WACHTELL, LIPTON, ROSEN & KATZ
MARC WOLINSKY (*pro hac vice*)
GEORGE T. CONWAY III (*pro hac vice*)
VINCENT G. LEVY (*pro hac vice*)
51 West 52nd Street
New York, NY 10019
Tel./Fax: 212.403.1000/2000
MWolinsky@wlrk.com
GTConway@wlrk.com
VGLevy@wlrk.com

FARELLA, BRAUN & MARTEL, LLP
NEIL A. GOTEINER, State Bar No. 83524
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
Tel./Fax: 415.954.4400/4480
NGoteiner@fbm.com

Attorneys for Defendant
HEWLETT-PACKARD COMPANY

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE HEWLETT-PACKARD COMPANY SHAREHOLDER DERIVATIVE LITIGATION

This Document Relates to: All Actions

Master File No. 12-CV-6003 CRB

HEWLETT-PACKARD'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO SUSHOVAN HUSSAIN'S MOTION TO INTERVENE TO CHALLENGE SETTLEMENT

Date: August 25, 2014
Time: 9:30 a.m.
Dept.: Courtroom 6, 17th Floor
Judge: Hon. Charles R. Breyer

SUMMARY OF ARGUMENT

Sushovan Hussain, Autonomy's CFO from 2001 to May 2012, was one of the chief architects of the massive fraud on HP that precipitated this litigation. The notion that he should be permitted to intervene and challenge the substance of a settlement designed to protect the interests of the company he defrauded is ludicrous.

The shareholder plaintiffs who originally sued HP's directors and officers now agree that Hussain, along with Autonomy's founder and CEO, Michael Lynch, should be held accountable for this fraud. The settlement, therefore, provides for the shareholder plaintiffs to drop their claims against the victims of Lynch and Hussain's fraud, and for their counsel to assist HP in pursuing the perpetrators of the fraud, who inflicted billions of dollars of harm on the company. Hussain's interests, and those of the company and shareholders he damaged, could hardly be more diametrically opposed.

So what is really going on here?

Hussain acknowledges that HP will "no doubt" sue him "in England where discovery is limited." Even more of consequence to him, Hussain also knows that prosecutors on both sides of the Atlantic are investigating him, that HP is cooperating with those authorities and that, until he is charged, he has no access to the information that HP is providing to the authorities. So Hussain, the fraudster, wraps himself in a mantle of self-righteousness in an attempt to obtain discovery that he hopes will help him stay out of prison and defend the civil litigation he expects HP will file in the UK.

To paraphrase Hussain's brief: "Who's kidding whom?" Hussain is no champion of HP's interests. The only interests he is trying to protect are his own. And because his interests are diametrically opposed to HP's interests, he does not have standing to challenge the substance of the settlement.

Hussain, likewise, does not have standing to challenge the few legal aspects of the settlement that touch him. His cognizable rights are not being affected in any substantive way. The provision of the bar order that he challenges actually grants him a very generous benefit by *reducing* his liability; it is a routine provision in settlements of this type that has been approved by any number of

courts. *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989); *see also In re HealthSouth Corp. Sec. Litig.*, 572 F. 3d 854, 866 (11th Cir. 2009); *Gerber* v. *MTC Elec. Techs. Co.*, 329 F.3d 297 (2d Cir. 2003) (Sotomayor, J.). As for Hussain's claim that the settlement affects his right to indemnification from HP, a right that he does not have because he was never an officer (or even an employee) of the company, HP has agreed with the plaintiffs to revise the bar order to make clear that Hussain's rights to claim indemnification from HP or Autonomy (whatever they may be) are unaffected by the settlement.

ARGUMENT

In order to intervene as of right, Hussain must show, among other things, that (1) he has a significant protectable interest relating to the property or transaction that is the subject of the action, and (2) the disposition of the action may impair or impede his ability to protect that interest. *Arakaki* v. *Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). He does not meet this standard. There is no basis for Hussain to object here, and no impediment to Hussain defending himself in the litigation that HP will bring against him.

