IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

JACQUELINE DOTSON, JANET OVERTON, MARION ROBINSON and MOJGAN THELEN, individually and on behalf of all others similarly situated,	*	
Plaintiffs	*	HEARING: June 22, 2004 Hon. Steven I. Platt
v.	*	Case No. CAL 99-21004
BELL ATLANTIC-MARYLAND, INC. and MARYLAND PUBLIC SERVICE COMMISSION,	*	
Defendants	*	
FAUSTO SCROCCO, MOJAN, INC. and SYSNET, INC., individually and on behalf of all others similarly situated,	*	
Plaintiffs	*	
v.	*	Case No. CAL 00-09962
BELL ATLANTIC-MARYLAND, INC. and MARYLAND PUBLIC SERVICE COMMISSION,	*	
Defendants	*	

* * * * *

KAMUHANDA INTERVENORS' OPPOSITION TO PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

Intervening class members Emily Deborah Kamuhanda and Kathryn Mitchell (hereinafter "Kamuhanda Intervenors"), by and through their counsel, hereby file this Opposition to the Joint Motion of Class Plaintiffs and Defendants Bell Atlantic-Maryland, Inc. for Preliminary Approval of Proposed Class Action Settlement.

INTRODUCTION

The Court should not grant preliminary approval of the parties' Stipulation of Settlement because it fails to secure a fair, reasonable, and adequate result for the absent members of the class. The current proposed settlement suffers from several of the same deficiencies that doomed to failure the parties' previous attempt to settle this case. Both settlements allow class counsel to collect enormous fee awards in excess of $12 million, but fail to guarantee that the class itself would obtain monetary relief of any greater value than what class counsel gets paid. Since the newest settlement proposal again fails to protect the best interests of the class members, the Court should not grant preliminary approval.

First, the settlement allows class counsel to collect a fee award that is excessive in relation to the results they obtained for the class. The settlement again puts aside up to $12.5 million for class counsel's fees, while only guaranteeing monetary relief for the class in the virtually identical amount of $13.5 million *minus* the cost of notice and settlement administration. This fee award does not comport with this Court's ruling that any award of attorneys' fees using the percentage-of-recovery method must be appropriate to the value of relief actually recovered by the class.

The settlement also fails to guarantee payment of adequate relief to the class. In a settlement where Bell Atlantic is agreeing to pay out between $25 and $26 million in a combined fund for class relief, notice costs, and attorneys' fees, the parties' failure to guarantee that the class actually receives most of the fund's value in monetary relief renders the class relief provisions inadequate. The Court should not grant preliminary approval of a common fund settlement that permits a fifty-fifty split between monetary relief for the class and attorneys' fees for class counsel.

Finally, class counsel again have failed to adequately represent the class in negotiating this

proposed settlement. Class counsel could have advocated for the interests of the class members by guaranteeing that the class would recover a fair and reasonable percentage of the settlement fund's overall value. Instead, they negotiated a settlement agreement that allows them to collect attorneys' fees equal in value to the entire award of monetary relief paid to the class. Since class counsel did not fairly and adequately protect the interests of the class members, as required by Rule 2-231(a)(4), the Court should not grant preliminary approval of the proposed settlement.

ARGUMENT

THE PROPOSED SETTLEMENT DOES NOT MERIT THIS COURT'S PRELIMINARY APPROVAL

I. The Proposed Settlement Permits an Excessive Award of Attorneys' Fees.

The common element linking the current proposed settlement and the previous one that this Court rejected is class counsel's ability to collect over $12 million in attorneys' fees. Previously, the parties sought approval of a settlement awarding class counsel up to $13 million in fees as a percentage of the maximum settlement fund value of $64.9 million, even though the actual class recovery would have been less than $200,000. The Court rejected this proposed $13 million fee award because it was "based on phantom numbers and calculations based thereon," and further held that attorneys' fees awarded as a percentage of a settlement fund must be "appropriate to the value actually received by the Class Members." Opinion of November 13, 2003 (hereinafter, "Opinion") at 18. Now, the parties are seeking approval of a settlement that would allow class counsel to collect up to $12.5 million in fees plus their costs out of an approximately $26 million settlement fund where the class is guaranteed no more than this same value in monetary relief. *See* Stipulation of Settlement ("Settlement") at 22-23. For the reasons stated in its opinion rejecting the previous

settlement, this Court should not approve an agreement that lets class counsel collect attorneys' fees worth as much as the class relief itself.

