No. 14-72745

In the

United States Court Of Appeals

For the

Ninth Circuit

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, and
DANIEL STOVER,
Plaintiffs and 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

OPPOSITION OF PLAINTIFFS AND REAL PARTIES IN INTEREST MARK FICHTNER, SIDDHARTH HARIHARAN, AND DANIEL STOVER TO MOTIONS FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE

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INTRODUCTION

Plaintiffs and real parties in interest Mark Fichtner, Siddharth Hariharan, and Daniel Stover ("Plaintiffs") oppose the two motions for leave to file briefs as amici curiae from eight economists (Dkt. 8-1) and from the Chamber of Commerce of the United States of America and the California Chamber of Commerce (Dkt. 9-1) (collectively, the "Motions" and "Proposed Briefs").

First, the Motions should be denied because they are untimely. The Motions and Proposed briefs were filed more than a month after they were due, and there is no attempt to establish good cause for the delay.

Second, the Court should deny the Motions because the matters asserted in the Proposed Briefs are irrelevant to the disposition of the Petition for Writ of Mandamus ("Petition"). The Proposed Briefs do not say a word about the dispositive jurisdictional issue that renders the Petition moot. The district court's denial of preliminary approval terminated the proposed settlement agreement according to its own terms.

Finally, the Court should deny the motion for leave to file the proposed amicus by the Chamber of Commerce of the United States of America and the California Chamber of Commerce for the additional reason that the proposed brief only repeats arguments Petitioners already make.

ARGUMENT

I. THE COURT SHOULD REJECT THE MOTIONS FOR LEAVE BECAUSE THEY ARE UNTIMELY

The Motions were due "not later than 7 days" after September 4, 2014, the date the Petition was filed. Fed. R. App. P. 29(e). Here, the Motions and Proposed Briefs were filed on October 24, 2014, more than a month after they were due, and ten days after the October 14, 2014 deadline for Plaintiffs' response to the Petition. The 7-day deadline for amicus briefs was designed to be "short enough that no adjustment need be made in the opposing party's briefing schedule." Fed. R. App. P. 29(e) Advisory Committee's note (1998). "The opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading." *Id.* Plaintiffs could not address the arguments made by amicus in their responsive pleading because the proposed amicus briefs were filed after Plaintiffs' responsive pleading was due. The Motions were filed late, and there is no attempt to establish good cause for the delay. The Court should deny them. *See, e.g.*, *Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060, 1062 n.1 (9th Cir. 1996) (denying motion to file amici curiae brief: "This motion was filed late and there was no attempt to show good cause for the late filing.").

II. THE MATTERS ASSERTED IN THE PROPOSED AMICUS BRIEFS ARE IRRELEVANT TO THE DISPOSITION OF THE PETITION

As Plaintiffs explained in their Response to the Petition, under the terms of the settlement agreement, the proposed settlement has ceased to exist. (Response at 6-10.) Petitioners cannot obtain the relief they seek because there is no longer a settlement agreement to be preliminarily approved. As a result, the petition for writ of mandamus is moot and should be dismissed for lack of jurisdiction. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("Mootness is a jurisdictional question because the Court is not empowered to decide moot questions or abstract propositions") (internal citations and quotations omitted); *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999) ("If there is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction.").

The Proposed Briefs do not address the Court's lack of jurisdiction over the Petition, and thus are not "relevant to the disposition of the case." Fed. R. App. P. 29(b)(2). *See also id.*, Advisory Committee's note (1998) ("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.").

Just as the proposed amici curiae failed to file their Motions until after Plaintiffs' responsive pleading to the Petition, Petitioners ignored the dispositive jurisdictional defect until their Reply. And just as the movants offer no excuse or justification for their failure to file the Motions in a timely manner, Petitioners provided no reason for their failure to address the mootness of their Petition until after Plaintiffs filed their Response.

