IP 00-1232-C Uhl, et al. v. T-Cubed
Judge Sarah Evans Barker

Signed on 08/28/01

INTENDED FOR PUBLICATION AND PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UHL, FREDERICK A, ELZINGA, TIMOTHY, MILLER, LARRY L ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILIARLY SITUATED, Plaintiffs, vs. THOROUGHBRED TECHNOLOGY AND TELECOMMUNICATIONS INC, MASON, CATHY%, BUHL, DANIEL R%, MEIGHAN JR, JOE C%, Defendants.	)	CAUSE NO. IP00-1232-C-B/S

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FREDERICK A. UHL, and TIMOTHY ELZINGA, on behalf of themselves and all others similarly situated,,	)	
Plaintiff,	)	
vs.	)	IP 00-1232-C B/S
THOROUGHBRED TECHNOLOGY AND TELECOMMUNICATIONS, INC.,	)	
Defendant.	)	

ENTRY ON ALL PENDING MOTIONS

I. *Introduction.*

This is an action brought by a class, consisting of about 58,000 individuals who own properties that abut several thousand miles of railroad track. The properties adjacent to both sides of the tracks are subject to interests (in most instances an easement or right of way) owned by Norfolk Southern Corporation. Norfolk in turn, has granted to its subsidiary, Thoroughbred Technology Telecommunications, Inc. (known as "T-Cubed"), the right to lay fiber optic cable in the "corridors" along and under the railroad easements. T-Cubed has announced its intention to install – and in some cases already has installed – its cables in those corridors in order to market network services to communications providers.

The landowners, whose property resides on either side of the tracks, claim that they own

sufficient interests in the properties to prohibit T-Cubed from placing its cables in the corridors created by the easements or to be awarded damages for having done so. T-Cubed claims that its parent, Norfolk Southern, has sufficient interest in the corridors along the tracks to have given T-Cubed a lawful right to lay its cable. The putative class alleges in its complaint that T-Cubed has trespassed on some of the properties and slandered the title of all the properties; it also claims that the owners are entitled to a declaration of rights as to their titles and injunctive relief against T-Cubed.

Instead of proceeding to litigation, the parties entered settlement negotiations shortly after the complaint was filed, and they have reached an agreement. Meanwhile, three individual class members have asserted an interest in intervening in the action as plaintiffs, and six class members – the three prospective intervenors and three others – have voiced objections to the settlement.

The case is before the court on all pending motions: (a) the parties' motion to certify the class; (b) the parties' motion to approve the settlement; (c) class counsel's motion for fees and costs; and (d) the motions to intervene. For the reasons that follow, we GRANT all of the motions. Specifically, we GRANT the intervenors' motion to intervene, for the limited purposes of adding affidavits to the record of the fairness hearing and preserving their rights to appeal our decision to overrule their objections to the settlement; GRANT the motion to certify the class; APPROVE the settlement reached by the class and T-Cubed; and APPROVE class counsel's motion for fees and costs.

II. *Background.*

A. *The Underlying Action.*

T-Cubed, a subsidiary of Norfolk Southern, is a telecommunications company. T-Cubed has

announced its intention to install a network of fiber optic cables along or under ten point-to-point railroad corridors consisting of about 2,500 miles of Norfolk Southern railroad track.[1]

At the heart of the legal dispute is the nature of the property interests owned by the various parties: the 58,000 individual land owners, Norfolk Southern, and T-Cubed. T-Cubed has openly proclaimed that it has the right to construct its network because it owns a property interest, conveyed to it by Norfolk Southern, in easements along Norfolk's railroad rights of way. T-Cubed claims that Norfolk Southern's property interest in some of the land is in fee simple absolute, while other interests are such that the property owners cannot use the contested property without Norfolk Southern's consent. Although some property owners own their land in fee simple absolute, some of those parcels are subject to an easement that effectively bars the owners from using the land. In many instances, title to the properties – many subject to various conveyances over more than one hundred years – will be extremely difficult to prove.

The approximately 58,000 property owners[2] who own the land along both sides of the railroad

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[1]The specified corridors are:

1. Atlanta, GA - Jacksonville, FL 362 miles
2. Atlanta, GA - Chattanooga, TN 170 miles
3. Chattanooga, TN - Cincinnati, OH 190 miles
4. Chattanooga, TN - Memphis, TN 299 miles
5. Cincinnati, OH - Bellevue, OH 263 miles
6. Detroit, MI - Toledo, OH 57 miles
7. Atlanta, GA - Charlotte, NC 220 miles
8. Chicago, IL - Harrisburg, PA 719 miles
9. Harrisburg, VA - Alexandria, VA 169 miles
10. Cleveland, OH - Erie, PA 73 miles

[2]The class members are persons who, as of June 5, 2001, owned land either beneath or

(continued...)

tracks dispute T-Cubed's claim. According to their complaint, they conveyed to Norfolk Southern an easement for the sole purpose of conducting its railroad business, so that the Railroad had no lawful right to convey any interest to T-Cubed for the purpose of laying fiber optic cable. Accordingly, they contend, T-Cubed has no right to use the land.

The underlying lawsuit thus consists of three claims against T-Cubed: (1) slander of title (publicly claiming that it had a property interest in the land on which it would build its fiber optic network, knowing that it did not have such a property interest); (2) trespass (on the properties on which it has already built part of its network and on those on which it will build in the future); and (3) declaratory and injunctive relief, declaring the owners' interest in the land and prohibiting T-Cubed from taking further action consistent with its stated plan.

In view of the difficulties attending litigation over these issues – the potential weakness of the individual plaintiffs' cases (in particular proving title strong enough to prohibit T-Cubed's use of the property), the potential for protracted proceedings, the risk to the defendant of delaying selling its fiber optic network to potential buyers in a burgeoning and competitive market – the parties proposed the class certification and settlement that are now before the court in final form.[3]

B. *An Overview of the Proposed Settlement.*

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[2](...continued)
adjacent to the corridors. They are a subclass of a larger, nationwide class which has filed several lawsuits in other jurisdictions. Class Counsel Mem. in Support of Certification and Approval of Proposed Class Settlement, p. 9; Class Administrator report No. 1 (August 16, 2001).

[3]On October 3, 2000, a preliminary hearing was held during which the initial class specifications and settlement proposal were discussed. We conditionally approved the class and the settlement, subject to several modification relating to notice and administrative and tax considerations with respect to the proposed creation of Class Corridor LLC.

a. *"Cable Side" versus "Non-Cable Side" Owners.*

Before turning to the salient features of the proposed settlement, we discuss the provision that has proven to be most controversial to its opponents. The settlement agreement creates two groups of class members: "Cable Side" landowners and "Non-Cable Side" land owners. This distinction lies at the heart of many of the objections to the fairness, adequacy, and reasonableness of the proposed settlement, and also to the question of the class's commonality and the adequacy of class representative Elzinga's representation.

The distinction between Cable Side and Non-Cable Side class members refers to their respective locations along either side of the railroad tracks. If we envision a railroad track running north and south along a stretch of land, Norfolk Southern's easements, and, therefore, T-Cubed's corridors, run along both east and west sides of the track. T-Cubed will lay its fiber optic cables along one side or the other, but not along both. "Cable-Side" landowners are those who own the property on the side where the cable is actually laid. Non-cable-side landowners are those who own the property on the opposite side, the side on which the cable is *not* laid. According to the terms of the agreement, Cable Side owners will receive greater benefits by way of compensation than Non-Cable Side owners.

