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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SEAN LANE, et al., Plaintiffs, v. FACEBOOK, INC., et al, Defendants.	Case No. 5:08-cv-03845-RS Judge Richard Seeborg **OPPOSITION OF CLASS MEMBER GINGER MCCALL TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** Hearing Date: February 26, 2010 Time: 9:30 a.m. Courtroom: Courtroom 4, 5th Floor 280 South First Street San Jose, CA 95113

On February 1, 2010, class member Ginger McCall filed a timely objection to the proposed settlement in this case. McCall submits this opposition to class counsel's motion for final approval of the settlement primarily to address the points raised in the motion regarding the articles of incorporation and bylaws of the proposed Facebook foundation. McCall was unable to fully address those documents in her objection because the documents were posted online only a week before objections were due, and no notice was provided of their availability. *See* Prelim. Decl. of Daniel Rosenthal (Doc. No. 105), ¶ 10. As explained below, the late availability of these documents, and their critical importance to the fairness of the settlement, render the notice in this case defective and constitute an independent reason to deny approval.

ARGUMENT

I. Notice of the Proposed Articles of Incorporation and Bylaws of Facebook's Foundation Was Deficient.

On January 25, 2010, just one week before the February 1st deadline for class members to object to the settlement, counsel for the settling plaintiffs posted the Facebook foundation's articles of incorporation and bylaws on the Beacon Class Settlement website, http://www.beaconclass settlement.com/CourtDocuments.htm. *See* Rosenthal Decl. ¶ 10. As far as McCall is aware, no effort was made to notify class members that the website had been updated. Even for those class members who, like McCall, learned of the documents before filing their objections, the few days available between the date that the documents were posted and the deadline for objections was an insufficient amount of time to digest and prepare objections based on the thirty-nine pages of legal documents.

Because the settlement would extinguish their personal damages claims, including valuable claims for statutory damages, class members have an interest in the resolution of the class action that is protected by the Due Process Clause. *See Devlin v. Scardelletti*, 536 U.S. 1, 7-10 (2002) (emphasizing that class members are not strangers to the litigation, but parties with legal rights that are directly controlled by a settlement); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847-48 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Class members thus have a right to be heard on the question of the fairness and adequacy of the settlement. *See* Fed. R. Civ. P. 23(e)(1)(C), (4)(A)-(B). That right is meaningful only if class members have notice of all

information necessary to address the factors that bear on the settlement's fairness—that is, information sufficient to assess the benefits of the settlement and to weigh those benefits against the risk of litigation. *See Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (noting that an absent class member is entitled to "an adequate opportunity to test … the strengths and weaknesses of the proposed settlement").

Here, the lack of information regarding the organization of the foundation deprived class members of information that bears directly on the foundation's lack of independence from Facebook. *See Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (notice must "describe the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard") (internal quotation omitted). To begin with, the articles of incorporation revealed for the first time the identities of the foundation's initial directors and provide that Tim Sparapani, Facebook's chief lobbyist, will be one of the foundation's three initial directors and co-president of the foundation. *See* Articles of Incorporation Art. VI. As such, he will "be the general manager and chief executive officer of [the] Corporation and shall, subject to the control of the Board, have general supervision, direction and control of the business and affairs of [the] Corporation." Bylaws Art. V, sec. 7. Moreover, the bylaws allow the directors to be paid for their attendance at board meetings—an unusual provision for nonprofit organizations—meaning that the settlement allows money rightfully belonging to the class to be paid to a Facebook employee. Bylaws Art. IV, sec. 16.

The insidious effect of having a Facebook employee on the board is exacerbated by the bylaws' unanimous-vote requirement. Bylaws Art. IV, secs. 4, 11. Although class counsel portray the unanimity requirement (at 24) as a benefit to the class, it actually ensures that the Facebook director will have undue influence over the board. Just as unanimity precludes any one director from steering the foundation "in the wrong direction," Pls.' Mot. at 24, it gives the Facebook employee veto power over all corporate governance issues, including the important issues of board succession (Art. IV, Sec. 4) and amendment of the bylaws and articles of incorporation (Art. IV, Sec. 11). The

unanimity requirement thus allows Facebook to prevent the foundation from taking action with which it disagrees.

The articles of incorporation also name the other two initial directors, but class counsel did not disclose those directors' connections with Facebook. The motion to approve the settlement does not reveal, for example, that director Larry Magid is co-director of "Connectsafely.org," an organization that receives funding from Facebook. *See* Connect Safely | Supporters Logos, http://www.connectsafely.org/our_supporters. Such undisclosed connections raise at least the appearance of impropriety. Moreover, continuing conflicts of interest are expressly sanctioned by a provision in the bylaws allowing directors to accept compensation for "serving [Facebook] in any other capacity." Bylaws Art. IV, sec. 16. Whether the directors have commendable track records with respect to privacy issues or are experts in their fields, as class counsel emphasize (at 23-24), is beside the point. An independent privacy foundation should not be led by individuals with potential conflicts of interest, no matter how "well respected" or "distinguished" they might be.

Because the foundation is the sole "relief" provided by the settlement, the foundation's organization and independence are of central importance to an evaluation of the settlement's fairness. Indeed, class counsel's primary response to the arguments of McCall and other objectors (at 17) is to assail them for failing "to review the actual terms of the Foundation that guarantee its independence." Without knowing any of the key terms of the Facebook foundation at the time their objections were due, class members may have been discouraged from objecting and, even if they wanted to object, lacked the necessary information to object completely. *See Molski v. Gleich*, 318 F.3d 937, 952 (9th Cir. 2003) ("By failing to explain that only claims involving literally physical injuries were not released under the proposed consent decree, the notice misled the putative class members."); *In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 970-72 (9th Cir. 2007) (vacating settlement under PSLRS where it underestimated per claim recovery based on settling partners' erroneous assumptions). Thus, the Court, at a minimum, should require that the class receive notice of the terms of the articles of incorporation and bylaws and an opportunity to object to those terms.

