UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LISA JONES, *et al.*, Plaintiffs, v. MONSANTO COMPANY, Defendant, *and* ANNA ST. JOHN, Objector.	Case No. 19-CV-102-BP Hon. Beth Phillips

OBJECTOR ANNA ST. JOHN'S SUGGESTIONS IN SUPPORT OF HER MOTION FOR LEAVE TO REVIEW AND RESPOND TO PLAINTIFFS' LODESTAR BILLING

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INTRODUCTION

Rule 23(h) affords absent class members the right to receive notice of class counsel's fee motions and to object to the motion. Fed. R. Civ. P. 23(h)(1)-(2). These rights purposely enable objectors to "provide the court with critiques of specific work done by counsel" and furnish them with "information of what that work was, how much time it consumed, and how it contributed to the benefit of the class." *Keil v. Lopez*, 862 F.3d 685, 705 (8th Cir. 2017) (quoting *In re Mercury Interactive Corp. Secs. Litig.*,618 F.3d 988, 994 (9th Cir. 2010)). When the class's lawyers seek fees from a common fund, the lawyers' interests are directly adverse to the class's interest. The lawyers would like to take their fees from the fund; the class would like to retain the maximum possible share of the common fund. Thus, denying class members access to lodestar information would raise "due process concerns." *In re Anthem, Inc. Data Breach Litig.*, No. 15-md-02617, 2018 WL 3960068, 2018 U.S. Dist. LEXIS 140137, at *182 (N.D. Cal. Aug. 17, 2018) (Koh, J.); *accord Lawler v. Johnson*, 253 So. 3d 939, 948-52 (Ala. 2017).

Here, the Court has properly ordered class counsel to submit its lodestar billing for the Court's review. But the class members, the real parties in opposition, have not had this opportunity, and there is "no sound basis" for "paralyz[ing] objectors" by depriving them of it. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284, 286 (7th Cir. 2002). If the records contain some attorney-client confidences or work product revelations, narrow and limited redactions of the type specifically described in *Anthem* will protect them. *Anthem*, 2018 WL 3960068, 2018 U.S. Dist. LEXIS 140137, at *182-*183; *accord Reynolds*, 288 F.3d at 286.

Ideally, this Court should order plaintiffs to publicly file their lodestar records on the docket, and to upload a copy to the class settlement website. The Court should then permit any interested absent class members to file objections related to lodestar within a

reasonable time (perhaps three weeks). *See Allen v. Bedolla*, 787 F.3d 1218, 1226 (9th Cir. 2015) (instructing district court to cure the Rule 23(h) issue by giving "the entire class—and not just the Objectors-Appellants here—the opportunity to review class counsel's completed fee motion and to submit objections if they so choose.") Alternatively, the Court could simply allow St. John a chance to review and address class counsel's lodestar records and briefs. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1252-55 (11th Cir. 2020) (concluding that giving objector an opportunity, either written or oral, to address fee papers filed after the objection deadline ameliorates any Rule 23(h) violation).

I. Class members have a right to review class counsel's billing records submitted in support of a fee application.

Objectors should access and address class counsel's billing records, as a matter of right, according to the vast consensus of cases. Nearly 20 years ago, and even before Rule 23(h) (added in 2003), Judge Posner laid down a path in *Reynolds* that continues to be exemplary. In that case, the district court judge requested that the class's lawyers submit their fee applications in camera, "lest the paucity of the time they had devoted to the case…be used as ammunition by objectors." 288 F.3d at 284. On appeal, the Seventh Circuit "disapprove[d]" the practice of in camera submissions, a practice it "had never heard of and can find no case law concerning." *Id.* at 286. "To conceal the applications and in particular their bottom line paralyzes objectors, even though inflated attorneys' fees are an endemic problem in class action litigation and the fee applications of such attorneys must therefore be given beady-eyed scrutiny by the district judge." *Id. Reynolds* dismissed as "unlikely" the concern about confidentiality and further suggested any minor amount of confidential material in the bills "can be whited out." *Id.*

Reynolds augurs the current practice under Rule 23(h) of allowing class members to fully scrutinize and inspect the fee applications of class counsel at the time of settlement. The Eighth Circuit spoke to this in *Keil*, when it endorsed the notion that

absent class members should be provided "sufficient time after the ***full*** fee motion is on file to enable potential objectors to examine the motion." 862 F.3d at 705 (quoting Advisory Committee Note to 2003 Amendments to Rule 23) (emphasis added). The full fee motion includes the motion, the memorandum in support and any supporting evidentiary submissions. *See Redman v. Radioshack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014) (finding it to be "irregular" "indeed unlawful" to "handicap[]" class members by concealing from them the "details of class counsel's hours and expenses").

