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Judge King (00:00):

The case today is *Berry v. LexisNexis*. And the first lawyer is Mr. Paul. Mr. Paul, we are pleased to hear from you, sir. Good to have you here.

Richard Paul (00:17):

Thank you. Your honors. May it please the court. This case involves an abuse of the class action device of truly historic proportions. The district court below certified a class that encompassed 200 million people, essentially every adult living in all 50 states, Puerto Rico—

Judge King (00:36):

Including the members of this panel. How do you deal with that?

Richard Paul (00:39):

Everybody in this court. The class definition does exclude the judiciary handling the case.

Judge King (00:45):

It doesn't.

Judge Harris: (00:45):

Oh, man.

Judge King (00:46):

No, it doesn't.

Richard Paul (00:47):

Oh, it does not. Well.

Judge King (00:47):

It says it excludes the presiding judge and his staff. I think it's on page 15 of the settlement agreement. I was going to raise that to you, but you walked right into it. How do we deal with that? Can you interpret the presiding judge and his staff as being the appeals court judges?

Richard Paul (01:15):

I do think you can make that interpretation.

Judge King (01:17):

Well.

Richard Paul (01:18):
I do think that the class definition is overbroad, which is one of the arguments—

Judge King (01:22):
Well.

Richard Paul (01:22):
—we've made. This is just a different of the overbreadth of this class.

Judge King (01:25):
But you agreed to the thing didn't you, or you challenged it?

Richard Paul (01:28):
No, we've challenged everything about—

Judge King (01:29):
You didn't agree to it. They're going to have to. Okay. But it was approved, but you—

Richard Paul (01:33):
Over our objection, your honor.

Judge King (01:36):
Over your objection. You didn't object on that basis though?

Richard Paul (01:38):
We—not on the judiciary aspect of it. We objected on the overbreadth of the class.

Judge King (01:43):
So could you all amend it today and agree that we can hear it, or there's no opt out provision, so we can't opt out.

Richard Paul (01:54):
And that is really—

Judge King (01:55):
Have you got any suggestions on how we deal with, I won't charge this time against you.

Richard Paul (01:58):
[**Laughs**]

Judge King (01:58):
You can help us out!

Richard Paul (02:01):
Well, think the—I don't have a suggestion for your honor on that. I think—

Judge King (02:06):

Excluded from the settlement class, our council of record and their respective law firms for any of the parties and the presiding judge. The presiding judge, here was Judge Spencer in the action and his staff and all members of their immediate family. That's what we have to deal with.

Judge King (02:30):

Anyway, you go ahead with your argument.

Richard Paul (02:31):

Let me say this, your honor. I—to the extent that is yet an additional conflict in—

Judge King (02:37):

That's 4.11.

Richard Paul (02:40):

Uh I'm—

Judge King (02:40):

That's definition on page 15.

Richard Paul (02:43):

On behalf of the objecting parties, I'm willing to waive that conflict because I would hate for this court to send this back down on that issue and come back up on the true issues in this case, which are the not opt out provisions of this settlement. Your honors, there really is no fair reading. I don't believe of the *Walmart v. Dukes'* decision that allows this settlement to stand. And I particularly want to emphasize the point that while there was a divided court in *Dukes*, the unanimous portion of *Dukes* is what strikes this class action down. Ms. Aaron is one of the objectors in this case. And her claim for up to a thousand dollars in statutory damages was released through this class action settlement. And she would like to pursue that on her own, and the defendants and the plaintiffs got together and decided that their agenda of reformulating LexisNexis future conduct was more important than her property right.

Richard Paul (03:44):

Her claim for damages. And so they extinguished it in exchange for injunctive relief that she wasn't asking for. And doing that without her consent is a violation of both due process and the structure of Rule 23 itself. And, and that's the point that the *Dukes'* court takes great pains to make. And I think there's so many parts of the *Dukes'* decision that forbid the conduct that occurred here. One provision I'd like to highlight from the *Dukes'* decision is the court's finding that it is improper to use class certification under subsection (b)(2) if, and this is a quote, "Individual class members compensatory damage claims would be precluded by litigation they had no power to hold themselves apart from." That possibility, underscores the need for plaintiffs with monetary claims to decide for themselves whether to tie their faiths to the class representatives or go it alone, a choice that Rule 23 (b)(2) doesn't permit.

Judge Hazel (04:43):

Just make sure I understand that. I mean, someone would still be able to pursue actual damages, correct?

Richard Paul (04:47):

I don't draw the distinction between actual damages and statutory damages under this context because

this court has held in, in a related statute, that that statutory damages are presumed actual damages. So they are still, in the words of *Dukes*, compensatory damages. They are not punitive damages. Those are also—they were separately waived, but we are talking about statutory damages, which are compensatory damage claims. And so they still—even though there's this reservation or carve out for actual damage claims, many class members can't prove up actual damages. And that's why the statutory damage exists is because of the difficulty of proof of actual damages.

