

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

CYNTHIA MAISONETTE et al.

Plaintiffs

v.

JONES INTERCABLE et al.

Defendants

JACQUELINE DOTSON et al.

Plaintiffs

v.

JONES COMMUNICATIONS
OF MARYLAND, INC. et al.

Defendants

CRAIG SCHUSTER et al.

Plaintiffs

v.

COMCAST CORPORATION et al.

Defendants

MOJAN THELEN et al.

Plaintiffs

v.

PRIME COMMUNICATIONS
POTOMAC, LLC

Defendants

CAL 98-02283

CAL 99-19696

CAL 00-18218

CAL 03-02778

LORRAINE RICCA et al. :
:

Plaintiffs :

v. : **CAL 03-03001**

:

PRIME COMMUNICATIONS :

POTOMAC, LLC :

:

Defendants :

STAN SHUBILLA et al. :

:

Plaintiffs :

v. : **CAL 03-03694**

:

PRIME COMMUNICATIONS :

POTOMAC LLC :

:

Defendants :

DONNA HOLDREN et al. :

:

Plaintiffs :

v. : **CAL 03-12582**

:

TCI CABLEVISION OF MARYLAND et. :

al. :

Defendants :

OPINION AND ORDER OF COURT

Before this Court are the Motion of Plaintiffs’ Lead Counsel to Approve Final Disbursement of Attorneys’ Fees and Expenses, the Opposition thereto, and the Motion of Plaintiffs’ Counsel Beins, Goldberg & Gleiberman To Have the Court Determine the Allocation of Attorneys’ Fees, or in the Alternative, For the Appointment of a Special Master to Determine the Proper Allocation of Attorneys’ Fees Among All Plaintiffs’ Counsel, as well as Lead Counsel’s and other Co-Counsel’s Opposition to that Motion. These Motions

are all that remain, except administrative matters in the remaining Cable TV late fee cases filed in the State of Maryland. These cases were all transferred to the Circuit Court for Prince George's County, Maryland at various times pursuant to Maryland Rule 2-327(d), the Circuit Courts in the jurisdictions in which they were filed having judicially determined that each of these cases involve common questions of law or fact with those in the *Maisonette* cases filed in the Circuit Court for Prince George's County, Maryland.¹

HISTORY

The named Plaintiffs brought the above-styled consolidated causes of action, *Maisonette v. Jones Intercable*, Case No. CAL 98-02283 (*Maisonette*); *Dotson v. Jones Communications*, Case No. 99-19696 (*Dotson*); *Schuster v. Comcast*, Case No. CAL00-18218 (*Schuster*); *Thelen v. Prime Communications*, Case No. CAL 03-02778 (*Thelen*); *Ricca v. Prime Communications*, Case No. CAL 03-3001 (*Ricca*); *Shubilla v. Prime Communications*, Case No. 03-03694 (*Shubilla*); and *Holdren v. TCI Cablevision*, Case No. CAL 03-12582 (*Holdren*), against one or more of the Cable TV Company Defendants alleging, *inter alia*, claims for "Breach of Contract," violation of the Maryland Consumer Protection Act, Md. Comm. Law Code §13-310 *et seq.*, "Unlawful Liquidated Damages," "Restitution/Unjust Enrichment," "Restitution of Unlawful Liquidated Damages/Penalties," "Unjust Enrichment," and "Money Had and Received" in connection with the payment of late fees. administrative fees and/or collections fees by subscribers of cable television services in Maryland.

¹*Dua et al. v. Comcast et al.*, Case No. 03-C-99-002158 in the Circuit Court for Baltimore County consolidated with *Mucha v. Comcast et al.*, Case No. 03-C-00-000424 and *Kuvshinoff v. Comcast et al.*, Case No. 03-C-99-008720 in the Circuit Court for Baltimore County were the only Cable TV late fee cases not transferred because the Circuit Court for Baltimore County concluded that, unlike the transfer of other Cable TV late fee cases in the State of Maryland, a transfer of *Dua* would delay the proceeding and, therefore, would not promote the just and efficient conduct of the action. *Dua* ultimately settled prior to the cases that were consolidated and transferred to the Circuit Court for Prince George's County. It served as a model for the settlement of the remaining cases.

Maisonette was filed by Lead Counsel Philip Friedman on February 3, 1998 in the Circuit Court for Prince George's County, Maryland, *Dotson* was filed by Beins, Goldberg & Gleiberman on August 30, 1999 in Prince George's County, and *Schuster* was filed on July 29, 1999 in the Circuit Court for Charles County, Maryland and was transferred to Prince George's County on August 7, 2000.

