

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

In re VALEANT PHARMACEUTICALS
INTERNATIONAL, INC. SECURITIES
LITIGATION

This Document Relates TO:

Case No. 3:15-cv-07658-MAS-LHG

Master No. 3:15-cv-07658-
MAS-LHG

CLASS ACTION

Judge Michael A. Shipp

Magistrate Judge Lois H.
Goodman

Special Master Hon. Dennis M.
Cavanaugh, U.S.D.J. (Ret.)

**LOCHRIDGE'S RESPONSE
TO APPLICATION ON
BEHALF OF COUNSEL FOR
TIMBER HILL LLC FOR AN
ALLOCATION OF
ATTORNEYS' FEES
PURSUANT TO RULE
23(e)(5)(B) and 23(h)**

Cass counsel have attempted to hide a secret deal to buy Timber Hill's appeals in the Third Circuit.¹ In flagrant violation of Fed. R. Civ. P. 23(e)(5)(B), the parties' joint stipulation failed to mention that the requested dismissal of Timber Hill's appeals was made in connection with payment or "other consideration," specifically, class counsels' promise not to oppose attorneys' fees taken from their own fees.² Only *after* Lochridge pointed out the omission,³ did class counsel acknowledge the secret deal, while still trying to circumvent the requirements of Rule 23(e)(5)(B). Considering class counsels' demonstrated lack of candor and the possibility that they still haven't disclosed all material terms, the issue of whether any written agreement should be produced is currently before the

¹ *TIAA, et al. v. Valeant Pharmaceuticals, et al.*, No. 21-1218, ECF 55 (3d Cir.) (joint stipulation filed on October 14, 2021 by class counsel and Timber Hill omitting that class counsel promised not to oppose a fee motion in connection with dismissal of the appeals).

² *Id.* at ECF 58 at 2 (October 21, 2021 reply by class counsel remarking that "counsel for Plaintiffs-Appellees has agreed that it will not oppose a modest attorney fee award"). The claim by Timber Hill that "dismissal was not contingent upon approval of any fee" is irrelevant. Class counsel's non-opposition to an objector's fee to come from their own fee is clearly "other consideration" as contemplated by Rule 23(e)(5)(B). According to Rule 23's comments, "[t]he term 'consideration' should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel."

³ *Id.* at ECF 56, 59 (Lochridge's October 19, 2021 response and October 22, 2021 supplemental response to the joint stipulation).

Third Circuit, as is the requested dismissal itself.⁴

As an interested member of the settlement class, Lochridge reserves the right to move for at least partial disgorgement of class counsels' fee based on their ethical lapses that concern both the Court and the class members. *See* Katherine Ikeda, *Silencing the Objectors*, 15 GEO. J. LEGAL ETHICS 177, 204 (2001) (even before Rule 23(e)(5)(B) prohibited secret payments by class counsel, recognizing that “secret side settlements indicate that class counsel has violated her ethical duty to inform her client of relevant information, her duty of loyalty, and her duty to avoid the appearance of impropriety”); *In re Imax Sec. Litig.*, 2012 U.S. Dist. LEXIS 108516, at *35 (S.D.N.Y. Aug. 1, 2012) (“in light of the divergence of interests that can more generally develop between counsel and the class in securities class actions, it is essential that courts not doubt the forthrightness of counsel. In this case, *Robbins Geller* disappointed in its level of candor and based on its supplemental submission still fails to grasp the basis for our concern.... For reasons of public policy, the grant of fees and expenses must reflect this.”) (emphasis added); *see also Huber Taylor*, 469 F.3d 67, 82 (3d Cir. 2006) (noting

⁴ *See TIAA, et al*, Appeal Nos. 21-1218, 21-1324, & 21-1390 (3d Cir. November 1, 2021) (Clerk Order referring to a motions panel, among other things, the joint stipulation and Lochridge's responses calling for filing of the secret agreement). To the extent the Third Circuit simply denies the requested dismissal, this Court should require the filing of any written agreement between Timber Hill and class counsel as part of a prospective motion for indicative relief. *See* Fed. R. Civ. P. 23(e)(5)(B).

that “attorneys owe their clients a fiduciary duty” that “includes undivided loyalty, candor, and provision of material information[;]” this “duty may not be dispensed with or modified simply for the conveniences and economies of class actions”); *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012) (district court may consider a “lawyer’s misconduct,” and has “broad equitable power ... to require an attorney to disgorge fees already received”).

Regardless, this Court lacks jurisdiction to rule on Timber Hill’s motion. Rule 23(e)(5)(B) requires district court approval for any payment or other consideration provided in connection with dismissing an appeal. However, once an appeal has been docketed, any request for payment or other consideration must be made by motion for indicative relief since the lower court no longer has jurisdiction. Fed. R. Civ. P. 23(e)(5)(C); *see Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (“The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal”). Rule 23(e)(5)(B) provides that if the parties do not obtain approval “before an appeal has been docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.” Fed. R. Civ. P. 23(e)(5)(C). Rule 62.1, in turn, permits the district court to make an indicative ruling when the court lacks authority to grant a motion because an appeal has been

taken. Fed. R. Civ. P. 62.1(a)(3). After an indicative ruling, and upon remand from the court of appeals to the district court pursuant to a motion, the district court may then review and approve such a settlement. Fed. R. Civ. P. 23(e)(5)(B)(ii).

Given this clear jurisdictional defect, it is premature for Lochridge to address Timber Hill's entitlement to fees. However, Timber Hill's complicity with class counsel in attempting to pass off the secret arrangement in the Third Circuit in violation of Rule 23(e)(5)(B) certainly bears on the appropriateness of any fee in connection with the dismissal of their appeals.

CONCLUSION

Timber Hill's application for an allocation of attorneys' fees pursuant to Rule 23(e)(5)(B) and 23(h) should be denied for lack of jurisdiction.

DATED: November 5, 2021

Respectfully submitted,

/s/ Robert W. Clore

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Certificate of Service

The undersigned certifies that today he filed the foregoing objection and associated declarations on ECF which will send electronic notification to all attorneys registered for ECF-filing.

DATED: November 5, 2021

/s/ Jerome J. Froelich, Jr.

Jerome J. Froelich, Jr.