Case No. 14-72745

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE ADOBE SYSTEMS, INC.,
APPLE, INC., GOOGLE, INC., and INTEL CORP.

ADOBE SYSTEMS, INC., APPLE INC., GOOGLE INC., and
INTEL CORP., Defendants-Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, Respondent,

MICHAEL DEVINE, MARK FICHTNER, SIDDHARTH HARIHARAN,
BRANDON MARSHALL, and DANIEL STOVER,
Plaintiffs-Real Parties in Interest.

From the United States District Court
Northern District of California
The Honorable Lucy H. Koh, Presiding
Case No. 5:11-2509-LHK

PETITIONERS' REPLY BRIEF IN SUPPORT OF MANDAMUS

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The district court denied preliminary approval of a $324.5 million settlement based on its use of a bright-line proportionality requirement directly contrary to this Court's decisions, which focus on ensuring non-collusive, arm's-length negotiations and have rejected a formulaic approach to settlement approval. Absent mandamus review, the court's ruling will make settlement in future class actions significantly more difficult, harming plaintiffs, defendants, and absent class members, and imposing unnecessary costs on an already overburdened judiciary. The court's reliance on a clearly erroneous preliminary approval standard warrants mandamus review, and this Court should issue the writ.

ARGUMENT

I. Plaintiffs' Mootness and Procedural Arguments Are Baseless

1. Plaintiffs' mootness arguments distort the settlement agreement and the law. The issues presented are far from moot. If this Court vacates the denial of preliminary approval, the agreement will remain in full force and effect.

Although plaintiffs continue to "believe[] that the proposed settlement ... warrant[s] approval" (Pls' Br. 1-2), and indeed told the district court "it would be absolutely unethical for [them] to see that there was this much money available for the class on these claims and to ignore that and go to trial" (6/19/14 Tr. 30:4-7), they now retreat from the agreement they contractually pledged to support in good faith (Dkt. 921-1, at 6). They argue that the agreement "ceased to exist" by virtue

of an interlocutory order that defendants have not even had a chance to appeal. Pls' Br. 6.

But under California law, contracts presumptively contemplate a right to appeal *all* decisions unless that right is *expressly* waived. *Concepcion v. Amscan Holdings, Inc.*, 223 Cal. App. 4th 1309, 1322 (2014). "[I]f the parties to a contract want their agreement to encompass a waiver of the right to appeal from an anticipated judicial ruling, they must say so explicitly and unambiguously; they cannot leave their intent to be inferred from the language of the agreement." *Id.* (citation omitted). As a result, courts must "resolve [any] doubt in favor of appellant's right to appeal." *Bischel v. Fire Ins. Exch.*, 1 Cal. App. 4th 1168, 1172 (1991) (citation omitted).

No provision in the settlement agreement waives defendants' right to appeal or suggests that the order denying preliminary approval would nullify the agreement. Plaintiffs rely on section II.B.4 of the settlement agreement, which provides that "[i]f the Court denies without leave to re-file the motion for Preliminary Approval[,] the case will proceed as if no settlement had been attempted, and the Settling Parties shall be returned to their respective procedural postures." Dkt. 921-1, at 8; *see* Pls' Br. 6; Devine Br. 5. But nothing in this provision terminates the settlement agreement simply upon denial of preliminary approval by the trial court prior to appellate review.

In contrast, in a separate section of the agreement, the parties specifically agreed that, if the settlement was not "finally approved," *then* the settlement agreement would become "null and void." Dkt. 921-1, at 24-25. Although not even this section includes a sufficiently clear and express waiver of the right to appeal, it demonstrates that, had the parties intended that their agreement would be nullified upon denial of preliminary approval, at a minimum, they could and would have included explicit language to that effect in section II.B.4. *See, e.g.*, *Stephenson v. Drever*, 16 Cal. 4th 1167, 1175 (1997).

