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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BYRON MCKNIGHT, *et al.*,

Plaintiffs,

v.

UBER TECHNOLOGIES, INC., *et al.*,

Defendants.

Case No. 4:14-cv-05615-JST

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND LAWYERS FOR CIVIL JUSTICE IN RESPONSE TO THE COURT'S ORDER

Hearing Date: N/A
Time:
Judge:
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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ has specific expertise on the meaning, history, and application of Federal Rule of Civil Procedure 23 due to its advocacy efforts during the rulemaking process that led to the 2018 amendments of that rule. LCJ submitted several extensive comments to the Advisory Committee on Civil Rules.

This Court invited the Chamber and LCJ to file briefs addressing whether Federal Rule of Civil Procedure 23(e)(5)(B) "applies to objections to Class Counsel's fee request or an appeal of the amount of attorney's fees only." ECF 256 at 2. For reasons set forth below, the Chamber and LCJ believe that Rule 23(e)(5)(B) does apply to such objections, a conclusion that is supported by the Rule's text and structure, and by important considerations necessary to managing class action litigation. But the Court should not address the issue at this time because the objectors requesting an indicative ruling have not complied with requirements of Rule 62.1.

[1] Neither of the *amici* associations is a subsidiary or affiliate of any publicly owned corporation. *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Objectors can sometimes serve an important function in protecting class members' interests during settlement. "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)). Good-faith objectors can step into this adversarial role and can be useful in "generat[ing] the information that the judge needs to decide the case faithfully." *Id.* (quotation marks omitted). But not all objections are created equal. Some objectors file frivolous objections and appeals, leveraging their adversarial role to secure payouts to drop their objections and appeals. *See In re Wells Fargo & Co. Shareholder Derivative Litig.*, 523 F. Supp. 3d 1108, 1113 (N.D. Cal. 2021) (Tigar, J.) (discussing concerns of "objector blackmail"). Seeking to thwart the proliferation of bad-faith objectors, the Advisory Committee on Civil Rules ("Advisory Committee") adopted Federal Rule of Civil Procedure 23(e)(5)(B) in 2018 to require courts to approve payments in connection with withdrawing objections or dismissing appeals. These procedural requirements allow courts to monitor side deals between objectors and class counsel, protecting the integrity of the judicial process and ensuring that meritless objections are not rewarded at the expense of class members.

Two objectors in this case — Jennifer Hinojosa and Robert Hudson — argue that Rule 23(e)(5)'s procedural protections should not apply to their objections or appeals of the Court's orders addressing attorney's fees. ECF 253. They ask this Court to issue an indicative ruling to this effect in anticipation of potentially resolving their appeals through mediation. *Id.* But this Court should decline that request because the objectors have not filed a predicate motion as Rule 62.1 requires. There is no concrete issue presented to the Court for resolution and there is no reason to issue an advisory ruling. Instead, the Court should wait until the objectors have reached a mediated resolution and seek to dismiss their appeals. At that time, the Court can decide whether the terms of any proposed resolution fall within the scope of Rule 23(e)(5).

On the merits, the objectors' argument that Rule 23(e)(5) never applies in the context of fee objections and appeals is foreclosed by Rule 23's plain text. Their proposed approach would create a substantial loophole to ordinary class action procedures that would frustrate

Rule 23(e)(5)'s stated purpose and the expressed intent of the Advisory Committee. Attorney fees are an issue that implicates the interests of the certified class; objections to such fees are therefore properly subject to Rule 23(e)(5)'s procedural protections.

ARGUMENT

I. The Court Should Deny the Joint Motion Because It Does Not Comply with Rule 62.1's Requirements.

Rule 62.1 permits a district court to issue an indicative ruling "[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal." Fed. R. Civ. P. 62.1(a). The rule is designed to promote judicial efficiency and fairness. *Amarin Pharms. Ireland Ltd. v. FDA*, 139 F. Supp. 3d 437, 447–48 (D.D.C. 2015). The rule applies, for instance, when new evidence comes to light, a party files a timely motion for reconsideration based on that evidence, and the party then seeks an indicative ruling on its motion while the appeal remains pending. *Ret. Bd. of Policemen's Annuity & Ben. Fund of City of Chi. v. Bank of N.Y. Mellon*, 297 F.R.D. 218, 221 (S.D.N.Y. 2013).

