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AGHCHAY and The Certified Class

11  
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **FOR THE COUNTY OF LOS ANGELES**  
14 **CENTRAL CIVIL WEST**

15 CURT SCHLESINGER, PETER LO RE,  
16 JAMES ROTH, ADAM RUSSELL, MARYAM  
AGHCHAY, on behalf of themselves and The  
17 Certified Class,

18 Plaintiffs,

19 v.

20 TICKETMASTER, a Delaware Corporation,

21 Defendants.  
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**CASE NO.:** BC 304565

Assigned to: Judge Kenneth R. Freeman

**PLAINTIFFS' AND THE CLASS'  
OPPOSITION TO THE OBJECTION OF  
ERIC S. FULLER TO FINAL APPROVAL  
OF CLASS ACTION SETTLEMENT**

**[filed concurrently with Plaintiffs' and the  
Class' Consolidated Opposition to  
Objections to Class Action Settlement,  
Declaration of Robert J. Stein III]**

**DATE:** January 13, 2015

**TIME:** 10:00 a.m.

**PLACE:** Dept. 310

**TRIAL DATE:** Vacated

**ACTION FILED:** October 21, 2003

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PRELIMINARY STATEMENT

Eric S. Fuller's Objection to Final Approval of Class Action Settlement should be overruled. He is a ticket broker who buys multitudes of tickets and resells them on the secondary market at a profit. He complains that the settlement is unfair to ticket brokers because it limits recovery to 17 transactions. He also again asks the Court to establish a subclass of ticket brokers and appoint him as their representative.

This Court previously denied virtually identical objections and requests by Mr. Fuller when he opposed the last settlement, and later sought to intervene in January, 2012, some nine years after this case was filed and long after he had familiarized himself with its issues. The Court of Appeal, noting this Court's rejection of Mr. Fuller's "primary argument that the 17 transaction cap was unfair," affirmed denial of Mr. Fuller's petition to intervene, and awarded Plaintiffs their costs of appeal, which Mr. Fuller has still not paid. (*Schlesinger v. Ticketmaster* (Cal Ct. App. 2014) 2014 WL 1819869, at \*2.<sup>1</sup>) That ruling is now law of the case and binds this Court. Mr. Fuller was denied leave to intervene. He is not a party, and to represent a subclass one must be a party. Mr. Fuller cannot represent his proposed subclass, and an objection to a class action settlement is not a proper means to seek certification of a subclass.

Mr. Fuller lacks standing for other reasons. He admits that the proposed subclass is not ascertainable, he did not rely on Ticketmaster's misrepresentations, and he would not have changed the way he bought tickets from Ticketmaster even if he had known the truth. A class representative must prove that the misrepresentation was a factor that influenced his purchasing decision. Mr. Fuller admits that he did not rely on Ticketmaster's representations at all, and that they would not have made one iota of difference in his purchasing decisions. (April 5, 2012 Deposition Tr. of Eric Fuller ("Fuller Dep.") pp. 199:20-200:2.)

Mr. Fuller's objections lack merit. As this Court has correctly noted, "limiting the number of coupons for any one class member represents an attempt at compromise," *id.*, and that is as true now

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<sup>1</sup> Mr. Fuller's failure to pay the costs award demonstrates yet another facet of his inadequacy to serve as a class representative. Either he cannot afford to pay the modest award, or he simply believes he does not need to comply with court orders. Either renders him unfit to serve.

1 as it was when the Court first made the observation. A settlement does not provide everything either  
2 party could win at trial. It is a product of compromise, bargaining, an assessment of the risks,  
3 likelihood of recovery, value of certainty, time value of money, and avoiding litigation costs. Class  
4 members who placed more than seventeen orders with Ticketmaster could opt out and bring their  
5 own claim at little expense against Ticketmaster in small claims court. The objections based on  
6 purported fears that Ticketmaster will raise order processing fees (“OPF”) to offset discount codes  
7 are unfounded. Mr. Fuller’s objections should be overruled.

