UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BYRON MCKNIGHT,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., et al.,

Defendants.

Case No. 14-cv-05615-JST

ORDER DENYING OBJECTORS' MOTION FOR AN INDICATIVE RULING

Re: ECF No. 253

Before the Court is Objectors Robert Hudson and Jennifer Hinojosa's ("Objectors") motion for an indicative ruling. ECF No. 253. The Court will deny the motion.

In September 2021, this Court granted in part and denied in part Plaintiffs' motions for attorney's fees. ECF No. 236. Objectors then appealed the fee award to the Ninth Circuit. ECF Nos. 239, 241.

In February 2022, Objectors moved for an "indicative ruling that Rule 23(e)(5)(B) does not apply in the context of an objection to Class Counsel's fee request or an appeal of the amount of attorney's fees." ECF No. 253 at 3. Federal Rule of Civil Procedure 23(e)(5)(B) requires court approval for any "payment or other consideration" for "forgoing or withdrawing an objection" or "forgoing, dismissing, or abandoning an appeal from judgment approving the [class settlement] proposal." Fed. R. Civ. P. 23(e)(5)(B).

Because of the importance and relative novelty of this issue, and the fact that no substantive opposition to Objectors' motion was filed,[1] the Court invited amici to brief the issue.

[1] A document entitled "opposition" was filed, but its purpose was to correct statements Objectors made concerning another objector's litigation position. *See* ECF No. 254. It did not oppose the relief the motion requested.

See ECF No. 256. Five different legal organizations, representing a variety of perspectives – the American Association for Justice, the Impact Fund, the United States Chamber of Commerce, Lawyers for Civil Justice, and the Center for Class Action Fairness – filed amicus briefs.[2] ECF Nos. 258, 260, 265, 267. All amici agreed that the plain text of Rule 23(e)(5)(B) requires court approval of payments made to objectors in exchange for withdrawing objections to attorney's fees requests or appeals of attorney's fees awards. Additionally, the Chamber of Commerce argued that the Court should not reach the merits of Objectors' motion because they had not actually made a motion "for relief" as required by Rule 62.1, i.e., they had not placed any actual settlement before the Court or even affirmatively stated that they had reached such a settlement.

Plaintiffs then filed a response. ECF No. 270. Plaintiffs agreed with the Chamber of Commerce that the Court should not reach the merits of the request for indicative ruling because there was no actual motion for relief before the Court. *Id.* They agreed with amici that "by its terms, Rule 23(e)(5) requires court approval of any consideration received by objectors in exchange for dropping an appeal from a judgment approving a settlement." *Id.* at 5. And they stated affirmatively that they had not reached a settlement with Objectors Hinojosa and Hudson – and, in fact, that "no demands or offers to settle any of the appeals were [even] made." *Id.* at 3.

The present motion is not a referendum on whether objectors can ever provide a benefit in the resolution of class actions – they unquestionably can. "When defendants and class counsel seek to settle a class action, 'the clash of the adversaries' on which our system depends is lost." *Pearson v. Target Corp.*, 968 F.3d 827, 838 (7th Cir. 2020) (quoting *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014)). For that reason, "[o]bjectors can play a useful and valuable role in providing the court information regarding the fairness, adequacy, and reasonableness of settlements." *In re Leapfrog Enters., Inc. Sec. Litig.*, No. C-03-05421-RMW, 2008 WL 5000208, at *2 (N.D. Cal. Nov. 21, 2008); *see also* David F. Herr, Annotated Manual for Complex Litigation § 21.643 (4th ed.) (noting that objectors can play a "beneficial role in opening a proposed settlement to scrutiny and identifying areas that need improvement"). "The role of the

[2] The Chamber of Commerce and Lawyers for Civil Justice filed a joint brief. ECF No. 260. The Court here refers to these filers together as "the Chamber of Commerce."

objector is particularly important in the evaluation of the reasonableness of attorneys' fee requests by class counsel." *Leapfrog*, 2008 WL 5000208, at *2. In a common fund case, for example, when objectors interpose a valid objection to an attorney's fees request that the court would otherwise approve, class members benefit by the distribution of a greater share of the fund proceeds to class members.

But, as the Chamber of Commerce notes, "not all objections are created equal." ECF No. 260 at 6. Some objectors engage in "objector blackmail," "a well-known class and derivative action phenomenon whereby objectors 'use an appeal [of a class action or derivative settlement] as a means of leveraging compensation for themselves or their counsel.'" *In re Wells Fargo & Co. S'holder Derivative Litig.*, 523 F. Supp. 3d 1108, 1113 (N.D. Cal. 2021) (quoting *Vaughn v. Am. Honda Motor Co., Inc.*, 507 F.3d 295, 300 (5th Cir. 2007)). "In most cases, the class realizes no benefit when an objector drops an objection to a settlement or dismisses an appeal that ostensibly sought a better deal for the class." ECF No. 267 at 15. The Advisory Committee on Civil Rules adopted Rule 23(e)(5)(B) precisely to combat this abuse, requiring court approval for payments made in connection with dropping objections or appeals. *See* Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment ("[S]ome objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process.").