I. HUSSAIN MAY NOT CHALLENGE THE SUBSTANCE OF THE SETTLEMENT.

Under Rule 23.1, absent shareholders are entitled to object to the merits of a derivative settlement in order to protect the *company's* interests. Hussain's motion, however, does not seek to protect HP's interests; it is a transparent attempt to promote Hussain's own self-interest at HP's expense. As a putative defendant in a suit by HP, Hussain has *no* standing at all to appear — still less can he complain that HP and the plaintiffs have agreed to sue him for the massive fraud he perpetrated upon HP.

Hussain has the chutzpah to claim that he can object to the fairness of the settlement as an ordinary shareholder because, some time ago, HP issued him a handful of restricted stock units (or RSUs). But it is obvious that Hussain has no interest in objecting *as a shareholder* (if he even continues to hold those RSUs — and he does not say that he does). Hussain is clearly seeking to protect and promote his own personal interests rather than HP's.

And regardless, the motion is improper because his interests are adverse to HP's. Courts around the country hold that shareholders can object only if they have standing to file derivative

litigation in the first place.[1] At a minimum, this means Hussain must show that his interests are not "antagonistic to those [he] is seeking to represent." Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus, and Adam N. Steinman, FEDERAL PRACTICE AND PROCEDURE § 1833 (3d ed. 2014). Although the Ninth Circuit has stopped short of holding that objectors must have standing to sue (leaving the question for another day), it, too, has cautioned that objectors cannot have interests that are "hostile" to those of other shareholders. *Zarowitz* v. *BankAmerica Corp.*, 866 F.2d 1164, 1166 (9th Cir. 1989).

Here, there can be no doubt that Hussain's interests are "antagonistic" and "hostile" to those of HP and its shareholders. HP is about to sue him. After having been extensively briefed on the results of a review by HP's independent Demand Review Committee, the plaintiffs have agreed to help HP in that litigation. The plaintiffs' able attorneys are going to be paid (largely on a contingent basis) for their work. HP has reported Hussain's fraud to criminal and regulatory authorities in the United States and the United Kingdom, and is cooperating with those authorities. There can be no clearer case of antagonism. *Cf.* Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus, and Adam N. Steinman, FEDERAL PRACTICE AND PROCEDURE § 1768 (3d ed. 2014) (securities holder cannot act as representative in class action when also a putative defendant).

No doubt recognizing the infirmity of his position, Hussain says he is entitled to object to the settlement on the basis that he is effectively a non-settling defendant. Hussain Br. 5. But he ignores the general rule that "non-settling defendants … [a]re *not* entitled to object to the merits of [a] proposed settlement." *In re Beef Indus. Antitrust Litig.*, 607 F. 2d 167, 172 (5th Cir. 1979) (emphasis added); *In re Fine Paper Litig. State of Wash.*, 632 F.2d 1081, 1087 (3d Cir. 1980) (non-settling defendant who is also putative member of class cannot object to class-action settlement in view of "the general rule that a nonsettling party may not object to the terms of a settlement which

[1] *Darrow* v. *Southdown, Inc.*, 574 F.2d 1333, 1335 (5th Cir. 1978); *In re Pittsburgh & Lake Erie R.R. Co. Sec. & Antitrust Litig.*, 543 F.2d 1058, 1067 (3d Cir. 1976); Deborah A. DeMott, Shareholder Derivative Actions § 7:2 (2013-2014 ed.); *see also* Fed. R. Civ. P. 23.1 (plaintiff must "fairly and adequately" represent the interests of the other shareholders).

do not affect its own rights").[2] Non-settling defendants are allowed to object only if — and only to the limited extent that — a settlement results in formal legal prejudice to them in their individual capacity (more on the lack of any cognizable prejudice below).