Judge Harris (05:28):

Can I ask you sort of a broad question, and I really am hoping you can explain this to me. So on your theory, as you just described it, when would a mandatory (b)(2) class be okay? Doesn't it always sort of, even if they're seeking only injunctive relief, they haven't waved any monetary claims. I mean, if the class loses on the merits, one of these kind of mandatory class members is going to be collaterally estopped from bringing a damages claim, or at least there's a risk that he or she will be. So, does it follow from your theory that there really can be no such thing as a mandatory class?

Richard Paul (05:59):

No. I think the dichotomy that the Supreme Court has drawn is between collective rights and individualized rights. And in the context of declaratory relief or injunctive relief, there is this collective right.

Judge Harris (06:12):

But still if the class loses on the merits, right, like in your classic (b)(2) sort of desegregation case, they just lose on the merits. There's no segregation going on here. No class members going to be able to turn around and bring a 1983 suit for damages. Right?

Richard Paul (06:27):

It is unlikely. The effective offensive use of collateral estoppel is not all that broad—

Judge Harris (06:33):

Right. But it's at least at risk.

Richard Paul (06:34):

It certainly it is at risk. That's right.

Judge Harris (06:37):

So it just seems like the logic of your theory pushes us to a place we don't want to go, which is there can be no such thing as a mandatory (b)(2) class.

Richard Paul (06:45):

No, I think it's actually the opposite, which is there are in effect cases where one person litigates the collective right without pursuing the class remedy, but they are in effect litigating a class remedy. And the fact that they don't pursue it as a class doesn't mean that they're not litigating other people's rights in those cases where offensive collateral estoppel would apply to others' claims. But the pursuit of individualized damage claims is a much different creature.

Judge Harris (07:12):

Right, but then that's where I felt like the district court was like, "Well, the good thing is nobody is pursuing individualized damages claims here of those actual damages claims have been reserved. So we're totally fine with *Dukes*." So what's wrong with that?

Richard Paul (07:26):

It is drawing that false distinction between statutory damages and actual damages. The statutory damages exist for the very reason that it is difficult for many people to prove up actual damages. They are still compensatory damages. They are not punitive damages. They are compensatory damages. They're just presumed actual damages because of the difficulty of proving the harm in a privacy case.

Judge Harris (07:48):

They may be in that sense, compensatory, but they're still classwide, not individualized, right? They turn on the action of the defendant and whether it was willfully undertaken and that's just like one class-wide answer. Right?

Richard Paul (08:01):

Yeah. I don't agree with that, your honor. And here's why. It is possible that ultimately the willfulness finding that would be at issue to get statutory damages is a jury question. And so it is feasible that Ms. Aaron tries her case at her home state of Nevada and a jury finds that the defendants acted willfully and she obtained statutory damages. And it's equally plausible that a plaintiff file suit in Virginia and the jury finds no willfulness. And those aren't necessarily—that effect—offensive use of collateral estoppel was not going to apply in that context to prevent that jury from making a different finding than is found in another case.

Richard Paul (08:44):

And that is an issue in a lot of the class certification decisions that have primarily come out of the seventh circuit, dealing with the nationwide class problem. And Judge Posner, it's not a bad thing to find that it's a breach of a standard of care in one state and not a breach of the standard of care in another. And that's okay to have state juries making different decisions. And that's the problem that Judge Posner found with the nationwide class. And that is the same issue here. There is not automatic offensive use of collateral estoppel to prevent juries from making different findings. I agree there's some efficiency in it, but the court has been clear in its restriction of the right to pursue nationwide classes. And in this case, it is still a property right. And if somebody wants to, in the words of *Dukes* "go it alone," they have that right.

Richard Paul (09:36):

And that is the pithy phrase from our brief: my neighbor can't sell my house, even if the foundation's weak and they get a good deal for me; they can't do it without my consent. And that is, I think, the framework that the Supreme Court has set forth in not just *Dukes*, but in the *Schutz* case, in the *Thai Court* title case. And I would point out that the effort to buy peace here in the structure of this settlement, isn't effective at all anyway. In the Ninth Circuit, the *Brown v. Thai* Court title case the court dealt with a settlement, achieved within an MDL, that waived compensatory damage claims and obtained injunctive relief. And the court found we're not going to enforce race judicata against the release of those damage claims because they weren't the MDL plaintiff's property to sell.

Judge Harris (10:28):

Is this case a bit of an outlier?

Richard Paul (10:30):

No, I think it's fully consistent with *Dukes*. In fact, if you read *Dukes*, they don't reach that ultimate decision of can you ever resolve monetary damage claims in a (b)(2), but they go to great lengths to suggest how they would rule if based with that question. And the Ninth Circuit has answered that question. Ms. Aaron happens to reside within the Ninth Circuit. So she has the right to go file that case within the Ninth Circuit and say, "There's no res judicata effect on this release and this settlement." I think the Sixth Circuit has done the same thing in the, *In re Telectronics* case. I think that the Seventh Circuit has done the same thing

in the *Jefferson* case, both of those being in the (b)(1) context.

