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**

REPLY BRIEF OF APPELLANT WEISS & ASSOCIATES, PC

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A. STATEMENT OF FACTS

On July 14, 2009, Weiss & Associates, PC ("Weiss") filed Objections to Proposed Settlement and Notice of Intent to Appear at Fairness Hearing ("Weiss Objection"). (EOR 143) In this objection, Weiss made two scrivener's errors, inadvertently misnaming "Objector Matthew Weiss" instead of "Objector Weiss & Associates, PC" as well as inadvertently omitting a second AdWords account number/customer ID number, 586-629-8649, where only one AdWords account number/customer ID number, 338-806-2094, was written. (EOR 143-149) On August 6, 2009, Weiss filed a Notice of Scrivener's Errors. (EOR 150-152) On August 6, 2009, Appellees deposed Matthew Weiss and during that deposition, he again notified Appellees that the incorrect name was placed on the "Weiss Objection" and that it should have read "Weiss & Associates, P.C." (EOR 126-129, Deposition of Weiss) He also discussed the omission, by scrivener's error, of a second account number 586-629-8649. (EOR 126-127, 128-130, 131-132, 133-134, 141, 142, Deposition of Matthew Weiss, pages 3-4, 5-7, 15-16, 29-30, 36, and 37)

On October 28, 2009, Appellees filed a Motion to Dismiss Appeal arguing that Weiss did not file a timely and proper objection and thus has no power to

appeal. By order dated January 14, 2010, this Court denied the motion without prejudice allowing it to be addressed in the answering brief. (EOR 170)

B. ARGUMENTS

I. Weiss' Objections Were Timely and Its Amendments Proper.

Appellees contend that Weiss did not file a timely and proper objection because Weiss did not substitute itself for Matthew Weiss in the objections until after the deadline for submitting objections had passed, and Weiss did not provide the requisite proof of the dates during which it was an AdWords advertiser. (AB pg. 21). However, Weiss's Notice of Scrivener's Errors was sufficient to properly amend Weiss's objections to name Weiss a class member, and Weiss did include in the objections the dates during which Weiss was an AdWord's advertiser. The Notice of Pendency and Proposed Settlement of Class Action and Settlement Hearing stated that all objections "must include the name and address of the person and the dates that the person was an AdWords advertiser..." (EOR 110)

Weiss's timely objection on July 14, 2009 did follow these instructions in the Objection.[1] Additional notice occurred during Weiss' deposition on August 6, 2009.[2]

A scrivener's error is a clerical error resulting from "a minor mistake or inadvertence." *United States v. Gibson*, 356 F.3d 761, 766 n. 3 (7th Cir. 2004) (quoting Black's Law Dictionary 563 (7th ed. 1999)). Similar to the liberal Federal rules governing amendments to pleadings,[3] a scrivener's error cannot support a

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[1]The objection stated as proof of class membership "Objector Matthew Weiss, AdWords Account Number/Customer I.D. Number 338-806-2094, whose address is 419 Park Avenue South, 2nd Floor, New York, NY 10016, (Mjweiss@weissandassociatespc.com) is a person or entity residing in the United States, who has paid for advertising pursuant to Google's AdWords Program who, (A) became AdWords Advertisers between June 1, 2005 and February 28, 2009, inclusive..." (EOR __)

[2]Weiss discussed the approximate dates, from December 1, 2003 through November 17, 2004, within which Weiss advertised on AdWords account number 586-629-8649 and June 1, 2006 through February 28, 2009 within which Weiss advertised on account number 338-806-2094. (EOR 128, Weiss deposition at 5:24, 25 and 6).

[3]Federal Rule of Civil Procedure 15, governing amendment to pleadings, mandates liberal reading of the Rule's direction for free allowance of amendments, and motions to amend are to be granted in absence of declared reason such as undue delay, bad faith or dilatory motive, repeated failure to sure deficiencies by amendments previously allowed, undue prejudice to opposing party, or futility of amendment. *Gambelli v. United States*, 904 F.Supp. 494 (E.D.Va. 1995), affirmed 87 F.3d 1308. The purpose of this Rule is "to prevent defeat of justice through mere mistake as to parties or form of action." *Wagner v. New York, O. & W. Ry.*, 146 F.Supp. 926 (M.D.Pa. 1956).

dismissal of the appeal unless it causes some undue prejudice to the adverse party. The scrivener's error in this case was not significant enough to trigger the need to amend, but rather, was cured by Weiss's Notice of Scrivener's Errors.

