UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MIRANDA L. DAY, for herself and all persons similarly situated, Plaintiff, v. PERSELS & ASSOCIATES, LLC, *et al.*, Defendants.	:	Case No.: 8:10-cv-02463-VMC-TGW

OBJECTION OF CLASS MEMBER RAYMOND GUNN
AND NOTICE OF INTENT TO APPEAR

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INTRODUCTION

Class member Raymond Gunn objects to the proposed class settlement of this case. The proposed settlement provides benefits to defendants (a broad release from any liability to the 125,000 class members who paid substantial sums for debt settlement services), class counsel (attorney fees of up to $300,000), the representative plaintiff (an incentive payment of $5,000), and a research institute with no connections to the interests of the class or the objectives of this case (a cy pres distribution of $100,000). But it provides absolutely no benefit to the class. A settlement that forces class members to surrender all of their claims in exchange for no consideration is not "fair, reasonable and adequate" as required by Federal Rule of Civil Procedure 23(e)(2). The Court should deny final approval.

BACKGROUND

A. The Underlying Class Action

Plaintiff Miranda Day brought this putative class action against certain law firms and lawyers (the "Law Firm Defendants") and affiliated debt management businesses (the "CareOne Entities").[1] *See* Doc. 1 and 98. The complaint and the amended complaint describe an elaborate scheme under which the Law Firm Defendants and the CareOne Entities offered to help consumers settle their debts by negotiating with their creditors, but when the consumers gave defendants money to carry out the debt settlement plan, the defendants took such large fees out of the consumers' payments that the system was "designed to fail." Doc. 98, ¶ 55. Together, the complaints allege that defendants

[1]The Law Firm Defendants include Persels & Associates, LLC, Ruther & Associates, LLC, Jimmy B. Persels, Neil Ruther, Robyn R. Freedman, and Legal Advice Line, LLC. The CareOne Entities include CareOne Services, Inc., CareOne Credit Counseling, Ascend One Corp., 3C Inc., Freedom Point, and Bernardo Dancel.

misrepresented their debt settlement services, failed to assist their clients, and discouraged their clients from responding to creditors even after the consumers were sued. According to the complaints, the law firms promised legal assistance to consumers but did not provide it; instead, they passed consumers' cases off to employees of the CareOne Entities acting as "paralegal negotiators" whom the Law Firm Defendants did not supervise and who did not provide any legal help to the consumers.

The original complaint asserted claims under the Florida Deceptive and Unfair Trade Practices Act and the federal Credit Repair Organizations Act ("CROA"), and common-law claims for unjust enrichment, legal malpractice, breach of fiduciary duty and negligence. All defendants moved to dismiss and the CareOne Entities moved to compel arbitration. *See* Doc. 25, 39. The motion to dismiss was denied as moot pending an amendment of the complaint, Doc. 67, but the motion to compel arbitration as to the CareOne Entities was granted except as to claims against CareOne Services, Inc. ("CareOne") arising from consumers' retainer agreements with the Law Firm Defendants. Doc. 82.

On June 10, 2011, plaintiff filed her amended complaint against the Law Firm Defendants and CareOne in its capacity as the law firms' agent. Doc. 98. The amended complaint alleges violations of CROA and raises common-law claims for legal malpractice, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and three counts of negligence including negligent supervision. *Id.* On June 28, less than three weeks after the filing of the amended complaint and before the remaining defendants had answered, the parties announced that they had reached an "agreement in principle regarding the settlement of this case." Doc. 102. The parties filed their motion for preliminary approval on September 20, Doc. 100, attaching their settlement agreement, Doc. 110-1. The Court granted preliminary approval on September 29, Doc. 112, and the settling parties sent a notice of the proposed settlement to the members of the class, Doc. 111-1. The settlement class includes approximately 125,012 consumers nationwide who entered into retainer agreements with the Law Firm Defendants on or after April 28, 2005, to receive legal advice and services to help get out of debt, except for members of a statewide class in a putative class action pending against the Law Firm Defendants in the Eastern Distirct of Washington. Doc. 110-1, ¶¶ 7 and 16.

