UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KYLE CANNON, LEWIS LYONS, AND DIANNE LYONS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, v. ASHBURN CORPORATION, ET AL., DEFENDANTS.	Civil Action No. 16-1452 (RMB)(AMD) Judge Renee Marie Bumb Date: March 19, 2018 Time: 10:00 a.m. Courtroom: 3D

RESPONSE OF RYAN RADIA TO MOTION FOR FINAL APPROVAL OF AMENDED SETTLEMENT

Joshua Wolson
DILWORTH PAXSON LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102
Phone: (215) 575-7295
Fax: (215) 575-7200
Email: jwolson@dilworthlaw.com
Attorney for Objector Radia

Adam Schulman
COMPETITIVE ENTERPISE INSTITUTE
1310 L Street, NW, 7th Floor
Washington, DC 20005
Phone: (610) 457-0856
Email: adam.schulman@cei.org
Of Counsel

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Rules and Statutes

The settling parties have now moved for final approval of a revised settlement agreement. Dkts. 83, 84, 85, 88. Without waiving other objections that he may make, Ryan Radia files this response to stress the following few points: (1) While the revised settlement represents a considerable improvement, unaddressed deficiencies still preclude class certification and settlement approval; (2) Plaintiffs' scurrilous attacks on Objector Radia's employer and counsel, as well as their impugnation of the state and federal bodies appearing to express concern with their settlement, further indicate the inadequate stewardship of counsel; (3) If the Court approves the amended settlement, supplemental notice is required (along with an extension of the claims period), so that class members may exercise their "cash option."

Argument

I. The segregation of the $1.2 million fee fund still prevents the Court from remedying an imbalanced settlement after coupon redemption.

Radia's initial objection ("Obj.") (Dkt. 57) describes in depth how structuring a settlement to revert unawarded fees to the defendant rather than the class raises "a strong presumption of…invalidity." Obj. 27-29 (quoting *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014)). The amended settlement does nothing to rectify this defect.

Plaintiffs' rationalization that the class relief "was negotiated separately, and before the negotiation on fees" does not alter the *Pearson* presumption. Dkt. 88 at 50. Indeed, on at least two occasions, the Third Circuit has rejected the exact same defense that the plaintiffs proffer. "[E]ven if counsel did not discuss fees until after they reached a settlement agreement, [such a fact] would not allay our concern since the Task Force recommended that fee negotiations be postponed until the settlement was judicially

approved, not merely until the date the parties allege to have reached an agreement." *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig.*, 418 F.3d 277, 308 (3d Cir. 2005) (alteration in original) (quoting *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 804 (3d Cir. 1995)). One should be "loath to place such dispositive weight on the parties' self-serving remarks." *GM Trucks*, 55 F.3d at 804. Plaintiffs' formalistic desire to separate class's relief from the attorney's fee is simply "not realistic" because the defendant cares only about its "total liability." *Pearson*, 772 F.3d at 786.

This is not merely an academic issue; it has real world implications. Say that here, after the redemption period closes, class members ultimately redeem $1 million worth of coupons. The constructive common fund of the settlement then materializes as $2.7 million ($1 million in redemptions + $500,000 cash class fund+ $1.2 million fee fund). But a 44% fee from that fund is "clearly excessive." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (38.9% fee would be so). However, because of the fee segregation, reducing the fee to a reasonable 25% ($675,000), means only that almost $600,000 reverts to the defendant, even though there is "no apparent reason" why such money that the defendant was willing to put on the table should not benefit the class. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011).

It would be easy for the settling parties to eliminate this problem by allowing unawarded fees to roll into the $500,000 cash fund. Until they do so, the settlement remains unfair.

II. Plaintiffs have not demonstrated adequate representation.

Radia's objection explains why the proposed class cannot be certified consistent with Rules 23(a)(4) and (g)(4). Obj. 29-33. Most notably, there exists a prior attorney-client relationship between the named representatives' employer (the law firm Glassman, Wyatt, Tuttle and Cox, P.C.) and the Apperson Crump firm, a firm involved in some undisclosed respect with class counsel in these proceedings. Obj. 31-32. Because the burden to prove adequate representation lies with plaintiffs, the Court should draw an adverse inference from the plaintiffs' wholesale refusal to address this objection. *See Wright v. City of Philadelphia*, 2017 WL 5571061, at *6 (E.D. Pa. Nov. 20, 2017) (alluding to "Arthur Conan Doyle's famous dog that did not bark").

Yet, while remaining silent on this dispositive issue, plaintiffs do levy numerous vituperative *ad hominem* attacks on not only Radia's counsel and employer, but also on the Department of Justice and on the *amici* coalition of state attorneys general. *See* Dkt. 88 at 29 (bemoaning DOJ's "apparent bias and antagonism towards consumers"); at 30 (characterizing DOJ's "heights of hypocrisy"); at 40 ("none of these AGs are running a small business with a low profit margin"); at 43 ("like DOJ, CEI…represents interests that are antagonist to those of the class"); at 43 ("CEI…is an organization that exists for the sole purpose of objecting to and frustrating class actions [and] is funded by a variety of conservative organizations dedicated to abolishing collective litigation."); at 45-46 ("[CCAF's director's] partisan agenda must be kept in mind."); at 47 (CEI "make[s] a career out of carpet-bombing class action settlements nationwide with meritless argument"). First things first, the attacks are in no uncertain terms outright falsehoods. *See* Declaration of Theodore H. Frank (attached as Exhibit 1). Second and

perhaps more importantly, such *ad hominem* deprecation is unbecoming of members of the legal profession. Ascribing unfavorable political or ideological views to a litigation adversary, and attempting to induce a court rule on that basis is unethical. Such language could be reasonably viewed as encouraging the Court violate Radia's First Amendment rights by weighing political viewpoint in the equation when evaluating his objection. *See, e.g.*, *R.A.V. v. St. Paul,* 505 U.S. 377, 392 (1992) (outlining prohibition on viewpoint discrimination). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

