"MULTIPLE INDICIA OF COLLUSION" DOOM BLUETOOTH HEADSET CLASS SETTLEMENT THAT WOULD HAVE PAID $800,000 TO THE LAWYERS AND NOTHING TO THE CLASS

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To Our Clients and Friends:

On Friday, the United States Court of Appeals for the Ninth Circuit rejected a proposed class action settlement between Bluetooth headset manufacturers and a putative class of 100 million+ consumers who purchased those headsets. Under the settlement, class members would have received nothing but additional disclosures in future user manuals. The defendants would have paid $1.2 million in notice costs and contributed $100,000 to advocacy groups for the hearing impaired. The plaintiffs' lawyers, however, would have walked off with an $800,000 fee. Looking at this 8:1 ratio of attorneys' fees to any even arguable benefit to the class, the Ninth Circuit held that "the current record does not adequately dispel the possibility that class counsel bargained away a benefit to the class in exchange for their own interests," and remanded the case for "a more searching inquiry into the fairness of the negotiated distribution of funds."

In re Bluetooth Headset Products Liability Litigation sprung from 26 separate complaints alleging that headset manufacturers "failed to disclose the potential risk of noise-induced hearing loss associated with extended use of their wireless Bluetooth headsets at high volumes" and thereby violated state consumer protection laws. The plaintiffs sought damages in the amounts of the prices that every consumer paid for a headset between 2002 and 2009, plus punitive damages. The defendants moved to dismiss on a number of grounds, but before the Court heard that motion, the parties reached the proposed settlement.

On appeal, plaintiffs' counsel argued that because they "prevailed" in the case, they were entitled to recover their lodestar of fees accrued prosecuting the case, which they said was $1.6 million. They thus portrayed their request for "only" $800,000 as reflecting a substantial discount. The district court faulted plaintiffs' lodestar calculation but nevertheless said that their lodestar exceeded $800,000, making the $800,000 fee request "reasonable" even though it greatly exceeded the amount these attorneys recovered for the class. The Ninth Circuit, however, said that any lodestar award must be cross-checked by looking at the "results obtained" and how much time class counsel should have "*reasonably* expended on the litigation" given those results. Any comparison between the meager settlement in the case and the $800,000 fee, the Ninth Circuit held, should have raised many more questions than the district court elected to ask.

On remand, the Ninth Circuit said, "the district court should (1) decide whether to treat the settlement as a common fund; (2) choose the lodestar or percentage method for calculating a reasonable fee and make explicit calculations; (3) ensure that the fee award is reasonable considering, *inter alia,* the degree of success in the litigation and benefit to the class; and (4) if standard calculations yield an unjustifiably disproportionate award, adjust the lodestar or percentage accordingly."

Separate from the fee discussions, the Ninth Circuit also reversed the district court's approval of the settlement itself. The combination of the apparently excessive fee, a "clear sailing" agreement pursuant to which the defendants promised not to object to the fee request, and a provision stating that any reduction in the fee would revert to the defendants, not the class, created "multiple indicia of possible implicit collusion." These factors imposed a "special obligation" on the district court to inquire much further than it did into the circumstances that led to the settlement. On remand, the court must conduct that more searching inquiry.

Because the fee issues alone justified vacating the settlement, the Ninth Circuit did not reach another interesting issue the objectors had raised. Objectors also suggested that a charitable contribution — or, at least, such a small contribution — could not suffice as consideration for a full damages release from so many class members. Even if the *Bluetooth* case itself does not return to the Ninth Circuit for eventual consideration of that issue, that same court already has two cases before it that will address that issue. In one case involving a marketing program undertaken by Facebook, and another involving a Google marketing program, those companies reached class settlements providing for multi-million-dollar charitable contributions, with the attorneys' fees amounting to no more than 25% of those contributions. Both settlements were approved at the district court level over objections; the objectors' appeals are pending. The Ninth Circuit's decisions in those cases, combined with this one, should help set the outer limits for what kind of settlements will pass muster in these types of low-value cases.

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Please do not hesitate to contact us if you have any questions.

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