As this Court has recognized, "'the dynamics of class action settlement may lead the negotiating parties – even those with the best intentions – to give insufficient weigh to the interests of at least some class members.'" Opinion at 10 (quoting MANUAL FOR COMPLEX LITIGATION, THIRD § 30.42 at 238 (1995)). The Court of Appeals also has observed the tension between the interests of parties negotiating settlements and the class members whose claims are released:

> Once there has been a recovery in a common fund class action case, a conflict arises between counsel for the representative plaintiffs and the class. Because the stake of an individual class member is usually quite small, and because the judgment against the defendant is not ordinarily affected by the portion of the common fund that is awarded to plaintiffs' counsel, it becomes the duty of the court to ensure that the interests of the class members are protected.

United Cable Television of Baltimore Ltd. Partnership v. Burch, 354 Md. 658, 688 (1999). Thus, Rule 2-231(h) requires a court's independent approval before any class action settlement becomes enforceable. Rule 2-231(h) and its federal analog require a court to find that a proposed settlement is "fair, reasonable, and adequate" to the class, and is "in the best interest of those whose claims will be extinguished." *See, e.g.*, *In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litig.* ("*GM Trucks*"), 55 F.3d 768, 785 (3d Cir. 1995). By permitting class counsel to collect attorneys' fees equal in value to the monetary relief paid to the entire class, the proposed settlement here fails to satisfy this standard for judicial approval.

Since the parties' agreement concerning attorneys' fees is part of the overall settlement, the Court cannot approve the settlement unless it approves the fee provisions. The Court has already established the benchmark for approving any award of attorneys' fees in this case by holding that

fees must be "appropriate to the value actually received by the Class Members." Opinion at 18; *see also National Association of Consumer Advocates—Standards and Guidelines for Litigating and Settling Consumer Class Actions* ("*NACA Guidelines*"), 176 F.R.D. 370, 399 (1997) ("[I]t is inappropriate for class counsel to seek a percentage fee unless . . . the settlement provides for a minimum settlement level which is guaranteed to be paid (either to class members or as a *cy pres* payment) and the fee sought is based upon a percentage of the minimum amount.") Here, the settlement creates a $26 million settlement fund that includes monetary relief to the class, notice and settlement administration costs, and attorneys' fees for class counsel. *See* Settlement at 22-23; Plaintiffs' Memorandum in Support of Joint Motion at 12; Bell Atlantic's Brief in Support of Preliminary Approval at 4.[1] The attorneys' fees awarded under this proposed settlement must therefore be appropriate or reasonable as a percentage of this $26 million fund.

A proposed attorneys' fee award of $12.5 million plus costs out of a $26 million settlement fund, totaling over 48% of the fund, is not reasonable or appropriate. In *Burch*, the Court of Appeals held that Maryland courts awarding fees on a percentage-of-fund basis should use a "market approach" wherein a court must determine "the approximate percentage of a potential multi-million dollar recovery that a business person would be able to negotiate with counsel of the caliber of plaintiffs' counsel in a case of comparable complexity." *Burch*, 354 Md. at 688. Here, there is no evidence showing that such an approach would justify a 48% contingency fee. To the contrary, extensive authority establishes that the Court should use a much lower percentage. *See, e.g.*, Alba

[1] The parties add $675,000 to this minimum settlement value based on the cost of the class notice from the previous settlement that this Court previously rejected as improper, Opinion at 23, but they fail to produce any authority allowing them to count the cost of legally defective class notice towards the value of relief.