In this case, issuing an indicative ruling at this juncture would be improper because the objectors (Hinojosa and Hudson) have not made "a timely motion … for relief" that an indicative ruling would appropriately resolve. Fed. R. Civ. P. 62.1(a). Instead, they 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. Rather than returning to this Court if a mediated resolution is reached — either to comply with Rule 23(e)(5)'s procedures or for a determination that Rule 23(e)(5) does not apply — they want the Court to pre-judge the issues and grant them a free pass to reach a resolution on appeal exempt from judicial scrutiny.

That request is improper because it does not comply with Rule 62.1's requirements. As courts have held, a party cannot avoid filing a timely motion by seeking an "independent, free-standing" request for an indicative ruling. *Medgraph, Inc. v. Medtronic, Inc.*, 310 F.R.D. 208, 210–11 (W.D.N.Y. 2015). "Absent an underlying predicate motion, there is no basis for relief under Rule 62.1." *Id.* (citing Fed. R. Civ. P. 62.1 advisory committee notes). Although Rule 62.1

allows the district court to exercise jurisdiction while an appeal is pending, it does not override the essential principle that the district court's role is not "to declare rights in hypothetical cases." *Wetlands Water Dist. Distrib. Dist. v. NRDC*, 276 F. Supp. 2d 1046, 1050 (E.D. Cal. 2003) (discussing "prohibition on advisory opinions"). The objectors have requested only that this Court advise on whether Rule 23(e)(5) might apply if, at some future point, they seek to dismiss their appeals. ECF 253. Because that request seeks a hypothetical ruling divorced from any underlying predicate motion, they have not complied with Rule 62.1.

Strong prudential concerns weigh in favor of enforcing Rule 62.1's requirements. *First*, whether Rule 23(e)(5)'s procedures apply should depend on the precise nature and terms of any proposed resolution of the pending appeals. As described below, Rule 23(e)(5) applies to fee awards in general because they almost always qualify as an "issue" that implicates the interests of the certified class. But even if that conclusion were not warranted in all circumstances, it would at least depend on the terms of the proposed resolution and how any resolution is structured. *See In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 334 F.R.D. 62, 63–64 (S.D.N.Y. 2019) (denying request for indicative ruling because of concern that objectors are receiving improper consideration for withdrawing their objection and dismissing their appeal). The Court should not resolve in the abstract whether Rule 23(e)(5) applies without evaluating the concrete terms of any proposed resolution to determine whether they implicate the claims, issues, or defenses of the certified class. Accordingly, the objectors should return after they have reached a proposed resolution of their appeals, and this Court can then decide whether Rule 23(e)(5)'s procedures should or should not apply.

Second, a premature indicative ruling could "have the potential for spawning future appeals," depending again on the terms of any proposed resolution. *Rabang v. Kelly*, 2018 WL 1737944, at *3 (W.D. Wash. Apr. 11, 2018) (quoting *Ret. Bd. of Policemen's Annuity & Ben. Fund*, 297 F.R.D. 218 at 223). For example, other absent class members should have the right to object to any payout to the objectors that takes money away from the common fund and thereby "perpetuates a system that … encourage[s] objections advanced for improper purposes." *In re Wells Fargo*, 523 F. Supp. 3d at 1117 (alteration omitted) (quoting advisory committee notes to

2018 amendments); *see also In re Foreign Exch.*, 334 F.R.D. at 63 (same). In these circumstances, "rather than aiding the Court of Appeals in its consideration of the pending" appeals, an indicative ruling "would do just what the filing of a notice of appeal is designed to avoid." *Amarin Pharms.*, 139 F. Supp. 3d at 447. "[I]t would, to borrow Judge Posner's words ... get 'the district court and the courts of appeals' in 'each other's hair.'" *Id.* at 447–48 (quoting *In re Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring)).

