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

REAL PARTY IN INTEREST MICHAEL DEVINE'S OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS AS *AMICI CURIAE*

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INTRODUCTION

Michael Devine is a named plaintiff and class representative who objected to the proposed settlement with defendants Apple, Google, Intel and Adobe. He opposes the motions of the eight economists and the California and United States Chambers of Commerce for leave to file briefs as *amici curiae* in support of the defendants' petition for writ of mandamus. (Dkt. Nos. 8 & 9.) The motions were filed after the deadline set by Federal Rule of Appellate Procedure 29(e), and the proposed brief of the Chambers of Commerce merely repeats arguments already advanced by the defendants. More importantly, the defendants' petition is moot because the parties to the settlement agreement agreed that in the event the district court denied preliminary approval of the proposed settlement, "the case will proceed as if no settlement had been attempted." Because the defendants cannot obtain the relief they seek from this Court—a writ of mandamus directing the district court to enter an order granting preliminary approval of the settlement—their petition must be dismissed for lack of jurisdiction.

ARGUMENT

As Mr. Devine and the other plaintiffs demonstrated in their responses to the defendants' petition, the petition must be dismissed because it is moot and this Court lacks jurisdiction. *See* Devine's Response (Dkt. No. 6) at 5-11; Plaintiffs' Response (Dkt. No. 4) at 6-10. The parties contemplated in their settlement

agreement the possibility that the settlement agreement would not be preliminarily approved. They agreed to a termination clause which provides that if the district court denied preliminary approval the case would proceed as if no settlement had been attempted. Section II.B.4 of the settlement agreement states:

> If 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, i.e., *status quo* as of April 24, 2014, so that the Settling Parties may take such litigation steps that Plaintiffs or the Settling Defendants otherwise would have been able to take absent the pendency of this Settlement Agreement. In the event the Settlement does not receive Preliminary Approval, the Settling Parties will negotiate and submit for Court approval a modified case schedule.

See Devine's Response, Ex. A at 8. The plaintiffs' attorneys who negotiated the settlement have confirmed that they intended this provision to mean that "the parties shall proceed as if there were no settlement in the event of a denial of preliminary approval by the district court." Plaintiffs' Response at 6.

The defendants have offered no plausible alternative interpretation. Instead, they argue in their reply brief that they retained the right to appeal because contracts presume a right to appeal all decisions unless the right is expressly waived. Reply (Dkt. No. 10) at 2. But "[u]nder California law, the fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time of contract." *U.S. Cellular Investment Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002). The parties' intent can be determined from

the plain language of section II.B.4 of the settlement agreement, which sets forth their understanding and agreement that in the event the district court denied preliminary approval of the settlement, "the case will proceed as if no settlement had been attempted, and the Settling Parties shall be returned to their respective procedural postures, i.e., *status quo* as of April 24, 2014." *See Shaw v. Regents of Univ. of Cal.*, 58 Cal. App. 4th 44, 53 (1997) ("Where contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms and go no further.") (citation omitted); *see also* Cal. Civ. Code § 1638 (same). The plain language of this provision of the settlement agreement was negotiated by sophisticated parties and does not create any doubt as to the parties' intent, so there is no ambiguity to resolve in favor of allowing an appeal.

Moreover, there can be no presumption of a right to appeal an order that the defendants do not have a right to appeal in the first place. The defendants contend that the presumption applies to appeals of "*all* decisions," but they cite no cases in which courts have presumed a right to appeal a court's interlocutory rulings. In California, the right to appeal is statutory, and the types of judgments and orders that are appealable are listed in Code of Civil Procedure section 904.1. *See People v. Mazurette*, 24 Cal.4th 789,792 (2001) ("It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute.") (citation omitted). Both cases the defendants cite involved judgments

or orders the parties had a right to appeal under section 904.1. In *Concepcion v. Amscan Holdings, Inc.*, the defendants appealed an order awarding attorneys' fees to class counsel that was entered after final judgment. 223 Cal. App. 4th 1309, 1321-22 (2014); *see also* Cal. Civ. Code § 904.1(a)(2) (granting the right to appeal an order made after an appealable judgment). In *Bischel v. Fire Insurance Exchange*, the defendant appealed the final judgment in favor of the plaintiff. 1 Cal. App. 4th 1168, 1171-72 (1991); *see also* Cal. Civ. Code § 904.1(a)(1) (granting the right to appeal a final judgment). These cases and their express waiver requirement therefore do not apply to the district court's interlocutory order denying preliminary approval. *See Farwell v. Sunset Mesa Property Owners Association, Inc.*, 163 Cal. App. 4th 1545, 1547-48 (2008) (interim class action orders are not directly appealable if they do not have the "death knell" effect of dismissing the entire action as to all class members other than the plaintiffs).

In addition, the motion for leave filed by the Chambers of Commerce should be denied because their proposed brief merely raises the same points already raised in the defendants' principal and reply briefs: judicial policy favors settlements, the district court's purported use of a strict mathematical formula was clear error, and the district court created a "most favored nation" arrangement. Their brief is therefore of no assistance to the Court. *See, e.g., Kinnard v. Rogers Trucking*, 176 F. App'x 829, 830 (9th Cir. 2006) (denying motions for leave to file amicus briefs

"because the proposed briefs raise the same points already raised in Kinnard's briefs"); *see also* Fed. R. App. P. 29(b) advisory committee note to 1998 amendment ("An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus curiae* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored."); *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544-45 (7th Cir. 2003) (denying leave to file amicus brief where, "[w]hile the amicus briefs sought to be filed in this case contain a few additional citations not found in the parties' briefs and slightly more analysis on some points, essentially they cover the same ground the appellants, in whose support they wish to file, do.").

Finally, both motions should be denied because they were filed well after the applicable deadline. Federal Rule of Appellate Procedure 29(e) requires an amicus curiae to file its brief (and motion for leave to file when necessary) "no later than 7 days after the principal brief of the party being supported is filed" or, if the amicus curiae does not support either party, "no later than 7 days after the appellant's or petitioner's principal brief is filed." Fed. R. App. P. 29(e). Both briefs support the defendants' petition and the motions were therefore required to be filed no later than 7 days after the defendants filed their principal brief on September 4, 2014. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 724-25 (7th

Cir. 2009) (explaining that "[a] 'principal brief' is the opening brief on the merits, as opposed to a reply brief or another variety of brief" and that someone who wants to file as *amicus curiae* in support of a request for discretionary relief must use the same schedule as the petitioner). The motions should therefore be denied as untimely.

CONCLUSION

Mr. Devine respectfully requests that the Court deny the motions of the eight economists and the California and United States Chambers of Commerce for leave to file briefs as *amici curiae*.

DATED: October 31, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on October 31, 2014.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Daniel C. Girard