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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In Re Anthem, Inc. Data Breach Litigation

ADAM E. SCHULMAN,

Objector.

Case No. 15-md-02617-LHK

REPLY IN SUPPORT OF MOTION OF ADAM E. SCHULMAN TO APPOINT SPECIAL MASTER

Date: February 1, 2018
Time: 1:30 p.m.
Courtroom: 8, 4nd floor
Judge: The Honorable Lucy H. Koh

MEMORANDUM OF POINTS AND AUTHORITIES

Issue to be decided

1. In conjunction with evaluating the reasonableness of class counsel's requested attorneys' fees (Dkt. 916-5), should the Court appoint a special master to (A) investigate counsel's billing records, time expenditures, hourly rates, and fee sharing agreements among the firms and to (B) report and recommend a lodestar accounting and a proposed fee allocation amongst the firms.

Proposed answer: Yes.

Statement of relevant facts

Schulman's motion ("Mot.") (Dkt. 929) describes in detail the relevant facts as of the filing of the motion. Mot. 7. On January 18, 2018, plaintiffs filed a timely opposition to Schulman's motion. Dkt. 938 ("Pl. Opp."). This reply memorandum follows.

Argument

I. Appointing an attentive special master would conserve this Court's resources and aid it in discharging its duty to safeguard the class's common fund.

As plaintiffs concede, this Court possesses the authority to appoint a master as recommended by Schulman. Pl. Opp. 3. Should it? Yes, the Court's "jealous regard"[1] for class members' share of the common fund, in conjunction with the unusual circumstances of this case counsel in favor of granting the motion. The specter of a "second major litigation"[2] fundamentally misunderstands the difference in posture between *Hensley* and a class-action settlement. *Hensley* was a fully-litigated case, followed by collateral 42 U.S.C. § 1988 litigation on fee-shifting after judgment. 461 U.S. at 426-29. As a matter of judicial economy, in such circumstances it is ideal for the fee dispute to be settled because it has no potential way of prejudicing the absent class, whose relief has already been etched in stone by an Article III court. By contrast, the fee request here direct and proportionally diminishes the class's enjoyment of the common fund. When "the proceeds available

[1] *In re Mercury Interactive Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (quoting *In re Wash. Pub. Power Supply Sys. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994)).

[2] Pl. Opp. 1, 4, 9 n.1, 18 (citing or quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

to class members rise and fall with the rising or falling amount of class counsel's fees" the Court should mark with a "sharp pencil." *United States ex rel. Palmer v. C&D Techs., Inc.*, 2017 WL 1477123, at *4 (E.D. Pa. Apr. 25, 2017). Put simply, settlements that affect the absent class "are different." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). And again just this week, the Ninth Circuit reaffirmed the solemn imperative to scrutinize class action settlement fee awards. *In re Hyundai and Kia Fuel Econ. Litig.*, __F.3d__, 2018 WL 505343, at *14-*15 (9th Cir. Jan. 23, 2018). Assuredly there are places for the judicial exercise of restraint, deference, compromise, and guesstimation, but a review of a class settlement and accompanying fee motion is not one such place.

Plaintiffs profess a belief that a special master appointment is an "exceptional measure" that requires an extraordinary justification, and that no exceptional circumstances are present here. *E.g.* Pl. Opp. 9 ("only truly exceptional circumstances warrant the appointment of a special master"). Plaintiffs manage to miss the mark in both directions. Rule 53 does not require the showing of exceptional circumstances for the type of referral Schulman seeks. Appointment is an "obvious possibility" "frequently used in fee matters and especially appropriate in a case such as this that lacks and adversary setting." *In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). Rule 53's text only requires an "exceptional condition" where the court appoints a master to hold trial proceedings; no such standard attaches where the reference is justified by the need to perform an accounting. Fed. R. Civ. P. 53(a)(B)(i)-(ii). Schulman does not ask for the outsourcing of a trial and the reference can be easily justified by the need to perform an accounting.

