UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: KENNETH P. KELLOGG; RACHEL KELLOGG; KELLOGG FARMS, INC.; ROLAND B. BROMLEY; BROMLEY RANCH, LLC, Petitioners.	No. 18-3220 (D.C. No. 2:18-cv-02408-JWL-JPO) (D. Kan.)

ORDER

(Filed Nov. 20, 2018)

Before **HOLMES**, **KELLY** and **MATHESON**, Circuit Judges.

Petitioners seek a writ of mandamus to reverse an order of the Judicial Panel on Multidistrict Litigation ("JPML") that transferred their putative class action suit filed in the United States District Court for the District of Minnesota, *Kellogg v. Watts Guerra, LLP*, No. 18-cv-1082-DWF-BRT, to *In re: Syngenta AG MIR162 Corn Litig.*, No. 18-cv-2408-JWL, MDL No. 2591, pending in the United States District Court for the District of Kansas.

"[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). "Although writs of mandamus may be best known for their traditional application—compelling a government official to perform a nondiscretionary duty owed to a plaintiff— . . . writs of mandamus have been invoked when a district court displayed a disregard of the Federal Rules of Civil Procedure." *Id.* at 1187 (citation omitted). Here, petitioners claim the JPML abused its discretion in transferring the Minnesota suit to the multidistrict litigation pending in Kansas.

To be entitled to a writ of mandamus, three conditions must be met:

> First, because a writ is not a substitute for an appeal, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires. Second, the petitioner must demonstrate that his right to the writ is clear and indisputable. Finally, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Id. (citations and internal quotation marks omitted).

Petitioners have failed to establish one or more of these conditions and we therefore deny the petition for

a writ of mandamus. We grant petitioners' motion to file a reply brief.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

App. 4

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: SYNGENTA AG MIR162 CORN LITIGATION MDL No. 2591

TRANSFER ORDER

(Filed Aug. 1, 2018)

Before the Panel:* Plaintiff farmers in a District of Minnesota action (*Kellogg*) move under Panel Rule 7.1 to vacate the Panel's order conditionally transferring this action, which is listed on the attached Schedule A, to MDL No. 2591. Defendant attorneys[1] oppose the motion.

After considering the argument of counsel, we find this action involves common questions of fact with the actions previously transferred to MDL No. 2591, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Transfer is warranted for reasons set out in our order directing

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* Judge Lewis A. Kaplan took no part in the decision of this matter.

[1] Cross Law Firm, LLC; Dewald Deaver, P.C., LLO; Givens Law, LLC; Francisco Guerra; Daniel M. Homolka; Hovland and Rasmus, PLLC; Johnson Law Group; Law Office of Michael Miller; Mauro, Archer & Assocs., LLC; Patton Hoversten & Berg, P.A.; VanDerGinst Law, P.C.; Wagner Reese, LLP; Mikal C. Watts; Watts Guerra, LLP; Wojtalewicz Law Firm, Ltd.; Pagel Weikum, PLLP and Yira Law Office LTD.

centralization. In that order, we held that the District of Kansas was the appropriate transferee forum for actions sharing allegations regarding Syngenta's decision to commercialize the MIR162 genetically modified corn trait in the absence of Chinese approval to import corn with that trait. *See In re: Syngenta AG MIR162 Corn Litig.*, 65 F. Supp. 3d. 1401 (J.P.M.L. 2014).

Plaintiffs in *Kellogg* sue their attorneys over alleged misrepresentations and omissions they made in their initial solicitations—via multiple websites, television commercials and town hall-style meetings—and other communications with the putative class of corn farmer clients. Defendants filed approximately 60,000 individual suits in Minnesota state court ostensibly on behalf of the putative class in *Kellogg*, in what plaintiffs characterize as a scheme to increase their attorneys' fees. Plaintiffs are members of the current MDL settlement class that has a final approval hearing set for November 15, 2018.

Plaintiffs oppose transfer, arguing that their action presents distinct issues as to the validity and enforceability of agreements between defendants and their clients, and *Kellogg* should be allowed to proceed in Minnesota, where the 60,000 state court cases were filed. While no similar action appears to have been brought in this MDL by state court plaintiffs against their own attorneys, *Kellogg* is replete with factual allegations of conduct that occurred in the Syngenta MDL proceedings. For instance, plaintiffs criticize the role of defendant Mikal Watts of Watts Guerra LLP, a member of the court-appointed Plaintiffs' Settlement

Negotiating Committee, in negotiating the MDL settlement and alleged related side-deals concerning fees. Plaintiffs also assail defendants' entry into Joint Prosecution Agreements with MDL counsel and Minnesota state court-appointed lead counsel and the allegedly inappropriate exclusion of plaintiffs, without appropriate consultation, from classes certified before the current settlement class was reached.

Further underscoring the factual connection of *Kellogg* to the MDL, plaintiffs' allegations are similar to objections made by approximately 9,000 individual plaintiffs to the preliminary approval of the MDL settlement concerning the settlement's allegedly unfair treatment of individuals who were represented by counsel and already had filed suit. Though the transferee judge rejected the argument that these concerns should delay preliminary approval, he noted:

> Many class members who did not file individual suits may have retained counsel, and the amount of work performed by attorneys for individual plaintiffs will have varied greatly. Therefore, it could certainly be reasonable (within the range of reasonable settlements) to treat all class members the same for purposes of recovery, whether or not they filed their own suits. *In addition, any such argument may be made as an objection to final approval or in connection with attorney fee applications.*

See In re: Syngenta, D. Kansas, Case No. 14-2591, doc. 3531 at 14-15 (April 10, 2018) (emphasis added).

Transfer places *Kellogg* before the transferee judge, and it may inform his overall assessment of the fairness of the settlement and any subsequent requests for attorneys' fees.

