IN THE CIRCUIT COURT IN THE
SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

WILLIAM T. CHAPMAN and ALICE C. MACON, individually and on behalf of all others similarly situated *Plaintiffs*, v. BUTLER & HOSCH, P.A., C. VICTOR BUTLER, JR., and ROBERT H. HOSCH, JR., *Defendants*.	CASE NO. 2000-2879 **OBJECTIONS TO APPROVAL OF THE SETTLEMENT AGREEMENT AND MOTION FOR CONTINUANCE OF JOHN W. PYLA, MARTHA L. PYLA, AND JAMES L. KNAPP**

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Class members John W. Pyla, Martha Pyla, and James Knapp ("Objectors"), hereby object to the approval of the settlement agreement. In addition, to allow the Court and the parties an opportunity to properly address the defects raised in these objections, Objectors urge this Court to continue the fairness hearing, together with the objection, opt-in, and claim deadlines for a period of no less than 90 days.

INTRODUCTION AND SUMMARY OF ARGUMENT

Before turning to the substance of their objections, Objectors draw the Court's attention to the unusual difficulties they have encountered in preparing these objections. The settlement agreement was entered into on October 19, 2005, and was conditionally approved by this Court the next day. Mailed notice of the settlement was to be sent by October 28, 2005, and those members of the class of who received the notice were told they had until November 28, 2005–less than thirty days from their receipt of the notice, including the Veteran's Day and Thanksgiving holidays–to seek the advice of counsel, evaluate the settlement, decide whether to file a claim, opt-out, and/or object, and if necessary, to prepare and file objections with this Court.

Yet, as explained in detail below, both the notice and the settlement agreement provided scant information concerning the basic terms of the settlement, making it impossible for class members, even those few with the benefit of counsel, to make informed decisions concerning their rights. The notice did not even identify the size of the class and thus left class members to guess at their expected share of the settlement fund. And although the settlement agreement contains a "clear-sailing provision," by which defendants agree not to object to class counsel's fee request, the notice offered no clue as to the amount class counsel are seeking in fees. Without this information, class members could neither calculate their expected share of the fund nor "determine the possible

influence of attorneys' fees on the settlement in considering whether to object to it." *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1130 (7th Cir. 1979). For this reason, among others, "class action settlement notices must contain the maximum of attorney's fees sought by class counsel." *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 957-958 (Tex. 1996) ("failure to notify the class members of the potential size of class counsel's fee award" requires invalidation of the settlement). Here, class counsel did not disclose the amount of their fee request at all—let alone in a notice to the class—until they filed their motion with this Court on November 17, 2005, leaving just *five business days* (excluding the Thanksgiving holiday) before the deadline for filing these objections.

Worse still, an entire category, and most likely the majority of the class members—those from whom Defendants sought to collect fees and costs but who did not reinstate or pay off their mortgages—*did not receive notices at all*, meaning that, under the settlement, their claims and defenses will be completely released without any opportunity to decide whether to participate in this settlement or not, and without any possibility that they would receive even a meager share of the settlement fund. With such poor notice, it should come as no surprise that so few class members have managed to come forward and present objections.

We raise these defects in the notice procedures at the outset not only because they undermine the propriety of the settlement, but also because they highlight the need for this Court to apply the brakes and allow the absent class members time to develop and marshal the facts and law in support of their positions. Accordingly, we propose that the fairness hearing, together with the objection, claim, and opt-out deadlines, be continued for a period of no less than 90 days. We also reserve the right to supplement the record with additional filings and to take discovery as needed.

As to the substance of the settlement terms, even on the available evidence, it is apparent that they are fundamentally flawed. Simply put, this settlement leaves many class members *worse off than if this lawsuit had never been brought*. It releases an extremely broad range of claims, including defenses and counterclaims that may be used in pending or future home foreclosure proceedings and claims that are well beyond the scope of this litigation, in exchange for a combination of grossly inadequate monetary relief and poorly defined nonmonetary relief that is of no benefit to the class. And, in addition to the overbreadth of the releases as a general matter, the settlement releases the claims of an entire category, and likely the majority, of the class—those who did not reinstate or pay of their mortgages—without providing them notice and, thus, an opportunity to obtain relief or opt out.

The First District Court of Appeal recently held, on essentially identical facts, that merely *excluding* those mortgagees who did not reinstate or pay off their mortgages from a similar class action was grounds for reversal. *See Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole,* 896 So.2d 773, 776 (Fla. 1st DCA 2004). The error here, of course, is much more fundamental, because the claims of those class members will be completely *released* for all time without compensation. In no jurisdiction in the United States will a settlement in which absent class members' claims are "throw[n] to the winds" in this fashion be permitted to stand. *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 17 n.6 (2d Cir. 1981). "An advantage to the class, no matter how great, simply cannot be bought by the uncompensated sacrifice" of the claims of other members of the class. *Id.* at 19.

Finally, because class counsels' request for fees was not filed until November 17, 2005, leaving us with no more than five business days to review it, we were unable to perform a thorough

review of the request. Given the structure of the settlement with respect to fees and the size of the request in relation to the meager relief afforded the class, we believe class counsel's request renders the settlement unfair. We therefore object to the request and reserve the right to respond in detail after we have had adequate time to study it.

* * *

These objections are filed on behalf of three class members: John W. Pyla, Martha L. Pyla, and James L. Knapp.

