IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: SAMSUNG TOP-LOAD WASHING MACHINE MARKETING, SALES PRACTICES AND PRODUCT LIABILITY LITIGATION	)	
	)	MDL Case No. 17-ml-2792-D
THIS DOCUMENT RELATES TO ALL ACTIONS	)	District Judge Timothy D. DeGiusti

PLAINTIFFS' OPPOSITION TO COUNSEL FOR *KENNEDY/ORENSTEIN* MOTION FOR ATTORNEYS' FEES AND EXPENSES

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Plaintiffs respectfully oppose the Motion for Attorneys' Fees and Expenses filed by the Nagel Rice law firm, counsel for the *Kennedy/Orenstein* plaintiffs (Doc. 140).

I. INTRODUCTION

Nagel Rice requests payment of more than $800,000 in fees and more than $30,000 in expenses for work spent separately fighting Samsung in cases that Nagel Rice purposely kept out of the MDL. This apparently includes compensation for time spent seeking sanctions against Samsung and its lawyers. But it is axiomatic that such amounts are awardable only where lawyers' work "benefitted the class." *Gottlieb v. Barry*, 43 F.3d 474, 491 (10th Cir. 1994). Nagel Rice cannot meet this threshold requirement because its efforts did not contribute to the settlement proposed in the MDL. Far from it: in addition to strategizing and fighting to stay separate and apart from the MDL, Nagel Rice worked to obstruct this resolution at every turn.

Even if Nagel Rice could satisfy the foundational prerequisite for an award of fees and expenses, its request is manifestly deficient. Nagel Rice did not comply with this Court's order requiring that time and expenses be reported to Co-Lead Class Counsel and thus its time was not taken into account when the Parties were negotiating the settlement. Nor does Nagel Rice assert that it submitted only time that contributed to its purported class settlement, much less time that Nagel Rice contends benefited this one.[1] Nagel Rice

[1] Lead Counsel removed huge amounts of time (in excess of $1,400,000 in lodestar) prior to submitting their request for fees to the Court on behalf of themselves and the firms who complied with this Court's order. Doc. 142 at 16. That time was honestly spent, but it was not work that benefited the class directly, as opposed to a client or an attorney. For example, Lead Counsel did not submit time related to drafting complaints, drafting briefs related to attorneys' fees, or for administrative matters such as reviewing time.

also does not specify any work that it did to benefit this settlement that was assigned or directed by Co-Lead Class Counsel (because there is no such work). Finally, Nagel Rice does not make any effort to account for the fact that, even accepting its implausible claim to have benefitted the class, its efforts related only to *a very small portion* of the relief received by the small group of the class with "drain pump" claims (approximately 3% of total claims to date). As a result, its fee request is grossly excessive at best.

The true thrust of Nagel Rice's request is the contention that Nagel Rice should be paid for a bargain it allegedly made outside the MDL with Samsung. It has nothing to do with fees and expenses in this settlement or work that led to this settlement.

II. ARGUMENT

A. In a class action settlement, only work that benefits the class is compensable.

Federal Rule of Civil Procedure 23(h) authorizes the Court to award fees and costs that are "reasonable." Inherent to that limitation is that lawyer work may be compensated *only* where it "benefitted the class." *Gottlieb*, 43 F.3d at 491. Work that contributed to the positive outcome for the class is compensable. Work for the sake of work is not. *See In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 197 (3d Cir. 2005) ("We emphasize that, in determining who is entitled to attorneys' fees for pre-appointment work, the court's only consideration must be whether or not the attorney's work provided benefits to the class.").

1. Nagel Rice did not benefit the class.

Nagel Rice agrees that work must benefit the class to be compensable. The crux of its motion is the claim that Nagel Rice's separate work in New Jersey "conferred a significant benefit on the MDL Settlement Class." Mot. at 1. That *ipse dixit* is false. Nagel Rice's motion reiterates several times that "[i]t is understood that the second MDL settlement is modeled on the first New Jersey settlement." *Id.* at 15. But the passive voice is important: no one other than Nagel Rice understands this.

a. Attorneys may not claim that they "benefited" a settlement they tried to prevent.