The requirement that the parties "shall be returned to their respective procedural postures" so that they "may take such litigation steps" (Dkt. 921-1, at 8) as they otherwise could have absent the agreement does not imply (let alone state clearly and expressly, as California law requires) that the agreement's preliminary rejection is insulated from appellate review. As with any interlocutory appeal, the parties "may take … litigation steps" while the appeal is pending. For that reason, the fact that defendants took litigation steps following the denial of preliminary approval was not an "acknowledg[ment]" of anything (Devine Br. 6; *see also* Pls' Br. 7), but simply compliance with the court's pretrial orders.

The agreement in *Gibson v. HoMedics, Inc.*, 2014 WL 2757585 (Cal. Ct. App. June 18, 2014), stated that, if final approval were denied, "each [p]arty shall retain all of their respective rights as they existed prior to the execution of [the

agreement]." *Id*. at *5.[1] Yet, the denial of final approval there did not nullify the agreement because, as here, the provision at issue "d[id] *not* provide that all of the parties' obligations under the [the agreement] are null and void." *Id*. Mr. Devine seeks to distinguish *Gibson* because denial there was based (in part) on a curable procedural defect (Devine Br. 9), but this Court's vacatur of the order denying preliminary approval would have the same effect as curing a procedural defect.

No California authority supports plaintiffs' position. Their only authority on this point—*In re Stock Exchanges Options Trading Antitrust Litigation*, 2005 WL 1635158 (S.D.N.Y. July 8, 2005)—applied New York contract law and involved an agreement that explicitly stated what section II.B.4 does not: that the agreement would be "null and void" upon denial of preliminary approval. *Id.* at *7.

Mr. Devine claims that because "district courts retain discretion to disapprove a settlement at *final* approval, there is little point in undergoing" an appeal from preliminary approval. Devine Br. 7-8 (emphasis added). But if this Court holds that the district court's proportionality standard is a fundamentally erroneous measurement of the adequacy of a settlement, the district court could not apply that methodology at the final approval stage either.[2]

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[1] Though not precedential, unpublished California appellate decisions may still be considered by this Court. *Beeman v. Anthem Prescription Mgmt. LLC*, 689 F.3d 1002, 1008 n.2 (9th Cir. 2012).

[2] Even if moot (and it is not), the issue presented would fall under a well-

2. Having contended that the denial of preliminary approval cannot be reviewed because the settlement has terminated, Mr. Devine unblushingly asserts that mandamus is inappropriate because denial of preliminary approval is reviewable after final judgment. Devine Br. 27-29. But he cites no example of any party ever challenging the denial of preliminary approval on direct appeal from final judgment, let alone a court allowing such an appeal.

Mandamus is proper due to the virtual certainty that the court's denial of preliminary approval will "evade review," despite the highly dubious and purely theoretical possibility that the court's order "might at some later time become the subject of an appeal." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1304-05 (9th Cir. 1982) (granting mandamus despite "possibility" that order could later be directly appealed). Mandamus is appropriate to review decisions that are, like denial of settlement approval, "'collateral to the litigation'" and "'thus lost to appellate review *in fact if not in theory*.'" *Id.* at 1304 (emphasis added) (citation omitted).

3. Finally, plaintiffs and Mr. Devine are incorrect in claiming that the admitted lack of any appellate guidance on the preliminary approval standard militates *against* mandamus. Devine Br. 14 n.2; Pls' Br. 3 n.1. Mandamus is appropriate on "an important question of first impression" where there is a "likelihood

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established exception to the mootness doctrine, because it would be "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). Under plaintiffs' theory, issues regarding preliminary settlement approval could *never* be reviewed on appeal.

[the Court] will not have the opportunity to address the issue" in a subsequent appeal. *Medhekar v. U.S. Dist. Court*, 99 F.3d 325, 327 (9th Cir. 1996). Indeed, the fact that the district court's order "raises new and important problems, or issues of law of first impression" is one of the five specifically enumerated factors *supporting* the exercise of mandamus jurisdiction. *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 655 (9th Cir. 1977). The issues presented here are bound to recur in many contexts, and specifically in pending lawsuits against various parties including Oracle, Microsoft, and Ask.com in the same district, before the same judge, alleging the same legal theory. This Court's guidance is therefore critical to establish the standard for district courts at the preliminary approval stage.