It is an element of the agreement that, at the outset at least, no one knows which class members are Cable Side and which are Non-Cable Side. Crucially, class representative Elzinga does not know – and, more pertinently, did not know before entering into the agreement – on which side of the tracks his property resides. Class members will find this out only gradually, as T-Cubed makes future decisions as to where it will lay successive cables. Thus, at the time their approval of the proposed agreement was sought, the class members did not know which set of benefits they would be entitled to:

the greater benefits provided to Cable Side owners or the lesser benefits owing to Non-Cable Side owners.

b. *Compensation.*

In general, pursuant to the settlement agreement, all class members will abandon their claims against T-Cubed and transfer an easement to T-Cubed for the specific purpose of laying cable to create its telecommunications network. In exchange for the easement, class members receive all or portions of three bundles of compensation: cash; a percentage of certain revenues generated by T-Cubed from the cables along the network; and certain assets in the form of cables laid by T-Cubed. The distribution of compensation and the transfer of easements will be undertaken by Class Corridor, LLC, a business entity that has been established for these purposes. In summary, compensation is allocated as follows:

i. *Cable Side Class Members Only.*

A. Cash compensation of $6,000 per linear mile (about $1.14 per linear foot).

B. A percentage of the revenue that T-Cubed realizes from the sale, lease, license or other disposition of certain of the conduits it installs along the corridors, as follows:

- The total that will be distributed on the percentage basis will be based on T-Cubed's gross receipts on all conduits beginning with the fourth conduit. On conduits 4 though 7, the percentage will be the greater of 7.5% of gross receipts or a stipulated minimum of $30,000 per mile. For conduits eight and thereafter, Cable Side owners will receive the greater of 11.25% or $30,000 per mile.

- Distribution of the percentage will be according to the same linear-mile basis as the cash compensation.

Compensation in the form of a percentage of T-Cubed's revenues from certain cables will

obviously depend on how well T-Cubed's business performs. If T-Cubed disposes entirely of all twelve projected conduits at no more than the stipulated minimum, Class Counsel estimates that Cable Side class members will receive in excess of $30,000 per linear mile. Transcript of August 21, 2001 Hearing (hereafter "Tr.,"), p. 129.

ii. *All Class Members: Class Corridor, LLC.*

All class members will gain an ownership interest in Class Corridor LLC, which will operate on behalf of the class. It will receive the easements from class members and transfer them to T-Cubed. It will receive the non-cash portions of the compensation from T-Cubed for allocation and administration. And, under certain conditions, it will own telecommunications assets and generate ongoing revenues for all class members and fees for Class Counsel.

In practice, Class Corridor, LLC will manage non-cash compensation that the Class and Class Counsel may receive from T-Cubed. This non-cash compensation consists of a note for telecommunications assets which, if the specified circumstances arise, Class Corridor will own and manage as a telecommunications company or take as a specified sum of money ($316 per linear mile of

dark-fiber-optic strands). As owners of membership interests in Class Corridor, Class Members will be entitled to share in any revenues that the company may earn from those telecommunication assets.[4]

The principal way in which Class Corridor, LLC helps create value for class members is that, by using the company, class members will aggregate otherwise small, disconnected, and discontinuous parcels of land into a unified, continuous corridor, the economic benefit of which is likely to be substantially greater than the individual parcels. If the conditions are satisfied under which assets are transferred to Class Corridor, the company may sell, lease, or otherwise dispose of its own network to the advantage of its owners, namely the class. Agreement, § I, 6; Affidavit of Philip L. McCool, Ex. B. (Class Corridor Information Statement, 1, 5); Marmelstein Aff., Ex E to Declar. of Kathleen C. Kaufmann. Class Members will own 100% of the company at a rate of one membership share for each

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[4]Upon approval of the settlement agreement, T-Cubed will transfer to Class Corridor, LLC a note for each Settlement Corridor. The note will provide that four years after the date the judgment and order are final, T-Cubed will pay Class Corridor, LLC $316 for each mile of dark-fiber-optic strands it installs or acquires in a particular railroad corridor. T-Cubed will notify Class Corridor, LLC each time it installs or acquires dark-fiber-optic strands in conduits. If after the first year, but before the end of four years after the judgment and order is final, T-Cubed has disposed of the fourth conduit in its network for its own account, Class Corridor, LLC may, instead of taking the cash payment, demand that T-Cubed transfer to the company the lesser of one half of the number of strands controlled by T-Cubed or sixteen strands in lieu of payment under the note. Agreement, ¶ IV, F.

ten linear feet of real estate owned by that member along the Settlement Corridors. Voting rights will be similarly apportioned. Class Corridor's shareholders will elect all members of the board of directors, except for one who will be appointed by Class Counsel.

In exchange for these benefits, class members abandon any and all claims against T-Cubed's use of corridors exclusively for telecommunication purposes. Upon approval of the agreement, each Class Member will be deemed to have transferred to Class Corridor an easement for telecommunication purposes over the Settlement Corridors. Agreement § IV.H.1. Once T-Cubed determines which side of the corridor it will use for its cables, "Class Corridor, LLC" will convey to T-Cubed a perpetual easement and right of way over, across, and under the Class Member's interests in the real estate that makes up the cable side of the Settlement Corridor. Agreement §§ IV, H, 3, 4. Class Corridor, LLC will retain the easement on the Non-Cable Side. Agreement, § IV, A. The Cable Side easements will terminate if T-Cubed has not installed telecommunications systems within four years after the effective date of the settlement's approval. Agreement, § IV, H, 4.

c. *Fees and Costs.*

All costs and fees will be paid by T-Cubed or by Class Corridor, LLC and will not reduce the benefits to the class members.

> i. T-Cubed has agreed to pay Class Counsel fees in the amount of $2,000 per linear mile for the first three conduits installed in the settlement corridors. Agreement, § VI, A, 1.
>
> ii. T-Cubed has also agreed to pay Class Counsel a percentage of its gross receipts with respect to the fourth and successive conduits, specifically: 2.5% of the gross receipts from conduits four through seven and 3.75% of the gross receipts from conduits eight and thereafter.
>
> iii. Class Counsel will also be entitled to 25% of certain revenues generated by Class Corridor, LLC or the cash payment to which Non-Cable Side class members are entitled in lieu of a percentage of the revenues. Agreement, § IV, A, 2.

In preparing the final proposal, Class Counsel consulted two independent experts on legal ethics, Professor Ronald Rotunda and former Professor W. William Hodes, both of whom filed affidavits in support of the fee provisions contained in the settlement agreement. Professor Rotunda expressed approval that the lawyers' risks and fees are exactly parallel to the risks and benefits to which the class members are exposed, so that Class Counsel receive fees only as class members receive compensation. Rotunda Aff., ¶¶ 24, 25. And both noted that the creation of Class Corridor LLC presents no danger of a conflict of interest between class counsel and class members (although obviously Class Corridor may become a competitor of T-Cubed). Rotunda Aff., ¶¶ 23-26; Hodes

Aff., ¶¶ 14-22.

In addition to the initial fees, Class Counsel will be entitled to 25% of either the cash payment, if any, related to the dark-fiber-optic strands installed or acquired by T-Cubed, or the net revenue from certain telecommunications assets transferred to Class Corridor, LLC in lieu of the cash payment. Agreement, §§ IV, A, 3; IV, B, 1. Class Counsel will not hold a membership interest in Class Corridor. If Class Corridor, LLC is sold or liquidated, Class Counsel will be entitled to counsel fees equal to 25% of the proceeds of the sale or liquidation. Agreement, § IV, B, 3. In the event Class Corridor, LLC or its successor, conducts an initial public offering of its securities, Class Counsel will be entitled to securities equal to 25% of the aggregate equity of Class Corridor. Agreement, § IV, B, 4.[5]

d. *The Claims Process*

As proposed in the final settlement proposal, we appoint Jon D. Noland to serve as claims

[5]We note that in this final proposal Class Counsel accepted less favorable compensation than in the initial proposed settlement. Under the original agreement, Class Counsel would have been entitled to receive 25% of the stock of Class Corridor. Agreement § IV, A. After the initial agreement was conditionally approved, Class Counsel sought advice from tax specialists on behalf of the Class -- for which Class Counsel advanced $175,000 -- to ensure that Class Members received favorable tax treatment.

administrator. Mr. Noland is an experienced claims administrator. We previously appointed him to the position under the terms of the initial settlement proposal and he has served in that capacity in the settlement in *Hinshaw v. AT&T*, No. IP99-0549 C H/G (S.D. Ind.). As claims administrator, Mr. Noland will be responsible for establishing, overseeing, and managing the Settlement Claims Office, subject to the court's oversight. T-Cubed will be solely responsible for all settlement administration costs, excluding costs and fees incurred by Class Members in filing and appealing their claims. Agreement, § V, B, 1.

