ROBERT J. STEIN, III (CA Bar No. 212495)
rstein@AlvaradoSmith.com
CLAIRE M. SCHMIDT (CA Bar No. 262946)
cschmidt@AlvaradoSmith.com
ALVARADOSMITH
A Professional Corporation
1 MacArthur Place, Suite 200
Santa Ana, California 92707
Tel: (714) 852-6800 Fax: (714) 852-6899

STEVEN P. BLONDER, *Pro Hac Vice.*
MUCH SHELIST, P.C.
sblonder@muchshelist.com
191 North Wacker Drive, Suite 1800
Chicago, Illinois 60606
312-521-2000

Attorneys for Plaintiffs CURT SCHLESINGER, PETER LO RE, JAMES ROTH, ADAM RUSSELL, MARYAM AGHCHAY and The Certified Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL CIVIL WEST

CURT SCHLESINGER, PETER LO RE, JAMES ROTH, ADAM RUSSELL, MARYAM AGHCHAY, on behalf of themselves and The Certified Class,

Plaintiffs,

v.

TICKETMASTER, a Delaware Corporation,

Defendants.

CASE NO.: BC 304565

Assigned to: Judge Kenneth R. Freeman

PLAINTIFFS' AND THE CLASS' MEMORANDUM IN OPPOSITION TO OBJECTORS' MOTIONS FOR AWARDS OF ATTORNEYS' FEES AND COSTS

[filed contemporaneously with Plaintiffs' and the Class' Consolidated Opposition to Objections to Class Action Settlement, Plaintiffs' and the Class' Opposition to Objection of Eric S. Fuller, Declaration of Robert J. Stein III]

DATE: January 13, 2015
TIME: 10:00 a.m.
PLACE: Dept. 310

TRIAL DATE: Vacated
ACTION FILED: October 21, 2003

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PRELIMINARY STATEMENT

Before the Court are motions from (1) Aaron Hagele, Brandon Holub, Michael Parks, and John Sullivan (the "Sullivan Objectors"), and (2) Cara Patton and Glenn Kassiotis (the "Patton Objectors") (collectively the "Objectors"). The Sullivan Objectors seek attorneys' fees, incentive awards, and costs. The Patton Objectors seek attorneys' fees and costs. All say their objections to the second settlement agreement resulted in improvements to the present Settlement Agreement, benefitting the class and entitling them to recovery under the common fund/substantial benefit doctrines.

But neither the Patton Objectors nor the Sullivan Objectors filed unique objections supporting their claim that they are exclusively responsible for substantial benefits to the class.[1] Even so, their motions should be denied because it is not possible to grant them fees in this case. Litigants may not recover attorneys' fees without an entitling statute or contract, or a common fund from which an award may be issued upon equitable principles. Here, the Objectors cite no statutory or contract right to recover their attorney's fees and costs because none exists. Nor is there a common fund from which such an award may be issued, even if it could be justified.

The Settlement Agreement is a private consensual contract. It requires Ticketmaster to pay attorneys' fees and costs directly to lead class counsel, the final award being subject to a cap and the Court's discretion. That is a material term of the Settlement Agreement. California law recognizes the validity of such agreements. The Objectors' motions should be denied.

ARGUMENT

In California, even "a prevailing litigant is not entitled to an award of attorney fees in the absence of statutory or contractual provisions." (*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* ("*Consumer Cause*") (2005) 127 Cal. App.4th 387, 396.) Two exceptions to this

[1] Plaintiffs dispute that the Objectors' work provided any benefit to the class.

rule are the common fund and the substantial benefit doctrines. (*Trope v. Katz* (1995) 11 Cal.4th 274, 279.)

Under the common fund doctrine, when "one who expends attorneys' fees in winning a suit" creates "a fund from which others derive benefits," those "passive beneficiaries" may be required to "bear a fair share of the litigation costs." (*Serrano v. Priest* ("*Serrano III*") (1977) 20 Cal.3d 25, 35.) Even if the objectors' efforts actually warranted a fee, the doctrine cannot be applied without a common fund or property. *Id.*

The substantial benefit doctrine "applies when no common fund has been created, but a concrete and significant benefit, although nonmonetary in nature, has nonetheless been conferred on an ascertainable class." (*Consumer Cause*, 127 Cal.App.4th at 397.) The "substantial benefit" must be to an ascertainable class who should, under equitable principles, contribute to the costs that created it. (*Woodland Hills Residents Ass'n, Inc. v. City Council* (1979) 23 Cal.3d 917, 943.)

