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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KIMBERLY BIRBROWER, an individual,

Plaintiff,

vs.

QUORN FOODS, INC., a Delaware Corporation and DOES 1 through 100, inclusive,

Defendant.

Alida Kass,

Objector.

Case No. 2:16-cv-01346-DMG (AJW)

FIRST SUPPLEMENT TO OBJECTION OF ALIDA KASS

Date: September 1, 2017
Time: 10:30 a.m.
Location: Courtroom 8C

INTRODUCTION

As the Court's order of May 1, 2017, permits, objector Alida Kass supplements her objection to reflect the information disclosed at the telephonic status conference. Dkt. 64. In response to Kass's objection filed on March 30, 2017, Dkt. 48 ("Objection"), class counsel took steps to improve notice, which was previously woefully deficient. While welcome, these belated adjustments cannot entirely remedy a settlement agreement negotiated to provide royal treatment for attorneys' fees.

To the extent that the objection of Ms. Kass and the oversight of this Court render the settlement fair, reasonable, and adequate because the claims rate (perhaps still implausibly) increases to a level that justifies the red-carpet treatment for class counsel, class counsel should not be rewarded based on class recovery that would not have otherwise occurred. Without the objection of Ms. Kass, zero class members would have received direct notice, and without the Court's oversight, these class members would have no reasonable opportunity to opt-out. If the settlement is salvageable, it is *despite* the original settlement agreement and notice plan, and class counsel should not win a windfall—and certainly not a blended $2593/hour windfall—due to claims received after direct notice was sent at Objector Kass's suggestion on April 16, 2017.

Should the Court approve the proposed settlement, less attorneys' fees should be awarded to class counsel than if counsel had proposed adequate notice and reasonable fees to begin with. Such a reduction deters future counsel from negotiating disproportionate fees and inadequate notice and hoping that no one notices or complains.

I. The original notice plan concluded on March 17, so claims received after belated direct notice cannot be attributed to class counsel.

In the April 28 Joint Status Report concerning claims, Dkt. 63 ("Status Report"), the parties do not directly answer the question this Court posed during the status conference: *why* was belated email notice sent to class members after the deadline to opt-out or object? The

parties likewise fail to explain why class counsel only recently served subpoenas to obtain class member information from retailers. Status Report at 2.

Class counsel failed to earlier take these basic steps and provide adequate notice. The original notice program provided no direct notice whatsoever and elapsed on March 15. *See* Declaration of Christopher Longley ("Longley Feb. Decl."), Dkt. 32-7 at 17. This plan appears to have been substantially executed as planned, with "Campaign 1" ending on March 17. *See* Declaration of Christopher Q. Longley ("Longley April Decl."), Dkt. 63-1 at 8.

It was Objector Kass (and *amicus* CSPI), not class counsel, who observed that Quorn *does* possess contact information for some of its customers. Objection at 7. As such, the settling parties lacked any excuse for failing to notice readily-identifiable class members. *See Larson v. AT&T Mobility LLC*, 687 F.3d 109, 128 (3d Cir. 2012) (vacating final approval where parties failed to use defendant's own records to provide direct notice). Class counsel should have planned direct notice without being prodded by Objector Kass. Defendant's possession of class member contact information was evident from Quorn's website and a cursory read of the product packages,[1] yet class counsel instead asserted that defendant possessed no such records. *See* Mem. in Supp. of Mot. For Prelim. Approval, Dkt. 32-1 at 21 ("Quorn does not maintain records of who purchased its products"); Longley Feb. Decl., Dkt. 32-7 at 2 (designing internet ad campaign because "[i]t is my understanding that the defendant…does not have a list of the consumers who purchased its products.").

As a result of the Objection, the parties have provided what they characterize as "additional notice," including emails to 7,932 class members who had previously contacted

[1] *See* Exhibit A to Original Complaint (Quorn package), Dkt. 1-1 at 29 ("Contact us!").

Quorn.[2] Claims derived from this direct email notice should be attributed at least in part to Objector Kass rather than fully to class counsel.

The belated third-party subpoenas were also inspired by Objector Kass, who objected that class counsel failed to subpoena shopper loyalty programs. Objection at 7-8. If the settling parties succeed in identifying additional class members by the subpoenas, they will be "amenable to discussing a reasonable extension of the claims period for such individuals only and will meet and confer in good faith to present a proposed extension to the court for approval." Status Report at 2. Such an extension would be appropriate and is especially generous of the defendant to offer—but again, class counsel should have taken this step from the outset, and should not receive full credit for claims that might result from belated notice inspired by Objector Kass's objection.

