

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE ANTHEM, INC. DATA BREACH
LITIGATION

Case No. 15-MD-02617-LHK

**ORDER GRANTING MOTION TO
APPOINT SPECIAL MASTER**

Re: Dkt. No. 929

On December 1, 2017, Plaintiffs filed a Motion for Attorneys’ Fees, seeking an award of \$37.95 million from the \$115 million settlement fund. ECF No. 916-6 at 1. On January 4, 2018, Objector Adam Schulman filed a Motion to Appoint Special Master. ECF No. 929. The Court held a hearing on February 1, 2018. Having considered the parties’ submissions, the relevant law, the record in this case, and the arguments advanced at the hearing, the Court hereby GRANTS the motion to appoint a special master.

On July 6, 2015, the Court appointed Eve Cervantez of Altshuler Berzon LLP and Andrew Friedman of Cohen Milstein Sellers & Toll PLLC as temporary lead counsel to organize Plaintiffs for the preliminary case management conference. ECF No. 16 at 2. The Court also set a September 10, 2015 hearing to appoint lead Plaintiffs’ counsel. *Id.* at 3. The Court requested that

1 applicants “set forth attorney fee proposals, rates, and percentages that applicants expect to seek if
2 the litigation succeeds in creating a common fund.” *Id.*

3 In the meantime, on July 16, 2015, the Court issued an Order Re Plaintiffs’ Counsel’s
4 Billing Records and Briefs in Opposition to Motions for Appointment as Lead Plaintiffs’ Counsel.
5 ECF No. 46. The Court ordered “Plaintiffs’ counsel and their staff, consultants, and experts to
6 maintain contemporaneous billing records of all time spent litigating this case.” *Id.* at 1. The
7 Court defined “contemporaneous” as “an individual’s time spent on a particular activity . . .
8 recorded no later than seven days after that activity occurred.” *Id.* Moreover, the Court
9 highlighted efficient billing in explaining that, “[w]hen appointing lead Plaintiffs’ counsel, the
10 Court [would] designate one lead counsel to review all billing records each month to ensure
11 compliance with [the] Order and to strike any duplicative or inefficient billing.” *Id.*

12 On August 20, 2015, the Court received eighteen separate motions to serve as lead
13 Plaintiffs’ counsel. ECF No. 284 at 1–2. The motion from Ms. Cervantez and Mr. Friedman
14 sought appointment as lead Plaintiffs’ counsel and proposed a Plaintiffs’ steering committee
15 composed of six other law firms. ECF No. 190 at 1. Their motion represented that Ms. Cervantez
16 and Mr. Friedman “are cognizant of the issues that can arise with multiple firms involved in
17 litigation and have developed a system to guard against inefficiency and duplication by assigning
18 work carefully and monitoring that work and all firms’ billing.” *Id.* at 4. The Court received only
19 one opposition brief, which was filed by Robbins Geller Rudman & Dowd LLP on August 27,
20 2015. ECF No. 284 at 2. That opposition brief “strongly” opposed Ms. Cervantez and Mr.
21 Friedman’s “suggestion of an eight-firm leadership structure.” ECF No. 217 at 1. In particular,
22 the brief explained that “an eight-firm structure is not small, not efficient, and not necessary.” *Id.*

23 The Court held a hearing on September 10, 2015. With regard to Ms. Cervantez and Mr.
24 Friedman’s proposal of an eight-firm structure, the Court said:

25 Mr. Friedman and Ms. Cervantez, I was very disappointed to see that you need
26 eight law firms to litigate this case. I think that’s very inefficient and it makes me
27 wonder whether your two firms don’t have the resources or the expertise in data
28 breach and privacy cases to be lead Plaintiffs’ counsel here, that you feel like you

1 need the support of six additional law firms. To me, it doesn't instill confidence
2 in your motion.

