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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

18
19 In re:
20 Bluetooth Headset Products
21 Liability Litigation

Case No. 2:07-ML-1822-DSF-E

**DEFENDANTS' JOINT RESPONSE
TO OBJECTIONS TO THE
PROPOSED SETTLEMENT**

22 **Judge: Hon. Dale S. Fischer**
23 **Date: July 6, 2009**
24 **Time: 1:30 p.m.**
Dept.: 840

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I. INTRODUCTION

This Court should give final approval to the class action settlement in this case. No objection has been raised concerning the Court’s preliminary approval of a settlement class under Federal Rule of Civil Procedure 23 (Dkt. No. 64, Order Preliminarily Approving Settlement and Providing for Notice (“Notice Order”), ¶ 1). Nor has there been any substantive objection to either the Notice Plan or the direct mail and publication notices themselves.¹ (*Id.* at ¶¶ 7, 8.) Instead, a small number of class members have raised objections that fit within three categories, none of which provides any legitimate basis to reject the settlement.

First, several of the objectors argue that the settlement should be rejected and the case dismissed because the underlying lawsuit lacks merit. While Defendants agree that the underlying lawsuit lacks merit, that fact provides no basis to reject the settlement. If anything, the lack of merit to the underlying lawsuit supports the fairness of the settlement to the class.

Second, one objector opposes the settlement for fear that it will bar personal injury claims by those with purported hearing loss. Class members who participate in the settlement, however, do not give up their right to bring claims for any alleged personal injury, including hearing loss.

Third, some objectors argue that the terms of the settlement are unfair because of (a) payments to class counsel and class representatives, (b) the sufficiency of the benefits provided to the class, and (c) the *cy pres* distribution. None of these objections has merit. Objections concerning class counsel and class representative compensation are not valid attacks on the underlying settlement because the settlement is not contingent upon any payments to the class representatives or their

¹ Only two objectors even suggested that they had difficulty understanding the notice, and that point was not central to their concerns. (Dkt. Nos. 81 (P. Burress) & 112.)

1 counsel. Moreover, objections to the sufficiency of the benefits to the class fail to
2 account for the probability that the class would get nothing if this case were litigated.
3 Finally, arguments against the use of a *cy pres* have no basis in law.

4 **II. THE UNIVERSE OF OBJECTIONS.**

5 Defendants are aware of 50 objections sent to the Court and/or the settlement
6 administrator. Twenty-two of these objections failed to comply with the Court’s rules
7 governing objections, and the objectors are therefore “deemed to have waived [their]
8 objection[s].”² (Notice Order, ¶ 14.) Of the remaining 28 objections, eight objectors
9 also excluded themselves from the class, and therefore have no standing to object.³
10 *See, e.g., Trew v. Volvo Cars of N. Am., LLC*, No. S-05-1379 RRB EFB, 2007 WL
11 2239210, at *3 (E.D. Cal. Jul. 31, 2007) (noting that objectors who also opted-out of
12 the settlement “eliminat[ed] their standing to challenge it”). One objection was filed
13 after the June 9, 2009 deadline.⁴ (Notice Order, ¶ 12.) Thus, there are 19 procedurally
14 valid objections.⁵

15 **III. OBJECTIONS BASED ON THE UNDERLYING LITIGATION’S LACK 16 OF MERIT ONLY SUPPORT THE SETTLEMENT.**

17 Of the 19 procedurally valid objections, 14 (74%) argue that instead of
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20 ² These objectors failed to comply with the Notice Order (¶ 12) in one of three ways:
21 failure to file the objection with the Court (8 objections received by the settlement
22 administrator); failure to send the objection to the Settlement Administrator (Dkt. Nos.
23 82 (redacted), 86 (redacted), 88 (redacted), 95 (subsequently removed from the
docket), 96, 101, 103, 104, 109, 112, 115); or failure to include a telephone number
(Dkt. Nos. 81 (L. Leslie), 84, 118.)

24 ³ Dkt. Nos. 68, 80, 81 (B. Homer), 91, 97, 102, 111, 116 (including 2 objectors).

25 ⁴ Dkt. No. 113.

26 ⁵ Dkt. Nos. 67, 81 (P. Burress & R. Fader), 83, 85, 87, 89, 90, 93, 98, 99, 100, 105,
27 107 (including seven objectors), 108, 110, 114, 117, 119.