### 8 ARGUMENT

9 Fairness, adequacy, and reasonableness are the appropriate inquiries when a court is asked to  
10 approve a class settlement. *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4<sup>th</sup> 1794, 1801-02. The  
11 court has broad discretion to determine whether a settlement is fair. *Id.* at 1802. Less scrutiny is  
12 required, and a presumption of fairness arises, when a contested certification has occurred, *Wershba*  
13 *v. Apple Computer, Inc.* (2001) 91 Cal. App. 4<sup>th</sup> 224, 240, as it has here. The objector must provide  
14 an “analysis of the settlement terms which would overcome the presumption of fairness to which  
15 they are entitled.” *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4<sup>th</sup> 43, 54. These factors, and the  
16 supporting evidence, are thoroughly evaluated in Plaintiffs’ and the Class’ Motion for Final  
17 Approval of Proposed Class Action Settlement Agreement (“Pls.’ Final Approval Mot.). An  
18 important factor in evaluating fairness is the “strength of Plaintiffs’ case weighed against the amount  
19 of the settlement.” *Id.* Mr. Fuller has not provided that analysis or rebutted Plaintiffs’ analysis as set  
20 forth in their preliminary approval motion. Instead, his entire argument implicitly relies on false  
21 premises that Plaintiffs are certain to win at trial and he can negotiate a better deal (at least for  
22 himself) with Ticketmaster.

#### 23 I. Discounts for future purchases and the contingent benefit of fully transferable free 24 tickets are a meaningful remedy and the 17 transaction cap remains an appropriate 25 compromise

26 Mr. Fuller claims discounts for future purchases, as opposed to the payment of restitution, are  
27 not a meaningful remedy. (Mr. Fuller Obj. at 4.) But California law recognizes that the issuance of  
28 credits, coupons, or other non-cash entitlements are appropriate ways to settle class actions where, as

1 here, they involve relatively small consumer purchases. (See Plaintiffs' concurrently filed  
2 Consolidated Opposition to Objections to Class Action Settlement ("Pls.' Opp. Br") at §§II.A)

3 Mr. Fuller primarily complains that because he exceeded seventeen transactions, he will not  
4 recover all of his damages. (Mr. Fuller Obj. at 4.) This Court overruled that objection when it  
5 considered the last proposed settlement, holding that "limiting the number of coupons for any one  
6 class member represents an attempt at compromise." *Schlesinger*, 2014 WL 1819869, at \*2. Nor are  
7 Mr. Fuller's interests are unprotected. He could have opted out of the class and pursued his own  
8 claims. In *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812, the United States Supreme  
9 Court held that where a class member's claims are primarily monetary, the ability to opt out of the  
10 class satisfies due process. And in *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 474, the  
11 California Supreme Court held that the ability to opt out of the class amply protects class members  
12 who do not wish to be bound by the result of the suit.

13 Mr. Fuller has always known of the opt-out mechanism and testified that he would not  
14 exercise it, (Fuller Dep. pp. 189:14-190:5), though he could then sue Ticketmaster in small claims  
15 court for his own damages at small expense. Thus, Mr. Fuller objects to a settlement that benefits all  
16 class members so that he can attempt to recover more for ticket brokers—who, Mr. Fuller admits,  
17 are not ascertainable as a class. (Fuller Dep. pp. 186:6-187:13.)

18 Limiting class members to seventeen discount codes was the result of a hard-fought, arm's-  
19 length, carefully-analyzed, and reasonable compromise. It affects less than one percent of the class.  
20 The cap does not bar those persons from participating in the settlement; it only limits their  
21 participation to seventeen transactions. Further, none of the people whom Mr. Fuller seeks to  
22 represent have joined his objection (or filed their own objection) despite his solicitation efforts to get  
23 their support. In fact, Mr. Fuller testified that his purported subclass *did not want to be involved or*  
24 *identified*. (Fuller Dep. p. 187:4:-16.) This, as the Court has noted, is a bona fide effort to reach a fair  
25 compromise. Mr. Fuller's objection should, again, be overruled.

1 **II. The objection that Ticketmaster can raise OPF prices to offset discount codes is**  
2 **unfounded.**

3 Mr. Fuller claims that Ticketmaster has unlimited power to raise its fees after the discount  
4 codes are issued. (Mr. Fuller Obj. at 4-5.) This objection also lacks merit. Ticketmaster's ability to  
5 raise fees is limited by the marketplace in which it operates, and through contracts with theaters,  
6 arenas, or artists that limit the fees Ticketmaster can charge to the ultimate consumer. (Opp. Br.  
7 §II.G.)

8 **III. There is no basis on which to create a subclass of ticket brokers or appoint Mr. Fuller as**  
9 **class representative.**

10 As an alternative to denial of final approval, Mr. Fuller again improperly asks the Court to  
11 establish a subclass of ticket brokers, to appoint him as class representative (and fiduciary) for the  
12 subclass, and to stay approval of the Settlement Agreement while he attempts to negotiate a  
13 settlement for ticket brokers. (Mr. Fuller Obj. at 10.)