3 ECF No. 294 at 57–58; *see also id.* at 120 (“You know that I’m not happy with your Steering
4 Committee and your structure.”). Mr. Friedman reassured the Court:

5 Your Honor, again, what we’re talking about is not having a group of eight
6 litigate the case. There are two people litigating this case, and only on an as-
7 needed basis do we reach out to those people.

8 So there’s no guarantee of work. There is no guarantee that eight people are ever
9 going to work on this case. There is a—there is only a guarantee from Ms.
10 Cervantez and I that we will—we will litigate the case efficiently, and we will do
11 so with your Honor’s admonitions about overbilling.

12 But at any given time, there could be—there could be three people working the
13 case. There is not going to be a scrum, if you will, on a weekly basis. That’s not
14 our intention and that was not what we intended to put forward in the papers.

15 *Id.* at 62.

16 After the hearing, on September 11, 2015, the Court rejected the eight-firm structure and
17 appointed Ms. Cervantez and Mr. Friedman as Co-Lead Plaintiffs’ Counsel and Eric Gibbs of
18 Girard Gibbs LLP and Michael Sobol of Lieff Cabraser Heimann & Bernstein, LLP as Plaintiffs’
19 Steering Committee members. ECF No. 284 at 2–3. The Court noted that Ms. Cervantez and Mr.
20 Friedman could “take advantage of the wealth of knowledge and expertise demonstrated by the
21 other applicants” and, “as needed,” could “consult with the other applicants regarding devising
22 damages theories, retaining data security experts, litigating against the defendants in this case, and
23 identifying and communicating with potential plaintiffs.” *Id.* at 3. Nevertheless, the Court
24 emphasized that “two Co-Lead Plaintiffs’ Counsel supported by a two-member Plaintiffs’ Steering
25 Committee will best serve the interests of the putative class in this MDL.” *Id.* The Court’s
26 decision to appoint Ms. Cervantez and Mr. Friedman was based in part on their demonstrated
27 “commitment to maintain scrupulous, contemporaneous billing records of all time spent litigating
28 this case, in compliance with this Court’s July 16, 2015 order.” *Id.* at 2 (citation omitted).

On September 14, 2015, the Court clarified its Order Appointing Lead Plaintiffs’ Counsel.
The Court stated that “Co-Lead Plaintiffs’ Counsel may assign discrete tasks to counsel for other

1 plaintiffs in this MDL for resource-intensive tasks such as identifying plaintiffs for the
2 Consolidated Amended Complaint and reviewing discovery.” ECF No. 286 at 1. However, the
3 Court was explicit that “[t]his augmentation of resources should be on an as needed basis and
4 consistent with efficiency.” *Id.*

5 Presently before the Court is Plaintiffs’ attorneys’ fees request. As reflected in Plaintiffs’
6 January 31, 2018 billing chart, their request includes 331 billers from 53 law firms and 78,892.5
7 hours of legal work. ECF No. 960-5.¹ That list includes the 4 law firms that Ms. Cervantez and
8 Mr. Friedman proposed, and that the Court specifically declined to include, as part of the Steering
9 Committee. Specifically, those 4 law firms have billed \$3,624,911.50 in total. *See id.* (showing
10 \$653,171.50 billed by Barrack, Rodos & Bacine; \$977,342.00 billed by Branstetter, Stranch &
11 Jennings, PLLC; \$1,040,895.00 billed by Cohen & Malad; and \$953,503.00 billed by Stueve,
12 Siegel Hanson LLP). Plaintiffs had 107 partners and 94 associates work on this case. Also, a
13 large number of contract attorneys, staff attorneys, and a contract paralegal worked on the case;
14 the markup charged for their work was as high as \$447 an hour. Plaintiffs calculate a lodestar of
15 over \$38 million in attorneys’ fees. *Id.* at 9. They request that the Court award \$37.95 million in
16 attorneys’ fees, a figure which represents 33% of the \$115 million settlement fund. ECF No. 916-
17 6 at 1.

