IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE SAMSUNG TOP-LOAD WASHING MACHINE MARKETING, SALES PRACTICS AND PRODUCT LIABILITY LITIGATION	)	
	)	MDL Case No. 17-ml-2792-D
THIS DOCUMENT RELATES TO ALL ACTIONS	)	District Judge Timothy D. DeGiusti

OBJECTOR JOHN DOUGLAS MORGAN'S [PROPOSED] OPPOSED MOTION AND BRIEF TO DECERTIFY THE CLASS BASED ON NEW DISQUALIFYING BEHAVIOR OF CLASS COUNSEL

Due to the compelling circumstances of class counsel's recent disloyalty to the class, Objector John Douglas Morgan moves the Court to decertify the class and disqualify class counsel.[1]

The Court granted leave for the parties to resolve their impasse and file an executed side agreement between Samsung and Objector Morgan by March 2. Dkt. 227 ("Order"). Class counsel previously claimed that they "would have welcomed the opportunity to negotiate with Samsung and HLLI to resolve the various issues between the Parties, and we find it regrettable that they did not provide us that opportunity." *See* Declaration of M. Frank Bednarz ("Bednarz Decl."), Ex. 2.

Yet having secured this opportunity, class counsel instead demonstrated bad faith by rejecting a development that could increase their clients' recovery. Morgan asked class counsel immediately after the Court's February 18 order for a release permitting the side

[1] Before filing this (proposed) motion, counsel for Objector Morgan provided Plaintiffs and Samsung a copy of this motion and asked for their position on in. The parties have not yet advised their positions, but Objector anticipates they will oppose the motion.

agreement to go forward without risk of suit: "We simply need an assurance that you will not sue Morgan or HLLI for executing a substantially-identical agreement to the one [Samsung] shared with you last week." Bednarz. Decl. Ex. 3. Class counsel instead sandbagged Morgan and his counsel HLLI, not deigning to respond for six days. On Monday February 24, class counsel responded, again refusing to say they would not sue over "misconduct" and refusing to negotiate: "As you know, we've never threatened to sue your client. You have represented to the court otherwise. We do not believe any further engagement with you would be productive." Bednarz Decl. Ex. 4.

Morgan and HLLI are in the same situation they were in on February 12: their side agreement has been called "misconduct" and a "'direct violation of the [MDL] Settlement,' seriously raising the possibility that HLLI and its client could be dragged into meritless collateral litigation over inducing a supposed breach of the underlying Settlement." Dkt. 225 (HLLI Notice of No Side Agreement) at 1. Class counsel have not withdrawn the "misconduct" characterization, nor stipulated that they will not sue HLLI, nor will they even discuss the matter. As a result, class members lose out on a beneficial side agreement that gives class members $600,000 to $1.5 million in potential additional relief, as well as expediting relief to class members by eliminating lengthy appellate proceedings.

As discussed below, class counsel is taking this position against the interests of their own clients for impermissibly selfish reasons. Class counsel's breach of fiduciary duty has no excuse. The lead firms therefore cannot serve as class counsel under Rule 23(g). The class must be decertified and new class counsel appointed.

I. Background

A. The side agreement would be unambiguously beneficial to the class.

On December 13, 2019, Morgan and Samsung agreed in principle to resolve Morgan's primary objection to the underlying settlement: that class counsel had negotiated for itself a *disproportionate* $6.55 million pot for fees and costs that Samsung could not

challenge ("clear sailing" provision), and that any reduction in class counsel's excessive fee request would revert to Samsung instead of the class ("kicker" provision). *See* Dkt. 163 ("Objection") at 15-16. The term sheet for this agreement-in-principle, executed on December 15-16, was shared with class counsel on December 22, 2019. Dkt. 215 at 2.

