

No. 08-17372

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE: MERCURY INTERACTIVE CORP. SECURITIES LITIGATION

NEW YORK STATE TEACHERS' RETIREMENT SYSTEM

Class Member Objector-Appellant,

v.

THE MERCURY PENSION FUND GROUP

Plaintiff-Appellee.

On Appeal from an Order of the United States District Court,
Northern District of California No. 5:05-CV-03395-JF
The Honorable Jeremy Fogel

**BRIEF OF THE COUNCIL OF INSTITUTIONAL INVESTORS
SUPPORTING REVERSAL**

Robert A. Long, Jr.
Theodore P. Metzler, Jr.
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000
Counsel for *Amicus Curiae*

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RULE 26.1 DISCLOSURE STATEMENT

The Council of Institutional Investors is a California mutual benefit corporation. It has no parent corporations and no publicly traded company holds 10 percent or more of its stock.

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INTEREST OF AMICUS CURIAE

The Council of Institutional Investors is a not-for-profit association of more than 130 public, labor, and corporate pension funds with assets exceeding \$3 trillion.¹ Its members are major long-term shareowners responsible for protecting the retirement assets of millions of American workers.

The Council is an advocate for strong corporate governance standards. Its members seek to protect plan assets through proxy votes, shareowner resolutions, advocacy to regulators, discussions with management, and, when necessary, litigation. The Council has previously appeared as amicus curiae in cases affecting shareowner rights. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *CalPERS v. Felzen*, 525 U.S. 315 (1999).

The interests of the Council and its members are directly implicated by this case. Congress has recognized that institutional

¹ The parties to this appeal have consented by letter to the filing of this amicus brief.

investors are America’s largest shareowners and “have the most to gain from meritorious securities litigation.” H.R. Conf. Rep. No. 104-369, at 34 (1995), reprinted in 1995-2 U.S.C.C.A.N. 730, 733 (quoting testimony of Maryellen Andersen, then-Treasurer of the Council). Institutional investors were lead plaintiffs in almost 60 percent of the securities class actions settled in 2007, up from more than 50 percent of the securities class actions settled in 2006. Laura E. Simmons & Ellen M. Ryan, *Securities Class Action Settlements: 2007 Review and Analysis* 10 (2007). The Council has published a primer on securities litigation, reflecting the importance of this topic for institutional investors. See Council of Institutional Investors, *Everything You Always Wanted to Know About Securities Litigation . . . But Were Afraid to Ask* (2008). The Council and its members thus have a strong interest in curbing excessive awards of attorneys’ fees in securities litigation, particularly when such awards reduce the benefits available to shareowners.

STATEMENT OF THE ISSUE

The Council will address the following issue:

Whether the district court violated Federal Rule of Civil Procedure 23 and abused its discretion by failing to provide the class

with reasonable notice and opportunity to object to Plaintiff's motion for attorney's fees.

STATEMENT OF FACTS²

On June 2, 2008, the district court entered an Order Preliminarily Approving Settlement and Providing for Notice. 2 ER 9 at 239, 249. The court's order established a schedule for the remainder of the proceedings in the case. The court required that class notice be sent by July 2, 2008, and scheduled a fairness hearing for September 25, 2008. *Id.* at 241, 243.

The court's order recognized that class members were entitled to submit objections to the settlement, including "why attorneys' fees and expenses should or should not be awarded to counsel for the plaintiffs." *Id.* at 246. But the court's order required objections to attorney's fees to be filed before the application for attorney's fees was due. *Id.* at 246-47. Specifically, the court required objections to the settlement, including objections to the attorneys' fees, to be filed no later than "twenty-one (21) days prior to the Settlement Fairness

² This Statement of Facts addresses only those facts relevant to the issue addressed by this brief.

hearing,” or September 4, 2008. *Id.* at 246. The order provided that a class member who fails to object in the prescribed manner “shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to . . . the award of attorneys’ fees and expenses.” *Id.* at 246-47. The court’s order further provided that “any application by counsel for the plaintiffs for attorneys’ fees . . . shall be filed and served seven (7) calendar days prior to the Settlement Fairness Hearing,” or by September 18, 2008—two weeks after the deadline for objections to the application. *Id.* at 247.