Judge Harris (11:10):

Well, then what's the problem?

Richard Paul (11:11):

The problem is this settlement should have never been approved and we're going to—

Judge Harris (11:16):

But the process problem just went away, right? All these people fortunately reside in circuits where they are not in fact bound to this.

Richard Paul (11:22):

But we'll have created a situation where Ms. Aaron can pursue her claim because she's in the Ninth Circuit. And if this court doesn't reverse the district court's order, any plaintiff—any class member residing in the Fourth Circuit will not be able to pursue their claim. And that is the type of circuit conflict on which the Supreme Court would have to resolve clearly. But it isn't a level playing field for the (b)(2) class members in this case.

Richard Paul (11:53):

The justification that the defendants and the plaintiffs use here—I think they acknowledge it. And here is really the fundamental problem. There is a separate (b)(3) class here; 31,000 people, approximately. And they received money for their statutory damage claims and their actual damage claims. And because they received money, they received the right to opt out. They weren't placed within a (b)(3) class and their logic goes, "Well because the (b)(2) class did not receive any money; they don't get the minimal structural assurances of fairness in (b)(3). They have to be in (b)(2) and they cannot opt out." And the rule of law, thus, is if you, if you don't, if you get a dollar, because at money you get due process, you get (b)(3), but if you don't get anything, then you get less rights. The less recovery equals less rights.

Richard Paul (12:41):

It makes zero sense. And the structure in which they've put this forward, it is an admission by structuring the (b)(3) class as a (b)(3), because they got money. That's the only difference between those classes. They were all originally pled as (b)(3) classes and the plaintiffs and defendants ask the court to engage in a fiction that there's no damage claims here. We're not wiping out damage claims because or not, they don't say we're not wiping them out. They say, there's no damage claims at issuing the case, because they're not getting money. Well, because that's the deal you made for them. But of course in the complaint, it's the only relief afforded. And under the statute, it's the only relief afforded.

Judge Hazel (13:19):

Just to make sure I understand the (b)(3) folks include people who did something, correct. Took some affirmative step.

Richard Paul (13:24):

Correct.

Judge Hazel (13:25):

Either requested their files or they took some dispute. So isn't it reasonable that they would get sort of a different, or for lack of a better word, better deal than the (b)(2) folks?

Richard Paul (13:34):

Sure. There's an argument that you can get a better deal, but it's still in the—

Judge Hazel (13:40):

In terms of being fair and reasonable.

Richard Paul (13:41):

It, well not in terms of being fair and reasonable. I—look the difference that the fact that it can be a different result. I understand, and I don't argue with that, but the fact is they get due process and the other group did not. And had they gotten a dollar in that negotiation, they would've gotten due process, but because they got zero dollars, they got nothing. And the argument is they got the injunctive relief, but they still gave up something for that injunctive relief. And so this fiction that there are no damage claims in the case because they waived them isn't true. This court held in [**inaudible**] that you need to look at the complaint. The prayer for relief is solely for money damages here. The statute only provides for money damages, and they made a deal that may be fair to some people. Some people in the (b)(2) class may say, "That's a good deal. And I'm willing to take that. I'm willing to trade my damage claim for injunctive relief." But others may not want to make that deal. And that's their due process right—to opt out. And in the words of *Dukes*, "go it alone."

Richard Paul (14:48):

The last point I want to quickly make is there are additional cases from the Fifth Circuit, the Seventh Circuit, and the Eleventh Circuit that have held that if there's not injunctive relief provided for under the relevant statute, that it is an abusive discretion to certify the class under (b)(2), and here the district court did certify it under (b)(2), even though the Fair Credit Reporting Act does not provide for injunctive relief.

Judge Harris (15:14):

Do all of those cases involve settlement agreements where the defendant has consented to the relief?

Richard Paul (15:19):

They are not in the settlement context, which the plaintiffs and defendants point out as a relevant distinction, but the Am Cam court makes clear from the Supreme Court that in the settlement context, class members get heightened due process rights, not less rights. So the fact that the parties are agreeing to it is irrelevant. The court's obligation to protect absent class members is heightened in that context, not lowered.

Judge Hazel (15:45):

That point is relevant to the idea that you can give injunctive relief, despite the fact that it's not actually on the statute.

Richard Paul (15:50):

And we don't dispute—

Judge Hazel (15:50):

Because it's a settlement agreement—

Richard Paul (15:51):

Correct.

Judge Hazel (15:52):

They have the power to do that.