The terms of side agreement were well-explained in two prior filings. Dkts. 211 & 215. Essentially, Morgan agreed he would withdraw his objection to the underlying settlement because the objection would be substantially moot due to Samsung's commitment to contribute money in such a way to counteract the clear-sailing and kicker provisions of the underlying MDL settlement. That is, Samsung would spend its own money to fund a *supplemental distribution* if plaintiffs (including New Jersey plaintiffs) secured less than $6.55 million in attorneys' fees and costs. *See* Dkt. 215 at 2. In particular, Samsung would provide 70% of any reduction from the $6.55 million fee allocation to fund payments to the class, as long as this new distribution would be at least $600,000. *Id.* Class counsel mischaracterized the side agreement as being a transfer of fees from them to HLLI (Dkt. 218 at 3),[2] but in fact HLLI could not apply for any attorneys' fees unless the class receives this new distribution from Samsung of at least $600,000. Dkt. 215 at at 3.

The side agreement between Samsung and Morgan could have only benefited class members by requiring Samsung to remit more of its own money in the event attorneys' fees were reduced. While the agreement would not provide anything in the event class counsel's

[2] Class counsel also claimed the side agreement and litigation over attorneys' fees could cause a "delay" against class interests (Dkt. 218 at 3), but the reverse is true. The MDL settlement allows for administration of its benefits to begin following the "Effective Date," which does not require the Court to decide class counsel's fee award. Dkt. 92-1 at 7-8. In fact, the side agreement would have *greatly expedited* the Effective Date, which cannot occur until appeals of approval of the underlying settlement are resolved. *Id.* By curing the fundamental flaw of the settlement, the side agreement would have resolved all objections favorably to the class, and thereby eliminated need for such appeal. If the Court then took longer to decide the matter of class counsel's fees, this delay would not slow the administration of the underlying settlement (and would anyhow be slight compared to the delay of a Tenth Circuit appeal).

fee request was approved in full, in effect it would have undone the selfish (and, in Morgan's view, illegal) kicker and clear-sailing provisions, so that up to 70% of the reductions in attorneys' fees would become available to class members rather than returning to Samsung. This contingent value to class members constitutes a class benefit, and no faithful fiduciary would have rejected it. Class benefits under the side deal may have been substantial, as shown in the table below:

Plaintiffs' Fee Award	**Benefits to Absent Class Members Under Side Agreement**
Plaintiffs' counsel awarded full fee request	No change in benefits, but class **receives payment more quickly** because Effective Date occurs earlier. As of the November 14, 2019 settlement administrator declaration, MDL settlement relief includes: cash payments of $106,881.40 to 680 class members; coupons to 26,401 or more class members; and a three-year extended claims process (not actually a warranty) that resulted in only $92,118.31 worth of class claims over first four years of coverage. *See* Dkt. 206-1.
MDL and New Jersey counsel collectively paid $5.5 million rather than $6.55 million	In addition to MDL settlement relief described above, Samsung would provide an *additional* distribution of checks worth about **$600,000** to tens of thousands of class claimants.
Counsel collectively paid $2.956 million (i.e., class counsel's purported lodestar)	In addition to MDL settlement relief described above, Samsung would provide an *additional* distribution of checks worth over **$1.5 million** ($2.45 million less fees and administrative costs) to class claimants.

B. Class counsel labels side agreement as "misconduct" and breach of settlement.

Class counsel knew that the side agreement could only *benefit* class members by requiring Samsung to send *additional* contingent cash payments to class members. But instead of welcoming this development, class counsel's January 21, 2020 response to the tentative agreement suggested that Samsung, Objector, and Objector's counsel had committed sanctionable conduct and breach of contract. Class counsel characterized the agreement as

"misconduct by HLLI and Samsung," "misbehavior," (Dkt. 218 at 2) and a "direct violation of the Settlement," seriously raising the possibility that the Objector and HLLI could be dragged into meritless collateral litigation over inducing a supposed breach of the underlying Settlement. *Id.* at 3.

Admittedly, Morgan and HLLI were slow to appreciate the severity of the implicit legal threat class counsel had made. Once the risk became clear to them, however, Morgan and HLLI sought assurance that plaintiffs and class counsel would not sue them given their rhetoric that the side agreement constituted "misconduct" and a "direct violation of the settlement." On February 10, Morgan and HLLI (which was then party to the draft side agreement) informed Samsung that they would need class counsel's assent to the side deal to proceed. *See* Bednarz Decl. ¶ 5.