As required by the order, the class notice was sent to class members by July 2, 2008. 3 ER 12 at 328, ¶ 6. The notice stated that the class was to be paid from a \$117 million settlement fund, and that lead counsel for the class “will apply to the Court for attorneys’ fees in the amount of 25% of the Settlement Fund and reimbursement of out-of-pocket expenses not to exceed \$975,000 to be paid from the Settlement Fund.” *Id.* at 337. The notice stated that class members have the right to file written objections “to any aspect of the settlement, the Plan of Allocation, or the application for attorneys’ fees and expenses” by September 4, 2008. *Id.* at 338.

Appellant New York State Teachers' Retirement System filed an objection to the 25 percent fee contemplated in the class notice before the district court's September 4, 2008 deadline. 1 ER 3 at 19-27. Another class member, Commonwealth of Pennsylvania Public School Employee Retirement System, also filed an objection to the 25 percent fee. *Id.* at 132-34. Because the motion for attorneys' fees had not yet been filed, the objectors did not and could not object to any line item or particular work performed by counsel.

Lead counsel for the class filed their motion for attorneys' fees on September 18, 2008, two weeks *after* the deadline to object had passed. 2 ER 12 at 271. The motion and its attached declarations asserted that counsel had expended 17,000 hours on the case, but did not specify the work that was performed during those 17,000 hours. *See* 3 ER 12 at 341, 386-87, 395, 411, 416, 433, 438, 446, 468.

On September 25, 2008, the district court awarded fees in the amount of \$29.3 million, representing the requested 25 percent of the \$117 million fund. 1 ER 1 at 1-2. The court summarily rejected the objections to the fees, observing that the objectors "do not object to any line item or work that was done, but rather they simply believe that the

amount of the contingency fee should be 18 percent rather than 25 percent.” 1 ER 3 at 15.

SUMMARY OF THE ARGUMENT

“In setting the date objections are due, the court should provide sufficient time after the full fee application is on file to enable potential objectors to examine the motion.” Fed. R. Civ. P. 23(h) Adv. Comm. N. (2003). Federal Rule of Civil Procedure 23(h) governs the procedures for awarding attorneys’ fees in class actions. The Rule requires (i) a motion for attorneys’ fees, (ii) reasonable notice of the motion to the class, and (iii) an opportunity to object. Both the Rule and its Advisory Committee Notes make clear that these requirements apply to “the full fee motion.”

In this case and others, however, district courts have permitted class counsel to file their fee request after the deadline for submitting comments has passed. That procedure violates Rule 23(h) and denies class members an adequate opportunity to challenge the fee request. The procedure permitted by this and other district courts invites abuse by effectively removing the safeguard of class objections. For example, the defendant typically has no incentive to challenge a fee

award because, as in this case, the amount of the fee award does not affect the amount that defendants pay out-of-pocket.

A general statement in the class notice of the percentage of the fee request is not sufficient to permit meaningful objections. Such a statement does not satisfy the requirement of Rule 23(h) that there be an opportunity to object to the full fee request. Moreover, as shown by the district court's statements here, the only possible objection to such a statement—that the percentage is too high—may be too general to convince a court that the fee request is excessive.

Rule 23(h) is a relatively new addition to the Federal Rules of Civil Procedure, and to date it has received only limited analysis in the courts. This case presents the Court with an opportunity to provide much-needed guidance to the district courts, many of which are failing to implement the requirements of Rule 23(h).

STANDARD OF REVIEW

The Court “review[s] *de novo* whether the timing of a notice satisfies” Federal Rule of Civil Procedure 23. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993); *see also Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 201

(2d Cir. 2008) (“We review *de novo* any issues of law underlying the Rule 23 ruling.”). The Court “review[s] the award of attorney fees for abuse of discretion.” *Torrissi*, 8 F.3d at 1376.

ARGUMENT

I. Rule 23(h) Requires Notice And Opportunity To Object To Class Counsel’s Attorneys’ Fee Request.

Federal Rule of Civil Procedure 23(h) sets out the procedure for awarding attorneys’ fees in class actions. *See* 7B Wright, Miller, & Kane, Federal Practice & Procedure § 1803 at 325 (3d ed. 2005). The Rule applies to “an action certified as a class action,” including “cases in which there is a simultaneous proposal for class certification and settlement.” Fed. R. Civ. P. 23 Adv. Comm. N. (2003).

