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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SHAHRIAR JABBARI and KAYLEE HEFFELFINGER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WELLS FARGO & COMPANY AND WELLS FARGO BANK, N.A.,

Defendants.

No. 15-cv-02159-VC

PLAINTIFFS' OPPOSITION TO ALEX CHERNAVSKY AND WILLIAM CASTRO'S MOTION FOR ATTORNEYS' FEES

Date: March 22, 2018
Time: 10:00 a.m.
Courtroom: 4, 17th Floor

Judge: Hon. Vince Chhabria

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I. INTRODUCTION

The law firm representing Class members Alex Chernavsky and William Castro (the "Audet Firm") requests an award of attorneys' fees. It argues that its objection (the "*Chernavsky* Objection") improved the Settlement in several ways. The Audet Firm points to these improvements to argue that it merits an award of $4.26 million—or, in the alternative, $3.2 million—in attorneys' fees.

Respectfully, the Audet Firm has overstated its contribution. While it asserts that it was responsible for six changes to the Settlement, it had nothing to do with four of them. Of the other two changes, one—removing a court seal from Claim Forms—is too minor to justify an award. For the other change—lengthening the claims period—the Audet Firm cannot claim sole responsibility.

Even if the Audet Firm could merit an award of fees, the fee it requests is disproportionate. It requests a percentage-of-the-fund award, calculating the award based on the entire $142 million Settlement Fund, or, alternatively, based on the $32 million added to the Settlement Fund when the parties extended the Class Period to 2002. Either award would be unjustified. The theory behind a percentage-of-the-fund award is that attorneys responsible for creating a common benefit deserve a share of the benefit they created. Yet it is difficult to see how the Audet Firm was responsible for creating the Settlement Fund or for adding $32 million to that Fund.

The motion should be denied.

II. ARGUMENT

A. The Audet Firm does not merit an award of fees

In requesting fees, the Audet Firm points to six ways the Settlement changed between the initial motion for preliminary approval and the amended Settlement submitted a month and a half later. Alex Chernavsky and William Castro's Notice of Motion and Motion for Award of Attorney's Fees ("Audet Mot.") at 5–7, ECF 179. These changes, it argues, were "directly attributable" to arguments made by the Audet Firm, *id.* at 5, and were "substantial and extensive enhancements" that justify an award of fees, *id.* at 8.

Four of these changes were not attributable to the Audet Firm. Another change—removing a court seal from Claim Forms—is too peripheral to justify an award of attorneys' fees. As for the final change—the extension of the claims period—the Audet Firm cannot claim sole responsibility.

1. The Audet Firm had no share in several of the changes for which they take credit

a. The Claim Forms

The parties made minor changes to the Claim Forms when they submitted their Amended Settlement Agreement. The Audet Firm contends that it was responsible for those changes. Audet Mot. at 6. This contention is inaccurate, as is shown by comparing the *Chernavsky* Objection to the Court-ordered change.

The *Chernavsky* Objection argued that the Claim Forms put too heavy a burden on Class members. At times, the Objection appeared to suggest that Claim Forms were not necessary at all because Wells Fargo already had all the necessary information.[1] Alex Chernavsky and William Castro's Opp'n to Pls.' Mot. for Prelim. Approval ("*Chernavsky* Obj.") at 17, ECF 116. Aside from this overarching suggestion, the Objection advanced two concrete arguments against the Claim Forms. First, the Claim Forms improperly expected Class members to recall facts from as early as 2002. *Id.* at 7. Second, they required Automatically-Enrolled Claimants to submit a claim form to receive full relief. *Id.*

As far as Plaintiffs can discern from the record, the Court never adopted the *Chernavsky* Objection's view of the Claim Forms. In its initial order on preliminary approval, it asked the parties to give Class members "an opportunity . . . to provide further description of any credit-related injury" on their Claim Forms. Order re Mot. for Prelim. Approval at 1, ECF 155. Unlike the *Chernavsky* Objection, though, it did not ask the parties either to eliminate Claim Forms or to simplify them in some way.