Anthem is particularly instructive. There, accompanying their full fee application, plaintiffs moved to seal "all narrative descriptions of each attorney's work" in its billing records. *Anthem*, 2018 WL 3960068, 2018 U.S. Dist. LEXIS 140137, at *182-*183. An objecting class member (represented by CCAF) opposed those motions, contending that litigation adversaries are entitled to review opposition billing entries. *Anthem*, Dkts. 975 (Feb. 5, 2018), 989 (Feb. 9, 2018). That is especially true in class actions where "[c]lass members cannot participate meaningfully in the process contemplated by Federal Rule of Civil Procedure [23(h)] unless they can review the bases of the proposed [fee award]." *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 309 (6th Cir. 2016). And it is most true in common fund cases when defendants have "no incentive" to oppose the fee motion, effectively "suspend[ing]" "the adversary system…during fee proceedings." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000). In view of these interests, Judge Koh denied plaintiffs' motion to seal the narrative descriptions of each attorney's work. *Anthem*, Dkt. 995 (Mar. 16, 2018).

Plaintiffs then submitted an amended and narrowed motion that agreed to "publicly disclose[]" "almost the entirety of each attorney's narrative descriptions" with minor redactions in two basic patterns. *Anthem*, 2018 WL 3960068, 2018 U.S. Dist. LEXIS 140137, at *182-*183. To account for attorney-client privilege, "[t]he first takes the form: 'Email/call to [client] regarding ____.'" *Id.* at 183. And then, to account for work-product

doctrine, the second pattern redacted "particular work or research" that revealed mental thought process, as in the form: "Research legal issues relating to ___." *Id*. But for the most part, all the basics (which biller, did what work, for how long, at what time) were fully disclosed. CCAF's client did not object and the court granted the narrowed motion. *Id.*

These redactions were narrow and confined because "a blanket claim of privilege"—work product or attorney-client—cannot succeed. *Arctic Cat Inc., v. Polaris Indus*., No. 16-cv-0009, 2017 WL 6187325, 2017 U.S. Dist. LEXIS 218031, at *5-*6 (D. Minn. May 15, 2017). "A motion for attorneys' fees necessarily places documentation of litigation time records at issue." *Strauch v. Computer Sciences Corp*., No. 14-cv-956, 2020 U.S. Dist. LEXIS 62523, at *10 n.5 (D. Conn. Apr. 9, 2020) (denying motion to seal class counsel's time records). Blanket privileges "cannot preclude the opposing party from conducting an analysis of the reasonableness of the petitioning party's claim for attorneys' fees." *Arctic Cat*, 2017 U.S. Dist. LEXIS 218031, at *5-*6 (cleaned up); *accord Starr Indem. & Liab. Co. v. Cont'l Cement Co., L.L.C.*, No. 11-cv-809 (JAR), 2012 U.S. Dist. LEXIS 170988, 2012 WL 6012904, at *5 (E.D. Mo. Dec. 3, 2012) (stating that the challenging party has a right to know "what the particular task was" for which reimbursement is sought). And more generally, "no court of appeals has held that disclosure of the general subject matter of a billing statement…violates attorney-client privilege." *Avgoustis v. Shinseki*, 639 F.3d 1340, 1344-45 (Fed. Cir. 2011) (noting, that, among others, the Eighth Circuit upheld a fee reduction for "vague" entries, such as "met with client").[1]

[1] Although federal common law generally governs evidentiary privileges, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. Because there is no conflict between federal and state law here, the Court need not wrestle with the thorny issue of whether plaintiffs' motion for attorneys' fees in this nationwide multi-claim class action is a matter of state or federal law. Under Missouri law, itemized billing statements that "merely