The Settlement Claims Office is responsible for disseminating information to class members about settlement procedures, assisting the court in processing opt-out requests, and administering class members' claims for payment under the agreement. It will, for example, notify class members of the number of linear feet they own on a corridor and the side on which they own it; the amount of cash compensation they are entitled to receive when the compensation becomes due; and the number of membership interests in Class Corridor, LLC they are entitled to receive. Agreement Ex. B, pp. 6-7. The Settlement Claims Office will also hear appeals from the matters just noted.

III. *Approval of the Class and the Settlement.*

Parties to class actions seek with increasing frequency to settle their disputes early in the litigation and before a class is certified. When this occurs, the court is still required to apply the criteria established by Fed.R.Civ.P. 23. Indeed, courts faced with a settlement that includes a request for class certification must apply Rule 23's protocol with particular care, because they do not have information that might ordinarily surface during the course of litigation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689 (1997). Still, it is perfectly proper to certify a class and a settlement in the same proceeding, and we do so here.

A. *Certification of the Class*.

The decision to certify a class resides in the court's sound discretion. *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998). Where, as here, certification is requested along with a comprehensive settlement, we nevertheless must find that the class satisfies the requirements of Fed.R.Civ.P. 23(a) and (b). *Amchem*, 521 U.S. at 620-21, 117 S.Ct. at 2238. We find that the proposed class here satisfies those requirements. First, the class satisfies the four criteria identified in Rule 23(a):

- *Numerosity*: the class must be so large that joinder of all parties would be impracticable.

Here, the numerosity requirement is obviously satisfied: the class consists of more than 58,000 landowners. Joinder would be little short of impossible. In *Hubler*, by contrast, the class that was certified numbered 200. 193 F.R.D. at 577. In *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 184 (N.D. Ill. 1992), the court approved a potential class consisting of 129-300 members where they were geographically dispersed.

- *Commonality:* there must be questions of law or fact common to the class. The

commonality requirement is ordinarily satisfied when there is "a common nucleus of operative facts." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). As this court noted in Hubler, 197 F.R.D. at 577:

> Commonality does not require that all questions of fact or law be identical. *See Johns v. DeLeonardis*, 145 F.R.D. 480, 483 (N.D.Ill.1992). Factual variation among class grievances does not defeat a finding of commonality. *See Rosario*, 963 F.2d at 1017. Rather, this requirement is satisfied as long as "the class claims arise out of the same legal or remedial theory," *Johns*, 145 F.R.D. at 483. It is enough to satisfy commonality that there be a "common question ... at the heart of the case...." *Rosario*, 963 F.2d at 1018.

The commonality requirement may be satisfied where there is a single overriding issue of law or fact common to all. *In re Prudential Ins. Co. of Amer. Sales Practices Litigation,* 148 F.3d 283, 310 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).

Here, T-Cubed has asserted its right to lay cable along property owned by the class members. Several legal issues are common to all members, for example: the nature of the property interests that the landowners conveyed to Norfolk; whether Norfolk, in turn, had sufficient title to convey an interest to T-Cubed; and, ultimately, whether T-Cubed's property interest is sufficient as against the property owners. Similarly, all class members face the same legal issues with respect to their causes of action: whether T-Cubed's conduct constitutes either trespass or slander of title. There are also common

issues of fact incident to each of the legal issues, such as: whether T-Cubed announced its intention to its lay cable; whether T-Cubed knew that its title was not good; whether T-Cubed had any interest at all in the properties; and whether T-Cubed trespassed on the land.

- *Typicality:* Although intervenors question whether Mr. Elzinga can properly represent all members of the class, we find that his claims are typical of the class. This requirement is similar to the commonality requirement. It is satisfied where the named plaintiffs' claims "arise[] from the same . . . practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuentes v. Stokely-Van Camp, Inc.* 713 F.2d 225, 232 (7th Cir. 1983). As the Third Circuit has observed: "The typicality requirement is designed to align the interests of the class and class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Prudential*, 148 F.3d at 311. "[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *Id.*

Here, named plaintiff Elzinga shares with all class members: (1) the same factual allegations as

to T-Cubed's wrongdoing; (2) the same legal claims for slander of title, declaratory and injunctive relief, and trespass; and (3) the same interest in proving T-Cubed's liability.

- *Adequacy of representation:* The named representative must be able to fairly and adequately protect the interests of the class. The Supreme Court has noted that the "adequacy" requirement tends to merge with the "commonality" and "typicality" requirements, because the more common and typical the class' interests are, the less likely it will be for conflicts to arise between the class representative and other members. *Amchem*, 521 U.S. at 626, n. 20, 117 S.Ct. at 2251, n. 20.

The adequacy standard involves two elements: one relates to the adequacy of the named plaintiff's representation of the class and requires that there be no conflict between the interests of the representative and those of the class in general; the other relates to the adequacy of class counsel's representation. Both are satisfied here.

As to the adequacy of the named representative, we stated in *Hubler Chevrolet*:

> The interests of the class members need not be identical; the only conflicts relevant to our inquiry are those that relate materially to Plaintiffs' claims. In addition, as will be addressed in our discussion of (b)(3) certification, if members of the putative class believe that the named plaintiffs do not adequately represent their interests, they may choose to opt out of the suit.

193 F.R.D. at 578. Here, Mr. Elzinga, like all members of the class, has an interest in defending his property rights, in proving that T-Cubed has infringed on those rights, and in recovering as much as possible for the infringement. For reasons explained more fully in sub-section III, B, 1, below, Mr. Elzinga made crucial decisions concerning the interests of the class before knowing whether he would be entitled to Cable Side or Non-Cable Side benefits. Accordingly, he was similarly-situated to all class members and had an interest in maximizing the compensation for all.

Class Counsel's experience and expertise are unchallenged. Indeed, notwithstanding objections to the fairness, adequacy, and reasonableness of the settlement, attorney Levin, representing intervenor Mason, stated: "We're not here saying, 'Make us lead counsel. Throw these guys out.' These guys have worked very hard. They understand this case, Your Honor." Tr., p. 22. Class counsel have served as class counsel in many complex class litigations nationwide.[6]

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[6]They have represented to the court that they have successfully served as class counsel in the following actions: *Hinshaw v. AT&T Corp.,* Civil Action No. 1P99-0549-CT/9 (S.D. Ind.); *Consolidated Rail Corp. v. Lewellen*, 682 N.E.2d 779 (Ind. 1997); *CSX Transportation, Inc. v. Clark*, 646 N.E.2d 1003 (Ind. Ct. App. 1995); *Hash v. United States*, Civil Action No. CV 99-324-S-MHW, 2000 WL 146801 (D. Idaho July 7, 2000); *Schneider v. United States*, Civil Action No. 8: 99CV035, 2000 WL 1481128 (D. Neb. July 21, 2000); and *Bywaters v. United States*, 196 F.R.D. 458 (E.D. Tex. 2000); Counsel to objecting class members in *Hefty v. All Other Members of the*
(continued...)

As we noted earlier, Professors Rotunda and Hodes also have applauded Class Counsel's work in arranging the settlement and conclude that their ethics have been unimpeachable. Professor Rotunda observed:

> In my opinion, the terms of the settlement satisfy all ethical rules governing lawyers. With my assistance, the lawyers took care to structure a settlement that provides for legal fees that were reasonable in amount and not superior to the class member compensation in terms of timing or risk. The cash terms of the settlement are either superior to or comparable to other settlements reached in similar cases. The asset portion of the settlement is creatively structured in the best interest of class members to provide unique additional potential benefits. The settlement does not put the class counsel in conflict with any member of the settlement class.

(Rotunda Aff. ¶ 9).

Class Counsel discussed in some detail the negotiations that yielded the settlement agreement. Nels J. Ackerson Declar. in Support of Approval, ¶ 2. Counsel's recitation is supported in the Rotunda and Hodes affidavits. The statements taken together support a reasonable conclusion that the negotiations were undertaken intelligently and at arm's length. Indeed, no one has raised a reasonable allegation or inference to the contrary.