II. The District Court's Clearly Erroneous Legal Standard for Preliminary Approval Warrants Mandamus Review

1. The district court's rigid and formulaic benchmark standard for preliminary approval is clearly erroneous as a matter of law. Although the "decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge" (*Officers for Civil Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)), a court *necessarily* abuses that discretion when it "applie[s] the wrong legal standard" (*Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1162 (9th Cir. 2013) (citation omitted)).

The district court acknowledged that "[c]lass counsel have been zealous advocates for the Class" (Dkt. 974 ("Op."), at 31:21), and Mr. Devine acknowledges

again on appeal that "[t]here was no suggestion of collusion or preferential treatment" (Devine Br. 15; *see also* 6/19/14 Tr. 10:4-8 (this "wouldn't be a serious claim")). Moreover, the settlement negotiations were conducted with the aid of a former federal district judge as mediator. But the court brushed these factors aside, and deemed the settlement consideration too low, because, according to the court, "[c]lass members [would] recover less on a proportional basis from the instant settlement with Remaining Defendants than from the settlement with the Settled Defendants a year ago." Op. 6:21-7:2. The court thus imposed a bright-line floor on the permissible settlement, *limiting* the court's discretion at the preliminary approval stage, and requiring what it believed (incorrectly) to be strict proportional adherence to settlements reached previously in the case.

Plaintiffs nonetheless suggest that the district court denied preliminary approval based on a wide-ranging and flexible analysis. Devine Br. 16; Pls' Br. 4. In fact, however, the court considered only a comparison to the initial settlements and the relative strength of plaintiffs' case (Op. 7, 10, 27), and did not "explore[] comprehensively all factors" (*Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009) (citation omitted); *see* Pet. 18-22). The court acknowledged that "there very well may be weaknesses and challenges in Plaintiffs' case that counsel cannot reveal," but substituted its own judgment for that of the parties and "conclude[d] that the Remaining Defendants should, at a minimum, pay" what the court deemed

"their fair share as compared to the Settled Defendants." Op. 31:23-25.

This new proportionality test contravenes even the *final* approval standard set forth in *Rodriguez*. There, the objectors proposed a test that would have limited the range of permissible settlement based on a formulaic analysis of the probability of potential outcomes. 563 F.3d at 965 (citing *Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646 (7th Cir. 2006)). But this Court rejected that approach, explaining that the Court "put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution" and "ha[s] never prescribed a particular formula by which that outcome must be tested." *Id*. Rather, a court's role in approving a settlement is an "'amalgam of delicate balancing.'" *Id*. (quoting *Officers for Justice*, 688 F.2d at 625).

Moreover, at the preliminary approval stage, a district court should presume that a settlement that is the product of an arm's-length negotiation between experienced counsel is fair and reasonable and require a party seeking to overcome that presumption to bring forth evidence showing that the settlement was not the result of such a negotiation. Such evidence could potentially include proof that the amount is so low that class counsel acting in the best interests of the class could not reasonably have agreed to it.

But rather than this type of approach, the district court applied a strict proportionality formula tied to the previous settlements based on its view of each

defendant's "fair share." Op. 31. In doing so, the court committed clear legal error warranting mandamus review.

2. Mr. Devine claims that the "district court used the well-accepted test articulated in *In re Tableware* [*Antitrust Litigation*, 484 F. Supp. 2d 1078 (N.D. Cal. 2007)]" (Devine Br. 15), but neither *Tableware* nor any of the other district court decisions he cites—all of which *approved* settlements—imposed a proportionality requirement. Rather, courts ask whether the "proposed settlement [wa]s *obviously deficient*." 484 F. Supp. 2d at 1080 (emphasis added); *Cordy v. USS-Posco Indus.*, 2014 WL 212587, at *2 (N.D. Cal. Jan. 17, 2014) (same). Indeed, even in situations (unlike here) involving *cy pres* awards, coupon settlements, or negligible cash recovery, courts have deferred to the settling parties in the absence of obvious deficiencies. *See, e.g.*, *Keirsey v. eBay, Inc.*, 2013 WL 5755047, at *5 (N.D. Cal. Oct. 23, 2013) (preliminarily approving settlement providing account credits and *cy pres* distribution because court found "no obvious deficiencies").

