

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

**PENELOPE BAIM BLOCK,
BRIJ M. SHARMA, CHARANJIT
SINGH, LISA M. BERTINI,
VANDANA MAKKER, BALA M.
KRISHNA, TY C. GERHARDT,
JEFFREY ZIMMERMAN,
MUKESH MITTAL, SANJAY
AGARWAL, and SAVITA REDDY,**

Plaintiffs,

v.

Case No. 01 CH 9137

McDONALD'S CORPORATION,

Judge Richard Siebel

Defendant.

**JOINT REPLY IN OPPOSITION TO SETTLEMENT OF
VEGETARIAN LEGAL ACTION NETWORK (VLAN),
JAMES PIZZIRUSSO, LAURIE GELMAN AND JENNIFER ALLEN**

VLAN, James Pizzirusso, Laurie Gelman and Jennifer Allen (“joint objectors”) submit this joint reply brief in opposition to the settlement. Approximately 2,600 other individuals and groups have also opted out or objected to the settlement in this case. This Court should not ignore these staggering numbers for such a limited consumer case. As indicated by these numerous objections, there are serious problems with this settlement.

I. THIS COURT MUST CAREFULLY SCRUTINIZE THE PROPOSED SETTLEMENT DUE TO ITS UNIQUE NATURE.

Counsel assert that numerous courts have allowed for fluid recovery or *cy pres* funds to be given directly to responsible private organizations as settlement of a case. See Plaintiffs’ Memorandum in Support of Final Approval of Class Action Settlement Agreement and Petition for Fees (“Pl. Memo.”) at 4. However, the only cases cited by

Plaintiffs' counsel involve violations of antitrust laws and all but one, *In re Folding Carton Antitrust Litig.*, 557 F. Supp. 1091 (N.D. Ill. 1983), were initiated by a state. Pl. Memo. at 4-7. While VLAN has not contested the availability of *cy pres* relief in this case, there is no directly applicable precedent on point. VLAN is unaware of any published opinion wherein a court approved the settlement of a national consumer class action that consisted entirely of *cy pres* relief. Most courts encounter *cy pres* issues when determining how to distribute left over settlement funds after class members have already received a direct benefit from the settlement. Here, where injured consumers will not receive any direct relief, it is even more crucial that the Court ensure that the *cy pres* settlement is fair to unnamed class members who give up all rights to pursue this litigation unless they opt out.

II. THIS SETTLEMENT FAILS UNDER THE STEINBERG STANDARDS.

As class counsel concede, Illinois courts scrutinize settlements in light of the following criteria: (1) the strength of the case for the plaintiffs on the merits, balanced against the extent of the settlement offer; (2) the ability of the defendant to pay; (3) the complexity, length, and expense of further litigation; (4) the substance and extent of opposition to the settlement by the class members; (5) the reaction of members of the class to the settlement; (6) the opinion of competent counsel; and (7) the progress of the proceedings. Steinberg v. System Software Associates, Inc., 306 Ill. App. 3d 157, 713 N.E.2d 709 (1st Dist. 1999).

A. The strength of the case vs. the settlement and McDonald's ability to pay.

There was clear liability here. McDonald's repeatedly asserted that it never marketed its french fries as "vegetarian," yet letters McDonald's sent to class members

indicated that the french fries were vegetarian. The discovery in this case is under a protective order, but presumably there were documents obtained from McDonald's that further indicated the deceptive nature of McDonald's acts. While damages might be difficult to prove in this case, economic experts could likely set up a realistic damages model based on the number of vegetarians in this country, the amount of french fries and hashbrowns sold during the class period, and any corresponding drop in sales after the publicity associated with this lawsuit. Additionally, there are statutory damages allowed under the Illinois Consumer Fraud Act.

Class counsel have not submitted anything in the record, however, to justify such a small settlement of \$10 million. The non-profit status of the recipient organizations means McDonald's will be able to receive tax write-offs for these donations and the actual amount spent by McDonald's will be trivial compared to their sales of french fries to vegetarians. While McDonald's can afford this settlement, it would likely equal the fees associated with trying this case to its end and any related appeals and thus, this hardly supports approval.