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[6](...continued)
Certified Settlement Class, 680 N.E.2d 843 (Ind. 1997); and Counsel for Amici Curiae Indiana Landowners with Land Underlying or Adjacent to Abandoned Railroad Right of Ways in *Calumet National Bank v. American Telegraph & Telephone Co.*, 682 N.E.2d 785 (Ind. 1997).

- *Rule 23(b)(2) Requirements.*

In addition to satisfying the criteria of Rule 23(a), the class also must satisfy the requirements set forth in Rule 23(b)(2). We find that this action may be maintained under Rule 23(b)(2) because "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Amchem*, 521 U.S. at 614. Here T-Cubed acted or refused to act with respect to the class by:

> engaging in a course of conduct nationwide of asserting a right to a property interest in railroad easements to which it has no right;
>
> engaging in a course of conduct nationwide of installing or threatening to install telecommunications cable on land owned by the class members;
>
> refusing to obtain authorization from the landowners to engage in its business;
>
> refusing to compensate the landowners for using their property without their permission.

In sum, T-Cubed has acted on grounds generally applicable to the class by asserting a legal interest in, or by actually installing, a telecommunications system on land owned by the Class Members. Conversely, it has refused to act on grounds generally applicable to the Class by refusing to pay

compensation to the individual landowners for the use of their land for commercial purposes. T-Cubed justifies its course of conduct by pointing to rights-of-way conveyed to it by Norfolk Southern. It asserts this claim of right against all members of the class.

The fact that the class seeks damages as well as injunctive and declaratory relief does not change the Rule 23(b)(2) analysis. Where, as here, clear and comprehensive notice to the class is provided and members have a right to opt out, the class may be certified. *Lemon v. International Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 581-82 (7th Cir. 2000); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999). Here, all parties can and have been identified and have been sent good notice – arguably notice that exceeds constitutional requirements – by mail and by other means. See Tr., pp. 146-147. See below, sub-part III, B, 3. As of August 16, 2001, 129 of the 58,000 class members had opted out. Report No. 1 of Claims Administrator.

- Rule 23(b)(3) Requirements.

In an action such as this one, proponents of the class also must satisfy Rule 23(b)(3)'s requirement that "the questions of law or fact common to the members of the class predominate over

any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Common questions predominate when they "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." Wright & Miller, *Federal Practice & Procedure: Civil* § 1788. *See Amchem*, 521 U.S. at 515-616, 117 S.Ct. at 2246 As we noted in *Hubler Chevrolet,* the predominance requirement is satisfied when there is an "essential factual link between all class members." 193 F.R.D. at 580. The Supreme Court has cautioned us to weigh the predominance and superiority issues against individual class member's interest in going it alone. *Amchem*, 521 U.S. at 616, 117 S.Ct. at 2246.

The situation in this case permits us to conclude that common issues of law and fact predominate over individual issues. Here, as noted earlier, the entire case arises from a common nucleus of operative facts: T-Cubed's course of conduct of ignoring the interests of the individual property owners and asserting its right to lay its cable in the corridors at issue. All class members have been harmed by T-Cubed's course of conduct, varying only to the extent that their parcels vary in size.

The law of slander of title and trespass in the different states in which the class members reside is sufficiently similar as to have no adverse impact on the commonality of the issues of fact. Appendices A and B to Elzinga's initial memorandum. Thus, we conclude that the common questions predominate over any individual ones.[7]

We also find that a class action is superior to individual actions, although those class members who prefer to go it alone have had ample opportunity to opt out. The class includes 58,000 members. A lawsuit by each would stress the capacity of the judicial system. Obviously, however, not all would file suits, because the property interest at issue is less, in many cases, than the amount it would cost for

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[7]By contrast, the predominance problems in *Amchem* serve as an object lesson in over-inclusiveness. The "common facts" there were so broadly defined – the district court found that "The members of the class have all been exposed to asbestos products supplied by the defendants. . . ." – that potentially millions of people, many unidentifiable, with enormously different interests were included in the class. The differences left over after the "common facts" were defined were the crucial ones: exposure to "different asbestos-containing products, for different amounts of time, in different ways, and over different periods," with differing manifestations of injury, or none at all -- overwhelmed these common facts. 521 U.S. at 623-624, 117 S.Ct. at 2250. The Third Circuit, whose decision the Supreme Court affirmed, observed: "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma. . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry." Id. In other words, common facts did not predominate.

each to prosecute a case. In addition to obtaining a just conclusion for the offended individuals, the economic value of this action as a class action lies in the aggregation of the individual parcels. Add to this the fact that all individual class members would be forced to establish good and sufficient title to prosecute their own cases and the superiority of a class becomes clearer. Absent a class action the class members would likely be without a remedy and T-Cubed would likely retain the benefits of its alleged wrongdoing. As the Supreme Court has observed: "Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they employ the class-action device." *Deposit Guar.. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

B. *Approval of the Settlement*

The Seventh Circuit has noted that "[f]ederal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996), citing *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir.1985), *cert. denied,* 478 U.S. 1004, 106 S.Ct. 3293, 92 L.Ed.2d 709 (1986). This court must approve a settlement before it may be implemented, but our

review "is limited to the consideration of whether the proposed settlement is lawful, fair, reasonable, and adequate." Id. *Cusack v. Bank United of Texas, FSB,* 159 F.3d 1040, 1041 (7th Cir. 1998). Indeed, the Seventh Circuit has cautioned district courts against substituting their own judgment for that of the parties as to the terms of the settlement. *Armstrong v. Board of School Directors of the City of Milwaukee,* 616 F.2d 305, 315 (7th Cir. 1998), *overruled on other grounds, Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998).

Instead, in order to determine whether a settlement is fair, adequate, and reasonable, the Seventh Circuit, following the *Manual for Complex Litigation* and *Moore's Federal Practice*, has outlined a non-exhaustive set of considerations to serve as a guideline:

1. The strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement;

2. The defendant's ability to pay;

3. The complexity, length and expense of further litigation;

4. The amount of opposition to the settlement;

5. Whether collusion was present in reaching a settlement;

6. The reaction of members of the class to the settlement;

7. The opinion of competent counsel;

8. The stage of the proceedings and the amount of discovery completed.

Armstrong, at 314. *See EEOC v. Hiram Walker*, 768 F.2d at 889 ; *Cook v. McCarron*, 1997 WL 47448 (N.D.Ill. 1997), *7. The authorities are agreed that the most important consideration is the first. *E.g., Isby*, 75 F.3d at 1199.

With the exception of the last, the criteria that apply here strongly support the settlement.

- First, bearing in mind that our responsibility is not to resolve the merits of the lawsuit or to determine with precision the parties' rights, *Isby*, 75 F.3d at 1196-97, we find that the plaintiffs' cases is sufficiently uncertain to weigh heavily in favor of a settlement. The stubborn fact at the bottom of this case is that T-Cubed has announced that it is going to lay its cable arguably on the owners' lands. *E.g.*, Tr. pp. 131-134. It appears that it will do so either pursuant to the class settlement agreement or it will take its chances on successfully defending against individual lawsuits. *E.g.*, Tr. pp. 118-121. (Another class action might conceivably be initiated, but there is little or no likelihood that T-Cubed is going to wait.) It follows that the legal and factual matter at the heart of this lawsuit is the question of whether

58,000 individual landowners in at least sixteen different states will be able to prove good title to the land on which T-Cubed has announced its intent to build.

No one questions that the owners have *some* property interest in the lands. Some may own a fee simple absolute interest, perhaps good enough to prevent T-Cubed from building, or, if T-Cubed already has built, good enough to oust it or collect damages. Others own lesser interests in the land. T-Cubed argues that at least some of the owners have granted easements sufficiently extensive to have permitted Norfolk Southern to convey those interests to T-Cubed, and others that require Norfolk Southern's consent for the landowners to use the land that they appear to own on paper. Tr. p. 134. Whatever the legal rights of the individual owners might be, proving title to property interests that involve century-old conveyances to railroads is a daunting task. *See, Isaacs v. Sprint Corporation*, 2001 WL 930177 (7th Cir. August 14, 2001), *2.

