UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BRIAN H. ROBB, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FITBIT INC., JAMES PARK, WILLIAM R. ZERELLA, ERIC N. FRIEDMAN, JONATHAN D. CALLAGHAN, STEVEN MURRAY CHRISTOPHER PAISLEY, MORGAN STANLEY & CO. LLC, DEUTSCHE BANK SECURITIES INC., and MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,

Defendants.

No. 3:16-cv-00151-SI
CLASS ACTION
Hon. Susan Illston

OBJECTION OF JEFF M. BROWN PRO SE TO THE PROPOSED SETTLEMENT AND NOTICE OF INTENT NOT TO APPEAR

NOW COMES, Pro Se Objector, Jeff M. Brown on behalf of Jeff M. Brown and Nancy L. Brown, Joint Tenants, (collectively the "Objector") and hereby files this Objection to the Proposed Settlement and Notice of Intent Not to Appear (the "Objection") in response to the to the proposed settlement as described in that

certain Order Granting Preliminary Approval filed January 19, 2018 and docketed as Document # 207 in this matter (the "Proposed Settlement"). In support of the Objection the Objector states as follows:

Upon information and belief Objector believes he is a member of the class

I. NOTICE OF INTENT TO NOT APPEAR

Objector hereby gives notice that he does NOT intend to appear at the Settlement Hearing to be held at 10:00 a.m. on April 20, 2018 at the United States District Court for the Northern District of California in Courtroom 1, 17th Floor, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102.

II. OBJECTOR IS A CLASS MEMBER

After reviewing that certain Legal Notice of Class Action Settlement dated February 8, 2018 (the "Notice"), Objector states that he is a class member, as defined in the Notice, with standing to object to the Court's Order for Preliminary Approval of the Settlement and proposed motion for final approval and for approval of attorney fees by virtue of his purchase of Fit Bit Common Stock. Objector will submit a timely claim to the Settlement Administrator via First Class U.S. Mail. Objector's address and telephone number are listed at the conclusion of this Objection.

III. PROCEDURAL TIMELINE

The initial complaint in this action was filed on January 11, 2016. On March 11, 2016, multiple movants filed motions seeking appointment by the Court to serve as lead plaintiffs under the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4.

On May 10, 2016, the Court entered an Order appointing the Fitbit Investor Group, composed of individuals to serve as Lead Plaintiff and appointing Glancy Prongay & Murray LLP and Pomerantz LLP, to serve as Lead Counsel.

The operative Amended Complaint was filed on July 1, 2016. Defendants moved to dismiss the Amended Complaint. The Court denied the motions to dismiss in October 2016. The Fitbit Defendants subsequently filed a motion for reconsideration which the Court denied on January 19, 2017.

On March 3, 2017, Plaintiffs filed their motion for class certification, which Defendants did not oppose. On April 26, 2017, the Fitbit Defendants moved for summary judgment. Before the Court could rule on the motion, the parties agreed to pursue mediation. Settlement negotiations included two mediation before Hon. Daniel Weinstein and Jed Melnick, Esq. of JAMS.

Plaintiffs and Defendants agreed to a proposed settlement whereby Defendants agreed to create a settlement fund of thirty-three million dollar ($33,000,000) (the "Settlement Fund"). Class Counsel intends to ask the Court for up to $9.24 million dollars in attorneys' fees (28% of the Settlement Fund) and up to $250,000 dollars in reimbursement for expenses. If approved by the Court, these amounts (totaling approximately $0.07 per share) will be paid from the Settlement Fund. The estimated average recovery, after deducting attorneys' fees and expenses, administrative costs and class representative awards is $0.17 per share.

On January 28, 2018 the Court gave preliminary approval to the proposed settlement.

IV. REASONS FOR OBJECTING TO THE PROPOSED SETTLEMENT

For the following reasons, inter alia, the Settlement Agreement is not fair, reasonable nor adequate:

A. Class Counsel and Class Administrator Have Not Complied with Their Duty to Provide Adequate Notice to Class Members.

Objector asserts that Class Counsel and Settlement Administrator have failed to provide Class Member with sufficient notice of the proposed final settlement terms by failing to post the required motion for final approval and

for an award of attorney fees (the "Motion") on the settlement website (the settlement website can be found at http://www.fitbitsecuritieslitigation.com) (the "Website").

The Preliminary Approval Order (the "Order") states:

> "24. Class Counsel shall file all papers, including memoranda or briefs in support of the Settlement, the Plan of Allocation, an award of attorneys' fees and reimbursement of expenses, and Plaintiffs' award of reasonable costs and expenses **no later than March 17, 2018.** Reply papers, if any, shall be filed no later than April 13, 2018.
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> 25. The Court reserves the right to adjourn or continue the Settlement Hearing, including the consideration of the motion for attorneys' fees and expenses, without further notice of any kind. The Court may approve the Settlement with modifications as may be agreed to by the Settling Parties, without further notice to the Settlement Class."