Because the class receives the benefits, the class that must bear the fees of the lawyer who created the benefit. *Id.* But as Ticketmaster rightly observes in its Opposition to the Objectors' motions, there must also be a way to shift to fees "with some exactitude to those benefitting." (*Alyeska Pipeline Serv. Co. v. Wilderness Society* (1975) 421 U.S. 240, 264 n.39.) California courts have, for example, applied the doctrine in shareholder derivative cases, "when the action produces a substantial benefit for the corporation on whose behalf the action was prosecuted." (*Consumer Cause*, 127 Cal. App. at 397.) But when, as here, there is no common fund or property, courts cannot impose fees directly on the benefitting class members because the class did not receive a monetary recovery from which to issue fees. (*Fleury v. Richemont N. Am., Inc.* (N.D. Cal. Nov. 4, 2008) 2008 WL 4829868, at *3.)

I. The Objectors' motions should be denied because there is no common fund or property from which to award fees

The common fund doctrine requires a common fund or property of the class, against which an equitable right of payment can be enforced. (*Serrano III*, 20 Cal.3d at 35; (Richard M. Pearl, California Attorney Fee Awards ("Pearl, Fee Awards") (3d ed. Cal CEB 2013) §5.10 [common fund requires creation or preservation of a fund, any payment of fees under this doctrine must be "paid out of the fund or property itself" and "not by the opposing party"], *id* §§5.12-14 [fee award under common fund requires "recovery of an identifiable fund of money from which the fees may be paid" and the fund's "beneficiaries" (i.e., class members) "not the defendant, must pay the fees"].) Objectors here have not identified *any* fund. There is none. The common fund doctrine is thus inapplicable.

Under the terms of the Settlement Agreement, Ticketmaster will issue credits to class members which can be redeemed for discounts on future ticket purchases, with the contingent benefit of making free concert tickets available to class members if an insufficient amount of discount codes are redeemed. There is no common fund in this case.

The Patton Objectors claim there is "authority to order the fees to be paid by the defendant and by plaintiffs' counsel jointly," even without a common fund. (Patton Objectors' Mot. at 12.) Their discussion consists of one paragraph which does not mention *Common Cause*, the only California case to address the issue. In *Common Cause*, the court rejected an objector's motion for fees because there was no common fund and "no direct authority in California applying the substantial benefit doctrine to award attorney fees to an objector who successfully opposes settlement of a class action." (*Common Cause*, 127 Cal.App.4th at 397.)

The Patton Objectors' cited cases are not factually analogous to this case because neither they nor the Sullivan Objectors show that their efforts produced "a concrete benefit for the class, allowing it to recover more (or otherwise be in an improved position) than it would have been in the absence of the objectors efforts." (*id.* at 398.) They only speculate that they did so. In *Shaw v.*

Toshiba America Info. Systems, Inc. (E.D. Tex. 2000) 91 F. Supp. 2d 942, 973-74, there was a common fund, and the court required counsel for the class and the defendant to pay the objector's counsel's fees because there was unequivocal evidence that the parties had accepted and agreed to those objections, and there was a substantial benefit to the class. But that finding cannot be made here—there has been no direct proof of any benefit to the class that is attributable to the Patton or the Sullivan Objectors. Moreover, there is no common fund, and the Court's authority to allocate (or reallocate) fees in *Shaw*, and any common fund case, derives from the Court's jurisdiction over the *fund.* (Pearl, Fee Awards §5.10 [common fund "grounded" in equitable powers over the fund], *id* §5.16 ["court's ability to control the fund" provides basis for awarding fees (citing *Boeing Co v. Van Gemert* (1980) 444 U.S. 472, 479 [court's "jurisdiction over the fund" allows court to award fees from it])].)

Neither *Shaw* nor *Great Neck Capital Appreciation Investmt. P'ship, L.P. v. PriceWaterhouseCoopers* (E.D. Wis. 2002) 212 F.R.D. 400 (also cited by the Patton Objectors) are California cases or apply California law. By contrast, applicable precedent available, *Common Cause,* compels the opposite result here. The Patton Objectors' only other case is *Friends of the Trails v. Blasius* (2000) 78 Cal. App. 4th 810, 837-38, a public easement opinion holding that a court need not apportion statutory fees among defendants. That case is not a class action, and does not involve a class settlement, fee awards to objectors, or fee awards under the common fund or substantial benefit doctrines.

II. The Objectors' motions should be denied because the Court cannot restructure the Settlement Agreement, as the Objectors essentially request

Essentially, the Objectors ask the Court to rule as if there was a common fund, or to require the parties to do other than what they have agreed to do. That would require the Court to restructure the Settlement Agreement, which it cannot do. Under the Settlement Agreement, Ticketmaster must pay attorneys' fees and costs directly to lead class counsel, subject only to a cap and the Court's discretion.