II. Detailed disclosure concerning claims is necessary to evaluate the settlement and class counsel's fee request.

As discussed in the Objection, the proposed settlement should only be approved is class members file claims sufficient to become the "foremost beneficiaries" of the settlement. Objection at 17; *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013). For example, if the number of non-fraudulent class member claims exceeds $1.5 million, then the negotiated *cy pres* component of the settlement becomes moot, and the settlement may turn out to be fair, reasonable, and adequate after all. As of April 21, the settlement still fell short. The claims administrator averred that 2,028 class members had submitted only $469,410 worth of claims

[2] At minimum, adequate notice should have been sent to *all* class members Quorn can identify—not just those who expressed concern or discomfort. Objector Kass cannot tell whether this actually occurred. The Status Report suggests that the parties employed unduly narrow notice: "Quorn customers who contacted Quorn Foods directly expressing concern over labeling of its products, or have experienced discomfort from eating Quorn Foods Products" were emailed on April 16, 2017. This description differs from what the direct notice itself says. The Court received an email from a class member forwarding direct email notice, which was sent April *24*, 2017, nor April 17. The forwarded email suggests notice was sent more broadly to customers who "contacted Quorn Foods, Inc. between January 26, 2012 - December 14, 2016."

as of this date. *See* Longley April Decl., Dkt. 63-1 at 10. For perspective, these claims compare to $1,350,000 in attorney's fees with clear sailing and kicker that counsel negotiated for themselves.

The Court should expect parties to provide the actual number of claims that *will be paid* to gauge the fairness of the settlement. The removal of fraudulent or mistaken claims can greatly shrink the size of actual class recovery. This disclosure is especially important because the value of claims reported on April 28 seems implausible.[3]

Further, the settlement administrator should break down the claims received before and after it sent direct notice. Claims filed *after* direct notice should not be fully credited to class counsel, because direct notice would never have been provided but for Objector Kass.

III. Attorneys' fees should be reduced to deter "heads I win, tails don't count" tactics by plaintiffs' counsel.

Should the Court approve the proposed settlement, it should reduce the attorneys' fees awarded to class counsel to deter counsel from requesting exorbitant fees and deficient notice. If class counsel were awarded the same fee it could have received by properly noticing the class, plaintiffs' attorneys will continue to play "heads I win, tails don't count" in the future. Why avoid profitable but improper behavior if the only consequence is to have the same result that would have occurred if adequate notice and fees were requested in the first place?

Plaintiffs' attorneys in class action settlements are tempted to request excessive fees because they will often receive the full benefit of an excessive fee. When the defendant has agreed to clear sailing, courts usually have no party to help them evaluate a fee request. Plenty of unfavorable settlements are approved quickly, quietly, and unopposed, without a single

[3] Without itemized receipts, class member recovery cannot exceed $200, yet the average claim supposedly stands at $231. Longley April Decl., Dkt. 63-1 at 10. On April 28, counsel for Objector Kass emailed counsel for the settling parties inquiring (1) whether these claims are post-audit claims to be paid and whether the administrator expects to reject claims, (2) whether an institutional class member filed a large claim, throwing off the average, and (3) whether the parties would disclose size of the ten largest claims. No response has been received to date. So that parties cannot exaggerate class recovery, the Court should require disclosure of the number of claims that will actually be paid under the settlement.

objection filed. *See Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012) (citing, *inter alia*, a 1996 FJC survey of several federal districts that reported between 42% and 64% of settlements engendered no filings by objectors). This is unsurprising. *See In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) ("No class member objected either—but why should he have? His gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule.").

Even when good-faith objectors emerge, courts typically just reduce fees to what they should have been in the first place—with a reasonable multiplier and/or percent of fund. This incentivizes class counsel to "free roll" and ask for too much, which is precisely why nearly everybody does it, especially since most fee requests do not receive objections at all.

The Court can only deter this perverse result by awarding class counsel *less* than if they had arranged for adequate notice and proportional fees to begin with. Courts award such reduced fees in the analogous context of statutory fee shifting:

> If, as appellant argues, the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place. To discourage such greed a severer reaction is needful, and the District Court responded appropriately in the case at bar.

Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980) (affirming district court's award of $0 attorneys' fees for plaintiffs' counsel in successful § 1983 suit where unreasonably bloated fee request submitted).

Numerous federal and California courts have applied the reasoning from *Brown*. *See Scham v. District Courts Trying Crim. Cases*, 148 F.3d 554, 558 (5th Cir. 1998) (affirming denial of § 1988 request where first-year attorney requested $750/hour because the "sum is so clearly excessive that it 'shocks the conscience' of the court"); *Fair Hous. Council v. Landow*, 999 F.2d 92, 96 (4th Cir. 1993) (reversing and remanding with instructions to deny § 1988 fee award where request was "so excessive it shocks the conscience"); *Burton Way Hotels, Ltd. v. Four Seasons Hotels Ltd.*, No. CV 11-303 PSG, 2012 U.S. Dist. LEXIS 195227 (C.D. Cal. June 12,

2012) (citing *Brown* and awarding less than lodestar for fee request under Cal. Civ. Proc. Code § 425.16(c)); *Christian Research Institute v. Alnor*, 165 Cal. App. 4th 1315, 1322 (Cal. App. 2008) (citing *Brown* and affirming award of only 71 hours out of more than 600 submitted under Cal. Civ. Proc. Code § 425.16(c)).