As of April 2, 2018 the motion has not been posted to the Website. Objector anticipates it would take Class Counsel and/or the Settlement Administrator a matter of minutes to post the Motion Website. By posting the Motion on the Website, Class Counsel/Settlement Administrator would have fulfilled each party's duty to provide reasonable notice to the Class Members. Neither Class Counsel nor the Settlement Administrator took the time to post the Motion to the Website. This omission leaves only the federal government paid site as the sole option for a Class Member to have received some degree of notice of the proceedings (assuming the Motion and supporting documents were, in fact, timely filed via PACER).

Accordingly, Objector requests the Court cancel the Fairness Hearing and require Class Counsel to post the Motion on the Website. Objector furthers requests the Court reschedule the Fairness Hearing to a time that gives Class Members sufficient time to comment on the proposed final settlement and attorney fee request. In an effort to limit the number of times the Objector has to petition the Court, Objector asserts that Class Counsel's motion be accompanied by copies of specific time entries (and not just a billing summary). Then, and only then, will Class Members be able to comment intelligently to the Motion.

B. Quick Pay Provision In The Settlement Agreement Creates a Conflict of Interest for Class Counsel.

The Settlement Agreement also contains what is known as a "quick-pay provision" which "allows class counsel to be paid in short order, even if an appeal is taken." In re LivingSocial Mktg. & Sales Practice Litig., 298 F.R.D. 1, 22 n.25 (D.D.C. 2013); see also Settlement Agreement ("Lead Counsel's attorneys' fees and expenses, as awarded by the Court, shall be paid within ten (10) days of the award by the Court ("Fee and Expense Award"), notwithstanding any appeals that may be taken, subject to the obligation of all counsel who receive any award of attorneys' fees and costs to make full refunds or repayments to the Escrow Account plus interest earned thereon if the award is lowered or the Settlement is disapproved by a final order not subject to further review. The Settlement is not

conditioned upon any award of attorneys' fees and costs, and any objection to or appeal from such an award shall not affect the finality of the Settlement or the judgment of dismissal.") Settlement Agreement at page 27.

The brief in support of the preliminary approval does not mention the quick pay provision. The Settlement Agreement merely states how the payment is to be made, without pointing out, that it is a quick pay provision. Because the Motion is not posted Objector is left to guess whether the quick pay provision is discussed at all. With all these omissions in mind, Objector will attempt to argue against the quick pay provision in a vacuum.

In a class action case, at the time the plaintiff and defendant come to terms regarding a settlement, the class counsel's interest in being paid its large attorney fee and its fiduciary duty to act in the best interest of the class members come into inherent conflict. By this time in the case, the counsel for the class has often litigated the case, without being paid and further, payment, if any, remains somewhat contingent (however seasoned class counsel has a fairly good handle on the case's chance for settlement and counsel's risk-or lack thereof- of being paid). The facts are ripe for class counsel to "sell out" the class by cutting the best deal it can for the class ***while still making the pay day for the attorneys sufficient***. Of course, now enter an objector, who by this time, is the proverbial skunk at the garden party.

In most cases, courts have done the best they can to look out for the class member's interest, given this less than ideal fact scenario. The degree of the conflict has a corresponding relationship to the amount of the fee request. The greater the amount of the fee request the greater the degree of the conflict.

Objector contends that here the attorney fees being requested, $9.240 million dollars exceeds the Ninth Circuit benchmark and Objector has been provided no evidence to cross check the 29% contingent fee. Accordingly, the fee, on its face, appears to be excessive (see Argument section below). Given this as a starting point, any additional factor(s) that sweetens the "deal" for Class Counsel, should be avoided. A quick pay provision would clearly be one of these "additional factor(s)".

Professor Fitzgerald, who is usually cited for supporting class counsel's fee awards, is weary of quick pay provisions. He writes:

> "[I]nsofar as quick-pay provisions are valuable to class counsel, one might expect that the defendants who must agree to the provisions would be able to extract something in return—perhaps a smaller total settlement amount. If this is the case, then class members might be harmed by the provisions to some extent. Moreover, quick-pay provisions are not without risks to class members even if class counsel do not trade away some portion of their recoveries: if class counsel are, for some reason, unable to repay the attorneys' fees they have received early, class members may be left without any way to recover them. For these reasons, it cannot be said with certainty that quick-pay provisions are a net benefit to class members."
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> Brian Fitzpatrick, *The End of Objector Blackmail*?, 62 VAND. L. REV. 1623, 1647 (2009).

Although Professor Fitzgerald, sees value in quick pay provisions in combating "objector "blackmail, ultimately, he concludes that the limitations of quick-pay provisions "render them a suboptimal solution." *Id.* at 1666.