Plaintiffs also argue that neither the settlement, nor Rule 23, authorizes the transferee judge to resolve this dispute over the validity of client contracts. That argument misses the point. We need not speculate about the precise contours of the transferee judge's authority. If the settlement or Rule 23 does not provide a basis to limit or declare the attorney fee contracts at issue void *ab initio*, as plaintiffs request, then transfer of *Kellogg* provides a ground for doing so, if such relief is indeed warranted. Should the transferee judge agree with plaintiffs that this dispute can be resolved more appropriately in the District of Minnesota, he can suggest Section 1407 remand to that district after he has had the opportunity to examine plaintiffs' serious allegations of misconduct occurring, in part, in the MDL.[1]

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[1] For example, Judge Lungstrum may wish to examine plaintiffs allegations of improper exclusion of the plaintiffs from a prior certified class. *See Kellogg* Complaint at 11182 ("when the courts approved class notice that automatically excluded Defendants' 60,000 clients from the class definition and the obligatory Rule 23 notice and opt-out requirements, the courts erred in accepting Defendants' sleight-of-hand claim that Farmers were never part of the class because they were excluded from the class by the JPA and MPA. The courts accepted Defendants' claim because they presumed, in orders approving class notice, that Defendants had satisfied their fiduciary and ethical obligations to procure informed consent from individual Farmers to be automatically excluded from the class proceedings.").

Plaintiffs alternatively sought to stay the issuance of our transfer order so they may pursue a writ of mandamus challenging our transfer decision. *See* 28 U.S.C. § 1407(e). We decline this request. If plaintiffs choose to pursue appellate relief, they can do so in the normal course.

IT IS THEREFORE ORDERED that this action is transferred to the District of Kansas and, with the consent of that court, assigned to the Honorable John W. Lungstrum for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION

/s/ Sarah Vance
Sarah S. Vance
Chair

Marjorie O. Rendell
Charles R. Breyer
Ellen Segal Huvelle
R. David Proctor
Catherine D. Perry

IN RE: SYNGENTA AG MIR162 CORN LITIGATION MDL No. 2591

SCHEDULE A

District of Minnesota

KELLOGG, ET AL. v. WATTS GUERRA, LLP, ET AL., C.A. No. 0:18-1082

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: SYNGENTA AG MIR162 CORN LITIGATION MDL No. 2591

ORDER DENYING RECONSIDERATION

(Filed Oct. 3, 2018)

Before the Panel:* Plaintiff farmers in a District of Minnesota action (*Kellogg*) seek reconsideration of our August 1, 2018, order denying their motion under Panel Rule 7.1 to vacate the Panel's order conditionally transferring this action, which is listed on the attached Schedule A, to MDL No. 2591. Defendant attorneys[1] oppose the motion.

After considering all argument of counsel, we conclude that we need not reconsider our denial of plaintiffs' motion to vacate. As we previously found, this action involves common questions of fact with the MDL No. 2591 actions, and transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and

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* Judge Charles R. Breyer took no part in the decision of this matter.

[1] Cross Law Firm, LLC; Dewald Deaver, P.C., LLO; Givens Law, LLC; Francisco Guerra; Daniel M. Homolka; Hovland and Rasmus, PLLC; Johnson Law Group; Law Office of Michael Miller; Mauro, Archer & Assocs., LLC; Patton Hoversten & Berg, P.A.; VanDerGinst Law, P.C.; Wagner Reese, LLP; Mikal C. Watts; Watts Guerra, LLP; Wojtalewicz Law Firm, Ltd.; Pagel Weikum, PLLP and Yira Law Office LTD.

witnesses and promote the just and efficient conduct of the litigation. Transfer is warranted for reasons set out in our order directing centralization. In that order, we held that the District of Kansas was the appropriate transferee forum for actions sharing allegations regarding Syngenta's decision to commercialize the MIR162 genetically modified corn trait in the absence of Chinese approval to import corn with that trait. *See In re: Syngenta AG MIR162 Corn Litig.*, 65 F. Supp. 3d. 1401 (J.P.M.L. 2014).

We rarely reconsider our transfer orders, and we do so only upon a showing of a significant change in circumstances.[2] Plaintiffs, on behalf of a putative class of roughly 60,000 farmers who sue their attorneys for wrongfully pursuing individual state court cases, point to no change in facts or other developments that would merit reconsideration. Instead, their motion mostly parrots arguments made in their initial motion to vacate, largely ignoring our significant observation that "*Kellogg* is replete with factual allegations of conduct that occurred in the Syngenta MDL proceedings." *See* Transfer Order at 2.[3]

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[2] *See, e.g.*, *In re: Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig.* (*No. II*), 588 F. Supp. 1448, 1449 (J.P.M.L. 1984) (granting reconsideration due to intervening events in the litigation).

[3] "For instance, plaintiffs criticize the role of defendant Mikal Watts of Watts Guerra LLP, a member of the court-appointed Plaintiffs' Settlement Negotiating Committee, in negotiating the MDL settlement and alleged related side-deals concerning fees. Plaintiffs also assail defendants' entry into Joint Prosecution Agreements with MDL counsel and Minnesota state court-appointed

Plaintiffs argue that our transfer order improperly equates the *Kellogg* plaintiffs with objectors to the settlement. It does not. While the transfer order noted that a group of approximately 9,000 individual plaintiffs had objected to preliminary approval because of the settlement's allegedly unfair treatment of individuals who were represented by counsel and already had filed suit, we were aware that the *Kellogg* plaintiffs were not objecting to the MDL settlement or any fees awarded thereunder. Our reference to the objections to the preliminary settlement merely served to underscore that other individual plaintiffs were objecting to the potential imposition of additional, non-class attorney fees. Were those arguments successful and the terms of the settlement affected, the *Kellogg* plaintiffs' recovery potentially could be impacted.

Plaintiffs offer a somewhat confusing argument that transfer *of Kellogg* denies them their due process rights under the Fifth and Fourteenth Amendments to proceed in D. Minnesota. As an initial matter, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citations and quotations omitted). Plaintiffs' argument that transfer denies them such an opportunity is speculative, largely devoid of specifics and, ultimately, without merit. Defendants offer a

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lead counsel and the allegedly inappropriate exclusion of plaintiffs, without appropriate consultation, from classes certified before the current settlement class was reached." Transfer Order at 2.

persuasive response: so long as their claims are adjudicated in accordance with governing statutes and rules (*i.e.*, relevant federal and state statutes and federal procedural rules), the requirements of due process are fulfilled. Plaintiffs failed to meaningfully respond to this assertion in their reply.

