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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: LITHIUM ION BATTERIES
ANTITRUST LITIGATION,

INDIRECT PURCHASER PLAINTIFFS,

Plaintiff-Appellee,

v.

MICHAEL FRANK BEDNARZ,

Objector-Appellant,

v.

PANASONIC CORPORATION;
PANASONIC CORPORATION OF
NORTH AMERICA; SANYO ELECTRIC
CO, LTD; SANYO NORTH AMERICA
CORPORATION; HITACHI, LTD.;
HITACHI MAXWELL, LTD.;
MAXWELL CORPORATION OF
AMERICA; TOSHIBA CORPORATION;
TOSHIBA AMERICA ELECTRONIC
COMPONENTS, INC.; NEC
CORPORATION; SAMSUNG SDI CO.

No. 21-15120

D.C. No. 4:13-md-02420-YGR

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

LTD.; SAMSUNG SDI AMERICA, INC.;
SONY CORPORATION; SONY
ENERGY DEVICES CORPORATION;
SONY ELECTRONICS, INC.; NEC
TOKIN CORPORATION; LG CHEM,
LTD.; LG CHEM AMERICA, INC.,

Defendants-Appellees.

In re: LITHIUM ION BATTERIES
ANTITRUST LITIGATION,

INDIRECT PURCHASER PLAINTIFFS,

Plaintiff-Appellant,

v.

STEVEN FRANKLYN HELFAND;
MICHAEL FRANK BEDNARZ;
CHRISTOPHER ANDREWS,

Objectors-Appellees,

v.

PANASONIC CORPORATION;
PANASONIC CORPORATION OF
NORTH AMERICA; SANYO ELECTRIC
CO, LTD; SANYO NORTH AMERICA
CORPORATION; HITACHI, LTD.;
HITACHI MAXWELL, LTD.;
MAXWELL CORPORATION OF

No. 21-15200

D.C. No. 4:13-md-02420-YGR

AMERICA; TOSHIBA CORPORATION;
TOSHIBA AMERICA ELECTRONIC
COMPONENTS, INC.; NEC
CORPORATION; SAMSUNG SDI CO.
LTD.; SAMSUNG SDI AMERICA, INC.;
SONY CORPORATION; SONY
ENERGY DEVICES CORPORATION;
SONY ELECTRONICS, INC.; NEC
TOKIN CORPORATION; LG CHEM,
LTD.; LG CHEM AMERICA, INC.,

Defendants.

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted October 17, 2022
San Francisco, California

Before: HAWKINS, McKEOWN, and BYBEE, Circuit Judges.

On December 10, 2020, the district court granted Indirect Purchaser Plaintiffs' ("IPPs") motions for final approval of the class-action settlement and for attorney's fees ("Settlement Order"). The court also partially granted objector Frank Bednarz's motion for attorney's fees ("Fee Order"). Bednarz appeals the Settlement Order, arguing that the district court abused its discretion in awarding attorney's fees in two respects: (1) by failing to consider a bid submitted by Hagens Berman Sobol Shapiro LLP ("Hagens Berman") to be lead class counsel as

a baseline and (2) by not reducing class counsel's fee award based on the conflict of interest present in representing plaintiffs from both *Illinois Brick*¹ repealer and non-repealer states. Bednarz also appeals the Fee Order, arguing that the district court erred by not granting his fee request in full. IPPs cross-appeal the Fee Order, arguing that the district court erred in awarding Bednarz fees at all. We have jurisdiction under 28 U.S.C. § 1291, and we review a district court's award of attorney's fees and its chosen method of calculation for abuse of discretion. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011). We affirm.