On February 11, counsel for Samsung sent class counsel the most recent draft side agreement and asked for plaintiffs' assent to complete the deal.[3] *See* Bednarz Decl. Ex. 1. Class counsel did not respond. On February 12, the undersigned counsel for Morgan also asked for plaintiffs' position. *See* Bednarz Decl. Ex. 2. Class counsel Jason Lichtman responded: "Plaintiffs' position is that we would have welcomed the opportunity to negotiate with Samsung and HLLI to resolve the various issues between the Parties, and we find it regrettable that they did not provide us that opportunity." *See id.*

C. Court permits further negotiation, but class counsel stonewalls.

While Morgan found class counsel's welcoming position implausible and at odds with their past conduct (Dkt. 225 at 2), counsel for Morgan followed up on February 14: "please advise whether plaintiffs would assent to Samsung funding a potential supplemental distribution to the class." Bednarz Decl. Ex. 3 at 2. Morgan noted that the deadline for filing

[3] Morgan agreed with Samsung to keep the unexecuted draft agreement in confidence. The key terms of the agreement are accurately described in the public filings, and the draft itself contained a provision to ensure it became public upon approval by the Court.

the side agreement had passed, but expressed optimism that "the court would agree to a motion to continue to permit the finalization of the agreement." *Id.* Morgan also clarified what it needed from class counsel: "Plaintiffs need not be party to this agreement [between HLLI and Samsung], but could instead sign a stipulation that this agreement does not violate the underlying MDL settlement." *Id.*

Co-lead counsel Jason Lichtman responded the next day, "[w]hile we do wish that you'd included us in the discussion with Samsung over these past months to attempt to resolve your concerns in a mutually agreeable way, we do not believe a dialogue at this time would be productive." Bednarz Decl. Ex. 3 at 1.

Subsequently, the Court proactively granted leave to continue negotiating the side agreement, Dkt. 227, so Morgan's counsel again messaged class counsel:

> In view of the court's order extending the time to complete the side-settlements until March 2, we would like to clarify your position on our proposed agreement with Samsung.
>
> We simply need an assurance that you will not sue Morgan or HLLI for executing a substantially-identical agreement to the one Michael [Mueller] shared with you last week. As we explained in our filing, approval of the side-settlement would greatly expedite relief to the class by eliminating an appeal of the underlying MDL settlement. And of course, it potentially leads to a supplemental distribution for claimants.
>
> Please advise whether plaintiffs and PSC could provide a stipulation allowing Morgan to enter that side-settlement without risk of litigation. Please let us know your position by COB Thursday, February 20 so we have time to finalize the agreement with Samsung and draft a stipulation with you.

Bednarz Decl. Ex. 3 at 1.

Class counsel did not respond to this message by the February 20 deadline suggested, so Morgan followed up again on February 21: "Does class counsel still contend that this agreement is misconduct or are you willing to stipulate that Morgan may enter this

agreement without risk of litigation from class counsel? Time is of the essence. Morgan reserves all rights." *Id.*

Finally on February 24—six days after the Court granted leave for the parties to finalize side agreements—class counsel Jason Lichtman provided another one-paragraph response refusing to further negotiate: "As you know, we've never threatened to sue your client. You have represented to the court otherwise [sic]. We do not believe any further engagement with you would be productive." Bednarz Decl. Ex. 4. Class counsel did not disclaim its "misconduct" accusations against HLLI, nor did class counsel stipulate not to sue HLLI. *See id.*

While class counsel could have easily agreed it would not litigate against HLLI, it answered with a carefully-worded negative pregnant: "we've never *threatened to sue* your *client*." But class counsel *did* accuse HLLI of "misconduct" and collaborating with Samsung "in direct violation of the Settlement." Dkt. 218 at 2, 3. While class counsel may not have threatened Morgan specifically, the gist is the same: class counsel believes the side agreement is unlawful and refuses to disclaim that characterization or negotiate to allow Morgan to enter the agreement without risking litigation against him and his non-profit counsel HLLI.