The Pylas. The Pylas received a notice of the proposed settlement by mail on or about November 1, 2005. After they defaulted on their home mortgage, Butler & Hosch filed a foreclosure action against the Pylas on behalf of their mortgage lender, Countrywide Home Loans, on July 19, 2001. On or about August 28, 2001, the Pylas paid Butler & Hosch the excessive fees and costs that are the subject of this action and reinstated their mortgage.

James Knapp. Mr. Knapp *did not receive any notice* of the proposed settlement. After he defaulted on his Countrywise Home Loans mortgage, Butler & Hosch filed a foreclosure action against Mr. Knapp on October 12, 2001. Almost immediately thereafter, Mr. Knapp entered into a forbearance and repayment plan with Countrywide to reinstate his mortgage debt ad pay any past due amounts. The payment plan and Mr. Knapp's payments under that plan included the excessive fees and costs that are the subject of this action. The 2001 foreclosure action remains pending and Mr. Knapp is being represented in that action by Jackonville Legal Aid, Inc.

ARGUMENT

I. THE COURT SHOULD CONTINUE THE FAIRNESS HEARING AND DEADLINES.

The simultaneous scheduling of the objection deadline and the fairness hearing so soon after the conditional approval of settlement have put the Objectors in an awkward position. Objectors had no choice but to file these objections at the last minute, making it impossible for the Court to review them in advance and making it impossible for class counsel to respond in writing prior to the fairness hearing. Even given the very short amount of time between receipt of notice and the deadline for objections, however, Objectors have identified numerous aspects of this settlement that are either independently unlawful or that call into question to the propriety of the settlement as a whole. Nationally-prominent experts on class actions and consumer litigation have reviewed or are in the process of reviewing this settlement and will be offering their views. But, with the exception of Todd B. Hilsee, an expert on class action notice, and Alan M. White, an expert on mortgage foreclosure litigation, both of whom were able to evaluate aspects of this settlement with remarkable dispatch and prepare affidavits that are filed herewith, these experts have found it impossible to conduct a full review and submit their views before the scheduled hearing date.

The most reasonable step is to continue the fairness hearing and the deadlines for class members to exercise their rights for at least 90 days to allow to the issues raised here to be properly aired at the trial court level. There is no question that this Court has the authority to continue the fairness hearing. *See* Order of Conditional Approval at 10, ¶ 26 ("The Court reserves the right to adjourn the hearing from time to time without further notice and to protect and effectuate this order and all matters relating to the administration and execution of the settlement agreed to by the

parties."); Fla. R. Civ. P. 1.460. Even in ordinary trial litigation, where the parties have been apprised of the litigation for some time, motions for continuances are granted where, as here, their denial would cause an injustice to the movants and the opposing parties would suffer minimal prejudice as a result. *See, e.g., Michigan Nat. Bank v. Ibis Landing Venture, Ltd.*, 899 So.2d 328 (Fla. 4th DCA 2005) (reversing trial court's denial of motion for continuance as abuse of discretion).

In the class action settlement context, it is critical that courts balance any need to adhere to rigid deadlines against the rights of absent class members. *See, e.g., In re Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315 (3d Cir. 2001) (reversing trial court's exclusion of class member for failure to meet registration deadline). "Integral to that balancing . . . is the court's responsibility and inherent duty to protect unnamed, but interested persons." *Id* at 321. Absent class members "are akin to wards of the court," *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972), and "the court plays the important role of protector of the absentees' interests, in a sort of fiduciary capacity." *In re Orthopedic Bone Screw Products*, 245 F.3d at 321. To rush the fairness process without due consideration of these objections would be inconsistent with that important role.

We verbally requested that class counsel stipulate to a continuance in advance of this filing, but counsel declined to consent on the grounds that doing so might require additional notice the class. Not so. As the conditional approval order in this very case recognizes, fairness hearings and deadlines for inclusion and exclusion are routinely continued in class action litigation without any need for additional notice. *See, e.g., In re Prudential Ins. Co. of America Sales Practices Litigation*, 148 F.3d 283, 327 n.89 (3d Cir. 1998) (notice of fairness hearing's postponement "not required"). The reason for this is simple: The class is not harmed in any way by a continuance of the hearing.

The only class members who would even arguably be prejudiced are the small number who actually appear in court on the original hearing date, and a court clerk can inform them of the continuance.

Finally, 90 days is an appropriate minimum period of time for continuance of the hearing and deadlines. Such a continuance would still allow less time than is routinely permitted in class actions in which the stakes for absent class members are much lower. *See, e.g., Fruchter v. Florida Progress Corporation*, 2002 WL 1558220 (Fla. Cir. Ct. 2002) (settlement conditionally approved on October 19, 2001; fairness hearing and deadline for objections set for February 19, 2002; Circuit Court's opinion with respect to settlement issued on March 20, 2002).

II. NOTICE WAS DEFICIENT IN NUMEROUS RESPECTS AND MOST CLASS MEMBERS RECEIVED NO NOTICE AT ALL.

Florida Rule of Civil Procedure 1.220 is "based on Federal Rule of Civil Procedure 23," but differs in a few respects. Fla. R. Civ. P. 1.220, Committee Notes. One such difference is that "[t]he notice requirements have been made *more explicit and stringent* than those in the federal rule." *Id.* (emphasis added). The rule provides that, after a claim has been certified for class treatment, it "shall not be . . . compromised without approval of the court after notice and hearing," and further, that "[n]otice of any . . . compromise *shall be given to all members of the class*." (emphasis added). In addition to Rule 1.220's stringent requirements, of course, notice must also satisfy constitutional standards. The touchstone for procedural due process analysis remains the U.S. Supreme Court's decision in *Mullane v. Central Hannover Bank & Trust Co.*, which held that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonable adopt to accomplish it." 339 U.S. 306, 315 (1950); *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("The plaintiff

must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the *best practicable*.") (emphasis added).

