

**Court of Appeals Case No. 10-094856
(Accelerated Docket)**

**IN THE COURT OF APPEALS OF OHIO
Eighth Appellate Judicial District, Cuyahoga County**

**ROBERT SCHMIDT,
Individually and on behalf of all others similarly situated,
Appellee-Plaintiff**

v.

**AT&T, INC. and SBC INTERNET SERVICES, INC.
d/b/a/ AT&T INTERNET SERVICES,
Appellees-Defendants**

**Appeal of GAIL FORD and CARRIE A. DUNNE,
Appellants-Proposed Intervenors**

**On Appeal from Cuyahoga County Court of Common Pleas
Case No.: CV 2009 688788**

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I. ASSIGNMENTS OF ERROR.

Appellants assert the following assignment of error:

The trial court erred in denying Appellants' Motion to Intervene.

II. COUNTERSTATEMENT OF THE ISSUE ON APPEAL.

Whether the trial court abused its broad discretion under Civ. R. 24 in denying a motion to intervene filed by disgruntled class members after the consummation of a proposed class settlement, but before the trial court's fairness hearing on the proposed settlement, when the trial court expressly stated that all class members who file objections to the settlement may participate in the fairness hearing.

III. STATEMENT OF THE CASE.

AT&T adopts the statement of the case by plaintiff-appellee and adds the following:

Appellants Gail Ford and Carrie Dunne have served since 2009 as named plaintiffs in another putative class action against AT&T in Missouri, *Ford and Dunne v. SBC*, No. 06CC-003325 (St. Louis County, Mo.), which was filed in 2005. Dkt. 34 ¶ 15. Ford and Dunne's counsel knew by December 23, 2009 of the Ohio case and the trial court's preliminary approval of the settlement here. Dkt. 37 at 5. More than five weeks later, on January 29, 2010, they moved to intervene in Ohio, claiming the proposed settlement is "unfair and inadequate" because the compensation for class members is too low and there is no injunctive relief; they also object to the attorneys' fees and charitable contributions provided for in the settlement, and to the claim form. *Id.* at 8-9. It is undisputed that the trial court's order setting forth the procedures for the approval of the settlement provided Ford and Dunne with the opportunity to object to the settlement at the fairness hearing if they did not opt out of the class.

IV. STATEMENT OF FACTS.

AT&T adopts the statement of facts by plaintiff-appellee and adds the following:

1. During settlement negotiations, AT&T provided plaintiff-appellee Robert Schmidt and his counsel with substantial data regarding AT&T's various DSL speed plans for its Internet customers and prices for those plans over time, customer speed performance data, and the full record of the case against AT&T in Missouri in which Ford and Dunne are the named plaintiffs, including discovery materials and transcripts of court proceedings from that litigation. Dkt. 39 at 2. The trial court found that "[t]he Settlement Agreement is not the result of collusion"—it was entered into "only after extensive arms length negotiations involving multiple mediation sessions" with former Judge McMonagle. Dkt. 34 ¶ 3.

The trial court conditionally certified a nationwide class of all persons who purchased DSL service from AT&T in the last 16 years, designated Schmidt as the settlement class representative, and appointed Schmidt's counsel as settlement class counsel. *Id.* ¶¶ 4-8. The court required class members to submit objections to the settlement before the fairness hearing, and stated that any class member who does not opt out and follows the objection procedures shall have the right to appear and be heard at that hearing. *Id.* ¶¶ 9, 19. The court further provided that a class member who wished to opt out of the class could do so by submitting a written request for exclusion before the fairness hearing. *Id.* ¶¶ 14, 16.

2. The Missouri case is much narrower in scope than the Ohio case: it alleges a narrow subset of the claims here (covering only one of AT&T's tiers of DSL service) and involves a narrow subset of the class members here (only customers living in Missouri, Arkansas, Texas, Oklahoma, and Kansas). Dkt. 34 ¶¶ 4, 15. The Missouri case, where trial court proceedings are now stayed pending appeal of class certification, is not advanced and has involved chiefly motion practice concerning matters unrelated to the merits of the claims at issue, such as personal jurisdiction, venue, whether AT&T's parent company is a proper defendant, whether

named plaintiffs were appropriate class representatives, and class certification.¹ Dkt. 39 at 3. The Missouri trial court stated in November 2009 that only “limited discovery” has occurred there, Dkt. 46, Ex. A at 2, 4.