Nagel Rice purposely remained outside and apart from the MDL and worked to prevent the MDL settlement at every turn. This is so even though, by its "own admission," it was "aware of the JPML Order creating this MDL and had concerns about the potential overlap of the MDL with [its] own pending cases in the District of New Jersey in mid-October 2017." Doc. 115 at 5. But Nagel Rice did not alert the JPML. Instead, after Plaintiffs notified the JPML of the pending New Jersey cases, Nagel Rice tried to avoid the MDL by moving to vacate the conditional transfer order, *see* J.P.M.L, MDL No. 2792, Docs. 53, 54, and moving to stay proceedings here until its JPML motion had been resolved, *see* Doc. 103-1.

After those gambits failed, Nagel Rice doubled down on its efforts to prevent the settlement. It asked the Court to deny preliminary approval on the basis that Samsung had acted inequitably, that the settlement violated the "first to file" rule, and that the settlement was a "collateral attack" on an order issued in the District of New Jersey. *See*

Doc. 122. Nagel Rice also moved to reopen discovery, and thus delay the settlement by months, and moved for preliminary approval of a *different* settlement. *See id.*; Doc. 127; *cf.* Doc. 138 (rejecting all of these contentions). Attorneys who repeatedly try to prevent the class from receiving a settlement should not later be permitted to claim that they actually benefited the class because of their purported contributions to that same settlement. Assuming *arguendo* that there was some hypothetical benefit to the class from the Nagel Rice settlement, it was more than negated by the harm Nagel Rice caused the class when Nagel Rice delayed the settlement and tried to prevent it from occurring at all.

b. <u>The Nagel Rice settlement did not benefit the class.</u>

Setting aside that Nagel Rice worked *against* class members' interests, its settlement did not benefit the class. Lead Counsel did not know the terms of the Nagel Rice drain pump settlement when negotiating the MDL settlement.[2] The fact that the MDL settlement includes relief for a very small subset of the class with allegedly defective drain pumps does not mean that Nagel Rice's efforts to negotiate a drain pump settlement somehow *caused* the MDL settlement. Indeed, the vast majority of the MDL settlement does not bear even a superficial resemblance to the Nagel Rice drain pump settlement; i.e., the key feature of the Nagel Rice settlement was an agreement to pay up to $50,000 to a select group of people whose drain pumps had already broken on a few particular models of washing machines. The MDL settlement, on the other hand,

[2] And as the Court has found, Nagel Rice "do[es] not contend the MDL parties failed to vigorously advocate their respective positions throughout the pendency of the case." Doc. 138 at 6 (internal quotation marks and alteration omitted).

provides sweeping, prospective relief for an entirely different defect to nearly everyone who purchased a much broader set of washing machines.

The terms of the two settlements contradict any inference that the New Jersey proposed settlement contributed to the MDL settlement even with respect to drain pump claims. Nagel Rice pays lip service to this Court's finding that "the MDL Settlement is objectively superior to the proposed New Jersey settlement," Doc. 138 at 11, but nevertheless maintains that the two settlements share the same "model" or "template." Mot. at 15. The Court has correctly found to the contrary: "the total relief for the class as a whole, and individually, is *significantly* greater in the MDL Settlement, the MDL Settlement covers future failures for a longer period of time, and, significantly, no proof of purchase is required in order for class members to assert their rights under the MDL settlement." Doc. 138 at 11 (emphasis added). If it were relevant, for example, that the "[r]elease is virtually identical" or that the "[d]irect notice provisions are similar," Mot. at 15, then any attorney who ever settled a consumer products liability case could claim fees here.

2. <u>The Nagel Rice cases do not support its request for fees.</u>

Nagel Rice relies primarily on *Gottlieb*, a case that demonstrates why its fee motion is meritless. In *Gottlieb*, the Court of Appeals awarded fees to non-designated counsel where the record showed clearly that non-designated counsel conferred a "benefit on the class." 43 F.3d at 488. Indeed, designated counsel in *Gottlieb* essentially conceded as much. *Id*. at 489 ("[Designated counsel] never suggested to this court that, based on his familiarity with the case, he believed that Non-Designated Counsel

conferred no benefit on the class."). Here, Nagel Rice did not benefit the class, it obstructed and worked at cross-purpose to it. Nagel Rice's only argument otherwise—that its settlement was a "model" or a "template" for the MDL settlement—is without factual basis. And even under Nagel Rice's own, incorrect logic, it cannot be said that Nagel Rice contributed benefit to the very small portion of the class that experienced drain pump failure[3] since the MDL drain pump settlement is vastly superior to the Nagel Rice drain pump settlement.

Nagel Rice cites to other cases which also refute its fee request even more clearly. Another court in this district awarded fees only when it found that non-designated counsel "participated and assisted Appointed Counsel in litigation of this case [and] conferred some benefit on the class." *In re Williams Companies ERISA Litigation*, 2006 WL 5411268, at *1 (W.D. Okla. Mar. 14, 2006). And in *Fankhouser v. XTO Energy, Inc.*, the court found that "Class Counsel relied on the massive discovery performed by" non-class counsel and that counsel's "work formed the foundation on which this case was built." 2012 WL 4867715, at *2 (W.D. Okla. Oct. 12, 2012); *see also In re Cendant*, 404 F.3d at 196-97 (fees appropriate where lead counsel "later rely" on other counsel's work). Here, Nagel Rice worked *against* Class Counsel and *opposed* the settlement.

[3] Approximately 3% of claims in this litigation to date have been for drain pump relief.

3. Nagel Rice's secondary "benefit" arguments are also without merit.

Nagel Rice also supports his fee demand by citing: (1) the settlement agreement; and (2) cases discussing the "catalyst theory" for awarding attorneys' fees. Neither support Nagel Rice's argument.

First, the settlement agreement does not authorize fees for Nagel Rice, and it would not matter if it did. The agreement refers to fees and expenses awarded by the Court, it does not endorse any particular award to any particular lawyer. Nor could it: whatever a settlement agreement says, courts must "engage[] in independent determinations of reasonable fees, as required by law." *Stanton v. Boeing Co.*, 327 F.3d 938, 971 (9th Cir. 2003). Fees and costs, even where "authorized . . . by the parties' agreement" must be "reasonable." Fed. R. Civ. P. 23(h).

Second, the "catalyst theory" does not provide a basis for the fees demanded. The catalyst theory is just an application of the principle that an attorney must provide a benefit in order to receive compensation. The theory, generally arising in civil rights lawsuits, requires a showing that "(1) the legal action is causally linked to securing the relief obtained; and (2) the defendant's conduct in response to the action was required by law rather than a gratuitous response to a frivolous or groundless action." *Ellis v. Univ. of Kansas Med.Ctr.*, 163 F.3d 1186, 1194 (10th Cir. 1998); *see also Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health and Human Res.*, 532 U.S. 598, 605 (2001) (requiring the relief to include a "judicially sanctioned change in the parties' legal relationship").

Here, Nagel Rice was not the catalyst of the MDL settlement; Nagel Rice tried to *prevent* this settlement and asked the Court to approve a *different* (and inferior) settlement. Nor is there anything apart from bare speculation in Nagel Rice's claim that its work in New Jersey "was the catalyst in bringing the drain pump issues to light." Mot. at 13. Such failures were included in the scope of this MDL from the very beginning, independent and apart from Nagel Rice's efforts. *See* J.P.M.L, MDL No. 2792, Doc. 36 at 2 (including *Wagner* drain pump case in the MDL).