1. The district court properly declined to use the Hagens Berman bid as a baseline in awarding attorney's fees to class counsel. We have previously held that "when class counsel secures appointment as interim lead counsel by proposing a fee structure in a competitive bidding process, that bid becomes the starting point for determining a reasonable fee." *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 934 (9th Cir. 2020). Here, however, the district court determined that a three-firm co-lead interim counsel structure was preferable to a sole lead

¹ *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977) (holding that indirect purchasers cannot recover damages under federal antitrust law). About thirty states (repealer states) have authorized indirect purchasers of goods to bring state antitrust claims, while the remaining states (non-repealer states) follow federal antitrust law and restrict such claims.

counsel structure. Consequently, Hagens Berman’s bid to be sole interim counsel was not relevant to the district court’s assessment of the reasonableness of class counsel’s fee request because the firm did not “secure[] appointment as interim lead counsel by proposing a fee structure in a competitive bidding process.” *Id.* Importantly, when interim counsel is selected in the manner it was in this case—as opposed to through a competitive bidding process—the risk that a firm will deliberately submit a low bid to secure the position as lead counsel only to make a substantially higher fee request when the case resolves is mitigated. And, when the counsel structure differs from that conceived of in the singular competitive bid submitted, that bid offers little insight into market rates. The district court did not abuse its discretion by excluding the bid from its calculations.

2. The district court did not abuse its discretion in rejecting Bednarz’s objection based on the potential representational conflict faced by class counsel in representing both repealer-state class members and non-repealer-state class members. Although Bednarz argues that the district court concluded that there was no conflict simply on the grounds that “class counsel ‘achieved an excellent result for *all* class members,’ ” the district court did more. After questions as to class certification and choice-of-law became more settled, the district court approved the third round of settlements subject to a 90/10 distribution plan. The plan allocated

90% of the settlement fund to repealer-state class members and 10% of the settlement fund to non-repealer-state class members to account for the differing strength of their claims.² In the Settlement Order, the district court approved the same 90/10 distribution plan for the first two rounds of settlements as well. The district court concluded that, among other things, “the structural assurances of fairness inherent in the proposed distribution plan” satisfied the court that “class counsel . . . have no conflict with the class and have represented all members’ interests fairly.” In addition to finding that the 90/10 distribution plan mitigated intraclass conflict concerns, the district court explicitly considered the primary case Bednarz relies on in his argument, *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948 (9th Cir. 2009), and concluded that it was inapposite because there was no similar conflict in the case at hand. The district court also noted that class counsel did not seek fees associated with Bednarz’s earlier appeal, which involved issues relating to the potential conflict among class members, or the related hours incurred on

² IPPs made the 90/10 third round settlement distribution “recommendation based upon the parties’ stipulated adversarial process before the Honorable Rebecca J. Westerfield (Ret.), in which Judge Westerfield considered extensive analysis and rendered findings and recommendations concerning an appropriate allocation as between the two groups of putative class members.” Bednarz does not challenge the allocation.

remand. As such, the district did not abuse its discretion in declining to reduce class counsel's award because of an alleged representational conflict.

3. The district court did not err in partially granting Bednarz's motion for attorney's fees. Because Bednarz generated an extra \$10 million benefit for repealer-state class members by successfully objecting to the original distribution plan for the second round settlements, he is entitled to attorney's fees for conferring a material benefit to a portion of the class. *See Rodriguez v. Disner*, 688 F.3d 645, 658–59 (9th Cir. 2012) (objectors “may claim entitlement to” attorneys’ fees when they confer a substantial benefit on the class); *Rodriguez v. West Publ’g Corp.*, 563 F.3d at 963 (finding it “clearly erroneous” to deny fees to objectors who augmented the class’s net fund); *In re Southwest Airlines Voucher Litig.*, 898 F.3d 740, 746 (7th Cir. 2018) (reversing denial of fees to objector who conferred benefit on the class). However, because the benefit represented a transfer from non-repealer-state class members to repealer-state class members, it is difficult to quantify the benefit to the class as a whole. We have held that the district court has “discretion to award fees based on how much time counsel spent and the value of that time” in situations where it is difficult to quantify the benefit to the class. *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1126 (9th Cir. 2020) (citing *In re*

Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 571 (9th Cir. 2019)). Here, the district court did precisely that.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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Date

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