It is plain that the notice procedures in this settlement fell far short of what is required under both Rule 1.220 and the U.S. Constitution. As described in detail in the affidavit of notice expert Todd Hilsee, the notice of the settlement in this case was grossly inadequate as a general matter. *See* Hilsee Aff. at 33, ¶ 88-89 (concluding that "[t]he Notice Plan was not reasonably calculated to inform the class . . . I have studied numerous communication efforts involving important information communicated in class action cases. Of all these experiences, the communication of the Class members' rights and options in the *Chapman* settlement ranks among the least effective."). Among the most significant failures of notice are the following:

Address Updating**:** "The notice plan did not prescribe any steps to update addresses. In fact, in a highly unusual step, totally inconsistent with 'best practicable' notice practice, the Settlement Agreement banned any efforts to find better addresses. This is a significant problem because people move quite often in our country, and this class, mostly lower income people who move most often – dates all the way back to 1996." Hilsee Aff. ¶ 18. Given the availability of Internet searches and other tools that can be used to update addresses at minimal cost, the settlement's provision that "no skip-tracing or other efforts to locate the Class Members shall be required," Settlement ¶ 15, cannot be justified. Moreover, skip-tracing, the process of locating current addresses, "is crucial--without skip-tracers, typical consumer class actions will distribute benefits to only twenty-five to fifty percent of the class." S. Rossman & D. Edelman, *Consumer Class Actions* (5th ed. 2002) § 13.2.3 at 175. The failure to even attempt to update the addresses in defendants' records violates due process. *Plemons v. Gale*, 396 F.3d 569, 576 (4th Cir. 2005) ("when prompt return of an initial mailing makes

clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient").

Language of the Notice**:** "The Notice goes out of its way . . . to discourage exclusion." Hilsee Aff. ¶ 44. The notice uses highly unusual language that appears designed to scare the reader out of opting-out of the settlement, and is also poorly drafted and difficult to understand. Such a notice violates due process. *See Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) ("[T]he best notice practicable under the circumstances cannot stop with . . . generalities. It must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member.").

Opt-In and Opt-Out Process: Although all class members are ostensibly entitled to equal payments under the terms of the settlement, the notice and claim procedure requires class members to receive notice and affirmatively opt-in to the settlement in order to receive payments but does not require them to opt-in to be bound by the release. There is no apparent reason why automatic payments could not have been used. *See* Hilsee Aff. ¶¶ 82-83. Furthermore, the notice packet includes a simple claim form to opt-in, but places an unnecessarily onerous burden on those who wish to opt-out, requiring them to handwrite, word-for-word, a long passage, including phrases such as "I will receive no money whatsoever," "I may receive nothing" and "I may receive less than I would have." This requirement is unprecedented and has been employed for only one reason: to effectively eliminate opt-out rights. *See* Hilsee Affidavit ¶ 15 ("I have never in all of my cases experienced a case where a Class member was literally required to handwrite an exclusion request . . . Any requirement to re-write certain lengthy phrases is clearly using communication requirements as an artificial deterrent against the free exercise of legal rights.").

Although this brief could easily become an exhaustive catalogue of the settlement's failures of notice, we believe that the above examples are sufficient to show that the notice program was woefully inadequate and must be rejected. Two additional failures of notice merit further discussion.

A. The Failure to Inform Class Members About the Amount of Fees Sought Rendered the Notice Defective and Requires That the Settlement Be Rejected.

The settlement agreement contains two key provisions with respect to attorneys' fees. First, it contains a "clear sailing" provision, under which the "[t]he Settling Defendants shall not object to or otherwise contest the Plaintiffs' Attorneys' Fees and Expenses or any request therefor." Settlement ¶ 36. Second, the agreement provides that attorneys' fees and expenses determined by the Court will be distributed from the settlement fund before any distribution is made to the class. Settlement ¶ 36. Both of these arrangements trigger heightened scrutiny by the courts. *See Weinberger v. Great Northern 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."); *id.* at 524 (describing "the conflict between a class and its attorneys" as "most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery").

Despite these arrangements with respect to fees, the notice revealed *nothing* to the class about the amount of fees to be sought by class counsel. Only in their fees motion to the Court, filed just days before the hearing, did class counsel reveal that they seek a staggering 46% of the entire settlement fund in attorneys' fees and costs. As Todd Hilsee explains, "[t]his [recent] revelation does not help the class members who have received the notice without any such information. The fact that the $1,775,000 settlement fund will actually be closer to $1,000,000 is completely lost on

class members who received this notice." Hilsee Aff. ¶ 38. Particularly where the amount of fees sought is such a large percentage of the settlement fund, failure to disclose the amount leaves the class members completely in the dark about the settlement terms and leaves them unable to meaningfully exercise their rights.