Conte, *Attorney Fee Awards* (2d ed. 1993) § 2.07 at 48 (recognizing one-third as the standard-level contingency fee in the legal marketplace, with courts moderating this percentage in some class cases due to economies of scale); *id.* § 2.34 at 125-27 (chart showing fee recoveries ranging from 15% to 33 1/3% in consumer and mass-tort common fund settlements valued at up to $25 million). Since the proposed settlement allows a 48% fee award that far exceeds generally recognized benchmarks, the settlement's fee provisions are not reasonable and should not be approved by this Court.[2]

Finally, the parties cannot justify the $12.5 million fee award based on Bell Atlantic's agreement not to seek approval from the Public Service Commission ("PSC") to recoup the full value of the settlement fund from its current customers. The parties contend that this agreement "is of significant additional value to the Class over and above the monetary value of the proposed settlement," Plaintiffs' Memo at 12, and that it adds "a potential additional value to the settlement of at least $26,675,000," Bell Atlantic's Brief at 5. But the parties do not and cannot explain how this agreement not to try to take back the money paid out in the settlement constitutes "*additional* value" above and beyond that of the settlement fund itself. The parties also cannot demonstrate that the PSC would or even *could* allow this type of recoupment of funds from class members whose underlying claims are constitutional in nature. *Cf. Burch*, 354 Md. at 683 ("The constitutionalized public policy of Maryland remains that the legal rate of interest is six percent and that, if any changes in that rate are to be made, they are to be made by the General Assembly.") Even if the parties

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[2] The proposed 48% fee award again calls to mind the Court of Appeals' holdings in *Attorney Grievance Commission v. Korotki*, 318 Md. 646, 665 (1990) and *Friolo v. Frankel*, 373 Md. 501, 515 (2003), that it is generally a violation of Maryland's ethics rules for a lawyer's stake in the result of a case to exceed that of his or her client. The Intervenors respectfully submit that there should be more than a 2% difference between what constitutes a reasonable class action attorneys' fee and what constitutes a presumptive violation of the ethics code.

somehow could demonstrate that the no-recoupment agreement had value, they could not determine what the value would be *for the class* because they claim to have no way of identifying who within the current rate-paying population actually paid an unlawful late fee and therefore is part of the class. *See* Bell Atlantic's Brief at 4 n.2.

Since the parties cannot determine what, if any, value this agreement has for the class members, the Court should not count the agreement as adding to the value of the settlement for purposes of determining the attorneys' fee award. *See NACA Guidelines*, 176 F.R.D. at 398-99 (court should not grant percentage-based fee award where it is impossible to determine the actual value of relief); *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003). In *Staton*, the court rejected the class plaintiffs' attempt to count unquantifiable injunctive relief towards the value of a settlement fund for purposes of determining a percentage-based fee award because it left too much room for manipulation by the parties: "Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Id.* The no-recoupment agreement seems to serve the same purpose here.

In light of this Court's previous opinion establishing the baseline for a reasonable award of attorneys' fees, the Court should find that the proposed settlement allowing class counsel to collect fees totaling over 48% of the settlement fund's value does not meet the "probable cause" threshold for granting preliminary approval.

II. The Class Relief is Inadequate in Light of the Settlement Fund's Overall Value.

The proposed settlement is also inadequate because it fails to guarantee that the class members will recover even half of its overall value in monetary relief. Under the terms of the proposed settlement, Bell Atlantic must make the following payments: (1) Up to $12.5 million for

class counsel's attorneys' fees, Settlement at 27 ¶1; (2) approximately $1 million for class notice and settlement administration expenses, *id.* at 25-26 ¶6; and (3) a total of $13.5 million *minus* the costs of notice and settlement administration for class relief, *id.* at 22-23. Thus, out of a $26 million combined settlement fund, the class relief constitutes approximately $12.5 million, or 48% of the fund, an amount equal to that set aside for attorneys' fees. The Court should hold that this relief is inadequate and therefore provides an additional basis for denying preliminary approval.

As we previously have argued, the presence of a sizable award of attorneys' fees relative to the value of monetary relief provides strong evidence that a settlement's class relief provisions are inadequate. As the federal court of appeals warned in *Staton*:

> If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have been obtained.