B. The Proposed Settlement

The proposed settlement provides no monetary relief to the approximately 125,000 absent class members. Instead, if the settlement is approved, defendants will pay (1) $100,000 to the American Bar Foundation; (2) up to $300,000 in attorneys' fees; (3) a $5000 incentive payment to the representative plaintiff; and (4) costs of administering the settlement. *Id.* ¶¶ 19(b), 35, 23, 21.

The proposed settlement also sets forth three steps for the Law Firm Defendants in the nature of "injunctive relief." First, in the future, they may only collect fees from consumers after negotiating a settlement with the consumers' creditors. This "relief" is limited in three crucial respects: (1) the Law Firm Defendants may continue to collect fees in advance "to the extent permitted by law"; (2) the change in the law firms' practice does not modify any agreement made prior to October 1, 2010; and (3) the Law Firm Defendants may continue to charge fees for other services, including specifically an upfront "consultation fee" that is "currently set at $150" but which the settlement agreement does not prohibit the defendants from raising. *Id.* ¶ 19(a)(i) & n.1. Second, the Law Firm Defendants agree to "modify the retainer agreement with their clients" to disclose an estimate of total amounts payable by clients, an estimate of the amounts of fees the firms will take, an estimated date by which clients' debts will be satisfied, the nature of the firms' services, and the cost of additional services. However, these changes apply only "prospectively" and therefore do not benefit the class. *Id.* ¶ 19(a)(ii). Third, the firms agree to "establish or demonstrate to Class Counsel that they already have established processes that provide reasonable assurance that clients requesting assistance with matters that should be appropriately handled by an attorney are able to communicate with an attorney within a reasonable period of time." *Id.* ¶ 19(a)(iii). Finally, CareOne, "in its role of providing administrative support services" to the Law Firm Defendants, agrees in unspecified terms to "assist" them in complying with their obligations to provide the agreed-upon injunctive relief, although this obligation terminates if CareOne's contractual relationship with the Law Firm Defendants terminates "at any time for any reason," *id.* ¶ 19(a)(iv)—including, it would seem, for the reason that CareOne does not wish to undertake any obligations under this settlement.

In exchange for the "relief" described above, the proposed agreement requires the class not only to dismiss this lawsuit, *id.* ¶ 32, but to release, on behalf of themselves and "all of their spouses, former spouses, administrators, executors, personal representatives, heirs, agents, attorneys, assigns, predecessors and successors," *id.* ¶ 24, an extraordinary range of claims: namely, "*any and all* claims, demands, suits, or causes of action *of any nature or description whatsoever*, *whether known or unknown*, that Representative Plaintiff and/or Class Members may have *against the Released Persons or any of them*." *Id.* ¶ 14(u) (emphasis added). The release of "unknown claims" is specified to mean that class members "completely, fully, finally and forever compromise, settle, release discharge, and extinguish any and all Released Claims, known or unknown, suspected or unsuspected, contingent or absolute, accrued or unaccrued, apparent or unapparent, which now exist, or heretofore existed, or may hereafter exist, without regard to the subsequent discovery of additional or different facts." *Id.* ¶ 14(bb). Moreover, class members may not "institute, be represented in, participate in, submit, file, or permit to be filed on their behalf, any lawsuit, arbitration, charge, claim, complaint, or other proceeding in which a Released Claim is asserted." *Id.* ¶ 25. In short, the proposed settlement agreement releases defendants from liability to the class members for any claim, of any kind, on any facts, at any time in the past, present or future, without limitation.

IDENTITY OF OBJECTOR AND INTENT TO APPEAR

These objections are filed on behalf of class member Raymond Gunn of Wooster, Ohio. *See* Exhibit 1, Gunn Decl. Mr. Gunn's declaration contains all of the information required by paragraph 6 of the preliminary approval order. Doc. 112. Mr. Gunn intends to appear at the Final Approval Hearing through counsel and present argument in support of his objections.