The Ninth Circuit case of *Waller* v. *Financial Corporation of America*, which Hussain cites, is both instructive and controlling. 828 F.2d 579 (9th Cir. 1987). The plaintiffs there had brought a class action against a corporation and its accountants under the securities laws. The plaintiffs and the corporation settled their claims. As part of the settlement, the corporation agreed to cooperate with the plaintiffs in litigation against the accountants and to share in any recovery. *Id.* at 583-84. Reiterating the general rule barring nonsettling-party objections, the Ninth Circuit held that the accountants could *not* object to the settlement, even though the corporation's cooperation with plaintiffs put the accountants at "something of a tactical disadvantage." *Id.* at 584. *Waller* forecloses Hussain's challenge to the merits of the settlement.[3]

II. THE SETTLEMENT DOES NOT RESULT IN "FORMAL LEGAL PREJUDICE."

Hussain fares no better in his effort to invoke the exception permitting non-settling defendants to object to a settlement to the extent of any "formal legal prejudice." *Waller*, 828 F.2d at 583. This is a narrow exception that applies only in "those rare circumstances when, for example, [a] settlement agreement *formally* strips a non-settling party of a legal claim or cause of action, such as a cross-claim for contribution or indemnification," and in those cases the non-settling party is permitted to object only to that limited extent.[4] It is an exception that Hussain cannot use.

---

[2] *See also, e.g.*, *Jamie S.* v. *Milwaukee Pub. Schools*, 668 F.3d 481, 501 (7th Cir. 2012); Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus, and Adam N. Steinman, FEDERAL PRACTICE AND PROCEDURE § 1797.4 (3d ed. 2014) ("the court typically will not consider objections [to class-action settlements] by non-settling defendants as they have no standing to object to a settlement to which they are not parties.").

[3] The *Waller* court held that intervention was proper but that the accountants had no standing to object. Here, because any objection must fail, there is no reason to grant intervention.

[4] *Bhatia* v. *Piedrahita*, 2014 WL 2883924, at *3 (2d Cir. June 26, 2014) (emphasis in original); *Waller*, 828 F.2d at 583; *Beef*, 607 F.2d at 172-73 (citing 3 Newberg on Class Actions § 5660b at 564-65 (1977)); *Eichenholtz* v. *Brennan*, 52 F.3d 478, 488 (3d Cir. 1995); 4 Newberg on Class Actions § 11:55 (4th ed. 2014) ("nonsettling defendants in a multiple defendant litigation context have no standing to object to the fairness or adequacy of the settlement by other defendants, but they may object to any terms that preclude them from seeking indemnification from the settling defendants"); *see also Smith* v. *Arthur Andersen LLP*, 421 F.3d 989 (9th Cir. 2005) (non-settling defendant

Hussain's objection to the release starts with an incorrect premise. He says that "the shareholder release provisions of the Proposed Settlement … release *all* potential claims that any HP shareholder [including Hussain] could bring against any of the released defendants." Hussain Br. 5 (emphasis added). But the definition of released claims makes crystal clear that it covers only shareholder claims "*asserted on behalf of the Company*." Settlement Agreement § I.A.61 (Docket No. 149-2, at 14) (emphasis added). And it carves out "direct [c]laims." *Id.* § I.A.61 (Docket No. 149-2, at 21). Hussain states no intention to press derivative claims on HP's behalf (nor could he), and the release does not affect any claim he may have in his own right.

Hussain's challenge to the bar order is just as baseless. Hussain asserts that the bar order is "less than clear" but "would appear" to have the same effect of foreclosing "any counterclaims or other claims" that he may have against HP, its officers, or its directors. Hussain Br. 4. But the bar order, which Hussain quotes, applies *only if* Hussain advances claims "where [his] alleged injury … is [his] alleged liability to the Company or Autonomy." Proposed Order Approving Settlement and Judgment, ¶13(a) (Docket No. 149-2, at 111). In other words, it applies only to the extent that Hussain seeks to hold others responsible for the losses that he caused to HP.

