Credits, which was to be distributed according to the Plan of Allocation. (EOR, p. 175) The Settlement also provided a clear-sailing provision whereby Defendant agreed not to object to the attorney's fees sought by Class Counsel as long as those fees did not exceed \$5 million, plus costs not to exceed \$250,000 and incentive awards for the Representative Plaintiffs not to exceed \$20,000 each. (EOR, p. 176-177) The Plan of Allocation was included in the Notice of Pendency and Proposed Settlement of Class Action and Settlement Hearing ("Notice"). (EOR, p. 100) The Plan of Allocation provided an equation for the calculation of each Class

²The Settlement Agreement and Release provides that, in describing the Plan of Allocation, within ten business days of the Effective Date... Google ... will compute each Class Member's Distribution. (EOR, p. 174) The Effective Date is defined as the date by which all conditions and events specified in paragraph 7.1 of the Settlement have been met and occurred. (EOR, p. 172) Paragraph 7.1 includes the condition that the Final Judgment becomes final (EOR, p. 178) The Settlement provides that the Judgment becomes final seven days after the date on which the last appeal or certiorari petition has been denied or withdrawn without the Judgment being reversed, vacated, or modified in any material respect. (EOR, p. 173) Therefore, Google has not yet computed each Class Member's distribution, and therefore, it is unknown how many Class Members have active Adwords accounts with balances less than their distribution under the Settlement, and are therefore potential coupon recipients.

Member's distribution from the Settlement fund: (Class Member's Total Overcharges multiplied by the Net Settlement Proceeds) divided by the "sum total of Estimate of all Class Members' Total Overcharges." (EOR, p. 100) Under the Plan of Allocation, Class Members with active Adwords accounts and balances equal to or greater than their distribution under the Settlement will receive Adwords Credits, without the option of receiving cash; Class Members with active Adwords accounts and balances less than their distribution may elect to receive a cash distribution in the amount by which their distribution under the Settlement exceeds the balance on their Adwords account; Class Members without active Adwords accounts will receive a cash distribution. (EOR, p. 101-102) The Notice was sent to Class Members via email, or by U.S. Mail of the Class Member's email address was not known or working (EOR, p. 87) The Notice informed Class Members of the Settlement Fund, the claims Class Members were relinquishing, the equation by which individual distributions would be calculated, the Plan of Allocation, and the attorney's fees, costs, and incentive awards applied for by Class Counsel. (EOR, p. 94, 99, 100, 105) However, the Notice did not provide absent Class Members with information in support of the fee petition of 25% of the \$20 million Settlement Fund. (EOR, p. 105) Weiss objected to the Settlement after the district court preliminarily approved the Settlement. (EOR, p. 88) Weiss

provided evidence that it suffered \$135,000 in overcharges due to Google's actions. (EOR, p. 180) On September 14, 2009 the district court entered its Final Judgment approving the Settlement and its Order Approving Award of Attorney's Fees. (EOR, p. 122); (EOR, p. 134) The district court's Final Judgment stated merely that "the Court finds that the Agreement, and the terms of the settlement set forth herein, is fair, just, reasonable and adequate to the Class..." (EOR, p. 99) The district court's Order Approving Award of Attorney's Fees awarded Class Counsel 25% of the Settlement Fund of \$20 million and \$147,599.50 in reimbursement for expenses. (EOR, p. 135) The district court awarded the Representative Plaintiffs \$20,000 each as an incentive award. (EOR, p. 135) It is from the district court's Final Judgment and its Order Approving Award of Attorney's Fees that Appellant appeals.

SUMMARY OF ARGUMENT

This Court should reverse the district court's approval of the Settlement and find instead that the Settlement is not fair, adequate or reasonable and that the district court abused its discretion in approving the Settlement. This Court should reverse the approval of the district court for four reasons. First, the district court abused its discretion when it approved a seemingly inadequate settlement without stating sufficient justification. Second, the notice approved by the district court failed to

satisfy the demands of due process. Third, the district court awarded attorney's fees prematurely. Fourth, the district court failed to articulate sufficient reasons for its award of attorney fees, and therefore abused its discretion.

