

Blog Entry: Plus Feature – OUCH

NOVEMBER 11, 2016

Source: Array

When plaintiffs' counsel settle a massive antitrust class action for \$244 million, they should be happy, right?

One would think so, unless their \$72.3 million fee request is cut by the court to \$48,825,000 in the process, and its order to that effect comes complete with pretty pointed language. Time to hold the Champagne?

The order at issue was entered October 31, 2016 in *Dial Corporation v. News Corporation*, Southern District of New York, case no. 13cv6802, Judge William H. Pauley III presiding.

The individual plaintiffs were The Dial Corporation, Henkel Consumer Goods, Inc., Kraft Heinz Foods Company f/k/a H.J. Heinz Company, Foster Poultry Farms, BEF Foods Inc., Smithfield Foods Inc., and HP Hood LLC. They represented a class of non-retailer consumer packaged-goods firms in the United States who claimed that Defendants News Corporation, News America Incorporated, News America Marketing In-Store Services, LLC, and News America Marketing FSI, LLC monopolized the in-store promotion services market. Five law firms represented the plaintiff class. The case was, in the court's words, "exceptionally complex." "[D]iscovery," the court continued, "was breathtaking: 11 million documents were reviewed and exchanged; dozens of current and former officers and employees were deposed; and six experts in economics and marketing provided reports and testimony." As trial neared, the parties reached a \$244 million settlement. They then asked the court to approve it.

The court did so. It found the settlement "fair, reasonable, and adequate." *Applause all around.* Then it addressed plaintiffs' counsels' fee claim. It started auspiciously: "The time and labor expended by Counsel in this matter was extraordinary." *Many vigorous nods.* "As recounted previously, Counsel worked through fact and expert discovery, class certification, dispositive motions, and trial. They surmounted significant challenges and avoided potential setbacks at every turn." *High fives all around.* "Plaintiffs' Counsel seeks an award of \$73.2 million, or 30% of the Fund. Over six years of investigating the claims and litigating this action, Counsel collectively billed a staggering 69,128.95 hours - which equates to more than 35 billable years by 'Big Law' standards." *A chuckle or two.* And then, the storm clouds gather:

But this Court would be remiss if it did not highlight the fact that the time and labor expended by five law firms - three more than this Court appointed - most certainly led to a duplication of effort and multiplication of attorneys' fees. Some of that redundancy stems from Counsel's circumvention of this Court's initial appointment order, and is therefore self-inflicted. After this Court denied two requests for the appointment of all five law firms as joint lead counsel, Counsel proposed the appointment of Susman Godfrey and Kellogg Huber as co-lead counsel. Satisfied that its message had been received, this Court appointed them. However, Counsel did not apprise this Court that one

day before proposing Susman Godfrey and Kellogg Huber as co-lead counsel, they engineered a private work-around among themselves designating Kramer Levin and McKool Smith as co-lead trial and settlement counsel. Months later, by serendipity, this Court learned of Counsel's subterfuge. At that time, it could have vacated the July 2015 Order. But, to avoid upsetting intricate financial arrangements among the Plaintiffs and delaying trial, this Court opted for a "pragmatic approach." It permitted Susman Godfrey and Kellogg Huber to "keep their title, even if it [was] just an ornament," and Kramer Levin and McKool Smith to proceed in their role as co-lead trial and settlement counsel. Nevertheless, this Court cautioned Counsel repeatedly "to avoid duplication of effort and multiplication of attorneys' fees."

Smiles dissolve.

A review of Counsel's time records validates this Court's concern that allowing five firms to represent the Class would result in a duplication of effort and a multiplication of attorneys' fees. From July to December 2014, for example, it appears the five firms staffed nine partners, nine associates, five staff attorneys, and a few paralegals who spent over 1,900 hours briefing and arguing the class certification motion, leaving this Court wondering why so many attorneys - let alone partners - were staffed on the task.

Palms moisten.

In October 2015, all five firms staffed 12 partners, 10 associates, two staff attorneys, and a handful of paralegals who spent 1,100 hours briefing Plaintiffs' opposition to summary judgment. That too, is beyond the pale. Opposing summary judgment is a fundamental task in any complex litigation - one that readily could have been assumed by the two very capable firms the Court originally appointed for a fraction of the cost and time.