STANDARD UNDER RULE 23(e)(2)

A district court may approve a class action settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The settling parties bear the burden of showing that the settlement meets this standard. *Faught v. Am. Home Shield Corp.*, --- F.3d ---, No. 10-12496, 2011 WL 5119115, at *4 (11th Cir. Oct. 31, 2011). "[C]areful scrutiny by the court is 'necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members.'" *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) (quoting *United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980)); *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982) (purpose of court scrutiny is "protection of those class members . . . whose rights may not have been given due regard by the negotiating parties"). Indeed, the Eleventh Circuit's predecessor court has described the role of a judge reviewing a settlement as that of a "fiduciary serving as guardian for the unrepresented class members." *City of Miami*, 614 F.2d at 1331 (5th Cir. 1980). The proposed settlement here requires a higher level of scrutiny because it was reached prior to class certification. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997); *In re GM Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 787-88 (3d Cir. 1995).

The Eleventh Circuit has recognized six factors to guide courts in evaluating the substantive fairness of a proposed settlement:

> (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.

Faught, 2011 WL 5119115 at *5. Other circuits rely on similar factors. *See, e.g., In re Katrina Canal Breaches Litigation*, 628 F.3d 185, 194-95 (5th Cir. 2010); *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). No matter how the factors are described, the essence of the inquiry is whether the settlement reflects a reasonable compromise in light of the prospects of further litigation. "The court must be assured that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants." *Canal Breaches*, 628 F.3d at 195; *see True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1070 (C.D. Cal. 2010) (court must determine whether "settlement is reasonable in relation to the value of the claims surrendered").

ARGUMENT

I. The Settlement Provides No Benefit To Class Members But Requires Them To Release All Claims Against Defendants.

This settlement is unfair for the simple reason that class members will receive nothing in return for releasing all claims against defendants—both present claims that have value and future claims of unknown value. A simple comparison of what the class members would receive and what they would give away under the proposed settlement is sufficient to demonstrate that the proposed settlement is unfair and should be rejected.

A. What The Class Members Receive.

The most glaring deficiency with this settlement is that the class receives absolutely nothing. Except for the representative plaintiff, class members receive no monetary compensation. There is no respect in which any of the payments defendants would make under the proposed agreement, including the proposed cy pres distribution, would benefit the class even indirectly.

Similarly, the injunctive relief is of no value to the class. The Law Firm Defendants appear to be agreeing to collect fees from a consumer only after negotiating a settlement with the consumer's creditors, Doc. 110-1, ¶ 19(a)(i), but what the defendants initially give, they immediately take back in the subsequent sentences of the agreement. First, the defendants may continue to collect fees in advance "to the extent permitted by law." This exception undermines the entire force of the concession, because it limits defendants to promising nothing more than to obey the law—an obligation that imposes no additional legal constraints on defendants' conduct and that is in any case unenforceable. *See, e.g., Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1531-32 (11th Cir. 1996) ("obey-the-law" injunction unenforceable); *SEC v. Sky Way Global, LLC*, 710 F. Supp. 2d 1274, 1277-78 (M.D. Fla. 2010) (same). The second qualification notes that defendants will not modify any agreement made prior to October 1, 2010, even though the class includes all consumers who entered into an agreement with defendants since April 28, 2005, many of whom have already terminated their agreements with defendants. *Cf. True v. Am. Honda Motor Co.*, 749 F. Supp. 2d at 1077 ("The Court is inclined to agree with Plaintiffs and the Objectors that the injunctive relief is of minor, if any, value. . . . No changes to future advertising by [the defendant] will benefit those who already were misled by [the defendant]'s representations . . . ."). The third qualification permits defendants to continue to charge fees for other services, which notably include an upfront "consultation fee" that is "currently set at $150" and which the settlement agreement does not prohibit the defendants from raising. Doc. 110-1, ¶ 19(a)(i) & n.1.

Second, the Law Firm Defendants promise to provide clients with information about their services and fees. The canons of professional ethics already require such disclosures. *E.g.,* Fla. R. Prof. Cond. 4.1-5(e) (duty to communicate basis or rate of fee to client); Ohio R. Prof. Cond. 1.5(b) (same); *see generally* ABA Model R. Prof. Cond. 1.5(b) (same). And this provision of the agreement would apply only "prospectively," Doc. 110-1, ¶ 19(a)(ii), and, therefore, would not benefit the class.