Third, the Court should not issue an indicative ruling until all issues on appeal are resolved. The motion filed by the objectors incorrectly asserts that the only issues on appeal relate to the attorney fee objections and not the underlying settlement. ECF 253. In fact, at least one objector, Gordon Morgan, has appealed this Court's order granting final approval of the *settlement* and the corresponding final judgment. *See* ECF 254 (noting that Morgan's amended notice of appeal included the district court's order granting final approval of the settlement and the corresponding final judgment). Accordingly, because the underlying settlement has been challenged on appeal, an indicative ruling that the objectors seek would only confuse the issues.

II. Rule 23(e)(5) Applies to Objections to Fee Requests and Appeals of Attorney's Fees.

Under Rule 23(e)(5), a class member is entitled to challenge any "proposed settlement, voluntary dismissal, or compromise" of any of "[t]he claims, issues, or defenses of [the] certified class." Fed. R. Civ. P. 23(e). When a class member objects or appeals, a special procedure applies to ensure that objectors fulfill their fiduciary obligations to the class and to prevent objectors from "using objections to obtain benefits for themselves rather than assisting the settlement-review process." Fed. R. Civ. P. 23(e)(5)(B), Advisory Comm. Note to 2018 Amends.; *see also Pearson*, 968 F.3d at 833 (objectors are "bound to protect" the class's common interests and may not "sacrifice those interests to their own advantage by selling their appeals without benefit to the class") (cleaned up). As a result, the court must approve, after a hearing, any "payment or other consideration" provided in connection with "forgoing or withdrawing an objection," or "forgoing, dismissing, or abandoning an appeal." Fed. R. Civ. P. 23(e)(5)(B).

There is little precedent interpreting Rule 23(e)(5), and no case that appears to address directly whether Rule 23(e)(5) applies to objections limited to contesting an award of attorney fees.

But the question is not difficult to answer — objections to attorney fees fall squarely within Rule 23(e)(5)'s ambit.

Rule 23(e)(5)'s plain text. Attorney fee awards are an essential part of any proposed settlement or compromise, as they directly implicate the class's interests. They are therefore one of the "issues … of a certified class" that can "be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Contrary to the objectors' assertions, it is not possible to segregate the fee award from the underlying interests of the certified class. *See* Fed. R. Civ. P. 23(h) ("[T]he court may award reasonable attorney's fees ... that are authorized by law *or by the parties' agreement*") (emphasis added).

The objectors contend that the fee award is not an "integral part" of the settlement. ECF 253 at 2 n.2. But that makes no sense. The long-form settlement notice in this case informed class members the names of "class counsel" and the fact that they intended to request a percentage of the settlement fund for attorneys' fees. ECF 125-5 at 9 ("The fees and expenses awarded by the Court will be paid out of the Settlement Fund."). In addition, the Court ultimately approved a non-reversionary settlement fund and granted plaintiffs' counsel a fee award based on a percentage of that fund, to which it applied a "lodestar cross-check." ECF 236 at 9–13. In determining an appropriate award, the Court took care to ensure that the fee would not "represent[] too large a transfer of the class's settlement funds to class counsel." *Id*. at 13. It thus rejected Hudson's objections, *see* ECF 152, which urged the Court to reduce the fee award to a smaller percentage of the common fund, *see* ECF 236 at 13. Similarly, it denied Hinojosa's request for additional attorney's fees because her objections did not "result in an increase in the common fund" or "otherwise substantially benefit the class members." ECF 250 at 1 (quoting *Rodriguez v. Disner*, 688 F.3d 645, 658 (9th Cir. 2012)).

The objectors nonetheless contend that Rule 23(e)(5) does not apply because they objected to the award of fees under Rule 23(h)(2). But that also makes no sense. Rule 23(h) sets out the procedures for objecting to an award of fees and reinforces the principle that, at the fee determination stage, a district court judge "must protect the class's interest by acting as a fiduciary

for the class." *In re Rite Aid Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005), *as amended* (Feb. 25, 2005). Nothing in Rule 23(h) dispenses with the requirements of Rule 23(e).

That conclusion is supported by considering how courts applied Rule 23(e) before the 2018 amendments. In that context, courts applied the earlier version of Rule 23(e)(5) to both fee objections and to appeals. *See In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1109 n.8 (D. Kan. 2018); *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 210 (E.D. Pa. 2014). Significantly, nothing in the 2018 amendments changed Rule 23(h). *See* Fed. R. Civ. P. 23(h) Advisory Comm. Note to 2018 Amends. It is therefore appropriate to conclude that the Advisory Committee updated Rule 23 with the existing interpretation in mind—if it had intended to exclude fees objections or appeals from the scope of Rule 23(e)(5), it would have done so explicitly. *See Shapiro v. United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924))).