Richard Paul (15:52):

And we don't dispute that they could have negotiated for it. And they did negotiate for it. They have that right. Our point is because money damages were waived in exchange for that injunctive relief, you must have the right to opt out and go it alone.

Richard Paul (16:06):

Thank you.

Judge King (16:06):

Now you're also challenged in the fee award.

Richard Paul (16:08):

Uh, I do, and thank you, your honor. I do need to mention that quickly. I do speak for all of the objecting parties here today. I personally did not make that objection, but Mr. Schulman did make that objection.

Judge King (16:21):

Well it's in your brief.

Richard Paul (16:22):

And it is in the brief that we joined together for purposes of the appeal, your honor. I think the point there is simple, he made objections and this court has held on repeated occasions that when an objector makes specific objections here to a fee application, it is the district court's obligation to make relevant findings of fact that can be meaningfully reviewed on appeal. And here there's not really a record addressing his specific objections to the hourly rates, to the load star, to the allocation between the (b)(2) and the (b)(3) for this court to engage in meaningful review and the failure to do that is an abusive discretion. Thank you.

Judge King (16:58):

Thank you. Mr. Wilkins?

Billy Wilkins (17:04):

My name is Billy Wilkins and Mike Caddell, and I represent the plaintiff appellees at council table with me is Joe Palmore. He represents Lexis and he will follow me in just a few minutes. The plaintiffs brought this lawsuit seeking several things. They wanted certification. They wanted a termination that the accurate for collections report was covered by the FCRA. Number three, they asked for actual damages, if any existed, based upon negligence. Number four, they sought reimbursement of cost. Five, they sought attorney's fees. And six, they asked for money based on willful compliance, which after all the evidence was in the district court held, this would have been uniform to all class members and not individualized. Well, the court-approved settlement in essence gives the class members one and two and three and four and five. What the plaintiffs waived were remedied based upon noncompliance, but in reality, they gave up almost nothing.

Billy Wilkins (18:14):

I say almost because in litigation, as the court well knows, nothing is ever in the for sure category. Forty years ago when *Flinn v. MFG*, this court in a class certification case, stated that in examining a class action settlement, now, quote, the most important factor for this court to consider in determining whether there has been a clear abuse of discretion by the district court in approving the settlement is whether the district

court gave proper consideration to the strength of the plaintiff's claim on the merits. Well, the district court properly discharged its responsibilities. And in the end, it concluded that the plaintiff's claim for willful non-compliance was, and I quote, "speculative at best." Here's what the district court well understood in bringing an action, seeking a remedy based on willful noncompliance, the plaintiffs would have to prove first that accurate for collections was covered by the FCRA. Two, they'd have to prove that a violation occurred. Three, they'd have to prove that this violation was willfully committed. And finally, they would have to successfully climb a very, very steep hill. They would not be entitled to a single dime unless Lexis's interpretation of the Fair Credit—return—Fair Credit Act was reasonably, was objectively unreasonable. This is so even if it turns out that Lexis's interpretation was erroneous, just as the Supreme Court said in addressing a similar issue in *Safeco*.

Judge Hazel (19:56):

Even if they have a tough row to hoe on that, that shouldn't the objectors still have the right to take it on if they choose to?

Billy Wilkins (20:03):

I'm sorry, Judge?

Judge Hazel (20:05):

Even if we assume that they would've had a really tough time establishing willfulness for the purposes of getting statutory damages, and that it would've been really difficult for them to achieve that.

Billy Wilkins (20:15):

Mm-hmm.

Judge Hazel (20:15):

Shouldn't they still at least have the right if they choose to, to opt out and pursue that?

Billy Wilkins (20:19):

Not if the damages were incidental to the injunction relief. And as this, the District Court held, and Seven Circuit, Second Circuit reasonably held, damages or incidentally if they flow directly from liability established and they flow directly to the class as a whole and are not individualized—

Judge Hazel (20:41):

But can you, can you—

Billy Wilkins (20:41):

And then if—I'm sorry—

Judge Hazel (20:43):

Can you view something as incidental if it's the only relief really sought in the complaint?

Billy Wilkins (20:47):

Well, you don't look at the complaint. You do in litigation where the parties have to object to each other and the judge or the jury makes a decision. This is a settlement, and that's a whole different ballgame. Settlement is—this was hammered out over a two-year period. Two judges assisting in the, with another mediate to assisting in multiple hearings, multiple mediations, multiple settlement conference. And they hammered this thing out and went before the district judge had a full blown hearing and he issued a 26-page order approving the settlement. And that's where we stand. Now, the cases that the plaintiffs are

citing deal with cases where there has not been a settlement; where there's been litigation. Injunctions were imposed over the objection of defendants. That's not the case here. And you can—you can settle the case under any terms, as long as it's fair and reasonable as you pointed out, Judge.