Hence, it is reasonably clear that many of the individual class members would have, at best, uncertain prospects of prevailing on the merits. (Indeed, certain of the intervenors question whether the class members have any cause of action at all.) As we noted earlier, in addition, the greatest economic

benefit that the settlement provides to class members is the capacity to aggregate their otherwise small, disconnected, and discontinuous parcels of land into a unified, continuous corridor. *See* Tr. p. 60.

As to the actual economic benefits derived from the settlement as compared with any amount T-Cubed might pay, a trial could never eventuate in some of the benefits contained in the proposed settlement. For example, a jury could not award the class members a percent interest in T-Cubed's future revenues from cable laid in the corridors at issue; nor could a jury require T-Cubed to award them an interest in future conduits.

Although intervenors have expressed serious reservations as to the economic value of the settlement – particularly to Non-Cable Side class members – there is sufficient evidence on the record to show that the creation of Class Corridor, LLC is likely to have value commensurate with what class members could achieve at trial. Michael R. Baye Aff., ¶¶ 6-9, 13, 18; Ronald D. Rotunda Aff., ¶ 20 ("Over and above the cash compensation negotiated in this settlement, class members will also receive asset compensation. One of the most creative aspects of the settlement is the creation of Class Corridor to hold asset compensation."). The fact that some of the value is counterbalanced by risk is

not enough to warrant withholding our approval of the settlement. Jerry Marmelstein, CEO of Riser Communications Group, testified that: "The benefit of allowing a company such as Class Corridor to develop the assets contemplated in the Amended Settlement Agreement is to maximize long-term compensation to the shareholders with recurring and non-recurring revenues for the use of the awarded assets. Risk is justified on one part of the settlement." Marmelstein Aff., Ex. E to Kathleen C. Kaufmann Declar.

Reasonable class members – whether Cable Side or Non-Cable Side – could reasonably conclude that the economic value of the settlement compares favorably with any amount they might win if they continued to trial.

- Next, as to the "complexity, length and expense of further litigation" we already have noted the difficulty that many class members would have in proving title. Additionally, while information appears to have flown freely between Class Counsel and T-Cubed, a full-blown litigation would require extensive discovery, which has been avoided because of the early settlement. One might conservatively project a litigation lasting for years. Absent an injunction preventing T-Cubed from laying its cable in

the meantime – an uncertain prospect about which we offer no opinion – T-Cubed would likely be the only economic beneficiary before the litigation ended.

- We note with respect to factors 4 and 6 that, out of 58,000 class members, only 129 have opted out. Among the members that have chosen to remain in the class are such major and sophisticated business enterprises as AT&T, Sprint, International Paper Company, and Weyerhaeuser. Tr., pp. 111-112. Only six class members, including the three intervenors, presented objections – about 1 in 10,000. Additionally, the President of the Ohio Farm Bureau concluded:

> While we are happy that a settlement has been negotiated that provides both cash and a percentage of revenue to the affected landowners, we are especially pleased with the part of the settlement that allows the landowners to own an enterprise that will control the future use of their land under the railroads for fiber optic cable purposes. The settlement is innovative and excellent for the landowners and the fiber optic company. The settlement balances the landowners' present interest in receiving compensation for the infringement of their property rights that has already occurred, while providing a way to handle future fiber optic cable development on their land.

Harry L. Pearson (President, Indiana Farm Bureau, Inc.) Aff., Attachment.

- No intervenor has suggested that counsel handled the settlement incompetently or unethically. (As noted below, one objector, Mary Jane Rossmaier, did allege collusion between Class Counsel, T-

Cubed Counsel, and the court. However, she offered no factual basis for her allegation.) We note, particularly, that several experts have weighed in on factors 5 and 7, which go to the issues of how competently and ethically counsel have negotiated the settlement. Professor Ronald Rotunda and (former Professor) W. William Hodes gave their blessing to the attorney fee provisions. Professor Rotunda expressed approval that the lawyers' risks and fees are exactly parallel to the risks and benefits to which the class members are exposed. Rotunda Aff., ¶¶ 24, 25. And both noted that the creation of Class Corridor LLC presents no danger of a conflict of interest between class counsel and class members (although obviously Class Corridor may become a competitor of T-Cubed). Rotunda Aff., ¶¶ 23-26; Hodes Aff., ¶¶ 14-22. Also see *Isby*, 75 F.3d at 1199 (the "district court was entitled to give consideration to the opinion of competent counsel that the settlement was fair, reasonable and adequate").

The parties provide sufficient evidence that they have engaged in an arm's-length negotiation. They have provided one another sufficient information – including one million pages of documents provided by T-Cubed – to arrive at informed conclusions. Although they did not engage in formal

discovery, that practice has become increasingly the case. The Ninth Circuit has observed that, "[i]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1239 (9th Cir. 1998). The Seventh Circuit impliedly concurs. *Isby*, 75 F.3d at 1200.

In short, our independent assessment leads us confidently to the conclusion that the proposed settlement is fair, adequate, and reasonable.

IV. *The Intervenors and their Objections*

A. *The Intervenors.*

Three members of the class[8] have sought to intervene: Cathy Mason has filed a motion to

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[8]At the August 21, 2001 fairness hearing, Ms. Mason's counsel acknowledged that she has waived her right to opt out so that she is a member of the class. Tr. pp 6-7. Counsel for Messrs. Buhl and Meighan stated that Mr. Meighan has waived his right to opt out so that he is a member of the class, but that Mr. Buhl has "reserved" his right to opt out, notwithstanding his motion to intervene and notwithstanding his acknowledgment that the time for opting out has passed. Tr. pp. 7-8. The Seventh Circuit has noted, without deciding, that it is questionable whether a class member may seek to intervene without waiving his or her right to opt out. *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 706, n. 6 (7th Cir. 2001), citing *In re Potash Antitrust Litig.,* 162 F.R.D. 559, 561 (D.Minn.1995). We do not address the issue here because Settlement Counsel have invited late opt-outs upon petition following our decision here. Tr. pp. 147 (Mr. Ackerson on behalf of Class

(continued...)

intervene; and Daniel Buhl and Joe Meighan have jointly filed a motion to intervene. Ms. Mason is a landowner in Georgia; Messrs. Buhl and Meighan are landowners in Tennessee. All three have property interests at issue. In addition, Messrs. Buhl and Meighan are the class representatives in another similar class action in Tennessee against Sprint Communications, *Buhl/Meighan v. Sprint*, Davidson County Court, No. 98MD-1.[9]

The Seventh Circuit has held that, "[b]ecause only parties may appeal, it is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision." *Crawford v. Equifax Payments Services, Inc.*, 201 F.3d 877, 880 (7th Cir. 2000). *See Felzen v. Andreas*, 134 F.3d 873, 874 (7th Cir.1998) (intervention is the proper mechanism for nonparties to protect interests that may be adversely affected

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[8](...continued)
Counsel),151 (Mr. McClard on behalf of T-Cubed). The question of whether interveners Mason, Buhl, and Meighan may be permitted to opt out, therefore, remains an open one.

[9]Three decisions have been rendered in the Tennessee actions. *Meighan v. U.S. Sprint Comunications Co.*, 942 S.W.2d 476 (Tenn. 1997); *Meighan v. U.S. Sprint Communications Co.*, 942 S.W.2d 632 (Tenn.1996); and *Buhl v. U.S. Sprint Communications Co.*, 840 S.W.2d 904 (Tenn. 1992). According to Buhl's and Meighan's motion to intervene, the pending Tennessee case involves alleged wrongs that occurred in 1988, thirteen years ago. Tr. pp. 54-55. No trial has been held as yet and no settlement has been reached.

by a trial court's judgment), *affirmed California Public Employees' Retirement System v. Felzen*, 525 U.S. 315, 119 S.Ct. 720, 142 L.Ed.2d 766 (1999). *Also see In re Discovery Zone Securities Litigation*, 181 F.R.D. 582, 588 (N.D.Ill. 1998). It is proper to grant a motion to intervene for limited purposes, such as to preserve the intervenor's appellate rights. *Crawford*, 201 F.3d at 881; *Vollmer,* 248 F.3d at 707.

Fed.R.Civ.P. 24 provides two methods of seeking intervention:[10] by right or by permission. The district court in *Discovery Zone* set forth a convenient four-pronged method for analyzing intervention as of right:

(1) the applicant must have an "interest" in the property or transaction which is the subject of

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[10]Rule 24 provides in pertinent part:

a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
constitutional right otherwise timely asserted.

> the action; (2) disposition of the action as a practical matter may impede or impair the applicant's ability to protect that interest; (3) the application is timely; and (4) no existing party adequately represents the applicant's interest.

181 F.Supp.2d at 589. It also outlined the requirements of permissive intervention:

> A permissive intervener must demonstrate that (1) it shares a common question of law or fact with a party, (2) its application is timely, and (3) the court has independent jurisdiction over its claims.

Id. Mason, Buhl, and Meighan seek to intervene under either theory. We grant their motions but only under Rule 24(b), however, because they are not entitled to intervene as of right.

1. *Intervention as of Right*.

We deny intervenors' motion to intervene as of right because the intervenors have not satisfied the second and fourth criteria of that standard; that is, they have not established that they will be impeded in their ability to protect their interests, nor have they shown that no existing party adequately represents their claims. We note before proceeding any further that the latter issue also goes to the question of whether the class should be certified, an issue we address in greater detail below.

There are two reasons why the interests of the intervenors will not be impeded by the class action. First, all three are knowledgeable about the terms of the settlement and their right to opt out.

Indeed, all three submitted objections and all three showed up by counsel (and Messrs. Buhl and Meighan in person) at the August 21, 2001 fairness hearing. Tr. p. 7. The opt-out provision provides a ready mechanism for all three to protect their interests outside the class action. All three argued at some length that, depending on their ability to prove good and sufficient title to their property – an issue that class certification and the settlement avoids – they are likely to be better off outside the class than in it. Messrs. Buhl and Meighan argued, in addition, that their property rights under Tennessee law are superior to the law in the other jurisdictions in which the class members reside so that they are likely to be far better off by filing individual claims there. It follows that, as a practical matter, none of the three has an interest that he or she cannot adequately protect without intervening.

Second, in one of the more perplexing aspects of the intervenors' objections to the proposed settlement, all three intervenors have contended – Ms. Mason strenuously so – that this lawsuit is based on quicksand because either all of the class members, or those class members whose property ends up on the Non-Cable Side, *have no cause of action*. The implications of this assertion are staggering, including that there is no justiciable claim under the "case or controversy" provision of the Constitution

and that this court lacks subject matter jurisdiction over the case. Leaving those weighty issues aside, surely another implication of intervenors' assertion is that they *have no interest* to protect by intervening. The logic of this position is, of course that by intervening they drown in the quicksand along with the rest of the class.

As to the question of whether class representative Elzinga adequately represents the interests of the class – including those of the intervenors – we note here that he does, although we have discussed that issue in sub-section III, A above, and touch on it again in sub-section B, 1 below. We further note that, while intervenors argue that Mr. Elzinga does *not* adequately represent their interests, none of the three intervenors asks to replace (or even to join) Mr. Elzinga as class representative, nor does any of the three claim to represent others with similar objections or interests, nor does any propose an alternative to Mr. Elzinga, nor does counsel for any of the three ask to be named co-counsel with Class Counsel. *See, e.g.*, Tr. pp. 15-16, 22, 47. Ms. Mason has asked the court to grant her motion to intervene to permit her to conduct some discovery, and she all but asks the court not to certify the class. But it is not clear precisely what these intervenors want other than to challenge the fairness of the

settlement agreement (which they may do as class members in any event), to challenge whether the class should be certified (an argument which they present essentially as a matter of whether Mr. Elzinga adequately represents the class), and to preserve their rights to appeal. *See, In Re Brand Name Litigation*, 115 F.3d 456, 458 (7the Cir. 1997) ("Class members who don't want to opt out or create a subclass can move to intervene (if they want, for the limited purpose of being able to appeal) and if their motion is denied they can appeal from that denial just like the opt-outs.").

2. *Permissive Intervention.*

We do, however, grant intervenors' motion to intervene by permission. Contrary to intervenors' own argument, we believe that Ms. Mason and Messrs. Buhl and Meighan do have protectable interests in issue. We also conclude that those interests are commonly shared, in law and in fact, with all other class members, their application was timely, and the court has jurisdiction over their claims. *Discovery Zone*, 181 F.Supp.2d at 589.

Class Counsel argues that the motions to intervene were not timely filed. In *Crawford*, however, Judge Easterbrook noted that, while a filing is timely only when it is made "'as soon as it

[becomes] clear . . . that the interests of the unnamed class members would no longer be represented by the named class representatives,' unnamed class members generally don't realize that they are not being properly represented until the terms of the settlement are revealed." 201 F.3d at 880-881, *quoting United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977). Here, intervenors acted seasonably after receiving notice to analyze the settlement and file motions to intervene along with supporting briefs and objections. Nor do we find that the proponents of the settlement will be prejudiced by the limited intervention.[11] Although Class Counsel understandably would like to avoid an appeal that delays implementing the settlement, they acknowledge that the denial of a motion to intervene is itself an appealable order, so that the settlement cannot be insulated from appellate review. Tr., p. 117.

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[11]Discovery Zone, 181 F.Supp2d at 594: "The timeliness determination "requires a consideration of all the circumstances of a case and not just the point to which the suit has progressed." *Ragsdale v. Turnock,* 941 F.2d 501, 504 (7th Cir.1991). The *Ragsdale* court outlined four factors for consideration: "(1) the length of time the intervener knew or should have known of his or her interest in this case, (2) the prejudice to the original party caused by the delay, (3) the resulting prejudice to the intervener if the motion is denied, and (4) any unusual circumstances." *Id.*"

Accordingly, we grant intervenors' motions to intervene, but we limit the scope of their intervention.[12] The intervenors may intervene to: (a) present objections (which, as earlier noted, they had a right to do in any event); (b) file affidavits with respect to the monetary value of the settlement as discussed at the fairness hearing; and (c) preserve their rights to appeal.[13]

B. *Intervenors' Objections.*

1. *Cable Side versus Non-Cable Side.*

The intervenors' most important and far-reaching objection is that, by dividing the class into Cable Side and Non-Cable Side members and awarding the two groups differing compensation, the settlement is unfair and that the class representative does not adequately represent their interests. They argue, further, that they cannot make an informed decision as to whether

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[12]If a court may place reasonable limitations on interventions as of right, "[i]t is axiomatic that courts may put limitations on a party's ability to intervene permissively under Rule 24(b)(2)." *Discovery Zone,* 181 F.Supp.2d at 601.

[13]This means that we deny Ms. Mason's motion to intervene for the purpose of conducting discovery. Only one of Ms. Mason's discovery requests was reasonably calculated to obtain evidence as to the fairness of the settlement or the adequacy of the representation: whether Mr. Elzinga knew whether his property was on the Cable Side or the Non-Cable Side when he agreed to the terms of the settlement. That question has been answered satisfactorily: Mr. Elzinga *did not know* the side on which his property is located in October 2000, when he expressly elected not to opt out. Elzinga Aff., ¶ 14; Tr. pp. 30-33.

to opt out of the class because they have no way of knowing whether they are members of the Cable Side or Non-Cable Side group. It is certainly plausible that if Non-Cable Side class members knew that they were Non-Cable Side class members, they might well be interested in opting out and taking their chances on individual lawsuits.

The intervenors are not merely arguing that awarding differing compensation to two groups within the class is inherently unfair. If they were, the answer has been supplied by the Eighth Circuit, which certified a class and approved a settlement involving three-tiered compensation based on the proximity of class members to defendant's refinery. In *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140 (8th Cir. 1999), the court stated:

> If the objectors mean to maintain that a conflict of interest requiring subdivision is created when some class members receive more than other class members in a settlement, we think that the argument is untenable. It seems to us that almost every settlement will involve different awards for various class members.

Id. at 1146. *Also see Follansbee v. Discover Financial Services*, 2000 WL 804690 (N.D.Ind. 2000) ("there is nothing wrong with negotiating different damages awards for different subclasses, so long as the difference is based on legitimate considerations.").