327 F.3d at 964; *see also GM Trucks*, 55 F.3d at 810 ("Our concerns about the adequacy of the settlement are complicated by the generous attorneys' fees GM agreed to pay in this case."); *Bloyed v. General Motors Corp.*, 881 S.W.2d 422, 435-36 (Tex. Ct. App. 1994) ("Attorneys' fees . . . have a direct effect on the net amount that will ultimately be paid to the litigants."), *aff'd sub nom.*, *General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996).

In addition, as this Court has recognized, the presence of a "clear sailing" agreement in a proposed settlement only heightens the danger that class counsel may have been tempted to "'urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.'" Opinion at 21 (quoting *Weinberger v. Great Northern Nekoosa*, 925 F.2d 519, 524 (1st Cir. 1991)). Here, Bell Atlantic has agreed "not to oppose or comment on Class Counsel's fee and

expense application in the trial court or in any appellate court, . . . and not to appeal from any order awarding attorneys' fees and expenses entered in connection with the Actions." Settlement at 27 ¶1. The settlement's provision for a 50/50 split of attorneys' fees and class relief, coupled with the lack of opposition at the bargaining table, serves as powerful evidence that the proposed settlement fails to provide adequate class relief.

Finally, the proposed settlement's "no-recoupment" provision does not cure the inadequacy of the class relief. As discussed, *supra* at 6-7, Bell Atlantic's agreement not to recoup the value of the settlement fund does not provide additional value to the class members beyond that in the settlement fund itself. Moreover, Bell Atlantic's proclamation to the contrary that this agreement adds "at least $26,675,000" to the settlement's value, Brief at 5, is highly suspect in light of the fact that the parties' previous settlement agreement did not even address recoupment. If the right to recoup really has a dollar-for-dollar value corresponding to that of the settlement fund, then the last settlement's *failure to prevent recoupment* would have exposed Bell Atlantic customers to millions of dollars *in liability* and left most of the class members *worse off* than if the case were never settled. Under the terms of the last settlement: (1) 18,000 out of the 2.5 million class members claimed less than $200,000 in relief; (2) class counsel claimed $13 million in attorneys' fees; and (3) Bell Atlantic was ostensibly free to recoup these costs from its customers. Thus, according to the parties' current arguments about the value of recoupment, Bell Atlantic could have recouped *both* the $200,000 in class relief *and the $13 million in attorneys' fees* from its customers, thereby forcing them to pay $13 million for representation in a class action settlement that netted them no benefit whatsoever. This type of settlement would have been malpractice of the first order. *Cf. NACA Guidelines*, 176 F.R.D. at 370 (describing settlement where class members lost money as "[p]erhaps the most notorious

example of abuse"). Since the parties' current arguments about the value of the no-recoupment agreement cannot be squared with their previous actions in this case, the Court should reject these arguments lock, stock, and barrel.

The proposed settlement's class relief provisions stand or fall based on the minimum value of monetary relief guaranteed to the class. Since the minimum relief for the class is worth less than half the settlement's overall value, the Court should hold that the proposed settlement fails to provide adequate relief for the class and should deny preliminary approval.

III. The Proposed Class Notice Unlawfully Burdens the Rights of Class Members to Opt Out and Object

Whether intentionally or otherwise, the parties drafted their proposed class notice in a way that imposes unnecessary and unlawful requirements on class members who seek to opt out of or file objections to the settlement. The proposed notice requires any recipient who wishes to opt out of the settlement to "certify under oath that you paid one or more Late Fees to [Bell Atlantic] during the Relevant Time Period set forth above." Notice of Class Certification and Settlement ("Notice") at § III (A). Similarly, the notice requires class members who wish to object to the settlement to file "a statement under oath that you are a member of the Settlement Class." Notice at § III (B). Both of these requirements are unnecessary, will have the effect of deterring class members from exercising their constitutional rights, and therefore should be struck from the proposed Class Notice.