There is no “smoking gun” establishing liability and damages in Missouri. Ford/Dunne Br. 5. Indeed, in its class certification order (now on appeal), the Missouri trial court noted that AT&T “presented several complex *and compelling* arguments” relating to, among other things, “disputed contractual, liability, and choice of law issues.” Dkt. 46, Ex. A at 2 (emphasis added). While the Missouri court concluded that these issues were “not relevant to a non-merit based procedural class certification determination under Missouri law,” it stated that “these merit arguments could play a substantial role in the ultimate outcome of this case if class certification is upheld, either as substantive evidence or for class modification as the case progresses.” *Id.* at 2-3. As will be shown at the fairness hearing, AT&T possesses formidable factual and legal defenses to the claims that are being settled, including the claims alleged in the Missouri case.

Ford and Dunne’s unsupported statements (at 6) about what occurred in the Missouri mediation sessions should be disregarded. First, those statements are improper—Missouri prohibits any disclosure of mediation discussions. Mo. Rev. Stat. § 435.014. Second, the statements are factually incorrect, as AT&T will show at the fairness hearing if the trial court decides that evidence regarding the Missouri negotiations may be presented.

3. Ford and Dunne’s motion to intervene said nothing about taking discovery. Dkt. 37. Nor did their reply brief. Dkt. 40. Not until their third brief on intervention (an opposition to AT&T’s motion to file a surreply) did Ford and Dunne first say that they sought intervention to conduct discovery. Dkt. 42 at 4. They filed that brief on March 3; because the court denied leave to intervene the next day, AT&T did not have time to object to this new ground for intervention.

¹ The May 2007 motion that Ford and Dunne cite (at 5 n.3) concerned two *other* named plaintiffs (Klorer and Bell) who since have been dropped from the case. Dkt. 46, Ex. A at 2.

Ford and Dunne never actually served discovery or requested leave from the trial court to do so.

V. ARGUMENT.²

A. Standard Of Review.

AT&T adopts the standard of review section in plaintiff-appellee's brief: decisions on whether to grant intervention are left to the sound discretion of the trial court. That deferential standard is consistent with the standard used for trial courts in class proceedings generally, in recognition of their case management expertise. See *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, ¶ 18 (the abuse of discretion standard applied to class certification "is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket"). Deference to the trial court's decision in this case is also consistent with that court's responsibility for instituting procedures to facilitate settlement (Civ. R. 16(1)) and its duty to determine the fairness of a class settlement (Civ. R. 23(E)).

B. The Trial Court Did Not Abuse Its Discretion In Denying Ford And Dunne's Motion For Intervention Of Right Under Rule 24(A).

"It is well settled that 'an appeal from the denial of a motion to intervene is limited solely to the issue of intervention.'" *State ex rel. Sawicki v. Court of Common Pleas*, 121 Ohio St.3d 507, 2009-Ohio-1523, ¶ 18. The substance and proceedings of the fairness hearing are matters strictly for the trial court in the first instance; that court has not yet had an opportunity to consider those issues as a result of the putative intervenors' premature appeal.

Ford and Dunne must establish *each* of the following elements for intervention of right:

"(1) the intervenor must claim an interest relating to the property or transaction that is the subject of the action; (2) the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect his or her interest; (3) the intervenor must demonstrate that his or her interest is not adequate-

² As explained in AT&T's motion to dismiss this appeal for lack of appellate jurisdiction (filed April 8, 2010), the order denying intervention is not appealable under R.C. § 2505.02.

ly represented by the existing parties; and (4) the motion to intervene must be timely.” *Cleveland v. State*, 8th Dist. No. 92735, 2009-Ohio-6106, 2009 WL 3861921, ¶ 6. As explained in detail below, the trial court did not abuse its broad discretion in concluding that Ford and Dunne did not satisfy their burden of establishing all four elements.