For this reason, both state and federal appellate courts do not hesitate to invalidate settlements based on a failure to disclose the amount of a fee request. *See General Motors Corp. v. Bloyed*, 616 S.W.2d 949, 957 (Tex. 1996) ("[T]he settlement must be set aside because the class members did not receive adequate notice of all the material terms of the proposed settlement, specifically the projected amount of attorney's fees and expenses."); *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980) (holding that trial court "must require that notice be given to the class of the proposed attorneys' fees"); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1130 (7th Cir. 1979) (without a "clear estimate of attorneys' fees and expenses," class members "could not determine the possible influence of attorneys' fees on the settlement in considering whether to object to it"); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 803 & n.23 (3d Cir. 1995) (castigating class counsel for failure to disclose any information about fees in the class notice); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 1995 WL 222177 (E.D. La. Mar. 15, 1995) (striking down proposed class action settlement and criticizing class counsel's failure to notify class members of the amount of fees to be sought); *see also State v. Homeside Lending, Inc.*, 826 A.2d 997, 1010-1011 (Vt. 2003).[1]

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[1]Both the *Guidelines* for consumer class action settlements and the leading treatise on consumer class actions make clear that providing notice of the amount of the fee request is essential. *See The National Association of Consumer Advocates Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 399 (1998). (Notice should include "[t]he total maximum fees, in dollars, to be sought by the class attorneys, and the method

"[A]ny contention that providing fee information in a class action notice would be impracticable is belied by the routine inclusion of such information in class action notices." *Bloyed*, 916 S.W.2d at 958 (collecting cases). Indeed, here, the practicability of such notice is demonstrated by the fact that class counsel were able to prepare and submit their fee request to the Court just weeks after the notice to class members was sent out. There is no reason why this essential information could not also have been shared with the class.

B. A Majority of the Class Received No Notice At All.

Rule 1.220's requirement is clear: Notice of a proposed settlement must "be given to *all* members of the class." Fla. R. Civ. P. 1.220(e) (emphasis added). That basic requirement was violated here–and violated in spades. Under the express terms of the settlement, the notice was inexplicably sent only to those class members "*who reinstated or paid off their mortgages* at their last-known addresses to the extent such addresses can be obtained through computerized records produced by the Defendants," and, "[o]ther than requesting forwarding service, no skip-tracing or other efforts to locate the Class Members [were] required." Settlement ¶ 15 (emphasis added). Yet the definition of the settlement class is far broader. It includes "all persons against whom Defendants have claimed, attempted or threatened to collect costs and attorney fees as counsel for a lender or mortgagee through a reinstatement letter and/or foreclosure of a mortgage relating to

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whereby they were calculated (hourly, hourly with a multiplier, percentage, or a combination), as well as the source from which payment will be sought."); Rossman & Edelman, *Consumer Class Actions* § 10.3.1, at 139-40 ("Care should be taken to describe the proposed settlement adequately, including the best available information concerning fees and expenses that may be deducted from the gross amount. The notice should also contain an estimated range of recovery . . . that members of the class may expect to receive if the settlement is approved.").

residential property in the State of Florida during the period from December 6, 1996 to the date of the entry of the Order of Conditional Approval." Settlement ¶ 1.x.

As explained below in our discussion of the settlement's substantive fairness, this mismatch between the category of plaintiffs to which notice was sent and the category of plaintiffs who will be bound by the settlement is extremely significant. It means that a large category of plaintiffs will have a broad range of claims released without ever receiving notice of the settlement or the opportunity to decide whether to opt out or opt in. Such a settlement cannot stand.

This total failure to provide notice, though never permissible under Rule 1.220, is particularly egregious here because it would have been easy for the settling parties to employ well-established methods to locate those class members who did not reinstate or pay off their mortgages. *Se*e Hilsee Aff. ¶¶ 21-27. Moreover, it is important to note that some of these class members undoubtedly continue to live at the same addresses found in Defendants' records, because they have neither reinstated their mortgages nor lost their homes, *see* White Aff. ¶¶ 10-12, but notice was apparently not even sent to them. Mr. Knapp is one of these unnoticed class members.

There can be no serious argument that mere publication–particularly the perfunctory and ineffective publication that occurred here, *see* Hilsee Aff. ¶¶ 28-35 –is sufficient to provide these members of the class with notice. The U.S. Supreme Court could have been speaking about the publication notice in this very case when it warned that "when notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315; *see Greenfield v. Village Indus., Inc.*, 483 F.2d 824, 830 (3d Cir. 1973) (two-time publication in *Wall Street Journal* and *Philadelphia Evening Bulletin* "was insufficient notice under any standard of fairness, justice, or due process"); Rossman and Edelman, *Consumer Class Actions* § 10.1.4 at 137 ("If class members

cannot be located by resorting to the Internet, credit records, postal records, motor vehicle records, and similar sources, they probably cannot be found, and notice by publication is a meaningless and expensive gesture."). Indeed, the U.S. Supreme Court has held that due process *requires mailed notice* even where the number of interested parties is staggering and the individual property interests at stake are small. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974), the Court held that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort," even though there were 2.25 million such individuals, most of whom had small claims. The Court's decision was based on the requirements of Fed. R. Civ. P. 23(c)(2), which, as we have noted, are if anything less exacting than Rule 1.220. In any event, the Court found that its conclusion was reinforced by the Advisory Committee's Note showing that the Rule incorporates the *Mullane* due process standard. *Eisen*, 417 U.S. at 173-175.