The rule establishes three basic requirements. *First*, the claim for fees “must be made by motion . . . at a time that the court sets.” Fed. R. Civ. P. 23(h)(1). *Second*, “[n]otice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.” *Id.* *Third*, “[a] class member, or a

party from whom payment is sought, may object to the motion.” Fed. R. Civ. P. 23(h)(2).³

Each of these requirements—motion, notice of motion, and opportunity to object to the motion—applies to the attorney’s “motion” for attorneys’ fees. The class thus must be given sufficient notice of the motion and sufficient opportunity to object to the motion.

The Advisory Committee Notes to Rule 23(h) confirm that “[t]he court should direct when the fee motion must be filed.” Fed. R. Civ. P. 23 Adv. Comm. N. (2003). The Notes contemplate that the motion will be filed even before the class notice is sent, let alone before objections to the motion are due: “When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel’s fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.” *Id.* The Notes state that “it would be important to require the filing of at least the initial motion in time for inclusion of

³ The rule also provides that the court may hold a hearing, must enter findings of fact and conclusions of law pursuant to Rule 52(a), and may refer issues related to the amount of the award to a magistrate or special master. Fed. R. Civ. P. 23(h)(3), (4).

information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e).” *Id.* The Notes add: “*In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.*” *Id.* (emphasis added). The district court departed from this clear instruction by requiring class members to submit objections to the motion for attorneys’ fees two weeks before the motion was filed or available for examination.

A leading commentator confirms this conclusion. Rule 23(h) requires that “[s]pecific, court-set deadlines for fee motions must be set by the court in each class action.” 5 James Wm. Moore, *Moore’s Federal Practice* § 23.124[2] (2009). When the fee arrangement is in accordance with a settlement agreement, “the court should generally direct that any motions for fees or nontaxable costs be filed at a time that will permit inclusion of information concerning the fee motions in the Rule 23(e) notice to the class.” *Id.* The court “should not set deadlines any later than is absolutely necessary.” *Id.* Moreover, in all cases the court must “set a time limit that will permit both reasonable notice to the class and prompt resolution of any fees motion.” *Id.*

If the motion is not filed before the class notice is sent, notice of the motion must nevertheless be “directed to class members in a reasonable manner.” Fed. R. Civ. P. 23(h)(1). “Members of a class have a right to receive reasonable notice of any motion that class counsel makes for an award of attorney’s fees or for reimbursement of nontaxable costs.” 5 Moore’s Federal Practice § 23.124[3][b], at 23-500. Class members’ right to notice “do[es] not depend on whether the fee or cost award is to come from a common fund created in the course of the litigation for the class’s benefit or from some other source.” *Id.*

The motion for attorney’s fees should “include[] information sufficient to provide a basis for class members to exercise their right to object to the motion.” *Id.* Moreover, “for notice of counsel’s fee motion to be ‘reasonable,’ class counsel must give it sufficiently far in advance of the determination of the motion to permit class members to prepare and file meaningful objections to the claim for fees.” *Id.* “The Rule 23(h)(1) notice requirement provides the class with sufficient information to question objectionable fee requests and to scrutinize any potential conflicts of interest that arise from certain payment scenarios.” *Cobell v. Norton*, 229 F.R.D. 5, 21 (D.D.C. 2005).

Similarly, “[a]ny objection deadline set by the court should provide the eligible person with an adequate opportunity to review all the materials that may have been submitted in support of the motion and, in an appropriate case, conduct discovery concerning the fees request.” 5 Moore’s Federal Practice § 23.124[4].

In sum, the text of Rule 23(h), the Advisory Committee Notes to the Rule and learned commentary all confirm that “[i]n setting the date objections are due, the court should provide sufficient time *after the full fee motion is on file* to enable potential objectors to examine the motion.” Fed. R. Civ. P. 23(h) Adv. Comm. N. (2003) (emphasis added).

II. The District Court Violated Rule 23(h) By Setting The Deadline For Objections Before The Due Date For The Attorneys’ Fee Motion.