Petitioners do not contest that Plaintiffs put Petitioners on notice—both before and after the filing of the Petition—that the settlement agreement ceased to exist upon the district court's denial of preliminary approval without leave to amend. (Response at 10-11 n.2 and Exs. A-C, attached thereto.) Petitioners' failure to address the question of mootness at the outset in their Petition violated their duty to this Court. "[A]ll counsel have a duty 'to bring to the federal tribunal's attention, without delay, facts that may raise a question of mootness.'" *Lowery v. Channel Comm'n, Inc.* (*In re Cellular 101, Inc.*), 539 F.3d 1150, 1154 (9th Cir. 2008) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 23 (1997)). Petitioners also concede that, instead of abiding by this obligation,

Petitioners threatened Plaintiffs to prevent them from informing the Court of the mootness question. (Response, Ex. B.)

Petitioners' argument regarding mootness relies on several cases never before cited to Plaintiffs. (*Compare* Reply at 1-6 *with* Response, Ex. B.) Petitioners rely on these cases for the proposition that the proposed settlement agreement was insufficiently explicit and unambiguous to "waive" Petitioners "right to appeal." (Reply at 2.) But the proposed settlement agreement, negotiated by sophisticated counsel, leaves no ambiguity: when the district court denied preliminary approval, Petitioners agreed that the case will "proceed as if no settlement had been attempted," and the parties will "be returned to their respective procedural postures, i.e., status quo as of April 24, 2014[.]" (Settlement Agreement at 8.)

Petitioners urge the Court to look instead to section VIII.A of the settlement agreement, which Petitioners say states that the agreement will be "null and void" only if the settlement is not "finally approved[.]" (Reply at 3.) What section VIII.A actually says is: "In the event that the Settlement Agreement is *terminated*, is not finally approved *or does not become effective for any reason*, . . . then . . . this Settlement Agreement shall be null and void and of no force and effect[.]" (Settlement Agreement at 25; emphasis added.) In the same paragraph, the settlement agreement explains

the result of the settlement agreement becoming "null and void": "In such event, the case will proceed as if no settlement has 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." (*Id.*) Thus section VIII.A uses the same exact language as section II.B, leaving no doubt that the parties intended a denial of preliminary approval without leave to amend by the district court to terminate the settlement agreement and render it "null and void and of no force and effect[.]" (*Id.*)

Nothing in the settlement agreement suggests that the parties contemplated that the settlement agreement would remain in full force and effect pending an attempt by a party to seek appellate review of the district court's order denying preliminary approval. To the contrary, the portion of the agreement dealing with appeals concerns only a potential appeal by a class member from the "proposed order and final judgment." (Settlement Agreement § VIII.Q.) Nothing in section VIII.Q, or anywhere else, entertains the possibility of an appeal by a party to the settlement agreement from a denial of preliminary or final approval. *See In re Stock Exchs. Options Trading Antitrust Litig.*, 2005U.S. Dist. LEXIS 13734, at *26-*28

(S.D.N.Y. July 11, 2005) (settlement agreement elsewhere discussed what would happen in the case of an appeal, making clear that the parties would have made an exception for an appeal of denial of preliminary approval if they meant to do so).

In addition to being inconsistent with the clear and explicit language of the settlement agreement, Petitioners' interpretation of the settlement agreement would lead to absurd results. According to the Petitioners, they have retained a "right to appeal" the district court's denial of preliminary approval going forward, and the settlement agreement remains valid and binding in the meantime. Thus, if this Court declined to entertain Petitioners' request for a writ of mandamus, Petitioners could raise the issue again on appeal following a loss at trial. Petitioners would then seek to have an adverse judgment vacated, with the action remanded with instructions to preliminarily approve the April 24, 2014 proposed settlement agreement. No rational plaintiff (or defendant[1]) would agree to such a possibility *ex ante*, which is why the settlement agreement expressly provides the opposite. Once the district court denied preliminary approval without leave to amend, sections II.B and VIII.A terminated the settlement agreement,

[1] Under Petitioners' argument, Defendants could prevail at trial but Plaintiffs would retain the right to ask this Court to order the district court to preliminarily approve the April 24, 2014 settlement agreement.

leaving it null and void and of no force and effect. "Where contract language is clear and explicit and does not lead to absurd results, we ascertain the intent from the written terms and go no further." *Shaw v. Regents of Univ. of California*, 58 Cal. App. 4th 44, 53 (1997) (internal quotation omitted). *See also State of California v. Continental Ins. Co.*, 281 P.3d 1000, 1004 (Cal. 2012) ("If contractual language is clear and explicit, it governs.") (internal quotation omitted); Cal. Civ. Code § 1638 (same).