18 In order to evaluate the reasonableness of a request for attorneys’ fees, the Court must be
19 able to determine “the hours reasonably expended.” *Young v. Polo Retail, LLC*, No. 02-CV-
20 04546-VRW, 2007 WL 951821, at *6 (N.D. Cal. Mar. 28, 2007). However, Plaintiffs’ motion
21 showed “the tasks performed by each law firm, but not the tasks performed by each biller at each
22 law firm.” ECF No. 955 at 1. Accordingly, the Court requested supplemental information from
23 Plaintiffs both before the February 1, 2018 hearing, *see* ECF Nos. 945, 955, and at the February 1,
24 2018 hearing. The Court “requires detailed submissions that provide sufficient information from
25

26 ¹ To the extent that the numerical figures in this Order differ slightly from the figures mentioned at
27 the hearing, the figures in this Order are based on the most recent information received from
28 Plaintiffs as well as representations made by Plaintiffs at the February 1, 2018 hearing.

1 which the Court can determine whether there has been any duplication in attorney effort or
 2 whether the amounts expended were reasonable.” *In re Johnson & Johnson Derivative Litig.*, 900
 3 F. Supp. 2d 467, 499 (D.N.J. 2012).

4 Moreover, based on Co-Lead Plaintiffs’ Counsel’s assignment of tasks across 53 law firms
 5 and 331 billers, the Court has concerns that billing items may be duplicative or inefficient. The
 6 operative Fourth Consolidated Amended Class Action Complaint is 291 pages, ECF No. 714, and
 7 there have been two rounds of motions to dismiss, resulting in an 82-page order and a 90-page
 8 order, ECF Nos. 468, 524. Additionally, the parties have litigated 14 discovery motions before
 9 this Court and another discovery motion in the District of Columbia. ECF No. 916-8 ¶ 37. To be
 10 sure, this case required a significant amount of work. Nevertheless, employing 53 law firms likely
 11 resulted in unnecessarily duplicative or inefficient work by virtue of the fact that so many billers
 12 needed to familiarize themselves with the case and keep abreast of case developments.

13 A special master’s review of the extensive billing in this case is also necessary because if
 14 the Court were to award the full \$37.95 million in attorneys’ fees, \$2.14 million in attorneys’
 15 costs, \$597,500 as incentive awards to the named Plaintiffs, and \$23 million in administrative
 16 costs, only approximately 45% of the \$115 settlement fund would remain to benefit the class.

17 The administrative costs in this case were high because the settlement administrator sent
 18 notice by mail to 54.9 million class members and by email to 5.15 million class members. ECF
 19 No. 916-32 ¶¶ 10, 13. To reach the remaining class members with no known mailing or email
 20 addresses, the settlement administrator published notice in *People* and *Good Housekeeping* and
 21 also purchased more than 180 million advertising impressions across Twitter, LinkedIn,
 22 Instagram, Google Display Network, and Facebook. *Id.* ¶¶ 14–15. Unfortunately, despite these
 23 extensive notice efforts, only 1.33 million class members out of the approximately 79.15 million
 24 class members, or 1.68% of the total class, have submitted claims. ECF No. 958 ¶ 4. In light of
 25 these circumstances and the Court’s duty to protect the interests of the absent class members, a
 26 special master’s close scrutiny of Plaintiffs’ attorneys’ fees request is warranted.

27 The foregoing discussion is not meant to suggest that Plaintiffs have not obtained a good

1 result for the class. The \$115 million settlement amount is the largest settlement reached in a data
2 breach class action in the United States. Every class member receives fraud resolution services.
3 ECF No. 869-8 ¶ 4.9. \$15 million is set aside to reimburse up to \$10,000 for each class member
4 who incurred out-of-pocket expenses as a result of the data breach. *Id.* ¶ 6.4. Additionally, the
5 settlement agreement allows class members to submit claims for either credit monitoring or
6 alternative cash payments. The credit monitoring lasts for at least two years (and up to four years)
7 beyond the two years that Anthem has already provided. *Id.* ¶¶ 4.7–4.8. For class members who
8 already have credit monitoring, the alternative cash payments can reach \$50 per class member. *Id.*
9 ¶ 5.3.

10 In addition to monetary relief, the settlement agreement requires Anthem to triple its
11 annual spending on data security and to implement cybersecurity controls and reforms
12 recommended by Plaintiffs’ cybersecurity experts. *Id.* ¶ 2. For example, Anthem must change its
13 data retention policies, follow specific remediation schedules, and do annual IT security risk
14 assessments and settlement compliance review. *Id.*

15 However, despite the important relief that the settlement agreement secures for the class,
16 the above-identified concerns counsel in favor of appointing a special master to review the billing
17 records and analyze Plaintiffs’ attorneys’ fees request. Accordingly, pursuant to the Court’s
18 authority under Federal Rule of Civil Procedure 23(h)(4), the Court will refer the “issues related to
19 the amount of the award to a special master.”

20 Courts within this district and outside this district have often appointed special masters in
21 similar circumstances. *See, e.g., In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917,
22 2016 WL 4126533, at *1 (N.D. Cal. Aug. 3, 2016) (approving in part motion for class action
23 attorneys’ fees based on report and recommendation of special master); *In re TFT-LCD (Flat*
24 *Panel) Antitrust Litig.*, No. 10-CV-04572-SI, 2014 WL 12635766, at *1 (N.D. Cal. Feb. 3, 2014)
25 (issuing report and recommendation to district court on motion for attorneys’ fees in MDL); *In re*
26 *Johnson & Johnson*, 900 F. Supp. 2d at 498 (appointing special master where counsels’ fee
27 declarations did not contain enough detail and supplemental filings were also deficient); *Acosta v.*

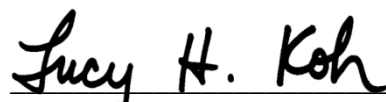
1 *Master Maint.*, 192 F. Supp. 2d 577, 602 (M.D. La. 2001) (“It is customary for the Court to
 2 appoint a special master in mass tort cases or class actions to account for the money the Court has
 3 ordered to be set aside to pay for the common expenses incurred by the court-appointed
 4 committee.”), *aff’d*, 69 F. App’x 659 (5th Cir. 2003); *see also* 9C Arthur R. Miller, Federal
 5 Practice and Procedure § 2602 (3d ed. 2017) (“[F]ederal courts . . . may designate special masters
 6 to help determine the amount of or allocate attorneys’ fees, litigation expenses, and court costs in
 7 complex cases.”).

8 Indeed, the Ninth Circuit has affirmed district court fee awards made after referral to a
 9 special master and has itself referred appellate attorneys’ fees disputes to a special master. *See*
 10 *Carlsen v. Glob. Client Sols., LLC*, 542 F. App’x 594, 594–95 (9th Cir. 2013) (affirming fee
 11 award where district court adopted special master’s report and recommendation); *AANP v. Am.*
 12 *Ass’n of Naturopathic Physicians*, 37 F. App’x 894, 895 (9th Cir. 2002) (“The determination of an
 13 appropriate amount of fees on appeal . . . is referred to the court’s special master, Appellate
 14 Commissioner Peter L. Shaw . . .”).

15 The Court therefore GRANTS the motion to appoint a special master. At the hearing, the
 16 Court notified the parties of the Court’s intention to appoint a special master and suggested Hon.
 17 James Kleinberg (Ret.). Pursuant to Federal Rule of Civil Procedure 53, the Court offered the
 18 parties an opportunity to object to Judge Kleinberg and to suggest other candidates for the
 19 appointment. Plaintiffs volunteered to do so by February 2, 2018. On February 2, 2018, Plaintiffs
 20 filed a statement indicating that they have no objection to Judge Kleinberg, unless Judge
 21 Kleinberg reveals a ground for disqualification under 28 U.S.C. § 455. ECF No. 970 at 2.

22 **IT IS SO ORDERED.**

23
 24 Dated: February 2, 2018

25 

26 LUCY H. KOH
 27 United States District Judge