

FILED

NOT FOR PUBLICATION

JUL 16 2014

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: FERRERO LITIGATION,

No. 12-56469

ATHENA HOHENBERG, individually
and on behalf of all others similarly
situated and LAURA RUDE-BARBATO,
on behalf of herself and all others similarly
situated,

D.C. No. 3:11-cv-00205-H-KSC

Plaintiffs - Appellees,

MEMORANDUM*

COURTNEY DREY and ANDREA
PRIDHAM,

Objectors - Appellants,

v.

FERRERO USA, INC., a foreign
corporation,

Defendant - Appellee.

In re: FERRERO LITIGATION,

No. 12-56478

ATHENA HOHENBERG, individually

D.C. No. 3:11-cv-00205-H-KSC

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

and on behalf of all others similarly situated and LAURA RUDE-BARBATO, on behalf of herself and all others similarly situated,

Plaintiffs - Appellees,

MICHAEL E. HALE,

Objector - Appellant,

v.

FERRERO USA, INC., a foreign corporation,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted June 4, 2014
Pasadena, California

Before: KOZINSKI, Chief Judge, and TROTT and CALLAHAN, Circuit Judges.

Athena Hohenberg and Laura Rude-Barbato (“Plaintiffs”) filed these class actions alleging that Ferrero was misleadingly advertising Nutella as a healthy breakfast food. After a class of California consumers was certified, the parties negotiated a settlement. The settlement (a) created a \$550,000 monetary fund to partially reimburse class members who had purchased Nutella and (b) provided for substantial injunctive relief requiring Ferrero to revise its advertising campaign for

Nutella and to supply more nutritional information on Nutella's label. In the settlement agreement, Ferrero agreed that it wouldn't challenge class counsel's application for a fee award, not exceeding \$900,000, specifically for the injunctive relief obtained. The district court approved the settlement and made an overall attorneys' fee award of \$985,920.

Three class members (the "objectors") objected to the settlement, and appeal from the district court's approval of the settlement. They argue that: (1) there was inadequate notice of the request for attorneys' fees; (2) the injunctive relief doesn't justify a fee award; (3) the district court failed to adequately explain its approval of the fee award; and (4) the district court failed to consider whether class counsel adequately represented the class. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

1. Class members had adequate notice of the terms of the settlement and class counsel's request for attorneys' fees. Federal Rule of Civil Procedure 23(h) requires that class members have "an opportunity thoroughly to examine counsel's fee motion." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010). The settlement in this case was preliminarily approved on January 23, 2012, the motion for attorneys' fees was filed on May 25, 2012, and the objectors filed their opposition on June 8, 2012. This is in stark contrast to *In re*

Mercury Interactive, where the motion for attorneys' fees was filed two weeks after the deadline for filing objections to the settlement agreement. *Id.* at 991. The objectors have not shown that they were denied the notice required by Rule 23(h) and *In re Mercury Interactive*.

2. Objectors argue that the district court shouldn't have awarded attorneys' fees based on the injunctive relief obtained in the settlement. They contend that the value of the injunctive relief is too speculative to be ascertainable and, in any event, benefits "society at large" rather than the class members themselves. Objectors' argument relies on the incorrect premise that the district court was, or should have been, using a "percentage of the fund" calculation method, in which fees are typically limited to 25% of the overall value of a settlement fund. *See Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003). However, the district court here had discretion to instead award attorneys' fees using the lodestar method. *Id.* at 972. Under the lodestar method, a court need not determine the "value" of particular injunctive relief because fees are calculated through an assessment of time expended on the litigation, counsel's reasonable hourly rate and any multiplier factors such as contingent representation or quality of work. Contrary to objectors' contentions, the injunctive relief in this case is meaningful and consistent with the relief requested in plaintiffs' complaint: As a result of the

settlement, Ferrero must include extra nutritional information on Nutella's packaging and follow new protocols in its Nutella advertising. The district court did not abuse its discretion in approving a settlement that compensated counsel under the lodestar method for procuring such relief.

3. The district court adequately explained its approval of the fee award under the lodestar method. It stated that the amount was "appropriate given the contingent nature of the case and the excellent results obtained for the Class," and was justified "by prior awards in similar litigation and . . . in line with prevailing rates in this District." Objectors offer no specific challenges to the hours or rates submitted by class counsel. Instead, objectors contend that the district court should have explicitly considered the indicia of collusion discussed in *In re: Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011). *Bluetooth*, however, concerned a settlement negotiated prior to class certification which provided for "\$100,000 in *cy pres* awards and zero dollars for economic injury, while setting aside up to \$800,000 for class counsel." *Id.* at 938. Here, by contrast, settlement was reached after class certification, through settlement conferences with judicial officers, and produced both monetary and injunctive relief for the class. These differences ameliorate the concerns regarding collusion expressed by the *Bluetooth* court.

The settlement agreement does contain a “clear sailing” provision and a provision reverting unpaid attorneys’ fees to Ferrero rather than to the class—two terms the *Bluetooth* court said were deserving of heightened scrutiny. 654 F.3d at 947. But the district court did not abuse its discretion in concluding that the settlement survived such scrutiny. The attorneys’ fee award in this case stands up when evaluated using the factors set forth in *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002): (a) counsel’s procurement of monetary and injunctive relief appears to have been an exceptional result; (b) counsel took on considerable risk as Ferrero is well financed and had facially valid defenses; (c) and counsel devoted considerable time to the litigation and settlement.

4. Objectors have failed to raise any serious questions as to the adequacy of class counsel. On appeal, they argue first that class counsel and the named Plaintiffs have abandoned their concerns with the truth of Ferrero’s ad campaign, and second that the district court failed to consider class counsel’s improper actions in other cases. The first argument is not supported by the record because the settlement agreement fairly addresses the concerns set forth in the complaint. The second argument is not persuasive because objectors’ evidence of alleged impropriety in previous cases does not suggest that the Weston Firm engaged in any misconduct in this case.

Affirmed.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
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TOTAL:				\$ <input type="text"/>	TOTAL:				\$ <input type="text"/>

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk