

95-9154

To be argued by:
PAMELA JONES HARBOUR

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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STATE OF ALASKA, by Attorney General Bruce Botalho;
STATE OF ARIZONA, by Attorney General Grant Woods;
STATE OF ARKANSAS, by Attorney General Winston Bryant;
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STATE OF WISCONSIN, by Attorney General James E. Doyle, Jr.;
STATE OF WYOMING, by Attorney General William U. Hill;

Plaintiffs-Appellees

SYLVIA DONNENFELD AND EDUARDO A. LOPEZ,

Appellants

v.

REEBOK INTERNATIONAL LTD., THE ROCKPORT COMPANY,
INC. and JOHN DOES 1-500,

Defendants-Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES
THE STATE OF NEW YORK AND OTHER PLAINTIFF STATES

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PRELIMINARY STATEMENT

Following an intensive, two-year investigation into the retail pricing policies of Reebok International Ltd. and its wholly-owned subsidiary The Rockport Company, Inc. ("Reebok"), all fifty states, the District of Columbia, the Commonwealth of Puerto Rico and the United States Virgin Islands (the "States"), proceeding on their own behalf and as parens patriae on behalf of their natural person citizens, settled federal antitrust claims against Reebok simultaneously with the filing of their complaint. Reebok agreed to pay \$8 million in settlement of the States' claims, and the States committed to devote the money to public uses benefitting those most likely to have been injured by Reebok's pricing policies. The settlement avoided a costly, protracted antitrust litigation and trial.

The United States District Court for the Southern District of New York (Koeltl, Judge) directed that notice of the settlement be published nationwide, informing the public of its basic terms, and setting a deadline for objections and/or opt outs. This was done, at a cost of almost one million dollars.

The appellants in this case did not object or opt out on or before the deadline. Instead, twenty days after the deadline expired, they sued Reebok in a Florida federal court as putative class representatives, making allegations tracking those in the States' complaint against Reebok.

In this case, appellants never deny they had notice of the settlement, or of the deadline for objections. Indeed, they

appeared by counsel before Judge Koeltl at the final hearing on the settlement. Although appellants are not named parties to this action and never sought to intervene, Judge Koeltl listened to their objections, considered them, and ultimately rejected them. In a carefully reasoned opinion, the district court approved the settlement, finding that it was fair, reasonable, and adequate.

Appellants now appeal, asking this Court to overturn the district court's order approving the settlement. Although there was no procedural bar standing in their way, appellants failed to seek the status of intervenors -- even for the limited purpose of taking this appeal.

Appellants have no standing to appeal Judge Koeltl's judgment. The appeal should be dismissed. In the alternative, the district court's judgment approving the settlement should be affirmed.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellants Donnenfeld and Lopez have appealed from a final order approving the settlement of this action between the States and Reebok. The States brought the action pursuant to section 1 of the Sherman Act, 15 U.S.C. § 1, and sections 4, 4C, and 16 of the Clayton Act, 15 U.S.C. §§ 15, 15c, and 26.

Because this action arises under federal antitrust statutes, the district court had jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337(a). The district court directed entry of a final judgment and consent decree, thus terminating all claims of all parties to this action. Accordingly, this Court has jurisdiction over the instant appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Whether the appellants, who neither intervened nor timely objected, have standing to appeal.

Standard of Review: De novo.

2. Whether the district court abused its discretion by approving a settlement in a parens patriae action as fair, reasonable, and adequate, where the settlement provides substantial value to the parens patriae group.

Standard of Review: Abuse of discretion.

3. Whether the method of settlement distribution the district court approved is reasonable and satisfies the requirements of 15 U.S.C. § 15e.

Standard of Review: Abuse of discretion.

STATEMENT OF THE CASE

A. The Nature of the Case

1. The District Court's Opinion and Order

In an Opinion and Order dated October 20, 1995, the district court approved the parties' settlement of claims of retail price fixing in the sale of Reebok athletic footwear. The Attorneys General of the States brought this action on their own behalf and as parens patriae on behalf of their residents. (Op. 1-17, JA¹ 379-95.) The settlement establishes a \$9.5 million fund, of which at least \$8 million must be distributed to "public and non-profit and/or charitable organizations with express conditions ensuring

¹ "JA" refers to the Joint Appendix.

that the funds will be used for various athletic facilities, equipment, or services." (Op. 6, JA 384.) The remaining \$1.5 million (less than 16% of the settlement funds) is reserved to cover administrative costs and attorneys' fees. (Id.) The settlement also provides for extensive injunctive relief to prevent future violations. (Op. 8, JA 386.)

The district court approved the settlement after a hearing, following extensive published notice. The court found the notice given to be "the best notice practicable under the circumstances given the enormous number of potential class [members] who had purchased products, the lack of warranty cards to identify customers, and the high costs of individual notice." (Op. 2 n.1, JA 380.)

In approving the settlement, the district court carefully considered, inter alia, that "both the States and the defendants are represented by vigorous, competent, and experienced counsel [who] believe that the Settlement is fair and reasonable"; that the settlement was the result of a "thorough investigation," which "included reviewing documents produced pursuant to subpoenas to the defendants and dealers throughout the country, as well as interviews and statements under oath"; that "[t]here . . . is no hint of collusion in this case"; that, absent settlement, "it would drag on for years" resulting in attorneys' fees that would "escalate exponentially" and a trial that would be "lengthy and complex" (Op. 9-11, JA 387-89); and that the States' case "would necessarily be risky" (Op. 12, JA 390). Moreover, in approving the

settlement, the district court "[b]alanced against these difficulties . . . the substantial amount of the Settlement," noting that "the \$8.0 million settlement fund is in excess of the actual damages estimates by plaintiffs' expert economist." (Op. 13, JA 391.)

The district court also considered, but rejected, an individual claims procedure, characterizing the chosen distribution method as "utterly fair." (Op. 13, JA 391.) It did so because: (1) the "amount of the potential overcharge is so small as to undercut the incentive of individual consumers to attempt to obtain a refund and would dramatically increase the costs of administering any settlement"; (2) it involved an "enormous" potential for fraudulent claims as "there are no warranty cards and no other reasonable methods of assuring that the products for which a refund is sought were actually purchased during the damage period"; and (3) it posed a risk that the settlement fund "would be consumed in the costs of its own administration." (Op. 14-15, 17, JA 392-93, 395.) Moreover, the district court expressly found that the distribution procedure it approved "serves the general public interest, the interests of the plaintiffs and the consumers, and the public interests of disgorgement and deterrence" and was "fair, reasonable, and adequate." (Op. 15, JA 393.)

2. The Appellants

Appellants Donnenfeld and Lopez are the named plaintiffs in a Florida federal court action filed twenty days after the court-imposed September 8, 1995 deadline for objections or opt outs in

this case. See Brief for Appellants ("Appellants' Brief") at 5.² They represent a putative consumer class asserting retail price fixing claims against Reebok that are virtually identical to those asserted here. Id. Appellants did not intervene or object to the settlement in this action prior to the September 8, 1995 deadline.

B. Statement of Facts

1. Investigation and Complaint

On May 4, 1995, following a two-year investigation into Reebok's pricing practices commenced in February 1993 (JA 343, 730),³ the States filed a Complaint and proposed Settlement Agreement with Reebok (JA 45-126). On June 5, 1995, the district court preliminarily approved the settlement. (JA 22.)

The Complaint alleged that beginning in 1990, Reebok solicited agreements with dealers to set the minimum sale price for certain Reebok footwear and that, in furtherance of the conspiracy, Reebok implemented its "Centennial Pricing Policy" and "Marathon Program" that established fixed minimum retail prices for certain Reebok and Rockport models. (JA 50-51.) The Complaint further alleged that to effectuate the pricing policies, Reebok met with certain of its

² Donnenfeld v. Reebok International, Ltd., Inc., No. 95-2140 Civ. (S.D. Fla. Sept. 28, 1995); Lopez v. Rockport Company, Inc., No. 95-2141 Civ. (S.D. Fla. Sept. 28, 1995). Donnenfeld's complaint is dated September 20, 1995; Lopez's is dated September 22, 1995. Both summonses are dated and both complaints were filed September 28, 1995, not September 21 as stated in Appellants' Brief at 5.

³ The retail pricing practices of Reebok were also the subject of a Federal Trade Commission investigation commenced in late 1992. The FTC shared its investigatory material with the States who requested access thereto.

large retail accounts to discuss the terms and conditions of the policies and solicited and obtained agreements from them not to advertise or sell below the fixed minimum retail prices set forth therein. (JA 51.) The States also alleged that as a result of the resale price maintenance conspiracy, the purchase prices of certain Reebok models were maintained at artificial, noncompetitive levels, restraining price competition among authorized dealers in the sale of these models to the public. (JA 51-52.)

2. Terms of the Settlement Agreement

The Settlement Agreement required Reebok to pay the States \$9.5 million, of which \$8 million was to be used for consumer restitution and \$1.5 million to cover the costs of settlement administration and attorneys' fees. (JA 7.) The \$1.5 million was paid into an Administration Account⁴ in June 1995. (JA 8.) In October 1995, Reebok paid the remaining \$8 million⁵ into a Settlement Account used to fund a distribution in lieu of direct consumer restitution. (JA 11.)

Due to the virtual impossibility of identifying individual

⁴ The States used \$1.5 million to administer the settlement and pay attorneys' fees. Settlement administration included newspaper notice to approximately 1.7 million qualified purchasers and fees to the States' Claims Administrator and Settlement Trustee, Lee MacGregor of Alexander and MacGregor and expert economist, Dr. Gary J. Dorman of National Economic & Research Association, Inc. (JA 8-9.)

⁵ Each State either elected to receive its pro rata share of the \$8 million sum in money or in Reebok product. (JA 11.) The \$8 million deposited by Reebok into the Settlement Account was reduced by the monetary amount attributable to the State of Arizona and Commonwealth of Puerto Rico, which elected to receive their shares of the settlement in Reebok product. (JA 231.)

overcharged purchasers during the relevant period (JA 242-43) and the high costs of administering a check refund program with an average award of less than \$4 per individual consumer (JA 521, 563-64), the Settlement Agreement provided that each State distribute its settlement share to the State, a political subdivision, a not-for-profit corporation and/or a charitable organization, with express conditions that the funds be used to improve, refurbish, renovate, and/or provide athletic facilities, equipment or services. (JA 12.) As a result of this national settlement, over 520 charitable and community groups -- listed in the States' distribution plans and approved by the district court -- were to receive funds to benefit the parens patriae group. (JA 651-1965.)⁶ As the district court noted with respect to the distribution in New York State: "[T]he \$560,857.00 that the State of New York will receive will be divided among 58 separate organizations including the Association of Children with Down Syndrome, the New York Special Olympics, and numerous Boys and Girls Clubs and Police Athletic Leagues throughout the State." (Op. 7, JA 385.)

Reebok also is enjoined by the Final Judgment and Consent Decree from entering into any contract, combination, conspiracy, agreement, or arrangement with any dealer to fix, lower, raise, peg, maintain, or stabilize the retail prices at which their products are advertised or sold to end-user consumers. (JA 419, 423.) Reebok is further enjoined for five years from terminating,

⁶ Forty-two states have already disbursed \$3,589,558 to more than 500 charitable and non-profit organizations.

suspending, or failing to fill orders of any dealer, or reducing the supply of or discriminating in delivery, credit, or other terms provided to any dealer of Reebok or Rockport products to coerce such dealer to adhere to any suggested retail pricing policies. (JA 423.)

The Settlement Agreement also required Reebok to send letters to all of its dealers advising them of the settlement and reminding each dealer that it is entitled independently to set its own retail selling price for Reebok models. (JA 6.) Moreover, for a period of five years, Reebok is obligated to notify its dealers that they are free to set their own respective selling prices independently. (JA 423-24.)

3. Notice Procedure Afforded To Consumers Affected By The Settlement

The Settlement Agreement contained a detailed and comprehensive process for notifying members of the parens patriae group of the settlement. (JA 485, 487-91.) The district court approved the notice procedure on June 5, 1995. (JA 15-18, 22.)

Notice of the settlement was published during the week of July 9, 1995. (JA 347.) During this period, notice was published in newspapers circulated in all fifty States, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. (JA 347, 129-90.)

The notice summarized the settlement terms and instructed consumers that they could write to the Reebok Settlement Trustee for more information regarding those terms. (JA 487-91.) The

notice stated that all objections to the settlement had to be filed by September 8, 1995. (JA 485.)

The newspaper notices measured three columns by eight inches of display advertising. (JA 129-90.) These notices appeared once in the Sunday edition of each newspaper agreed upon by the parties, or if there was no Sunday edition, once during the week of July 9, 1995. (JA 236-37, 129-90.)

The court-approved notice was published in newspapers nationwide. (JA 129-90.) In Florida, for example, the notice was published in thirty-four (34) newspapers. (JA 140-41.) In all, notices appeared in a total of 808 newspapers nationwide at a total cost of \$875,571.35. (JA 129-90.) The district court explicitly concluded that the notice was fair and adequate. (Op. 2-3 n.1, JA 380.)

Consumers who requested information were sent, by first class mail, a long-form notice more fully describing the terms of the settlement and their right to object to the Settlement Agreement and/or opt out of the parens patriae group. (JA 487-91.) The long-form notice repeated that objections to the settlement had to be filed with the court and served on counsel on or before September 8, 1995. (JA 490.) It further stated that any person who failed to do so would be deemed to have waived any objections and would be forever barred from raising any objection to the settlement. (JA 491.)

By the end of the notice period, the settlement Trustee had received 2,595 pieces of mail from members of the parens patriae

group. (JA 519.) Only thirteen contained formal objections. There were 611 formal opt outs. (Op. 16, JA 394.) The other correspondence included various informal objections and requests for information. (JA 348-49.)

The district court characterized the number of oppositions to the settlement as "minuscule," citing the lack of opposition as a factor in its decision to approve the settlement. (Op. 15-16, JA 393-94.) Of the 2,595 pieces of mail the district court and Settlement Trustee received, none was from appellants. Neither appellant formally objected to the settlement or opted out of the parens patriae group.

4. Hearing On Final Approval

Judge Koeltl held a final approval hearing on October 13, 1995, to consider Reebok's and the States' Joint Motion for Approval of the Settlement Agreement. (JA 220.) Attorneys Carlos Lidsky and Thomas A. Paigo appeared at the hearing on behalf of appellants Donnenfeld and Lopez -- two Florida residents -- claiming to represent consumers who purchased Reebok and Rockport products. (JA 339.)

Donnenfeld and Lopez are unnamed members of the States' parens patriae group in this action who neither moved to intervene, filed timely objections, nor opted out. (JA 399-418.) Appellants' counsel simply appeared at the hearing demanding to be heard, although conceding that his clients were not parties to this action:

Your Honor, your assistant indicated that the

parties should announce their appearances, and we're not technically parties; that's why I hesitate to announce my appearance. . . . We understand that the deadline to file these objections have [sic] come and gone.

(JA 339.)

The States objected to the standing of Mr. Lidsky's clients.

(JA 341.) The district court noted the States' objection, but allowed counsel to speak so that it would not overlook anything relevant to its determination whether the settlement was fair, reasonable, and adequate. (JA 341-42.)

5. Final Approval of Settlement Agreement

On October 20, 1995, Judge Koeltl issued his Opinion and Order granting final approval of the settlement (Op. 17, JA 395), and authorized the parties to direct that payments be made from the Settlement Account (JA 396-97).

The district court found that the notice was fair and adequate and was the "best notice practicable" under the circumstances of this case. (Op. 2 n.1, JA 380.) It also found the method of settlement "utterly fair." (Op. 13, JA 391.) It further held the distribution procedure included in the Settlement Agreement to be fair, reasonable, and adequate. (Op. 15, JA 393.)

Appellants have not sought to enjoin distribution of the Reebok proceeds. The States have proceeded to distribute these funds pursuant to the Settlement Agreement and the district court's approval of it as fair, reasonable, and adequate. (Op. 10, JA 388.)

