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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFFERY ETTER; SUSAN ETTER; PAUL KAHLER; FRAN CURTIS; MICHELLE CURTIS; LESLIE CRAWSHAW; RICHARD KAYLOR; BRIAN MCBRIDE; DENNIS OSHA; JAMES PEARCE; CRAIG POST; RAYMOND ROLLE, SR; EMIL VARGO; LEONARD SOMERVILLE; ORRENE SOMERVILLE; RICHARD SPEARS; ALICE KNIGHT; ALAN BURKHART; SANDRA BURKHART; GEORGE FREDERICK; KATHLEEN FREDERICK; ALAN GREAGER; and, LINDA GREAGER, individually, and on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THETFORD CORPORATION, a Delaware corporation; NORCOLD, INC., a Delaware corporation; THE DYSON-KISSNERMORAN CORPORATION, a Delaware corporation; and, DOES 1 to 50, inclusive,

Defendant.

Case No. 8:13-CV-00081-JLS-RNB

*Assigned for all purposes to the Honorable Josephine Staton*

**NON-SETTLING PLAINTIFFS' OPPOSITION TO SETTLING PLAINTIFFS' MOTION FOR ATTORNEY'S FEES, EXPENSES AND INCENTIVE AWARDS**

Date of Hearing: 9/16/16
Courtroom: 10A

Date Action Filed: December 12, 2012
Removal Date: January 16, 2013

## INTRODUCTION

Concealed beneath the weight of 109 pages of briefing and 947 pages of exhibits is the fact that the Settling Plaintiffs' Attorneys (SPA) are claiming to have spent a combined 8,658.91 hours of time on a case in which no motion to dismiss was filed; no dispositive motions were filed; no interlocutory appeals were filed; and the case settled before the class certification motion was heard. The numbers claimed by the SPA represent more than 8 hours per day, five days per week, 52 weeks per year without a break over the four years since this action was filed. And the SPA claim to have spent all this time, notwithstanding the fact that the Non-Settling Plaintiffs' Attorney (NSPA) – Beard – brought considerable documentary evidence, expert analysis, and deposition and trial testimony to the case before it was filed supporting the merits of the claims in this action – which the SPA did nothing to generate – and Beard thereafter took the laboring oar to further develop the case by identifying plaintiffs – including the name plaintiffs Jeff and Susan Etter – and handling all of the discovery, defense witness depositions, and expert discovery.

It should be noted that the total number of hours the SPA claim to have worked on the case is nowhere mentioned in their briefing, but can only be determined by adding up the totals for the various billing records attached to the Declarations of Hart Rabinovitch and Christopher Ridout. This is not an unintentional omission, but rather a recognition that the SPA's fee claim is based on ludicrously inflated lodestar, and best kept buried in the weeds as much as possible. In short, insomuch as their proposed settlement is the epitome of what is wrong in the class action bar, SPA's fee motion is exhibit 1.

The NSPA do not argue that the SPA's work produced no benefit to the class. It obviously did, in conjunction with the work by the NSPA. However, the NSPA challenge the claim that the SPA spent 2.5 times more hours working on the case than

the NSPA's 3,281.55 combined hours, or that the class benefitted in any way from the bulk of those hours of work, assuming they actually occurred.

At the end of the day, the SPA's hourly claim is nothing more than old fashioned file churning – the result of inefficiency, duplication, and the elevation of the SPA's financial interests above those of the class. This kind of self-serving conduct – particularly when it results in a dollar for dollar reduction of the Settlement Fund available to class members – should not be condoned, much less rewarded.

## I. THE ATTORNEY FEE AWARD SHOULD BE CAPPED AT 20% OF THE SETTLEMENT FUND.

Predictably, the SPA are seeking an attorney fee award of 25% of the Settlement Fund ($9 million dollars). Their justification for this request is that 25% is the "standard" for attorney's fees in common fund cases in the Ninth Circuit, and that they obtained "exceptional results" for the class. This analysis is simplistic and flawed.

First, the 25% number is the *starting point* for a determination of a reasonable attorney fee – not a number guaranteed regardless of the facts or results of a particular case. On the contrary, the Judicial Manual for Complex Litigation is clear that the preeminent consideration for an award of attorney's fees is the benefit generated for the class.[1] When the benefits are modest—an understatement for this case—the percentage of the common fund set aside for attorney's fees is decreased.