The district court abused its discretion in approving the Settlement without elucidating sufficient reasons for doing so. The district court failed to set forth its reasoning or the factors it considered in evaluating the Settlement in an opinion. Instead, the district court issued a terse Final Judgment which provided no grounds for this Court to decide whether the district court had properly evaluated the Settlement or not. Under extensive federal precedent, district courts must utilize a high degree of scrutiny in evaluating Settlements, especially settlements like the Settlement in the instant case that are entered into before Class Certification. In light of the paucity of justification given by the district court for its approval of the Settlement, it is impossible to say whether the district court applied the requisite degree of scrutiny to the Settlement.

The district court erred in approving notice to the class members that failed to comply with the demands of due process. The notice given to Class Members omitted information critical to Class Members' decision regarding whether to opt out of or remain in the class. Class members were provided with an equation and told that Google would use that equation to determine their distributions under the Settlement.

However, the denominator in that equation is too vague to allow class members to even estimate their potential recovery under the Settlement, thus class members were not provided with sufficient information to decide whether to remain part of the class or to opt out.

The district court abused its discretion by awarding attorney's fee prematurely. The Settlement in the instant case contains a potential coupon portion, the extent of which has not yet even been determined, as described in footnotes 1 and 2, *supra*. The district court has approved a contingency fee award to Class Counsel. Under the Class Action Fairness Act, the portion of any contingency fee award in a class action where the settlement provides for a recovery of coupons to a class member which is attributable to the award of coupons must be based on the value of the coupons that are actually redeemed. Such a calculation in the instant case is not even possible, since Google has not yet calculated the distributions to the Class Members, and therefore those Class Members who may receive coupons under the Settlement cannot be determined. If no coupons have yet been awarded, and if the calculations upon which those awards of coupons would be based have not yet even been made, then there is no way that the district court could have properly complied with the requirements of the Class Action Fairness Act and based the award of that portion of attorney's fees attributable to the coupon award upon the value of the redeemed

coupons. The only way that the district court could have already properly awarded attorney's fees in this case is if that award had been based on a lodestar analysis rather than a percentage of the fund approach, which it was not. Thus the district court abused its discretion in awarding attorney's fee prematurely, and the award of attorney's fees should be reversed.

The district court abused its discretion in awarding attorneys fees in that it failed to justify its award with sufficient reasons. Courts have a fiduciary duty to the absent Class Members to ensure that the Settlement is not diminished by excessive attorney's fees. In the instant case, the district court's award of attorney's fees included only general conclusions of law. Furthermore, Rule 23(h) requires that the district court find facts and state its legal conclusions under Rule 52(a). Because the district court's award of attorney's fees included only general statements of fact applicable to class actions and because the court failed to support its conclusions of law, the award of attorney's fees did not comply with the requirements of Rule 23(h), and therefore the award of attorney's fees should be reversed.

ARGUMENT

This Court should reverse the district court's decision and find that the district court erred in approving the class settlement agreement and attorney's fees and costs between class counsel and Google for four reasons. First, the district court approved

an apparently inadequate settlement without specific analysis of the merits. Second, the Notice provided failed to meet the demands of due process of law. Third, the district court awarded attorney's fees prematurely. Fourth, the district court awarded attorney's fees from the settlement fund without stating sufficient reasons.

I. THE DISTRICT COURT'S DECISION TO APPROVE THE SETTLEMENT AGREEMENT WAS NOT SUPPORTED BY RELEVANT LAW OR FACTS.

The trial court must approve the Settlement by determining whether it is fair, adequate, and reasonable. *See Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). To determine whether a settlement agreement meets the standards of fairness, adequacy and reasonableness, the "district court must consider a number of factors, including: '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.'" *Staton*, 327 F.3d at 959. This approval cannot be a "mere boilerplate approval" but requires that "the trial judge undertake an analysis of the facts and the law relevant to the proposed compromise." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). Furthermore, district courts must "exercise the highest degree of

vigilance in scrutinizing proposed settlements of class actions.” *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006). In order to survive appellate review, the district court must show that in its evaluation of the settlement agreement, it comprehensively explored all factors. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