Hence, aside from the change ordered by the Court, the amended Claim Forms do not greatly differ from the initial Claim Forms. They do not make any changes to respond to the criticisms leveled

[1] As Plaintiffs have explained, *see* Pls.' Reply Mem. in Supp. of Mot. for Prelim. Approval ("Reply") at 16–17, ECF 133, Wells Fargo did *not* have the necessary information.

by the *Chernavsky* Objection. If anything, the amended Claim Forms ask Class members to provide slightly more information than the initial Claim Forms. *Compare* Am. Settlement Agreement, Ex. B-1.1, ECF 162-5, *with* Settlement Agreement, Ex. A1 at 3, ECF 100-2; *compare* Am. Settlement Agreement, Ex. B-1.2, ECF 162-6, *with* Settlement Agreement, Ex. A1 at 5, ECF 100-2; *compare* Am. Settlement Agreement, Ex. B-4, ECF 162-9, *with* Settlement Agreement, Ex. A4 at 2-3, ECF 100-5.

b. Released Claims

In their Amended Settlement Agreement, in response to the Court's order, the parties modified the language that defined the "Released Claims." The modification was meant to clarify what the parties had originally intended:[2] The release extends to claims that could have been, but were not, asserted in this litigation, but only if those claims arise from the identical factual predicate as the claims asserted here. Am. Settlement Agreement ¶ 2.50, ECF 162.

The Audet Firm asserts that it was responsible for this change to the definition of "Released Claims." Audet Mot. at 6. This is a curious assertion, since at the preliminary approval hearing, William Audet seemed to concede that the Court did "not agree with [him]" on "the release." Tr. of Proceedings at 52:12–14, ECF 153. In any event, the *Chernavsky* Objection had very little, if anything, to do with the change to the release.

The *Chernavsky* Objection criticized the Settlement for releasing unknown claims, for the way it defined unknown claims, and for waiving California Civil Code section 1542. *Chernavsky* Obj. at 8. These provisions remain the same in the Amended Settlement Agreement. *See* Am. Settlement Agreement ¶ 2.62. The Objection can also be read to criticize the release of claims that could have been, but were not, asserted in this litigation. *See Chernavsky* Obj. at 8–9. Nevertheless, such claims are still included in the Amended Settlement Agreement's "Released Claims." *See* Am. Settlement Agreement ¶ 2.50 (releasing such claims if they "arise out of the identical factual predicate" as the claims asserted

[2] *See* Defs.' Suppl. Mem. in Supp. of Mot. for Prelim. Approval at 16–17, ECF 146 (in response to the Court's supplemental briefing order, explaining the parties' intentions); *see also* Tr. of Proceedings at 26:10–13, ECF 153 (suggesting that the change would be clarificatory rather than substantive).

in this action). The Audet Firm, then, was not responsible for the change the parties made to the definition of "Released Claims."

c. Online objection or opt-out

In response to the Court's order, the parties modified the Settlement Agreement to provide online mechanisms for objections and opt-outs. *See* Am. Settlement Agreement ¶¶ 12.1, 12.6, Exs. B-6 & B-7. The Audet Firm maintains that it was responsible for this change. Audet Mot. at 7. That is incorrect.

The *Chernavsky* Objection did not expressly advocate for an online objection or opt-out form. Instead, it argued that the Settlement website should "provide information on objections or a link to see currently filed objections. . . . Finally, any settlement website should link to or otherwise provide access to an objection website and note as much in the short form notice." *Chernavsky* Obj. at 7–8. The Settlement website, however, does not link to or post objections. If by "an objection website," the *Chernavsky* Objection intended to refer to an online means of objecting, that intention was not clear to Plaintiffs, who understood it to mean a website where objections would be posted. *See* Pls.' Reply Mem. in Supp. of Mot. for Prelim. Approval ("Reply") at 18, ECF 133.