Indeed, this case illustrates the wisdom of deferring to a trial court’s discretionary decision on whether to grant a motion to intervene, which involves, at bottom, a judgment on how best to manage a particular case. Intervention decisions in class actions must be made with an eye toward protecting the interests of all class members, not just the interests of disgruntled objectors. Here, it is clear from the record that there was no reason to grant intervention. All of Ford and Dunne’s disagreements with the settlement may be raised and considered at the fairness hearing—a hearing in which objectors are entitled to fully participate, as the preliminary approval order provides. If those objections indicate a serious flaw in the settlement, Judge O’Donnell can permit intervention then. But granting intervention before then, particularly for the improper purposes present in this case, could only serve to delay the proceedings in the trial court, with no benefit to either the class as a whole or the objectors (who are already permitted as objectors to raise the same issues concerning the settlement that they could raise as intervenors). Under these circumstances, Judge O’Donnell acted well within his broad discretion in denying the motion to intervene.

1. Ford and Dunne have no interest in the action that intervention is necessary to protect.

a. Ford and Dunne contend (at 6, 10) that they need to intervene because the proposed settlement will “extinguish[]” their claims and provides “clearly inadequate compensation to the members of the Five-State Class.” Without intervention, they say, their “interest in obtaining a fair settlement” and their ability to “present[] relevant and important information...at the final fairness hearing” will be impeded. *Id.* at 3. But objecting class members can fully protect their

purported interest by objecting and participating in the fairness hearing, including presenting information about the settlement's substance—the adequacy of the compensation provided to class members will be one issue considered at that hearing. Or they may opt out, so they are not bound by any settlement. Either way, they need not intervene to protect their purported interest.

In these circumstances, courts deny motions to intervene by objecting class members. In *State v. Aggrey*, 10th Dist. No. 76AP-940, 1981 WL 3567, *1, the court rejected intervention because “[m]ovants have not opted out,” they “are therefore parties to the action as members of the class so that there is no necessity for them to intervene,” and their counsel “has been recognized for the purpose of offering evidence on their behalf” at the damages hearing. Likewise, in *Ruggles v. Bulkmatic Transp.* (S.D. Ohio Feb. 7, 2007), 2007 WL 496671, some class members sought to intervene after learning of a proposed settlement, arguing that they had an interest in the case “because if the settlement is approved, their claims will be released.” *Id.* at *2. The court rejected that argument, noting the intervenors could simply opt out. *Id.* The court also rejected their view that the settlement “is grossly inadequate” and “if intervention is not granted, they will not be able to protect their interests.” *Id.* The movants, the court held, “may protect their interests, if they choose to, by challenging the proposed settlement at the fairness hearing,” and “it would be premature to examine the fairness of the proposed settlement before the fairness hearing.” *Id.* at *3. Similarly, in *Bailey v. AK Steel* (S.D. Ohio Jan. 14, 2008), 2008 WL 148941, *6, *aff’d sub nom. Bailey v. White* (6th Cir. 2009), 320 F. App’x 364, another Ohio court denied a motion to intervene filed by a group of objectors, holding that “the primary purpose in moving to intervene, *e.g.*, to investigate and evaluate the fairness of the proposed settlement, is a function that Movants can fully perform as objectors upon the fairness hearing.”³

³ Federal cases are used in interpreting Ohio Civ. R. 24. *Indiana Ins. Co. v. Murphy*, 165 Ohio App. 3d 812, 2006-Ohio-1264, 848 N.E.2d 889, ¶ 8.

Courts consistently deny intervention when would-be intervenors can protect their interests by objecting at the fairness hearing or opting out. See *Santos v. Camacho* (D. Guam Aug. 5, 2004), 2004 U.S. Dist. Lexis 19365, *8, 16 (movants’ “rights and interests are preserved by opting out of the settlement[,] raising these same concerns at the fairness hearing,” or “filing separate suits”— “[i]ntervention would not accomplish any more than their participation as objectors” and thus is “unnecessary”); *Horton v. Metro. Life* (M.D. Fla. Oct. 25, 1994), 1994 U.S. Dist. Lexis 21394, *23-24 (denying intervention would not “unduly impede or impair [movants’] interests” because they may “opt out” and “litigate elsewhere” or “object to the settlement” and “appear at the fairness hearing”), *aff’d sub nom. Grilli v. Metro. Life* (11th Cir. 1996), 78 F.3d 1533; *Webcor Elecs. v. Whiting* (D. Del. 1984), 101 F.R.D. 461, 466 (“courts have denied motions to intervene based in part on the proposed intervenors’ opportunity to present objections at fairness hearings”) (collecting cases).⁴

Ford and Dunne cite no case disagreeing with these settled principles. Nor do they cite any case permitting intervention when, as here, unnamed class members can protect their interests by objecting at the fairness hearing or opting out.