An absent class member's rights to opt out of or object to a settlement are constitutionally based. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court addressed due process requirements in class actions where state courts exercise jurisdiction over absent class members without minimum contacts with the forum state. Among the due process requirements

recognized in *Shutts* were the absent class member's right to "receive notice plus an opportunity to be heard and participate in the litigation," and the right to "remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court." *Id.* at 812. With regard to the class notice, *Shutts* held that it must be "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections.'" *Id.* (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)).

The proposed class notice would violate the absent class members' due process rights by imposing the unnecessary burden of a sworn statement under oath upon any class member seeking to opt out or object. The oath requirement is unnecessary because the parties have no way of detecting perjury since Bell Atlantic continues to claim that it does not track who pays late fees. Brief at 4 n.2. Moreover, the requirement is burdensome because the class period covered in this case dates back to 1996, and it is unreasonable to expect every class member seeking to opt out or object to be able to state with the kind of certainty required for a statement under oath that they paid a $1 or $2 late fee some time between 1996 and 2000. The Court therefore should strike these requirements from the proposed Class Notice.

IV. Class Counsel Again Have Failed to Adequately Represent the Class.

The proposed settlement cannot be approved unless the class and the class representatives satisfy Rule 2-231's criteria for certification, including its requirement that "the representative parties will fairly and adequately protect the interests of the class." Md. R. 2-231(a)(4). The requirement of adequate representation is another minimal element of due process. *Cf. Shutts*, 472 U.S. at 812 ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately

represent the interests of the absent class members.") Even if the provisions of a class action settlement appear to be substantively fair, the settlement cannot be approved if class counsel did not adequately represent the class. *See In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1125 n.24 (7th Cir. 1979) ("No one can tell whether a compromise found to be 'fair' might not have been 'fairer' had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class.") (citation omitted).

In this case, class counsel have now negotiated two proposed settlement agreements that permitted awards of attorneys' fees for themselves in excess of $12 million, while failing in both instances to guarantee that the class itself would recover any more money than they did. In the first settlement, class counsel agreed to class relief provisions that resulted in the payment of less than $200,000 to the entire class, while securing attorneys' fees of $13 million for themselves. After the Intervenors objected, the Court rejected that settlement and demanded that any fee award must be based on the value of relief actually paid. Class counsel then came back with a settlement that permits a slightly reduced fee award of up to $12.5 million and guarantees the class no more than an equal $12.5 million value in monetary relief.[3] Together, these two attempts at settlement reveal a pattern of negotiation wherein class counsel are consistently permitted to recover an eight-figure fee award, the class itself recovers no more than is necessary to make the fees look palatable, and Bell Atlantic agrees not to object. Plainly this will not do. The Court should hold that class counsel

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[3] The substantial increase in the actual value to be recovered by the class resulted in significant part from the Intervenors' objections to the first proposed settlement and ongoing involvement in the litigation. Under established case law, Intervenors are entitled to seek and recover appropriate costs and attorneys' fees for their role in increasing the value of the class's recovery. *See, e.g.*, *In re Cendant Prides Corp. Litig.*, 243 F.3d 722, 743-44 (3d Cir. 2001); *Gottlieb v. Barry*, 43 F.3d 474, 491 (10th Cir. 1994); *Duhaime v. John Hancock Mutual Life Ins. Co.*, 2 F. Supp. 2d 175, 176 (D. Mass. 1998). Intervenors intend to do so at an appropriate time.

did not adequately represent the class in negotiating this settlement, and therefore should deny the parties' motion for preliminary approval of the proposed settlement.

CONCLUSION

For all of the foregoing reasons, the Court should not grant preliminary approval of the parties' proposed settlement agreement.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June, 2004, the foregoing Opposition to Preliminary Approval of Proposed Settlement was sent by overnight mail, postage prepaid, to:

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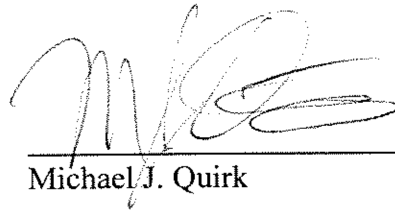

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