Billy Wilkins (21:39):

And this case is fair and reasonable. The district court thought it was. And I challenge anybody to prove that this was a broad—a clear abuse of discretion by the district judge. I might add to that, when this case was filed, there was a question about what the FTC did in 2008 dealing with accurate reports. Well, the District Court answered that question on page 24 of his order. He said this: the FTC in 2008, voted unanimously that accurate for collections reports do not fall within the FCRA and do not involve credit reports. Now, the objectors have never claimed in their briefs, certainly before this court, that this finding by the District Court was clearly erroneous. So it is the law of the case and it strengthens their position that willful non-compliance could never be established from a practical standpoint.

Billy Wilkins (22:41):

So in reality, the class members gave up the right to seek a remedy that was speculative at best and the exchange they were received, significant value. Now, Professor Richards, nationally known expert in the field of privacy law, in his expert opinion said real meaningful value was given to all of the class members. Professor Mullinix said, in her opinion, this structure, this settlement, was proper in every respect. Now this expert testimony was not contradicted because the objectors offered none. And it—and all of this coupled together with the fact that it has been pointed out, these class members reserved the right to seek actual damages. Now, the plaintiff brought up the fact that the objectors posed a hypothetical creating—equating someone's house to acclaim for willful non-compliance. What the objectors failed to point out is that if someone comes along and what they do point out, they say, if someone comes along and says, "Wilkins, we're gonna sell your house."

Billy Wilkins (23:55):

I should have the right to object that is opt out. But what they fail to point out is that before a house can be sold, it has to exist. So nobody can sell my house if I don't have a house in the first place, just as the objectors don't have a realistic remedy for based on willful non-compliance. So what they gave up in this settlement they really never had in the first place. But importantly, if I did have a house and I was damaged, I have every right under this settlement agreement to seek and obtain actual damages. I recognize this hypothetical posed by the objectors is perhaps a little silly, but when you think about it, when you examine it, it makes our case. Not theirs. If the court has no further questions, I'll conclude.

Judge King (24:54):

I've got a couple questions.

Billy Wilkins (24:54):

All right, sir.

Judge King (24:55):

What did you—what would you do about the fact that the members of this panel are within the class? The (b)(2) class?

Billy Wilkins (25:03):

Well, I would offer that we are willing to agree at this moment. That the language you read out, Judge King, can be interpreted to mean any presiding judge. That's the best I can offer. And I assume my colleagues would agree with me as well.

Judge King (25:23):
Maybe any judge?

Billy Wilkins (25:25):
Any presiding judge.

Judge King (25:26):
Maybe any judge, rather than presiding judge.

Billy Wilkins (25:28):
Well.

Judge King (25:28):
It may be any judge or justice. It goes to Supreme Court. Why wouldn't you? But, but seems to me that's pretty narrow, but, but I'll—

Billy Wilkins (25:37):
Well, well, I'll accept, I'll accept your suggestions—

Judge King (25:39):
I think you all may, you may need to think about it. Maybe we need—certainly need to think about it too, but that way written there is pretty narrow. But the—and the next thing, what about the attorney's fee issue?

Billy Wilkins (25:47):
Well, you know, that's—

Judge King (25:48):
The explanation was pretty sparse.

Billy Wilkins (25:52):
Well you know, again, we go back to—

Judge King (25:52):
The hours and the rates were these—where were the rates based on, New York or Richmond?

Billy Wilkins (25:57):
Well, I think they were, they were based on—we got lawyers involved in from all over.

Judge King (26:02):
Are you supposed to do Richmond rates or poor circuit rates?

Judge King (26:06):
I don't, I don't know the answer that perhaps, well—

Judge King (26:11):
But uh—

Billy Wilkins (26:11):

But—

Judge King (26:11):

And they, and, and I—and the that's a concern.

Billy Wilkins (26:19):

Well, this, again, a part of the settlement that was having a—

Judge King (26:24):

Where'd that multiplier come from? No, the judge had to find all that.

Billy Wilkins (26:27):

That's right.

Judge King (26:28):

No, this was, the judge had to approve the, there was a settlement and then the petition for fees. And the judge—

Billy Wilkins (26:35):

And, and—

Judge King (26:35):

He explained it in one paragraph.

Billy Wilkins (26:36):

And the—

Judge King (26:37):

He came up with the multiplier of 1.99.

Billy Wilkins (26:39):

Yes.

Judge King (26:40):

And he didn't explain where he got that multiplier. You all say in the brief or one of the briefs says that you can get that from experts and things that are somewhere in this record, but Judge Spencer didn't say where he got it. I don't think, but anyway, that's, I just was.

Billy Wilkins (27:00):

Well, they were, well as you I—

Judge King (27:01):

I'm just concerned whether that's enough of explanation.

Billy Wilkins (27:04):

I think it's enough. Plus the fact they reduced their—from what they were seeking from 30% to 25%. In

essence, the money is being paid is not is not coming from the—

Judge King (27:21):

It's not coming from the class members.