It is plain that when Judge O’Donnell denied the motion to intervene, the availability of those two options—opting out or objecting—fully protected Ford and Dunne’s interests, without any need for intervention. Class members who opt out clearly cannot intervene—they would have no further interest in the case and no standing to object to the settlement. *Beder v.*

⁴ See also *Thompson v. Metro. Life* (S.D.N.Y. 2003), 216 F.R.D. 55, 70 (“Where class members’ differences of opinion with class counsel on a negotiated settlement can be adequately addressed through the Court’s consideration of the objections, intervention is unnecessary and unwarranted”—the movants also “could have opted-out of the settlement and litigated elsewhere”); *In re DHB Indus.* (E.D.N.Y. Sept. 30, 2007), 2007 WL 2907262, *2 (“Bedik’s ability to protect her interest is not impaired” because “she can object to the fairness of the settlement” or “opt out of the class and bring her own lawsuit”); *In re Nasdaq Market-Makers Antitrust Litig.* (S.D.N.Y. 1998), 187 F.R.D. 465, 491 (“Class members need not formally intervene in order to raise their objections to a proposed settlement”).

Cleveland Browns (Com. Pl. 2001), 114 Ohio Misc. 2d 26, 31 n.3, 758 N.E.2d 307 (“Under Civ. R. 23(E), nonclass members lack standing to object to a proposed settlement”)⁵. On the other hand, objecting class members can participate in the fairness hearing and present information about the settlement’s substance. The trial court ultimately will determine whether their objections hold any water. In the unlikely event the trial court agrees with them, it could permit intervention then. *Webcor*, 101 F.R.D. at 466-67 (denying motion to intervene because the movant, Polak, could object at the fairness hearing, but stating that “[i]f the settlement is then disapproved because of Polak’s objections, the Court will more than likely grant his motion to intervene”—“[i]n the meantime, Polak’s rights will be fully protected as an objector”). Thus, Ford and Dunne could fully protect their interests by presenting their objections at the fairness hearing or by opting out.

b. Ford and Dunne assert (at 10) that without intervention “they would not be able to conduct discovery.” But they did not even mention discovery as a reason to intervene until their *third* intervention brief below—in opposition to AT&T’s motion to file a surreply—filed the day before the trial court denied the motion to intervene. Dkt. 42 at 4; compare Dkt. 37, 40. Thus, they have waived discovery as a ground for intervention. See *Hahn v. Wayne County Children Servs.*, 9th Dist. No. 00CA0029, 2001 WL 489959, *3 (“the trial court erred in addressing...arguments” that were “raised for the first time in [a] reply brief”). Indeed, they have never sought discovery here, even though they have known of the settlement since December.

In any event, Ford and Dunne cite no case holding that intervention is required before objecting class members may take discovery. The law is the reverse: it is well settled that courts may permit objectors to take discovery *without* intervening. See 2 MCLAUGHLIN ON CLASS ACTIONS § 6:10, at 57-58 (6th ed. 2010) (“Generally, courts have not required that objectors

⁵ Indeed, since the filing of this appeal, Ford has opted out of the settlement, and Dunne has asserted objections to the settlement that mirror those advanced in her intervention papers.

intervene in the action in order to invoke the discovery tools available to parties”—courts have “broad discretion to grant or deny an objector’s request for discovery”); *Hemphill v. San Diego Ass’n* (S.D. Cal. 2005), 225 F.R.D. 616, 619, 621-24 (granting objectors some discovery, but denying discovery into settlement negotiations and class counsel’s files); *In re Consol. Indus.* (N.D. Ind. May 28, 2008), 2008 WL 2225819, *1 (granting objectors discovery “to determine if the proposed settlement is fair and equitable”); *In re Domestic Air Transp. Antitrust Litig.* (N.D. Ga. 1992), 144 F.R.D. 421, 425 (granting objectors discovery on some issues). Further, intervention does not automatically guarantee discovery rights—a trial court has discretion to refuse discovery to intervenors. See Ohio Civ. R. 23(D)(3) (courts may “impose[] conditions... on intervenors” in class actions); *7547 Partners v. Fistek* (5th Cir. Apr. 29, 1997), 1997 WL 255562, *10 (affirming denial of discovery to plaintiff before fairness hearing; “in the class action context...determining whether or not to grant discovery requests is well within the discretion of the court”); *White v. NFL* (D. Minn. 1993), 836 F. Supp. 1458, 1497 (rejecting a defendant’s request for discovery, which would have delayed final approval of settlement), *aff’d* (8th Cir. 1994), 41 F.3d 402; see also *Tennessee Ass’n v. Grier* (6th Cir. 2001), 262 F.3d 559, 567 (trial courts have “discretion to limit the fairness hearing” to issues concerning “whether the proposed settlement is fair, adequate and reasonable”). In short, Ford and Dunne’s status as intervenors or objectors is irrelevant to their belated suggestion that they will seek discovery. See *Domestic Air*, 144 F.R.D. at 423 (“objectors would be no more entitled to the discovery they seek as intervenors than they are as class members”).⁶