II. Class Counsel Breached their Fiduciary Duty

In making threatening characterizations, and then refusing to assent to the side agreement—refusing even to stipulate ***not to sue*** Morgan and HLLI—class counsel are disregarding the interests of the absent class members, to whom class counsel owes a fiduciary duty. Instead, class counsel chose to protect their self-dealing clear sailing and kicker terms even though "there is no apparent reason the class should not benefit from the excess allotted for fees." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011).

This breach of fiduciary duty has no excuse. Class representatives have not stopped it, which means that they cannot provide adequate representation under Rule 23(a)(4).

"Realistically, for purposes of determining adequate representation, the performance of class counsel is intertwined with that of the class representative." *Pelt v. Utah*, 539 F.3d 1271, 1288 (10th Cir. 2008). Further, Lieff Cabraser and Federman & Sherwood cannot serve as class counsel under Rule 23(g)(4). The class must be decertified and new class counsel appointed. Prospective counsel should ideally compete on who will best represent the class, rather than collude with an unopposed steering committee, as occurred at the outset of these MDL proceedings. Dkt. 3. *See* Jay Tidmarsh, *Auctioning Class Settlements*, 56 WM. & MARY L. REV. 227 (2014); Geoffrey P. Miller, Competing Bids in Class Action Settlements, 31 HOFSTRA L. REV. 633 (2003) (suggesting that objectors should be able to bid for the right to serve as class counsel).

The conflict for class counsel is this: co-lead counsel Lieff Cabraser is a repeat player that regularly negotiates settlements or seeks fees that HLLI clients object to. Lieff Cabraser is adverse to HLLI clients in at least six other pending cases with tens of millions of dollars of fees at stake.[4] In almost every one of these cases, as in this one, class counsel defends its settlement and fees by engaging in vituperative and false *ad hominem* attacks against HLLI and its attorneys as uninterested in helping the class. That position would be undermined forever if class counsel reaches a public stipulation with HLLI that unambiguously improves the settlement and benefits the class. Class counsel is putting its interests in other litigation (and

[4] *Arkansas Teacher Retirement Sys. v. State Street Corp.*, 232 F.Supp.3d 189 (D. Mass. 2017) (ordering still-pending investigation of $75 million fee award to firms including Lieff Cabraser); *In re Wells Fargo & Co. Shareholder Derivative Litig.*, No. 4:16-cv-5541 (N.D. Cal.) (challenge to $68 million fee request); *In re Lithium Ion Batteries Antitrust Litig.*, No. 4:13-md-2420 (N.D. Cal.) (successful Ninth Circuit challenge to class certification and settlement approval that resulted in renegotiated distribution that awarded tens of millions more to previously disfavored subclass; expected forthcoming challenge to expected $38.5 million fee request in renegotiated settlement); *In re Google LLC Street View Elec. Comm. Litig.*, No. 10-md-2184 (N.D. Cal.) (objection to settlement providing $4M in fees, $0 for class); *Campbell v. Facebook, Inc.*, No. 17-16873 (9th Cir.) (objection to settlement that provided $3.9M in fees, $0 for class); *In re Domestic Airline Travel Litig.*, No. 15-mc-1404 (D.D.C.) (objection to partial settlement that currently has no plan for distributing any money to class).

in likely future litigation) ahead of the interests of the class in this case—a conflict of interest that isn't just hypothetical, but is actually adversely affecting the absent class members in this case. *Cf. Eubank v. Pella*, 753 F.3d 718, 724 (7th Cir. 2014) (ancillary litigation involving lead class counsel provided a "compelling reason" to disqualify him); *In re Bank of Am. Corp. Secs. Litig.*, 2015 WL 3454516, 2015 U.S. Dist. LEXIS 69550, at *7 (E.D. Mo. May 29, 2015) (finding "the existence of an apparent if not an actual conflict of interest" where class counsel was embroiled in outside pending litigation). And, of course, there is another reason for class counsel's position: they wish to shield their fee award in this case at the direct expense of the class in the hopes that the "gimmick" of the kicker clause will deter the court from reducing fees. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014); *accord* Morgan Obj. 15-16.