14 **A. The Court cannot restructure the Settlement Agreement**

15 Mr. Fuller's request should be denied, in the first instance, because he is asking the Court to  
16 restructure the Settlement Agreement. The Court cannot do that. The Settlement Agreement is a  
17 private consensual agreement. "Due regard should be given to what is otherwise a private consensual  
18 agreement between the parties." *Dunk*, 48 Cal. App. 4<sup>th</sup> at 1801-02. This Court cannot "delete,  
19 modify or substitute certain provisions. The settlement must stand or fall in its entirety." *Hanlon v.*  
20 *Chrysler Corp.* (9<sup>th</sup> Cir. 1998) 150 F.3d 1011, 1026 (internal citation omitted); Manual for Complex  
21 Litig. (4<sup>th</sup> ed. 2011) § 21.612 ("The judicial role in reviewing a proposed settlement is critical, but  
22 limited to approving the proposed settlement, disapproving it, or imposing conditions on it. The  
23 judge cannot rewrite the agreement."). As a matter of law, an objection to a class action settlement  
24 is not a procedurally correct means to create a subclass; that requires a class certification motion,  
25 which Mr. Fuller can prevail on (or even file) for a myriad of reasons, including that the law of the  
26 case doctrine prevents him from becoming a party to the action, which would be the starting point  
27 for filing a class certification motion.

1           **B.       The proposed subclass is not ascertainable**

2           Mr. Fuller testified that he could not even identify a ticket broker. (Fuller Dep. pp. 186:6-  
3 187:13.) Moreover, Mr. Fuller has testified that he spoke at a ticket broker conference regarding the  
4 prior settlement in this case, advocating that ticket brokers should oppose the settlement. (Fuller  
5 Dep. pp. 120:6-121:12.) Not only did he fail to garner any support from other ticket brokers, he  
6 testified that they wished *not* to be singled out (i.e. ascertained) because they feared doing so would  
7 cause them more harm than good.<sup>2</sup> (*id.* pp. 187:4-17.) “The party seeking certification as a class  
8 representative must establish the existence of an ascertainable class and a well-defined community  
9 of interest among the class members.” *Richmond*, 29 Cal. 3d at 470. In short, Mr. Fuller stubbornly  
10 seeks to represent a subclass which cannot be ascertained and whose members which to remain  
11 anonymous.

12           Mr. Fuller suggests he could fix this defect by changing the proposed subclass from all ticket  
13 brokers to all persons who had more than seventeen transactions during the class period. But the  
14 merits of this position are moot because, the seventeen transaction limit is a fair compromise and, as  
15 discussed below, Mr. Fuller admits he cannot meet the reliance requirement and therefore is not  
16 qualified to represent the proposed subclass.

17           **C.       Mr. Fuller cannot be appointed class representative because he is not, and**  
18           **cannot be, a party**

19           When this Court denied Mr. Fuller’s petition to intervene as a party in this case, he appealed.  
20 The Court of Appeal affirmed this Court’s decision. *Schlesinger*, 2014 WL 1819869, at \*2. It held  
21 there were ample grounds supporting this Court’s decision: when Mr. Fuller filed his intervening  
22 petition proposing a subclass for ticket brokers, the case was nine years old; discovery had been  
23 completed; Mr. Fuller had earlier objected to the proposed settlement as unfair to class members  
24 with more than seventeen transactions; intervention might delay proceedings further or interject new  
25 issues that Mr. Fuller could have raised earlier; and Mr. Fuller’s intervention was untimely. *Id.* at \*4.

26 \_\_\_\_\_  
27 <sup>2</sup> Ticketmaster has repeatedly argued that ticket brokers violate Ticketmaster’s terms of use, and  
28 perhaps engage in illegal activities, in order to acquire tickets. It seems that every ticket broker other  
than Mr. Fuller understands they have far more to lose than they have to gain by being put in a  
separate subclass, if that were even possible.

1 The Court of Appeal also held there were ample grounds supporting this Court's finding that  
2 Mr. Fuller's proposed intervention nine years into the case would unduly prejudice the rest of the  
3 class. *Id.* at \*7-8. The Court of Appeal noted credible arguments that had been made on the  
4 "significant additional discovery and proceedings" that would be necessary if Mr. Fuller was  
5 allowed to intervene, and the difficulty of identifying an ascertainable class. *Id.*

6 That Court of Appeal's unpublished ruling is law of the case and binds this Court. *People v.*  
7 *Stanley* (1995) 10 Cal. 4<sup>th</sup> 764, 786 (where an appellate court decides a rule of law necessary to its  
8 decision, that rule becomes law of the case and governs the remainder of the case); *Constructors v.*  
9 *McCarthy* (1979) 91 Cal. App. 3d 515, 522 (law of the case doctrine extends to unpublished  
10 decisions). Mr. Fuller was denied leave to intervene. He cannot be a party to the case and, *a fortiori*,  
11 cannot "adequately represent the class." *Richmond*, 29 Cal.3d at 470.