Third, the law firms would "establish[] processes that provide reasonable assurance that clients requesting assistance with matters that should be appropriately handled by an attorney are able to communicate with an attorney within a reasonable period of time." *Id.* ¶ 19(a)(iii). The various modifiers and circumspect wording of this promise—establishing a "process" for doing something is not equivalent to doing it, and both the assurance of contact and the amount of time within which contact is made are modified by the vague standard of "reasonableness"—render this promise of little value. In any case, this provision, like most of defendants' obligations under the agreement, would require no more of them than applicable codes of legal ethics. *See, e.g.,* Fla. R. Prof. Cond. 4.1-4(a) (duty to communicate with client and respond to requests for information); Ohio R. Prof. Cond. 1.4(a) (same); *see generally* ABA Model R. Prof. Cond. 1.4(a) (same).

Finally, CareOne's vague promise to "assist" the Law Firm Defendants to provide the injunctive relief does not add value, and CareOne's obligation will end if its contract with the Law Firm Defendants terminates "at any time for any reason," *id.* ¶ 19(a)(iv)—including, it would seem, for the reason that CareOne does not wish to undertake any obligations under this settlement.

In assessing the value of the "injunctive relief," the Court should not be led astray by the terms in the settlement *notice*, which misleadingly suggests that under the settlement "P&A and Legal Advice Line will also collect fees from consumers for Debt Settlement Legal Services only after negotiation of a settlement with the consumer's creditor, subject to certain conditions and limitations." Doc. 111-1 at 3. The vague qualifier "subject to certain conditions and limitations" minimizes the impact of the qualifications contained in the actual proposed settlement agreement—which as described above negate the effect of any supposed limitations on the law firm's ability to charge fees. For this reason, the notice does not fairly describe the settlement. Moreover, the notice does not provide a link to the actual agreement. Instead, it states that the settlement agreement "is available for your inspection" at the clerk's office in Tampa, "during normal business hours," *id.* at 3—hardly useful for the vast majority of members of a nationwide class.

The absence of any benefit to the class, monetary or otherwise, demonstrates that the settlement is unfair. Whether or not the claims are valuable, there is no justification for compelling the class to release defendants in exchange for nothing. The class would be in no worse position if defendants moved to dismiss *and won,* because the class would get precisely the same compensation in that circumstance as under the proposed settlement: zero. A settlement that provides no value to the class should be rejected. *See, e.g., Canal Breaches*, 628 F.3d at 195-96 (rejecting $21 million class settlement because there was no assurance that the class would receive any monetary benefit after costs were paid); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 220-21 (D. Me. 2003) (rejecting settlement for discount coupons not shown "to have any significant benefit to the members of the class as a whole"); *In re Ford Motor Co. Bronco II Product Liability Litig.*, 981 F. Supp. 969, 971-72 (E.D. La. 1997) (rejecting settlement because value to plaintiffs was minimal and included none of the relief sought in the complaint); *Clement v. Am. Honda Finance Corp.*, 176 F.R.D. 15, 28 (D. Conn. 1997) (rejecting settlement where the value to the class members was "too speculative" and there was "a strong danger that the settlement will have absolutely no value to the class").

B. What The Class Members Give Away.

1. The Release Is Overly Broad.

The release under the proposed settlement is of staggering breadth. Its overbreadth can be catalogued along at least four dimensions—the subject matter of the claims, the time horizon of the claims, the predicate facts of the claims, and the individuals who are giving up the claims.

First, by covering "any and all claims, demands, suits, or causes of action of any nature or description whatsoever," Doc. 110-1, ¶ 14(u), the release sweeps far beyond the conduct at issue in this lawsuit to grant defendants blanket immunity for any type of claim. For example, the Law Firm Defendants receive a release from any legal malpractice liability to any class member, even if the class member retained one of the Law Firm Defendants for a matter unrelated to debt settlement.

Second, by covering claims "which now exist, or heretofore existed, or may hereafter exist," *id.* ¶ 14(bb), the release extends defendants' immunity from liability into the indefinite future. Not only can no class member sue any defendant for any type of claim existing today, but a defendant could act with impunity toward any class member at any time in the future without facing any civil liability.