To the extent that class counsel seeks fees based on common fund principles rather than fee-shifting, the rationale behind *Brown* is even stronger. In most private actions, Congress has not intended "to attract competent counsel" with compulsory fee shifting as it has in civil rights cases. *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008) (discussing *Brown*).

Objector Kass does not suggest that a $0 fee award would be appropriate in this case. Instead, the objector simply proposes that class counsel's fee be discounted to take into account that the settlement originally provided deficient notice and an excessive 2.8 lodestar multiplier amounting to $2593/hour.[4] If supplemental direct notice ultimately renders the proposed settlement fair, reasonable, and adequate, class counsel should not be rewarded thanks to the diligence Objector Kass and the Court. *See IL Fornaio (America) Corp. v. Lazzari Fuel Co., LLC*, No. C 13-05197, 2015 U.S. Dist. LEXIS 66145 (N.D. Cal. May 20, 2015) ("It was only when the Court intervened to extend the claims deadline did the response rate improve. On this record, it would be a windfall for class counsel to recoup that much of the settlement fund when only a portion of the class will receive an actual payout."); *see also Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012) (affirming denial of attorneys' fees in whole because of ethical violations); *In re Classmates.com*, No. 09-cv-0045-RAJ, 2012 U.S. Dist. LEXIS 83480 (W.D. Wash. Jun. 15, 2012) (sanctioning class counsel for abusive litigation conduct, payable to class).

Thus, if the Court normally would approve 25% of the constructive common fund based on actual class benefits, the Court should award less here.

[4] Of course, even these numbers assume that class counsel's claim that 520,6 hours of work has a billable-hour market value of $477,062 is not exaggerated. If class counsel is correct, it means that the average blended billable-hour market rate of every partner, associate, and paralegal on the case is an implausible $916/hour. If the Court is skeptical of that figure and reduces it, the multiplier would be even higher than 2.83.

If it further turns out that Objector Kass is responsible for significant class recovery due to belated direct notice, it may be equitable and practical to simply deduct class counsel's fee request with an appropriate award of objectors' fees. Class action attorneys' fee awards derive from "the 'common benefit' theory [which] is premised on a court's equity power" *United Steelworkers of Am. v. Sadlowski*, 435 U.S. 977, 979 (1978); *accord Rodriguez v. Disner*, 688 F.3d 645, 654 (9th Cir. 2012). If Objector Kass generated significant benefit to the class, attorneys' fees should come out of class counsel's fee request. *See In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 748 (7th Cir. 2011) (affirming objectors' fees as a percentage of total attorneys' fees awarded); *see also Petruzzi's, Inc. v. Darling-Delaware Co., Inc.*, 983 F. Supp. 595 (M.D. Pa. 1996) ("Given that [defendant's] settlement agreement did not provide for liability to [objector] for attorneys' fees and it was the unfairness of [the] original proposed settlement which prompted [objector's] actions, fairness requires that class counsel absorb the [objector's] award from its recovery."). The class should not have to pay twice for a benefit they should have received at the outset. *See Classmates*, 2012 U.S. Dist. LEXIS 83480, at *23 (reducing fee to less than 20% of the common fund to "reflect[] that counsel should not benefit from its efforts to win approval of an inadequate settlement."); *McDonough v. Toys "R" Us, Inc.*, No. 06-cv-242, 2015 U.S., Dist LEXIS 7510, at *112 (E.D. Pa. Jan. 21, 2015) (debiting objector's fee award from class counsel's award because class' benefit was only achieved on the "second try"). Awarding all legal expenses from the fee pot is not merely equitable, it is also good public policy because it deters "heads I win, tails don't count" strategies.

Objector Kass reserves the right to again supplement her objection after the settlement administrator discloses the final claims figures on or before June 20. *See generally In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (reversible error to withhold information material to Rule 23(h) question from class until after objection deadline without giving class members reasonable opportunity to respond).

CONCLUSION

To the extent that claims under the proposed settlement are sufficiently robust to merit approval, the Court should scrutinize the number of claims attributable to class counsel's original notice plan. Claims submitted after direct notice was provided on April 16, 2017 should be attributed to Objector Kass rather than class counsel. Finally, any award to class counsel should be smaller than what would have otherwise be awarded. If if the Court awards what class counsel should have requested to begin with, plaintiffs' attorneys will be tempted to deliberately provide substandard notice and an outsized fee request based on "alternative fact" settlement values.

Dated: June 1, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically served the foregoing on all CM/ECF participating attorneys at their registered email addresses, thus effectuating electronic service under S.D. Cal. L. Civ. R. 5.4(d).

DATED this 1st day of June, 2017.

/s/ Theodore H. Frank
Theodore H. Frank