The district court in this case set the due date for the attorneys’ fees motion just one week before the scheduled date for the fairness hearing. The fee motion was thus due more than two months after the class notice was sent, and two weeks after class members’ objections were due. Moreover, the district court’s order prohibited

class members from filing any objections after the full fee motion was filed.

The district court's order in this case is not an isolated occurrence. *See, e.g., In re American Int'l Group, Inc. Sec. Litig.*, No. 04-Civ-8141 (S.D.N.Y. Oct. 6, 2008) (objections due 21 days before hearing; attorneys' fee motion due 7 days before hearing); *In re HCC Ins. Holdings, Inc. Sec. Litig.*, No. 4:07-cv-801 (S.D. Tx. April 17, 2008) (same); *In re St. Paul Travelers Sec. Litig. II*, No. 04-cv-4697 (D. Minn. Jan. 31, 2008) (objections due 22 days before hearing; attorneys' fee motion due 10 days before hearing); *In re Career Educ. Corp. Sec. Litig.*, No. 03-C-8884 (N.D. Ill. Jun. 26, 2008), (objections due 21 days before hearing; attorneys' fee motion due 7 days before hearing); *In re Vesta Ins. Group, Inc. Sec. Litig.*, No. CV-98-BE-1407 (N.D. Ala. Sept. 26, 2008) (objections due 17 days before hearing; attorneys' fee motion due 7 days before hearing).

The schedule set by these courts and the district court here violates Rule 23(h). The Rule requires reasonable notice of the fee motion and an opportunity to object to the motion. Fed. R. Civ. P. 23(h); *see also In re Forest Labs., Inc. Sec. Litig.*, No. 05-CV-2827-RMB

(S.D.N.Y. Dec. 23, 2009) (requiring attorney's fee motion to be filed and posted on counsel's internet web site 45 days before objections due).

Here, the district court did not direct that notice of the full fee motion be served on the class and prohibited class members from objecting after the motion was filed.

This procedure fails to satisfy the district court's obligation to protect the interests of absent class members and invites abuse by class counsel. "At the fee determination stage, the district judge must protect the class's interest by acting as a fiduciary for the class." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307-308 (3d Cir. 2005). "Class counsel's fee application is presented to the court with the enthusiastic endorsement, or at least acquiescence, of the lawyers on both sides of the litigation, a situation virtually designed to conceal any problems with the settlement not in the interests of the lawyers to disclose." *In re Oracle Sec. Litig.*, 136 F.R.D. 639, 645 (N.D. Cal. 1991). As Judge Easterbrook has stated, "[T]he court can't vindicate the class's rights because the friendly presentation means that it lacks essential information." *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting). As this Court has

explained, “[i]n a class action . . . [t]he absence of individual clients controlling the litigation for their own benefit creates opportunities for collusive arrangements in which defendants can pay the attorneys for the plaintiff class enough money to induce them to settle the class action for too little benefit to the class.” *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1397 (9th Cir. 1999). Here, the district court prohibited objections to the full fee request from the parties most likely to have an interest in limiting those fees: the class members whose recovery was directly diminished by the fees.

The notice that the class did receive—well before the full fee motion was on file—was not consistent with Rule 23(h) and was insufficient to permit a meaningful objection by class members. Rule 23(h) requires that notice be made of the attorneys’ fee *motion*, not the aggregate amount of fees that counsel intends to seek. *See Fed. R. Civ. P. 23(h) Adv. Comm. N.* (“[T]he court should provide sufficient time after the *full fee motion* is on file.” (emphasis added)). The class notice in this case simply stated that counsel would seek 25 percent of the settlement fund. 3 ER 12 at 337. It did not provide any statement of the time counsel spent, any description of the work counsel performed,

or any argument as to why the size of the fee award was reasonable in light of the result obtained by counsel.

The class notice thus departed from the procedure contemplated by Rule 23(h) to the detriment of class members. Because of the paucity of information provided in the class notice, Appellant and other class members could not undertake a meaningful evaluation or submit particularized objections to the fee request. Indeed, when Appellant and another class member objected based upon the only information available to them about the fee request, the percentage requested by counsel, the district court rejected their objections for failing to identify any “line item” or “work performed” that was objectionable. 1 ER 3 at 15.