Plaintiffs fret the possibility of inefficiency, delay, and costs—specifically costs to the Court—of a reference to a master now. Pl. Opp. 8-9. First, and perhaps most importantly, the appointment of a special master to resolve issues regarding the fee request would not prevent nor delay class members from receiving the settlement benefits they are owed. Settlement Agreement (Dkt. 869-8) ¶ 12.4 ("The finality or effectiveness of the Settlement will not be dependent on the Court awarding Class Counsel any particular amount of attorneys' fees and/or costs"); ¶ 14.1 (listing conditions precedent to effective date occurring; omitting mention of decision on fees). While *class*

counsel may have to wait a bit longer for their payday, that is a consequence of their own making. Second, plaintiffs express concern for the resources of the Court "in supervising this extended collateral litigation, for which no party could compensate." Pl. Opp. 9. Certainly, if the Court believes plaintiffs are correct that appointment of a special master would increase the Court's burden, it has the discretion to reject Schulman's motion on that basis. But the premise is contrary to common sense: appointing a special master should alleviate the burden placed on the court, not exacerbate it. *E.g. In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 499 (D.N.J. 2012).

Schulman appreciates plaintiffs' newfound preference for efficient litigation; he only wishes they had discovered that preference before delegating work to 53 firms and saddling the class members with that inefficiency. The time and money that a master consumes will be in direct relation to the severity of irregularities and other red flags raised by plaintiffs' fee request—all of which their counsel could have prevented. It is thus equitable that the burden from any increase in the time until plaintiffs' attorneys receive their fee award and any reduction in that award due as compensation to the master will fall on them.

In no other case has Schulman's counsel moved for such an appointment.[3] But in this MDL, the confluence of billing irregularities, unanswered questions, facial excess, and recidivism justifies the costs of a master.[4]

II. A special master should be appointed to investigate the prima facie unreliability of class counsel's purported lodestar.

Schulman, plaintiffs allege, "fails to point to any actual 'irregularities,' and offers no case-specific or factual justification for appointment of a special master here." Pl. Opp. 10. They apparently see nothing irregular about charging class members nearly $14,000,000 for reviewing

[3] In *Arkansas Teacher Retirement Sys. v. State Street Bank and Trust Co.*, 232 F. Supp. 3d 189 (D. Mass. 2017), CCAF filed an *amicus* brief endorsing Judge Wolf's *sua sponte* proposal to appoint a special master.

[4] Again, those costs should be borne by class counsel as the party who has occasioned the need for the master. Mot. 16-17

documents, when the market cost of that rote work would have been less than $2,000,000.[5] And nothing irregular about turning the appointment of a four-firm leadership structure into a 53-firm leviathan (from which the one dissident firm (Robbins Geller Rudman Dowd) (Dkt. 217) was conspicuously excluded). And nothing irregular about billing three days of work on average for each of nearly 200 depositions. And nothing irregular about spending 2500 hours to negotiate and draft the 31-page settlement. No one has questioned co-lead counsel's authority to "assign discrete tasks to counsel for other plaintiffs in this MDL for resource intensive-tasks." Pl. Opp. 16 (quoting Dkt. 286). Schulman questions only whether "[t]his augmentation of resources" was "on an as needed basis and consistent with efficiency" as the Court ordered. Dkt. 286. Only in a bizarre world is it considered "on the cheap" to bill something less than 78,553 hours for a case less than three years old and settled for less than a dollar per class member. Pl. Opp. 2.

True, a lodestar crosscheck need entail neither a green eyeshade nor a bean-counter. Pl. Opp. 3. And if we were talking about a misplaced bean or two, this motion would never have been filed. But the fact that class counsel sought fees on a percentage-of-recovery basis does not excuse inflating with impunity the lodestar-crosscheck figure. Plaintiffs should not be permitted to handicap this Court by depriving it of the discretion to rely more heavily on lodestar when the circumstances suit it. *See Nitsch v. DreamWorks Animation SKG Inc.*, 2017 WL 2423161 (N.D. Cal. June 5, 2017) (employing lodestar approach in megafund case to avoid "windfall profits"). Plaintiffs seek to have a "rough" crosscheck support a $37.8 million lodestar here, accumulated in less than 3 years. None of the cases plaintiffs rely on are remotely analogous. In cases of comparable duration, each produced lodestars of $2.2 million (*Perkins v. Linkedin Corp.*, 2016 WL 613255 (N.D. Cal. Feb. 16, 2016)), or