Having considered Objectors' motion and the other briefs submitted to the Court, the Court sees no reason to exclude objections to attorney's fees awards, whether on appeal or at another stage, from the provisions of Rule 23(e)(5)(B). For one thing, the plain text of the Rule leaves no room for such an exception. For another, such an exception would be inconsistent with the policy behind enactment of the rule, which is to bring payments to objectors into the sunlight and thereby protect settlements from being hijacked by opportunistic objections. "An empirical study of class actions in four districts found that attorneys' fees award[s] were the most frequent basis for objections in class action settlement approval." ECF No. 265 at 6 (citing Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal Districts 57 (Federal Judicial Center 1996)). Thus, Objectors' construction of Rule 23(e)(5)(B) would exempt from judicial scrutiny precisely

the category of objection most in need of it. As Judge Schofield recently concluded, "[t]his type of agreement is precisely what the court-approval provision in Rule 23(e)(5)(B) is meant to address." *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 334 F.R.D. 62, 63 (S.D.N.Y. 2019). The Court agrees with Plaintiffs and amici on this point.

The Chamber of Commerce also argues that Objectors' motion fails because they have not made "a timely motion . . . for relief" as required by Rule 62.1. *See* Fed. R. Civ. P. 62.1(a) ("If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue."). Instead, the Chamber of Commerce argues, the Objectors are "seeking an impermissible advisory opinion on an issue that is not ripe for resolution – specifically, whether Rule 23(e)(5) would apply in the event the parties on appeal reach a mediated settlement or some other proposed resolution [for withdrawing their appeal]." ECF No. 260 at 7.

"Courts are split as to whether a party seeking a ruling under Rule 62.1 must also file an accompanying predicate motion that the district court lacks authority to grant." *Est. of Najera-Aguirre v. Cnty. of Riverside*, No. ED CV 18-762 DMG (SPx), 2020 WL 5370618, at *1 (C.D. Cal. Aug. 13, 2020). Some courts require that a "'timely motion' (typically a Rule 60(b) motion) has been made for relief that the court lacks jurisdiction to grant [due to] the pendency of an appeal," because "procedurally there is no basis for an independent, free-standing Rule 62.1 motion." *Medgraph, Inc. v. Medtronic, Inc.*, 310 F.R.D. 208, 210 (W.D.N.Y. 2015). Other courts, however, "accept a 'freestanding' Rule 62.1(a) motion if the moving party sufficiently states the merits of its substantive argument in its briefs." *Index Newspapers LLC v. City of Portland*, No. 3:20-CV-1035-SI, 2022 WL 72124, at *2 (D. Or. Jan. 7, 2022) (surveying cases). This Court adopts the latter view, which is the prevailing view in the Ninth Circuit. *See, e.g., id.*; *Est. of Najera-Aguirre*, 2020 WL 5370618, at *1 ("Because Defendants' Rule 62.1(a) motion sufficiently sets forth the merits of their arguments to reconsider the Court's denial of summary judgment, the Court declines to deny Defendants' motion for an indicative ruling merely because they failed to file a separate motion for reconsideration."); *Lawson v. Grubhub, Inc.*, No. 15-cv-05128-JSC,

2018 WL 6190316, at *2 (N.D. Cal. Nov. 28, 2018) ("Plaintiff, however, has not made a formal Rule 60(b)(6) motion; instead, he asks, in effect, for the Court to indicate what it would do if Plaintiff filed a Rule 60(b)(6) motion. Nonetheless, rather than deny Plaintiff's motion for this procedural defect, the Court will construe it as a Rule 60(b)(6) motion which this Court does not have jurisdiction to decide because of the pending appeal."). If the Rule 62.1 motion is clear about the substantive relief sought from the district court, Rule 62.1 does not require filing a separate underlying motion before filing the Rule 62.1 motion.

The Court finds greater merit in the Chamber of Commerce's second objection – that the Objectors' motion is premature. Objectors seek a ruling on whether Rule 23(e)(5) requires court approval when objectors and plaintiffs' counsel settle fee-request objections or fee-award appeals in exchange for a monetary payment. In this case, however, no such settlement exists. Thus, Objectors are seeking an advisory opinion. "[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (citation omitted). And "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Moreover, it is not clear how a ruling on a hypothetical issue would be helpful to the Ninth Circuit. "[A]lthough parties may seek an indicative ruling on matters other than Rule 60(b) rulings, they may be denied if the ruling would not be helpful to the appellate court." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2911 (3d ed.). Here, no ruling on Objectors' motion could assist the Ninth Circuit, given that there is no settlement that could moot Objectors' objection to the Court's fee award.

Because Objectors seek an advisory ruling regarding a settlement that has not yet been reached, and because such a ruling would be of no assistance, the Court denies Objectors' motion for an indicative ruling.

IT IS SO ORDERED.

Dated: September 13, 2022

JON S. TIGAR
United States District Judge