As a practical matter, *ad hominem* diatribes are an irrelevant sideshow that serve only to distract from the real dispute between plaintiffs and objectors. As the Third Circuit has specifically noted, "[w]e fail to see how motives of the objectors…would make any fact of consequence to the determination of reasonable fees more or less probable." *In re Paper Antitrust Litig.*, 751 F.2d 562, 587 (3d Cir. 1984). Yet, plaintiffs spent more pages discussing "CEI's Biased Background" than they did the merits of CEI's arguments. Dkt. 88 at 43-50.

"[A] lawyer with objector status plays a highly important role for the class and the court because he or she raises challenges from the burden of conflicting baggage that Class Counsel carries." *In re Prudential Ins. Co. Am. Sales Practices Litig. Actions*, 278 F.3d 175, 202 (3d Cir. 2002); *accord Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993) ("The parties can be expected to spotlight the proposal's strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access

to information on the settlement's merits.") (internal citation omitted); *GM Trucks,* 55 F.3d at 803 ("[W]here there is an absence of objectors, courts lack the independently derived information about the merits to oppose proposed settlements."). From the plaintiffs' response to objections, it is doubtful they agree. But the Third Circuit is right; plaintiffs are wrong; and this case is proof itself. Objectors are the *sine qua non* of the only monetary benefit to the class offered in the currently proposed settlement, in addition to the extended coupon redemption period, the injunctive relief, and the agreement to comply with CAFA by deferring the fee request.

Adequate plaintiffs and counsel for the class would not have greeted good-faith objectors and *amici*—individuals who have already generated direct benefits for the class no less—with the unprofessional animus that class counsel displayed here.[1] This unethical behavior further reveals that Rules 23(a)(4) and (g)(4) are not satisfied.

III. The supplemental notice proposed by the settling parties is insufficient; the timetable requires an extension of the claims period.

As a general matter, whenever a court is contemplating "material alterations to the settlement," "[c]lass members should be notified." *In re Baby Prods. Antitrust Litigation*, 708 F.3d 163, 176 n.10 (3d Cir. 2013). "Before approving any distribution of settlement proceeds to the class members," if the district court finds cause for concern in the provision of notice, the court may "order[] further notice procedures." *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 93 (3d Cir. 1985). Here, the

[1] At a minimum, counsel's fee award should reflect this hostile treatment of objectors. *See generally In re World Trade Center Disaster Site Litig.*, 754 F.3d 114, 127 (2d Cir. 2014) ("ethical concerns" affect counsel's quality of representation)

parties propose to send supplemental email notice within five days after an order granting final approval. Dkt. 83-1 at 2. However, if the court takes the matter under submission for any reasonable period of time, it is highly likely there will be insufficient time for class members to receive notification and then submit a claims form before the April 19 deadline to exercise the newly available "cash option."[2] Because the timetable is too rushed currently, the parties should agree to extend the claims deadline for 60 days after the supplemental notice is distributed. *See, e.g., Lusby v. Gamestop*, 297 F.R.D. 400, 414 (N.D. Cal. 2013) (30 day claims period insufficient; class members must be "afforded at least sixty days to submit their claim form, opt-out, or object to the settlement.").[3]

Additionally, the form of the proposed notice unhelpfully buries the crucial piece of information (the amendment of the settlement and addition of a cash fund) on the second page under a sea of fine print. *See* Dkt. 83-1 at 8-9, Exhibit A. A reasonable Rule 23 notice must take care to draw the attention of the average class members to the significant facts that it wishes to convey. The proposed notice fares poorly in this

---

[2] Although plaintiffs repeatedly refer to the cash fund as a "cash option" (Dkt. 88 at 2, 24, 55), in reality, because of the limited size of the fund, ultimately unredeemed credits will only translate to some fraction of their face value in cash. So in no sense is it a true option of equivalent magnitude.

[3] Radia does not argue that formally reopening the opt-out and objection periods is necessary in this instance because the settlement amendment is unequivocally beneficial to absent class members. If late opt-outs or objections do happen to come in, however, the late settlement amendment should constitute a relevant circumstance in assessing whether there exists "excusable neglect."

respect. It should be revised to exclude lengthy sections on background that have already been sent to class members and will lose their attention immediately.

If the Court intends to approve the settlement, it should ensure that the supplemental notice comports with Rule 23.

Conclusion

The Court should still reject class certification and deny approval of the proposed settlement.

Dated: March 16, 2018

Respectfully submitted,

/s/ Joshua Wolson

Joshua Wolson
DILWORTH PAXSON LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102
Phone: (215) 575-7295
Fax: (215) 575-7200
Email: jwolson@dilworthlaw.com
Attorney for Objector Radia

Adam Schulman
COMPETITIVE ENTERPISE INSTITUTE
1310 L Street, NW, 7th Floor
Washington, DC 20005
Phone: (610) 457-0856
Email: adam.schulman@cei.org
Of Counsel

Proof of Service

I hereby certify that on this day I filed the foregoing with the Clerk of the Court via ECF thus effectuating service on all counsel who are registered as electronic filers in this case.

/s/ Joshua Wolson
Joshua Wolson