Case No. 13-16819
(Consolidated with Nos. 13-16819, -16919, -16929, -16936, -17028 & -17097)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL FRALEY, PAUL WANT, JAMES H. DUVAL, JAMES DUVAL, W.T., RUSSELL TAIT, SUSAN MAINZER,

Plaintiffs and Appellees,

JO BATMAN

Objector and Appellant

v.

FACEBOOK, INC.,

Defendant and Appellees

Appeal from The United States District Court
For the Northern District of California, San Francisco
D.C. No. 3:11-cv-01726-RS

REPLY BRIEF OF APPELLANT JO BATMAN

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TABLE OF AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons provided below and those stated in the opening brief, the District Court's approval of the settlement should be reversed. Specifically, Plaintiff-Appellees cannot show that class members who timely filed claims were made whole prior to the *cy pres* distribution of millions of dollars to charity. In addition, attorneys' fees are excessive (on that issue Appellant Jo Batman relies on the argument and authorities contained in her opening brief).

ARGUMENT

It is axiomatic that any money recovered on behalf of the class belongs to the class members. The entire net settlement fund must be paid to those class members who come forward and make claims unless and until those class members are made whole. In *Klier v. Elf Atochem N.A., Inc.,* 658 F.3d 468 (5th Cir. 2011),[21] the Fifth Circuit clarified that ***no settlement money may be paid to cy pres*** until every class member who has filed a claim as received 100% of the alleged damages.

Plaintiff-Appellees do not challenge this basic principle. Instead, Plaintiff-Appellees assert that:

> [T]he claiming Class members will have been 'made whole.' The average additional revenue that Facebook is

[21] Plaintiff-Appellees are correct to point out at p. 45 of their Brief that in *Klier* the distribution of funds to charity via *cy pres* would also have violated the settlement agreement, that fact does not change the black letter law and basic common sense quoted above that where the distribution of funds to class members is feasible because they filed claims that no *cy pres* distribution can occur until they are made whole.

> calculated to have earned per class member was only between approximately $0.94 to $1.45. Thus, the $15 payment is not disproportionate to the damage suffered by the vast majority of Class members. The cy pres award of the remaining funds, which will be over 2 million, provides the next best relief to benefit the Class. An additional distribution above the $15 would be unfair to the Class members who had purposely not asserted claims for monetary relief on the ground that they wanted the monies to go to cy pres.

Plaintiff-Appellees' Brief at 44. Plaintiff-Appellees contend "[t]he determination of damages is complex, and Plaintiffs refer the Court to their Memorandum in Support of their Joint Motion for Preliminary Approval (Dkt. 280), particularly pages 17-23." *Id.* n. 22. What Plaintiff-Appellees have done is to simply pick one of three measures of damages to show that that particular measure (between $0.94 and $1.45) is far less than $15 for each class member who filed a claim. Plaintiff-Appellees assert that any distribution above $15 would be unfair to the class members who did not file claims.

Plaintiff-Appellees' argument breaks down upon even a cursory evaluation of its merits. Taking Plaintiff-Appellees' argument to its logical conclusion, any distribution to a single class member above $1.45 (the high range of this particular measure of damages) would be unfair and a windfall. If Plaintiff-Appellees' argument was correct then $15 would be far in excess of what is fair and they certainly never should have agreed to increase the payment to filing class members

from $10 to $15. However, the argument based on the "maximum $1.45 in damages" is a straw man.

Plaintiff-Appellees, in their Second Amended Complaint, seek an "amount equal to the ***greater*** of $750 per incident, or actual damages, any profits attributable to FACEBOOK's (and Does 1-100) illegal action, before taking into account any actual damages, punitive damages, attorneys fees and costs, and any other relief as may be appropriate." Dkt. 22 at para. 118 (emphasis added). Plaintiff-Appellees cannot simply chose the lowest available measure of damages for the purpose of determining whether the class members are "made whole" eschewing the larger measures, including $750 per violation. The class members who filed claims were not "made whole" so long as a potential measure of damages in a live cause of action could have resulted in damages in excess of what they received. In this case, $15 is a far cry from the $750 in statutory damages that were available.

Incredibly, in their pleadings filed in support of preliminary approval, Plaintiff-Appellees point out all of the problems of proof associated with bringing a statutory claim for $750 in damages. Dkt. 280 at 22-23. They do this to justify the low settlement amount in this case and to justify the minimal distribution to the class. However, in doing so they have clearly rendered themselves inadequate counsel and should this case be remanded they should be disqualified from

representing the class because in order to get this settlement approved they have abandoned a viable and valuable right belonging to the class for the sake of their meager settlement. But for now, one must merely compare the $15 received with the $750 available in statutory damages to see that the class members who filed claims were not remotely "made whole."

CONCLUSION

The District Court's approval of the settlement should be reversed.

Dated: July 15, 2014

Respectfully submitted,

By: */s/ Christopher A. Bandas*

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

This brief complies with the type-volume limitation of 32(a)(7)(B) because this brief contains 1,162 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

Dated: July 15, 2014

Respectfully submitted,

By: *_____/s/ Christopher A. Bandas_____*
Christopher A. Bandas

CERTIFICATE OF SERVICE

I certify that on July 15, 2014, 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. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Christopher A. Bandas