In the instant case, the district court abused its discretion first by approving the Settlement without sufficient consideration of fairness, adequacy, and reasonableness. The court did not support its approval with an analysis of specific facts or law as required by *Cotton*, 559 F.2d 1326. The district court failed to apply any factor test, even those articulated by *Staton*. The court approved a Settlement that was inadequate in light of insufficient information, including but not limited to the potential recovery if the case had gone to trial. *See Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 389-91 (C.D.Cal. 2007) (finding that a settlement agreement wherein the cash value is far less than the litigation value of the claims is unfair and unreasonable and cannot be approved by the court).

The Settlement provides that those class members who have outstanding balances on their Adwords accounts will receive Adwords credits from the settlement instead of a cash distribution. (EOR, p. 101) Even more troubling, Class Members who have active Adwords accounts, but have balances less than their distribution

under the Settlement, will receive Adwords Credits unless they affirmatively elect to receive cash in the amount by which their distribution is greater than the balance on their account. (EOR, p. 101) This means that class members are forced to either take action or to receive the benefit of the settlement in Adwords credits, which is tantamount to a coupon settlement. Some class members will have to continue to do business with Google in order to receive their benefits.

The Settlement is also unfair because different portions of the class with the same claims are treated differently, with one section of the class receiving cash payments, and the other receiving Adwords credits. Those class members whose outstanding balances are less than their settlement proceeds can elect to have that portion of their settlement in excess of their balance paid in cash. (EOR, p. 101) This disparity within the class is not justified, and raises issues of the adequacy of representation. What if the class members who have outstanding balances with Google are in the process of disputing their balances? The Settlement allows Google to write any disputed balances off as paid while still receiving a release of the customer's claims, while the class member who might have been disputing the balance gets nothing for the release.

The district court must support its conclusions for approval of a settlement by a memorandum opinion. *Cotton*, 559 F.2d at 1330. A settlement approval phrased

in the appropriate language, if unsupported by an analysis of the facts and law, is insufficient to justify the approval of a settlement agreement. *Id.* The district court must focus on the terms of the settlement, and compare the terms of the settlement to the probable benefits to the class had the case been tried. *Id.*

In the instant case the district court provided little more than a one sentence justification of its approval of the Settlement. (EOR, p.153-56) This paucity of analysis was completely insufficient. *Id.* Judging from the Final Judgment in which the district court approved the Settlement, the district court based its approval on only two general and practically meaningless statements: first that the district court was fully informed of the reasons for approving the settlement, and second, that the court approves the settlement and finds that it is fair, just, reasonable and adequate to the Class, and in the best interests of the Class. (EOR, p. 153-54) The district court, charged with the fiduciary duty to protect the interests of absent class members by evaluating the Settlement to ensure that it was fair, adequate, and reasonable, stated only that it approved the settlement and found it to be fair, adequate and reasonable, and failed to use any one of the many sets of factors used by federal and state courts to evaluate settlements. (EOR, p. 153-54) There is no meaningful analysis to determine the best interest of the class and whether the settlement is fair, reasonable and adequate. Though phrased in the appropriate language from Rule 23, the Final

Judgment is excessively general. The district court failed to include specific findings in the record relevant to support its approval of the Settlement.

If meaningless regurgitations of the standards of Rule 23 could justify the approval of class action settlements, then every settlement would be approved and absent class members would be left with no effective tool for challenging the fairness and adequacy of Settlements. This lack of analysis is not conducive to the proper determination of whether Settlements are fair, adequate and reasonable.

Furthermore, where the economic benefit of a settlement appears to be significantly less than the potential recovery from litigation, the settlement is unfair. *See Acosta*, 243 F.R.D. at 394. In *Acosta*, the district court evaluated the settlement by properly considering the strength of the plaintiffs' case. *Id* at 391. The *Acosta* court explicitly addressed each of the arguments proffered by defendants regarding the sufficiency of the settlement. *Id* at 391-93. When confronted with a settlement the cash value of which was far less than the litigation value of the claims, the court deemed the Settlement unfair and unreasonable and refused to approve it. *Id* at 393.