Third, by covering claims "known or unkown, suspected or unsuspected, contingent or absolute, accrued or unaccrued, apparent or unapparent . . . without regard to the subsequent discovery of additional or different facts," *id.*, the release robs the class of claims they might already have but simply do not know about yet. No matter what a class member subsequently learns that a defendant has done, the defendant is shielded from liability by this blanket release.

Fourth, by purporting to cover claims not only by the class members themselves but by various individuals with whom the class members have or used to have some kind of relationship (such as "former spouses" and "heirs"), *id.* ¶ 24, the release attempts to extend defendants' immunity to individuals who are not even parties to this case.

2. The Class Has Valuable Claims.

The exploitative debt-adjustment practices challenged in this case are remediable under numerous state consumer-protection laws. For instance, Objector Gunn lives in Ohio, where the law restricts to $75 the consultation fee a debt adjuster can charge (in contrast to the $150 fee the settlement acknowledges that the defendants in this case charge, *id.* ¶ 19(a)(i) n.1), and restricts debt adjusting service fees to 8.5% of the consumer's payments plus up to $100 annually (in contrast to the 15% fee alleged in the complaint, Doc. 98, ¶ 55). *See* Ohio Rev. Code Ann. § 4710.02(B)(1)-(3) & (F)(1). Ohio law provides a private right of action to obtain monetary relief for violations of these provisions. *See id.* §§ 4710.04(A), 1345.09. Other states provide similar protections. *See, e.g.*, Ga. Code Ann. §§ 18-5-2 (capping fee rate at 7.5%), 18-5-4(b)(2) (private right of action); Ky. Rev. Stat. Ann. §§ 380.040(2) (capping fee rate at 8.5% plus one-time $75 set-up fee plus annual $50 maintenance fee), 380.110(1) (private right of action); Miss. Code Ann. §§ 81-22-13 (capping fees at $30 per month plus $75 one-time initiation fee and other specified one-time fees associated with obtaining credit reports, providing educational materials, and counseling regarding bankruptcy), 81-22-23(2)(d) (private right of action). In addition to these specific examples of state consumer protection statutes, class members in every state have recourse to common law claims similar to those invoked in this case, including negligence, malpractice, fraud, and unjust enrichment.

Losses to victims of exploitative debt adjustment practices can be significant, running into the thousands of dollars. For instance, Objector Gunn paid about $3,924 in unrefunded fees to the Law Firm Defendants. Gunn Decl. ¶ 4. Representative plaintiff Miranda Day alleges in her complaint that she paid $1,274.34 to defendants. Doc. 98, ¶ 91. In a similar action pending in Washington State against defendant Percels & Associates, the named plaintiffs have alleged that the fees collected by Percels totaled $320 and $2,136, respectively. *Bronzich v. Persels & Associates, LLC*, No. CV-I0-00364-EFS (E.D. Wash. Nov. 24, 2010) (Cmpt.) at ¶¶ 53-54.

Many plaintiffs have been successful in obtaining restitution from debt adjusters, including law firms. In one Connecticut case, a single plaintiff received more than $2,300 in restitution and $20,000 in punitive damages from a law firm that had taken money for debt adjustment services. *See Simmons v. Daly, Murphy & Sinnott Law Center*, No. CV020078449S, 2003 WL 21267184, at *3 (Conn. Super. Ct. May 15, 2003). A single plaintiff in Tennessee received $50,000 in compensatory damages and $100,000 in punitive damages against an illegal debt adjusting business. *See Pridemore v. Cherry*, 903 S.W.2d 705, 706, 709 (Tenn. Ct. App. 1995). The attached declarations of attorneys Amy Kleinpeter, Gregory S. Reichenbach, and Andrew G. Pizor demonstrate that plaintiffs regularly obtain significant monetary relief for claims of the type that the class will sacrifice for nothing if this settlement is approved. S*ee* Exhibit 2, Kleinpeter Decl. ¶¶ 3-8; Exhibit 3, Reichenbach Decl. ¶¶ 3-7; Exhibit 4, Pizor Decl. ¶¶ 6-8 & Ex. A. Because the value of the claims asserted in this case is not de minimis, the Court should reject the proposed settlement, which includes a broad release in exchange for nothing.