Intertwined with their due process argument, plaintiffs argue that if the global settlement is approved, then transfer would be futile because there will be no work remaining in the MDL, which in turn will force the transferee judge to remand *Kellogg* to D. Minnesota. This argument is unpersuasive for several reasons. Even if the global settlement resolves most cases, much work remains to be completed in the MDL—in addition to any opt-out litigation, four exporter cases remain in this MDL (one such case is set for a bellwether trial in September 2019). The conclusion of the substantial bulk of the farmer cases via settlement does not trigger the requirement that *Kellogg*—which is in its infancy—be remanded to the District of Minnesota. Section 1407 remand usually occurs upon the conclusion of pretrial proceedings, which in *Kellogg* are just beginning. *See* 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated"). Plaintiffs appear to argue that they should be afforded discovery and class certification before the settlement is finalized, but that is unlikely as a practical matter whether this

recently-filed action proceeds in the transferor or transferee court.[4]

Plaintiffs also suggest that transfer forecloses the possibility of discovery or class certification proceedings in *Kellogg*,[5] but nothing in our transfer order (or, more generally, Section 1407 transfer itself) prohibits class certification or discovery regarding plaintiffs' claims. All appropriate pretrial proceedings can take place in the transferee court, where much of the conduct about which plaintiffs complain is alleged to have occurred. The precise contours of such pretrial

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[4] Plaintiffs argue that the transferor judge is capable of issuing an escrow order holding the disputed funds until the claims in *Kellogg* have been resolved. We do not doubt that. But, in light of *Kellogg*'s undisputed factual overlap with the MDL proceedings, we view the more efficient approach to secure this relief would be transfer to the MDL. The transferee judge can resolve the first question of whether defendants are entitled to a fee (and, if so, how much) in connection with the class settlement proceedings. He can then decide whether any funds awarded should be placed in escrow in light of the pendency of *Kellogg*.

[5] *See* Motion to Reconsider at 6 ("There is no circumstance under which Farmers can fairly address Defendants' racketeering, attorney deceit and breach of fiduciary obligations without class certification and discovery and a jury trial. Any determination of Defendants' entitlement to a fee award by the Syngenta MDL or any court, without class certification, without discovery for Farmers, and without a trial on the jury issues, unambiguously violates the Fifth Amendment Due Process Clause."); Reply at 2 ("The Syngenta MDL cannot address whether Defendants' individual contingent fee contracts with Farmers were procured through deceptive marketing and are void without class certification and discovery for Farmers.").

proceedings are, as always, dedicated to the discretion of the transferee judge.

IT IS THEREFORE ORDERED that the motion for reconsideration of the Panel's August 1, 2018, order transferring the action listed on Schedule A is denied.

PANEL ON MULTIDISTRICT LITIGATION

/s/ Sarah Vance
Sarah S. Vance
Chair

Marjorie O. Rendell Lewis A. Kaplan
Ellen Segal Huvelle R. David Proctor
Catherine D. Perry

IN RE: SYNGENTA AG MIR162 CORN LITIGATION MDL No. 2591

SCHEDULE A

District of Minnesota

KELLOGG, ET AL. v. WATTS GUERRA, LLP, ET AL., C.A. No. 0:18-1082

1997 US Code
Title 28—JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 87—DISTRICT COURTS; VENUE
Sec. 1407—Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as

may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be

or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the

district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 14134 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION /	MDL No. 2672 CRB (JSC) **ORDER DENYING NON-CLASS COUNSEL'S MOTIONS FOR ATTORNEYS' FEES** (Filed Apr. 24, 2017)
This Order Relates To: ALL ACTIONS (except the securities action) /	

Six months ago, this Court approved a settlement between Volkswagen and owners and lessees of certain model Volkswagen and Audi 2.0-liter TDI diesel vehicles, resolving claims predicated on Volkswagen's use of a "defeat device" in those vehicles—software designed to cheat emissions tests. Shortly after final approval of the 2.0-liter Settlement, plaintiffs' Lead Counsel, and the 21 other attorneys the Court appointed to the Plaintiffs' Steering Committee ("PSC," and together with Lead Counsel, "Class Counsel"), filed a motion for $167 million in attorneys' fees and $8 million in costs on behalf of "all counsel performing common benefit services under the provisions of [Pretrial Order No.] 11" for work performed in connection with the consolidated class action complaint and resulting settlement. (Dkt. No. 2175 at 5.) The Court granted Class Counsel's motion in March. (Dkt. No. 3053.)

Now before the Court are 244 motions for attorneys' fees and costs filed by attorneys who did not serve as Class Counsel, and who were not compensated out of the $175 million ultimately awarded for common benefit work (collectively referred to as "Non-Class Counsel").[1] Non-Class Counsel, in many instances, filed complaints against Volkswagen in courts throughout the United States prior to consolidation of the litigation before this Court. Before and after the Court appointed Class Counsel, Non-Class Counsel also monitored the proceedings, and ultimately advised their clients on the Settlement's terms. For these services, they seek attorneys' fees and costs from Volkswagen. Because Volkswagen did not agree to pay these fees and costs as part of the Settlement, and because Non-Class Counsel have not offered evidence that their services benefited the *class*, as opposed to their individual clients, the Court DENIES the motions. To the extent that Non-Class Counsel seek to enforce their fee agreements with individual clients, however, they may bring such claims in an appropriate venue.

BACKGROUND

After the public learned in September 2015 that Volkswagen had installed defeat devices in its "clean diesel" 2.0-liter TDI vehicles, ligation quickly ensued. Attorneys filed complaints against Volkswagen on

[1] A list of the docket entries for the 244 motions is attached to this Order as an Appendix.

behalf of consumers across the country, and government entities launched criminal and civil investigations. (*See* Dkt. No. 1609 at 11.) On December 8, 2015, the Judicial Panel on Multidistrict Litigation transferred all related federal actions to this Court, where more than 1,200 cases have since been consolidated. (*See* Dkt. No. 2175-1 ¶ 3.)

In January 2016, the Court appointed Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein, LLP as Plaintiffs' Lead Counsel and as Chair of the PSC, to which the Court also named 21 other attorneys. (*See* Pretrial Order No. 7, Dkt. No. 1084.) The Court tasked the PSC with conducting and coordinating the MDL litigation, but vested Lead Counsel with authority to retain the services of other attorneys to perform work for the benefit of the class. (*See id.* ¶ 2; Pretrial Order No. 11, Dkt. No. 1254 at 1-2.)