II. The Foundation Is Not an Adequate Substitute for Relief to the Class.

Although the flaws in the Facebook foundation are serious, even a fully independent foundation would not make the settlement fair. McCall's primary objection to the settlement is that it disposes of class members' claims while providing them no benefit in return. In *Molski*, the Ninth Circuit held that the district court abused its discretion in approving a settlement that released the class's claims for damages in exchange for the defendant's donation to several nonprofit organizations. 318 F.3d at 954. Central to the court's holding that the settlement was unfair was "the fact that the cy pres award . . . replaced the claims for actual and treble damages of potentially thousands of individuals." *Id.* As in *Molski*, class members under the proposed settlement here "receive[] nothing." *Id.*

Class counsel respond to McCall's points about the fairness of the settlement primarily by mounting irrelevant attacks on her motives. As McCall has pointed out, however, it is the settling parties who have the burden of providing evidence of the settlement's fairness. Here, they have made little effort to meet that burden. For example, although class counsel reveal for the first time that the class has more than 3.5 million members, they still do not say how many of those class members have claims under the Video Privacy Protection Act (VPPA). It is impossible to make a full evaluation of the settlement's fairness without evidence of the value of the class's claims, but, if only one percent of class members have VPPA claims, the minimum potential statutory damages on just this one count would be more than $87 million. 18 U.S.C. § 2710(c)(2)(A). Even assuming that only a very small number of class members have VPPA claims, class counsel have not explained why those class members who do have such claims could not receive damages as a subclass.

Class counsel point to a declaration by Jeremy Wilson, one of the plaintiffs' lawyers in the *Harris v. Blockbuster* litigation, for the proposition that VPPA claims "cannot be realistically valued at anywhere near $2,500 per claim." Pls.' Mot. at 20. Wilson's declaration, in turn, simply notes that there is little case law interpreting the VPPA and that monetary damages under the VPPA are "discretionary." Wilson Decl. ¶ 9. Although it is true that few courts have addressed the VPPA, the plain language of the statute makes clear that at least the minimum statutory damages must be

awarded: "The court may award actual damages *but not less* than liquidated damages in an amount of $2,500." 18 U.S.C. § 2710(c)(2)(A) (emphasis added). In other words, the liquidated damages provided by the statute are not "discretionary." Indeed, class counsel appear to concede the potential for significant damages in this case, arguing that Blockbuster faces the prospect of crippling liability. But that is not, as class counsel contend, a reason to release the claims against Blockbuster. On the contrary, the prospect of crippling liability is powerful incentive for Blockbuster to settle the case and to provide some value to the settlement. The proposed settlement, however, provides that Facebook—not Blockbuster—will pay *all* $9.5 million into the settlement fund. *See* Settlement Agreement, Exh. 3 ("Facebook will provide $9.5 million to set up a non-profit foundation"). Blockbuster contributes nothing.

McCall understands that settlement involves some level of compromise, but class members here are asked not to compromise their claims, but to abandon them. Where class members receive nothing of value, the "litigation uncertainties" that concern class counsel (at 8) provide no incentive for the class to settle. *See TD Ameritrade Accountholder Litig.*, Case No. 07-2852 (N.D. Cal.) ("From the perspective of the class, the worst-case scenario may be realized if following the denial of a final settlement approval the case were to fail on dispositive motion. But in that event, class would end up essentially in the same situation it would be if final settlement approval were approved: with nothing."). As long as class members have nothing to gain from the settlement, they have nothing to lose by risking litigation. Indeed, because they will lose their claims against both Facebook and the Beacon merchants, class members will be left worse off under the settlement than if the case had never been brought.

Class counsel also assert that any concern about Blockbuster has been cured because "[t]he parties to the *Harris* action have now settled and class counsel in that action support this settlement." In fact, the settlement of the *Harris* litigation only raises new concerns. Attorneys for the *Harris* plaintiffs moved to intervene in this case on the ground that "Facebook, Inc., through the proposed settlement, was attempting to insulate Blockbuster, Inc., from liability in the Texas action." Wilson Decl. ¶ 3. *Harris* counsel's change in position is not explainable by any changes in the terms of the

settlement. According to Wilson's declaration, the "significant benefit" to the class from the settlement in the *Harris* litigation is that Blockbuster is required to: (1) designate one of its employees to be responsible for compliance with the VPPA; (2) disclose on its website that the VPPA is law, that Blockbuster tries to comply with it, and that customers can contact Blockbuster with questions about Blockbuster's disclosure; (3) distribute documents internally regarding the VPPA; and (4) post information on its website regarding the privacy foundation formed by the proposed settlement in this case. Wilson Decl. ¶¶ 5, 6. Although these provisions describe sound business practices that Blockbuster should have always had in place, none of them provides any benefit to the class. The only ones who stand to benefit from the *Harris* settlement are the lawyers in that case, whose time spent litigating *Harris* is now included in class counsel's motion for attorneys' fees.

From the beginning, the settlement process here has borne a disturbing resemblance to a "reverse auction," in which the defendants strike a deal with class counsel most willing to settle cheaply in exchange for generous attorneys' fees. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 282-83 (7th Cir. 2002). *Harris* counsel's change of heart, which corresponds to a request for their fees, only furthers those concerns. *See Molski*, 318 F.3d at 955-56.

CONCLUSION

For the foregoing reasons, and the reasons set forth in McCall's objections (No. 96), the proposed settlement should be rejected.

Dated: February 23, 2010

Respectfully submitted,

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