Finally, as an empirical matter, the ineffectiveness of the notice here was entirely predictable. A simple analysis of the circulation data of the Florida newspapers in which the notice was published would have revealed that, even if *every* class member was inclined to read *every* tiny fine-print notice buried in the back of their newspaper, with respect to those class members who did not reinstate or pay off their mortgages, "only small percentages . . . received any notice at all." Hilsee Aff. ¶ 34.

III. THE SETTLEMENT'S CONCESSIONS PLAINLY OUTWEIGH ITS BENEFITS.

Although Rule 1.220 does not specify the standard under which courts are to evaluate the fairness of a settlement and the Florida Supreme Court has yet to address the issue, we agree with class counsel that the standard in Florida courts is the same one used by the federal courts: The settlement must be fair, adequate, and reasonable. This settlement fails that standard because it

leaves almost the entire class in a *worse position* than if class counsel had abandoned the litigation altogether.

A. The Benefits for the Class Are Minuscule.

Although class members would have no way of knowing it from the notice, the relief they would receive under this settlement is minuscule. Of the $1,775,000 settlement fund, class counsel seeks fully $750,000 in attorneys' fees and $72,089.84 in costs–over 46% of the total fund. After deducting $10,000 in incentive awards for the class representatives, $942,910.16 is left for the class. In their brief seeking approval of the settlement (at 5), class counsel state that 18,386 class members were sent mailed notice of the settlement. Thus, even if the class consisted *only* of the subset that reinstated or paid of their mortgages–the only portion of the class that received notice–those class members' share of the fund would amount to $51.29 each. Common sense and experience suggests that the number of class members who did not reinstate their mortgages is considerably larger that the subset that did reinstate, but we have no way of ascertaining that number without the cooperation of the settling parties. Presumably Butler & Hosch's records contain the answer and presumably have learned it in the course of discovery. Once that unknown number of additional class members is factored into the equation, each class member's share of the fund becomes considerably smaller.

B. The Scope of the Release Renders the Settlement Both Unlawful and Unfair.

The relatively small amount of monetary relief afforded class members under the settlement must be weighed against the release of claims that Butler & Hosch receives in exchange. The settlement's release provisions are breathtakingly broad. The settlement defines "Released Claims" as "any and all claims, demands, actions or causes of action which the Plaintiffs and/or Class have, or formerly had, or may have in the future, whether known or unknown, against the Released Parties

based upon or arising out of any violation of any and all state and federal statutes and common law or breach of duty or act or omissions or other transaction of [sic] occurrence, whether for actual or statutory damages or other relief, and which relates in any way to Settling Defendants' actions, omissions or other involvement in the Underlying Foreclosures." Settlement ¶ 1.r; *see also id.* (at 21-22) ("Plaintiffs . . . shall be deemed to release, remise and forever discharge the Released Parties from all causes action, suits, claims, demands, liabilities, judgments, debts, costs, charges, and damages, including any and all claims for indemnity and attorneys' fees and costs, whatsoever, in law or in equity, arising under all federal and state statutes and common law theories of relief or recovery, known or unknown at this time, arising out of the Underlying Foreclosures....").

Thus, the release purports to cover not simply the claims asserted in the class action complaint, but any claims or potential claims related to the underlying foreclosures. That release places class members in a far worse position than if this suit had never been brought. In return for the minimal relief described above, class members are stripped of all the rights and protections that federal and state law provide consumers who are victims of unfair debt collection practices and unfair trade practices. Alan M. White, an expert on mortgage foreclosure litigation explains, opines that "the claims released by the settlement in *Chapman* could in individual instances have a potential value to the homeowner of $1,000 to $5,000 or more." White Aff. ¶ 8.

The breadth of the release renders the settlement unlawful. The settling parties cannot release claims for which they were never authorized to represent the class. For instance, the class members have claims under the Florida Deceptive and Unfair Trade Practices Act, *see Echevarria*, 896 So.2d 773 (Fla. 1st DCA 2004) (affirming certification of FDUTPA claims on parallel facts), and the federal Fair Debt Collection Practices Act, *see Miller v. Wolpoff & Abramson*, 321 F.3d 292 (2nd

Cir. 2003). Class counsel did not purport to represent the class members on these claims, and therefore cannot now execute a release of those claims. *See National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9, 18-20 (2d Cir. 1981); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1563 (3d Cir. 1994). Startlingly, the broadly worded release not only bars class members from affirmatively bringing suits against the settling defendants, but also deprives the victims of Butler & Hosch's collection practices from important defenses to foreclosure proceedings they are entitled to assert defenses under state and federal law. *See* White Declaration ¶ 10-12. The release also deprives class members of their ability to defend pending and future foreclosures in equity based on bad faith, unjust enrichment, and invalid acceleration based on the amounts stated in the preforeclosure acceleration notice. In sum, the class members receive little more than pocket change in exchange for the release of powerful defenses that help them save their homes.

It is elementary in consumer class actions that plaintiffs' counsel must take special care in drafting or agreeing to release language in settlements. *See* Rossman & Edelman, *Consumer Class Actions* § 12.3 at 162 ("Overbroad releases are unfair to the unnamed class members who may not understand the extent or the possible effect of such releases."); *id*. § 12.3.3 at 165 ("Plaintiffs' counsel should not allow any release phrased in vague terms, such as 'all claims which could have been brought.'"). That care was not exercised here.

