FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT BRISEÑO; CHRISTI TOOMER; KELLY MCFADDEN; JANETH RUIZ; BRENDA KREIN; ALEXIS JUSTAK; LEONORA ULITSKY; ANNE COWAN; JULIE PALMER; PATTY BOYER; NECLA MUSAT; PAULINE MICHAEL; RONA JOHNSTON; CHERI SHAFSTALL; JILL CROUCH; ERIKA HEINS; MAUREEN TOWEY; MICHELE ANDRADE; ANITA WILLMAN; DEE HOPPER-KERCHEVAL; LIL MARIE-BIRR, individually and on behalf of all others similarly situated, *Plaintiffs-Appellees*, v. M. TODD HENDERSON, *Objector-Appellant*, v. CONAGRA FOODS, INC., *Defendant-Appellee.*	No. 19-56297 D.C. No. 2:11-cv-05379-CJC-AGR OPINION

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted December 7, 2020
Pasadena, California

Filed June 1, 2021

Before: John B. Owens and Kenneth K. Lee, Circuit Judges, and David A. Ezra,* Senior District Judge.

Opinion by Judge Lee

SUMMARY**

Class Action Settlements

The panel reversed the district court's approval of a class action settlement in an appeal brought by a class member Objector in a diversity action where the class alleged that ConAgra Foods, Inc. used a misleading "100% Natural" label on Wesson Oil.

The panel held that the class settlement agreement raised a squadron of red flags that required further review. The panel held further that under the newly revised Fed. R. Civ. P. 23(e)(2) standard, courts must scrutinize settlement agreements – including post-class certification settlements – for potentially unfair collusion in the distribution of funds between the class and their counsel.

* The Honorable David A. Ezra, Senior United States District Judge for the Western District of Texas, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court erred by failing to apply the newly revised Fed. R. Civ. P. 23(e)(2). Specifically, the panel held that under the newly revised Rule 23(e)(2), courts must apply the heightened scrutiny in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011), to post-class certification settlements in assessing whether the division of funds between the class members and their counsel was fair and adequate. The panel held further that district courts must apply the *Bluetooth* factors to scrutinize fee arrangements to determine if collusion may have led to class members being shortchanged. The panel concluded that the class settlement here featured all three red flags of potential collusion that was noted in *Bluetooth*: plaintiffs' counsel received a disproportionate distribution of the settlement; the parties agreed to a "clear sailing arrangement" in which ConAgra agreed not to challenge the agreed-upon fees for class counsel; and the agreement contained a "kicker" or "reverter" clause in which ConAgra, not the class members, received the remaining funds if the court reduced the agreed-upon attorneys' fees.

The panel held that the district court erred by failing to approximate the value of the settlement's injunction. Specifically, the panel held that it was reversible error when the district court, rather than attempting to quantify the value of the injunctive relief, instead concluded that it had "some" value. The panel held further that the district court erred by placing even "some value" on the injunction because it was, and is, virtually worthless.

The panel next addressed – and rejected – appellees' argument that the *Erie* doctrine precluded the application of Rule 23(e)(2) to a class settlement where state substantive law governed attorney's fees in fee shifting cases. In any

event, the Objector challenged settlement fairness under Rule 23(e), rather than an award of attorney's fees under Rule 23(h). Thus, *Erie*'s effect on fee-shifting law, if it even had one, was not implicated in this appeal.

The panel held that the district court did not err by determining that the Objector failed to rebut its own conclusion that the settlement satisfied Rule 23(e)(2). The record demonstrated that the district court conducted its own independent analysis, and then considered, and dismissed, the Objector's objections. The district court never improperly shifted to the Objector the burden of rebutting the settlement's fairness, reasonableness, and adequacy at the fairness hearing.

The panel remanded for further proceedings.

COUNSEL

Theodore H. Frank (argued) and Melissa A. Holyoak, Center for Class Action Fairness, Hamilton Lincoln Law Institute, Washington, D.C., for Objector-Appellant.

Samuel Issacharoff (argued), New York, New York; Robert Klonoff, Portland, Oregon; Ariana J. Tadler, A.J. de Bartolomeo, and Brian R. Morrison, Tadler Law LLP, New York, New York; Adam J. Levitt and Amy E. Keller, DiCello Levitt Gutzler LLC, Chicago, Illinois; David Azar, Milberg Phillips Grossman LLP, Irvine, California; for Plaintiffs-Appellees.

Angela M. Spivey (argued), Alston & Bird LLP, Atlanta, Georgia, for Defendant-Appellee.

Mark Brnovich, Attorney General; Oramel H. Skinner, Solicitor General; Kate B. Sawyer, Assistant Solicitor General; Keena Patel, Assistant Attorney General; Office of the Attorney General, Phoenix, Arizona; Steve Marshall, Kevin G. Clarkson, Leslie Rutledge, Lawrence G. Wasden, Curtis T. Hill Jr., Daniel Cameron, Jeff Landry, Eric Schmitt, Dave Yost, Mike Hunter, Alan Wilson, and Ken Paxton, Attorneys General; as and for Amici Curiae Attorneys General of Arizona, Alabama, Alaska, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Missouri, Ohio, Oklahoma, South Carolina, and Texas.

OPINION

LEE, Circuit Judge:

We can perhaps sum up this case as "How to Lose a Class Action Settlement in 10 Ways." The parties crammed into their settlement agreement a bevy of questionable provisions that reeks of collusion at the expense of the class members: Class counsel will receive seven times more money than the class members; an injunction touted by an expert as worth tens of millions of dollars appears worthless; the defendant agrees not to challenge the plaintiffs' attorneys' fees amount; any reduction in those fees by the court reverts to the defendant; and on and on.

While courts should not casually second-guess class settlements brokered by the parties, they should not greenlight them, either, just because the parties profess that their dubious deal is "all right, all right, all right." We reverse the district court's approval of the class settlement because the agreement raises a squadron of red flags billowing in the wind and begging for further review. We

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