II. The Court Should Reject The Proposed Cy Pres Distribution.

As explained above, because the proposed settlement releases the absent class members' claims for no compensation, the agreement is unfair and does not adequately protect the interests of the absent class members. Rather than provide any relief to the class, the settling parties instead propose to have defendants make a $100,000 donation to the American Bar Foundation (ABF) "as a *cy pres* distribution on behalf of the Class." Doc. 110 at 5. For the reasons explained below, the proposed cy pres distribution further illustrates the inadequacy of the settlement.

Taken from the Norman French expression "*cy pres comme possible*" ("as near as possible"), cy pres is a charitable trust law doctrine under which a court directs that trust property be used for a purpose that carries out the settlor's intention after a distribution specified in the trust becomes impossible. *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002) (citations omitted). In the class action context, cy pres awards are used in two situations. First, and most typically, cy pres is used to distribute residual settlement funds after payments have been made to class members and where further distribution to class members is not economically feasible. *See, e.g., Powell v. Ga.-Pac. Corp.*, 119 F.3d 703, 706-07 (8th Cir. 1997) (approving cy pres distribution of unclaimed settlement funds where locating individual class members for an additional distribution would be very difficult and costly); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir.1990) (holding that a district court may properly consider cy pres for the purpose of distributing unclaimed funds). The proposed cy pres distribution in this case does not involve money remaining after distributions to individual class members; indeed, the proposed settlement here includes no compensation for the class.

Second, cy pres is used in class actions when it is economically infeasible to distribute settlement funds to individual members of the class, either because the class members cannot be identified or located, or because the class members' individual damages—although substantial in the aggregate—are too small to justify the expense of individual distributions. For example, in *Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, the court allowed funds collected as restitution to overcharged bus riders to be used to purchase new buses for the benefit of current bus riders in the same service region, because "identifying, locating, and notifying all those overcharged after so much time would be very difficult, if not impossible." 84 F.3d 451, 455 (D.C. Cir. 1996). Similarly, in a class action where the maximum recovery at trial would have been two million dollars and the class had more than 66 million members, a cy pres distribution was permissible—if a suitable beneficiary could be located—because the cost of distributing individual payments "would far exceed the maximum potential recovery" of about three cents per class member. *Nachshin v. AOL*, ---- F.3d ---, No. 10-55129, 2011 WL 5839610, *1 (9th Cir. Nov. 21, 2011). In contrast, several courts have rejected the use of cy pres where distribution to the class was economically feasible. *See, e.g., Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (refusing to affirm cy pres distribution where neither side contended that "it would be onerous or impossible to locate class members or [that] each class member's recovery would be so small as to make an individual distribution economically impracticable");

Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004) (rejecting proposed cy pres distribution where potential damages were sufficient to make individual payments feasible).

This case presents none of the circumstances that might justify a cy pres distribution in lieu of individual payments to class members. Defendants know the identity of the class members and how they may be contacted, and defendants know the amount of fees they collected from each class member. The settling parties suggest a cy pres distribution in lieu of individual payments because the settlement amount—less than one dollar per class member—is so small that it is not practicable to send each class member an individual share. But the potential recovery in this case is not small; the only small thing is the amount that the six defendants have agreed to pay and that class counsel has agreed to accept. Indeed, class members paid significant amounts of money to defendants, and settlements in cases against debt adjusters typically result in at least a return of the fees paid. *See* Ex. 2, Kleinpeter Decl., ¶ 8; Ex. 3, Reichenbach Decl., ¶ 7. Even if each class member paid only $100 to defendants, their damages would total more than ten million dollars. If, as is more likely, class members on average paid more than $1,000 to defendants, the damages would total more than one hundred million dollars. Because defendants know the amount of fees that each class member paid them, it would be feasible to divide an *appropriate* settlement fund among the class members based on the amount of each class member's loss.

Even if a cy pres distribution were appropriate in this case, ABF would not be a proper recipient because ABF lacks a sufficient nexus to the injuries of the class or the principles the class action seeks to vindicate. As explained in *Nachshin*, cy pres distributions "must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members, including their geographic diversity." 2011 WL 5839610 at *1 (rejecting proposed cy pres distribution); *accord In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d at 683 (emphasizing "the importance of tailoring a *cy pres* distribution to the nature of the underlying lawsuit" and rejecting a distribution to an organization that could not "claim any relation to the substantive issues in this case."); *Six Mexican Workers*, 904 F.2d at 1311-12 (rejecting cy pres distribution that was "inadequate to serve the goals of the statute and protect the interests of the silent class members").