In the months that followed, Class Counsel prosecuted the consumers' civil cases and worked with Volkswagen, federal and state agencies, and the Court appointed Settlement Master, to try and resolve the claims asserted. (*See* Dkt. No. 1609 at 11-12.) Class Counsel filed initial and amended consolidated class action complaints, conducted common discovery, and ultimately negotiated the 2.0-liter Settlement with Volkswagen (Dkt. No. 1685), which the Court approved on October 25, 2016. (Dkt. No. 2102.) With regard to attorneys' fees and costs, the Settlement Agreement provides that Volkswagen will "pay reasonable attorneys' fees and costs for work performed by Class Counsel in connection with the Action as well as work

performed by other attorneys designated by Class Counsel to perform work in connection with the Action. . . .” (Dkt. No. 1685 ¶ 11.1.) The Settlement Agreement defines Class Counsel as “Lead Counsel [*i.e.*, Ms. Cabraser] and the PSC.” (*Id.* ¶ 2.19.)

In early November 2016, Class Counsel filed a motion seeking $167 million in attorneys’ fees and $8 million in costs on behalf of “all counsel performing common benefit services under the provisions of [Pretrial Order No.] 11.” (Dkt. No. 2175 at 5.) In addition to seeking fees for work performed by the PSC, the motion also sought fees for the work of nearly 100 other law firms who Lead Counsel authorized to perform common benefit work. (*See* Dkt. No. 2175-1 ¶ 7.) The common benefit work included not only time spent drafting pleadings and participating in negotiations, but also time spent communicating with class members, which includes 20,000 communications between PSC attorneys and class members. (*Id.* ¶ 3.) Class Counsel’s fees motion also included 21,287 hours of reserve time to cover work necessary to “guide the hundreds of thousands of Class Members through the remaining 26 months of the Settlement Claims Period.” (*Id.* ¶ 15.) Recognizing that counsel had achieved an extraordinary result for the class and the public as a whole, the Court granted the fees motion in March of this year. (Dkt. No. 3053 at 3.)

At the time the Court awarded fees, it noted that various class members’ private attorneys—i.e., Non-Class Counsel—had also filed motions for fees and costs. (*Id.* at 2 n.1.) Some non-class attorneys began

filing these motions even before the Court approved the 2.0-liter Settlement (*see*, *e.g.*, Dkt. No. 2029, filed on October 13, 2016), while the bulk of the motions were filed in late December 2016 and early January 2017. Some non-class attorneys initially took a different approach, placing liens on several class members' settlement proceeds. (*See* Dkt. No. 2159.) The Court, in two related orders, enjoined any state court action seeking to enforce fee-related liens, assignments, trust-account agreements, or other means that could diminish class members' recovery under the Settlement. (Dkt. Nos. 2247, 2428.) The Court also ordered Volkswagen to pay class members the full amount to which they were entitled under the terms of the Settlement. (*Id.*)

In total, Non-Class Counsel have now filed 244 motions for attorneys' fees and costs. The motions vary in length and detail, but ultimately raise similar bases for relief. A significant number of the motions seek fees for time spent filing individual and class complaints against Volkswagen prior to the centralization of proceedings before this Court.[2] Many of the motions also seek fees for time spent communicating with class members—both before and after the Court appointed

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[2] (*See*, *e.g.*, Dkt. No. 2272 at 5 ("We were one of the first filed complaints in the Commonwealth of Pennsylvania."); Dkt. No. 2531 (filed putative class action complaint in the Central District of Illinois); Dkt. No. 2588 (filed putative class action complaint in the Eastern District of Virginia); Dkt. No. 2729 (filed complaints in 14 district courts on behalf of 697 individuals who purchased Volkswagen vehicles).)

Class Counsel—monitoring MDL proceedings, and ultimately advising clients on the 2.0-liter Settlement.[3]

On February 13, 2017, Volkswagen filed an omnibus opposition to Non-Class Counsel's motions for attorneys' fees and costs. (Dkt. No. 2903.) Volkswagen argues that it has no obligation to pay the fees of Non-Class Counsel under the Settlement or governing law. Non-Class Counsel responded by filings numerous reply briefs in support of their motions.[4]

DISCUSSION

The question at issue is whether the Court should require Volkswagen to pay Non-Class Counsel

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[3] (*See*, *e.g.*, Dkt. No. 2696 ("Met and corresponded with Plaintiff regarding his individual claims, settlement, and various other issues arising during [the] course of this litigation."); Dkt. No. 2532 ("Counsel[ed] and advise[d] the Class Member as to developments in the [MDL]" and the "'pros and cons' of the [Settlement]."); Dkt. No. 2648 at 6 (participated in "discussions with class members after each hearing and regarding the Settlement").)

[4] Many non-class attorneys argue in their reply briefs that the Court should disregard Volkswagen's opposition as untimely. (*See*, *e.g.*, Dkt. No. 2927 at 2-3; Dkt. No. 2952 at 2.) Volkswagen filed its omnibus opposition on February 13, 2017, more than 14 days after each non-class attorney filed his or her motion. *See* Local Rule 7-3(a). Under the unique circumstances at issue, however, where Volkswagen needed to respond to 244 separate motions, and where these motions were filed on a rolling basis, the Court concludes that Volkswagen filed its opposition within a reasonable period of time. In the future, however, Volkswagen (and other parties seeking to file pleadings outside of the time periods prescribed in the Local Rules) should seek leave in advance to file late pleadings.

attorneys' fees and costs as a result of the 2.0-liter Settlement. Because Volkswagen did not agree to pay these fees, and because Non-Class Counsel's work did not benefit the class as a whole, the answer is no.

