NOS: 11-55674 and 11-55706 (consolidated)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY DENNIS; JON KOZ

Plaintiffs-Appellees

vs.

KELLOGG COMPANY,
Defendant-Appellee,

STEPHANIE BERG AND OMAR RIVERO,

Objectors-Appellants

From the United States District Court
for the Southern District of California, San Diego
No. 3:09-cv-01786-IEG

JOINT OPENING BRIEF OF STEPHANIE BERG AND OMAR RIVERO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Codes, Rules and Other Materials

I. JURISDICTIONAL STATEMENT

The District Court had diversity jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A), because the case is a class action filed under Fed. R. Civ. Proc. 23 and at least one member of the proposed class is a citizen of a state different from one defendant, the number of members of all proposed plaintiff classes in the aggregate is at least 100, the aggregate amount in controversy exceeds $5 Million, exclusive of costs and interests, and no statutory exception applied to 28 U.S.C. § 1332(d)(2)(A).

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered its order approving the national class action settlement and releasing all outstanding claims on April 5, 2011. (Doc. 40, 50, E.R., p. 1-5.)(Hereinafter "D.E." shall refer to "docket entry' and "E.R." shall refer to Appellant's "excerpt of the record" and shall reference the page number(s) within the record upon which the citation may be found.) On April 22, 2011, Objector/Appellant Stephanie Berg (hereinafter, "Appellant Berg") timely filed the instant appeal. (Notice of Appeal D.E. 51, E.R. 35-9.) Fellow Objector Omar Rivero, (hereinafter, "Appellant Rivero")(jointly, "Appellants") also filed his timely appeal. (D.E. 56, E.R. 32-4.) These Objectors have standing to appeal the final approval of this class action settlement.

II. STATEMENT OF ISSUES

Appellants jointly raise the following issues with respect to the settlement of this class action:

1) The attorneys' fees are excessive because the settlement value was grossly inflated;

2) The attorneys' fees are excessive because the District Court should have utilized the lodestar analysis for this claims-made settlement;

3) The attorneys' fees are excessive because the facts of the case and details of the settlement do not support the fee award under this percentage of the fund analysis; AND

4) The $5.5 million in cy pres relief constitutes neither cy pres nor relief to the class.

III. STANDARDS OF REVIEW

A district court's award of attorney fees is reviewed for abuse of discretion. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000.) Where the district court applied the incorrect legal rule or where the *district court's application of the law to the facts* was: (1) illogical; (2) implausible; or (3) without support in inferences that may be drawn from the record, the Court

of appeals reviews for abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir.2009.)(emphasis added.)

IV. STATEMENT OF THE CASE AND FACTS

This case formally commenced on August 17, 2009, when a class action complaint was filed on behalf of Harry Dennis and all others similarly situated in the Southern District of California. (D.E. 1.) The case was styled *Dennis v. Kellogg Company,* Case No. 3:09-cv-01876-IEG (WMC). Two joint motions for extensions of time to answer the complaint were filed on September 4, 2009 and October 8, 2009. (D.E. 4, 10.) After no docket activity for nine months, on June 22, 2010, the Court noticed a hearing for dismissal of the class action for lack of prosecution. (D.E. 20.) On that same day, Plaintiffs filed a stipulated, first amended complaint. (DE. 22, 23.)

The operative complaint in this action alleges: violations of California's Unfair Competition Law, Business and Professions Code §17200, et seq., violations of California's Consumers Legal Remedies Act, Civil Code §1750, and unjust enrichment. (E.R. 98, D.E. 23.) The factual bases of this Complaint arose out of Defendant's alleged false and misleading advertising and promotional materials that stated eating Kellogg's Frosted Mini-Wheats cereal for breakfast improved kids' attentiveness, memory and other cognitive functions by nearly 20% for a

period of three hours. These "studies" were unfounded, according to the complaint, and did not support the true results of these studies. (E.R. 98-105, ¶1, 7-20, D.E. 23.)

After filing the Corrected First Amended Complaint (D.E. 23), the parties presumably engaged in successful settlement negotiations because, on September 10, 2010, they filed a joint motion for preliminary approval of settlement. (D.E. 34, 35.) Only three months passed between the amended complaint and the parties' motion for preliminary approval of class action settlement. (D.E. 34.) During the entirety of the litigation, no dispositive motions were filed nor discovery conducted. In short, this litigation was a brief and straightforward affair with little conflict and little activity. The Court approved the preliminary motion on October 14, 2010. (E.R. 12-25, D.E. 37.)