C. It Is Unlawful To Force Class Members to Relinquish Defenses To Claims That Have Yet To Accrue.

The settlement's overbroad release is unlawful for an independent reason. Butler & Hosch seeks to release the class members' defenses and counterclaims with respect to *future* claims that have yet to be brought and that have yet to accrue. See Settlement ¶ 4 (releasing "all claims which

Plaintiffs and the Class *have or may have against* [Defendants], whether or not based on facts now known or subsequently discovered"). The settlement purports to bar class members from raising defenses to *future* foreclosure actions — not only foreclosure actions that have not been filed but actions that cannot be filed because the borrower's loan is not presently in default or otherwise subject to foreclosure. It violates class members' due process rights to force them to relinquish defenses to claims that have yet to accrue. *See Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 259-61 (2d Cir. 2001) (settlement violated class members' rights to due process by purporting to relinquish their unaccrued future claims); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997); *Schweitzer v. Reading Co.*, 758 F.2d 936, 943 (3d Cir. 1985) (rejecting argument that "a person who had no inkling that years in the future he would be killed by a product produced by the debtor would be required to file a claim in the debtor's ... bankruptcy proceedings so as to preserve any rights that he might have in a future tort suit"); *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624, 626-27 (E.D. Ark. 1981) (future claims cannot satisfy Rule 23(a)'s typicality, commonality, or adequacy of representation requirements); *Freeman v. Motor Convoy Inc.*, 68 F.R.D. 196, 200 (N.D. Ga. 1975) (class action could not include future plaintiffs because "overbroad framing of the class may operate to deprive absent members of due process") (citing *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125-27 (5th Cir. 1969) (Godbold, J., concurring)); *see generally* Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 Colum. L. Rev. 397, 408 (1985) (certification of "futures" class violates due process because doing so requires courts to apply Rule 23 in a "factual vacuum," introducing "a substantial element of speculation, distortion, and confusion" into the certification process).

As in *Super Spuds*, where the Second Circuit held that the class representatives did not have authority to represent class members regarding unliquidated potato futures contracts, 660 F.2d at 17-18, the class representatives here simply do not have the authority to relinquish future claims or defenses before certain events (the events giving rise to a right to foreclose) have occurred. The concern is that class members not currently subject to foreclosure will not opt out and, later, when facing foreclosure, will find out that they have released their defenses. *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974) (rejecting release of future asbestos personal-injury claims because, before an injury has been sustained, "persons might neglect to 'opt-out' of the class, and then discover some years in the future that they have contracted asbestosis, lung cancer or other pulmonary disease"). The illegality here, as in *Super Spuds*, is greatly exacerbated, because "the notice of settlement did not adequately apprise class members" that they would be giving up their defenses that may be used in foreclosure proceedings, 660 F.2d at 16, thus making it impossible for the class members to intelligently exercise their opt-out rights.

D. Due to the Overwhelming Failures in Notice, Most of the Class Releases Potentially Valuable Claims In Exchange For Nothing.

As discussed above, perhaps the most glaring failure in this settlement is that a large category of the class–those who did not reinstate their mortgages–has been effectively written out of participation in the settlement by virtue of the defective notice procedures. The upshot of that failure is that these class members' valuable claims and defenses are released in exchange for nothing at all.

This failure is particularly egregious in light of the First District Court of Appeal's recent decision in *Echevarria*, 896 So.2d 773. There, mortgagors who had defaulted on their loans sued a law firm retained by the lenders to handle foreclosure proceedings, alleging violations of Florida

Consumer Collection Practices Act (FCCPA) and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The trial court's class certification excluded plaintiffs who received a reinstatement letter but who failed to reinstate their mortgage, resulting in a foreclosure judgment or the sale of their respective properties. The exclusion of these potential plaintiffs was error, the court held, because an action under the FCCPA is independent of any action by the creditor to collect on the debt and does not depend on whether the underlying debt is valid, owed, paid or reduced to judgment. Rather, the right to suit under the Act arises from the debt collector's conduit in collecting the debt, where that conduct violates the Act's prescriptions against unscrupulous debt collection practices. *Id.*, 896 So.2d at 776 ("[W]e conclude that the [restriction on the class] was erroneous as a matter of law because there is no legal justification for limiting the class as the trial court did. As the [trial] court noted it in its order, a violation of the collection practices would have occurred when the reinstatement letter was sent, regardless of the ultimate outcome of the foreclosure proceedings in any given case.").

The error here is much more serious and fundamental. Class members who did not reinstate their mortgages–class members, who, under *Echevarria* are entitled to participate in the litigation–have had their claims released without compensation. Judge Friendly could have been talking about this very case when he refused to approve a settlement because it released absentees' claims that the class representatives were "willing to throw to the winds in order to settle their own claims." *National Super Spuds, Inc.*, 660 F.2d at 17 n.6; *In re General Motors Corp. Engine Interchange*, 594 F.2d at 1133-35 ("convenience and expediency cannot justify the disregard of the individual rights of even a fraction of the class"). Moreover, under Rule 1.220(c)(2), as under Fed. R. Civ. P. 23(c)(2), class members in (b)(3) class actions have a right to opt out prior to a

determination of their claims. But the failure to provide a *meaningful* opt-out right violates both Rule 1.220(c)(2) and the due process clauses of the Florida and federal constitutions. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1986).