Federal Rules of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The second of these two avenues clearly does not apply here, because Volkswagen did not agree to pay the fees at issue as part of the Settlement Agreement. The Settlement Agreement provides that Volkswagen will "pay reasonable attorneys' fees and costs for work performed by Class Counsel in connection with the Action as well as work performed by other attorneys *designated by Class Counsel* to perform work in connection with the Action." (Dkt. No. 1685 ¶ 11.1 (emphasis added).) Non-Class Counsel are, by definition, not "Class Counsel," nor do they assert that the fees at issue are for work "designated by Class Counsel." Non-Class Counsel therefore cannot demonstrate that an award of attorneys' fees and costs is "authorized . . . by the parties' agreement." Fed. R. Civ. P. 23(h).[5]

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[5] At least one non-class law firm has offered evidence that it provided substantive information to PSC counsel upon request. (*See* Dkt. No. 2176-2 ¶ 8.) That law firm, however, does not currently seek compensation for that work, for which it may have already been compensated as part of the award of attorneys' fees made to Class Counsel. Other non-class attorneys assert that they made suggestions to the PSC regarding the language used in the consolidated class action complaints. (*See*, *e.g.*, Dkt. No.

The first avenue under Rule 23(h)—that the Court may award fees and costs that are authorized by law—also does not apply. In "common fund" cases, a court may award non-class counsel a reasonable attorney's fee only if counsel's work conferred a benefit on the *class*, as opposed to on an individual client. *See In re Cendant Corp. Secs. Litig*, 404 F.3d 173, 191 (3d Cir. 2005) ("Non-lead counsel will have to demonstrate that their work conferred a benefit on the class *beyond* that conferred by lead counsel." (emphasis in original)); *Gottlieb v. Barry*, 43 F.3d 474, 489 (10th Cir. 1994) (holding that non-lead counsel should receive compensation if "they have . . . conferred a benefit on the class"); *cf. Stetson v. Grissom*, 821 F.3d 1157, 1164 (9th Cir. 2016) (holding that, to be entitled to an award of attorneys' fees, an objector "must increase the fund or otherwise substantially benefit the class members" (internal quotation marks omitted)). Non-Class Counsel have not made such a showing here.

First, Non-Class Counsel's filing of individual and class complaints prior to the MDL did not benefit the class. These cases were consolidated before this Court as part of a multidistrict litigation less than three months after the public disclosure of Volkswagen's use of a defeat device. And approximately four months after the disclosure, the Court appointed Class Counsel to prosecute the consolidated consumer class action. There consequently was little to any pretrial activity in the cases filed by Non-Class Counsel, and the filings

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2316.) Those attorneys, however, have not submitted evidence that Lead Counsel requested and authorized this work.

alone did not materially drive settlement negotiations with Volkswagen. *See In re Cendant*, 404 F.3d at 191, 196, 204 (explaining that non-class counsel should not normally be compensated for "fil[ing] complaints and otherwise prosecuting] the early stages of litigation," which is best viewed as an "entrepreneurial effort," rather than as work that benefits the class). The relatively short time period between the public disclosure of Volkswagen's use of a defeat device and the consolidation of proceedings also distinguishes this case from *Gottlieb*, 43 F.3d at 488-89, where the Tenth Circuit reversed a district court order that did not award fees to non-class counsel who had "vigorously pursued [numerous] cases for *sixteen months* before class counsel was designated." *Id.* at 488 (emphasis added). Here, by contrast, Non-Class Counsel simply did not have the time needed to materially impact the consolidated class proceedings.

Second, Non-Class Counsel offers evidence that, before the appointment of Class Counsel, they fielded hundreds of phone calls from prospective and actual clients, and consulted with prospective class members about their potential legal claims. While undoubtedly requiring time and effort, this work at most benefited individual class members, not the class as a whole. *See*, *e.g.*, *In re Auction Houses Antitrust Litig.*, No. 00-CIV-0648., 2001 WL 210697, at *4 (S.D.N.Y. Feb. 26, 2001) (finding no reason "for the class as a whole to compensate large numbers of lawyers for individual class members for keeping abreast of the case on behalf of their individual clients"). Further, the significant

majority of 2.0-liter class members did not retain private counsel. In the 244 motions at issue, counsel seek fees for their work representing 3,642 class members, which represents only 0.74 percent of the total class of 490,000. (*See* Dkt. No. 1976 at 6.) That such a small percentage of class members actually retained Non-Class Counsel makes it even less likely that Non-Class Counsel's services benefited the class as a whole.

Third, Non-Class Counsel seek fees and expenses for services provided after the Court appointed Class Counsel, including time spent monitoring class proceedings, keeping class members informed, and ultimately advising class members on the terms of the proposed Settlement. Similar to Non-Class Counsel's efforts prior to the appointment of Class Counsel, the Court "cannot see how the monitoring itself benefits the class as a whole, as opposed to the attorney's individual client." *In re Cendant Corp.*, 404 F.3d at 201. Further, after this Court appointed Class Counsel, it explained that only "Court-appointed Counsel and those attorneys working on assignments . . . that require them to review, analyze or summarize . . . filings or Orders [in these proceedings] are doing so for the common benefit." (Dkt. No. 1253 at 4.) Non-Class Counsel therefore were on notice that they would not receive common benefit compensation for these efforts.

As for the time Non-Class Counsel spent advising class members on the terms of the Settlement, this work was duplicative of that undertaken by Class Counsel, and therefore did not "confer[] a benefit *beyond* that conferred by lead counsel." *In re Cendant*

Corp., 404 F.3d at 191. As noted in Class Counsel's motion for attorneys' fees, by the time the Court approved the 2.0-liter Settlement, the law firms comprising the PSC had logged over 20,000 communications with class members, responding to questions and requests for information. (*See* Dkt. No. 2175-1 ¶ 3.) Additionally, as part of an expansive Settlement Notice Program, the parties established a Settlement call center and website, which—as of the final Settlement approval hearing on October 18, 2016—had respectively received more than 130,000 calls and more than 1 million visits. (*See* Dkt. No. 2102 at 26.) Lead Counsel's fees award also included 21,287.4 hours of reserve time to cover additional work necessary to, among other things, guide the class members through the remaining Settlement Claims Period. (*See* Dkt. No. 2175-1 ¶ 15.) Thus, even without retaining Non-Class Counsel, class members could, did, and continue to obtain legal advice from Lead Counsel and the PSC.