The Motion for Final Approval of Class Action Settlement, which also functioned as class counsel's request for fees, was filed on December 30, 2010. (D.E. 40.) (hereinafter, "Motion for Settlement" or "Motion for Fees.") Immediately after, Appellant-Objectors filed their timely objections to the settlement terms and fee request. Appellant Rivero filed his pro-per objection on January 18, 2011 (D.E. 43) and Appellant Berg filed her objection, by and through counsel, on January 19, 2011. (D.E. 44.)

The final fairness hearing took place on February 14, 2011 during which class, defense, and objector Berg's counsel appeared for oral argument before the Honorable Irma Gonzalez in the Southern District of California. (E,R, 6.) Counsel for Objector argued before the Court in rebuttal to any contrary arguments, and offered thoughtful solutions to what Objector perceived as flaws in the Settlement. (E.R. 7-10.)

The Court took the matter under submission and issued a final order on April 5, 2011, approving the joint motion for settlement and class counsel's request for fees in its entirety. (E.R.2-5, D.E. 49.) Appellant Berg filed her notice of appeal on April 22, 2011 (E.R. 35-39, D.E. 51) and Appellant Rivero filed his timely notice of appeal on April 29, 2011 (E.R. 32-34, D.E. 56.)

V. SUMMARY OF ARGUMENT

A. The Attorneys' Fees Are Excessive Because They Were Based On An Inflated Calculation Of The Common Fund.

Although 25% is the benchmark fee for percentage awards in the Ninth Circuit, logically, the valuation of the fund must be accurate in order to reach a reasonable percentage. The District Court below awarded class counsel 19% of the common fund but this percentage was based upon a gross inflation of the fund by the parties. The District Court erred in

accepting the parties' estimation and should have inquired regarding the sums that comprised the common fund prior to awarding any percentage.

Class counsel stated in its fee motion that the common fund totaled $10.64 million. (E.R. 59, D.E. 40.) The calculation includes the following items: $2.75 million cash, $5.5 million worth of Kellogg's products donated to charities (which will in turn donate to indigent persons), $391, 500.00 in administration and notice costs, and $2 million in attorney's fees. (E.R. 54-56, 59.)(D.E. 40.)

As an initial matter, the $2.75 million fund provided to the class will never be fully exhausted by class members, as admitted by the parties themselves and in accordance with accepted claims rates for class actions such as this. Second, the value of the goods Defendant intends to give to charities is based upon the market price of those items, which is not an accurate assessment of the cost of this donation to Defendant. In addition, and as discussed further at Section V(D), this "*cy pres*" fund is not, actually, *cy pres* and in no way provides benefit to the class. Thus, basing the attorneys' fee award on this bloated value was improper, unreasonable, and an abuse of discretion.

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a. *The $2.75 Million Common Fund.*

It is commonly known that claims rates in class action settlements range between 2% and 10%. See *Sylvester v. Cigna Corp*, 369 F.Supp.2d 34, 52 (D.Me. 2005) (Acknowledging that claims-made settlements "regularly yield response rates of 10 percent or less.") In fact, there has never been a case in which a claims-made settlement fund was depleted entirely. See, e.g., *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 370 F.Supp.2d 320, 321 (D.Me. 2005) (2% submission rate); *Buchet v. ITT Consumer Fin. Corp.*, 845 F.Supp. 684, 695 (D.Minn. 1994) (rejecting settlement with a 0.1% redemption rate); *Strong v. Bellsouth Telecomm., Inc.*, 173 F.R.D. 167, 169 (W.D.La 1997) (4.3% claims rate). Here, the Court below did not take this well-known phenomenon of a low claims rate into account when it made its determination regarding fees.

Here, the cash component of the common fund is $2.75 million. This means that, at best, the class will probably claim $275,000. The attorneys' fees awarded to class counsel exceed this amount by almost 10 times. To avoid this result, numerous district courts faced with this very issue have chosen to defer a determination regarding fees until the relief to class members may be calculated. *See e.g., Yeagley v. Wells Fargo & Co.*, 2008 WL 171083 (N.D.Cal., January 18, 2008)(1% claim rate); *In re Compact*

Disc, supra, awarding attorneys' fees of 3% of value of redeemed coupons which was 30% of claimed lodestar). *See also*, *In re Excess Value Ins. Coverage Litig.*, 2005 U.S. Dist. LEXIS 45104 (SDNY 2006) at *28-33 (awarding class counsel fees in like amount to vouchers redeemed, which was 35% of lodestar. "I have determined to delay award of attorney fees until experience shows how many vouchers are exercised and thus how valuable the settlement really is.") *In re Compact disc*, 292 F. Supp.2d at 189-90. ("To award class counsel the same fee regardless of the claim participation rate…would reduce the incentive in future cases for class counsel to create a settlement which actually addresses the needs of the class… Common sense dictates that a reasonable fee in a class action settlement is a fee that takes into account the actual results obtained.")