In the instant case, the settlement amount of \$20 million in a combination of cash and Adwords credits appears to be significantly less than the potential recovery from litigation. As the *Acosta* court stated "were [p]laintiffs' claims against [defendants] grounded in such a tenuous basis that they were hopelessly doomed to

fail in court, such a colossal discrepancy between their apparent litigation value and the value of the Settlement may be acceptable. That is not true here.” *Id.* at 391. In the instant case, as in *Acosta*, Plaintiffs’ claims are in no way doomed to fail in litigation. Thus, the Settlement was not fair, adequate, or reasonable.

Finally, in evaluating the Settlement, the district court in the instant case fell short of the high degree of diligence required by its quasi-fiduciary duty to the class. *See Synfuel*, 463 F.3d at 653. The district court failed to apply any factor test in evaluating the settlement, leaving this Court without an adequate basis upon which to review the district court’s exercise of discretion. *See Cotton*, 559 F.2d at 1330.

III. THE NOTICE TO ABSENT CLASS MEMBERS WAS INSUFFICIENT TO SATISFY DUE PROCESS REQUIREMENTS.

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (U.S. 1950). To satisfy the demands of due process, notice must be “reasonably calculated to convey the *required information*.” *Id.* (emphasis added); *see also Oswald v. McGarr*, 620 F.2d 1190, 1197 (7th Cir. 1980) (“the notice should contain a *balanced and complete presentation of information* to

help individual class members make an informed decision.”) (emphasis added). The Notice was defective because it failed to provide absent class members adequate information regarding the Settlement. The equation provided to class members in the Notice by which Google was to calculate their distributions was too vague to allow class members to accurately calculate their potential recovery under the Settlement. (EOR, p. 100) The denominator of the equation is “sum total of Estimate of all Class Members’ Total Overcharges.” (EOR, p. 100) This variable cannot even be estimated by class members, even though Google surely has the information, since Google has agreed to provide the information necessary for the claims administrator to determine distributions. (EOR, p.101) That variable will have an enormous effect on class members’ recovery under the Settlement. The lack of that variable in the Notice makes it impossible for class members to determine their recovery under the Settlement, and therefore impossible for class members to decide whether it would be better for them to remain part of the Settlement and accept their benefits thereunder, or to opt out and attempt to recover their damages in an individual action. All of this information would have been necessary for class members effectively to make the decision of whether to stay in the class or opt out. In sum, the Notice did not contain “sufficient information to enable a class member to determine (1) whether to accept the offer to settle, (2) the effects of settling, and (3) the available

avenues for pursuing his claim if he does not settle.” *Oswald*, 620 F.2d at 1197 (7th Cir. 1980) (quoting *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1113 (7th Cir. 1979)).

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY AWARDING ATTORNEY’S FEES PREMATURELY.

The Class Action Fairness Act, 28 U.S.C. § 1712, provides that, in the context of a contingent fee award,

[i]f a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney’s fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

28 U.S.C. § 1712(a). Further,

[i]f a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney’s fee to be paid to class counsel, any attorney’s fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

28 U.S.C. § 1712(b)(1). The Settlement in the instant case includes a potential coupon element, the extent of which is not yet known, as described in footnotes 1 and 2, *supra*. Because the Settlement has a potential coupon portion, the above-referenced sections of the Class Action Fairness Act apply to the award of attorney’s fees in this case. The extent to which the Settlement will consist of coupons is