The courts that have considered whether a settlement amount falls within the "range of reasonableness" have analyzed, among many other factors, whether the settlement was in the relevant "'ballpark.'" *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 458 (2d Cir. 1974) (affirming approval), *abrogated in part on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *see also Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (low set-

tlement value relative to potential recovery "does not, in and of itself" mean settlement "should be disapproved") (citation omitted). No court has imposed a strict floor below which a settlement may not go based purely on a proportionality analysis, and without considering all the other relevant approval factors. Indeed, even consensual "most favored nations" clauses are disfavored in class settlements. Pet. 16-17.

The courts that Mr. Devine claims "rel[ied] on extrinsic benchmarks" (Devine Br. 15) did not require that a settlement be strictly proportionate to a previous settlement, as the court did here. In *In re Netflix Privacy Litig.*, 2012 WL 2598819 (N.D. Cal. July 5, 2012), for instance, the court remarked that one of six factors warranting approval was that the settlement "compare[d] favorably to settlements in other online consumer privacy cases"; but the court did not require that the settlement be proportional to the other settlements or suggest that it would otherwise have denied approval. *Id.* at *2; *see also Trombley v. Nat'l City Bank*, 759 F. Supp. 2d 20, 24-25 (D.D.C. 2011) (comparable settlements "can be relevant").

It may be that courts in some cases consider a comparison with other settlements among many other relevant data points and factors as part of the broader, more flexible preliminary approval analysis. The settlement here plainly qualified under this standard, as it was "(by far) the largest recovery ever achieved in an employee class action bringing claims under the antitrust laws, on either an aggregate

or net per class member basis." Dkt. 938, at 2. Indeed, the parties provided the court with comparable settlements that were far lower than the present settlement on both an aggregate and per-class-member basis. *See* Dkt. 920, at 16.

But it was legal error for the district court to *require* that the settlement be strictly proportional to the previous settlements in this case, and to *preclude* any lower settlement based solely on that formula. No court has imposed such a standard, and it is directly contrary to this Court's decisions. The settlement agreement here satisfies any preliminary approval standard that any other court has adopted.

Imposing a strict requirement that parties settle for no less proportionally than previous settlements in the case simply makes no sense. Litigants in multi-party actions settle at various times for a whole host of reasons that determine the amount of consideration and may result in earlier settlements being higher or lower than later settlements depending on the circumstances.

For example, some defendants place a high value on the certainty of settlement and avoiding possible negative publicity surrounding continued litigation. Smaller defendants often enter into disproportionately high settlements because the cost of litigating the case is prohibitive. Joint and several liability in antitrust cases such as this exposes defendants to an uncertain and potentially disproportionate share of liability, because plaintiffs may collect a damages judgment in full from any of the defendants (and there is no right to contribution). *See Tex. Indus., Inc.*

v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981). Thus, smaller defendants may pay proportionately more than other, larger defendants who settle later; or plaintiffs may be willing to settle simply to fund the litigation without giving up any part of the ultimate recovery. And here, much of the liability evidence the district court regarded as especially damning pertained to the early-settling parties. Op. 10; *see* Dkt. 531, at 25-26, 50-51; Dkt. 771, at 3; 6/19/14 Tr. 63:9-13. For these and many other reasons, courts cannot strictly require that later settlements proportionally adhere to prior ones.

Here, the district court performed no calculation or analysis of exposure or likely verdicts before approving the early settlements that it used as a benchmark. Rather, it granted preliminary approval, and later final approval, based on an observation that the settlements "provide for substantial consideration." Dkt. 915, at 3. The dearth of valuation analysis makes the court's decision a few months later to deem those settlements the extreme low end of the reasonable range of compensation all the more inexplicable. In addition, in addressing the present settlement the court then miscalculated the proportionality; as plaintiffs do not dispute, the net amount of the present settlement for class members (after fees) was proportionally *higher* than the previous settlements. Pet. 17-18.

3. The district court's decision, if not corrected, will *prevent* courts from exercising their critical role "to protect the unnamed members of the class from un-

just or unfair settlements affecting their rights" (*In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008)) by inhibiting settlement by class representatives who have serious concerns about their risk at trial.