The U.S. Supreme Court has repeatedly held that "decisions on the merits are not to be avoided on the basis of 'mere technicalities.'" *Schiavone v. Fortune*, 477 U.S. 21 (1986), citing *Foman v. Davis*, 371 U.S. 178, 181 (1962).[4]

The focus of the analysis rests with notice and prejudice. Fed. R. Civ. P. 15(c) addresses the similar issue of when an amendment to a pleading relates back to the date of the original pleading. Rule 15(c) requires that if the amendment

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[4]The U.S. Supreme Court considered Fed. R. Civ. P. 15(c) in the case of *Schiavone*. In *Schiavone*, the plaintiff had filed a pleading naming the wrong defendant, which was a subsidiary of the intended defendant, just before the statute of limitations had run. *Schiavone*, 477 U.S. at 22-23. The actual named defendant did not receive notice of the pleading until after the statute of limitations had already run. Id. at 23. The plaintiff amended the complaint to include the intended defendant, but after the statute of limitations had run, and the intended defendant moved to dismiss the amended complaints, which motion the district court granted. Id. the Court, citing *Conley v. Gibson*, 355 U.S. 41 (1957), affirmed that "the spirit and inclination of the rules favored decisions on the merits, and rejected an approach that pleading is a game of skill in which one misstep may be decisive." *Schiavone*, 477 U.S. at 27. Although the Court upheld the dismissal of the case, it did so because there was inadequate notice in accordance with Fed. R. Civ. P. 15(c). *See id.* at 30. Even though *Schiavone* has been partially superseded by an amendment to Fed. R. Civ. P. 15(c), the analysis still applies since that amendment has only made Rule 15(c) more liberal in allowing relation back in pleadings. *See Douglas v. County of Tompkins*, 1995 WL 105993 (N.D.N.Y. 1995).

changes the defendant, the amendment asserts a claim or defense arising out of the occurrence set out in the original pleading, and that the party being added received notice, such that its defense will not be prejudiced, and knew or should have known that the action would have been brought against it. Fed. R. Civ. P. 15(c)(1). By analogy, in the instant case Appellees had sufficient notice of Appellant's claims, and were not prejudiced in their defense on the merits by Appellant's scrivener's errors, a fact which the lower court implicitly acknowledged when it allowed Weiss's counsel to speak at the settlement hearing in order to present Weiss's objections.[5]

II. The Approval of the FCV

Approval of a class settlement "that takes place prior to formal class certification requires a higher standard of fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Courts should be even "more scrupulous than usual in approving settlements where no class has yet been formally certified." *GM Pick-Up Litig.*, 55 F.3d 768, 805 (3rd Cir. 1995) cited with approval in *Hanlon* at 1026. The district court is to assess the settlement in light of: "the

[5]The objections as filed before the expiration of the objections period, with the scrivener's error, included the information outlining Weiss' basic claims. Appellees cannot claim that they did not know Appellant's objections were brought against them, and Appellee received sufficient notice of the objections such that Appellee was not prejudiced in maintaining its defense.

strength of the 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." *Hanlon*, at 126.

In the instant case, the settlement was crafted before the class was certified, (EOR 72, Class Counsel's motion for approval of settlement and class certification), and yet the district court's gave conclusory approval of the settlement without supported findings of fact and conclusions of law. The district court failed to provide any substantiative justification for its approval of the settlement. (EOR 85-91, SER 1-38, Order approving settlement, transcript of settlement fairness hearing). This Court requires more to find approval of a class action settlement to be sufficient. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373 (9th Cir. 1995). A district court that does not respond to objections with findings of fact and conclusions of law must "provide a reasoned response [to those objectors] elsewhere in the record." *Id.* at 377.[6] It is significant that the words

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[6]Appellees cite *Shaffer v. Continental Cas. Co.*, Nos. 08-56124 & 08-56125, 2010 WL 106816 (9th Cir. Jan. 12, 2010) for their claim that the district court's approval of the settlement should be upheld even though it was conclusory. (AB

"provide a reasoned response" place the burden of action on the district court, and do not provide a foundation for the district court's implicit adoption of representations and arguments provided by Class Counsel. In *In re Pac. Enters. Sec. Litig.*, the Court found the district court's conclusory finding that the class action settlement was fair, adequate and reasonable was sufficient *only* because the district court conducted an extensive settlement hearing, responded to the objections, and *explained on the record* why the settlement was fair, adequate and reasonable. *Id.* (emphasis added).

In the instant case, the district court heard from, but did not directly respond to, the objectors. (SER 1-38, transcript of fairness hearing) Furthermore, in this case, the district court did not explain why the settlement was fair, adequate and reasonable at the fairness hearing. (SER 1-38, transcript of fairness hearing) Again, as above, a district court that does not place its reasoned response to objectors in its final judgment must have provided the reasoned response

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pg. __) The language cited from *Shaffer* quoted *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566 (9th Cir. 2004), and the *Churchill* court quoted *In re Pac. Enters. Sec. Litig*. *Shaffer*, 2010 WL 106816 at *__; *Churchill*, 361 F.3d at ___. Thus, the language from *Shaffer* that seems to support Appellees' argument actually originates in a case that is antithetical that argument. Furthermore, the *Shaffer* case, though it may be cited, is not to be considered precedent for the rule asserted by Appellees. *Shaffer*, 3010 WL 106816, FN** ("This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.").

elsewhere in the record. That requirement is not met by the court relying on Class Counsel's responses to the objectors. Thus, according to *In re Pac. Enters. Sec. Litig.*, because the district court did not provide a reasoned response to the objectors elsewhere in the record, the district court's conclusory approval of the settlement was insufficient.