Finally, Non-Class Counsel's requests for fees and costs for work performed after the Court appointed Class Counsel are deficient in another—procedural—respect. In Pretrial Order No. 11, this Court explained that all plaintiffs' attorneys needed to obtain Lead Counsel's authorization to perform compensable common benefit work. (*See* Dkt. No. 1254 at 1-2 (noting that the recovery of common benefit attorneys' fees would be limited to Lead Counsel, members of the PSC, and "any other counsel authorized by Lead Counsel to perform work that may be considered for common benefit compensation").) As noted above, Non-Class

Counsel have not asserted that they obtained authorization from Lead Counsel to perform the common benefit work for which they now seek compensation, as required.

In sum, because Volkswagen did not agree to pay the fees and costs at issue as part of the Settlement, and because Non-Class Counsel have not offered evidence that their services benefited the class as a whole, Volkswagen is not required to pay Non-Class Counsel's attorneys' fees and costs as a result of the 2.0-liter Settlement.[6]

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While Non-Class Counsel are not entitled to fees from Volkswagen as part of this class action, Non-Class

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[6] Certain non-class counsel argue that they are entitled to attorneys' fees because they filed complaints bringing claims under statutes with fee-shifting provisions, providing that a "prevailing party" may recover attorneys' fees and expenses. (*See*, *e.g.*, Dkt. No. 2356 at 2-3 (citing South Carolina Dealers Act, S.C. Code § 56-15-110); Dkt. No. 2243 at 2 (citing Magnuson-Moss Warranty Act, 15 U.S.C. § 2310).) To the extent that class members are prevailing parties as a result of the 2.0-liter Settlement, however, they prevailed because of the work of Lead Counsel and the PSC, not because of Non-Class Counsel's efforts. As a result, awarding fees to Non-Class Counsel under these provisions would be inappropriate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (reasoning that a "prevailing party" should be awarded fees based on the "value of a lawyer's services"). Further, the Ninth Circuit has held that, "[a]pplication of the common fund doctrine to class action settlements does not compromise the purposes underlying fee-shifting statutes," and "common fund fees can be awarded [even] where statutory fees are available." *Staton v. Boeing Co.*, 327 F.3d 938, 968-69 (9th Cir. 2003).

Counsel may be entitled to payment of certain fees and costs pursuant to attorney-client fee agreements. This is a matter of contract law, subject to the codes of professional conduct, and such disputes should be resolved in the appropriate forum. To that end, the Court VACATES the injunction on state court actions, to the extent those actions are brought to enforce an attorney-client fee agreement. Volkswagen, however, must continue to "directly pay consumers the full amount to which they are entitled under the Settlement" for all the reasons stated in the Court's previous Order. (Dkt. No. 2428 at 2.)

To the extent that a non-class attorney brings an action against his or her client or makes a demand to enforce a fee agreement, the Court orders that attorney to first provide his or her client with a copy of this Order, and to file a certificate of service with this Court.

IT IS SO ORDERED.

Dated: April 24, 2017

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	**Hon. Anita B. Brody**
THIS DOCUMENT RELATES TO: ALL ACTIONS	

April 5, 2018 **Anita B. Brody, J.**

MEMORANDUM

Over the past year, the Court has focused on the implementation of the Settlement Agreement. Now that implementation is in progress, it is time to focus

on attorneys' fees. There are four key issues for the Court to decide:

(1) the total amount for the common benefit fund;

(2) the allocation of the common benefit fund among Class Counsel;

(3) the amount, if any, to be set aside for attorneys' fees incurred in the implementation of this complex Settlement Agreement and the possible need for future attorneys' fees throughout the 65-year term of the Agreement; and

(4) the reasonableness of the amount of fees to be paid by individual Class Members from their Monetary Awards to individually retained plaintiffs' attorneys ("IRPAs").

This last issue impacts on the Monetary Awards to be distributed to individual Class Members and will be addressed below.[1]

On September 14, 2017, I appointed Professor William B. Rubenstein of Harvard Law School as an expert witness on attorneys' fees, covering the issues of (1) fees to be paid to individually retained plaintiffs' attorneys ("IRPAs") and (2) Class Counsel's 5% holdback request. Professor Rubenstein then issued an Expert Report covering those topics. Interested parties

[1] Because the amount of fees to be paid to Class Counsel impacts the calculation of the fee cap addressed in this opinion, the common benefit fund opinion has also been filed today.

were given the opportunity to respond to the Expert Report. Professor Rubenstein then filed a reply to the interested parties' responses to the Expert Report. Lastly, several interested parties filed sur-replies to Professor Rubenstein's reply.

For the reasons set forth below, after considering the recommendations of Professor Rubenstein and the viewpoints of interested parties, I adopt the conclusions of Professor Rubenstein and order that IRPAs' fees be capped at 22% plus reasonable costs. I further adopt Professor Rubenstein's suggestion that IRPAs and Class Members be allowed to file petitions seeking upward or downward deviations from this fee cap. Such deviations, however, will only be granted in exceptional or unique circumstances.

I. BACKGROUND

In his Expert Report, Professor Rubenstein provided extensive background on IRPAs' involvement in this litigation. Expert Report 2-12, ECF No. 9526. Most importantly, Professor Rubenstein explained the special circumstances related to IRPAs in this case:

> While Class Counsel represent the interests of all class members in the aggregate, many individual class members also have their own lawyers. This MDL encompassed thousands of individual lawsuits filed by hundreds of players who were represented individually (or in groups) by their own lawyers. Moreover, other players (or their families) retained individual counsel to represent them in the course of the

> class action proceedings. The class action settlement foreclosed all individual cases, except for those pursued by players who opted out of the settlement, and the class action notice advised players that, "You do not have to hire your own attorney." Nonetheless, about half (47% or 9,477 out of 20,376) of the parties that have registered for payment through the class action settlement are represented by their own attorneys.

Id. at 7-8 (footnotes omitted).

II. DISCUSSION

A. The Authority to Impose a Fee Cap

I adopt Professor Rubenstein's conclusion that a court has the authority to impose a fee cap derived from both the power of a court presiding over an MDL or class action and the ability of a court to review individual fee awards. *Id.* at 12-19.