B. Complexity of the case.

Counsel contend that this case is overly complex because “[p]roving actual damages might require individual testimony of each claimant concerning his or her consumption of McDonald's french fries or has [sic] browns and his or her religious, moral, or ethical reasons for not eating meat.” Pl. memo. at 16. Joint objectors disagree. In fact, if such were the case, the class representatives' claims would not be typical of the class and would not predominate over individual issues. Additionally, class counsel would be inadequate for this class action because they would not believe in the

manageability of this case as a class action. While any class action is complex, this case is no more complex than any other national consumer class case which has been certified in Illinois.

C. The substance, extent and reaction of class members.

As noted, over 2,600 individuals and organizations have attacked this settlement as unfair. This hardly can be considered a miniscule number given the limited number of vegetarians in this country and the even smaller number who ate McDonald's french fries or hash browns during the class period. In fact, class counsel contradict themselves when they say, on the one hand, there are "millions" of class members. They then assert that "[m]any vegetarians, Hindus and others with similar views regarding the consumption of beef would never go to McDonald's for any reason. It is, in common parlance, a 'hamburger joint.' . . . As such, McDonald's represents the epitome of what vegetarians, Hindus, and others adhering to non-beef dietary practices oppose." Pl. Memo. at 17-18. Counsel cannot have it both ways and argue that there are few objectors given the large number of class members, but then assert that the objectors are likely not "real" class members because vegetarians would never go to McDonald's. To the contrary, the fact that these individuals took the time to assert their legal rights indicates that they are likely class members upset by what has happened.

D. The opinions of experienced counsel.

Of course, most of the class counsel agree with everything they have done in this case. Notably, Harish Bharti, the first to file any case over these issues, has criticized the handling of the *cy pres* selection process. Counsel also contend that "McDonald's apology represents a real triumph to class members." Pl. Memo. at 20. They fail to note,

however, that McDonald's apologized after Mr. Bharti's initial suit was filed, before the other attorneys were even involved in this litigation.

E. The progress of the proceedings.

The proceedings did not get very far before McDonald's was willing to settle. Thus, it appears that the bulk of the attorneys' time in this case was spent in irrelevant settlement negotiations that should have been handled by an independent board or a special master.¹

III. THIS COURT SHOULD NOT GIVE FINAL APPROVAL TO THE CY PRES SELECTION PROCESS IN THIS SETTLEMENT

Counsel state that “[t]o the extent that the VLAN . . . and other objections name those organizations as deserving of Cy Pres funds, they must be dismissed as motivated purely by a [sic] avaricious fear on the part of those organizations that they will not receive Cy Pres funds.” Pl. Memo. at 23. This mischaracterization of VLAN's motivation in this litigation could not be further from the truth. VLAN has no reason to consider -- much less “fear” -- the loss of *cy pres* funds because it has not been identified as a recommended or even a potential recipient. Counsel's contention that an organization's legal arguments should be dismissed simply because it has (or had) a financial interest in the settlement is absurd. If the Court were to accept this flawed logic, it must also dismiss all arguments from plaintiff's counsel as motivated by the “avaricious fear” that they will not receive their \$2.4 million in fees.

A. The Court should examine potential conflicts.

¹ As such, this Court should scrutinize fee petitions which likely contain more hours settling the case than actually litigating it. The joint objectors do not contest Mr. Bharti's fee petition or his adequacy in this case.

Counsel indicate that objectors “fail to refer in any way to how . . . alleged biases or prejudices have improperly influenced counsel’s decision making process.” Pl. Memo. at 23. However, at this point it is difficult for any class members to know with certainty how biases or prejudices may have influenced the selection process because class counsel have been so secretive and have refused to disclose why groups were picked or rejected. In fact, class counsel have still not released a final settlement plan, a month after objections and opt outs were due and less than three weeks before the final approval hearing.

Additionally, some limited disclosures from class counsel do indicate that there may be some conflicts here. See Declaration of Cory S. Fein, Attachment B. For one, Dr. Dean Ornish, PMRI’s “leader,” is a past paid consultant to McDonald’s. While McDonald’s is rejecting groups who are “anti-McDonald’s,” it is ironic that they would select the “non-controversial” group of a past consultant. Additionally, Kevin Roddy attended, and his daughter is presently enrolled at UNC-Chapel Hill, another potential recipient. Not to be outdone, McDonald’s counsel has also indicated a preference to donate funds to his alma mater, Tufts. Finally, while joint objectors have not done significant research on Hindu organizations, it appears that some of the Texas lawyers have improper ties to Arya Pratinidhi Sabha America. These potential conflicts should not go unscrutinized by this Court.