ARGUMENT

I. APPELLANTS LACK STANDING TO APPEAL BECAUSE THEY NEITHER OBJECTED IN A TIMELY MANNER NOR INTERVENED BELOW

A. The Notice Of Settlement Approved By The District Court Met All Applicable Statutory And Constitutional Standards

The antitrust laws' parens patriae provisions give the district court wide discretion in fashioning the manner in which notice of settlement may be given:

An action under subsection (a)(1) of this section [the federal statutory parens patriae authority] shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

15 U.S.C. § 15c(c).

The statute expressly permits notice by publication, limited only by the requirement that it be consistent with due process:

In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

15 U.S.C. § 15c(b)(1).⁷

The due process standard governing notice in cases like the one at bar, where identities and addresses are unknown, was

⁷ The legislative history makes clear the rationale behind the provision: "The number of potential claimants will frequently be very large, the absence of documented proof of purchase will make identification of individual claimants in many instances hard, if not impossible and publication will quite literally be the 'best notice practicable.'" H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 12, reprinted in [1976] U.S. Code Cong. & Admin. News at 2582.

established by the Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), as being that which is "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." There can be no doubt that the form and manner of notice directed by the district court in this case amply meets that standard.

As Judge Koeltl stated in his Opinion and Order, "[u]nlike cases where there are warranty cards returned by consumer class or other similar documentation, it would be difficult in this case to locate individual purchasers." (Op. 13, JA 391.) Accordingly, notice by publication (which, as indicated, is specifically authorized by the statute) was perfectly appropriate here and, indeed, was the "best notice practicable." (Op. 2 n.1, JA 380.)

The district court approved the form of the notice before publication (JA 485, 487-91). The notice not only apprised readers of the pendency of the settlement, but also expressly stated that "the legal rights of all buyers of Reebok and Rockport products between January 1, 1990, and December 31, 1994, will be resolved and foreclosed by this settlement." (JA 485 (emphasis added).) Likewise, the notice not only advised consumers of their right to opt out or object to the settlement but explicitly stated that "all opt outs and exclusions must be postmarked by September 8, 1995 and all objections . . . must be filed by the same date." (JA 485,

490.)⁸

The district court also approved in advance the publications in which the notice was to appear. (JA 127-28.) Indeed, publication of the notice was not merely reasonable, but was prominent and widespread. The notice was three columns by eight inches (approximately one-quarter of a newspaper page). (JA 237.) The notice appeared in 808 newspapers nationwide during the week of July 9, 1995, most frequently in the Sunday newspaper, which generally has the highest circulation. (JA 127.) The cost of this extensive notice was \$875,571.35. (JA 237.)

Accordingly, the district court acted well within its statutorily-conferred wide discretion in fashioning the form and manner of notice in this case. As the district court expressly found, the notice given "was plainly the best notice practicable under the circumstances given the enormous number of potential class members who had purchased products, the lack of warranty cards to identify customers, and the high costs of individual notice." (Op. 2 n.1, JA 380.) For the reasons stated, it is clear that the record amply supports the district court's finding that "[t]he published notice was reasonable notice to the class consistent with due process." (Id.)

⁸ Moreover, the notice further advised that anyone wishing to do so could write to the Reebok Settlement Trustee for more information regarding the terms of the settlement. (JA 485.) Consumers who requested information were sent, by first class mail, a long form legal notice describing in more detail their rights to object to the Settlement Agreement and/or opt out of the parens patriae group and the procedures to be followed to opt out or object. (JA 487-91.)

B. Appellants Failed To File Timely Objections To The Proposed Settlement And Have No Right of Appeal From The Final Judgment Below

The parens patriae statute provides in relevant part:

The final judgment in an action under subsection (a)(1) of this section shall be res judicata as to any claim under section 15 of this title by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

15 U.S.C. § 15c(b)(3). Appellants failed to file timely objections by the deadline clearly stated in the notice of proposed settlement. Accordingly, their individual claims have been extinguished and they lack standing to prosecute this appeal.

Appellants did not file objections to the proposed settlement by September 8, 1995. Indeed, appellants have never filed with the district court any written objections. As noted above, appellants first appeared below by their counsel at the October 13, 1995 final hearing on the fairness of the proposed settlement, at which time counsel conceded that he had no right to be heard:

Your Honor, your assistant indicated that the parties should announce their appearances, and we're not technically parties; that's why I hesitate to announce my appearance . . . We understand that the deadline to file these objections have [sic] come and gone.

(JA 339.)

Appellants' counsel has sought to excuse their failure to file a timely objection by implying that they lacked actual notice. Appellants' Brief at 5. (JA 340.) This assertion strains the

bounds of credulity.⁹ Notice of the proposed settlement appeared in thirty-four newspapers throughout the State of Florida during the week of July 9, 1995, at a cost of \$58,650.¹⁰ (JA 140-41.) Moreover, in addition to the formal notice, the filing of the States' complaint and proposed \$9.5 million settlement on May 4, 1995 was the subject of extensive press coverage.¹¹ Most tellingly, however, as even appellants themselves concede (Appellants' Brief at 5), their complaints, filed in Florida on September 28, 1995, track the allegations in the States' complaint.

⁹ In fact, a close reading of Appellants' Brief reveals that they undoubtedly did have notice that was both timely and actual. Appellants say merely that an October 10th facsimile from Reebok's counsel was the only "direct" notice they received of the settlement. Appellants' Brief at 5. That does not mean they were unaware of the settlement.

¹⁰ The newspapers that published the notice in Florida were: (1) Boca Raton News; (2) Bradenton Herald; (3) Brooksville Sun Journal; (4) Cape Coral Breeze; (5) Clearwater Sun; (6) Cocoa Beach Florida Today; (7) Daytona Beach Journal News; (8) Delray Beach News; (9) Fort Lauderdale Sun Sentinel News; (10) Fort Myers News - Press; (11) Fort Pierce News Tribune; (12) Fort Walton Beach NW Florida News; (13) Gainesville Sun; (14) Hollywood Sun Tattler; (15) Inverness Citrus Co. Chronicle; (16) Jacksonville Times Union; (17) Lake City Reporter; (18) Lakeland Ledger; (19) Leesburg Commercial; (20) Miami Herald; (21) Naples News; (22) Ocala Star Banner; (23) Orlando Sentinel; (24) Palatka News; (25) Panama City News-Herald; (26) Pensacola News Journal; (27) Sarasota Herald - Tribune; (28) Stuart News; (29) St. Augustine Record; (30) St. Petersburg Times; (31) Tallahassee Democrat; (32) Tampa Tribune; (33) Vero Beach Press Journal; and (34) West Palm Beach Post. Notice also appeared in USA Today, The New York Times, and Washington Post, which are widely available in Florida.

¹¹ For example, on May 11, 1995, the States' settlement with Reebok was highlighted on the front page of the Antitrust & Trade Reg. Rep. (BNA), Vol. 68, No. 1712, at 595, a legal periodical commonly read by antitrust practitioners. In addition, a Nexis search shows that at least 44 other articles about the settlement appeared in a wide variety of publications between May 4, 1995 and September 30, 1995.

The States' complaint was filed simultaneously with the settlement.

In any event, whether or not appellants received actual notice is irrelevant. As the language of the statute makes clear, if the notice of settlement met due process standards -- which it plainly did in this case -- appellants' failure to object "within the time period specified in the notice" extinguishes their claims and any right of appeal. To rule otherwise would result in endless litigation as to whether claimants received actual notice (or failed to do so through their own negligence). In addition, permitting claimants to object after the deadline for filing of objections would be extremely unfair and prejudicial to the settling parties, depriving them of an opportunity to develop the record in response to the belated objections.¹² Accordingly, permitting appellants to prosecute this appeal after having failed to comply with the district court's lawful order would defeat the statutory purpose and inhibit the good faith settlement of litigation.

¹² Here, for example, the States represented that the complaint and proposed settlement were filed after an extensive investigation commencing in February 1993 and continuing through 1994. (JA 230, 343.) The district court accepted that representation, coming as it did from 53 public enforcement officials, including all State Attorneys General, with no motive to enter into a collusive agreement with defendants' counsel. (Op. 10, JA 388.) Now, however, appellants question the adequacy of that investigation. Had appellants done so in a timely fashion, the Attorneys General would have been able to establish that the investigation included, inter alia, review of documents and statements from the Federal Trade Commission's parallel investigation of Reebok's conduct, issuance of 26 subpoenas duces tecum to Reebok and its retailers throughout the country, the review of thousands of pages of responsive documents, six formal interviews, and the taking of 21 investigatory statements under oath.