E. The Prospective Relief Is Of No Benefit to the Class.

In their motion for approval of the settlement (at 11), class counsel trumpet the value of the prospective relief under the settlement, and suggest that such relief should be incorporated in any calculation of the value of the settlement to the class. There is only one problem with that argument. The prospective relief does not benefit the class members. To the extent it has benefits—an issue on which we cannot form an opinion without more information—those benefits accrue only to future victims of Butler & Hosch. Thus, the Court should not consider the prospective relief in its calculation of the value of the settlement. Moreover, the prospective relief in the settlement is ill-defined; it requires that Butler & Hosch's collection letters "contain the types of disclosures reflected" in Exhibit F to the settlement, but does not define precisely how those disclosures will be used, what will constitute a violation of the terms of the settlement, or how compliance will be ensured.

F. Class Counsel's Fee Request Is Excessive.

Adding insult to injury, the settlement permits class counsel to request, and defendants have agree to pay, attorneys' fees of up to $750,000, even as the vast majority of class members are provided with only a few dollars. As discussed above, this so-called "clear sailing" fee arrangement should put this Court on heightened alert to the reasonableness of the award. *Great Northern Nekoosa*, 925 F.2d at 525; *Malchman v. Davis*, 761 F.2d 893, 906-08 (2d Cir. 1985) (Newman, J., concurring); William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in*

Class Action Settlements, 77 Tul. L. Rev. 813 (2003) (advocating per se ban on settlements that rely upon clear sailing provisions). This heightened scrutiny serves as a reminder here, that, as a general matter, all requests for attorney's fees are subject to searching scrutiny by the court. *See In re General Motors Fuel Tank Pickup Truck Prod. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995). "Because of the potential for a collusive settlement, a sellout of a highly meritorious claim, or a settlement that ignores the interests of minority class members, the district judge has a heavy duty to ensure that . . . the fee awarded plaintiffs' counsel is entirely appropriate." *Piambino*, 610 F.2d at 1328. Moreover, quite apart from whether collusion is present, careful scrutiny is required to prevent excessive fees and, thus, public aversion toward the judicial process and class actions in particular. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 225 (2d Cir. 1987). This Court's searching review is particularly critical in cases like this one, in which, rather than the defendant paying the fee pursuant to a fee-shifting statute, the fee will come from a settlement fund out of which the class recovery will also be paid. *See Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Great Northern Nekoosa*, 925 F.2d at 524. In short, at the fee stage, "the plaintiffs' attorney's role changes from one of fiduciary for the clients to that of claimant against the fund created for the clients' benefit," *Rawlings*, 9 F.3d at 516 (quoting Third Circuit Task Force Report), because each dollar paid to counsel means one less dollar for the class members.

Under *Kuhnlein v. Department of Revenue*, 662 So.2d 309 (Fla. 1995), fees in common fund settlements are computed using the lodestar method. But *Kuhnlein* also emphasizes that the lodestar method must take into account "the results obtained for the benefit of the class." *Id.* at 315 ("[I]t is appropriate in common fund cases . . . to place a greater emphasis on the monetary results achieved."); *see also Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1151 (Fla.

1985) ("'results obtained' may provide an independent basis for reducing the fee"). The fee issue is also inextricably related to the fairness, adequacy, and reasonableness of the settlement as a whole because every dollar paid out in fees is a dollar less that is available to compensate class members. Here, class counsel seek nearly half of the settlement fund, an amount that is excessive and unfair on its face in light of the paltry sum promised to the class members. Because we have only a few days to review the fee request, we object to the request and reserve the right to respond in detail after we have had adequate time to study it.

G. The Incentive Payments Accorded the Named Plaintiffs Underscore the Settlement's Failings and Further Demonstrate Class Counsel's Inadequacy.

Rather than throw a few dollars at the class representatives, as the settlement does for most class members, the settlement proposes to award those representatives $5,000 each. Because named plaintiffs "may be tempted to accept suboptimal settlements at the expense of the class members," *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D.N.Y. 1989), courts must carefully scrutinize incentive awards. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). The size of the proposed incentive awards here—at least 100 times the share of the other class members—underscores both the unfairness of the settlement and the inadequacy of class counsel. In light of the significant relief that *should* be available to the class members under the FCCPA, FDUTPA, and FDCPA, the disparate treatment of the named plaintiffs dramatically highlights just how bad the class action settlement is for the vast majority of the class members who will get minimal compensation, but lose all of their claims and defenses.

Which brings us to class counsel's inadequacy. Would any impartial observer believe that class counsel could have obtained the named representatives' consent to the proposed settlement if

the settlement offered them twenty-five or fifty dollars for the release of all their potential, claims, defenses and counterclaims? To ask the question is to answer it. The proposed settlement, which strips thousands of borrowers of valuable claims and defenses in exchange for a pittance, is grossly unfair to the class and should be rejected by this Court.