Maisonette, *Dotson*, and *Schuster* were subsequently consolidated for administrative purposes, and on January 21, 2003, Plaintiffs *Maisonette*, *Chatman*, *Dotson*, *Overton*, *Robinson*, *Schuster* and *King* filed a Consolidated and Amended Class Action Complaint (*Maisonette* Complaint).

Shubilla was filed in the Circuit Court for Montgomery County, Maryland on June 14, 1999. The Circuit Court for Montgomery County certified a class in *Shubilla* under Maryland Rules of Civil Procedure 2-231(b)(3) comprised of:

All persons and entities that constitute the current and past cable television subscribers of the Defendants in the State of Maryland and who paid a late fee to the Defendant during the applicable statute of limitations period (*Shubilla* Litigation Class).

Thelen was filed in Montgomery County on September 8, 1999 and *Ricca* was filed in Montgomery County on September 27, 1999. Plaintiffs in *Thelen* filed a Second Amended Class Action Complaint on December 22, 1999. All three cases were transferred to Prince George's County on February 6, 2003 and consolidated with *Maisonette*, *Dotson*, and *Schuster* for administrative purposes on March 31, 2003.

Plaintiff *Shubilla* filed a Second Amended Class Action Complaint on May 10, 2003. *Holdren* was filed on December 14, 1999 in the Circuit Court for Worcester County, Maryland and transferred to Prince George's County on June 18, 2003. Thereafter *Holdren* was consolidated with *Maisonette*, *Dotson*, *Schuster*, *Shubilla*, *Thelen* and *Ricca*.

The Circuit Court for Prince George's County certified a class in *Maisonette* comprised of:

All persons who are now, or at any time since February 3, 1995 have been subscribers to any of the Defendants' cable television systems in the State of Maryland and who have paid such systems in the State of Maryland at least one late fee and/or administrative fee (*Maisonette* Litigation Class).

The Court certified the *Maisonette* Litigation Class under Maryland Rules of Civil Procedure 2-231(b)(2) and 2-231(b)(3). The Court amended the class definition to include all Defendants named in the consolidated *Maisonette* Complaint on November 14, 2003.

On December 8, 2003, counsel in all of these cases and their clients entered into a Settlement Agreement that disposed of all issues between the Plaintiffs, Comcast and the other Defendant Cable TV Companies.

That Settlement, in pertinent part with respect to attorneys' fees, provided that:

“2.24 ‘Lead Class Counsel’ shall mean Philip S. Friedman, Esquire, Friedman Law Offices, P.L.L.C.”

It further provided that:

“8.9 *Plaintiffs' Counsel's attorneys' fees shall be in such amounts or percentage of the Settlement Proceeds as may be allowed by the Court.* Defendants agree not to oppose or comment on a motion for attorneys' fees up to 33-1/3% of the Settlement Proceeds plus reasonable Litigation Costs, as awarded by the Court in accord with subparagraphs 8.5.3 and 8.5.4. Plaintiffs' Counsel's request for attorneys' fees is estimated to be sum of \$4.5 million.” (Emphasis added).

On December 18, 2003, this Court preliminarily approved this Settlement. Final Approval was granted by this Court's Order dated April 12, 2004, in which the Court retained “continuing jurisdiction over implementation of this Settlement and distributions to Class Members and the disposition of the Settlement Proceeds and other matters related to the motions for incentive awards, cy pres award and *attorneys' fees.*” (Emphasis added).

Currently the Motions before this Court and the respective Oppositions thereto follow what Lead Counsel Philip Friedman in oral argument on these Motions described as a “marriage of necessity” between lawyers who appeared, at best then and even now the “morning after” the Settlement of these cases, to neither respect nor trust each other. Indeed, their “marriage,” as was conceded by all counsel, was motivated by “necessity” on the part of Lead Counsel and other Co-Counsel to have a unified negotiating position against the Defendants Comcast et al., so as, in the words of Lead Counsel Philip Friedman again at the hearing on these Motions, “to make sure that Comcast when it looks to this side of the table only saw one person and one group with whom it could deal; not an opportunity to see if there is another attorney group with whom it could do some sort of auction or bid to get the lowest deal.”

Such was the backdrop for the strategic union of the lawyers for the two groups of named Plaintiffs in these cases. The view of Comcast and therefore its leverage to negotiate with the now unified Plaintiffs and their attorneys was thereby strategically and effectively constricted by the unnatural alliance of Plaintiffs’ lawyers in the instant cases. The result was arguably the fair and reasonable settlement of all of these consolidated cases reached with the assistance of this Court’s mediator, Retired Judge Joseph S. Casula. This Settlement was preliminarily approved by this Court on December 18, 2003 and finally on April 12, 2004.