Here, the District Court awarded fees according to unsubstantiated speculation about how much relief was made available to, or on behalf of, class members. The District Court took the parties at their word without any independent analysis of the valuation. The Court abused its discretion because it should have deferred ruling on Class Counsel's attorney fee request until all refunds were paid to ensure that fees were paid according to the relief actually received.

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b. *The Cy Pres Distribution Is Over-Valued.*

Similarly, the valuation of the "*cy pres* distribution" is inflated, and should not have been included in the aggregate settlement value calculation, particularly in the Court's assessment of attorneys' fees. The $5.5 million *cy pres* distribution represents the largest portion of the common fund; which class counsel estimates at $10.64 million. (E.R. 4-6, 20, 21, D.E. 40.) This "*cy pres*" should not have been included as part of the common fund because it is not relief provided to the class. (See Section V(D).) However, if this Honorable Court deems that it should be included, $5.5 million is a greatly inflated value of the goods.

First, it is unclear from any of the documents whether the $5.5 million was a valuation of Kellogg's products at retail or at cost. Importantly, the District Court did not seek to clarify this point. However, for purposes of this opening brief, Appellants will presume it was valued at retail based on the language in the Motion for Settlement, "Kellogg will donate $5.5 million worth of food." (E.R. 55, D.E. 40.) Assuming the parties intended to donate $5.5 million in retail, an assessment of the actual cost to Defendant is in order.

Most cereals enjoy a markup of approximately 40%. For example, Kellogg's Corn Flakes was found to have an average markup of 42.53%.

(Http://www.entrepreneur.com/tradejournals/article/162990087.html. *Brand-supermarket demand for breakfast cereals and retail competition*. By Benaissa Chidmi & Rigoberto A. Lopez, American Journal of Agricultural Economics - May, 2007. Last visited on August 24, 2011.) Accordingly, assuming a lower markup of 40%, the valuation of this donation is more closely approximated at a cost of $2.2 million to Defendant. (5,500,000.00 x .40 = 2,200,000.)

The record is devoid of more information than what is provided here. The District Court took none of the previous issues into account with respect to its appraisal of the settlement. The Court did not once question the parties regarding how they arrived at the value of this *cy pres* component. Thus, the Court erred as a matter of law in attributing it to the common fund and in utilizing this sum in its analysis of the appropriateness of the fee percentage.

c. *The Actual Percentage Of The Common Fund.*

Utilizing the numbers reached in Subsections (a) and (b), above, a more accurate valuation of the settlement is arguably: $275,000 (actual claims made by class members) + $2,200,000 (assuming the Court had included this poorly named "*cy pres*" as relief to the class) + $391,500 (notice and administration) + $2,400,000 (attorneys' fees) = $5,266,500.00. Based on this total, class counsel's fee award is actually 45% of the entire

common fund. One step further, if the Court had chosen not to include any "*cy pres*", the percentage is much higher at 78% of the common fund.

Attorneys' fees in this amount are egregious and have no basis in reasonableness or in law, no matter how difficult or lengthy the case. Accordingly, the District Court erred in its award of $2,400,000 in attorneys' fees.

B. The District Court Erred By Employing The Percentage Of The Fund Instead Of The Lodestar Analysis.

In instances where the value of the common fund is uncertain, courts within the Ninth Circuit have opined that the lodestar methodology is a superior method of awarding attorneys fees. *Hanlon v. Chrysler*, 150 F.3d 1011, 1029 (9th Cir. 1998.) Appellants contend that, as a result of the incalculableness of the cash fund at the time of the final settlement, the District Court should have either waited to assess the claims made to the fund (See Section V(A)(a), supra) or should have used the lodestar method. Because the District Court did neither, it committed an abuse of discretion.

The Ninth Circuit permits calculation of class counsel's attorneys' fees under either the lodestar or the percentage of the fund approach in cases that establish a common fund for the benefit of the class. *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d. 1291, 1295 (9th Cir. 1994.) Regardless of the method employed, awarding a reasonable fee

is the hallmark of the common fund case, while arbitrary or unreasonable fee awards are to be avoided. *In re Bluetooth Headset Products Liability Litigation* ---F.3d---, 2011 WL 3632604, *5 (9th Cir., August 19, 2011.)