Rule 23(e)(5)'s recognized purpose. Rule 23(e)(5)'s plain text is reinforced by its well-understood purposes. Courts recognize that objectors can play a "beneficial role in opening a proposed settlement to scrutiny and identifying areas that need improvement." David F. Herr, Annotated Manual for Complex Litigation § 21.643 (4th ed.). But objectors can also hijack the settlement process for personal gain, raising arguments designed "to obtain benefits for themselves" in exchange for dropping the objection or dismissing the appeal. Fed. R. Civ. P. 23(e)(5)(B) Advisory Comm. Note to 2018 Amends. "[A]llowing payment perpetuates a system that can encourage objections advanced for improper purposes." *Id.*

To prevent this abuse of the class action process, the Advisory Committee adopted Rule 23(e)(5)(B), requiring court approval for payments made in connection with dropping objections or appeals. *See* Fed. R. Civ. P. 23 Advisory Comm. Note to 2018 Amends. ("[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."). Excluding fee objections and fee appeals from these procedural requirements would frustrate the purpose of Rule 23(e)(5) because meritless

objections also occur in the context of fee awards. *See Pearson*, 968 F.3d at 838 (ordering disgorgement of fees paid to objectors who withdrew their objections, including those who objected solely to the fee award); *see also* Robert Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly*, 89 Fordham L. Rev. 475, 486 (2020) (describing "an objector [who] opposed giving class counsel *any* fees for the time spent negotiating the settlement in the case"). Indeed, precisely because class counsel has an incentive to settle with objectors on appeal, and class members have no ability to "participate in the negotiations" that would "conceal any problems with" any proposed resolution that was "not in the interests of the lawyers to disclose," the need for judicial oversight is heightened. *In re Oracle Sec. Litig.*, 136 F.R.D. 639, 645 (N.D. Cal. 1991) (discussing outside the objector context the need for close court oversight of fee awards); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980) (noting the "responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it").

Rule 23(e)(5) is designed to distinguish between, on one hand, objectors who "may advance class interests in a particular case" and, on the other hand, objectors who are in it only "to obtain benefits for themselves" by seeking "to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements." Fed. R. Civ. P. 23(e)(5)(B), Advisory Comm. Note to 2018 Amends. If the Court accepts the objectors' invitation to decide that Rule 23(e)(5) categorically does not apply, it will undermine Rule 23(e)(5)'s purpose. Rather than screening out bad-faith objectors while preserving legitimate appeals, it will allow objectors to resolve their objections through mediation on appeal and escape any meaningful judicial scrutiny. The Court should not permit that to occur.

The Supreme Court has consistently held that courts have a special role to play in overseeing class actions. They should not certify a class unless they have rigorously analyzed the issues and the representative plaintiffs have carried their burden to demonstrate strict adherence to Rule 23's requirements. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (noting the importance of "heightened[] attention" to Rule 23's requirements in the settlement context). Once a class is certified, because the pressures for settlement are often substantial, the court must

continue to ensure that the settlement, and any fee award, is appropriate and does not prejudice the rights of absent class members. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848–49 (1999).

That same obligation applies in the context of evaluating objections and any proposed resolution of objections by class counsel. Rigorous adherence to all of Rule 23's provisions, including Rule 23(e)(5), is necessary to protect the rights of absent class members. The Court has a special obligation to defend their interests, which not only includes stopping bad-faith objectors, but also preventing objectors with meritorious and beneficial challenges from "selling out the class in exchange for private payment" on appeal. *Pearson*, 968 F.3d at 838. Excluding fee appeals and objections from Rule 23(e)(5)(B) scrutiny would permit objectors to do just that.

CONCLUSION

For these reasons, this Court should deny the joint motion for an indicative ruling. If the Court decides to reach the merits, it should conclude that Rule 23(e)(5)(B) applies to fee objections and appeals.

Respectfully submitted,

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