12 **D. Mr. Fuller Did Not Rely on Ticketmaster's Misrepresentations**

13 Plaintiffs seek relief under the Unfair Competition Law. Proposition 64 imposed a modest  
14 reliance requirement for standing to represent a class for a UCL claim. A class representative must  
15 prove that the misrepresentation was a "substantial factor in influencing his purchasing decision." *In*  
16 *re Tobacco II Cases* (2009) 46 Cal.4<sup>th</sup> 298, 326-27.

17 Mr. Fuller lacks standing to represent the proposed subclass. He has conclusively testified  
18 that he never relied on Ticketmaster's misrepresentations, that he would have bought tickets from  
19 Ticketmaster regardless of its misrepresentations, and would not have changed the way he bought  
20 tickets from Ticketmaster in any respect had he had known the truth. (Fuller Dep. pp. 199:20-200:2.)  
21 Even if Mr. Fuller could identify a subclass of ticket brokers and the Court certified that subclass—  
22 and there has been no showing of that—he would have no standing to be appointed class  
23 representative for the subclass because his purchase decisions were not influenced by Ticketmaster's  
24 misrepresentations.

25 **E. Mr. Fuller is an inappropriate choice for class representative for other reasons**

26 Mr. Fuller, a former California lawyer, was convicted in the mid-1990s after a 14-day jury  
27 trial in federal court for bank fraud, making false statements on loan applications, and money  
28 laundering. *United States v. Mr. Fuller* (9<sup>th</sup> Cir. 1997) 131 F.3d 149, 149-50 (unpublished). Mr.



1 Fuller was disbarred on January 22, 1999, with the State Bar ruling that making false statements to a  
2 lending institution is a felony offense involving moral turpitude.

3 <Http://members.calbar.ca.gov/fal/Member/Detail/129339>. It was after Mr. Fuller’s felony conviction  
4 and disbarment that he became a ticket broker.

5 Prior convictions involving fraud or dishonesty render persons inadequate as a class  
6 representative because they have been shown to be dishonest. That fact may be construed as  
7 detrimental to the class that the putative representative wants to represent, even if it is not relevant to  
8 the merits of the case. *CE Design Ltd. v. King Architectural Metals, Inc.* (7<sup>th</sup> Cir. 2011) 7 F.3d 721,  
9 728 (class representative’s credibility is properly considered where “there exists admissible evidence  
10 so severely undermining plaintiff’s credibility that a fact finder might reasonably focus on plaintiff’s  
11 credibility to the detriment of the absent class members’ claims”); *Pope v. Harvard Bancshares, Inc.*  
12 (N.D. Ill. 2006) 240 F.R.D. 383, 390 (class representative inadequate where her son-in-law, who had  
13 influence over the case, was convicted of tax fraud); *Folding Cartons, Inc. v. American Can Co.*  
14 (N.D. Ill. 1978) 79 F.R.D. 698, 703 (plaintiff inadequate to serve as class representative where he  
15 had been found to have engaged in fraud).

16 Given the foregoing, the knowledge that Mr. Fuller “stand[s] ready and willing to act as class  
17 representative,” (Mr. Fuller Obj. at 10), is not reassuring. Mr. Fuller’s felony record and the State  
18 Bar’s determination that his fraud conviction renders him unfit to represent law clients—facts he  
19 never disclosed to this Court when suggesting his appointment, (*id.*)—indicate it would be singularly  
20 inappropriate to appoint him as class representative, with the fiduciary responsibilities to the Court  
21 and the proposed subclass that his appointment would entail.

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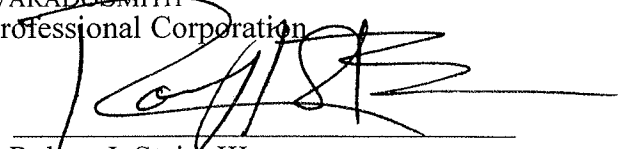
**CONCLUSION**

For these reasons, Plaintiffs respectfully submit that the Court should OVERRULE Mr. Fuller's objections.

Respectfully submitted,

DATED: December 8, 2014

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