Billy Wilkins (27:23):

That's right.

Judge King (27:23):

Are not coming from recovery to class cause there isn't any recovery class, but now on the other class, that's not even on appeal, you got—

Billy Wilkins (27:32):

(b)(3).

Judge King (27:33):

You got—you got three-and-a-half million dollars or something, and this is five-and-a-half million. That's still lurking out there and saying this appeal.

Billy Wilkins (27:41):

That's right. Well, there's no objection to the three.

Judge King (27:43):

I know there's no objection that it's been paid by LexisNexis. But the question is whether it's—whether the opinion and is satisfies our precedent that's--

Billy Wilkins (27:55):

Well.

Judge King (27:56):

That's what I'm getting at.

Billy Wilkins (27:56):

I understand where you're going, judge.

Judge King (27:58):

[**Laughs**]

Billy Wilkins (27:58):

But I think we just take an overall view and look at the magnitude of this case. It went on for five or six years. This one case took two years of negotiations, multiple times all over the country. And so we've got a big case here, and the parties agreed that this was a reasonable attorney's fees and the judge accepted it. That's about—that's the only explanation I could give, but again, we—

Judge King (28:22):

No, go ahead. I'm sorry.

Billy Wilkins (28:23):
That's it. I finished.

Judge King (28:25):
Very good.

Billy Wilkins (28:26):
All right. Thank you, judge.

Judge King (28:27):
Thank you, Mr. Wilkins.

Billy Wilkins (28:27):
Thank you.

Judge King (28:31):
Mr. Palmore, I mispronounced your name. I'm sorry.

Joseph Palmore (28:35):
Thank you. Palmore, Judge King. So I'm Joseph Palmore here on behalf of the defendant appellees, which I'll collectively call LexisNexis. The settlement in this case provides significant long-term consumer benefits through industry leading product changes in return for the compromise of a limited set of statutory remedies that plaintiffs almost certainly could not have secured through litigation. At the same time, the settlement preserves the right of (b)(2) class members to pursue actual damages claims for any individualized injury. This hard fought settlement is fully compliant with all requirements of Rule 23 and due process. I'd like to start with the point that objectors' counsel devoted much of his time to the question of whether it was appropriate to release the class's statutory damages remedies through a (b)(2) settlement. And I think it's important to separate out two separate arguments that objectors are making. Their principal submission is that no claim for monetary relief can ever be certified under 23(b)(2).

Joseph Palmore (29:40):
No court of appeals has ever adopted that rule to the contrary. Every court of appeals to have considered the question has held that non-individualized monetary remedies can be provided as part of a (b)(2) class. And those non-individualized remedies flow directly from a finding of liability on the part of the defendant. And the Supreme Court in *Dukes* went out of its way to emphasize several times that it was not rejecting that rule. And after *Dukes*, the Seventh Circuit in *Johnson*, in an opinion written by Judge Posner, and the Second Circuit in *Amara*, have held again that non-individualized damages can be certified under Rule 23(b)(2). So what objectives are asking this court to do is to go out in front of the law to create a circuit split, to be the only court of appeals to ever hold that as a categorical matter, non-individualized damages cannot be afforded under Section 23(b)(2) would suggest that would not be an appropriate thing for this court to do.

Joseph Palmore (30:38):
And I think that would be wrong because 23(b)(2) certification is appropriate when the relief awarded is unitary and invisible. When all members of the class receive the same remedy determined entirely by the defendant's conduct, not by an individual's plaintiff's particular circumstances. The unitary injunction agreed to in this settlement is an example of such a remedy, but it has also settled law, as I said, that non-individualized monetary relief can satisfy that standard, too. Class members who are in exactly the same position as every class member with respect to their entitlement to relief, whether injunctive or monetary,

do not need the right to opt out. Objectors backup argument, our second argument, is that even if non-individualized monetary relief can be provided under Rule 23(b)(2), that the release here is impermissible because class member statutory damages claims are individualized and that's wrong, also. Under the statute, any plaintiff with an individualized claim to harm, can seek compensation through recovery of actual damages with no cap. That remedy was specifically carved out of the release under this settlement. Any class member who can show concrete and individualized harm, any class member who has a house as Judge Wilkins said, can pursue that claim and try to recover.

Joseph Palmore (32:04):

Those claims to individual relief are in a sense opted out by the very structure of this settlement.

Judge Hazel (32:11):

There really aren't any claims here for actual damages, right? I mean, I haven't heard anything about what actual—what any actual damages anyone would have. So it seems like the only real chance of anyone getting any monetary relief would be through the statutory damages that they've now been given away.

Joseph Palmore (32:25):

Well, I respectfully disagree, Judge Hazel. I mean, we talked about the (b)(3) class members and those are people who took some action in the real world, reflecting of you that the accurate reports were in fact consumer reports.