According to the Audet Firm, it also argued that the Settlement Agreement inappropriately "required strict compliance" to opt out or object. Audet Mot. at 10 (citing *Chernavsky* Obj. at 6–7). This assertion is untrue; the Audet Firm did not make that argument. *See Chernavsky* Obj. at 6–7.

d. Settlement Administrator

In response to the Court's order, the parties modified the Settlement Agreement to allow the Court, before final approval, to examine how the Credit Impact Damages methodology is being implemented. Am. Settlement Agreement ¶ 9.7.1.7. The Audet Firm incorrectly takes credit for this modification. Audet Mot. at 7.

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The *Chernavsky* Objection argued that the Settlement should not give the Settlement Administrator the power of final approval or disapproval over the validity of a Class member's claim.[3] *Chernavsky* Obj. at 7. The change ordered by the Court, however, did not allow Class members to appeal from the Settlement Administrator's decision. It merely afforded the Court an interim opportunity to scrutinize whether the Credit Impact Damages methodology is fair, reasonable, and adequate. The provision that the *Chernavsky* Objection criticized has remained in the Amended Settlement. *See* Am. Settlement ¶ 9.5 (providing that "[t]he Settlement Administrator's good faith determination" of validity is final and not subject to review or appeal).

2. Removing a court seal from Claim Forms cannot justify an award of fees

The *Chernavsky* Objection argued that the court seal on the Claim Forms would scare off claimants. Plaintiffs responded by removing the seal, while noting that they did not share the *Chernavsky* Objection's concerns. Reply at 18. This, however, is the sort of "minor procedural change[]" in a settlement that cannot justify an award of fees. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002).

3. While the *Chernavsky* Objection argued for an extended claims period, the Objection was not solely responsible for that extension

The *Chernavsky* Objection argued that the claims period should be longer. *Chernavsky* Obj. at 7. In response, Plaintiffs extended the deadline for claims. Reply at 18.

It seems likely, however, that the claims period would have been significantly extended even without the Audet Firm's participation. The Court, on its own, asked that the schedule be structured to allow judicial scrutiny of Credit Impact Damages before final approval. Order re Mot. for Prelim. Approval at 1. That request by itself would have prompted a major extension of the claims period. To the extent the Court determines that the Audet Firm's work was duplicative or unnecessary, a fee award

[3] As Plaintiffs pointed out at the time, this is a common provision in class action settlements, and does not deprive Class members of Class Counsel's advocacy. Reply at 18.

1 is not merited. *See Rodriguez v. Disner*, 688 F.3d 645, 658–59 (9th Cir. 2012) ("Nor is it error to deny
2 fees to objectors whose work is duplicative . . . ."). If a fee is warranted, it should be modest.

3 **B. Even if the Audet Firm merited an award of fees, the size of its requested award lacks a**
4 **connection to any benefit that the firm may have conferred**