In addition Theodore Frank, a frequent objector, chimes in regarding quick pay provisions:

> "[t]o insure against professional objectors' potential use of leverage to extract a settlement, class counsel guaranteed themselves payment before their clients would ever see any compensation. Such speculative concerns of class counsel are dwarfed by its betrayal of the interests of the entire class. This Court should take the opportunity to reject this abuse of the class action system and declare quick-pay provisions unreasonable as a matter of law and as a matter of ethics."
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> Appellate Brief filed by counsel, Theodore Frank, in Bachman v. A.G Edwards Appeal from the Circuit Court of City of St. Louis Twenty-Second Judicial Circuit Appeal No. ED95074 (consolidated with Nos. ED95078 & ED95111)

Some insight into what the U.S. Congress might think of quick pay provisions was provided this past year in the House of Representatives. On March 9, 2017, the House approved the Fairness in Class Action Litigation Act of 2017 (H.R. 985) (the "Bill") that, if signed into law, would significantly modify class action practice. The Bill would impose new restrictions on class actions

The Bill was sponsored by Congressman Bob Goodlatte (R-VA), Chairman of the House Judiciary Committee, who previously sponsored similar legislation in 2015 that cleared the House but failed to advance in the Senate. With Republicans retaining control of the Senate and having recently captured the White House, the potential for class action legislation becoming law has increased. Key provisions of the Bill included a direct response to the use of quick pay provisions. The Bill reads:

> " Attorneys' Fees (§ 1718(b)): The Bill limits attorneys' fees to a "reasonable percentage" of any payments to class members and, notably, states that no attorneys' fees may be determined or paid for any reason until "the distribution of any monetary recovery to class members has been completed." This provision would likely eliminate "quick pay provisions" in class action settlement agreements, which enable class counsel to receive attorneys' fees prior to final approval."

Given the obvious overreach of Class Counsel, in requesting they are to be paid before any other party receives any monetary amount, the quick pay provision should be denied.

C. The Requested Attorney Fees are Excessive.

Plaintiff Class Counsel requests that the Court award a total of $9.240 million dollars in attorney fees and $250,000 in costs. The Settlement Fund is $33 million dollars. Class Counsel is seeking a fee award under the familiar "common fund"

doctrine. The Ninth Circuit benchmark amount for appropriate common fund fee awards in class action cases like this is 25% of the fund obtained for the class. See, e.g., *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). A 25% common fund fee award in this case would be reasonable under the relevant legal standards. *Id.* at 1050. Because the amount of Attorney Fees requested is three percent more than the benchmark, the request is, on its face, excessive.

At this point in this case, Class Counsel might attempt to justify its request by asking the court to double check its request against Class Counsel's "lodestar" fee Although not required to do so, the district court can (and Objector asserts ***should***) take an extra step, cross-checking this result by using the lodestar method. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). (checking the district court's percentage-of-recovery fees calculation against the lodestar method, which is "calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation . . . by a reasonable hourly rate for the region and the experience of the lawyer"). *Id* at 941–44. A lodestar cross-check could confirm that the percentage requested is reasonable. See *Vizcaino*, 290 F.3d at 1050 ("while the primary basis of the fee award remains the percentage method, the lodestar may provide a perspective on the reasonableness of a given percentage award").

Here, however the Objector has no motion nor supporting documentation to even consider a lodestar cross check. Objector argues that no fee request can be is reasonable in the absence of documentation, including detailed billing records (including hourly rates of the professionals, hours accumulated and reasonable cost incurred), which can be evaluated by Class Members and the Court to determine the reasonable nature (or not) of the request. Accordingly, the Court should deny the fee request by denying approval of the entire settlement.

C. Adoption of Other Objections.

The Objector hereby adopts and joins in all other objections which are based on sufficient precedent and theories of equity and law in this case and hereby incorporates said objections by reference as if they were fully described herein.

CONCLUSION

WHEREFORE, This Objector, for the foregoing reasons, respectfully requests that the Court, upon proper hearing:

1. Sustain these Objections;

2. Enter such Orders as are necessary and just to adjudicate these Objections and to alleviate the inherent unfairness, inadequacies and unreasonableness of the proposed settlement; and

3. Award an incentive fee to this Objector for his role in improving the Settlement, if applicable.

Date: April 2, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2018, I caused to be filed the foregoing with the Clerk of the Court of the United States District Court for Northern District of California by sending this document via Overnight delivery so that this document would be delivered within the timeframe described in the Notice published in this case. In addition, when the Clerk files this document in the docket for this case all parties in this case who use the CM/ECF filing system will be noticed. In addition, the undersigned has sent a copy via email to the counsel as listed in the Notice.

Camille Martin