Doors slam shut.

And for the first two months in 2016, the 13 partners, 11 associates, and several paralegals from the five firms logged over 5,300 hours preparing for trial. It was a curious arrangement, given this Court's October 15 order explicitly designating only two of the firms as co-lead trial and settlement counsel. But the lawyers from those two firms - Kramer Levin and McKool Smith - appear to have billed a little more than half the hours involved in the final preparation for trial and settlement negotiations.

Phone go on "Do Not Disturb."

Moreover, Counsel's allocation of time is heavily weighted towards partners. Such a division of labor is atypical in practice. In such instances, "[c]ourts have reduced the fee percentage requested where, as here, the lodestar value reflects an over-allocation of work to more expensive partners." Accordingly, this factor weighs against the approval of the Plaintiffs' fee request.

The first wave of nausea sets in.

The lodestar in this action is inflated, and therefore serves no useful purpose as a "cross-check" to the requested fee. The lodestar of \$36,433,985.50 was calculated by multiplying 69,218.95 hours billed with a "combined blended rate [among the firms] of \$526.35 per hour." But there are many anomalies in the blended rate. First, it is freighted with an inordinate number of partners and

overweighted with partner time. For example, five partners at Susman Godfrey billed 42.5% of the firm's total time; four partners at Kramer Levin logged 37% of their firm's total time; and four partners at McKool Smith expended 30% of their firm's total time. Second, the blended rate is enhanced by inflated billing rates. Some mid-level and senior associates billed at rates as high as \$855 per hour, and some paralegals billed at a lofty \$280 per hour. This kind of billing warrants an aggregate, "across-the-board" haircut of at least \$2.5 million, resulting in a revised lodestar of \$33,900,000. Then, there is the separate question of why the bloated billing did not end after this Court's July 2015 Order appointing Susman Godfrey and Kellogg Huber as the only firms authorized to represent the Class. Despite that Order, all five firms continued to bill for work in this action. This Court will also account for any duplicative work billed from that day forward in reducing the fee.

Any cottages for sale in Madagascar?

Counsel billed approximately 20,190 hours from July 10, 2015 to June 30, 2016. Based on their blended rate of \$526.35, the firms billed approximately \$10,627,006.50 in fees for work in connection with summary judgment, expert testimony, motions *in limine*, trial preparation, and settlement negotiations, among other things. This Court, in its discretion, will only credit two-fifths of that amount (\$4,250,802.60) as original work on the basis that the remaining three-fifths of those fees (\$6,376,203.90) are presumptively multiplicative and superfluous. The lodestar should therefore be further adjusted downward by approximately \$6 million to \$27,900,000.

I'm toast.

And even after this Court's October 15, 2015 order acquiescing in Counsel's decision to deputize Kramer Levin and McKool Smith as lead trial and settlement counsel, it is impossible to determine who actually did what. For example, in the January-February 2016 time frame, co-lead counsel Susman Godfrey and Kellogg Huber should have had little to do, since they had ceded responsibility for trial and settlement to Kramer Levin and McKool Smith. But Susman Godfrey appears to have logged more hours than McKool Smith during a period devoted substantially to trial preparation. And Kellogg Huber was a close second. Moreover, Kramer Levin billed disproportionately more than McKool Smith for trial preparation—roughly 2,550 hours versus 875 hours. Knowing the consequences, Counsel nevertheless continued to operate under their own byzantine and exquisite arrangement.

When will this end?

A reasonable multiplier enhancing the lodestar is appropriate in this action because it accounts for "the riskiness of the litigation and quality of the attorneys." But because Counsel's original lodestar was premised on a blended billing rate saturated by excessive partner time and timekeeper rates, and further bloated by time records reflecting an inscrutable division of labor among the five firms, this Court reduces the multiplier from 2.01 to 1.75. A multiplier of 1.75 recognizes the risk in this litigation, and falls within the range of multipliers awarded in cases of this magnitude. A lodestar of \$27.9 million multiplied by 1.75 results in a fee award of \$48,825,000.

Not bad considering that the original lodestar was \$36,433,985.50.

Champagne, anyone?