C. Even If They Had Filed A Timely Objection, Appellants Would Lack Standing To Appeal Because They Did Not Intervene In the Proceedings Below

Appellants did not intervene in the district court, are not parties to this action, and therefore lack standing to appeal. This Court refused to permit an appeal by non-intervening objectors from a district court's approval of a class action settlement in Hispanic Society of the New York City Police Department Inc. v. The New York City Police Department, 806 F.2d 1147 (2d Cir. 1986), aff'd sub nom. Marino v. Ortiz, 484 U.S. 301 (1988).¹³ Hispanic Society was a Title VII class action brought to challenge the New York City Police Department's sergeants' examination. Settlement negotiations took place following discovery. 806 F.2d at 1151. Ultimately, the parties submitted a proposed settlement agreement, which the district court conditionally approved, scheduling a final hearing for two months thereafter. Id.

At the final hearing, the putative appellants objected to the settlement. As in the case at bar, the district court heard the objections, rejected them, and approved the settlement. 806 F.2d at 1152. As in this case, the Hispanic Society appellants did not intervene. The result was a dismissal of their "appeal." Id.

In so holding, this Court noted the general rule that only a lawsuit's parties of record have standing to appeal from a district

¹³ As discussed below (see Point II, infra), notwithstanding significant differences between parens patriae and class actions under Fed. R. Civ. P. 23, courts analyze the fairness of parens patriae settlements by using standards developed in the context of class action settlements. By the same token, those cases analyzing the issue of appellate standing in the class action context are germane to the analysis of that issue in parens patriae cases.

court's judgment. 806 F.2d at 1152. Parties of record include those who originally joined in the lawsuit, as well as "those who have become parties by intervention, substitution, or third-party practice." Id. Because the Hispanic Society plaintiffs fell in none of those categories, they had no standing to appeal. Moreover, this Court stated that "[t]he fact that appellants were permitted to object to the settlement in the district court does not make them parties, or enable them to appeal from the approval of the settlement." Id. at 1153 (citation omitted).

The Supreme Court affirmed, squarely holding that because the putative appellants "were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving that lawsuit's settlement." 484 U.S. at 304. The Supreme Court's holding was premised on "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal," which it described as "well settled." Id. It, therefore, rejected a possible exception to this rule noted by this Court below:

The Court of Appeals suggested that there may be exceptions to this general rule, primarily "when the nonparty has an interest that is affected by the trial court's judgment." . . . We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable.

484 U.S. at 304 (quoting Hispanic Society, 806 F.2d at 1152).

The majority of the circuits that have addressed the standing of unnamed class members to appeal have held that mere objectors lack standing. The Fifth, Eighth, Tenth, and Eleventh Circuits

have all held that unnamed class members who are not parties must formally intervene in the proceedings below to have standing to appeal a judgment approving a class action settlement.¹⁴ The Sixth Circuit similarly has held that unnamed class members may not appeal a class action settlement unless they intervened below, moved for but were improperly denied intervention, or were summoned to the district court.¹⁵ The circuits that have held otherwise -- the Third, Seventh, and Ninth -- first addressed the issue pre-Marino.¹⁶ Only the Third Circuit has affirmed its ruling post-Marino.¹⁷ The Ninth Circuit has not reached the issue since and the Seventh Circuit has cast doubt on its holding.¹⁸

The rationale for requiring intervention was persuasively articulated in Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987). The Eleventh Circuit noted there that unnamed class members who

¹⁴ Walker v. City of Mesquite, 858 F.2d 1071, 1074 (5th Cir. 1988); Croyden Associates v. Alleco, Inc., 969 F.2d 675, 679 (8th Cir. 1992), cert. denied, 113 S. Ct. 1251 (1993); Gottlieb v. Wiles, 11 F.3d 1004, 1008 (10th Cir. 1993); Guthrie v. Evans, 815 F.2d 626, 629 (11th Cir. 1987).

¹⁵ Shults v. Champion Intern. Corp., 35 F.3d 1056, 1059 (6th Cir. 1994).

¹⁶ Ace Heating & Plumbing Company v. Crane Company, 453 F.2d 30, 32 (3d Cir. 1971); Armstrong v. Board of School Directors, 616 F.2d 305, 327-28 (7th Cir. 1980); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1176 (9th Cir. 1977).

¹⁷ Carlough v. Amchem Products, Inc., 5 F.3d 707, 713-14 (3d Cir. 1993) (dismissing as interlocutory an appeal of a denied motion to intervene by unnamed class members). Carlough both adhered to the decision in Ace Heating and distinguished the cases from the Fifth, Eighth, and Eleventh Circuits.

¹⁸ In re VMS Ltd. Partnership Securities Litigation, 976 F.2d 362, 367-69 & n.8 (7th Cir. 1992).

disagree with the course of a class action have several viable options, including a motion to intervene in the district court as of right pursuant to Federal Rule of Civil Procedure 24(a)(2) or the right to opt out of the settlement and not be bound by its terms. As the court stated:

A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogenous class, who would all otherwise have access to the court through individual lawsuits. . . . If each class member could appeal individually, the litigation could become unwieldy. Thus, allowing direct appeals by individual class members who have not intervened in the district court would defeat the very purpose of class action lawsuits.

Guthrie, 815 F.2d at 629 (citations omitted).

The other circuits deny a right of appeal absent intervention for similar reasons. The Fifth Circuit stated that "if each class member could appeal individually, the litigation could become unwieldy, unmanageable, and nonproductive." Walker City of Mesquite, 858 F.2d 1071, 1074 (5th Cir. 1988). The Eighth Circuit noted:

We agree with Guthrie that Marino provides substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so.

Croyden Associates v. Alleco, Inc., 969 F.2d 675, 679 (8th Cir. 1992), cert. denied, 113 S. Ct. 1251 (1993).

The instant action is precisely the type of "unwieldy, unmanageable, and nonproductive" litigation that Hispanic Society and Marino seek to prevent. Walker, 858 F.2d at 1074. As was stated by the Eleventh Circuit in Guthrie, "there is no need to

permit an individual to appeal a judgment with which the class representatives, and presumably the majority of class members are satisfied." 815 F.2d at 628. We respectfully submit that this reasoning is all the more powerful in the context of a parens patriae action prosecuted on behalf of a state's natural person citizens by their statutorily designated representative.

II. THE SETTLEMENT WAS FAIR, REASONABLE, AND ADEQUATE AND THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SO FINDING

This Court has long held that approval of a settlement will not be overturned on appeal absent a clear abuse of discretion. In re the Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992) (citations omitted); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1323 (2d Cir. 1990) (same). As this Court has stated: "great weight [will] be accorded the views of the trial judge because exposure to the litigants and their strategies makes him uniquely aware of the strengths and weaknesses of the case and the risks of continued litigation." TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 463 (2d Cir. 1982); see Handschu v. Special Services Division, 787 F.2d 828, 833 (2d Cir. 1986).¹⁹

This standard of review flows from the strong public policy

¹⁹ Despite what appellants seem to believe, the purpose of judicial review of a settlement is not to resolve "ambiguities" in the factual or legal issues raised by the lawsuit. See Appellants' Brief at 19. On the contrary, a court need not and should not reach any dispositive conclusions on unsettled legal or factual issues. City of Detroit v. Grinnell Corp., 495 F.2d 448, 456 (2d Cir. 1974); Pfizer, 440 F.2d at 1086. The purpose of a settlement is to avoid the determination of "sharply contested and dubious issues." Pfizer, 440 F.2d at 1086; see City of Detroit, 495 F.2d at 456; Newman, 464 F.2d at 692; Saylor v. Lindsley, 456 F.2d 896, 904 (2d Cir. 1972).

fostering settlement of disputes. As explained by this Court:

the policy favoring settlement is so strong that opposition should be made difficult. Another might be that, generally speaking, one judicial examination of an agreed disposition should suffice.

Newman v. Stein, 464 F.2d 689, 692 n.7 (2d Cir.), cert. denied, 409 U.S. 1039 (1972); see Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., 514 F.2d 767, 771 (2d Cir. 1975); West Virginia v. Chas. Pfizer Co., 440 F.2d 1079, 1085 (2d Cir. 1971).

Notwithstanding some significant differences between parens patriae and class actions under Federal Rule of Civil Procedure 23 ("Rule 23"), district courts have considered similar issues when analyzing whether a parens settlement should be approved. See, e.g., New York v. Keds Corp., 1994-1 Trade Cas. (CCH) ¶ 70,549 (S.D.N.Y. 1994); New York v. Nintendo of America, 775 F. Supp. 676, 680 (S.D.N.Y. 1991); In re Minolta Camera Products Antitrust Litigation, 668 F. Supp. 456 (D. Md. 1987); In re Mid-Atlantic Toyota Antitrust Litigation, 585 F. Supp. 1553 (D. Md. 1984); In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305, 315 (D. Md. 1979).