As this Court acknowledged in its Ruling and Order of September 26, 2012, California law holds that such agreements—called "clear sailing" agreements—are valid. (*See Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 553 [holding that clear sailing agreements are valid under California law and should be encouraged to the extent they facilitate the completion of class action settlements].) "Due regard should be given to what is otherwise a private consensual agreement between the parties." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4ht 1794, 1801-02.) This Court cannot "delete, modify or substitute certain provisions. The settlement must stand or fall in its entirety." (*Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026 [internal citation omitted]; Manual for Complex Litig. (4th ed. 2011) § 21.612 ["The judicial role in reviewing a proposed settlement is critical, but limited to approving the proposed settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the agreement."]. The Settlement Agreement, a private, consensual contract, does not create a fund from which to pay the fees of objectors.

III. The Objectors Fee Petitions Should Also be Denied for Failure to Comply with California Law

A. The Objectors Failed to Provide Information Required for a Fee Petition

The objectors "fee petitions" fail to meet the basic requirements of California law. Where, unlike here, there is a legal basis to award fees to objectors, they still must make the proper evidentiary showing required of any party seeking fees, which means they had the "burden of producing evidence to support the fee claims." (Pearl, Fee Awards §11.46.) "The amount of fees claimed should be thoroughly and carefully supported . . . [by] evidence on each factor relevant to computation of a fee under the lodestar method," including records of how the time was spent and evidence of hourly rates "including the basis for those rates." (*id.* §11.48; see also *id* §11.50 [fee motion should include "bases for entitlement to a fee award and the evidence supporting the amount of fees sought . . . [d]eclarations for the attorneys claiming fees, stating their background, training, their role in the litigation, a description of their services . . . an explanation of why the hours are reasonable . . . a description of any billing judgment exercised, a state of the hourly rates and the basis"].) None of the objectors have provided any of this information, let alone with a proper

evidentiary basis.

Similarly, none of the objectors filed their fee agreements, as required by Cal. Rules of Court, Rule 3.769)(b).

Finally, the Patton Objectors have simultaneously filed an objection to this settlement, meaning they are taking the position that the very benefits they claim justify a fee result in a settlement that is not "fair, reasonable and adequate" and, they argue, should not be approved. While Plaintiffs disagree with objections made by the Patton Objectors, for purposes of their fee petition, the Patton Objectors' objection constitutes and admission against interest. Parties may argue alternative legal theories, but not alternative versions of the facts. The current objection made by the Patton Objectors undermines their simultaneous fee petition.

B. The Sullivan Objectors' motion should be denied because their principal lawyer is not Admitted to Practice In California

Finally, Plaintiffs note that one of the two lawyers representing the Sullivan Objectors—Christopher V. Langone—is not licensed to practice law in California, nor has he petitioned the Court for admission *pro hac vice*, as is required by Cal. Bus. & Prof. Code §6125 ("No person shall practice law in California unless the person is an active member of the State Bar").

A Google search is unclear as to whether Langone has class action experience, but is clear that his co-counsel, Grenville Pridham, does not. His website indicates that he practices in the areas of estate planning, debt collection abuse, and credit reporting errors. Http://www.yelp.com/biz/law-office-of-grenville-pridham-orange. There is nothing in his website about class action representation.

Cal. Rule of Court 9.40 requires an out of state lawyer to be admitted *pro hac vice* to practice in California. Under Cal. Rules of Court Rule 9.47(c)(4), the out of state lawyer must petition for *pro hac vice* admission "promptly after it becomes possible to do so. Failure to seek that authorization promptly, or denial of that authorization, ends eligibility to practice under this rule." "No one may recover compensation for services as an attorney at law in this state unless [the person] was at the time of the services were performed a member of the State Bar." (*Birbrower, Montalbano, Condon*

& Frank v. Superior Court (1998) 17 Cal.4th. 119, 127 [citation omitted]. The Sullivan Objectors' motion should be denied.

CONCLUSION

For these reasons, Plaintiffs respectfully submit that the fee motions of the Sullivan and Patton Objectors should be denied.

Respectfully submitted,

DATED: December 8, 2014

ALVARADOSMITH
A Professional Corporation

By: _____
Robert J. Stein, III
Lead Class Counsel

MUCH SHELIST, P.C.
Steven P. Blonder, Pro Hac Vice.

Attorneys for Plaintiffs
CURT SCHLESINGER, PETER LO RE, JAMES ROTH, ADAM RUSSELL, MARYAM AGHCHAY and the Certified Class