When settlement relief will be paid on a claims-made basis, such as it will be here, "courts often use a lodestar calculation because there is no way to gauge the net value of the settlement or any percentage thereof." *Hanlon v. Chrysler*, 150 F.3d 1011, 1029 (9th Cir. 1998.); See also *Blum v. Stenson*, 465 U.S. 886, 897 (1984). *Grays Harbor Adventist Christian School v. Carrier Corp.*, Not 2008 WL 1901988, *1 (April 24, 2008, W.D. Wash.) (Claims-made settlements ordinarily lend themselves more readily to calculation of attorneys' fees by lodestar.); *Pelletz v. Weyerhaeuser Co.*, 592 F.Supp.2d 1322, 1326 (W.D.Wash., 2009.) ("Under both federal law and Washington law, the lodestar method is best suited to evaluate the attorneys' fees request in this case. First, Settlement relief will be paid on a claims made basis with no cap to the relief available, so the total value of the Settlement is difficult to monetize. Thus, the requested attorneys' fees do not lend themselves to a percentage of the fund analysis." Citing *Hanlon*, supra.) See also, *Yeagley v. Wells Fargo & Co.*, 365 Fed.Appx. 886 (9th Cir., 2010.)(Requiring the district court to utilize the lodestar method to

calculate fees where the value to the class could not be ascertained; in fact there was no monetary relief.)

This case provided a $2.75 million cash fund to class members that submitted claims; with a maximum recovery of $15.00 per claimant. To the extent the fund is not exhausted, the remaining "fund" will be donated to charities. (E.R. 72, D.E. 34.) No mail notice was provided due to the impracticability and impossibility of personal service. (E.R. 55, D.E. 40.) Notice by an internet campaign was deemed to be sufficient. *Id.* As discussed in Section V(A)(a), claims-made settlements ordinarily do not deplete more than 10% of the common fund. Thus, the bulk of this settlement will be *cy pres* donated to entities and charities, the choice over which class members have no control.

The District Court below erred in failing to seriously consider the practical outcome of this settlement in relation to the attorneys' fee award. This award is both unreasonable and arbitrary because the percentage awarded to class counsel far exceeds 19% of the common fund. The percentages estimated above; 45% and 78% are patently excessive and, accordingly, the District Court should have utilized the lodestar methodology both sensibly and as a matter of law. The Court erred in failing to do so.

C. Regardless Of The Valuation Of The Settlement, This Award Is Excessive Under Ninth Circuit Analysis Of Percentage Of The Fund.

Although the Ninth Circuit has adopted a benchmark of 25% in percentage of the fund cases, that is not the end of the analysis. A percentage award "should be adjusted, or replaced ... when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six Mexican Workers v. Arizona Citrus Growers*, 904 F. 2d 1301, 1311 (9th Cir. 1990); *Citing Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984).

Regardless of the method the district court employs in its assessment of attorneys' fees, this Circuit requires "only that fee awards in common fund cases be reasonable under the circumstances." *In Re Washington Public Power Supply Sys. Securities* Litigation 19 F.3d 1291, 1294-5, fn. 2 (9th Cir. 1994), citing *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir.1990.) In assessing reasonableness of a percentage of the common fund, Courts look to factors such as: (a) the results achieved; (b) the risk of litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the financial burden; and (f) the awards made in similar cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.2002); *Six Mexican*

Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir.1990). A review of the litigation, and the above factors, indicates that this case is not entitled to an award of 19% of the common fund.

a. *Results Achieved Were Not Significant*.

The result achieved for the class is the most important piece of the puzzle for the district court. The committee notes to Rule 23(h) state, "[o]ne fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members…[f]or a percentage approach to fee measurement, results achieved is the basic starting point." 2003 Committee Note, Rule 23(h).

In this case, the results obtained were not as significant as touted in the Motions for Settlement and for Fees. (E.R. 53-85.)(D.E.40.) The first component, the cash fund, provides $2.75 million to reimburse the class for purchases of Mini-Wheats during the class period. Each class member may recover up to $15; the equivalent of three boxes of cereal. (E.R. 54, D.E. 40.) This cash component is the only substantive relief for class members in the settlement of their claims. Furthermore, as discussed supra, the expected claims to this fund are not likely to exceed 10%, based on historical figures.