1 approving the settlement, the Court should dismiss the case because it has no merit.⁶

2 The common points raised by these objectors include the following:

- 3 • It is “common sense” to limit noise exposure from any device and
4 “warnings” not to listen to Bluetooth headsets at high volumes for long
5 periods of time are superfluous. (*See, e.g.*, Dkt. Nos. 81 (P. Burress), 85, 90,
6 93, 98, 99, 100, 107 (representing seven objectors), 110, 114.)
- 7 • Unnecessary litigation unjustifiably increases the cost of consumer goods.
8 (*See, e.g.*, Dkt. Nos. 81 (P. Burress), 93, 98, 110, 114.)
- 9 • The case should be ended before more Court time and taxpayer dollars are
10 wasted. (*See, e.g.*, Dkt. Nos. 81 (P. Burress), 114.)

11 Defendants agree that this case does not have merit. But, these objections miss
12 the point. For purposes of final approval, the Court must determine whether the
13 settlement reached by the parties is “fair, reasonable and adequate.” FED. R. CIV. P.
14 23(e). Objections suggesting that the underlying litigation has no merit are of limited
15 usefulness to this inquiry. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)
16 (finding that in making the determination whether to approve a class action settlement,
17 the court should “not decide the merits of the case or resolve unsettled legal
18 questions”). Indeed, as discussed further below, to the extent these objections claim
19 that the lawsuit lacks merit, they actually support the fairness of the settlement
20 because the class members will receive benefits that they would not otherwise receive
21 if the lawsuit were dismissed.

22 Moreover, rejecting the settlement and forcing the parties to resume litigation
23 will only exacerbate the economic concerns raised by the objectors. Defendants have
24 already satisfied a substantial portion of their financial obligations under the

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26 ⁶ Dkt. Nos. 81 (P. Burress & R. Fader), 83, 85, 89, 90, 93, 98, 99, 100, 105, 107
27 (including 7 objectors), 110, 114.

1 Settlement Agreement by paying \$999,189 for the cost of the Publication Notice.
2 (Kinsella Decl. ¶ 25, filed contemporaneously herewith.) If the settlement is rejected,
3 Defendants will have to bear the cost of litigating the case, including any appeals,
4 which will likely exceed the remaining cost to Defendants of settling, thereby
5 increasing the economic impact of these cases to Defendants.

6 **IV. THE SETTLEMENT DOES NOT BAR PERSONAL INJURY CLAIMS.**

7 One of the procedurally valid objections suggests that the settlement is unfair
8 because it will bar claims by those who have allegedly suffered hearing loss. (Dkt.
9 No. 117.) That objection is unfounded. Quite simply, class members who participate
10 in the settlement do not give up their right to recover for any personal injury actually
11 caused by the headsets, including any alleged hearing loss (although Defendants
12 strongly believe that no valid hearing loss claims exist). (See Dkt. No. 61, Settlement
13 Agreement (“S.A.”) ¶ 3.10.) Class members only waive their right to bring claims for
14 economic damages (such as the cost of their headset).

15 **V. THE TERMS OF THE SETTLEMENT ARE FAIR.**

16 The remaining objectors challenge the terms of the settlement as unfair and
17 focus on three principal areas: (a) the size of the payments to class counsel and the
18 class representatives; (b) the alleged lack of sufficient benefits to the class; and/or (c)
19 the appropriateness of a *cy pres* distribution. None of these arguments has merit.

20 **A. Any Payments to Class Counsel and the Class Representatives Will**
21 **Be Fair Because the Court Will Determine the Appropriate**
22 **Amounts.**

23 Twelve of the 19 procedurally valid objections (63%) assert that the Settlement
24 Agreement’s maximum allowable attorneys’ fees (\$800,000, S.A. ¶ 3.6), costs
25 (\$50,000, S.A. ¶ 3.7), and/or payments to the class representatives (\$12,000 total, S.A.
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¶ 3.5) are too high.⁷ Defendants do not object to or oppose an award of attorneys’ fees and costs and incentive awards for the Representative Plaintiffs, provided the amounts sought do not exceed those set forth above.