B. Even assuming some benefit, the Nagel Rice fee request is deficient.

Even assuming for the sake of argument that Nagel Rice provided some inchoate benefit to the drain pump portion of the MDL settlement, the Nagel Rice request for fees should be denied.

First, Nagel Rice did not, as required by this Court's order, submit its time and expenses to Class Counsel for common benefit consideration. This Court's orders were clear: Class Counsel's duties including the collection of "monthly time, lodestar and expense reports from each Plaintiff's counsel . . . whose time is expected to be included in any fee petition." Doc. 52 at 3. And this Court expressly ordered Nagel Rice and its clients to "familiarize themselves with MDL Order [Doc. No. 52]." Doc. 130 at 3. An attorney who declines to submit time to lead counsel consistent with Court orders cannot claim fees from that MDL. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, 914 F.3d 623, 642 (9th Cir. 2019) (denying Nagel Rice fees after it, similar to this action, did not comply with pretrial orders on reporting time to lead counsel and the district court finding "that the efforts of non-Class Counsel for which

they sought fees did not benefit the class"). This general rule applies with particular force here because Nagel Rice cannot claim ignorance of the rule: it was denied fees in the *Volkswagen* litigation for the very same reason. *See id*.

Second, Nagel Rice made no effort to determine the benefit it claims it provided to the Class. The drain pump issue is a relatively small part of the overall settlement, accounting for approximately 2,000 of the more than 61,000 claims submitted to date.[4] The Nagel Rice proposed settlement in New Jersey provided up to $50 to class members whose drain pumps had failed; the MDL settlement provides 4x that number.

Third, Nagel Rice did not make any effort to separate time that it contends provided some benefit to the class from other time. It appears that Nagel Rice claims that every hour it spent related to litigation with Samsung is compensable, including, for example, time spent actively fighting the MDL settlement as well as sanctions it sought against Samsung after the settlement was reached in this action. This stands in contrast to Class Counsel's fee petition, which carefully analyzed what time benefitted the MDL. *See* Doc. 142 at 16 (deciding not to "seek reimbursement for over $1.4 million of attorney time spent prosecuting the class actions before consolidation—time that, while important to each individual action, did not ultimately benefit the Class"); *id.* at 18 (noting that "Co-Lead Counsel exercised discretion, pursuant to the Court's Order, to eliminate hundreds of time entries").

[4] These numbers are based on the current claim statistics provided by the settlement administrator.

C. Samsung's conduct in the New Jersey cases has no bearing on Nagel Rice's entitlement to fees in this settlement.

When Nagel Rice moved to intervene (and to stay), it requested attorneys' fees as a sanction for asserted misconduct on the part of Samsung. *See* Doc. 122 at 20-23. Although now cloaked in the guise of an MDL settlement fee request, the basis for Nagel Rice's motion is the same: Samsung allegedly treated it unfairly and made misrepresentations to the court in New Jersey. But fees from an MDL settlement are based on benefit to the class, not purported inequity between one party and another, or misbehavior of a party or its counsel. As this Court previously found, "Defendant SEA's conduct with regard to New Jersey Plaintiffs, Judge Martini, the JPML or any other party outside of the MDL settlement negotiations does not bear on the quality of the negotiations between Defendants and MDL Plaintiffs in reaching the proposed MDL Settlement." MDL 138 at 7. Nor does it bear on anything else that is part of the settlement process.

III. CONCLUSION

For the above reasons, Plaintiffs respectfully ask the Court to deny in its entirety the motion for fees and expenses filed by Nagel Rice in connection with the class action settlement.

Respectfully submitted, April 26, 2019,

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CERTIFICATE OF SERVICE

The undersigned herby certifies that, on April 26, 2019, a copy of the above pleading was electronically filed with the Clerk of Court of the United States District Court for the Western District of Oklahoma, using the CM/ECF system, which will send a Notice of Electronic filing to all parties of record.

/s/ William B. Federman
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