

No. 16-3169  
IN THE  
**UNITED STATES COURT OF APPEALS**  
FOR THE EIGHTH CIRCUIT

ALEXIA KEIL; NICK HUTCHINSON; JASON DAVIS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; RACHEL D. STONE; MAJA MACKENZIE; BRIAN ANDACKY; MELISSA BAGGETT; DAVID DELRE; CHRISTOPHER RENNA; KIMBERLY LEMON; JOSHUA TEPERSON; JONATHON FISHER; CINDI INMAN; BETH COX; VICTORIA LYMAN; STEPHANIE DOUGLAS; SARAH JACOBS, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED

*Plaintiffs – Appellees*

v.

BLUE BUFFALO COMPANY, LTD.

*Defendant-Appellees*

v.

JENNIFER HOUSER; PAUL LOPEZ 16-3159 *Objector-Appellant*

PAMELA McCOY 16-3164 *Objector – Appellant*

CAROLINE NADOLA 16-3167 *Objector-Appellant*

PAMELA SWEENEY 16-3168 *Objector-Appellant*

GARY SIBLEY 16-3169 *Objector-Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
DISTRICT COURT CASE NO. 4:14-MD-02562-RWS

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**MOTION FOR REHEARING EN BANC**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....

THIS COURT SHOULD GRANT AN EN BANC REHEARING.....

THE FAILURE TO FOLLOW RULE 23 WAS NOT HARMLESS  
ERROR

CERTIFICATE OF FILING AND SERVICE .....

## TABLE OF AUTHORITIES

### CASES

<i>Cassese v. Williams</i> , 503 Fed. App'x 55, 57 (2d Cir. 2012) (unpublished).....	3
<i>In re Nat'l Football League Players Concussion Injury Litig.</i> , 821 F.3d 410, 446 (3d Cir. 2016).....	2
<i>In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.</i> , 847 F.3d 619, (8th Cir. 2017).....	3
<i>In Re: Mercury Interactive Corp. Securities Litigation</i> , 618 F.3d 988 (9th Cir. 2010). ....	1,2
<i>Redman v. RadioShack Corp.</i> , 768 F.3d 622, (7th Cir.2014), <i>cert. denied sub nom..S.S.</i> .....	2
<i>U.S. v. American-Foreign S.S. Corp.</i> , 363 U.S. 685 (1960) .....	4

### STATUTES AND FEDERAL RULES

Fed. R. Civ. Proc 23(h). ....	1,2
Fed. R. Civ. Proc 23(h)(1).....	2
Fed. R. Civ. Proc 23(h)(2).....	2

## THIS COURT SHOULD GRANT AN EN BANC REHEARING

This appeal raises a critical legal issue that was only partially addressed by the panel in rendering its opinion. The issue should be addressed by this Court to establish uniformity of the law in this Circuit. Additionally, this court should correct the decision of the panel to conform to recent decisions of other Circuit courts. The issue is should a Court approve attorney fees in a class action Final Approval Hearing without timely notice of the motion for fees and an opportunity to review it and comment be given to class members. In this case the deadline to object or opt out was prior to the date set for the filing of Class Counsel's Motion for Fees.

Objector-appellants raised six issues in the District Court concerning the approval of the settlement. One of the issues the Sibley objection raised was the issue of allowing the Motion for Attorney Fees to be filed after the deadline for filing objections in a class action settlement. Rather than deciding this core legal issue the panel side-stepped the timing issue and provided little guidance to District Courts in this Circuit. The Court acknowledged that the Ninth Circuit has held that Rule 23(h) and due process require the fee motion to precede the objection deadline, *In Re: Mercury*

*Interactive Corp. Securities Litigation*, 618 F.3d 988 (9th Cir. 2010).

The Seventh Circuit reached the same conclusion in *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir.2014), *cert. denied sub nom.* where counsel did not file the attorneys' fee motion until after the deadline set by the court for objections to the settlement had expired. That procedure violated [Rule 23(h)]."). The Third Circuit, in dicta, has agreed with this interpretation. See *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 446 (3d Cir. 2016). However, the Court went on to say that while:

Here, the district court's scheduling order likewise violated Rule 23(h)(2). Although class members were informed by the notice of proposed settlement that class counsel would request up to \$8,000,000 in attorneys' fees, they "could make only generalized arguments about the size of the total fee" in their objections. See *Mercury*, 618 F.3d at 994. Indeed, class members "could not provide the court with critiques of the specific work done by counsel when they were furnished with no information of what that work was, how much time it consumed, and whether and how it contributed to the benefit of the class" until class counsel submitted their fee motion. See *id.* at 994. Because the deadline for submitting objections had passed by the time class counsel submitted their fee motion, class members were denied an "adequate opportunity to review and prepare objections to class counsel's completed fee motion." See *id.* at 994-95. We do not purport to decide how much time after the fee motion deadline is sufficient to provide class members with an adequate opportunity to object to the motion. We hold only that the district court erred by setting the deadline for objections on a date before the deadline for class counsel to file their fee motion.

The Circuit Courts have not been uniform in adopting *Mercury* in an unpublished Second Circuit has rejected the per se ruling of *Mercury*. There, the court construed a class member's objection as "as a challenge to the reasonableness

of the notice of class counsel's fee motion under Rule 23(h)(1). *Cassese v. Williams*, 503 Fed. App'x 55, 57 (2d Cir. 2012) (unpublished).

The Court says that we will not set a bright line number of days for when the Court should require the motion for fees to be filed, this court should set a bright line number requiring at the minimum that the motion be filed for at least fourteen days prior to deadline to file objections. Abuse billing practices in class action cases include billing at associate rates for contract attorneys that are paid a much lower rate, billing in 15 minute increments, billing partner work that should have been performed at associate rates, billing at associate rates for work that should have been performed by paralegals and failing to itemize costs.

Frequently the percentage-of-the-benefit approach is used in determining fee awards. In this Circuit it is within the discretion of the District Court to use the percentage-of-the-benefit approach. See *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622 (8th Cir. 2017) (quotations and citations omitted). The problem is that when a District Court is using the percentage-of-the benefit approach the notice to the class members is very general and provides no meaningful opportunity to examine the fee award. It is impossible to compare the number of hours worked to the requested fee award. Here the District Court noted that because the Motion for Fees was filed two weeks before the Fairness Hearing and that was sufficient time. In a nationwide class action most of the class members will live far from the location of the Court and frequently the Motion for Fees is not

posted on the settlement website.<sup>1</sup> Nor, do Class Counsel always sent the Motion for Approval and Fees to objectors. In light of the above is the procedure used by the District Court should be harmless error.

THE REQUISITE CRITERIA FOR EN BANC REVIEW  
HAS BEEN SATISFIED

As the Supreme Court has noted, one purpose of convening en banc courts is to avoid conflicts within a circuit's law. The goal should be "to maintain its integrity as an institution by making it possible for a majority of its judges always to control, and thereby to secure uniformity and continuity in its decisions. *U.S. v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689-690 (1960) (internal citation omitted). As the instant matter fulfills these criteria, it is respectfully submitted that en banc review should be granted, or alternatively panel rehearing should be granted.

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<sup>1</sup> Here the Motion is listed on the settlement website but the link would not

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of July, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to counsel of record.

Gary W. Sibley  
/s/Gary W. Sibley