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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SALVATORE GALLUCCI; et al., Plaintiffs - Appellees, v. HENRY GONZALES, Objector - Appellant, v. BOIRON, INC.; et al., Defendants - Appellees.	No. 12-57081 D.C. No. 3:11-cv-02039-JAH-NLS MEMORANDUM[*]

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted December 11, 2014
Pasadena, California

Before: WARDLAW and BERZON, Circuit Judges, and SMITH, District Judge.[**]

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

[**] The Honorable William E. Smith, Chief District Judge for the U.S. District Court for the District of Rhode Island, sitting by designation.

Objector Henry Gonzales appeals from the district court's order approving a class settlement (Settlement) with Boiron, Inc. and awarding fees and expenses to class counsel. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. The district court did not clearly abuse its discretion in concluding that the Settlement—which created a fund from which class members could receive refunds for their purchases of Boiron's allegedly mislabeled products and provided injunctive relief in the form of label modifications—was fair, reasonable, and adequate. Fed. R. Civ. P. 23(e); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011).

Because the class was certified for purposes of settlement only, the district court was required to closely scrutinize the settlement "for evidence of collusion or other conflicts of interest." *In re Bluetooth*, 654 F.3d at 946. Both the district court's final approval order and the transcript of the settlement approval hearing make clear that the court searched for signs of collusion—including the "subtle signs" of collusion explicitly mentioned in *Bluetooth*—and correctly found none. *Id.* at 947. This conclusion is bolstered by the fact that the Settlement was negotiated with the aid of a retired magistrate judge and experienced mediator, who reported no evidence of collusion.

The district court also acted within its discretion in approving the Settlement despite the theoretical possibility—based only on the existence of multiple potential classes with which Boiron could have settled—that a reverse auction could have occurred. The record contains no evidence suggesting that a bidding war between the various potential class counsel actually occurred, and as we have observed in a different context, if the mere existence of multiple potential classes were sufficient to prove collusion, "the reverse auction argument would lead to the conclusion that no settlement could ever occur in the circumstances of parallel or multiple class actions." *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1099-1100 (9th Cir. 2008) (internal quotation marks omitted). We have never adopted such a rule and decline to do so here.

Gonzales contends that even if the district court adequately considered signs of collusion, we nevertheless must reverse because the court clearly abused its discretion in its balancing of the so-called *Churchill* factors, used to determine whether a settlement is fair, reasonable, and adequate. *See Churchill Vill., L.L.C. v. Gen. Electric*, 361 F.3d 566, 575 (9th Cir. 2004). Focusing primarily on the fourth factor, "the amount offered in settlement," *id.*, Gonzales argues that the district court failed to compare the cash value of the Settlement to the expected value of going to trial. The record demonstrates, however, that the district court

was fully informed of the parties' competing estimates of the class action's value and considered those estimates in determining whether the Settlement was adequate. Moreover, we have never required courts "to estimate the range of possible outcomes and ascribe a probability to each point on the range." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (internal quotation marks and alterations omitted) (explaining that approval of a settlement is "nothing more than an amalgam of delicate balancing, gross approximations and rough justice" (internal quotation marks omitted)). More importantly, the Settlement's $5 million common fund was intended to be—and by all accounts, is in fact—more than adequate to compensate all class members who submitted refund claims.

The remaining *Churchill* factors also support the district court's order. For example, the record shows that Boiron had a potentially effective defense, that class counsel were experienced, and that the class was largely satisfied with the Settlement. *See Churchill*, 361 F.3d at 575.

2. The district court did not abuse its discretion in awarding 25 percent of the cash value of the Settlement in fees to class counsel. *See Bluetooth*, 654 F.3d at 940, 942 ("Because the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the

lodestar. Applying this calculation method, courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award . . . .").

3. The district court did not err in concluding that the Settlement provided for "the best notice that is *practicable* under the circumstances." Fed. R. Civ. P. 23(c)(2)(B) (emphasis added); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-73 (1974). The settling parties had no means of identifying and targeting notice to individual Boiron customers, who made their small purchases nationwide, primarily at retail locations. Instead, notice was conveyed through nationwide online and print media that, according to reliable expert testimony, were specifically tailored to reach Boiron's customer base. Thus, the notice provided was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Eisen*, 417 U.S. at 174-75 (internal quotation marks omitted) (endorsing, albeit implicitly, notice by publication where notice by mail is impossible).

4. The district court did not abuse its discretion in certifying the class for settlement purposes. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023-24 (9th Cir. 1998). The class representatives' claims and legal theories are reasonably co-extensive with those of the other class members, as all class members alleged that Boiron's labeling and marketing deceptively masked the possibility that the

products would not work as advertised due to heavy dilution. *See id.* at 1020 (noting that Rule 23(a)(3)'s typicality requirement is "permissive").

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.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

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			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
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Other**			$	$			$	$
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* *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