The cases on which Petitioners seek to rely are inapposite because they concern situations in which the validity of the underlying agreement was not at issue. *See Concepcion v. Amscan Holdings, Inc.*, 223 Cal. App. 4th 1309, 1321-22 (2014) (examining whether settlement agreement waived defendant's right to appeal from trial court's order awarding attorney fees entered after final judgment); *Bischel v. Fire Ins. Exch.*, 1 Cal. App. 4th 1168, 1171-72 (1992) (assessing whether defendant waived right to appeal based on an insurance policy provision requiring it to pay loss payments within 60 days of a court judgment); *Stephenson v. Drever*, 16 Cal. 4th 1167 (1997) (reviewing parties' obligations under a "buy-sell agreement"). The issue here is not whether Petitioners agreed to waive a right to appeal in a valid agreement, but rather whether the underlying agreement exists at all.

In *Gibson v. Homedics, Inc.*, 2014 Cal. App. Unpub. LEXIS 4279, at *14-*17 (Cal. App. 4th Dist. June 18, 2014), the trial court granted preliminary approval, and then only denied final approval without prejudice due to a procedural failure of one of the signatories of the settlement agreement to perform according to the agreement's terms. The trial court granted final approval upon correction of the procedural defect, and at issue on appeal was defendant's motion for attorney fees arising out of its efforts to enforce the settlement agreement. Here, however, the district court denied preliminary approval without leave to amend based upon the terms of the agreement itself, not because of a correctible failure by one of the parties to perform. Further, unlike *Gibson*, the settlement agreement here expressly provides a "condition subsequent . . . referring to a future event [the district court's denial of preliminary approval without leave to amend], upon the happening of which" (*id.* at *11-*12), "the case will proceed as though no settlement had been attempted" (Settlement Agreement § II.B).

Finally, Petitioners provide no authority for the idea that they had a "right to appeal" the district court's order in any case. In recognition of this, before the Court is not an appeal as of right, but a petition for writ of mandamus, where "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary

remedy." *Bauman v. United States Dist. Court*, 557 F.2d 650, 654 (9th Cir. 1977) (quoting *Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976)).

Petitioners should not be permitted to pursue a writ of mandamus regarding a ruling on a settlement agreement that no longer exists, and movants should not be permitted to file untimely amicus briefs in support of that effort.

III. THE PROPOSED AMICUS BRIEF FROM THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE SIMPLY REPEAT PETITIONERS' ARGUMENTS

The Court should deny the motion for leave to file as amici curiae from the Chamber of Commerce of the United States of America and the California Chamber of Commerce because the proposed amicus brief ("Chamber Brief") only duplicates arguments Petitioners already make. Ninth Cir. R. 29-1, Circuit Advisory Committee Note to Rule 29-1 ("Movants are reminded that the Court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties.") (*Compare* Chamber Brief § I *with* Petition § III; *compare* Chamber Brief § II *with* Petition § II and Reply § II).

CONCLUSION

For the aforementioned reasons, the Court should deny the two motions for leave to file briefs as amici curiae from eight economists and from the Chamber of Commerce of the United States of America and the California Chamber of Commerce.

Respectfully submitted,

Dated: November 3, 2014 By: */s/ Kelly M. Dermody*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document 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 November 3, 2014.

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

I further certify that I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following:

Honorable Lucy H. Koh
United States District Court
Robert F. Peckham Federal Building
280 S. First Street
San Jose, CA 95113

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 November 3, 2014, at San Francisco, California.

/s/ *Dean M. Harvey*