c. Ford and Dunne also argue (at 11) that intervention is “necessary to protect [their] right to appeal the trial court’s fairness determination.” Not so. The case they cite holds that “a non-

⁶ It would be premature for this Court to address whether discovery should be permitted and the specific topics on which Ford and Dunne say they will seek discovery. Those are issues that should be decided by the trial court in the first instance, after Ford and Dunne have filed formal discovery requests.

named party that has not been permitted to intervene *may also have standing to bring a direct appeal* if a motion to intervene, which is then appealed, should have been granted.” *Sutherland v. ITT Res. Cap.* (1997), 122 Ohio App. 3d 526, 538, 702 N.E.2d 436 (quoting *Shults v. Champion Int’l* (6th Cir. 1994), 35 F.3d 1056, 1061) (emphasis added). True, *Sutherland* also held that the appellant there lacked standing to appeal, but that was because he “merely filed written objections to the proposed settlement” and “failed to properly make an appearance”—before the fairness hearing, he “had never previously notified the parties or the court of his intention to appear,” as required. *Id.* Further, to the extent that *Shults*, on which *Sutherland* relied, held that non-named class members could not appeal an order approving a class action settlement, it was specifically overruled in *Devlin v. Scardelletti* (2002), 536 U.S. 1, 6, 14 (“We hold that nonnamed class members...who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening”).

2. Adequacy of representation is another issue for the fairness hearing.

Ford and Dunne contend (at 12-13) that their interests are not adequately represented by plaintiff Schmidt and class counsel. Again, this is an issue to be decided at the fairness hearing.

When the interests of a proposed intervenor are “virtually identical” to that of a party named in the action, intervention will not be granted unless the proposed intervenor makes “a compelling showing that the party already participating in the proceeding can not or will not adequately represent the prospective intervenor’s interest.” *Toledo Coalition for Safe Energy v. Pub. Utils. Comm’n* (1982), 69 Ohio St. 2d 559, 562, 433 N.E.2d 212. Here, the trial court designated plaintiff Schmidt as the settlement class representative, and appointed his counsel as settlement class counsel. Dkt. 34 ¶¶ 7-8. The fact that Schmidt and his counsel agreed to a settlement that Ford and Dunne think is “low” and includes an allegedly improper charitable contribution (Ford/Dunne Br. 13) does not demonstrate inadequacy of representation. *McDonald*

v. Med. Mut. of Cleveland (Com. Pl. 1974), 41 Ohio Misc. 158, 168, 324 N.E.2d 785 (finding settlement class adequately represented despite objectors' claims that the settlement was unfair); *Laskey v. Int'l Union* (6th Cir. 1981), 638 F.2d 954, 957 ("That the class counsel proposed a settlement which the named representatives opposed does not prove that the interests of the class were not protected"); *Delaware Valley Citizens' Council v. Pennsylvania* (3d Cir. 1982), 674 F.2d 970, 973-74 (that the proposed intervenors would not have entered into the consent decree does not mean their interests were not adequately represented); *Bailey*, 2008 WL 148941, *7 ("Mere dissatisfaction with the terms of a proposed class action settlement is insufficient to prove that the interests of class members are not adequately represented by their class representatives"); *Bowling v. Pfizer, Inc.* (S.D. Ohio 1992), 143 F.R.D. 141, 152 ("whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance").

