

2013 WL 4541118 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Megan MAREK, Petitioner,

v.

Sean LANE, Individually and on Behalf of All Others Similarly Situated, et al., Respondents.

No. 13-136.

August 27, 2013.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Brief in Opposition

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***i COUNTER-STATEMENT OF QUESTION PRESENTED**

Whether the district court abused its discretion in finding that a settlement which provided injunctive relief and *cy pres* that directly and substantially related to the complained of harm was “fair, reasonable and adequate.”

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*1 INTRODUCTION

Applying well-established standards for review of class action settlements involving a *cy pres* remedy, the Ninth Circuit affirmed the district court's approval of the settlement in this case. The Ninth Circuit appropriately applied the deferential standard of review for fairness determinations. Petitioner's Appendix ("Pet. App.") 9 (citation omitted). At bottom, petitioner merely disagrees with the conclusions reached by the district court in applying settled standards for class action settlements.

The district court carefully evaluated the settlement in this case under Ninth Circuit precedent and concluded that, in light of the specific facts and claims at issue, it was "fair, reasonable, and adequate" under [Federal Rule of Civil Procedure 23\(e\)](#). The Ninth Circuit reviewed that determination for an abuse of discretion and affirmed. Petitioner does not cite a single case from the Ninth Circuit or any other Circuit holding that approval of a class action settlement involving a *cy pres* recipient of the type at issue here constitutes an abuse of discretion. This case does not implicate any issue of national importance or split between the Circuits that would warrant this Court's review.

FACTUAL AND PROCEDURAL BACKGROUND

This case concerns a Facebook program called "Beacon," which was launched in 2007. Beacon posted the actions of Facebook users on certain other websites in their Facebook News Feed. Lane and others filed a putative class action alleging claims *2 under federal and state privacy laws against Facebook and other Beacon participants. Facebook moved to dismiss. Before that motion was decided, the parties agreed to mediation. Following many months of negotiations, the parties reached a settlement (the "Settlement"). *See* ER 50-56.

The Settlement requires Facebook to pay \$9.5 million to the Digital Trust Foundation ("DTF"), a new privacy foundation that will "fund and sponsor programs designed to educate users, regulators and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats." ER 109-113. After settlement costs and attorneys' fees, the full amount goes to the foundation. *Id.* In addition, the Settlement provides for injunctive relief requiring Facebook to terminate the Beacon program. *Id.*

Out of more than 3.6 million potential class members, most of whom received direct electronic notice, four objected and 108 opted out. Pet. App. 8.

The Ninth Circuit noted that the district court had applied the settled standards for evaluating class settlements, including "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the amount offered in settlement; ... the experience and views of counsel; ... and the reaction of the class members to the proposed settlement." Pet. App. 26-27 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (CA9 1998)). As the Ninth Circuit explained, the district

court responded to objections regarding the foundation created by the Settlement and found that *3 DTF bore a sufficient nexus to the claims raised by class members. Pet. App. 17 (discussing Pet. App. 57).

Given significant litigation risks, including but not limited to the fact that the asserted claims based on consumers' privacy rights were novel and untested, the district court found the \$9.5 million offered in the settlement "substantial" and that the foundation defined by the Settlement was sufficiently "directed toward a purpose closely related to Class Members' interests in this litigation." Pet. App. 56, *quoted in* Pet. App. 12.

REASONS FOR DENYING THE PETITION

I. The Creation and Funding of the Digital Trust Foundation Is a "Fair, Reasonable, and Adequate" *Cy Pres* Remedy Achieved Through Settlement Negotiations.

The Settlement resulted from months of protracted, contentious negotiations. The settlement negotiations were conducted at arms' length, with counsel for each party vigorously representing the interests of their own clients. The negotiating parties were ably assisted by a skilled and reputable mediator. When the parties could not agree on a recipient for *cy pres* funds, they agreed to create a new entity. The parties, with the mediator's assistance, carefully crafted DTF, composed of directors with significant experience in the field of Internet privacy, and with a clear mission and directives designed to further the interests of the plaintiff class. The *cy pres* distribution is consistent with well-developed law establishing that such a *4 remedy is appropriate where distribution to individual class members would be *de minimis* (and direct monetary payments to class members thus would be infeasible). *E.g.*, *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 474-75 & n.15 (CA5 2011); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (CA2 2007); *see also In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (CA1 2009); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (CA7 2004); ALI, Principles of the Law of Aggregate Litigation § 3.07 Comment (2010).