A Rule 23 class action settlement will be approved if it is fair, reasonable, and adequate to the members of the class on whose behalf it was reached. E.g., Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1079 (2d Cir. 1995); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 24 (2d Cir. 1987); Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); Pfizer, 440 F.2d at 1085. This Court has identified nine factors to be considered in making that determination:

1. the complexity, expense, and likely duration of the litigation;
2. the reaction of class members to the settlement;
3. the stage of the proceedings and the amount of discovery completed;
4. the risk of establishing liability;
5. the risk of establishing damages;
6. the risk of maintaining the class action through trial;
7. the ability of the defendants to withstand a greater judgment;
8. the range of reasonableness of the settlement fund in light of the best possible recovery; and
9. the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit, 495 F.2d at 463.

Appellants address only items 2, 3, 4, and 8 in their brief. Appellants' Brief at 22-27. The omission of any discussion of items 1 and 5 is particularly telling. The States discuss all factors, except item 7, which has no applicability here.²⁰

A. Without a Settlement, This Litigation Will be Complex, Expensive, and Long

In evaluating a proposed class settlement, the complexity, expense, and likely duration of the litigation must be considered. Protective Committee v. Anderson, 390 U.S. 414, 424 (1967); County of Suffolk, 907 F.2d at 1323; City of Detroit, 495 F.2d at 463; see TBK Partners, 675 F.2d at 463. In this case, the district court correctly determined that this factor weighed heavily in favor of approval of the settlement:

If this case did not settle, it would drag on for years

²⁰ Item 7 does not apply because there is no question here as to Reebok's solvency.

as the parties conducted discovery throughout the country. Attorneys' fees would escalate exponentially and could potentially reduce the amounts that the defendants would pay in settlement. The trial would be lengthy and complex because of the nationwide scope of the alleged activities.

(Op. 11, JA 389.)

There is ample support in the record for this conclusion and appellants do not contend otherwise. Continued litigation of this case, involving fifty-three plaintiffs and allegations of a nationwide conspiracy between Reebok and its retailers, would be protracted and very costly to the parties. In addition, the litigation would be a significant drain on scarce judicial resources.

B. There Was Little Opposition To The Settlement

Reaction of members of a group affected by a settlement is a relevant factor in considering its approval. County of Suffolk, 907 F.2d at 1323; City of Detroit, 495 F.2d at 463. The lack of opposition to a settlement supports its approval. See City of Detroit, 495 F.2d at 462; Keds, 1994-1 Trade Cas. (CCH) ¶ 70,549 at 71,967 (S.D.N.Y. 1994). Indeed, as this Court stated in Grant v. Bethlehem Steel Corp., 823 F.2d 20 (2d Cir. 1987):

Even if we were to assume that the objectors represented a majority of the class, majority opposition is not a total bar to approval of the settlement.

Id. at 23.

In the instant case, 611 class members opted out of the settlement by the September 8, 1995 cut-off date. A list of the names of these individuals is included in the Joint Appendix. (JA

523-42.) Informal objections to the settlement were received from 209 class members. (JA 351.) Thirteen formal objections were filed with the clerk of the district court. (JA 351.) With approximately 8.5 million pairs of Reebok Prestige and Rockport models sold pursuant to the Centennial and Marathon policies during the damage period, the district court assuredly was correct in describing the number of objections as "minuscule" (Op. 16, JA 394), and finding that "[t]hese objections . . . do not raise any grounds that lead the Court to conclude that the settlement is not fair, reasonable, and adequate." Id.

C. The Settlement Was Reached After A Thorough Investigation And Vigorous Negotiations Between Experienced Counsel

To determine whether a proposed class settlement is fair, reasonable, and adequate requires consideration of the "process by which the settlement was reached." Weinberger, 698 F.2d at 74. This entails consideration of whether the settlement was the result of good faith, arms-length negotiations by experienced counsel, and whether there was any collusion. New York v. Keds Corp., 1994-1 Trade Cas. (CCH) ¶ 70,549 at 71,966 (S.D.N.Y. 1994); In re Panasonic Consumer Electronics Antitrust Litigation, 1989-1 Trade Cases (CCH) ¶ 68,613 at 61,244 (S.D.N.Y. 1989); see Drexel, 960 F.2d at 292; Weinberger, 698 F.2d at 74; TBK Partners, 675 F.2d at 463; City of Detroit, 495 F.2d at 463-66.

The district court also was entitled to place great weight upon the judgment of experienced counsel in approving a settlement, New York v. Keds Corp., 1994-1 Trade Cas. (CCH) ¶ 70,549 at 71,966

(S.D.N.Y. 1994); see Flinn v. FMC Corporation, 528 F.2d 1169, 1174 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976); Schwartz v. Novo Industri A/S, 119 F.R.D. 359, 363 (S.D.N.Y. 1988). This is especially so when a government agency is one of those counsel. See Wellman v. Dickson, 497 F. Supp. 824, 830 (S.D.N.Y. 1980):

Approval of the settlement by experienced counsel . . . and the participation in the negotiations resulting in the proposals by a government agency committed to the protection of the public interest and its endorsement of the agreement are additional factors which weigh heavily on the side of the approval of the settlement.

Accord, In re Cuisinart Food Processor Antitrust Litigation, 1983-2 Trade Cas. (CCH) ¶ 65,680 at 69,473 (D. Conn. 1983).

Accordingly, Judge Koeltl did not abuse his discretion in finding that "both the States and the defendants are represented by vigorous, competent, and experienced counsel," (Op. 9, JA 387), and relying on their representations that the settlement was "fair and reasonable." (Op. 10, JA 384.) Judge Koeltl also found that there was "no hint of collusion" (Op. 10, JA 388), and that the settlement "was the result of a thorough investigation." (Op. 9, JA 387.)

There is ample support in the record for the district court's findings and conclusion. In this case, New York, with the assistance of eight other States,²¹ used subpoena and other investigatory powers²² to conduct a two-year investigation into the allegations. That investigation was the foundation on which the

²¹ California, Florida, Michigan, Missouri, North Carolina, Pennsylvania, Tennessee, and Texas.

²² See N.Y. Gen. Bus. Law § 343 (McKinney 1988).

settlement was negotiated.

The district court also appropriately concluded that the States are experienced in these cases. The New York Attorney General's Office and the offices of other Attorneys General nationwide have considerable expertise in complex antitrust litigation, particularly resale price maintenance claims. See, e.g., New York v. Keds Corp., 1994-1 Trade Cas. (CCH) ¶ 70,549 (S.D.N.Y. 1994); Maryland v. Mitsubishi Electronics America, Inc., 1992-1 Trade Cas. (CCH) ¶ 69,743 (D. Md. 1992); New York v. Nintendo of America, Inc., 775 F. Supp. 676 (S.D.N.Y. 1991); In re Panasonic Consumer Electronics Antitrust Litigation, 1989-1 Trade Cas. (CCH) ¶ 68,613 (S.D.N.Y. 1989); In re Minolta Camera Products Antitrust Litigation, 668 F. Supp. 456 (D. Md. 1987). The law firm representing Reebok, Hutchins, Wheeler & Dittmar, also has recognized expertise in antitrust litigation.

D. The Risks of Prevailing on Liability Are Significant

Appellants cavalierly assert that "[e]stablishing liability against Reebok does not appear to be difficult." Appellants' Brief at 25. The district court, however, clearly did not abuse its discretion in finding that "[t]he States' case [on both liability and damages] . . . would necessarily be risky." (Op. 12, JA 390.)

Success in this case, like most cases asserting resale price maintenance claims, would have meant overcoming Reebok's defense that its activities to maintain resale prices were permissible unilateral suggestions, United States v. Colgate & Co., 250 U.S. 300 (1919), rather than activities that coerced retailers to agree.