Judge Hazel (32:38):

Right. I get that—

Joseph Palmore (32:39):

And—

Judge Hazel (32:39):

So that's why I'm referring to the (b)(2) class in terms of not having.

Joseph Palmore (32:41):

One can imagine—you one can imagine a (b)(2) class member who said, you know, I was harassed by a debt collector who was calling my number erroneously, and that's because the information in the report was incorrect and maybe they would have a claim to actual, actual damages and they can bring that claim. There's nothing in this settlement that bars that claim any individualized relief can be awarded, and that plaintiff with an individualized claim to harm can pursue that remedy.

Judge Harris (33:09):

And counsel, how do you respond to the argument that no these damages—the statutory damages are individualized because there's always the chance that if there weren't a mandatory class, people could go out across the country, fan out across the country, and get inconsistent verdicts on willfulness?

Joseph Palmore (33:24):

I don't think that's what individualized means, Judge Harris. I think individualized means is there's something particular to a plaintiff that would lead to a different outcome. Not that you could roll the dice in different proceedings and get a different outcome in different parts of the country. And here, the fundamental issue in the case from the beginning was, are these reports, consumer reports, for purposes of the FCRA. That was a global issue. And the corollary to that was, was LexisNexis willful in not treating them as consumer reports. That also under the particular circumstances of this case was a global, visible

classwide issue. So we think that it was appropriate here to—that the any statutory damages that could have been awarded under the particular circumstances of this case would've been non-individualized, and then the release, therefore, as part of the (b)(2) class, as appropriate.

Joseph Palmore (34:20):

I'd like to also address the fairness inquiry that Mr. Wilkins touched on. Because contrary to objector's arguments, the settlement here is fundamentally fair. And the district court plainly did not abuse its broad discretion—in approving it. This court has said that the most important factor in evaluating the fairness of a settlement is the strength of the plaintiff's claims. And here, as Judge Spencer recognized, the claims were very, very weak. The only way the class could have received statutory damages in litigation would've been through a showing not only that LexisNexis violated the statute, but also that the violation was willful. Under the Supreme Court's *Safeco* decision, this is like a qualified immunity test. You have to violate clearly established law. Your conduct has to be objectively unreasonable. And the defendant—so the defendant must have violated if the statute's very clear on a question and I would submit that the FCRA is not very clear on very many questions, then it's possible the willfulness standard can be satisfied. If there's a definitive statement from controlling authority, like a court of appeals or the FTC prohibiting the defendant's conduct, it's possible that conduct would be willful.

Joseph Palmore (35:30):

In this case, as the district court found, plaintiffs could not have established willfulness under the *Safeco* standard. The plaintiff's pointed and neither plaintiffs nor objectors have pointed to any controlling authority stating that accurate reports or reports like them are consumer reports for purposes of the statute. To the contrary, the FTC unanimously held that accurate reports are not consumer reports under the statute. As Mr. Wilkins said, the district court noted that that was the basis for the FTCs finding and the objectors have not made any effort to show that the district court's finding in that regard was clearly erroneous. In return for compromising these very weak claims for statutory damages, the class received what the district court also found, as a matter of fact, was industry-leading injunctive relief that fundamentally reforms the products at issue. The class will receive all the protections of the FCRA for LexisNexis's new collections-decisioning product, and a number of significant and unprecedented FCRA-like protections for the new contact and locate product.

Joseph Palmore (36:35):

Even though that product is not even arguably covered by the statute. These reforms are much more valuable to the class than a nominal cash payment would've been. Indeed, in unrebutted evidence, Professor Richards, who Mr. Wilkins mentioned, put the value of the injunctive relief to the class in the billions of dollars, the right to receive a copy of a report annually is alone worth $160 million. So that's a concrete, real world benefit that plaintiff class received through this settlement that you can actually put a dollar figure on. For all these reasons, the district court acted well within its broad discretion in improving the settlement, and we would respectfully ask the court to affirm. I'd be happy to answer any remaining questions the court has.

Judge King (37:18):

What's your position on the—whether the judges or judges being within definition of the class. These judges?

Joseph Palmore (37:27):

Your Honor, we agree with Mr. Wilkins that the agreement between the parties is certainly amenable to the reading that the presiding judge would mean any presiding judge who's presiding over the case that would include—

Judge King (37:39):
And their families.

Joseph Palmore (37:39):
The three of you.

Judge King (37:41):
We're disqualified, you know, based on what our spouses may be interested in. It may have something, too.

Joseph Palmore (37:47):
Well, I think you would be treated the same way that Judge Spencer was treated.

Judge King (37:51):
Yeah.

Joseph Palmore (37:51):
So you would be—you would be considered a presiding judge for purposes of the settlement agreement.

Judge King (37:56):
And any other judge that ever gets involved?

Joseph Palmore (37:59):
I think that would be that interpretation would be ongoing, Your Honor.