Instead, intervenors' major objection runs deeper. They assert that the division into two sub-groups affects not merely the fairness of the compensation, but goes to the heart of the adequacy of the class' representation. As Mr. Levin, counsel for intervenor Mason put it: "Mr. Elzinga cannot represent both sides of the track." Tr., p. 137. In the context of this agreement, we think he can.

Although intervenors present several objections to the fairness of the settlement, the *only* objection as to the adequacy of Mr. Elzinga's representation is that he cannot represent both sides of the track. The key to whether or not Mr. Elzinga can adequately represent the interests of both sub-groups lies in the answer to the question of whether Mr. Elzinga knew on which side his or anyone else's property was located at the time he agreed to the settlement. It is established that he did not. Elzinga Aff., ¶ 14. Ms. Mason does not know the side on which her property resides and neither did anyone else at the time the agreement was reached. Tr., pp. 17-19. That's the *problem*, as intervenors see it.

By contrast, we see Mr. Elzinga's ignorance as a crucial aspect of the settlement's fairness and of his adequacy as class representative. This class certification and settlement present us with a rare,

concrete, working example of John Rawls' celebrated theory of the "veil of ignorance." In *A Theory of Justice* (Harvard University Press 1971, pp. 136-142), Rawls postulated that fairness is best assured where decision makers operate from behind a veil of ignorance, meaning that, while all decision makers know how to create positive outcomes for the whole, no decision maker knows anything about his own status in the world so that he cannot effectuate his own ends while supposedly making decisions for the general good.[14] As one commentator has suggested:

> None of the planners knows what the eventual role of any of them will be in society – whether male, female, butcher, baker, candlestick-maker, disabled, gay, member of a majority or minority race, merchant, or thief. Yet all of the planners know and fully understand these roles. Thus, the purpose of perfect knowledge is to allow informed lawmaking, but the veil of ignorance assures that lawmakers will be concerned for the whole society, not just for themselves.

David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 Harv. J. on Legis. 331, 387-388 (Summer 2001).

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[14] As Rawls summarizes his idea: "Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain." *A Theory of Justice* at p. 12.

Here, since Mr. Elzinga did not know whether his property (or anyone else's) was located on the Cable Side or the Non-Cable Side, he lacked any incentive to negotiate a more favorable outcome for either group, and the knowledge necessary to create such an outcome. Instead, even if we assume he acted out of a rational regard to his own self-interest, his only interest could have been to ensure the most favorable outcome for both groups. Mr. Elzinga supported this interpretation in his affidavit, where he wrote: "Because I could not opt out in the future, and because I did not know if I would be a cable side or a non-cable side owner, I was particularly careful to make sure the compensation would be fair and reasonable no matter whether my land ended up being cable side or non-cable side." Elzinga Aff., ¶ 14. *Also see*, Ryan Kathleen Roth, *Mass Tort Malignancy in the Search for a Cure, Courts Should Continue to Certify Mandatory, Settlement Only Class Actions*, 79 B.U. L. Rev. 577 (April 1999), which applies Rawls' theory broadly to class action settlements. We might have arrived at a different allocation of benefits in also acting behind the veil of ignorance, but we cannot conclude for that reason that Mr. Elzinga's representation is inadequate or that the settlement is not fair.

Many of the intervenors' objections relate, directly or tangentially, to the Cable Side *versus* Non-Cable Side issue. In the following discussion, we focus only on other objections.

2. *Mason's Objections: No Case Or Controversy*.

In a significant variation on the Cable Side *versus* Non-Cable Side debate, intervenor Mason focuses on the "no-case-or-controversy" theory that we find so perplexing here. She argues that the division is unfair and that it leads to significant problems, foremost among which is that the Non-Cable Side owners do not now have, and "will never have," a case against T-Cubed. Mason's Objections, p. 7. *Also see* Buhl and Meighan's Objections to Proposed Settlement, ¶ 4. Since T-Cubed can lay its cable on only one side of the tracks, Ms. Mason argues, then it can never use the land on the other side. It follows that the Non-Cable Side owners will never be burdened with T-Cubed's cable and therefore have no cause of action and never will. The proper conclusion under this analysis, says Ms. Mason, is that the settlement fails to satisfy due process standards by dividing the class into two groups

with unequal rights. Accordingly, the class should not be certified even for purposes of settlement. Ms. Mason characterizes the settlement as "a non-adversarial endeavor to impose on countless individuals without currently ripe claims an administrative compensation regime binding on those individuals if and when they manifest injuries. . . ." Mason Objections, p. 11, quoting *Amchem*, 521 U.S. at 612.

If Non-Cable Side members have no cause of action and never will have one, Ms. Mason argues, then there is no justiciable case or controversy before the court.[15] The effect of this fact, she argues, would be that this court lacks subject matter jurisdiction over this matter, at least with respect to the Non-Cable Side owners (whoever they may be).[16] It also follows, says Ms. Mason, that neither Mr. Elzinga, nor any other potential representative can adequately represent the class; indeed, that Mr. Elzinga has no "standing" to do so. Mason Objections, pp. 7-8.

The essential flaw in Ms. Mason's no-case-or-controversy argument is that it presupposes that

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[15]Although Mason repeatedly cites *Amchem*, the *Amchem* court expressly refused to reach the question of whether the underlying lawsuit presented a justiciable case or controversy and whether the class representative had standing. 521 U.S. at 613, 117 S.Ct.at 2244.

[16]One further implication of this line of argument is that Mason is seeking to intervene in a lawsuit which, she claims, is not a case or controversy and over which, she argues, this court lacks jurisdiction. Mason nowhere explains how this court may rule on her motion to intervene without having jurisdiction over the subject matter.

"trespass" is the only cause of action alleged. *See* Mason Objections, pp. 11-12. If T-Cubed has not entered on the property – as it will not have on the Non-Cable Side – then no trespass has occurred. In fact, however, the complaint also alleges slander of title and it seeks a declaratory judgment specifying the plaintiffs' rights along with injunctive relief. If the slander of title and declaratory judgment actions are viable, then the Non-Cable Side owners *do* have a present cause of action (albeit perhaps not trespass) and the case or controversy requirement is satisfied. Without issuing an opinion on a matter not before us, it appears reasonably likely that, if the slander of title and declaratory judgment actions were adjudicated, they would not be subject to Rule 12(b)(6) dismissal. It follows that there are viable claims undergirding the class certification and the settlement.

3. *Buhl's and Meighan's Objections*

Consolidated here are the principal objections raised by intervenors Buhl and Meighan.

a. Intervenors Buhl and Meighan, like intervenor Mason, do not believe that the proposed compensation to class members is adequate. They argue that Non-Cable Side compensation is purely speculative, and that Cable Side compensation is inadequate. They protest that they do not

know which class members will be Cable Side and which Non-Cable Side. Meanwhile, the settlement grants T-Cubed far more advantage than it grants to the class members. T-Cubed gets a perpetual easement, which includes perpetual ingress and egress anywhere over the landowners' remaining property. Compensation to the class members is incommensurate with the interest that the class members cede to T-Cubed.

In addition, all three intervenors object to Class Corridor, LLC, which they see as an inappropriate vehicle for transacting business on behalf of the class and class counsel. They also argue that class counsel's 25% share in some of the revenues creates a conflict of interest between them and the class members.

We believe these objections go to issues that lie outside the fairness, adequacy, and reasonableness of the settlement. It is, perhaps, inevitable that, in a class of 58,000, some class members will not be satisfied with the terms negotiated by class counsel. As we noted earlier, however, our responsibility is not to ensure a perfect agreement or even an agreement with which all

class members are satisfied. It is to review the settlement negotiated by competent counsel with an eye toward its fairness, adequacy, and reasonableness. The fact that Messrs. Buhl and Meighan (and perhaps others) would have negotiated a different deal, or even a better deal, does not negate the finding that *this* deal was negotiated fairly, and that its terms are adequate and reasonable under all the circumstances. We are not at liberty to substitute our judgment for that of Class Counsel, T-Cubed Counsel, and the class representative. *Armstrong*, 616 F.2d at 315 ("Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.")

b. Intervenors Buhl and Meighan (and intervenor Mason as well) object that they received too little information as to the economic value of the settlement. In addition to arguing in favor of the economic value of the settlement, Class Counsel stated that there is no more information to be had on this issue. In other words, Class Counsel has provided intervenors – along with all class members and the court – all the information they had when they made the decision to enter into the agreement.