However, Defendants note that approval of the settlement is not contingent on approval of fees or costs in any amount. As explicitly stated in the Settlement Agreement: “The Parties expressly agree that the terms of this Agreement are not conditioned upon any minimum attorneys’ fee award, minimum costs award, or upon the payment of any incentive award to any Plaintiff.” (S.A.¶ 3.8.) In other words, the question of what payments to the putative class representatives or class counsel are appropriate is left entirely to the Court’s discretion. Thus, even if the Court were to agree with the objectors and award compensation to the named class representatives and counsel in an amount less than the maximum permitted under the settlement, the settlement can still be approved. (S.A.¶ 3.8.)

B. The Benefits to the Class Are Sufficient Because the Class Will Likely Get Nothing if This Case Is Litigated.

Eight of the 19 procedurally valid objections (42%) raise some argument that the settlement does not provide a sufficient recovery for the class.⁸ Most of the objectors who make this objection raise the general concern that the payments to class counsel and the class representatives will overshadow any benefit received by the class. *See, e.g.*, Dkt. Nos. 67 (noting the class receives “nothing” while “[t]he attorneys on the other hand are in line to be awarded \$800,000 . . .”); 83 (“I believe the fees and the donations should be reversed.”); 87 (same); 117 (the benefit to the class is “paltry compared to the benefit to the Class Counsel and Class

⁷ Dkt. Nos. 67, 81 (P. Burress), 83, 85, 87, 89, 100, 107 (including seven objectors), 108, 114, 117, 119.

⁸ Dkt. Nos. 67, 83, 87, 107 (including seven objectors), 108, 114, 117, 119.

1 Representatives”); 108 (same); 119 (same).

2 Those objections concerning the size of any payments to class counsel and the
3 class representatives compared to the benefits of the settlement to the class are without
4 merit for the reasons stated above—the settlement is not contingent on any minimum
5 compensation to the class representatives and counsel. The Court has the discretion to
6 determine what compensation is appropriate up to the maximum amount provided in
7 the settlement. Thus, objections to the proposed compensation to class counsel and
8 class representatives as compared to the compensation to absent class members are not
9 a valid basis for rejecting the underlying settlement between the parties. (S.A. ¶ 3.8.)

10 Aside from these challenges, a handful of the procedurally valid objections
11 argue that the warnings offer little or no benefit to the class. (Dkt. Nos. 107
12 (including seven objectors), 108, 117, 119.) Three more objections dispute that the *cy*
13 *pres* provides any tangible benefit. (Dkt. Nos. 107 (including seven objectors), 108,
14 119.)

15 These objectors fail to appreciate that the settlement is appropriate if it is fair to
16 the class. Fed. R. Civ. P. 23(e). In determining fairness, the Court will consider a
17 number of factors, including “(1) the strength of the plaintiffs’ case; [and] (2) the risk,
18 expense, complexity, and likely duration of further litigation” *See, e.g.,*
19 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

20 The benefits provided by this settlement are fair because if the case is litigated,
21 it is unlikely Plaintiffs will succeed, in which case the class would get nothing at all.
22 *Carson*, 450 U.S. at 88 n.14 (“Courts judge the fairness of a proposed compromise by
23 weighing the plaintiff’s likelihood of success on the merits against the amount and
24 form of the relief offered in the settlement.”); *Van Horn v. Trickey*, 840 F.2d 604, 607
25 (8th Cir. 1988) (“The single most important factor in determining whether a
26 settlement is fair, reasonable, and adequate is a balancing of the strength of the
27 plaintiff’s case against the terms of the settlement.”); *Gribble v. Cool Transports Inc.*,

1 No. CV 06-04863 6AF, 2008 WL 5281665, at * 8 (C.D. Cal. Dec. 15, 2008) (finding
2 settlement benefits were appropriate where plaintiff would have faced significant
3 complexity at trial because “[b]y settling, Plaintiff will be able to avoid those
4 complexities and secure a fixed sum of compensation for the class members”). As set
5 forth in Defendants’ Motion to Dismiss, there is a strong likelihood that if this
6 litigation proceeds, Plaintiffs’ case will fail because: (1) Plaintiffs lack Article III
7 standing since their damages claim is based on nothing more than a hypothetical
8 economic injury, (2) Plaintiffs fail to allege a cognizable “injury” or “damages” under
9 applicable state law, (3) Plaintiffs fail to allege any affirmative misstatement of fact,
10 and (4) Plaintiffs’ claims are defied by the very NIOSH “standards” on which they
11 rely. (Dkt. No. 34, Defendants’ Motion to Dismiss.) If the case is dismissed, any
12 benefit provided by the settlement would disappear.