Judge King (38:03):
And you—you all, didn't brief anything about the—about the legal fees. You were staying out of that?

Joseph Palmore (38:09):
We did not. We've contractually agreed with, to the fee amount—

Judge King (38:14):
You don't have any position on that right now—

Joseph Palmore (38:16):
Well, we can contractually agree to support the fee application, which we did through making for residential information available to Professor Richards and the other experts to assess the value of the injunctive relief so that plaintiffs could make their showing that the value of the injunctive relief that they secured on behalf of the class was significant.

Judge King (38:39):
Thank you very much, sir.

Judge King (38:43):
Mr. Paul, you've got a few more minutes.

Richard Paul (38:45):

Thank you. To the extent that damage claims can be resolved in a (b)(2) class post-*Dukes*, the Supreme Court made clear that at the very least, they must be incidental to the injunctive relief. And the court defined what incidental means. And excuse me—it said that those damages must flow from the issuance of the injunction or declaratory relief. And in that regard while the court goes on to, I think, question whether they would even allow the incidental damages, to the extent that that exists, the *Johnson* case that the plaintiffs and defendants rely on, I think is a great example of those types of incidental damages. In that case, there was a question about how benefits and a pension plan were defined. And the court issued declaratory relief defining how those benefits—changing how those benefits should be determined.

Richard Paul (39:44):

And by the issuance of that declaratory relief, everybody's pension benefits changed. And the court went out of its way to note that the calculations were rote math as a result of the declaratory relief. And then said, but to the extent that we're wrong and we don't—we may not know the full implications of this ruling when this goes back down to the district court, if it is an—if the damages are not rote calculations, and there may be instances where somebody wants to prove up their own measure of benefits, then the court needs to reconsider whether that can be done in a (b)(2) class and whether it needs to be re-characterized in a (b)(3) class. Here, the injunction that is obtained in the settlement agreement relates to their future conduct. They are changing the way they do things and issuing additional rights going forward. There are no damages that flow from the issuance of that injunctive relief. So they're entirely separate, which is necessarily the fact that the injunction isn't even authorized by the agreement. It's an additional add-on in negotiation.

Judge Harris (40:48):

Counsel, you're sort of resisting the idea that incidental means non-individualized. You think damage award could both be non-individualized—could be non-individualized, but still not be incidental?

Richard Paul (41:07):

I'm lost in the double negative.

Judge Harris (41:08):

Yeah, I know. Me too.

Richard Paul (41:08):

[**Laughs**]

Judge Harris (41:08):

But I guess what I'm saying is, so even you, you're—the idea is that just for the sake of argument for this moment, you could maybe concede, even if I thought, look, these look like classwide, that the statutory damages in this case, they look pretty classified to me. They do not look individualized to me. You might say, well, okay, Your Honor, they're not individualized, but they're still not incidental because they don't flow directly from the injunctive relief.

Richard Paul (41:31):

That is correct. I think that is the additional limitation that *Dukes* put on this area of the law. I mean, I think that was the advancement that *Dukes* made. I would also note that this court has twice decided that damages—the statutory damages are individualized in the still mock in the—in the suitor case. They did note that it was individualized and noted that they could be differing amounts. I still think that there is this concept of whether it's an individualized right to a money judgment. And the fact that my client could go

out and get their own money judgment in their name makes this an individualized right as opposed to a collective right. And I do think that that's what the *Dukes*—the dichotomy that the *Duke* court was trying to draw.

Richard Paul (42:19):

I also want to address the notion that the fact that this was—it can be treated differently because it's a settlement class, I think is wholly erroneous. One, I think the [**inaudible**] decision puts that to bed. Due process rights are heightened in the settlement context. But to the extent that this is different in a litigation class, plaintiff's counsel argued that in the litigation context, the defendant has the right to object. And so what he's really arguing is that the defendant has more rights than absent class members to object to the pursuit of injunctive relief. And I don't think that's right at all. The parties to litigation have equal rights to make those objections, and absent class members have the right to say: I don't want that injunctive relief in exchange for my property claim.

Richard Paul (43:07):

I want to pursue my claim for damages. I want money. I don't want the injunction. And it may very well be that many class members want the injunction, but that's their personal choice to make the decision, and I think that *Dukes*, *Schutz*, [**inaudible**] title cases all make that abundantly clear. And I would also note that, contrary to defense counsel's perspective, that the *Brown v. [**inaudible**]* title case out of the Ninth Circuit, I think did take that next step that *Dukes* marginally open and said no money damages. And that is their refusal to apply res judicata to the release of money damage claims there is what creates the chaos here. There, there will be claims follow from this decision, this case, if this court doesn't reverse and people in Ninth Circuit will be treated differently than people in the Fourth Circuit. Thank you.

Judge King (43:58):

Thank you, Mr. Paul. We'll come down and greet counsel and call our next case.