

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 14-3421

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY ELLEN KALANGE,)
)
 Interested Party-Appellant,)
)
 v.)
)
 DOUGLAS J. SUTER, et al.,)
)
 Plaintiffs-Appellees,)
)
 PORSCHE CARS NORTH AMERICA, INC.; DR.)
 ING. H.C. F. PORSCHE AG,)
)
 Defendants-Appellees.)

FILED
 Jul 13, 2015
 DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE UNITED
 STATES DISTRICT COURT FOR
 THE SOUTHERN DISTRICT OF
 OHIO

ORDER

Before: SUHRHEINRICH, ROGERS, and GRIFFIN, Circuit Judges.

Mary Ellen Kalange, an Idaho citizen, appeals pro se the district court order approving a final settlement of a class action. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Cases from around the country against Porsche Cars North America, Inc. (“PCNA”), the distributor for Porsche automobiles in America, and Dr. Ing. h.c. F. Porsche AG (“Porsche AG”), the German manufacturer, were consolidated in the Southern District of Ohio in a class action. The complaint, filed under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-12, and state tort law, alleged that certain model years of the Porsche Cayenne SUV with V8 engines had defective plastic tubes in the cooling system. PCNA filed a motion to dismiss for failure to state a claim, which was partially granted. Porsche AG filed a motion to dismiss for lack of personal

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jurisdiction under Federal Rule of Civil Procedure 12(b)(1), which was not ruled on. The named plaintiffs and PCNA then entered into settlement negotiations. The resulting agreement awarded the named plaintiffs \$5000 each. Unnamed class members could file claims for damages of up to \$1800, depending on the mileage on their vehicles and other factors. In exchange, all claims other than those for personal injury against the defendants were waived. Notice of the settlement was served on the class.

Interested party-appellant Kalange filed objections to the settlement and attended the fairness hearing in the district court, arguing that the proposed awards to claimants were insufficient to compensate them or to punish the defendants. She did not opt out of the class. She stated that she had previously clerked for both federal district and circuit court judges but was no longer practicing law. She acknowledged that she would be eligible for the highest damages, \$1800, under the settlement agreement. However, she never filed a claim.

The district court overruled Kalange's objections, noting that she could have opted out of the class if she believed she could obtain greater damages, and that her desire to punish Porsche AG faced a significant hurdle in that the court's jurisdiction over that defendant was in doubt. The settlement agreement was approved, and this appeal followed. The appeal was dismissed when Kalange failed to timely file her brief, but it was later reinstated. Kalange argues that the notice to the class members did not satisfy due process because the notice of the claims and parties to be released was unclear. She also argues that the settlement was unfair, that several objections were erroneously sealed, and that the objecting parties were not served with the final order. Defendant PCNA, in its brief, urges the court to consider sanctioning Kalange for raising claims on appeal that she waived below, and moves the court to take judicial notice of its attempt to convince Kalange to narrow the issues on appeal.

Issues that were not raised in the district court are waived and will not be reviewed on appeal. *O'Bryan v. Holy See*, 556 F.3d 361, 375 (6th Cir. 2009). An exception may be made where the failure to consider an issue would result in a miscarriage of justice. *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 528-29 (6th Cir. 2014). Kalange never

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raised in the district court the issue she presents in her brief regarding the adequacy of the notice to the class. In fact, she expressly waived that issue at the fairness hearing. No miscarriage of justice will result if the claim is not reviewed by this court, because it is without merit. Kalange complains that the notice did not give accurate notice of the claims and parties to be released. However, the notice provided the class with addresses, phone numbers, and a website to access the settlement agreement, which listed the released parties and claims in paragraphs 17 & 18. The settlement agreement was also available on Pacer, to which Kalange had access.

The approval of a settlement agreement is reviewed for an abuse of discretion. *Int'l Union, UAW v. Gen. Motors Corp.*, 497 F.3d 615, 625 (6th Cir. 2007). Kalange relies on *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 755 (6th Cir. 2013), in arguing that the settlement in this case gave preferential treatment to the named plaintiffs and only perfunctory relief to the unnamed class members. Again, at the fairness hearing, Kalange waived any objection to the awards for the named plaintiffs or the agreed attorney fees. The district court correctly noted that, to the extent Kalange felt she was personally entitled to more than the \$1800 she could receive through the agreement, she could have opted out of the class to pursue her claim. The district court thoroughly discussed all of the relevant factors: 1) the risk of fraud or collusion, 2) the complexity, expense and likely duration of the litigation, 3) the amount of discovery, 4) the likelihood of success, 5) the opinions of class counsel and representatives, 6) the reaction of the absent class members, and 7) the public interest. *See Poplar Creek Dev. Co. v. Chesapeake Appalachia, LLC*, 636 F.3d 235, 244 (6th Cir. 2011). Kalange makes no meaningful objection to the court's findings. Most notably, the district court found that the issues of law, particularly the personal jurisdiction over Porsche AG, were complex. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 758-62 (2014) (finding no personal jurisdiction in U.S. courts over foreign firm with limited contacts). Also, all of the class counsel and representatives were in favor of the settlement. This factor is one that the court is required to consider, despite Kalange's argument that such "blind deference" was improper. Regarding the rest of the class, thousands filed claims under the agreement, only four opted out, and only twelve filed

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objections. Finally, the settlement served the public interest because the class members would be encouraged to replace the allegedly defective tubes before they caused a public safety concern.

Kalange objects to the district court's filing of some of the class members' objections under seal. This objection is without merit because the objections were summarized and addressed in the motion for approval of the settlement by the named class representatives and the response to the objections by PCNA. Kalange complains that she did not receive these filings because she was on vacation the week before the fairness hearing. However, she admittedly had access to the filings on Pacer. Finally, Kalange complains that the objectors were not served with the district court's order approving the agreement, hypothesizing that more objectors might otherwise have filed timely appeals. This objection does not affect Kalange, whose appeal was timely. Moreover, the order was available on the website, of which all class members were apprised.

PCNA's brief urges the court to consider sanctions against Kalange, noting that the order reinstating the appeal warned her that raising claims not presented to the district court could warrant sanctions under Federal Rule of Appellate Procedure 38. *See B & H Med., LLC v. ABP Admin., Inc.*, 526 F.3d 257, 270 (6th Cir. 2008). PCNA also moves the court to take judicial notice of its attempt to persuade Kalange to narrow the claims presented for appeal. Rule 38 requires a separately filed motion, which PCNA may file after the disposition of the appeal. The attachment to its motion to take judicial notice would be appropriately included with such a motion. The motion to take judicial notice is therefore denied as unnecessary.

For all of the above reasons, the district court's order approving the class action settlement agreement is affirmed.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

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

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Clerk

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Filed: July 13, 2015

Ms. Mary Ellen Kalange

Mr. William Francis Kiniry Jr.

Mr. Mark Hayden Troutman

Re: Case No. 14-3421, *Douglas Suter v. Porsche Cars N Amer, Inc, et al*
Originating Case No. : 2:11-md-02233

Dear Sir or Madam,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Robin Baker
Case Manager
Direct Dial No. 513-564-7027

cc: Mr. Matthew Aaron Goldberg
Mr. Gary Klein
Mr. Mark D. Landes
Mr. Terrance Michael Miller
Mr. Richard W. Nagel
Mr. Gregory M. Travalio
Mr. Gregory Wayne Wix

Enclosure

Mandate to issue