Class counsel may argue that the near-final side agreement is supposedly against class interests because it modifies the underlying MDL Settlement, but such an excuse rings hollow. For example, class counsel argued that the Settlement's unfavorable kicker provision was appropriate because it was allegedly negotiated last (Dkt. 186 at 21), but this excuse could never withstand scrutiny. The alleged chronology of negotiation does not matter because defendants always care about minimizing their overall exposure. "[W]e are loath to place such dispositive weight on the parties' self-serving remarks. And even if counsel did not discuss fees until after they reached a settlement agreement, the statement 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 GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 804 (3d Cir. 1995). Moreover, Samsung had the ability to walk away from a deal if they disagreed on later-negotiated fee terms, and we know this is true because Samsung apparently did exactly this to the New Jersey plaintiffs. *See* Objection at 17-18. Class counsel easily could have structured its fee fund as part of a common fund that would benefit the

class if not awarded, and we now *know* this is true too because Morgan negotiated a similar feature from Samsung even though he has a fraction of class counsel's leverage and staffing.

Counsel's breach of fiduciary duty to the class additionally or alternatively provides cause to deny class counsel's fee motion in full. Class counsel not only failed to zealously advance the interests of the absent class members, they meritlessly accused Samsung and Morgan of "misconduct" for behavior that could only conceivably benefit the class. This implicit legal threat against benefiting class members is itself ethical misconduct by class counsel, which owes a fiduciary duty to the class.

"In determining what fees are reasonable, a district court may consider a lawyer's misconduct, which affects the value of the lawyer's services." *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012). *Rodriguez* instructs courts to apply "equitable principles even more assiduously" in class actions because of the court's "special duty to protect the interests of the class." *Id.* at 655; *accord Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999) (affirming denial of attorneys' fees to a firm that was removed as class counsel due to a conflict of interest, even if the firm's efforts conferred some benefit on the class). In class actions "even the appearance of divided loyalties of counsel" cannot be allowed. *Rodriguez*, 688 F.3d at 655. *Rodriguez* involved a conflict of interest that arose out of *ex ante* incentive award agreements between class counsel and named representatives, and these award agreements decoupled the financial interests of those representatives and the absent class members. *Id.* at 655-57. Even though the divided loyalties arguably did not diminish the *Rodriguez* settlement, it constituted a "pervasive conflict of interest" so "we cannot say the district court abused its discretion in denying all fees." *Id.* at 658. Here the conflict is more direct, class counsel's breach of duty in opposing the side agreement did diminish and delay class recovery. Class counsel's fiduciary duty "forbids a lead lawyer from advancing his or her own interests by acting to the detriment of the persons on whose behalf the lead lawyer is empowered to act." American Law Institute, *Principles of the Law of Aggregate Litig.* § 1.05,

cmt. f (2010); *see also Carpenter v. Boeing Co.,* 456 F.3d 1183, 1204 (10th Cir. 2006) (adequate representatives cannot "put their own interests above those of the class"). Class counsel must maximize class recovery; they "cannot agree to accept excessive fees and costs to the detriment of class plaintiffs"[5] or sacrifice class recovery for "red-carpet treatment on fees."[6] "[I]t is unfathomable that the class's lawyer would try to sabotage the recovery of some of his clients." *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015). When class counsel is "motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violate[s] its ethical duty to the class." *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship.*, 874 F.3d 692, 694 (11th Cir. 2017).

III. Conclusion

Class counsel has flunked its Rule 23(g)(4) duty to "fairly and adequately represent the class." The class representatives have similarly put the interests of class counsel ahead of the class in violation of Rule 23(a)(4). For these reasons, the class must be decertified and new class counsel appointed.

Dated: February 26, 2020

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[5] *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000).

[6] *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (*quoting Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)).

Certificate of Service

I hereby certify that on this 26th day of February, 2020, I filed the foregoing Motion and Brief to Decertify the Class with the Clerk of the Court for the Western District of Oklahoma via the Court's CM/ECF system. Based on the records currently on file in this case, the Clerk of the Court will transmit a Notice of Electronic filing to all parties of record in this matter.

/s/ M. Frank Bednarz
M. Frank Bednarz