In MDLs and class actions, "district courts have routinely capped attorneys' fees *sua sponte*." *In re World Trade Center Disaster Site Litig.*, 754 F.3d 114, 126 (2d Cir. 2014); *see also In re: Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mexico, on Apr. 20, 2010*, No. 10-md-2179 (E.D. La. June 15, 2012) (order setting caps on individual attorneys' fees), ECF No. 6684 at 2; *In re Vioxx Prod. Liab. Litig.*, 650 F. Supp. 2d 549, 553-54, 558-59 (E.D. La. 2009). In complex mass litigation, "excessive fees can create a sense of overcompensation and reflect poorly on the court and its

bar," negatively impacting "[p]ublic understanding of the fairness of the judicial process." *In re Zyprexa Prod. Liab. Litig.*, 424 F. Supp. 2d 488, 493-94 (E.D.N.Y. 2006). Consequently, courts must curb such excessive or unreasonable fees to safeguard the public's perception of the courts and the legitimacy of the legal system's handling of massive MDLs and class actions. The way to curb such fees is with a cap.

District courts also derive authority to cap fees from their power to review an individual attorney's fee agreement. "Third Circuit law unequivocally supports the proposition that this Court possesses the inherent authority to regulate the contingent fees of lawyers appearing before it and any lawyer representing a class member in this Settlement is clearly subject to this authority." Expert Report 19; *see also McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 100 (3d Cir. 1985) [*McKenzie I*] ("[I]n a civil action, a fee may be found to be 'unreasonable' and therefore subject to appropriate reduction by a court. . . ."); *Dunn v. H. K. Porter Co.*, 602 F.2d 1105, 1110 (3d Cir. 1979) ("[W]here there is a fee contract, courts have the general power to override it, and set the amount of the fee." (internal quotation marks omitted)).

B. The Need for a Fee Cap

I agree with Professor Rubenstein that the circumstances of this litigation require the implementation of a cap. I adopt Professor Rubenstein's conclusion that a fee cap is necessary in this case, because:

> (1) *players with IRPAs are paying two [sets of] lawyers' fees* (2) in a case settled on an aggregate basis (3) following relatively little litigation (4) requiring IRPAs to undertake a modest amount of work . . . for [5] vulnerable clients [6] who may be subject to contingent fees contracts that were either problematic at formation or are no longer reasonable.

Expert Report 26 (emphasis added). The reality is that two sets of attorneys—IRPAs and Class Counsel—have worked to achieve results for individual Class Members. Although some of the work of IRPAs may be considered separate and distinct from the work of Class Counsel, it is undeniable that all IRPAs have benefitted from Class Counsel's work. An assessment of the reasonableness of IRPAs' fees requires a deduction for Class Counsel's work, which reduced the amount of work required of IRPAs. *See Walitalo v. Iacocca*, 968 F.2d 741, 749 (8th Cir. 1992) (acknowledging that class counsel reduced the amount of work required of individual counsel and directing "the district court to review the plaintiffs' fee arrangements with their individual counsel for reasonableness in light of their decreased responsibilities and the fee award to [class] counsel"). This reduction is necessary to prevent a "free-rider problem"—enabling IRPAs to financially benefit from the work of Class Counsel even though they did not bear the costs. *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (1st Cir. 1992); *cf. In re Vioxx*, 760 F. Supp. 2d at 653 ("[A]s between a common benefit attorney who expended considerable time, resources, and

took significant economic risks to produce the fee, and the primary attorney who did not, it is appropriate and equitable that the former receive some economic recognition from the [latter].") Additionally, it is necessary to reduce IRPAs' contingent fees to avoid the problem of Class Members paying twice for the same work—once to Class Counsel and then again to IRPAs.[2]

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[2] Many of the interested parties contend that Class Counsel's fee has no bearing on Class Members' recoveries because the Settlement is uncapped. Thus, they argue that Class Counsel's fee should not be calculated in the total amount of attorneys' fees attributable to each Class Member. I join Professor Rubenstein in rejecting this argument:

> A simple analogy helps demonstrate why I continue to believe that Class Counsel's contingent fees must be counted as part of the class's recovery regardless of how the settlement is structured. Assume a client hired a lawyer to pursue a tort claim on a one-third contingent fee basis. After some litigation, the lawyer calls the client and says, "Good news, the defendant has agreed to settle the case and you will be getting $1.1 million. Better yet," she continues, "After we settled your case, we negotiated my fee and the defendant separately agreed to pay me $700,000 directly, with not a penny of that corning out of your $1.1 million." At that point, the client might think, "Wait a minute. It appears we are getting $1.8 million in total and my 2/3 share should be $1.2 million and your 1/3 share $600,000, per our retainer agreement." And of course the client would be right. The point of the analogy is not to suggest malfeasance by Class Counsel in this case; the analogy simply drives home the point that, in assessing the reasonableness of the fees being paid by individual class members, Class Counsel's fees must be considered a component of the class's relief. The facts that the parties have set class members' individual recovery levels net of those fees, that the fees were (partially)

I further adopt Professor Rubenstein's conclusion that "a one-third contingent fee best approximate[s] the risk and work that the two sets of attorneys (Class Counsel and IRPAs) undertook in this case."[3] Expert Reply 3, ECF No. 9571. Because I conclude that an

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> negotiated separately from the class's recovery, and/or that the NFL has agreed to pay all claims made in the settlement, in no way alter the point, nor are the parties' efforts to distinguish the key Third Circuit precedents convincing.

Expert Reply 3 n.8, ECF No. 9571. Moreover, although the Settlement Agreement is uncapped, the amount of each individual Class Member's Monetary Award is limited by the terms of the Settlement Agreement. Thus, Class Counsel's fee may have impacted the formula for each individual Monetary Award and must be considered a component of Class Members' relief.

[3] Some interested parties contend that the fee cap selected is arbitrary. I adopt Professor Rubenstein's recommendation that an overall fee of 33% is appropriate given the nature of the litigation in this case. This case settled early in the litigation. As Professor Rubenstein noted:

> Class Counsel settled the entire case after briefing one dispositive motion, without undertaking any formal discovery, without significant motion practice, without summary judgment briefings, and without preparing for, much less engaging in, a class (or even one bellwether) trial; no IRPA will need to undertake these tasks either. One of the firms designated as Class Counsel itself states that "[t]his is the only mega fund case in which there was no paper discovery, no depositions, no motion practice, no litigation, no trials, no trial activity."