(See Section V(A)(a.)) The parties fully expect that few class members will makes claims to this cash fund. (E.R. 55, D.E. 40.)

The secondary component of this settlement involves the alleged "*cy pres*" distribution of $5.5 million to charities that support indigent people. (E.R. 55, D.E. 40.) This so-called "*cy pres*" relief in no way benefits the class members. (E.R. 55-6, D.E. 40.) Although Appellant certainly recognizes that this is a benevolent gesture, it certainly should not be considered a benefit for class members – particularly with respect to the calculation of fees.

b. The Risk Of No Recovery Was Low.

Further undermining the district court's decision to award 19% of the fund is the ease with which this case was settled. This lawsuit was, in laymen's terms, a slam-dunk. Mini-Wheats brand cereal released advertisements claiming that eating a bowl of Mini-Wheats would increase attentiveness in kids by nearly 20% for up to three hours after eating. However, the study conducted clearly did not show this result. The Complaint states, inter alia, "[e]ating a bowl of Product for breakfast was not clinically shown to improve kids' attentiveness by nearly 20% compared to kids who ate no breakfast. Under the study, children who ate the Product for breakfast had an average of only 10.6% better attentiveness three hours later

than kids who did not eat any breakfast, with relatively few experiencing better attentiveness near the 20% level." (E.R. 90, ¶ 16, D.E. 23.) Plaintiffs claims and underlying support were sufficiently detailed that the result was, no substantive litigation was conducted.

Truly, the only litigation appears to have occurred between June and September, 2010, during which Plaintiffs filed a first amended complaint, narrowly escaped a dismissal for want of prosecution, and reached a settlement with Defendants. No dispositive motions were filed, no discovery was conducted; in fact, it is unclear what, if anything, was done to thresh out the issues of this case.

Clearly, the risk undertaken by Plaintiffs was not significant, as is evidenced by the facility of settlement without any need for formal litigation. (See Transcript, p. 14, February 14, 2011, wherein class counsel, Mr. Blood states, "the case has been around for a little, a little while, but it wasn't heavily litigated.) (E.R. 10.) Accordingly, the abject lack of risk is further indication of the District Court's error in granting such a significant percentage of the fund.

c. The Skill Required And Quality Of Work Is A Neutral Factor.

As discussed at Section III, this litigation was extremely short and straightforward. There were no dispositive motions, no discovery conducted

and, in fact, no Answer was ever filed to the class action complaint. Appellant does not contend that the skill and quality of class counsel is dependent upon the length of the litigation. To the contrary, short litigations can sometimes be indicative of great skill on the part of counsel. Certainly, the settlement, which provides little to class members should be considered as a negative factor but, on the whole, whether counsel was skillful and performed quality work is a neutral factor based on the absence of any information with which to make this determination.

d. The Contingent Nature Of The Action.

Certainly the risks of counsel in bringing this litigation typically weigh in favor of a higher return in attorneys' fees. However, here, the risk was only borne for a short period of time, the burden for which was shared between several firms, and the investment was minimal, at only 944 hours. (E.R. 61, D.E. 40.) Accordingly, this factor, too should weigh negatively against a significant percentage award.

e. Awards Made In Similar Cases

The District Court erred in approving 19% of the common fund, or a multiplier of 4.3 of the lodestar calculation. (E.R. 4-5, 10, D.E. 49.) In its Final Order, the Court cited to the Ninth Circuit decision, *Vizcaino v. Microsoft Corp*., to support its reasoning regarding attorneys' fees. *Vizcaino*

150 F.3d 1048-1050. (E.R. 5, D.E. 49.) However, reliance on *Vizcaino* is misplaced, as this case and the Ninth Circuit decision are dramatically different cases. A review of Ninth Circuit precedent indicates that this case is nothing like other cases which enjoyed the presumption of a 25% fee award.

Within this Circuit, multipliers higher than the range of one to four are reserved for cases of exceptional difficulty, with uncommonly rare questions of law or fact, lengthy and arduous dockets, and a significant risk of no recovery. (See *Id.* at 1050, awarding a multiplier of 3.65, or 28% of the fund for creation of a fund of $96.885 million during a litigation that spanned 11 years.) (See also, *Six (6) Mexican Workers* 904 F.2d at 1311, awarding 25% in light of the fact that the litigation spanned 13 years, obtained substantial success, and contained complicated legal and factual issues.)

The district court may adjust the percentage awarded "upward or downward to account for any unusual circumstances involved" in the case. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). A review of the settlement achieved here clearly does not warrant such a high award of fees under either the lodestar or percentage approach. This case did not present class counsel with difficult questions of law or fact. This was not a hard fought litigation for the lost pensions of a teacher's fund.