B. Class counsel and McDonald's should have no role in the selection of *cy pres* recipients.

Counsel contend that they are acting in accordance with the preliminarily approved settlement by selecting *cy pres* recipients. That, however, is the problem; McDonald’s and class counsel should not be selecting the recipient organizations. For

one, Cory Fein tellingly indicates some of what went on behind closed doors:

McDonald's counsel assisted doing its own research on the groups under consideration. Both McDonald's counsel and Plaintiffs' counsel sought to avoid, to the **greatest extent possible**, any groups that were involved in **highly controversial activities** that would be supported by some class members but opposed by others.

...

McDonald's counsel did request that no groups be chosen that were actively suing McDonald's or **vigorously protesting McDonald's**. In the spirit of settlement, **I did not take this to be an unreasonable request**, and because we were able to locate numerous suitable groups, McDonald's position did not prevent us from coming up with a list of excellent reputable groups, closely tailored to the class definition and to the purposes of the litigation.

Declaration of Cory S. Fein, ¶¶ 17-18 (emphasis added).

On the one hand, Mr. Fein acknowledges that the *Cy Pres* groups need to be closely tailored to the purposes of the litigation (vegetarians suing McDonald's over their right to know what's in their food). On the other hand, however, he asserts that any groups engaged in the process of suing McDonald's (presumably that included VLAN since it started this litigation) or protesting McDonald's (which also includes VLAN since it encouraged class members to complain to McDonald's management) are summarily excluded from the settlement. Class counsel consistently contradict themselves. They acknowledge that the *cy pres* relief needs to be "narrowly targeted to benefit those persons who were harmed by the alleged wrongdoing" (Pl. memo. at 7), yet they refuse to narrowly target that relief in this case since McDonald's might be offended. One of the primary purposes of this litigation was to punish McDonald's and deter it from making misleading statements regarding the contents of its food products. The most representative *cy pres* groups would therefore be those which have actively sought to encourage McDonald's, through various means including litigation and protest,

to provide vegetarians with accurate information regarding their food products.

At the very least, class members have the right to know the final recipients and why they were picked and others were rejected before they give up their legal rights in these claims. Then, they must be given the time to reflect on these issues and choose to object or opt out. VLAN attempted to learn what criteria were used in the selection process by asking class counsel the following questions:

- 1) What are the objective criteria for picking *cy pres* groups?
- 2) How do you determine if groups come “as near as possible” to the interests of the class?
- 3) Are class members/representatives actively involved in the process?
- 4) What groups have been rejected and on what grounds?
- 5) What groups have been included and on what grounds?
- 6) If no groups have been included or rejected, which groups have been sent follow-up letters (as referenced by you in your phone call of May 23)?
- 7) Of the groups included or under consideration, which were suggested by plaintiffs’ counsel and which by defendant’s counsel?

See VLAN Amicus, Exhibit 5. Mr. Roddy’s response was, “As I am sure you recognize, it would be impractical to carry out the process of selecting the groups in the open.” *Id.*

As a result of class counsel’s failure to respond, class members were forced to decide whether to opt out or object without knowing which groups would receive portions of the settlement fund and on what basis.

C. Counsel have chosen groups which bare little relation to the purposes of this suit.

The proposed settlement agreement provides only broad, undefined guidelines for choosing recipient organizations. All that is required is that the recipient be a nonprofit vegetarian organization doing work in the U.S. and that the donation be used for a vegetarianism purpose. However, even with these broad criteria, counsel have still failed to meet their own definition of which groups are proper recipients under the settlement.

“Vegetarian organization” is not a difficult concept. However, less than half (4/9) of the groups identified as tentative vegetarian *cy pres* recipients are actual “vegetarian groups” (Vegetarian Resource Group, North American Vegetarian Society, Vegetarian Visions, Inc., The American Vegan Society). One is a professional organization of dietitians (ADAF Vegetarian Nutrition Dietetic Practice Group); one is a health research institution (Preventive Medicine Research Institute); and **three** are universities (Loma Linda University, Tufts University, UNC, Chapel Hill, Dept. of Nutrition). Even with the broad definition of “vegetarian organization,” class counsel fail to select groups that adequately fall under that definition and propose to give them \$2.5 million of the settlement.