Second, the benefits of the proposed settlement are not "exceptional" – or even good – but are meager at best. For example:

- The settlement does not remove a single defective refrigerator from the

[1] The SPA have attached a series of articles to their fee motion which provide a fascinating window into their thinking on the issue of attorney's fees. One in particular – "Do Class Action Lawyers Make Too Little?" (Doc. 480-17) is particularly counter to established precedent in this Circuit. It argues that the purpose of consumer class actions is not to provide a recovery to class members, but to deter recidivism by corporate defendants, and therefore the *entire settlement* should properly be paid to Class Counsel. Even under this bizarre standard, the SPA fee claim is in trouble. The settlement the SPA brokered with Defendants contains absolutely no deterrence to Defendants continuing their wrongful business practices of selling dangerously defective refrigerators into the market, concealing the defects, and putting people at risk of catastrophic fire and injury.

marketplace, while granting the Defendants nationwide relief from ever having to fix or replace their defective refrigerators on a class wide basis. Indeed, the Defendants do not even have to admit that their refrigerators are defective;

- The settlement does not provide sufficient funds to allow the rank and file Class member to replace their defective refrigerators on their own, thus operating to shove virtually the entire cost and risk of Defendants' defective product onto consumers;
- The settlement does nothing to alleviate the ongoing public safety risk caused by Defendants' defective products continuing to fail and ignite fires;
- The settlement provisions providing for a warning – while better than originally proposed – are still inadequate in content in that they do not convey the nature of the defect, the manner in which it manifests itself, and all of the safety risks involved;
- The proposed warning is fundamentally deceptive in that it continues to convey the notion that if a consumer has the latest recall device installed, the refrigerator will be safe to use, when it is undisputed – even by Defendants – that the HTS device will not stop N6/N8/1200 Series refrigerators from corroding, cracking, and leaking flammable and toxic gases; and
- The settlement provisions regarding an extended warranty for N6/N8 owners is unsupported by any showing that the warranty conveys an actual benefit to Class members.[2]

Considering the limited funds made available for settlement, and the fact that Class members covered by the settlement are going to be thrown upon their own

[2] See, Doc. 492 at pp 7 – 8.

resources to deal with Defendants' defective products, every dollar deducted from the Settlement Fund counts. Capping the attorney fee award at 20% of the Settlement Fund is a reasonable accommodation to the facts of this case, and the risks Class members will face.

## II. THE SPA'S LODESTAR IS GROSSLY INFLATED, AND AN INAPPROPRIATE BASIS UPON WHICH TO ALLOCATE FEES IN THIS CASE.

In their motion for attorney's fees, costs and incentive payments, the NSPA advised the Court that a resolution of the attorney fee issue would be a two-step process – first, a determination of the percentage of the Settlement Fund to be set aside for attorney's fees, and second, an allocation of that percentage between the SPA and NSPA. In their attorney fee motion, the SPA pay scant lip service to the idea of allocation, and instead focus on justifying the award of the entire fee to themselves. While the NSPA do not yet have the benefit of the SPA's response to their proposal that the attorney's fees be split 50/50, it is presumed that the SPA will urge the court to base any allocation solely on the basis of each side's total lodestar. Such an allocation would unfair and inequitable for the following reasons.

### A. The SPA's lodestar is the result of substantial duplication, inefficiency and overbilling.

In light of the fact that Beard brought substantial documentary evidence to the case from the very beginning, and fully participated in every phase of the litigation thereafter, the question must be asked – what were the SPA doing to run up 8,658.91 hours of time? If, as the SPA repeatedly claim, they are "experienced class counsel", and are given a substantial head start through all of the information brought to the case by Beard, how is it that the SPA spent anywhere near 8,658.91 hours to file the three pleadings in this case – the original complaint, the amended complaint, and the class certification motion?