And, more importantly, although Hussain apparently would like the Court to believe that the bar order stops there, it doesn't. The bar order contains a corresponding benefit, one that he should embrace. It provides him the full value of any contribution claims he might have, without his having to bring them: the bar order reduces Hussain's liability with a judgment credit that "corresponds to the percentage of responsibility of the applicable Releasee(s) for the loss to the Company or Autonomy." Proposed Order Approving Settlement and Judgment, ¶13(a) (Docket No. 149-2, at 111-12). "This constitutes very significant compensation to [Hussein], in light of the perception by the underlying plaintiffs and [HP] that [Hussain] was a central figure in the violations." *In re HealthSouth Corp. Sec. Litig.*, 572 F. 3d 854, 866 (11th Cir. 2009). Bar orders of this sort are standard fare in "partial settlements," where plaintiffs settle with some defendants but not others, and

---

who faces "formal legal prejudice" cannot object to fairness of partial settlement but can object to subject-matter jurisdiction of court to impose prejudice).

they have been upheld time and again. *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989); *HealthSouth*, 572 F. 3d 854; *Gerber* v. *MTC Elec. Techs. Co.*, 329 F.3d 297 (2d Cir. 2003) (Sotomayor, J.). In a telling omission, Hussain makes no attempt to show that the judgment credit is insufficient, which by itself dooms any challenge to the bar order.[5]

What of Hussain's assertion that the bar order "appear[s]" to block claims against the company itself (rather than its officers and directors) for indemnity? Hussain could not possibly ever have any such a claim — he was *never* a director, officer, or employee of HP. But even if he had been employed by HP and could have such a claim, the claims could nonetheless properly be the subject of a bar order. *See HealthSouth*, 572 F. 3d 854 (upholding bar order that abridged officer's indemnification and advancement claims against company, subject to judgment credit). None of this matters, however, because HP has never intended to block claims that Hussain could never properly assert. To avoid any ambiguity on this point, the settling parties have agreed to make it clear that Hussain can bring whatever claim he wants against HP, whether for indemnification or otherwise.[6]

In short, the settlement does not impede or interfere with Hussain's interests by formally abridging his rights. HP is going to sue Hussain, and Hussain will be completely free to interpose any defense and to assert any counterclaims against HP or Autonomy. What he may not do, however, is appear in this Court and object to a settlement that puts him squarely in the company's cross-hairs.

---

[5] In addition, the bar is "subject to a hearing to be held by the Court, if necessary." Proposed Order Approving Settlement and Judgment, ¶13(a) (Docket No. 149-2, at 111).

[6] The settling parties have agreed to modify the proposed Approval Order and the proposed Final Judgment to add the following savings clause (*see* Declaration of Marc Wolinsky submitted contemporaneously herewith):

"Notwithstanding the permanent injunction or complete bar … [t]he following Claims shall not be barred or enjoined:"

"(6) by Legacy Autonomy Officials, Autonomy Pre-Acquisition Advisors, or Autonomy Business Partners against the Company or Autonomy."

III. HUSSAIN IS NOT ENTITLED TO DISCOVERY.

Since Hussain has no basis to object to the settlement, he has no basis for his discovery requests. He makes little effort to mask the obvious purpose for seeking discovery — his concern that HP is likely to sue him in England, where he lived when he worked at Autonomy, but where discovery is limited, and his desire to get a perceived edge that the English civil procedure denies him. Even if Hussain's motive for seeking discovery in this action were appropriate (and it clearly is not), his intervention could not plausibly justify the broad discovery he seeks. As noted, even if Hussain had a right to object at all, which he does not, he could challenge only the terms that affect his formal legal rights. *E.g.*, *Beef*, 607 F.2d at 172-73 (citing 3 Newberg on Class Actions § 5660b at 564-65 (1977)). All he needs to see is the settlement agreement, which he already has.

CONCLUSION

Hussain's interests are antagonistic to HP's. His motion to intervene should be denied, as should his brazen and improper attempt to obtain discovery.

Dated: August 4, 2014

WACHTELL, LIPTON, ROSEN & KATZ

By: _____

Marc Wolinsky
George T. Conway III
Vincent G. Levy
51 West 52nd Street
New York, NY 10019
Telephone: (212) 403-1000
Facsimile: (212) 403-2000

FARELLA BRAUN & MARTEL, LLP
Neil A. Goteiner
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

Attorneys for Defendant Hewlett-Packard Company