Class counsel, experienced in class litigation, recognized that the claims asserted were novel and uncertain, and that, after years of litigation, the class could end up with nothing. Class counsel also recognized that, given these risks, Facebook's agreement to pay \$9.5 million to resolve the case was significant. Given the size of the class, however, it would result in *de minimis* payments (approximately \$1.12) to individual class members. Pet. App. at 17-18. As a result, the parties and the mediator concluded that a *cy pres* remedy was more beneficial to the class than direct payments. Contrary to petitioner's contention that the type of *cy pres* settlement achieved in this case should never be approved, it exemplifies why the availability of a *cy pres* remedy is essential. Without this type of relief, the case likely would not have been settled.

Petitioner primarily takes issue with the *recipient* of the *cy pres* fund - DTF. The gravamen of petitioner's argument is a single factual contention unsupported by the record, that the presence of one Facebook designee on DTF board of three gives an improper voice to the defendant. Petitioner does not *5 cite any case so holding and her fact-bound arguments do not demonstrate any issue of national importance or split between the Circuits that would warrant this Court's review.

The Ninth Circuit appropriately applied the standard of review for fairness determinations, explaining: "Appellate review of the district court's fairness determination is 'extremely limited,' and we will set aside that determination only upon a 'strong showing that the district court's decision was a clear abuse of discretion.'" Pet. App. 9 (citation omitted).

A. DTF is an appropriate recipient of the *cy pres* fund.

Although the Settlement allows Facebook to nominate one of three initial foundation directors, it also provides that DTF's "governance and operations shall be determined by a *majority vote*." ER 113 (emphasis added). The district court considered and rejected the objection that DTF was "unduly subject to the influence and control of Facebook," after analyzing the many provisions of the charter and bylaws designed to ensure that would not be the case. Pet. App. 60, 61.

To the extent petitioner is arguing that the [DTF] could be structured somewhat differently, or that it would be even better for the funds to go to some existing organization, such fine-tuning of the settlement reached by the parties is beyond the purview of the Court.

*6 Pet. App. 61. The Ninth Circuit agreed, finding “no substance” to petitioner's claims that the presence of a Facebook designee on DTF's board of directors would preclude DTF from serving as the recipient of the *cy pres* funds. Pet. App. 15.

Likewise, the district court considered and rejected arguments that DTF's status as a newly formed entity made it an improper *cy pres* recipient, holding that this did not “undermine the conclusion that the Settlement is fair and adequate.” Pet. App. 60. Again, the Ninth Circuit agreed: “We also reject Objectors' claim that the settlement agreement's *cy pres* structure is impermissible because the parties elected to make a new grant-making entity, DTF, rather than give *cy pres* funds to an already-existing online privacy organization.” Pet. App. 16-17.

B. DTF will benefit class members.

DTF's mission, set forth in its governing charter, is to fund and sponsor “programs designed to educate users, regulators and enterprises regarding critical issues relating to the protection of identity and personal information online through user control, and the protection of users from online threats.” Facebook's Supplemental Excerpts of Record (“SER”) 40. This mission directly and substantially relates to the harms Plaintiffs sought to address by asserting state and federal privacy claims, and thus answers the specific mandate of the Ninth Circuit's decision in *Naschin*, which suggested that such a focused organization would be acceptable. *See Naschin v. AOL, LLC*, 663 F.3d 1034 (CA9 2011).

*7 Indeed, DTF's mission is customized to address Plaintiffs' specific concerns regarding lack of user control over identity and personal information. DTF's mission would cover funding projects aimed at increasing users' personal control over their information. Moreover, the mission's scope is not limited to educating users, but extends to *regulators* and *enterprises* as well. The mission would support funding to educate social networking companies and other online companies about protecting users' identity and personal information online.

Recognizing this close and customized fit between the gravamen of the claims and DTF's mission, the district court found “the nexus of online privacy, safety and security, particularly as those values relate to the online threat landscape and benefit of protecting consumers' identities and personal information online from those threats” as set forth in DTF's charter to be “sufficiently related to the claims raised by Class Members.” Pet. App. 57. So too the Ninth Circuit held: “The *cy pres* remedy the settling parties here have devised bears a direct and substantial relationship to the interests of absent class members and thus properly provides for the ‘next best distribution’ to the class.” Pet. App. 15.

Petitioner also contends that even if the required nexus exists between the interests the class sought to vindicate and DTF's purpose, DTF still is not a proper *cy pres* recipient because as a newly created organization, it lacks a proven track record. But this argument would require the Court to make a factual determination that DTF will act in an *ultra vires* manner (violating its own charter). The record *8 is devoid of any evidence that this would occur. Pet. App. 17 (finding the assertion that DTF might not abide by its charter “unsupported speculation”).