The history of how this class action legal scene and culture evolved in Maryland is instructive. It began prior to, but was inspired by the Court of Appeals decision in *United Cable Television v. Louis Burch et al.*, 354 Md. 658 (1999), and has grown exponentially since that decision planted the seeds for the growth of further class action litigation in the

area of late fees in this State. Indeed, the history of the instant cases, and the conduct of counsel and their interaction in these cases as well as other “late fee class action cases,” illustrates the course upon which that growth has proceeded and the complex ethical, economic, legal, and public policy issues that arise from conduct of this and similar litigation.

The visual of the evolution of class action litigation over late fees in Maryland is not a pretty picture. It includes races to the courthouse, recruitment of potential competing plaintiffs and potential classes and class members by rival lawyers and law firms, as well as alleged manipulation of these same rival class action plaintiffs’ law firms and lawyers by targeted defendants in the form of the auctioneering of settlements substituting higher legal fees for lower total recoveries for their class member clients. It also includes charges of conflicts of interest, dual billing, and other ethical violations. Finally, temporary “marriages of necessity,” such as in the instant cases, are apparently viewed as a means of resolving these conflicts or at least deferring their publication. That is, of course, if counsel can ultimately agree on a division of the total of all attorneys’ fees approved by the Court. In the case at bar, at this stage of the proceedings, they are unable to do so.

ANALYSIS

The threshold issue in the instant case is whether this Court or “Lead Counsel” should initially determine the allocation of the fees among Plaintiffs’ Counsel in these cases. The amount to be allocated is undisputed as agreed upon in the Settlement Agreement and approved by this Court. It is \$4,450,854.06. Lead Counsel and his fellow Co-Counsel, except Beins, Goldberg & Gleiberman, preliminarily argue that all counsel, including Beins, Goldberg & Gleiberman, expressly agreed that Lead Counsel would allocate the attorneys

fees approved by this Court in these consolidated cases. Simply put, this Court is not persuaded that such an agreement ever took place. It is certainly not evident from the relevant provisions of the Settlement Agreement. Nor is there any other competent evidence presented to this Court upon which even an inference that such an agreement ever took place could be drawn.

Lead Counsel then argues that, even absent an agreement between Counsel, the weight of authority compels this Court to defer at least initially to the recommendations of Lead Counsel. This Court resolved that procedural issue by directing Lead Counsel Philip Friedman to initially propose an allocation. He has done that and requested that this Court approve it. Mr. Friedman and all other Plaintiffs' Counsel, except Beins, Goldberg & Gleiberman, join with Lead Counsel in urging this Court to approve his proposed allocation.

This Court is urged to defer to Lead Counsel for reasons which include "courts prefer to make a single lump sum award and leave it to the participating firms to divide the fees among themselves because the interest of both the Class and the Defendant is only in the total award of fees, not the particular division," citing NATIONAL CONSUMER LAW CENTER, CONSUMER CLASS ACTIONS (5th Ed. 2002) at §15.5. In addition, it is pointed out by Lead Counsel that it is the custom, tradition and habit of courts where multiple attorneys are involved "to approve an aggregate amount for the group as a whole with instructions to the attorneys to work out individual awards among themselves," referring this Court to *Longden v. Sunderman*, 979 F.2d 1095, 1101 (5th Cir. 1992); *In re: Catfish Antitrust Litigation*, 939 F.Supp. 493, 504 (N..D. Miss. 1996); *Spicer v. Chicago Board Options Exchange, Inc.*, 844 F.Supp. 1226, 1256 (N.D. Ill. 1993); *In re Shell Oil Refinery*, 155 F.R.D. 552, 568 n.45 (E.D. La. 1993).

It is then argued that thereafter Lead Counsel is entrusted with the responsibility of determining the distribution of fees among the various counsel involved in the litigation, *citing In re Indigo Securities Litigation*, 995 F.Supp. 223, 235 (D. Mass. 1998)(“Any and all allocation of attorneys fees among counsel for all class representatives shall be made by lead counsel for the class, who shall apportion the fees and expenses based on their assessment of the respective contributions to the litigation made by each counsel.”), *citing In re VMS Limited Partnership*, 1991 U.S. Dist. LEXIS 9624 *14; *In re Agent Orange Product Liability*, 818 F.2d 216, 223 (1987); NEWBERG ON CLASS ACTIONS, § 14:9 (4th Ed. 2002)(noting approval of aggregate award to be distributed amongst attorneys pursuant to the discretion of lead counsel).