5 The Audet Firm asks for $4.26 million in attorneys' fees, "or, alternatively, no less than" $3.2
6 million. Audet Mot. at 2. This award would be improper even if the Audet Firm's work merited fees.
7 Common-fund fees are rooted in the equitable doctrine that "those who benefit from the creation
8 of a fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash.*
9 *Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). It is this rationale that also
10 allows fees to objectors when they benefit a class. *See, e.g.*, *Vizcaino*, 290 F.3d at 1051–52. "The
11 principles of restitution that authorize such a result also require, however, that the objectors produce an
12 improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered
13 no benefit to the class." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002).
14
15 These principles mean that when an objector requests fees that represent a percentage of a fund,
16 the creation of that fund must be attributable to the objector. Otherwise, the objector's fee will not be
17 tied to the common benefit that the objector created—the connection that justifies awarding the fee in
18 the first place. In addition, severing the connection between the fee and the benefit risks awarding a fee
19 that exceeds the marginal improvement that the objector added to the settlement. That is precisely what
20 a fee award to an objector must avoid. *Id.*
21
22 Thus, where objectors have requested percentage-of-fund fees, they have asked for, and
23 sometimes have been awarded, a percentage of the *marginal benefit* their efforts conferred on the class.
24 *See In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2015 WL 4776946,
25 at *1–2 (N.D. Cal. Aug. 13, 2015) (percentage of the expenses claimed by class counsel that the objector
26 asked the Court to disallow); *Dennis v. Kellogg Co.*, No. 09-cv-1786 L(WMC), 2014 WL 145150, at *2
27 (S.D. Cal. Jan. 13, 2014) (percentage of the increase in the settlement amount after a successful appeal),
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aff'd, 628 F. App'x 510 (9th Cir. 2016); *In re Apple Inc. Sec. Litig.*, No. 5:06-cv-05208-JF (HRL), 2011 WL 1877988, at *4–5 (N.D. Cal. May 17, 2011) (percentage of the increase in the settlement amount that was attributable to objection); *see also* Audet Mot. at 14 (citing cases to the same effect). The objectors in these cases did not seek any portion of what they had no plausible claim to creating. Much less did they seek a percentage of the entire settlement fund, since most of that fund already existed before the objectors got involved. Indeed, Plaintiffs have not been able to find a case in which objectors have successfully requested a percentage of the entire settlement fund.

Here, a percentage of the entire Settlement Fund is just what the Audet Firm requests. The Audet Firm's work did not create the $142 million Settlement Fund, however. The Fund was created by the Settlement that Class Counsel reached with Wells Fargo. *See* Decl. of S. Clinton Woods in Supp. of Mot. for Attorneys' Fees ¶¶ 5, 12 & Ex. 5, ECF 179-1 (acknowledging that the Audet Firm did not participate in settlement negotiations).

Nor did the Audet Firm create the $32 million expansion of the initial $110 million Settlement. That expansion resulted from Class Counsel's successful efforts to extend the Class Period to 2002. The Audet Firm states that it did not "alone obtain[] the increase in the initial settlement fund amount," Audet Mot. at 2 n.1, but even that statement is incorrect, because it assumes that the firm played any role in "obtain[ing] the increase." The Audet Firm provides no evidence that it played any such role, so its request for a portion of the $32 million Settlement expansion is unjustified.

Finally, Plaintiffs note that the Audet Firm has not submitted any documentation to support a lodestar cross-check, let alone a lodestar award. *Cf. Procedural Guidance for Class Action Settlements*, U.S. District Court for the Northern District of California, [http://www.cand.uscourts.gov/ClassAction SettlementGuidance](http://www.cand.uscourts.gov/ClassActionSettlementGuidance) (last visited Feb. 1, 2018) ("All requests for approval of attorneys' fees awards must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund.").

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C. Class members Chernavsky and Castro do not submit evidence to justify service awards

The Audet Firm also asks the Court to make service awards to Class members Chernavsky and Castro. Audet Mot. 13 n.5. That request should be denied because the Audet Firm has not provided evidence of Chernavsky's or Castro's involvement or effort. *See, e.g.*, *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 266 (N.D. Cal. 2015) (service awards must be justified with evidence).

III. CONCLUSION

The Audet Firm's motion for attorneys' fees should be denied.

Respectfully submitted February 2nd, 2018.

KELLER ROHRBACK L.L.P.

By *__/s/ Derek W. Loeser__*

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CERTIFICATE OF SERVICE

I, Derek W. Loeser, hereby certify that on February 2, 2018, I electronically filed **PLAINTIFFS' OPPOSITION TO ALEX CHERNAVSKY AND WILLIAM CASTRO'S MOTION FOR ATTORNEYS' FEES** with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notification to all counsel of record.

/s/ Derek W. Loeser
Derek W. Loeser