Additionally, by trying to select “non-controversial” vegetarian groups, class counsel have swung so far in the other direction that these groups no longer represent the class. Much has been raised about the Vegetarian Resource Group (VRG). In contrast to Mr. Fein’s suggestions to the contrary, VLAN does not view VRG as a “rival.” In fact, as he indicated, VLAN put them on its list of *cy pres* groups, albeit with some trepidation. As indicated by a letter VLAN sent to Mr. Fein on May 28, VRG publicly stated in a newsletter editorial:

This year several consumer advisers gave us more complete answers than ever before [in our vegetarian fast food survey]. We believe this is because of all the follow-up questions we've asked in the past. **But interestingly, more and more chains are telling us that they serve nothing vegetarian. We hypothesize that this is due to the actions of some vegetarians who have screamed at the fast food chains or even went so far as to sue them.** Unfortunately, some restaurants, rather than boasting about the vegetarian alternatives they have, and thus increasing demand, are more in a defensive mode. **We think the approach of many people quickly attacking a company for what they're not doing, rather than giving assistance and encouragement for what they are doing, can be counterproductive at times.** Sometimes protest is called for, and at other

times encouragement is the right approach, especially when the chain is making an effort to offer veggie options.
(emphasis added).

See Letter, Exhibit A. Thus, VRG criticized VLAN's attempts to sue McDonald's yet they are now poised to take in \$1,750,000 of the proceeds of this suit. Joint objectors are not opposed to VRG being included in the settlement so long as their inclusion is limited to publicizing their vegetarian guide to fast food and so long as other activist groups are similarly included. This is not the case. VRG is the only one of nine organizations which VLAN thought should be represented and VRG's own comments hardly justify their being the largest *cy pres* recipient in this settlement.

Plaintiffs' counsel also acknowledge that McDonald's failure to disclose that its french fries and hash browns contained beef tallow is "a fact highly material to persons such as the plaintiffs who have ethical religious and/or moral objections to the consumption of animal-flesh or beef products." Pl. Memo. at 2. This information would not be relevant to health-based vegetarians because they would not likely be consuming deep-fried potato products. Yet, counsel in this case insist on awarding almost half of the money earmarked for vegetarian groups to health-based research initiatives.

Perhaps most surprising is the inclusion of the Preventive Medicine Research Institute, Dr. Dean Ornish's organization. As described on its website, the activities of PMRI are designed primarily to benefit individuals with heart disease:

In a series of clinical trials over the past twenty-three years (funded in part by the National Heart, Lung and Blood Institute of the National Institutes of Health), Dean Ornish, M.D. and collaborators have demonstrated that the progression of moderate to severe coronary artery disease often can be slowed, stopped, or reversed by a program of comprehensive lifestyle changes, while diminishing utilization of pharmaceuticals. These lifestyle changes include: a low-fat, whole foods, plant-based diet; regular practice of stress-management techniques (including stretching, progressive relaxation, imagery, breathing techniques and

meditation); moderate aerobic exercise; and participation in group support sessions.²

As its name clearly indicates, PMRI is a medical research organization. While its activities are certainly laudable, PMRI does not combat the fraudulent misrepresentation of food content to vegetarians. Nor does it represent, or even purport to represent, vegetarians' rights as they were implicated in this suit. In reality, PMRI is not a vegetarian organization of any kind – its activities are more likely to benefit consumers of meat whose health would improve upon switching to a vegetarian diet. Class members certainly have no need to be convinced of the health benefits of such a diet – they are *already* vegetarians. An examination of Ornish's specific recommendations further clarifies that PMRI does not target vegetarians in any way: the diet includes the daily consumption of fish oil.³

Like PMRI, the Vegetarian Nutrition Practice Group, a division of the American Dietetic Association, does not engaged in activities designed to combat the harms suffered by class members. VNPG members “are at the forefront of research into vegetarian nutrition and its relationship to disease management and disease prevention.”⁴ Again, laudable activities, but totally unrelated to the claims in this litigation which were never about nutrition. Loma Linda University and counsels' alma maters are also not pursuing vegetarians' rights to know what is in their food.

The remaining four proposed recipients – the Vegetarian Resource Group,⁵ North American Vegetarian Society (“NAVS”), Vegetarian Vision, and the American Vegan

² <http://www.pmri.org>.

³ <http://www.ornish.com/supp.htm>; (“Recommended Supplements for Most Adults: ... Fish oil 2 grams/day”).