unknown, and therefore there is absolutely no way for the district court to have determined what portion of the attorney's fee award was properly attributable to the coupon portion, nor could the district court have based that portion of the award of attorney's fees on the value to the class members of the coupons that are redeemed, as required by 28 U.S.C. § 1712(a). The district court never addressed the issue of the potential coupon portion of the Settlement, and yet the district court awarded Class Counsel a contingent fee of 25% of the \$20 million Settlement Fund. (EOR, p. 153-56); (EOR, p. 165-67). This contingent award was premature given the potential coupon portion of the Settlement. The only way that the district court could have properly awarded attorney's fees in this case without taking the value of the actually-redeemed coupons into consideration would be to have based the award of fees on a lodestar calculation of the amount of time class counsel reasonably expended working on the action. 28 U.S.C. § 1712(b)(1). However, the district court did not award fees according to a lodestar calculation. (EOR, p. 165-67) Thus, the district court abused its discretion by awarding a contingent fee in a class action with a settlement that has a potential coupon portion without reference to the value of the coupons redeemed, and indeed without the ability to make such a reference, considering the fact that the extent of the coupon portion is unknown, to say nothing of the extent of the redemption of those unknown coupons.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES WITHOUT SUFFICIENT JUSTIFICATION.

A thorough judicial review of attorney's fees is required in all class action settlements. *See In re Diet Drugs*, 582 F.3d 524, 537-38 (3rd Cir. 2009) (citation omitted). The standard of review of an award of attorney's fees is abuse of discretion, but such abuse may occur if the district court fails to employ the proper procedures in making the determination, or bases an award on clearly erroneous findings of fact. *Id.* at 538, citing *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727 (3rd Cir. 2001). District courts must set forth the reasoning in support of a fee award to ensure that an appellate court may have a sufficient basis for review. *Id.*, citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3rd Cir. 2005). "To avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Staton*, 327 F.3d at 963, citing *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980) (where the Fifth Circuit found that where the district court abdicated its responsibility to assess the reasonableness of a class settlement fee award, its approval of the settlement had to be reversed on that ground alone). When evaluating a fee application where the fees will be paid out of the common fund, the

district court has a fiduciary duty to the class. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994).

Nothing in the district court's Order Approving Award of Attorney's Fees and Expenses indicates whether the district court applied the requisite scrutiny to class counsel's fee application. (EOR, p. 165-67) There are only general conclusions of law, nothing to allow this Court, on appeal, to determine whether the district court properly exercised its discretion in accordance with its fiduciary duty to the class in approving the attorney's fees. Usually, the district court has the discretion to use "either the lodestar or the percentage-of-the-fund approach . . . depending upon the circumstances . . . in determining what would be reasonable compensation for creating a common fund." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1295. That discretion, however, is reviewable and should be supported by the record, including specific findings and reasoned explanation for the district court's action.³

Rule 23(h) requires that, when awarding attorney's fees, a court must find the facts and state its legal conclusions under Rule 52(a). Fed. R. Civ. P. 23(h)(3). Rule

³In the case of *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009), where the district court had failed to consider an important factor in the award of attorney's fees, this Court considered that such a failure may have been due to the insufficiency of the record, and remanded to give the parties an opportunity to develop the record further. *Rodriguez*, 563 F.3d at 968. Similarly, where a district court has not sufficiently supported its award of attorney's fees, remand of the fee award is appropriate.

52(a) requires that “the court must find the facts specially and state its conclusions of law separately.” Fed. R.Civ. P. 52(a)(1). The district court’s Order Approving Award of Attorney’s Fees, if it can be said to include any findings of fact at all, includes only the most generalized statements regarding the facts, and fails to support the court’s conclusions of law. (EOR p. 165-67) Thus, the in approving the application for attorney’s fees, the district court abused its discretion not only by failing to conform its inquiry to the specificity and scrutiny required by the relevant law, but in failing to comply with the requirements of Rule 23(h).

CONCLUSION

Weiss & Associates, P.C., therefore requests that this Court reverse the district court’s Opinion and Order approving the Settlement and award to class counsel for fees and costs, and remand for further consideration, or grant whatever other relief deemed just and appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

I hereby certify that pursuant to Fed.R.App.R. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionally spaced, has a typeface of 14 points or more and contains 5,628 words (not exceeding 14,000 words.) Headings, footnotes, and quotations have been counted toward the word limitation; the table of contents, table of authorities, and the certificates and statements of counsel have not been counted toward the limitation.

Dated: February 12, 2010

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, there are no other related cases in this Court.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 12th day of February, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF program.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

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