Expert Report 22 (footnote omitted) (internal quotation marks omitted). Given that, on average, other similar cases capped overall fees at 32.25%, the decision to use 33% is well-founded. *See*, *e.g.*, *In re Vioxx*, 650 F. Supp. 2d 549 (implementing a cap of 32% on overall fees in a case settled following six bellwether trials).

overall contingent fee of 33% is appropriate, and I have concluded in a separate opinion issued today that the fee to be paid to Class Counsel will constitute approximately 11% of the Class's recovery,[4] the fees to be paid to IRPAs will be presumptively capped at 22%. To ensure that a 22% cap is fair to all parties involved, I must now crosscheck that number with an assessment of the relevant Third Circuit factors, data on contingent fee levels in this case, and data from other cases.

In assessing the reasonableness of contingent fees, the Third Circuit directs courts to consider the "circumstances existing at the time the arrangement is entered into, . . . the quality of the work performed, the results obtained, and whether the attorney's efforts substantially contributed to the result." *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987) [*McKenzie II*]. Importantly, a court must consider whether subsequent events have rendered an agreement—that may have been fair at the time of contracting—unfair at the time of enforcement. *Id.*

I adopt Professor Rubenstein's conclusion that "application of the Third Circuit's reasonableness factors argues in favor of a substantially reduced contingent fee" for IRPAs. Expert Report 28. The risks of this litigation changed dramatically throughout the various phases of litigation that were noted by Professor Rubenstein. I adopt the conclusion that "contingent fee

[4] The 11% figure is derived from the overall attorneys' fee award ($106,817,220.62) divided by the overall estimated present value of the Settlement ($982,200,000).

contracts for large percentages entered into earlier in this case's history are no longer reasonable under the case's present circumstances." *Id.* at 27.

I must also consider "the quality of the work performed, the results obtained, and whether the attorney's efforts substantially contributed to the result." *McKenzie II*, 823 F.2d at 45. The work of Class Counsel substantially contributed to the aggregate resolution of this case. The IRPAs' work here involves the shepherding of their clients through the claims process of the Settlement Agreement. "An IRPA should be able to serve her client to this level without need of 30-40% of that award." Expert Report 28. Therefore, the presumptive cap of 22% is reasonable, and any exceptional or unique circumstances will be accounted for on an individualized basis.

Data on the contingent fees set by IRPAs at various points during this litigation also support a reasonable cap of 22%. Professor Rubenstein evaluated 640 IRPA contracts in this case and found that the contingent fee rates "range from a low of 15% to a high of 40%, with a median of 30% and a mean of 29%." *Id.* As the risk involved in the litigation decreased, the contracted-for rates also decreased. *Id.* at 28-29. These later contingent fee rates range between 20-25%. *Id.* at 29. Thus, the market rate for IRPAs in this case indicates that a 22% fee cap is reasonable under the current circumstances.

Comparison to fee caps in other cases confirms that a 22% fee cap here is reasonable. As Professor Rubenstein noted:

> Courts in cases with similar settlement structures – *i.e.*, cases involving both central aggregate lawyers and IRPAs – have capped contingent fees in the past. In six such cases, courts set total fee caps (for both the aggregate lawyers and IRPAs) ranging from 20% to 37.18%, with an average of 32.25%; these six data points yielded effective IRPA fees ranging from 18% to 33.5%, with an average of 23.69%. In another set of seven cases, courts more directly capped IRPA rates, with those caps ranging from 5% to 33.33%, with an average of 17.95%. The average IRPA cap across all 13 cases is 20.6%. An eighth court simply awarded IRPAs a flat fee cap of $10,000 for processing claims through the class action settlement.

Id. at 30.

In light of these considerations, including the amount of attorneys' fees charged by both Class Counsel and IRPAs, I conclude that a fee cap of 22% for IRPAs is reasonable.[5]

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[5] As noted in the common benefit fund opinion also issued today, the Court is reserving judgment on Class Counsel's request for a 5% holdback of all Monetary Awards as a precaution to ensure sufficient funds to pay for implementation of the Settlement. Currently, the Claims Administrator is withholding that 5% from the fee of each IRPA. Therefore, while the Court's determination remains pending, this practice will continue. The precautionary

C. Petitions to Deviate from the Fee Cap

I adopt Professor Rubenstein's conclusion that counsel and their clients should be given the opportunity to petition the Court to deviate from this cap in exceptional or unique circumstances.[6] I further adopt Professor Rubenstein's non-exhaustive list of circumstances that might provide a party a basis to deviate from this presumptive fee. *See id.* at 32-33. As in all cases relating to contingent fee agreements, attorneys are required to demonstrate by a preponderance of the evidence that the fee requested is reasonable. *Id.* at 33; *see also McKenzie I*, 758 F.2d at 100. These petitions will be referred to the Honorable David R. Strawbridge, United States Magistrate Judge for the Eastern District of Pennsylvania,[7] for review in accordance with 28 U.S.C. § 636.

5% withholding effectively lowers the IRPA fee cap to 17% until further notice. The Court hopes that the 5% holdback will not be necessary for implementation. However, even if the effective 17% cap is final, the Court notes that it would also be reasonable based on Professor Rubenstein's calculation that the average direct fee cap for IRPAs is 17.95%, *see* Expert Report 30, and his initial recommendation and support for a 15% fee cap, *see id.* at 1.

[6] Certain interested parties contend that the fee cap violates their procedural due process rights. Prior to my decision to institute a fee cap, however, IRPAs were given an opportunity to respond to Professor Rubenstein's recommendations for a fee cap contained in both his initial Expert Report and his Expert Reply. Additionally, they still have the opportunity to petition the Court to deviate from the cap in exceptional or unique circumstances.

[7] If necessary, these petitions may be referred to another United States Magistrate Judge for the Eastern District of Pennsylvania.

V. CONCLUSION

For the reasons set forth above, fees to IRPAs will be capped at 22% plus reasonable costs unless the terms of a contingent fee contract reflect a rate lower than the 22% fee cap, in which case the lower fee will apply. In exceptional or unique circumstances, the Court will entertain petitions seeking an upward or downward deviation from the presumptive fee cap.

s/Anita B. Brody

ANITA B. BRODY, J.