The Ohio court denied a motion to intervene filed by would-be settlement objectors on this same ground in *Ruggles*. In response to the movants' argument "that the representation in the instant case is inadequate," the court held that "any challenge to the proposed settlement is premature." 2007 WL 496671, *3. See also *Santos*, 2004 U.S. Dist. Lexis 19365, *12 (if the movant believes there was "collusion between the parties in reaching a settlement, she may raise such objection at the time of the fairness hearing"); *Webcor*, 101 F.R.D. at 465 ("The Court at this time, having not yet held a settlement hearing,...does not know if Webcor adequately represents the [class's] interests"); *Nasdaq*, 187 F.R.D. at 491 (an objector's argument of inadequate representation because "class counsel negotiated a settlement of which he does not approve...can be adequately addressed through this Court's consideration of the fairness of and timely objections to the settlement. Intervention as of right is unnecessary and unwarranted").

Like other issues as to the appropriateness of the settlement, adequacy of representation is

a question for the fairness hearing—at which objecting class members could present their position on the matter. Intervention is not necessary to consider this issue.

3. The purpose for which Ford and Dunne sought to intervene was improper.

Judge O’Donnell also properly exercised his discretion to deny a motion to intervene interposed for an improper purpose. Ford and Dunne sought to intervene not to prosecute in this case their claims against AT&T, or to protect their individual interests, but to scuttle the proposed settlement in order to continue the Missouri case. Dkt. 37, Proposed Complaint at 4. Under the parties’ agreement, the settlement may be terminated if it is not approved in its current form, or if more than 10,000 persons opt out. Dkt. 37, Ex. 4 ¶ V(6)(b). Thus, while Ford and Dunne purport to seek only to “exclude the Five-State Class from this settlement” (Ford/Dunne Br. 15 n.14), that relief would destroy the settlement for *all* members of the nationwide class. This is another reason why the trial court appropriately denied their request for intervention. *Horton*, 1994 U.S. Dist. Lexis 21394, *7, 27 (denying intervention because “[t]he Coulters’ attempt to exclude all Pennsylvania residents from the settlement class”—and proceed with a “separate class action” in Pennsylvania—“is improper”); *Santos*, 2004 U.S. Dist. Lexis 19365, *12 (denying intervention when it would “perhaps destroy the settlement and would thus prejudice the rights of the class members”).

What is more, while Ford and Dunne sought intervention to protect the interests of the “Five-State Class” that Ford and Dunne purport to represent, in *this* case, they represent only themselves. The trial court has preliminarily designated Robert Schmidt as class representative, including for customers in Missouri, Texas, Oklahoma, Kansas, and Arkansas. Dkt. 34 ¶ 7. It has not designated Ford and Dunne (or their counsel) as representatives of *any* class. Even if Ford and Dunne were deemed to represent a limited class in Missouri, that would change nothing in this case, because Ford and Dunne still could not exercise the right of other class members to opt

out of or object to the proposed settlement here—opt outs and objections must be submitted individually. See Dkt. 34 ¶ 16 (preliminary approval order: “‘mass’ or ‘class’ opt-outs *shall not be allowed*”); Dkt. 37, Ex. 4 (emphasis added), Ex. G ¶ 13 (notice to the class: objections will not be considered unless the class member submits a written objection containing “Your name and address” and “Your contact telephone number”); *Hanlon v. Chrysler Corp.* (9th Cir. 1998), 150 F.3d 1011, 1024 (“no class action rule, statute, or case” allows a “putative class plaintiff or counsel to exercise class rights en masse, either by making a class-wide objection or by attempting to effect a group-wide exclusion from an existing class”).

Additionally, Ford and Dunne pursued intervention in order to derail the notice process provided for by the trial court’s preliminary approval order and to convene what would essentially have been a private fairness hearing separate and apart from the proceedings available to all other potential class members. Again, the trial court appropriately exercised its discretion in denying this legally insupportable request.

4. The motion to intervene was untimely.

Ford and Dunne’s motion to intervene was also untimely. In deciding the timeliness issue, courts consider, among other things, “the purpose for which intervention is sought,” “the length of time preceding the application during which the intervenor knew...of his interest in the case,” and “the prejudice to the original parties due to the proposed intervenor’s failure, after he or she knew...of his or her interest in the case, to apply promptly for intervention.” *Peterman v. Village of Pataskala* (1997), 122 Ohio App. 3d 758, 762, 702 N.E.2d 965.