13 **C. The *Cy Pres* is Appropriate.**

14 Two of the procedurally valid objections argue that the *cy pres* feature of the
15 settlement is not appropriate. (Dkt. Nos. 107, 119.) The first objector complains that
16 the selection of charities that will receive the *cy pres* payments was “quite random”
17 with “no apparent explanation as to why they were chosen.” (Dkt. No. 119, ¶ 5.) This
18 is simply inaccurate. The parties negotiated what charities would receive the *cy pres*
19 distribution. Plaintiffs explained the reasons for the selection of each charity in their
20 Motion for Preliminary Approval of Class Settlement. (Dkt. No. 57, at 1-3.)

21 The second group of objectors, represented by Theodore Frank, argues that the
22 very concept of a *cy pres* distribution is inappropriate. (Dkt. No. 107, at 7-9.) Courts
23 in the Ninth Circuit have approved of the use of *cy pres* distributions. *Six (6) Mexican*
24 *Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990). Frank concedes
25 as much. (Dkt. No. 107, at 9 (noting that *Six (6) Mexican Workers* “approves of the
26 use of *cy pres*”).)

27 Frank’s attempt to cite contradictory authority from various other Circuits is his
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1 admitted attempt to manufacture an issue “for further appeal.” (*Id.*) Moreover, the
2 cases cited by Frank actually support the use of a *cy pres* in this case. For example, in
3 *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007) (Dkt. No.
4 107, at 8), the Second Circuit held that a *cy pres* is appropriate where “direct
5 distribution to individual class members is not economically feasible” *Id.* at
6 436. That is clearly the case here. Practically speaking, splitting \$100,000 among
7 millions of potential class members simply would not work. The *cy pres* payment to
8 charities is a reasonable substitute to sending checks to class members for what would
9 likely be less than the cost of a postage stamp. *See, e.g., Koppell v. Keds Corp.*, No.
10 93 CIV. 6708 (CSH), 1994 WL 97201, at *3 (S.D.N.Y. Mar. 21, 1994) (finding “the
11 *cy pres* resolution adopted by the settlement agreements is reasonable and adequate”
12 where, given the size of the class and the small size of any individual recovery, the
13 cost of identifying and administering any claims process would consume the entire
14 settlement).

15 Frank also cites *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir.
16 2004). Frank fails to mention that after remand, the district court in *Mirfasihi*
17 approved (and the Seventh Circuit affirmed) a settlement where defendants made a
18 charitable contribution to a nonprofit organization whose mission related to the claims
19 raised in the complaint. *Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, 2007 WL
20 2066503, at *7 (N.D. Ill. Jul. 17, 2007); *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d
21 682, 686-87 (7th Cir. 2008). In short, the full procedural history of *Mirfasihi* actually
22 supports the use of a *cy pres* in this case.

23 Frank’s last ditch effort to challenge the *cy pres* by arguing that CAFA changes
24 the game similarly misses the mark. Frank is correct that CAFA contemplates special
25 scrutiny of settlements with a distribution of coupons to class members. 28 U.S.C.
26 § 1712(e). But, there are no coupons at issue here and Frank’s attempt to shoehorn the
27 *cy pres* into CAFA’s statutory language is inappropriate because CAFA’s language
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1 applies only to coupon settlements. *Id.* The *Synfuel* case cited by Frank (Dkt. No.
2 107, at 8) rests on an analogy to coupons based on certain “characteristics” of coupons
3 that are plainly inapplicable here—including “forced future business with the
4 defendant” and a potential failure to disgorge defendant’s gains because of a failure to
5 use the “coupon.” *Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654
6 (7th Cir. 2006).

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2 **VI. CONCLUSION**

3 For the reasons stated herein, the objections to the settlement should be
4 overruled and the Court should approve the settlement.

5 Dated: June 22, 2009

Respectfully submitted,

6
7 /s/ Becca Wahlquist

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have electronically filed the following document:

3 **DEFENDANTS' JOINT RESPONSE TO OBJECTIONS TO THE**
4 **PROPOSED SETTLEMENT**

5 with the Clerk of the Court using the CM/ECF system, which will automatically send
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14 Executed June 22, 2009, at Los Angeles, California.

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