Plaintiffs' counsel could not have been clearer at the preliminary approval hearing that they were "sobered" by the "jury testing" and "empirical work" they had done preparing for trial. 6/19/14 Tr. 25:4-6, 63:22-64:5, 75:15-21. They thus determined that "*it would be absolutely unethical*" and "malpractice" to reject the settlement "and go to trial knowing that there might be *a very strong risk that the class gets nothing*." *Id.* at 22:23-25, 30:4-7 (emphases added).

The court gave short shrift to these concerns and instead substituted its own view as to the likely outcome, which necessarily did not take account of evidence not yet before the court and the obstacles to a unanimous verdict that plaintiffs' counsel had already seen in jury testing. While plaintiffs' response in this Court now opportunistically embraces the district court's analysis of the evidence (Pls' Br. 5), they cannot escape their very own counsel's assessment of the serious problems with their case.

The problems are many. Plaintiffs' liability theory is implausibly premised on stitching together a novel unitary conspiracy from six alleged bilateral agreements, disparately entered into between the 1980s and 2007 in different industries and covering employees in different geographic areas. *See* Pet. 19. No defendant

had agreements with more than three companies, and the largest defendant (Intel) had only one alleged agreement. Dkt. 771, at 3. Thus, for example, if the plaintiffs fail to convince the jury that a 1984 agreement between Lucasfilm and Pixar and a 2007 agreement between Intuit and Google were part of a unified conspiracy, the class members would get nothing. Indeed, if the jury rejects the participation of even one defendant, the class members would get nothing, given that plaintiffs' damages theory assumes (and requires) participation by all seven defendants. Dkt. 569-14, at 1031:19-1032:14.

Plaintiffs would also have to convince a Silicon Valley jury that two-party agreements to refrain from a single recruiting technique (cold-calls) depressed the wages of high-tech employees at all seven companies, even though inter-defendant hiring actually *increased* during the relevant period. Dkt. 846, at 7-8, Ex. 1. They would have to convince a jury that, for example, additional calls to one company's employees would have resulted in an across-the-board increase in compensation for every technical employee at that company throughout the United States. In addition, the jury would need to accept plaintiffs' expert's damages model, even though the expert admitted his estimates are not statistically significant under any accepted level of significance. Dkt. 570, at 6-7; Dkt. 573-4, at 1257:23-1258:12; Dkt. 577-47, at 1044:7-21.

It is therefore not at all surprising that plaintiffs' jury testing showed that

"while [they] might have great evidence, [they] have to overcome a number of hurdles." 6/19/14 Tr. 25:4-6.

By contrast, the district court's decision rests on the "tacit assumption" that "all will be well for surely the plaintiff will win and manna will fall on all members of the class." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (citation omitted). Indeed, the court *expressly* assumed this. 6/19/14 Tr. 21:1-2. But this assumption places the claims of absent class members at great peril, particularly where (as here) plaintiffs' counsel express "great concern" with "tak[ing] th[e] case to trial." *Id.* at 64:2-3; *see id*. at 24:22-23 (plaintiffs' counsel: "your honor may have assumed more than we did about the lack of risk at trial").

In sum, district courts do play a "critical role … in the class action settlement process" (Devine Br. 24) and should be vigilant at the preliminary approval stage in ensuring that the settlement reached is the product of serious, informed, non-collusive negotiations. But imposing an arbitrary floor on the amount of the settlement, and effectively forcing the parties to trial despite plaintiffs' "great concern" about the "very real risks" of losing, risks irreparable harm to the class members, whom the named plaintiffs and their counsel are supposed to represent.

CONCLUSION

The Court should issue a writ of mandamus vacating the district court's decision and ordering the court to preliminarily approve the settlement.

Dated: October 24, 2014

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ATTESTATION: The filer attests that concurrence in the filing of this document has been obtained from all signatories.

CERTIFICATE OF SERVICE

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I declare under penalty of perjury under the laws of the State of California and the United States that the above is true and correct.

Executed on October 24, 2014, at San Francisco, California.

/s/ Michael F. Tubach
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