United States v. Parke Davis & Co., 362 U.S. 29 (1960). Plaintiff's burden of establishing that a coerced agreement occurred can be a significant one. For example, despite affirming a verdict in favor of an antitrust plaintiff, Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), has been interpreted by many courts as imposing significantly more difficult evidentiary standards on plaintiffs in actions alleging vertical price fixing. See Garment District, Inc. v. Belk Stores Services, Inc., 799 F.2d 905 (4th Cir. 1986), cert. denied, 486 U.S. 1005 (1988); Terry's Floor Fashions, Inc. v. Burlington Industries, Inc., 763 F.2d 604 (4th Cir. 1985). Similarly, Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988), appears to confine vertical price fixing claims to agreements regarding "price or price levels," id. at 735-36, instead of the broader definition of price fixing in horizontal cases, which for example includes agreements to stabilize prices. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 252-54 (1940).

Appellants also assert, contrary to the record, that both Reebok's damage liability and consumer injury exist not only in 1993, but also in 1990, 1991, 1992, and 1994. Appellants' Brief at 18. The States' extensive investigation of Reebok's practices uncovered only isolated attempts by Reebok to fix retail prices prior to 1993. Appellants have come forward with no facts to the contrary.²³ These sporadic attempts had no real impact on retail

²³ Indeed, upon information and belief, appellants have conducted no discovery whatsoever of Reebok since their complaint was filed in the Southern District of Florida.

prices and no discernable consumer injury. The States' representations as to lack of evidence of injury to the parens group for all periods except 1993 were before the district court (JA 230), and Judge Koeltl clearly considered them when he approved the settlement (Op. 14-15, JA 392-93).²⁴

E. The Risks Of Prevailing On Damages Are Significant

Even if the States successfully proved an unlawful agreement between Reebok and their retailers, the burden of proving damages would be considerable. In response to the States' subpoenas, Reebok, Rockport, and numerous dealers stated they did not maintain the type of retail pricing information that the States have used in the past to calculate damages in these types of cases. In addition, investigatory statements of Reebok dealers in 1992-93 revealed little evidence of potential damage liability in 1990, 1991, and 1992, the years preceding Reebok's suspect 1993 pricing policies. Similarly, investigatory statements taken of dealers in 1994 revealed no evidence of any overcharges beyond 1993 as a result of Reebok's pricing policies. These facts were also before the district court. (JA 230.)

Moreover, the challenged pricing policies, particularly the Centennial Policy, were neither uniform nor uniformly applied. At

²⁴ Likewise, appellants assert that the States, having collected damages only on Prestige models, impermissibly released claims on all Reebok footwear. Again, the States' extensive investigation found no significant evidence of a price effect on non-Prestige models or on models outside the Centennial or Marathon pricing policies. Further, appellants failed to raise this point below.

different times, the Centennial Policy allowed no discounting on Prestige Products, a ten percent discount on Prestige Products during specific promotional periods, and a ten percent discount on any Prestige Product beginning sixty days after its initial introduction. Similarly, Reebok's actions to enforce these policies varied as to time period and policy.²⁵

These facts were also before the district court. (JA 497.) Judge Koeltl was well aware, as the States asserted, that 1993 was the only year with quantifiable overcharges. (JA 230, 497-503.) He was also aware that Reebok's economist, Professor Hausman, while endorsing the States' damage methodology, found the Centennial Policy to have no effect on the retail prices of Reebok products. As the court stated:

I read Dr. Hausman's affidavit. He doesn't necessarily support that there was, in fact, the damages that Dr. Dorman suggests. His affidavit is really a comparison affidavit of what happened to the pricing policies of Reebok in particular, and Rockport less so because there wasn't much data available for Rockport, and concludes that the data wouldn't support that there was in fact an impact from these pricing policies at least with respect to Reebok, and with respect to Rockport, because of a lack of statistics, he has to extrapolate that his conclusion would also be that any impact was likely to be negligible.

(JA 351-52.)

By enacting 15 U.S.C. § 15d, Congress provided a more realistic and practical method of proving damages in parens actions. Because damages in parens patriae cases may be proved in

²⁵ Appellants seem to concede these facts when they state that "the non-prestige lines have a lower retail value and the retailers were permitted to sell the shoes at a limited discount." Appellants' Brief at 26.

the aggregate by statistical or sampling methods, the States' expert economist relied on those methods in assessing the amount recovered pursuant to the settlement. Nonetheless, as the district court noted (Op. 14, JA 392), the difficulty of reliably assessing damages, where little or no effect on price exists, is a significant one which the States would have to overcome at trial.

F. Parens Patriae Authority Would Likely Extend Through Trial

The next factor to be considered is whether the authority to represent the class can be maintained through trial. City of Detroit, 495 F.2d at 463. The concern expressed by courts is that a representative with questionable authority will be used by the defendants to settle a class action to the detriment of the class members. Id. at 465.

There is no risk here that authority to represent the parens patriae group will not extend through trial. State Attorneys General are designated by the parens patriae statute itself as proper representatives of the natural person citizens of their respective states; they need not be certified as do named plaintiffs in a Rule 23 class action. In enacting section 4C of Clayton Act, 15 U.S.C. § 15c ("section 4C"), Congress conferred parens patriae authority on State Attorneys General despite the availability of private Rule 23 class actions. Congress's preference for parens patriae authority followed traditional recognition of superior representation of consumers in antitrust actions by State Attorneys General. In In re Antibiotic Antitrust

Actions, 333 F. Supp. 278, 280 (S.D.N.Y. 1971), the court stated that "it is difficult to imagine a better representative of retail consumers within a state than the state's Attorney General."

Since passage of section 4C, courts unanimously have rejected attempts by private class action parties to supersede parens patriae authority asserted by State Attorneys General. Pennsylvania v. Budget Fuel Co., 122 F.R.D. 184, 185-86 (E.D. Pa. 1988); In re Montgomery County Real Estate Antitrust Litigation, 1988-2 Trade Cas. (CCH) ¶ 68,230 at 59,473-74 (D. Md. 1978); see Lohse v. Dairy Commission, 1977-2 Trade Cas. (CCH) ¶ 61,805 at 73,337, 73,340 (D. Nev. 1977). The superiority of government actions is recognized in other contexts. Kamm v. California City Development Co., 509 F.2d 205, 210-13 (9th Cir. 1975) (false and misleading advertising and deceptive sales practices); United States v. City of Chicago, 411 F. Supp. 218, 243 (N.D. Ill. 1976) (civil rights claims), aff'd and rev'd in part on other grounds, 549 F.2d 415 (7th Cir. 1977); Stuart v. Hewlett-Packard Co., 66 F.R.D. 73, 77-78 (E.D. Mich. 1975) (sex discrimination claims); Wechsler v. Southeastern Properties, Inc., 63 F.R.D. 13, 16, 17 (S.D.N.Y.) (securities claims), aff'd, 506 F.2d 631, 636 (2d Cir. 1974).

G. The Settlement Was Reasonable In Light Of The Possible Recoveries

The adequacy of the settlement is illustrated by the alternative proposed by appellants. The States' success in securing 125% of estimated single damages clearly constitutes a

reasonable, if not extraordinary, settlement. Appellants concede that the method of distribution approved by the district court is consumer distribution, Appellants' Brief at 38 ("The adapted Cy Pres method of distribution is also substantially the same remedy as the distribution of damages provision of 15 U.S.C. [§] 15e."), and cite numerous authorities in the class action context that "overwhelmingly approved" the "Cy Pres method of distribution." Appellants' Brief at 37.

Rather than challenge the amount secured in settlement or the means of distribution, appellants' thinly-veiled goal is to ensure that "a large portion of settlement funds . . . go undistributed," Appellants' Brief at 29, at least for a time. Appellants attack the distribution method only to the extent that the method lacks the preliminary step of an individual claims procedure and the creation of an undistributed fund.

The alternative urged by appellants would make the settlement less fair, less reasonable, and less adequate. Appellants want to dissipate the benefit ultimately provided to consumers by requiring additional administrative costs. Appellants want to dissipate the value the settlement provides to consumers by delaying the admittedly permissible method of distribution. Appellants want to dissipate the value of the settlement by creating a pot of undistributed money from which they can seek fees. Efforts to decrease consumer distribution and increase counsels' fees merit prompt and decisive rejection by this Court. See Lowenschuss v. C.G. Bluhdorn, 613 F.2d 18, 20-21 (2d Cir.), cert. denied, 449 U.S.

840 (1980).

H. The Settlement Recovery Was Reasonable In Light Of The Attendant Risks

"Basic to this process [of approving a settlement], is the need to compare the terms of the compromise with the likely rewards of litigation." Protective Committee v. Anderson, 390 U.S. at 424-25; see County of Suffolk, 907 F.2d at 1324; City of Detroit, 495 F.2d at 463. "The primary concern [when considering whether a class settlement is fair, reasonable and adequate] is the substantive terms of the settlement." Weinberger, 698 F.2d at 73.