Lead Counsel Mr. Friedman then highlights authority for the proposition that, where a separate fee petition is offered following the determination of such fees by Lead Counsel, the federal appellate court in the 3rd Circuit has held that the trial court has broad discretion to reject the separate fee petition as the proper exercise of the trial court’s broad discretion over award of attorneys’ fees. *See, e.g., In re FPI/Agretech Securities Litigation*, 105 F.3d 469, 476 (1997)(upholding district court’s complete rejection of separate fee petition of co-counsel).

Lead Counsel then explains that, as pointed out in *In re Copley Pharmaceutical, Inc.*, 50 F.Supp.2d 1141, 1148 (D. Wy. 1999), the U.S. District Court in Wyoming has articulated the conclusion that “the rationale for this policy is both logical and practical. Class counsel are better able to decide the weight and merit of each other’s contributions.” Moreover, where disagreements arise among class counsel, the Court must “necessarily g[i]ve substantial deference to Lead Counsel’s proposed allocation ... because Lead Counsel, like

the Court as the presiding jurist, [is] in a unique position to weigh the contributions to the litigation.” *Id.* at 1149, *citing* MANUAL FOR COMPLEX LITIGATION § 20.22 at 27 (3d Ed. 1995); *In re Indigo Sec. Litig.*, 995 F.Supp. 233, 234 (D. Mass. 1998). *See also In re Diet Drugs Product Liability Litigation*, 2003 WL 21641958, p.6 (E.D. Pa. 2003)(“Although the ultimate decision with respect to the award and allocation of counsel fees is reserved for the court, we will give substantial deference to the recommendations of [Lead Counsel] as long as we conclude the recommendations are fair and reasonable.”) *citing Copley*, 50 F.Supp.2d at 1149; *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 730 (3d Cir. 2001)(*quoting Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328-29 (9th Cir. 1999).

This Court takes Judicial Notice that this class action suit is neither filed nor being litigated in Wyoming. Indeed, this Court is reminded of the scene in the Wizard of Oz when Dorothy says to her dog Toto, “Toto, I don’t think we’re in Kansas any more.” Well, we never were in Wyoming, and for reasons stated *infra*, Wyoming’s deference to Lead Counsel in these matters is not consistent with Maryland’s. Lead Counsel argues with *Copley Pharmaceutical, Inc., supra*, as authority that this Court “must necessarily give substantial deference to Lead Counsel’s proposed allocation.” In fact, what *Copley* pointed out was simply the historical fact that the Court when faced with a situation similar, but not identical to the case at bar, “necessarily gave substantial deference to Lead Counsel’s proposed allocation.” 50 F.Supp.2d at 1149.

In the cases at bar, Lead Counsel is not, as in *Copley Pharmaceutical, Inc., supra*, “like the presiding jurist” because unlike *Copley*, Lead Counsel and his Co-Counsel are on the record accusing Co-Counsel Beins, Goldberg & Gleiberman of conduct, which despite their accompanying disclaimers, constitute violations of the Rules of Professional Conduct

and also of dishonesty, or at best disingenuousness. Also, unlike any of the cases cited by Lead Counsel in the instant case, there is not only a disagreement over basic facts, there is downright hostility between counsel, which would make it difficult, if not impossible, for this Court to, as the Court did in *Diet Drugs, supra*, conclude that Lead Counsel's recommendations are objective, fair and reasonable. Indeed, this Court takes Judicial Notice that Lead Counsel in the instant case and his "Co-Counsel" are involved as adversaries with respect to who should be "Lead Counsel" and what attorneys' fees should be approved in other cases pending before this Court and presided over by this member of the Court, specifically, *In the Circuit for Prince George's County, Maryland, Jacqueline Dotson et al. v. Bell Atlantic-Maryland, Inc. et al.*, Case No. CAL 99-21004, consolidated with *Fausto Scrocco et al. v. Bell Atlantic-Maryland, Inc.*, Case No. CAL 00-09962. This does not inspire confidence in Lead Counsel or any human being's ability to be impartial.

This Court knows what it has observed, seen, and heard in the Courtrooms and Conference Rooms of the Courthouse in Upper Marlboro, Maryland. It does not know, nor can it decide based on conflicting attorney proffers of disputed facts, what took place in the law offices of counsel of record, in the halls of the General Assembly of Maryland, the Court of Appeals of Maryland, and the Circuit Court for Baltimore County among other places. Finally, common sense and basic due process does not permit this Court to evaluate the credibility of counsel's testimony or their office records by listening to them argue about them without being under oath. For that a Special Master is required.