[5] Plaintiffs claim "Objector ignores the context of the special master's appointment in" *State Street*. Pl. Opp. 10. This is wrong. The court in *State Street* was concerned about far more than double-counting. The *State Street* appointment expressly stated that "the court wonders whether paying clients customarily agreed to pay, and actually paid, an hourly rate for staff attorneys that is about ten times more than the hourly cost, before overhead, to the law firms representing plaintiffs" and "what other lawyers in their community charge paying clients for similar services." 232 F. Supp. 2d at 192-93.

less (*Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856 (C.D. Cal. Jul. 21, 2008) ($1.5 million); *Covillo v. Specialtys Café*, 2014 WL 954516 (N.D. Cal. Mar. 6, 2014) ($1 million); *Ellsworth v. U.S. Bank, N.A.*, 2015 WL 12952698 (N.D. Cal. Sept. 24, 2015) ($1 million); *Young v. Polo Retail, LLC*, 2007 WL 951821 (N.D. Cal. Mar. 28, 2007) ($770,000); *De Mira v. Heartland Employment Serv., LLC*, 2014 WL 1026282 (N.D. Cal. Mar. 13, 2014) ($300,000)).

An even more rigorous crosscheck is warranted by the fact that the valuation of the fund is particularly murky here: the majority of the supposed benefit will simply be the in-kind benefit of bulk-purchased credit monitoring. See Obj. 9 (citing, *inter alia*, *Acosta v. Trans Union LLC*, 243 F.R.D. 377 (C.D. Cal. 2007)). The value of injunctive relief is "easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003); *see, e.g.* Pl. Opp. 12. A genuine lodestar-crosscheck is needed—rather than auditing perfection—from which the Court can assure itself that the hours counsel has billed are both reasonable and beneficial to the class.

Plaintiffs protest that this District does not require class counsel to always submit daily time records to support a common fund fee request. Pl. Opp. 6. Schulman never suggests that this inscrutability alone is a reason to appoint a special master. The reason is that the fee papers that have been submitted raise more questions than they answer, questions relating to hourly rate, inefficient delegation of tasks, duplication of effort, and billing judgment. Failing to submit detailed time records makes it hard to answer those questions, but it didn't raise them in the first instance. Plaintiffs boast that they have done precisely what Judge Tigar asked of the petitioner in *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326 (N.D. Cal. 2014). Pl. Opp. 15-16. But they have failed to provide what Judge Tigar ultimately found to be adequate: "charts that break down, by individual attorney for whom fees are claimed, the attorney's work on this case by general category, and by specific types of tasks within that category." 303 F.R.D. at 333.

Schulman can agree than the reasonable hourly rates for contract attorneys and associates conducting document review is ultimately a legal question for the Court. Pl. Opp. 1. But that doesn't mean the question would not benefit from elucidation under the microscope of a master, as Judge

Wolf believed in *State Street*. How many of the firms for whom plaintiffs submitted contract attorney time charge those same rates to paying clients? How many charge paying clients $500/hr associate time to conduct document review? Plaintiffs purport to address this question vis-à-vis a single firm and call it a day. Pl. Opp. 11 n.3.

As in *State Street* and *Johnson & Johnson*, class counsel's unreliable lodestar justifies the appointment of a special master here.

III. A special master should be appointed to investigate any fee-sharing understandings between firms and to recommend an apportionment of the ultimate fee award.