H. Inadequate Representation Violates Due Process.

One additional point bears mention. As the U.S. Supreme Court has said repeatedly, the requirement of adequate representation in state-court class actions has it roots in the Fourteenth Amendment's Due Process Clause. *See, e.g., Shutts*, 472 U.S. at 812; *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *see also Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 889 (1996) (Ginsburg, J., concurring). Because the causes of action held by absent class members are a form of property protected by state law, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982), they cannot be compromised unless the named plaintiffs have provided adequate representation. *Shutts*, 472 U.S. at 712. And although, the Florida Supreme Court has yet to develop a due process class action jurisprudence, we have no doubt that Article I, section 9 of the Florida Constitution—which is modeled on the Fourteenth Amendment's due process clause—incorporates the same principles enunciated by the Supreme Court of the United States. Here, it is uncontested that the named representatives have drastically altered the nature of the class members' rights in their causes of action. For the reasons stated above, the settlement must be rejected on non-constitutional grounds. Moreover, the complete abandonment of the interests of absent class members such as Objector Knapp and the other inadequacies in representation discussed above also constitutes a violation of the due process clauses of the Florida and United States Constitutions.

I. The *Cy Pres* Award Is Inappropriate and Contributes to the Unfairness of the Settlement.

In some circumstances, a limited portion of a class action fund may be directed to a charity, under the close supervision of the court, whose purposes directly relate to the relief sought in the complaint. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 184-86 (2d Cir. 1987). Such *cy pres* disbursements are permissible when there is left-over money following distribution of a cash fund and further distribution is impractical or impossible. But the settling parties here "do not claim that a *cy pres* settlement is appropriate because it would be impossible or difficult to locate class members, or because each individual class member's recovery would be so small as to make an individual distribution economically impossible." *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 606 (D.N.J. 1994) (rejecting settlement because payment went to charity rather than to class members). In fact, as discussed above, the settling parties specifically agreed not to make *any attempt* to locate a large portion of the class. "[T]here is no reason, when the injured parties can be identified, to deny them even a small recovery in favor of disbursement through some other means." *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997). The appropriateness of the award is also called into question by the fact that one of the class counsel in this case has family ties to an employee at the designated organization and the possibility that a *cy pres* award may tend to discourage the recipient organization, which represents low-income consumers, from objecting to the settlement.

J. Plaintiffs Are Likely To Prevail.

If this Court agrees with Objectors that the proposed settlement actually places class members in a worse position than had they never been part of a class action, then it need not proceed any

further. If, however, it believes the settlement has some overall net benefit to the class, then it should weigh its valuation of the settlement against the risks and possible rewards of litigation.

In addressing this important issue, Objectors are handicapped not only by the problems of notice and timing addressed earlier, but also by the perfunctory nature of class counsel's brief in support of final approval. The brief (at 9-10), offers only a single paragraph concerning likelihood of success, and even that paragraph merely asserts in general terms that "there still exist numerous issues for trial that pose significant obstacles to success." The brief cites not a shred of case law or other legal support with the exception of one unpublished federal district court case, *Beck v. Codilis & Stawiarski*, 2000 WL 34490402 (N.D. Fla. 2000), where a district judge dismissed factually similar claims. That decision, of course, has no controlling effect in any court, let alone this one. Moreover, that decision was issued at an early stage of the litigation, before a class had been certified. By contrast, this lawsuit has survived a motion to dismiss, an appeal, and defendants' opposition to the motion for class certification.

Class counsel does not identify the specific legal issue in *Beck* that they believe poses a significant "obstacle to success" in this case. To the extent that they are referring to *Beck*'s dismissal of plaintiffs' claims based on an interpretation of the federal doctrine of absolute witness immunity, that ruling poses no obstacle here. First, the ruling is based on a federal immunity doctrine that has no application to state-law causes of action.[2] Second, the First District Court of Appeal's opinion

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[2]Even within the federal courts, the weight of authority is decidedly to the contrary. *See, e.g., Miller v. Wolpoff & Abramson*, 321 F.3d 292 (2nd Cir. 2003) (verified complaint filed in state collection action by defendant attorneys subject to FDCPA); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469 (7th Cir. 2000) (debt collector's complaint, incorrectly alleging it was "subrogated" to rights of creditor, subject to FDCPA); *Blevins v. Hudson & Keyse, Inc.*, --- F. Supp. 2d ----, 2004 WL 3560971 (S.D. Ohio 2004); *Todd v. Weltman, Weinberg & Reis Co., LPA*, 348 F. Supp. 2d 903 (S.D. Ohio 2004) (rejecting witness immunity argument and denying

in *Echevarria*–a published decision that *is* binding on this Court–held that the state law parallel to the witness immunity doctrine, the judicial immunity rule, "cannot be applied to as a bar" to claims under the Florida Consumer Collection Practices Act. 896 So.2d at 777.

The motion for approval's omission of *Echevarria* is telling. In light of that decision, the defendants' appeal of this Court's certification order–one of the "obstacles" mentioned in the motion for approval–is unlikely to prevail.

We do not mean to suggest that the litigation carried no risks; virtually all class action litigation involves considerable risk. But, in light of the inadequate benefits under the settlement and the enormous concessions made, class counsel have fallen far short of their burden to demonstrate that the likelihood of success made such a settlement fair, adequate, and reasonable under the circumstances.

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motion for judgment on the pleadings in FDCPA action against attorneys who signed form affidavits filed in state garnishment proceedings); *Campos v. Brooksbank*, 120 F. Supp. 2d 1271 (D.N.M. 2000) (attorney's fee affidavit and deposition notice subject to FDCPA).

CONCLUSION

For the foregoing reasons, this Court should deny final approval of the proposed class action settlement. Additionally, to give both the Court and the parties an opportunity to properly address these objections, this Court should continue the fairness hearing, together with the objection, opt-in, and opt-out deadlines, for a period of no less than 90 days.

Respectfully submitted,

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