For example - a review of the voluminous billing records submitted by the Ridout Lyon Ottoson and Ridout Marker Ottoson firms shows massive duplication,

i.e. the same entry, for the same date, for the same amount of time, repeated twice or three times. Most of these entries are of the "Receipt and Analyze" variety – representing meaningless time that produced no benefit to the class, but only served to increase the SPA's lodestar. Particularly egregious examples include a series of duplicate and triplicate entries beginning April 29, 2013 (Doc. 491-3, at pages 22 – 31; and Doc. 491-4, at pages 2 – 10). Defendants served *identical* written discovery to each of the 28 plaintiffs. The RLO billings reflect that each separate discovery request and deposition notice was reviewed by at least two if not three separate attorneys – who all billed identical amounts of time on the same date for their "review and analysis". The review and analysis did not result in any positive action, because the responses to the discovery were largely handled by the paralegal at ZR and Beard.

The ZR billing records reflect similar duplication with regard to defense depositions. Beard handled all of the defense and expert depositions, including the deposition of Jerry Alexander in Los Angeles, Mary Pouliot and Bob Cutright in Ohio, and Orion Keifer and Peter Layson in Florida. Beard had extensive litigation experience and did not need a "minder" to take an effective deposition. Yet Hart Rabinovitch of ZR attended each deposition to "observe", and ultimately bill the class for his time.

A further example of duplication and inefficiency is the repeated filing of the class certification motion. Pursuant to the informal division of labor between Beard and ZR, the class certification motion was the latter's primary responsibility. ZR filed an initial brief that was too long, contained formatting gimmicks to evade the Local Rules, and failed to include the required recitation regarding attempts to meet and confer before filing the motion, leading to the class certification briefing being stricken, and the class certification motion taken off calendar, and all class certification documents having to be refiled from scratch. (Doc. 116) Rather than

acknowledge their mistake and write off the time necessary to fix their pleadings, ZR used their own mistake to further increase their lodestar.[3]

Another example is the discovery hearing before Magistrate Block on January 22, 2015. The hearing was the culmination of a lengthy and contentious Rule 37-1 process through which the NSPA were trying to pry discovery out of Defendants on their claimed inability to pay a larger settlement. While the discovery dispute was between NSPA and Defendants, SPA showed up for the hearing as well – Mr. Rabinovitch flying in from his office in Phoenix – and had to be told in no uncertain terms that their presence was not only unnecessary, but unwanted.[4] Of course, the SPA billed for their appearance nevertheless.

Perhaps the most revealing example of the unreasonable billing practices of SPA is a comparison of the time records of SPA and NSPA between August 21, 2014 – the date the NSPA filed their Notice of Intent to Object to Motion to Preliminary Approval (Doc. 176), and June 15, 2015 – the date of the Court's order denying the SPA's renewed motion for preliminary approval, and finding that the Defendants had an ability to fund a larger settlement. (Doc. 401).

Between these dates, NSPA filed repeated challenges to the SPA's motion for preliminary approval (Docs. 200 – 208; 259 – 263); filed motions to conduct confirmatory discovery (Doc. 243, 245, 246); engaged in extensive Rule 37-1 negotiations regarding document production, and highly contentious discovery proceedings and a hearing before the Magistrate Judge (Doc. 277 – 286; 288);

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[3] This is not an isolated event. ZR again ran afoul of the rules when they filed their initial motion for preliminary approval in September, 2014. The brief was almost twice the page limit set by the Court. ZR spent so much time arguing the page limit issue that it resulted in an article in the National Law Journal. See, *Request to Exceed Page Limit Draws Judge's Displeasure*, September 17, 2014, at http://www.nationallawjournal.com/printerfriendly/id=I202670229433. Ultimately, the brief was ordered stricken. (Doc. 194). Rather than write off the time consumed in correcting their pleadings as a result of their own mistakes, ZR has instead included all of this time in their lodestar to the detriment of the class.

[4] See Declaration of Terrence A. Beard in Opposition to Settling Plaintiffs' Motion for Attorney's Fees, Costs and Incentive Payments (TABDEC), filed concurrently herewith, at ¶ 3, Ex A.

successfully obtained permission to depose SPA's financial consultant (Doc. 295, 299); retained their own financial consultant to review and analyze Defendants' financial statements; and engaged in extensive briefing regarding reporting to the Court on the results of the confirmatory discovery conducted (Doc. 318 – 323; 329; 347; 366 – 367; 374 – 376; 381).