We are inclined to agree with Class Counsel that intervenors do not lack information so much as they lack confidence that the deal is the best that could have been negotiated. Given the information at hand, the intervenors are dissatisfied with the results.

We cannot, however, permit the disappointment of a few class members to outweigh the considered judgment of class counsel and the class representative. "[I]t is well established that a settlement can be fair notwithstanding a large number of objectors." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2nd Cir.1987), *cert. denied, Bethlehem Steel Corp. v. Grant*, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981). Indeed, the Second Circuit noted that numerous settlements have been approved where significant percentages of the class members have filed objections. Id. Here, as noted earlier, only 129 of 58,000 class members opted out, and only six class members presented objections, an enviable ratio of 1 in 10,000. As the D.C. Circuit noted in *Thomas v. Albright*, 139 F.3d 227, (D.C. Cir. 1998), *cert. denied, Thomas v. Albright*, 525 U.S. 1033, 119 S.Ct. 576, 142 L.Ed.2d 480 (1998):

> The court's primary task is to evaluate the terms of the settlement in relation to the strength of the plaintiffs' case. *See, e.g., Isby*, 75 F.3d at 1199. The court should not reject a settlement

> merely because individual class members complain that they would have received more had they prevailed after a trial. *See EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir.1985); *see also United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C.Cir.1977).

These views square with our responsibility to oversee the fairness, adequacy, and reasonableness of the settlement without second-guessing the judgment of seasoned participants.

c. "One of the most egregious aspects of the settlement," write Buhl and Meighan, "is that landowners who do not respond to the notice will be deemed to have surrendered a perpetual easement across their land." Objection, ¶ 5. The notice is conveyed by unsolicited mail, and many people do not read unsolicited mail. "Nobody expects to receive a letter to the effect that if they do not take action they are surrendering fundamental rights in their land." Id. Mr. Vowell, attorney for intervenors Buhl and Meighan, renewed this objection at the August 21 hearing. Tr., pp. 57, 86-87.

Messrs. Buhl and Meighan argue, additionally, that the notice is fatally defective. The opt-out procedure is difficult to understand and will lead to confusion. The language on compensation is misleading in that it describes amounts that class members "will" receive, when "might" receive is more

accurate. The statement that the landowners' use of their property is not diminished is misleading, because the settlement gives T-Cubed ingress and egress over property not adjacent to the corridor. Important information is buried in a lengthy and complex document. In its list of "considerations" that the potential class member should contemplate in determining whether to opt out, the question of whether the land owner can prove good title against T-Cubed is placed first and compensation is placed last. The placement of these considerations has a chilling effect on those who might otherwise opt out. The language of the notice is unclear with respect to opting out. It is also unclear as to the fact that remaining in the class grants T-Cubed a perpetual easement.

We are not unsympathetic to intervenors' arguments especially in this era of junk mail, when subscriptions to magazines come in envelopes marked IMPORTANT and it can be difficult to discern the difference between an official document from the IRS and an invitation to receive a new and unsolicited credit card. But the law requires "adequate notice," not perfect notice, and mailings have served the notice requirement since *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). *See United States v. McGlory*, 202 F.3d 664, 673, n. 9

(3d Cir. 2000). Similarly, all notices of class actions contain language that may be difficult for lay people to fully grasp. The notice issued here attained a reasonable balance between lawyerly precision and plain English (not to mention visual aids) and thus clearly passed constitutional muster.

d. Intervenors Buhl and Meighan next argue that the settlement has a particularly adverse effect on Tennessee landowners. They suggest that Tennessee law is clearer than, and superior to, the law of other states whose landowners are class members. Because of their other class action lawsuit, Tennessee law holds that the installation of telephone cable without the consent of the owners is a taking. In addition, Tennessee landowners may be entitled to punitive damages if the company unlawfully laying its cable does so in willful violation of the landowners' rights. Nevertheless, under the proposed settlement, Tennessee landowners are treated the same as all others.

It is apparent from these arguments that intervenors Buhl and Meighan – and similarly-situated Volunteers – might be better served by opting out of the class and proceeding in a Tennessee court. Opt out provisions serve as a kind of fail safe mechanism for class members who are unhappy with a proposed settlement and who believe their chances are stronger in a separate action. Indeed, use of an

opt out election is particularly useful where damage claims may be resolved by a class action and individual class members do not wish to be bound by the decision affecting the class. See, e.g., *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998).

4. *Other Objections*.

In addition to the objections of the three intervenors, Class Counsel addressed objections leveled (but not filed) by three other persons: Sprint Communications Company, Mary Jane Rossmaier, and Eric Beyeler. Each objected by letter to Class Counsel. The letters are attached to Plaintiffs' Response to Other Additional Objections and Assertions.

a. Ms. Rossmaier alleges that the settlement (and the lawsuit underlying it) is a sham engineered to make the lawyers money. Indeed, she asserts collusion between Class Counsel and the court: "The Class Members' attorneys have made arrangements (a deal with the court) that will make them millionaires for doing virtually nothing other than assembling the "class." The Class Members obtain almost nothing at the front end; the attorneys get most of it. In addition, the attorneys are setting themselves up to run the L.L.C. to provide a continuing stream of fees that is likely to consume any

profits of the L.L.C. and again the Class Members receive little."

Ms. Rossmaier is not alone in objecting to the attorney fee structure (although she is unique in asserting that the court harbors some devious intention to turn the lawyers into millionaires). Besides neglecting to provide any support for her assertions, her concerns are well addressed by the testimony of Professors Rotunda and Hodes, both of whom opine that the fee allocation comports with the Rules of Professional Responsibility, there is no conflict between counsel and the class members, and, in fact, applaud Class Counsel for making their pecuniary interests parallel to the class members. In addition, any hint that Class Counsel would "run" Class Corridor, LLC has been eliminated in the final settlement proposal.

b. Mr. Beyeler echoes intervenors in arguing that the landowners have no right of action at all, unless the Railroad has abandoned its easements. Instead, the Railroad retains its rights on active lines and can dispose of its property interests in any manner it chooses. This includes, presumably, granting easements to T-Cubed. These argument are more befitting the defendant in this action rather than the class. But the fact that T-Cubed has agreed to compromise the "rights" that

objector Beyeler believes Norfolk Southern conveyed to it is reasonably persuasive evidence that T-Cubed lacks Mr. Beyeler's confidence in his legal conclusion. Mr. Beyeler offers no legal support for his conclusion.

c. Sprint Communications wrote to inform Class Counsel that it intends to "preserve its rights to appear and participate in the August 21, 2001 hearing in this matter" and then, based on the information it learned at the hearing decide whether to opt out of the class. Mr. Evan Logan, counsel for Sprint, appeared at the August 21 hearing. Mr. Logan did not offer any explanation as to why he was present nor did he explain that he had any basis for asserting Sprint's standing. On class counsel's objection, we ruled him out of order. Tr., pp. 152-153.

V. *Conclusion.*

For the reasons addressed, we GRANT the parties' motion to certify the class, GRANT the parties' motion to approve the settlement, GRANT Class Counsel's petition for attorney fees and costs, and GRANT intervenors' motions to intervene with the court's permission for the limited

purposes of filing affidavits as to the value of the settlement and to preserve their right of appeal.[17]

Intervenors' objections are overruled.

It is so ORDERED this ______ day of September 2001.

____
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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[17]We also DENY Intervenor Mason's Motion for 30-Day Extension of Time to Submit Counter-Affidavits in Support of Objection to Class Action Settlement. At the August 21 hearing we invited additional affidavits supporting intervenors' valuation of the settlement, which Ms. Mason was apparently unable to do by the court's imposed deadline. After considering the voluminous documentation already on the record, we have determined that the factual record requires no further development to allow us to determine that the settlement is fair, adequate, and reasonable, so that the extension of time is thus denied..

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