This was a consumer class action that settled quickly and with relative ease. This settlement will scarcely benefit any class members. Cases of this type are not deserving of such significant multipliers or percentages anywhere close to the "benchmark" in the Ninth Circuit.

"Selection of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048. Also troubling is the absence of findings in the record to support the District Court's fee award. During the final fairness hearing, the Court questioned class counsel regarding its fee request, specifically regarding the 4.3 multiplier, noting that it seemed a "little high." (E.R. 10, lns. 9-11.) Despite this concern the Court deemed this topic not worth further discussion and summarily granted class counsel's fee request in its entirety. (E.R. 4-5, D.E. 40.)

This factor weighs heavily against a finding that the District Court's order regarding fees is justified. The District Court abused its discretion under the foregoing factors, no matter which method it used to calculate class counsel's fees.

D. The *Cy Pres* Relief Is Not Truly *Cy Pres*.

The doctrine of *cy pres* originated in the law of wills and trusts and allowed courts to redirect money from trusts and testamentary gifts that

would otherwise fail for legal reasons. *In Re Wells Fargo Securities Litigation*, 991 F.Supp. 1193, 1194-95 (N.D. Cal. 1998). However, a district court cannot direct funds to any seemingly worthwhile recipient, instead, the funds must be used in such a way that best serve the original intent of the settlor or testator. *Id* at 1195. In the context of class actions, distribution of funds through the use of *cy pres* should be limited in two ways. *Id* at 1194. First, the doctrine of *cy pres* should only be invoked when "(1) no parties have equitable interests in the residue or (2) distribution to such parties would be impractical." *Id*. Second, "a court must be careful to direct the residue to an entity that will indirectly serve the interests of class members or "others similarly situated, e.g. *future class members* who engage in future transactions of the type involved in the class litigation." *Id* at 1195.

The Ninth Circuit has held that distributions of *cy pres* that stray too far from the benefit of the class members cannot be approved. "Although we do not generally disapprove of *cy pres*, we cannot affirm the district court's application in this case. The district court's proposal benefits a group far too remote from the plaintiff class. Even where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the "next best" distribution. See *City of Philadelphia v. American Oil Co.*, 53 F.R.D.

45, 72 (D.N.J.1971)." *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990.)

In this case, the "*cy pres* distribution" as described in the settlement is not, actually, *cy pres*. The settlement provides that $5.5 million worth of food will be given to charities that provide food to the homeless. (E.R. 5-6, D.E. 40.) While this is certainly a worthwhile and altruistic gesture, this is not *cy pres*; it is a donation that has nothing to do with the plaintiff class or the intended relief, while simultaneously engendering goodwill and a tax write-off for Defendants.

The Motion for Settlement states that this "*cy pres*" is a result of the "difficulty and expense in locating Settlement Class Members and otherwise meeting the requirements of a distribution under the '*cy pres*' doctrine[.]" (E.R. 74.) However, certainly if the Settlement is made with the intention of distributing the common fund to class members upon a properly made claim, the distribution of Kellogg's brand products to class members could also be made. Kellogg's makes a multitude of cereals, breakfast items, and other healthy snack foods. Even if a class member would prefer not to receive Mini-Wheats as the non-monetary portion of their settlement, they could presumably select a different, more palatable item.

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V. CONCLUSION

For the foregoing reasons, this Honorable Court should reject the Settlement approved below and remand to the district court for further consideration of the issues above. Appellant also requests such other relief, as the Court deems appropriate.

Dated: August 29, 2011

Law Offices of Darrell Palmer

By: /s/ Joseph Darrell Palmer
Joseph Darrell Palmer
Attorney for Appellant
Sonia Newman

Dated: August 29, 2011

Bandas Law Firm, P.C.

By: /s/ Christopher A. Bandas
Christopher A. Bandas
Attorney for Appellant Omar Rivero

CERTIFICATE OF COMPLIANCE TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 4,835 words.

Dated: August 29, 2011

By: /s/ Joseph Darrell Palmer
Joseph Darrell Palmer

STATEMENT OF RELATED CASES

Appellants Stephanie Berg and Omar Rivero are aware of the following related cases pending in this Court:

Consolidated Appeals: 11-55674
11-55706

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 29, 2011.

I certify that all active participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. All non-registered participants will be served via U.S. Mail.

/s/ Joseph Darrell Palmer_____
Joseph Darrell Palmer