Courts have approved settlements representing a fraction of the estimated single damages as fair, adequate, and reasonable. E.g., Newman v. Stein, 464 F.2d 689, 698 (2d Cir.) (14% of potential recovery), cert. denied, 409 U.S. 1039 (1972); In re Four Seasons Securities Law Litigation, 58 F.R.D. 19, 37 (W.D. Okla. 1972) (less than 8% of estimated damages). See generally In re Folding Carton Antitrust Litigation, 84 F.R.D. 245, 254 (N.D. Ill. 1979).

In this case, the Settlement Agreement required Reebok to pay the States \$9.5 million, of which \$8 million was to be used for consumer restitution and \$1.5 million for the costs of settlement administration and attorneys' fees. The States' expert estimated single damages at \$6,400,000 (\$5,200,000 for Reebok products and \$1,200,000 for Rockport products). (JA 501-02.) Thus, the consumer distribution represents 125% of the estimated single damages. The total recovery represents 148% of the estimated

single damages. The \$1.5 million was paid into an Administration Account. Reebok paid the remaining \$8 million into a Settlement Account used to fund a distribution in lieu of direct consumer restitution.

In fashioning appropriate relief, the States were confronted with the virtual impossibility of identifying individual overcharged purchasers during the relevant period and the high costs of administering a check refund program with an average award of less than \$4 per individual consumer. (JA 232-33.) Thus, the Settlement Agreement provided for the alternative distribution described above.

The Settlement Agreement also includes significant injunctive relief provisions. Reebok is enjoined for five years from "fixing" the retail prices at which its products are advertised or sold to end-user consumers. (JA 423.) Reebok is enjoined from coercing any dealer to adhere to suggested retail prices. In addition, Reebok must inform dealers that they are entitled to set the retail price of Reebok products independently, and are not required to follow Reebok's suggestions. Id. To ensure that these provisions were both understood and followed in fact, Reebok was required to send letters to its dealers informing them of the settlement and specifically stating that each is entitled to set its own retail selling price for Reebok and Rockport products independently of Reebok's suggestions. These letters were sent in November 1995.

Based on the foregoing, the district court correctly concluded that the settlement was within range of the best possible recovery:

Balanced against these difficulties is the substantial amount of the Settlement here. Even subtracting the . . . costs of administration, the \$8.0 million settlement fund is in excess of the actual damages estimates by the plaintiffs' expert economist.

(Op. 13, JA 391.)

The fees portion of the settlement is also very reasonable, especially compared to typical Rule 23 actions like the one appellants' counsel seeks to maintain in Florida.²⁶ The States agreed to accept less than 5% of the settlement funds as fees, even though the normal range of antitrust litigation fee recoveries as a percent of the common fund is 20% to 30%. E.g., Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990); Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989); In re Ampicillin Antitrust Litigation, 526 F. Supp. 494, 498-99 (D.D.C. 1981).

III. THE SETTLEMENT COMPORTS WITH THE REQUIREMENTS OF SECTION 15E

Appellants' final objection is that the absence of a procedure for individual consumer claims violates section 4E of the Clayton Act, 15 U.S.C. § 15e ("section 15e"), constituting an abuse of the district court's discretion and dereliction of the States' duties to the parens patriae group. Appellants' objection, however, is based on a misapprehension of the differences between Rule 23 class actions and parens patriae actions. The two are not the same,

²⁶ The efforts undertaken by the States in investigating and settling the claims asserted in this litigation were extensive and entitled to compensation. E.g., Illinois v. Sangamo Construction Co., 657 F.2d 855, 858-62 (7th Cir. 1981); Arizona v. Maricopa County Medical Society, 578 F. Supp. 1262, 1271 (D. Ariz. 1984); In re Gypsum Cases, 386 F. Supp. 959, 987-88 (N.D. Cal. 1974).

although appellants treat them as if they were.

Appellants' confusion is illustrated by their treatment of West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), which they discuss as if it interpreted section 15e. See Appellants' Brief at 33-35. Pfizer, however, was decided five years before section 15e was enacted, and the court there made clear that its decision was based on Rule 23, not parens patriae, jurisprudence. Pfizer, 440 F.2d at 1079, 1089.

A. Congress Amended The Clayton Act To Permit Parens Patriae Lawsuits By Attorneys General Because Consumers Were Not Well Served By Private Class Actions

Prior to enactment of the parens patriae provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("section 4C"), an Attorney General was able to sue for direct damages to a State. The Attorney General, however, was precluded from suing for damages on behalf of the States' injured citizens unless the State had been injured in the same manner and could serve as a class representative. H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 6, reprinted in [1976] U.S. Code Cong. & Admin. News 2575 ("House Report"). In Pfizer, for example, the State was permitted to sue for damages to its citizens as a class representative pursuant to Rule 23. Pfizer, 440 F.2d at 1079, 1089. The decision in California v. Frito-Lay, 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973), highlighted the shortcoming in the law that often deprived the public of an effective means of obtaining redress for its antitrust injuries. Congress responded by enacting section 4C.

In Frito-Lay, the Ninth Circuit held that parens patriae

damage actions were not authorized by the Clayton Act. The court dismissed California's parens patriae lawsuit asserting price-fixing claims against manufacturers of snack foods. The Frito-Lay court suggested in dicta that legislative action was needed to enable California to represent its injured citizens. Frito-Lay, 474 F.2d at 777. The congressional response was enactment of section 4C:

H.R. 8532 [section 4C] is a response to the judicial invitation extended in Frito-Lay. The thrust of the bill is to overturn Frito-Lay by allowing State attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have found under Rule 23.

House Report at 8, [1976] U.S. Code Cong. & Admin. News at 2578.

Congress enacted the Hart-Scott-Rodino Act because of its concern that private class actions had not adequately served consumers. See House Report at 4-5, [1976] U.S. Code Cong. & Admin. News at 2573-74. The legislative history is replete with references to Congress's dissatisfaction with the limitations inherent in Rule 23 actions, which often rendered them ineffective as a means of providing redress for the antitrust injury inflicted upon consumers. See House Report at 4, [1976] U.S. Code Cong. & Admin. News at 2573. For example, Congress refers to the parens patriae action as an "alternative remedy" creating effective consumer redress where none existed before. House Report at 8, [1976] U.S. Code Cong. & Admin. News at 2579. The legislative history indicates that section 4C was intended "to avoid, in consumer actions, the cumbersome litigation of peripheral issues which under Rule 23 has sometimes become more time-consuming and

costly than litigating the merits of the case." House Report at 11, [1976] U.S. Code Cong. & Admin. News at 2580. One particular point of congressional dissatisfaction with private Rule 23 class actions was their ineffectiveness in providing an adequate remedy where a large number of consumers sought to recover on claims with small individual damages. House Report at 6-7, [1976] U.S. Code Cong. & Admin. News at 2575-76.

Elsewhere, the House Report states that Attorneys General would act as "consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have found under Rule 23." House Report at 9, [1976] U.S. Code Cong. & Admin. News at 2578. Similarly, the Senate Report describes the statute as the "legislative response to restrictive judicial interpretations of the notice and manageability provisions of Rule 23." Senate Rep. No. 803, 94th Cong., 2d Sess. 40-41 (1976) ("Senate Report").

In enacting section 4C, Congress built upon the common law parens patriae powers of a state Attorney General to create a representative for consumers superior to a Rule 23 class representative:

H.R. 8532 employs an ancient concept of our basic English common law -- the power of the sovereign to sue as parens patriae on behalf of the weak and helpless of the realm -- to solve a very modern problem in antitrust enforcement. This doctrine is also firmly embedded in American jurisprudence. Since 1900 the Federal courts have expanded the power of a State to sue "in her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them."

House Report at 8-9, [1976] U.S. Code Cong. & Admin. News at 2578

(citing Georgia v. Pennsylvania R.R., 324 U.S. 439, 443 (1945)).

A State attorney general is an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens. He is normally an elected and accountable and responsible public officer whose duty is to promote the public interest.

House Report at 5, [1976] U.S. Code Cong. & Admin. News at 2575.