As a result of these efforts, NSPA were not only successful in challenging the adequacy of SPA's original proposed settlement – forcing SPA and Defendants to improve the settlement terms for the benefit of the Class – they were also successful in pursuing meaningful confirmatory discovery that led directly to the Court's June 15, 2015 Order finding that Defendants had an ability to pay a larger amount in the settlement, which resulted in the subsequent $3 million dollar increase to the Settlement Fund. (Doc. 401, 402). The SPA fought NSPA's efforts every step of the way, in lock-step with Defendants. NSPA spent a combined total of **854.10** hours of attorney time during this period. In a shocking example overbilling, SPA claim they spent **2,462.25** hours during the same time period, which of course does not count any of the work done by the Defendants' attorneys who were—at least facially—on the other side of the dispute.[5]

This comparison holds true when looking at the entire scope of the case. In contrast to the 8,658.91 hours claimed by SPA, NSPA claim only a combined 3,281.55. The Hagens Berman share of the latter is an extremely modest 351.1 hours. Beard's share is less than 3,000 hours (2,930.45), notwithstanding the fact that Beard was an active participant in all phases of the litigation from before the case was filed.

It is simply not possible that SPA legitimately spent the hours they claim on this case in light of all of the work that was being contributed by NSPA prior to the initial settlement, and also by Defendants' attorneys in the fight over the inability to pay claim. Rather, SPA's lodestar appears to be overstated by a factor of 2.5 to 3, and

[5] See, TABDEC, at ¶ 2.

cannot therefore form a reliable basis upon which an allocation between of attorney's fees between SPA and NSPA can be based.

**B. An Allocation Based Solely on Lodestar Does Not Recognize the Relative Benefits Conveyed by SPA and NSPA to the Class.**

It cannot be denied that the work of NSPA benefitted the class in every way – from initiating the case in the first instance, prosecuting it to the point of the initial settlement, and then continuing to push to make the settlement better in every material respect.

The same cannot be said for much of the effort of SPA. SPA were responsible for putting together an initial settlement agreement that was permeated with fatal conflicts of interest that caused their attempts at preliminary approval to be rejected, and the Court to question their adequacy as potential class counsel. (Doc. 221). SPA spent thousands of hours fighting the efforts of NSPA to obtain meaningful confirmatory discovery on Defendants' inability to pay claims, notwithstanding the fact that Defendants had their own attorneys who were very capable of protecting the interests of Defendants on their own.

This was a particularly bizarre expenditure of time in that it put SPA in direct conflict with the interests of their own clients, and the Class they were seeking to represent. Defendants' actual ability to pay was a central issue in the case, and directly affected the amount of the settlement. To the extent Defendants had a greater ability to pay than they let on – which ultimately turned out to be the case – the Settlement Fund would have had to increase in order to justify approval by the Court. It therefore made no sense for SPA to actively help Defendants hide the details of their financial condition, because that artificially suppressed the size of the Settlement Fund to the detriment of the Class.

Yet the record is clear that SPA was at all times more adverse to NSPA's efforts at confirmatory discovery than they ever were with the Defendants themselves. And now, through their fee petition, SPA are *billing the Class* for the time they spent trying

to keep the Settlement Fund to $33 million, and thereby keep each Class member's recovery lower than it needed to be.

It is hard to imagine why a plaintiffs' attorney would join with Defendants to suppress the value of their own client's recovery. Perhaps SPA can provide an explanation in their reply, and advise the Court whether the clear sailing agreement for 25% of the Settlement Fund had anything to do with SPA's thinking. But whatever the explanation, it is clear that the thousands of hours the SPA spent trying to keep the Settlement Fund to $33 million did not benefit the Class, and the Class should not have to pay for it. Nor should SPA be allowed to use any of this time as part of an allocation of the attorney fee award with NSPA.

## III. CONCLUSION

For the foregoing reasons, SPA's request that the attorney fee award be set at 25% of the Settlement Fund should be rejected in favor of a cap of 20%; and any fee awarded in this case, should the court approve the settlement, be apportioned 50/50 between SPA and NSPA.

DATED : 8/26/16

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**PROOF OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on August 26, 2016.

/s/ Terrence A. Beard
TERRENCE A. BEARD