III. This Court Should Exercise its Discretion to Hear the Issues Raised for the First Time on Appeal.

Even though Weiss failed to raise some issues before the district court that are subsequently being raised on appeal for the first time, the appellate court nevertheless has discretion to address those issues; *i.e.,* waiver does not defeat appellate jurisdiction. *AlohaCare v. Hawaii, Dept. of Human Servs.*, 572 F.3d 740, 744 (9th Cir. 2009), quoting *El Paso City of Tex. v. Am. W. Airlines, Inc. (In re Am. W. Airlines, Inc.)*, 217 F.3d 1161, 1165 (9th Cir. 2000) ("'Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have the discretion to do so.'").

Because justice for the class members and compliance with the Class Action Fairness Act are the issues at stake, this court should exercise its discretion. If the Court finds with Appellant that the settlement includes a coupon component, then under the Class Action Fairness Act, the award of attorney's fees according to the

percentage of the fund was premature. Attorney's fees based on the value of coupons may only be awarded based solely on counsel's lodestar, or, if the percentage method is used, the percentage must be based on the value of the coupons actually redeemed. 28 U.S.C. § 1712(a), 1712(b)(1). Furthermore, the disparate treatment of different subparts of the class, with some automatically receiving cash and others either being forced to receive only AdWords credits or having to elect to receive that portion of their settlement benefits that exceed their outstanding AdWords balances in cash, raises significant fairness issues.

Appellees suggest that there is no possibility of a coupon element to the settlement because class members do not have to purchase additional services or otherwise spend money. (AB pg. 36) However, the definition of a coupon is not as limited as Appellees seem to believe. Although the Class Action Fairness Act does not explicitly define a "coupon," the legislative history suggests that even when a non-cash benefit which allows the consumer to purchase an entire product, without spending any money out of pocket, it may still be considered a coupon. *Fleury v. Richemont North America, Inc.*, 2008 WL 3287154, *2 (N.D.Cal. 2008), citing 109 S. Rpt. 14 (2005) (suggesting that settlements where class members received free products were coupon settlements). Thus, for those class members with settlement distributions higher than their outstanding AdWords balances,

there clearly is the potential for a coupon element. In fact, the only class members certain to obtain a cash distribution under the settlement are those who no longer have active AdWords accounts. For those class members with active AdWords accounts, the default is still to receive AdWords credits; even those class members with active AdWords accounts who owe no money to Google will still have to affirmatively act to receive the benefit of the settlement in anything other than a coupon. (EOR 171-178, Settlement agreement; SER 1-38, transcript of fairness hearing, pg. 10-12).

Furthermore, the issues regarding the attorney's fees do not rely on this Court's discretion to be heard on appeal, as that issue was raised before the district court. (SER 17, Transcript of fairness hearing pg. 17). Weiss's counsel, Mr. Bishop, stated: "[Weiss] also has an objection to the award of fees at 25 percent..." (SER 17, Transcript of Fairness Hearing pg. 17).[7]

Also, the case of *Slaven v. Am. Trading Transp. Co., Inc.*, 146 F.3d 1066 (9th Cir. 1998), cited by Appellees for the assertion that the appellate court will not address issues not raised before the district court, is distinguishable from the

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[7]Mr. Miller, whose statements were adopted by Mr. Bishop on the issue of attorney's fees (SOR 17, transcript of fairness hearing pg. 17), stated that "...Class Counsel have left Google with all of the cards and is asking [the district court] to approve a stealth settlement blindly..." (EOR 23-24, transcript of fairness hearing pg. 23-24)

instant case. In *Slaven*, the objectors who initially raised an objection, then functionally withdrew that objection and consented to the judgment. Thus, when it stipulated to the entry of an order approving settlement without reservation or condition they waived the right to appeal that judgment. *Slaven*, 146 F.3d at 1069. In the instant case, Weiss neither withdrew its original objections, nor stipulated to entry of the district court order approving the settlement.

C. CONCLUSION

Weiss properly filed an objection before the district court, and should therefore be permitted to maintain this appeal. The district court did not provide sufficient justification for its approval of the settlement. The potential coupon component of the settlement results in that part of the attorney's fee award, based on the potential coupon component, being premature and incorrectly calculated as a percentage of the settlement fund. This Court should reverse and remand to the district court with appropriate guidance and instructions.

Respectfully submitted,

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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 3,416 words (not exceeding 7,000 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: April 22, 2010

Respectfully submitted,

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I hereby certify that on the 22nd day of April, 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.

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