From the start, Ford and Dunne’s purpose has been to disrupt and delay the issuance of notice and the fairness hearing. Although they knew by December 23, 2009⁷ of the preliminarily approved settlement and the June 1 hearing date (Dkt. 37 at 5), they waited more than five weeks

⁷ Contrary to what Ford and Dunne say (at 9 n.9), no discovery requests in Missouri required AT&T to notify them of the Ohio case earlier than that.

before taking any action in this case, seeking improperly to intervene. After the trial court denied their motion to intervene on March 4, they did nothing for two more weeks, filing their notice of appeal on March 19. They took no action in the trial court to try to prevent notice from being given to the class until filing a belated stay motion, also on March 19—when the expensive process of notifying millions of class members was well underway. Dkt. 47, Exs. 1-2.

Ford and Dunne admit that granting intervention will delay this case, but they say (at 15) the delay will be only “slight.” But disruption of the existing schedule harms millions of class members by depriving them of the opportunity to obtain the benefits of the settlement while they await a rescheduled fairness hearing. Ford and Dunne may be content to wait, but this Court should not disregard the interests of their fellow class members around the country. Cf. *Carlough v. Amchem Prods.* (E.D. Pa. 1993), 1993 WL 441720, *2 (denying objectors’ motions to certify orders for interlocutory appeal and noting that “[a]ny delay in dissemination of notice puts off the day when the class members can begin to benefit from the terms of the proposed settlement should the Court find its terms fair”).

Under these circumstances—when Ford and Dunne’s purpose in seeking to intervene was to disrupt the orderly procedures established by the trial court to consider objections to the proposed settlement—it is clear that the motion to intervene was untimely and intervention would unduly prejudice the existing parties. *Bailey*, 2008 WL 148941, *6 (“The parties are prejudiced by the... delay in moving to intervene because the settlement will be disrupted and delayed, undermining the very purposes of any settlement”—thus, “the motion to intervene is not timely”).

Ford and Dunne say that none of this matters—that “undu[e] delay or prejudice” to the parties “are not factors when considering intervention of right.” Ford/Dunne Br. 8 (citing *Brewer v. City of Middletown*, 12th Dist. No. CA91-02-039, 1992 WL 185691, *2). *Brewer*, however,

cites no authority to support this proposition, it has never been cited for this point, and we are unaware of any other case so holding. In fact, *Brewer* is contrary to long-settled law in this Court, *Likover v. City of Cleveland* (1978), 60 Ohio App. 2d 154, 158-59, 396 N.E.2d 491 (“the basis of the alleged right to intervene is balanced against trial convenience and potential prejudice to the rights of original parties”), and elsewhere, e.g., *Bailey*, 2008 WL 148941, *6.

C. The Trial Court Did Not Abuse Its Discretion In Denying Ford And Dunne’s Motion For Permissive Intervention Under Rule 24(B).

For the reasons already stated, permissive intervention is also inappropriate. Because class members may “object or exclude themselves from the settlement class already...[g]ranted permissive intervention...would serve no purpose.” *Horton*, 1994 U.S. Dist. Lexis 21394, *33. See *Youngstown Educ. Ass’n v. Youngstown City Bd.* (1973), 36 Ohio App. 2d 35, 44, 301 N.E.2d 891 (affirming denial of permissive intervention when “no useful purpose would be gained by permitting [movant] to become a party to this lawsuit”) (concurring opinion by two judges). Permissive intervention would cause delay, thus harming the many class members who would like to participate in the settlement and are in the process of submitting claim forms. *Santos*, 2004 U.S. Dist. Lexis 19365, *16 (denying permissive intervention because it “could unduly prejudice the settling parties by unnecessarily delaying the fairness hearing”). The motion to intervene was also untimely, which “alone justifies denying [permissive] intervention.” *Horton*, 1994 U.S. Dist. Lexis 21394, *30-31. And none of the allegedly “common, overlapping questions” that Ford and Dunne list (at 14) are, in fact, questions of law or fact pending before the Missouri case. Rather, they pertain solely to the proposed settlement in this case.

VI. CONCLUSION

If the Court does not dismiss this appeal for lack of appellate jurisdiction, it should affirm the trial court’s order denying intervention. AT&T also respectfully requests that the Court, in its opinion deciding this case, lift the stay pending appeal if it is still in place then.

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I hereby certify that a copy of foregoing **APPELLEES-DEFENDANTS' BRIEF** was served via ordinary U.S. mail, postage prepaid, this 24th day of May, 2010 upon the following:

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