In some federal districts and in some states it may be the traditional and customary procedure for the Court to defer, as has been suggested here, to Lead Counsel on these

matters. Indeed, there may be case law compelling it in those jurisdictions. That is clearly, however, not the practice and certainly not the authority in the State of Maryland.

This dispute is potentially over as much as \$4.5 million dollars in attorneys' fees. Although there is no direct guidance in Maryland, the rules contained in the Maryland Lawyer Rules of Professional Conduct are rules adopted by the Court of Appeals of Maryland, the highest court in this State, "in the exercise of its inherent Constitutional authority to regulate the practice of law. ... [T]hey serve to "**regulate virtually every aspect of practice of law**, establishing both **general and particular standards** for how lawyers must handle funds belonging to them ... and **how they may and may not deal with each other....**" *Post v. Bregman*, 349 Md. 142, 163, 707 A.2d 806 (1998). "[T]he power generally to regulate matters regarding the profession and its practitioners, are reposed inherently in the judiciary." *Attorney General v. Waldron*, 289 Md. 683, 694, 426 A.2d 929 (1981). This "constitutes an expression of public policy having the force of the law." *Post v. Bregman*, 349 Md. At 163. It should therefore not be considered as "late breaking news," although if it is, so be it, that it also applies to disputes between attorneys, as in the case at bar, who are co-counsel in Maryland class action suits as a result of a "marriage of necessity" and whose conduct, in my view, must be highly regulated in the interest of maintaining "the integrity [of the profession] which is vital to nearly every other institution and endeavor of our society...." *Id.* The allocation of the attorneys' fees approved in this case may not therefore be delegated to Lead Counsel except upon agreement of all of Class Plaintiffs' Counsel. No such agreement exists in the case at bar.

In addition, the visual presented to this Court, and more importantly society in general, of class action attorneys who travel this State competing with each other for cases

and fees and accusing each other of unethical conduct in the process makes an even more compelling case for the judiciary, in this case this Court, to ensure that the resolution of the dispute between Class Plaintiffs' Counsel in this case be resolved by this Court and others like it be resolved by the judiciary of this State fairly and *impartially* and that the process be logical, transparent, and unimpeachable.

THEREFORE, it is this 27th day of August, 2004, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Motion of Lead Counsel to Approve Final Disbursement of Attorneys' Fees and Expenses is hereby **DENIED**; and it is further

ORDERED, that the Motion of Plaintiffs' Counsel Beins, Goldberg & Gleiberman to Have the Court Determine the Allocation of Plaintiffs' Attorneys' Fees, Or, In the Alternative for Appointment of a Special Master to Determine Allocation of Attorney's Fees is hereby **GRANTED**; and it is further

ORDERED, that pursuant to Maryland Rule 2-541, the Court hereby appoints Alvin I. Frederick, Esquire to act as a Special Master to make recommendations to the Court regarding the allocation of attorneys' fees and reimbursement of expenses among all Plaintiffs' Counsel; and it is further

ORDERED, that pursuant to Maryland Rule 2-541(a)(2), the compensation fees and costs of the Special Master, which shall be \$300.00 per hour, shall be paid by all Plaintiffs' Counsel from the corpus of the attorneys' fees awarded in these actions which are being held in Lead Counsel's trust; and it is further

ORDERED, that the Special Master shall include in his recommendations a specific allocation of his fees and costs of the proceedings before him between counsel in this case; and it is further

ORDERED, that the Special Master shall have all of the powers set forth in Maryland Rule 2-541, as well as the power to regulate all proceedings and any hearings held, including the power to:

1. Direct the issuance of a subpoena to compel the attendance of witnesses and the production of documents or other tangible things;
2. Administer oaths to witnesses;
3. Rule upon the admissibility of evidence;
4. Examine witnesses;
5. Convene, continue and adjourn the hearing, as required;
6. Recommend contempt proceedings or other sanctions to the court; and
7. Recommend findings of fact and conclusions of law;

and it is further

ORDERED, that the Special Master shall fix the time and place for the hearing and shall send written notice to all parties; and it is further

ORDERED, that a party may procure by subpoena the attendance of witnesses and the production of documents or other tangible things at the hearing; and it is further

ORDERED, that all proceedings before the Special Master in this case shall be recorded either steno-graphically or by an electronic recording device, unless the making of a record is waived in writing by all parties. A waiver of the making of a record is also a waiver

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