Decisions reflect this principle in the context of class proceedings where cultivating transparency and adversarial scrutiny is even more important. *See, e.g.*, *Rodriguez v. Evergreen Prof'l Recoveries, Inc.*, No. 19-cv-0184-JCC, 2021 WL 603319, 2021 U.S. Dist. LEXIS 15560, *5 (W. D. Wash. Jan. 27, 2021) (finding Rule 23(h) violation where class members could not review "the fee motion itself" or the forthcoming "time sheets detailing how many hours were spent by each attorney on specific tasks"); *Fangman v. Genuine Title*, No. 14-cv-0081, 2016 U.S. Dist. LEXIS 160434, at *11-*12 (D. Md. Nov. 18, 2016) (denying motion to seal billing sheets and affidavits of class counsel even where class counsel sought percentage-based award); *Martin v. Global Mktg. Research Servs.*, No. 14-cv-1290, 2016 WL 4129033, 2016 U.S. Dist. LEXIS 101898, at *4 (M.D. Fla. Aug. 3, 2016) ("regardless of what the settlement agreement requires or does not require to be posted, potential class members are entitled to make their own assessment. Accordingly, the time sheets must be docketed and posted on the class action settlement website."). "Where in camera review was challenged and litigated, courts have held that due process requires filing billing records on the docket so that opposing parties can examine all materials on which the court relied." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-md-1917, 2016 U.S. Dist. LEXIS 35627, 2016 WL 1072097, *3 (N.D. Cal. Mar. 17, 2016). State court decisions concur, sometimes also as a matter of federal due process. *Lawler v. Johnson*, 253 So. 3d 939 (Ala. 2017); *Strack v. Cont'l Res., Inc.*, No. 117,276, 2020 Okla. Civ. App. LEXIS 3, at *17-*18 (Okla. Civ. App. Feb. 20, 2020) ("We hold that a judicial review of the billing records in camera, depriving Objector of the opportunity to review them, was an improper procedure requiring reversal and a new hearing").

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identify attorney [tasks]…are neither privileged communications nor work product and do not fall within the attorney-client privilege." *Tipton v. Barton*, 747 S.W. 2d 325, 332 (Mo. App. E.D. 1988); *see also Baryo v. Philip Morris USA, Inc.*, No. 05-1182-CV, 2007 U.S. Dist. LEXIS 51717, 2007 WL 2084111, at *4 (W.D. Mo. July 17, 2007)(Laughrey, J.) (following *Tipton* as the law of the forum state).

Indeed, to St. John's knowledge, the only authority denying an objector's request for full access to class counsel's billing records is *Chambers v. Whirlpool*. 980 F.3d 645, 672 (9th Cir. 2020). There, however, the objector had not preserved the issue in the district court, and the fee was not paid by the common class fund. Rather, the defendant, who was paying class counsel's fee independently of class recovery, had access to the timesheets and was itself strenuously opposing class counsel's fee request. *Id.*

Rule 23(h) and basic due process precepts entail that class members have a need to review and respond to class counsel's full fee application, including tangible billing records. Denial of review would result in undue hardship to Objector.

II. The optimal remedy is public disclosure, class notice on the settlement website, and a reopened opportunity to object. At the very least, St. John should be permitted to review and address class counsel's billing records.

Rule 23(h) rights belong to the each class member. Thus, the best way to fully cure a Rule 23(h) deficiency, like that created here by the plaintiffs' failure to submit lodestar accounting with their fee papers, is to require full disclosure to the class on the docket and through the settlement website. By its terms Rule 23(h) requires then giving "the entire class and not just the [objector] here—the opportunity to review class counsel's completed fee motion and to submit objections if they so choose." *Allen*, 787 F.3d at 1226. Merely giving the objector notice and the chance to respond "does not cure the deficiency in notice to the class as a whole." *In re Colgate-Palmolive Softsoap Antibacterial Hand Soap Mktg. & Sales Practices Litig.*, No. 12-md-2320-PB, 2015 WL 7282543, 2015 U.S. Dist. LEXIS 154602, at *43 (D.N.H. Nov. 16, 2015).

These cases reflect the overarching aims of increasing accountability and transparency "in class actions—where by definition some members of the public are also parties to the case." *Shane Group*, 825 F.3d at 305 (internal quotation omitted). In turn, that transparency instills "[p]ublic confidence in the fairness of attorney compensation in class

actions" which "is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 688-92 (Cal. 2016) (Liu, J., concurring). Principles of openness should thus be observed "with particular strictness" in class settings. *Shane Group*, 825 F.3d at 305 (quoting *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001)).

That said, this Circuit has permitted a remedy of allowing existing objectors to address the late-filed fee papers. *Keil*, 862 F.3d at 705; *see also Johnson v. NPAS Sols., LLC*, 975 F.3d at 1255 (similar). Under *Keil*, this remedy suffices to make harmless a preexisting Rule 23(h) error. St. John therefore acknowledges the Court's discretion to grant a more limited remedy for her specifically rather than for the entire class.

CONCLUSION

For these reasons, the Court should require class counsel to publicly file their billing records, place them on the website, and allow class members to address them if they wish. In the alternative, it should permit Objector St. John to access those records and respond to them within a reasonable time.

Dated: March 18, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2021, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF system, which will send notifications of such filing to the CM/ECF participants registered to receive service in this matter.

/s/ Jonathan R. Whitehead