C. Facebook cannot control or assert undue influence over DTF.

As a result of long and difficult negotiations with the help of a well-respected mediator, the Parties arrived at the structure for DTF. Pet. App. 57-58. The DTF board will be composed of three highly qualified privacy experts; only one will be affiliated with Facebook.

The structure and numerous protections built into DTF ensure independence from Facebook. There is nothing nefarious about Facebook's point of view being considered by DTF. Petitioner cites no authority to support her contention that a *cy pres* remedy must never take into account the perspective of the settling defendant. After all, the purpose of the Settlement is to provide a benefit for the class. See *Parker v. Time Warner Entm't Co.*, 239 F.R.D. 318, 341 (E.D.N.Y. 2007) (“[T]here is no *per se* prohibition on the defendant receiving a business benefit as a result of a settlement.”); see also *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491, 499 (W.D. Ark. 1994), *aff'd*, 119 F.3d 703 (CA8 1997) (approving *cy pres* distribution to defendant's preexisting nonprofit entity).

The DTF bylaws require each director to perform his or her duties in good faith. SER 42, § 13. Nothing in the record could lead a court to conclude that the director affiliated with Facebook, or any other director, cannot or will not fulfill this duty. *9 Indeed, the district court concluded that petitioner failed to show that “there is any substantial reason to doubt the independence of two of the three directors” nor did they show “that the [DTF] will be a mere publicity tool for Facebook, or in any meaningful sense under Facebook's direct control.” Pet. App. 60-61 Directors who failed to follow these bylaws would do so at their own peril.¹

The DTF charter and bylaws were carefully crafted to include checks and balances to ensure that DTF carries out its mission.

- DTF is designed so that no single director controls it. No director has veto power.
- Two of the three directors' votes are needed to approve funding decisions. SER 41, § 10. This provision was specifically designed to provide a check on Facebook's designee. Facebook's designee, by design, could not block or force funding decisions: the other two directors could decide on any recipient, or reject any recipient, without the Facebook designee's support. As a result, the Facebook designee could *10 never unilaterally control DTF's funding decisions, but rather would have to work collaboratively with the other directors to determine appropriate recipients.
- All three directors must unanimously approve any plan of succession for selecting future directors. SER 41, § 4. Moreover, if the Facebook designee leaves the board, nothing requires the remaining board members to elect another Facebook designee.
- DTF is prohibited from funding lobbying or litigation. SER 40, Art. II.

D. A *cy pres* remedy does not disincentivize direct monetary recovery.

Petitioner's arguments that allowing the use of *cy pres* remedies in class action settlements disincentivizes class counsel from seeking direct monetary recovery are unfounded. This argument is predicated on a basic contradiction. It assumes that class counsel are unethical and will always disregard the interests of class in favor of their own. Yet it also assumes that these same self-interested class counsel will give up the larger fee associated with a larger recovery necessary to allow for direct payments to the class. Petitioner is simply wrong in fact and logic.

Class counsel has professional duties of loyalty and the obligation to represent the class *11 zealously. Plaintiffs' counsel in this case fulfilled that duty, and there is simply no basis for petitioner's presumption that Plaintiffs' counsel disregarded that duty at any point. Here, Plaintiffs' counsel evaluated the value of the claims at issue, which were novel and untested and thus subjected the class to substantial litigation risks. Class counsel concluded that a settlement requiring Facebook to terminate permanently the Beacon program and to pay \$9.5 million was a substantial benefit to the class. Because distributing class relief directly to the class would have resulted in *de minimis* payments, Plaintiffs' counsel further concluded that a *cy pres* distribution of these funds to an organization closely connected to Plaintiffs' claims was in the best interests of the class.

Petitioner's argument can only be understood as an argument for outright prohibition of *cy pres* remedies in class action settlements. Petitioner never raised this argument before the lower courts, and, indeed, disclaimed it in her brief to the court of appeals. Marek Appeal Brief at 21-22. The legal and policy implications of such a radical proposal are well beyond any

well-preserved issue below. Eliminating the *cy pres* remedy would make settlement of some class actions simply impossible, especially where, as here, a direct monetary payment to the class is infeasible.

CONCLUSION

The petition for writ of certiorari should be denied.

Footnotes

- 1 Directors of nonprofit corporations (even volunteer directors) may face personal liability, including monetary liability, for breaches of certain duties created by the California Corporations Code, including the duty to act in good faith. *See, e.g.*, [Cal. Corp. Code §§ 5231\(a\), 5239\(a\)\(2\)](#). These duties apply “without regard to whether a director is compensated by the corporation.” *Id.* § 5230.