⁴ <http://www.vegetariannutrition.net>.

⁵ <http://www.vrg.org>

Society (“AVS”)– are primarily oriented toward providing educational resources for vegetarians and organizing social activities. NAVS is an “educational organization dedicated to promoting the vegetarian way of life.”⁶ Its activities include an annual vegetarian conference, the publication of quarterly news publication known as “Vegetarian Voice”, and the distribution of books and other materials by mail and at local and national events. AVS is another educational membership organization which promotes:

teaching a compassionate way of living that includes veganism. Together we explore and apply compassionate living concepts, and reflect on them and ourselves. We learn how to revere the Earth, how to save the animals, and how to care for ourselves...The society motto is: Ahimsa lights the way.⁷

Finally, Vegetarian Vision’s purpose is “to serve as a resource network and a think-tank for vegetarians world-wide, with the ultimate objective of a healthy future for all of mankind and for planet earth.”⁸ However, its events appear to be primarily local and social, including a Thanksgiving dinner and a Vegetarian Cruise. One of their proposals for use of *cy pres* funds includes free-email and newsletters. Joint objectors are opposed to Vegetarian Visions being included in this settlement. While the joint objectors are not specifically opposed to NAVS and AVS, other groups such as those recommended by VLAN, may come closer to representing the purpose of the suit.

Neither VLAN nor any of the other eight groups VLAN proposed (except VRG which class counsel were already considering) were asked to submit proposals in this case. Thus, class counsel can hardly assert that their recommended groups were “better”

⁶ <http://www.navs-online.org/voice/mission.html>.

⁷ <http://www.aamericanvegan.org/about.htm>

than those selected when they don't know how these other groups would have proposed to use the funds.

In fact counsel noted, “[t]o the extent that VLAN appears to do little more than spew adversarial bluster, bring lawsuits, and lobby the Food and Drug Administration, its purpose does not coincide with the purpose of Cy Pres Fund.” Pl. Memo. at 41.

Ironically, all of the above activities were specifically directed at protecting vegetarians’ rights to know what is in their food, the **exact** purpose of this lawsuit. Apparently, because VLAN does not conduct health research and provide scholarship funds for nutrition students at counsels’ alma maters, VLAN does not represent the interests of the class.

Class counsel also attacked VLAN and James Pizzirusso as attempting to “extort” money in this case. See Pl. Memo. at 29 (“[VLAN] fails to inform this Court that it essentially tried to **extort money** from the settlement by threatening to [object]”); Id. at 41 (referring to “Mr. Pizzirusso’s **extortionate** attempts to gain a benefit to VLAN from the settlement.”) (emphasis added). Such baseless personal attacks have no place in Court. The Court should admonish such “experienced class counsel” from making these incendiary accusations. A threat to pursue some type of action, whether filing a complaint or objecting to a settlement, is not illegal or extortion. See e.g., Becker v. Zellner, 292 Ill.App.3d 116,130, 684 N.E.2d1378,1389 (Ill.App. 2 Dist.,1997); Tilberry v. McIntyre 135 Ohio App.3d 229, 241, 733 N.E.2d 636, 644 (Ohio App. 8 Dist.,1999).

V. CONCLUSION

Essentially, both sides in this case are asking this Court to approve a settlement where the core provisions are unknown and where class members have had no chance to

object to opt out based on those core provisions. They ask the Court and class to trust their “wisdom” in selecting *cy pres* recipients based on criteria having little do with the purposes of this suit. Finally, in selecting the “vegetarian organizations,” counsel have selected three universities (including two alma maters of opposing counsel); a research group promoting the consumption of fish oil; a professional society of dieticians and an organization whose main projects to date have included a cruise and Thanksgiving potluck and which wants to use the settlement to fund “free e-mail.”

For the foregoing reasons, and those noted in VLAN’s original brief, this Court should reject the proposed settlement in this case until these issues are resolved by all parties. Alternatively, this Court should appoint a special master or independent board to oversee the submission of proposals of any group that feels it could use settlement funds to further the purposes of this lawsuit. Objective criteria should be developed and the class should be made aware of which groups were selected and rejected, and the reasons for those decisions, before the filing deadline for opt outs and objections.

RESPECTFULLY SUBMITTED BY:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on the following recipients, as required under the McDonald's settlement agreement, on this the 7th day of August, 2002, addressed as follows:

Via Federal Express

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