Both the settlement agreement, Doc. 110-1, ¶ 19(b), and the motion for preliminary approval, Doc. 110 at 5, state that defendants will be required to pay $100,000 to ABF, but neither document explains anything about ABF or how a donation to ABF would benefit the class. The class notice states only that ABF "is an organization dedicated to advancing justice through rigorous research on the law, legal processes, and the law's impact on our society." Doc. 111-1 at 4. And ABF's website does not suggest that a donation to ABF would benefit a class of individuals who retained the Law Firm Defendants for assistance in getting out of debt. Although ABF may be a worthwhile organization, it should go without saying that class-member property arising from nationwide violations of various laws meant to curb debt-adjuster abuse should not be appropriated to fund an institute that conducts generalized research on the legal profession. Indeed, donations to organizations with no apparent connection to the interests of the class or the objectives underlying the lawsuit has generated widespread criticism of the use of the cy pres doctrine in class actions. "[A]s a growing number of scholars and courts have observed, the *cy pres* doctrine—unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries—poses many nascent dangers to the fairness of the distribution process." *Nachshin*, 2011 WL 5839610 at *3; *see S.E.C. v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414-17 (S.D.N.Y. 2009); Martin H. Redish et al., *Cy*

Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 Fla. L. Rev. 617 (2010). As explained in *Nachshin*, "[w]hen selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety." *Id.* at *4; *see Bear Stearns*, 626 F. Supp. 2d at 415; George Krueger & Judd Serotta, Op-Ed., *Our Class-Action System Is Unconstitutional*, Wall St. J., Aug. 6, 2008 ("Judges, in their unlimited discretion, have occasionally been known to order a distribution to some place like their own alma mater or a public interest organization that they happen to favor."); Editorial, *When Judges Get Generous*, Wash. Post, Dec. 17, 2007, at A20 ("[G]iving the money away to favorite charities with little or no relation to the underlying litigation is inappropriate and borders on distasteful."); Adam Liptak, *Doling out Other People's Money*, N.Y. Times, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like."). The court should reject the proposed cy pres distribution in this case.

III. The Attorney Fee And Incentive Payment Cannot Be Justified In Light Of The Poor Result Achieved For The Class.

Finally, the proposed settlement provides for an attorney fee award of up to $300,000, and an incentive payment of $5,000 to the representative plaintiff. Doc. 110-1, ¶¶ 23, 35. Because the agreement includes a so-called "clear sailing" clause, under which defendants agree not to contest these awards, the settlement bears heightened scrutiny. *See Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991) ("We believe it to be self-evident that the inclusion of a clear sailing clause in a fee application should put a court on its guard."). Indeed, as a general matter, all requests for attorney's fees and incentive awards are subject to searching scrutiny by the court "'to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members.'" *Holmes*, 706 F.2d at 1147 (quoting *City of Miami*, 614 F.2d at 1331).

In this case, the awards agreed to by the settling parties cannot be justified because class counsel and the representative plaintiff obtained no benefit for the class. The amounts of the attorney fee and the incentive award underscore the unfairness of the settlement to the absent class members who will release all of their claims against defendants in exchange for absolutely no value. Class counsel and the representative plaintiff should not be rewarded for selling out the class.

CONCLUSION

The Court should deny final approval of the proposed class action settlement.

Respectfully submitted,

/s/ Altom M. Maglio

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CERTIFICATE OF SERVICE

I certify that on December 15, 2011, the foregoing Objection of Class Member Raymond Gunn and Notice of Intent to Appear was filed electronically with the Clerk of the Court. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. In accordance with paragraph 7 of the order granting preliminary approval (Doc. 112), and paragraph 14 of the Notice (Doc. 111-1), the foregoing document has also been sent by mail to:

Settlement Administrator
c/o Rust Consulting, Inc.
P.O. Box 2625
Faribult, MN 55021-9625

/s/ *Michael T. Kirkpatrick*
Michael T. Kirkpatrick