The Attorneys General were relieved of the inapposite Rule 23 requirements and were statutorily established as the best representatives for consumers in their respective States. As Representative Peter Rodino, Chairman of the House Judiciary Committee and one of the principal sponsors of the 4C legislation, explained:

[T]he compromise bill does not incorporate the various requirements of rule 23(b)(3): That the claims be "typical"; that common issues "predominate" over individual ones; that the action be "manageable" within the meaning of rule 23 -- for this bill represents the legislative conclusion that the State's attorney general is the best representative conceivable for the State's consumers -- as the courts have repeatedly recognized.

122 Cong. Rec. at 30,879 (1976); see House Report 6-8, [1976] U.S. Code Cong. & Admin. News at 2576-78; Senate Report at 6, 39-41.

Thus, section 4C eliminates the complex determinations that courts must make in Rule 23 class actions on whether the class is sufficiently numerous, manageable, etc., by simply authorizing state Attorneys General to represent their citizens as parens patriae. Parens patriae authority is exercised as soon as the Attorney General files the action. In contrast to Rule 23 practice, the court need not make factual findings before certifying a class. Compare 15 U.S.C. § 15c(a)(1) with, e.g., Fed.

R. Civ. P. 23(c)(1) (court approval needed for class actions); id. 23(b)(3) (requires finding of superiority of class adjudication); id. 23(a) (requires findings of typicality, impracticability of joinder, and fair and adequate representation); see Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 573 n.29 (1983) (section 4C designed to remedy problems inherent in private Rule 23 antitrust actions and exempted parens patriae suits from class action requirements of Rule 23).

Section 4C invests the Attorneys General, subject to judicial oversight, with considerable authority, latitude, and creativity in fashioning appropriate remedies. Congress sought to give the Attorneys General the latitude to succeed where Rule 23 representatives had demonstrably failed; i.e., in redressing small individual monetary injuries inflicted on large numbers of consumers. Congress intended to encourage Attorneys General to pursue alternative, creative methods of using and distributing parens patriae recoveries for the benefit of the parens patriae group and the public at large.

Thus, for example, on the face of the statute, Congress expressed its strong preference for alternative methods such as "fluid recoveries," "cy-pres" type distributions,²⁷ and payments

²⁷ House Report at 16-17, [1976] U.S. Code Cong. & Admin. News at 2585. Congress favorably cited the innovative fashion in which courts had returned illegal overcharges to a next best class of consumers utilizing cy pres and fluid recovery concepts. See Bebhick v. Public Utilities Commission, 318 F.2d 187 (D.C. Cir.) (recoveries for illegal overcharges on transit fares were applied to reduce those fares in future years), cert. denied, 373 U.S. 913 (1963); In re Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971) (application of illegal overcharges in the

directly into state treasuries. Section 15e provides in part:

Monetary relief recovered in an action under section 15c(a)(1) of this title shall --

(1) be distributed in such a manner as the district court in its discretion may authorize; or

(2) be deemed a civil penalty by the court and deposited with the State as general revenues.

Likewise, the legislative history is replete with references to the goal of "fashion[ing] . . . mechanism[s]" for consumer redress and encouraging state Attorneys General to distribute funds in a "highly imaginative fashion." See, e.g., House Report 6, 8, 16, [1976] U.S. Code Cong. & Admin. News at 2576, 2577, 2585.

B. The Distribution Procedure Adopted Below Was, In The Circumstances Of This Case, A Reasonable Exercise Of The District Court's Discretion

The discretion permitted by section 15e is, of course, not unfettered. It is subject to the requirement that:

[A]ny distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

15 U.S.C. § 15e (emphasis added).

The appellants contend that the district court impermissibly disregarded this statutory requirement. Contrary to their contention, the district court evaluated all the facts and correctly concluded that providing an opportunity to secure individual recoveries in this case was not "reasonable."

Providing a procedure for individual recoveries here is not

antibiotic drug industry to a variety of programs beneficial to the drug-consuming public).

merely unreasonable, but is impractical, as simple arithmetic illustrates. The district court recognized that the maximum provable overcharge was \$3.77 per pair of Rockport shoes and \$3.89 per pair of Reebok shoes.²⁸ The court understood that the cost of processing claim forms and mailing a check to an individual was \$2.47. (JA 384, 392.) Thus, if an individual claims procedure was followed, it would cost \$2.47 to deliver a claimant \$3.77 or \$3.89. This, of course, assumes that purchasers of the price-fixed shoes could even be identified. As the district court correctly noted, "the potential for fraudulent claims is enormous because there are no warranty cards and no other reasonable methods of assuring that the products for which a refund is sought were actually purchased during the damage period." (JA 392-93.) In short, if an individual claims procedure were permitted, a substantial portion of the settlement funds could well have been dissipated in administrative costs, rather than spent to benefit the vast majority of injured consumers.

In concluding that individual distribution was not appropriate in this case, the district court followed well-established precedent.²⁹ It has been repeatedly held that individual distribution is not reasonable when the amount of each potential

²⁸ This was the overcharge calculated by the States' expert, Dr. Gary J. Dorman of NERA. (JA 501-02.) Contrary to appellants' assertions, Appellants Brief at 17, Dr. Dorman was retained by the States in early 1994 to assist in estimating damages. Reebok's expert, Prof. Jerry A. Hausman of M.I.T., concluded, of course, that there was no overcharge. (JA 282-84.)

²⁹ Indeed, as discussed at 23 n.19 above, a settlement should be approved unless it violates settled law.

claim is small in relation to the costs of administration. In New York v. Dairylea Cooperative, Inc., 1985-2 Trade Cas. (CCH) ¶ 66,675 (S.D.N.Y. 1985), the court held that section 15e did not require an individual claims procedure when there was a \$6 million fund and eleven million potential claimants. Similarly, in New York v. Keds Corporation, 1994-1 Trade Cas. (CCH) ¶ 70,549 (S.D.N.Y. 1994), the court concluded that section 15e did not require an individual claims procedure when there was a \$7.2 million fund and five million potential claimants.

In contrast, when the amount of average recovery is relatively large in proportion to the costs of administering each claim, individual distribution is reasonable and has been utilized by state Attorneys General in parens patriae actions. See, e.g., Maryland v. Mitsubishi Electronics America, Inc., 1992-1 Trade Cas. ¶ 69,742 (D. Md. 1992) (average individual consumer overcharge of \$37); In re Panasonic Consumer Electronics Products Antitrust Litigation, 1989-1 Trade Cas. (CCH) ¶ 68,613 (S.D.N.Y. 1989) (average individual consumer overcharge of \$31).

Moreover, an individual claims procedure would have been unreasonable here for reasons other than the cost of processing the claims and delivering checks. First, in most if not all instances, claimants could not reliably demonstrate that they were entitled to recovery. (JA 391-93.) Second, few of the affected consumers would expend the time and effort involved in seeking to claim a refund of \$3.89 so that a disproportionate amount of the recovery would be consumed in the cost of administering payments to a

relative handful of victims. . These practical considerations make an individual claims procedure even more unreasonable and the wisdom of the district court's decision even more obvious.

The district court's decision was reasonable and appropriate under the circumstances of this case. The States respectfully submit that to rule otherwise would defeat the congressional purpose behind the parens patriae statute -- encouraging imaginative remedies to redress small claims held by large numbers of victims -- and would diminish an \$8 million fund committed to a public purpose benefitting members of the parens patriae group.

CONCLUSION

The appellants, who modeled their putative class action upon the investigation and complaint of the States, who have conducted no independent discovery, and who have neither timely objected nor intervened below, have no standing to pursue this appeal. The district court's conclusion that the settlement was fair, reasonable, and adequate is amply supported by the record and well within the district court's discretion. For all of the foregoing reasons, the States respectfully request this Court to dismiss the

appeal, or in the alternative, to affirm the district court's order approving the settlement and its related orders.

February 21, 1996

Respectfully submitted,

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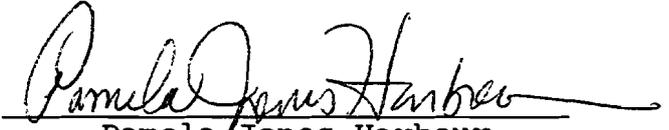
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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 1995, I caused two copies of the foregoing BRIEF FOR PLAINTIFFS-APPELLEES THE STATE OF NEW YORK AND OTHER PLAINTIFF STATES to be served on all parties listed below by first class mail:


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