The district court abused its discretion by adopting a schedule for the attorneys’ fee request and approving the attorneys’ fee request in this case in violation of Rule 23(h).

III. The District Courts Need Guidance On The Proper Application Of Rule 23(h).

This case presents the court with an opportunity to provide much needed guidance to the district courts. Since Rule 23(h) was adopted in 2003, few courts have directly addressed the Rule’s

requirements, and no appellate courts have done so.⁴ While some courts have correctly applied the Rule,⁵ the recent cases cited above show that the district courts are in need of guidance on this issue.

District courts regularly set schedules in class action settlements that place the deadline for objecting to the settlement, including any objections to the attorneys fee request, ahead of the deadline for filing a motion for attorney's fees. That procedure departs from the text and

⁴ In *In re Bisys Securities Litigation*, the court overruled an objection raised by an attorney who was not a member of the class that the settlement violated Rule 23(h)'s notice requirement by stating a percentage rather than the precise amount of fees where "[t]he actual application for fees was not filed until after the deadline for objections had elapsed." No. 04 Civ. 3840, 2007 U.S. Dist. LEXIS 51087, at *5 (S.D.N.Y. July 16, 2007). The court acknowledged that "no class member was on notice of the actual attorneys' fees requested at the time objections were due," but held that "members of the class were plainly on notice that the attorneys' fees might be as much as one-third of the fund and so had every reason to raise an objection if they thought this was excessive." *Id.* The court stated that "it might have been a better practice to provide them with more information relevant to evaluation of this request," but concluded that in light of the lack of any objection by class members, there was "adequate compliance with Rule 23(h)." *Id.* at *6.

⁵ *E.g.*, *Dare v. Knox County*, 465 F. Supp. 2d 14, 16 (D. Me. 2006) (ordering fee motion to be filed in time to be combined with the Rule 23(e) notice of settlement); *In re Livent, Inc. Noteholders Sec. Litig.*, 355 F. Supp. 2d 722, 739 (S.D.N.Y. 2005) (ordering notice of fee motion and providing 30 days for objections).

intent of Rule 23(h), removes an important safeguard for class members, and creates opportunities for abuse by class counsel. By holding that the district court's procedure violated the Rule, this Court will improve the administration of class action settlements and the protections afforded to class members.

CONCLUSION

The district court's order approving of class counsel's attorneys' fees should be vacated and the case should be remanded for reconsideration after the class has been provided adequate notice and opportunity to object to the full fee motion.

Respectfully submitted,

s/Robert A. Long, Jr.

Robert A. Long, Jr.

Theodore P. Metzler, Jr.

Covington & Burling LLP

1201 Pennsylvania Ave. N.W.

Washington, D.C. 20004

(202) 662-5612

Counsel for Amicus Curiae

Certificate of Service

I hereby certify that on April 20, 2009, I caused the foregoing brief of Amicus Curiae to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

As of April 20, 2009, the following participants in the case are not registered CM/ECF users. I have mailed one copy of the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Louis Gottlieb
Christopher J. Keller
Michael H. Rodgers
Labaton Sucharow LLP
140 Broadway
New York, NY 10005

Attorneys for Lead Plaintiffs-Appellees Mercury Pension Fund Group

Peter A. Binkow
Michael M. Goldberg
Glancy Binkow & Goldberg
Suite 311
1801 Avenue of the Stars
Los Angeles, CA 90067

Attorneys for Lead Plaintiffs-Appellees Mercury Pension Fund Group

No other parties to the cause below intend to file a brief or otherwise participate in the appeal based on the response to the Mediation order dated December 15, 2008.

s/Theodore P. Metzler, Jr.
Counsel for Amicus Curiae
Council of Institutional Investors

Certificate of Compliance

I certify that Pursuant to Federal Rules of Appellate Procedure 28.1(e)(2), 29(d), and 32(a)(7)(C) that the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and complies with the type-volume limitation in that it contains less than 7,000 words.

April 20, 2009

Date

s/ Theodore P. Metzler, Jr.

Counsel for Amicus Curiae