In continuing their "nothing to see here" strategy, plaintiffs represent, and each member of the co-lead/PSC team avers that there are no fee-sharing arrangements or agreements to disclose. Pl. Opp. 2, 13. Immediately, it is somewhat difficult to believe that non-lead firms would expend up to $1.5 million of attorney lodestar time with no guarantee—even if implicit—of any repayment. Dkt. 916-8 ¶ 50. Every recent inter-firm post-settlement fee dispute of which Schulman is aware has included an allegation that there was a fee-sharing agreement of some stripe—be it written or oral. *Grant & Eisenhofer, P.A. v. Bernstein Liebhard LLP*, 2015 WL 5751252 (S.D.N.Y. Sept. 30, 2015); *Dryer v. NFL*, 2016 WL 6609182 (D. Minn. Nov. 7, 2016); *Bernard v. Scott Litig. Group*, 2017 WL 819036 (E.D. La. Mar. 2, 2017). The Center, in its history, has not been able to obtain the most trivial work from a local counsel without a written retainer agreement.

But even assuming it is correct that there are no fee-sharing agreements—written or oral—to disclose, that doesn't resolve the issue. It just changes the question. The declarations raise more questions than they answer: *why* do dozens of firms agree to perform thousands of hours of work without any sort of agreement? What protections against malpractice from future conflicts of interest do the firms establish? Did Co-Lead counsel send all counsel a memo creating a shared understanding of how fees would be distributed, much as they sent a memo regarding billing protocol (Dkt. 190-1)? If not, do all counsel share an understanding of a preexisting communal standard in the plaintiffs MDL bar for dividing fees that class counsel expects to govern here? In any event, on what basis does co-lead counsel intend to allocate the fee award? While it may be

"premature" to say what the exact proposed allocation is (Dkt. 938-1 ¶4), it hardly seems premature to disclose what the methodology will be, and review whether that proposal is one that serves the class's interest.

Plaintiffs assert that without any fee-sharing agreements, there are "no questions regarding incentives or conflicts of interest." Pl. Opp. 13. Plaintiffs' asserted conclusion is too narrow; even in the absence of a fee agreement, and regardless of whether there is a tacit understanding or not, a master has a role to play in suggesting such fee allocation. In fact, the lack of any agreement means that co-lead counsel's power will be boundless if the Court refuses to involve itself. Rule 23(h) demands that class action attorneys be paid according to benefit they have realized for their client class. Advisory Committee Notes on 2003 Amendments to Rule 23 ("One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members"). Conversely, it does not tolerate payments that are made secretly, on the basis of playing favorites, political horse-trading, whim or caprice. At least putting forth a fee-sharing agreement would have reigned in co-lead counsel's unbridled discretion.

The complex inter-firm dynamics of the fee request are further reason to appoint a special master.

IV. Schulman's motion is timely and proper.

This Court's preliminary approval order set a deadline of December 29, 2017 for any class members to file objections or to exclude themselves, but it did not set a deadline for the making of ancillary motions. Dkt. 903 at 7. Schulman objected by the deadline, stating his intent to file this motion the following week. Obj. at 1, 18, 23. He did so, and requested from the Court's clerk the soonest hearing date available. Because Schulman did not flout any deadline set by court order or rule his motion is timely and should be heard. *E.g., Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1093 (9th Cir. 2011). Any delay from the clerk's establishment of an April 5 hearing date could be offset by a motion to move the hearing date and, in any event, has been rectified by the Court's *sua sponte* order changing the hearing date to February 1, an order much appreciated by Schulman. Dkt. 940.

As a result, plaintiffs suffered no unfair prejudice from the six-day delay between the filing of Schulman's objection and his motion—indeed, they were able to respond to the motion *before* they responded to Schulman's objection, and even sandbagged their response by incorporating by reference papers "Plaintiffs' specific responses to Objector Schulman's Objection in their Reply Brief in support of their Motion for Attorneys' Fees." Pl. Opp. 11 n.3.

CONCLUSION

For the foregoing reasons, the Court should appoint a special master to investigate the billing irregularities demonstrated here, and to recommend a firm-by-firm apportionment of the fee award.

Dated: January 25, 2018

Respectfully submitted,

/s/ Theodore H. Frank
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing motion using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 25th day of January, 2018.

/s/ Theodore H. Frank
Theodore H. Frank