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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAKOTA MEDICAL, INC., a California corporation doing business as Glenoaks Convalescent Hospital,

Plaintiff,

v.

REHABCARE GROUP, INC., a Delaware corporation, and CANNON & ASSOCIATES, LLC, a Delaware limited liability corporation doing business as Polaris Group,

Defendants.

No. 1:14-cv-02081-DAD-BAM

ORDER DENYING MOTION TO ENJOIN STATE COURT PROCEEDINGS

(Doc. No. 194)

The motion before the court concerns the allocation of fees between attorneys who at various times represented plaintiff prior to the certification or settlement of this class action. The court issued an order finally approving class settlement in this case on September 21, 2017. (Doc. No. 189.) On November 15, 2017, class counsel Darryl Cordero, Donald R. Fischbach, and Joel Magolnick (hereinafter “class counsel”) filed a motion seeking to enjoin state court proceedings brought against them by attorney Scott Zimmerman, a non-party to this suit (hereinafter “Zimmerman”). (Doc. No. 194.) Zimmerman filed an opposition to the motion to enjoin on December 5, 2017. (Doc. No. 198.) Class counsel filed a reply on December 12, 2017. (Doc. No. 200.) The court held a hearing on December 19, 2017, at which attorneys Cordero,

1 Fischbach, Daniel Lula, and Scott Luskin appeared on behalf of class counsel and plaintiff.
2 Attorney Zimmerman appeared on behalf of himself. Attorneys Melissa Gomberg and David
3 Jordan appeared on behalf of defendants. Having considered the submissions and arguments of
4 the parties, the court will deny the motion to enjoin the state court proceedings.

5 **BACKGROUND**

6 The underlying action here is a putative class action filed under the Telephone Consumer
7 Protection Act (“TCPA”), alleging defendants had sent a huge number of junk faxes to various
8 nursing homes and healthcare facilities. Following substantial litigation, the action was settled.
9 A motion for certification of the settlement class and preliminary approval of a class settlement
10 was filed on March 21, 2017 and the motion was granted on April 19, 2017. (Doc. Nos. 172,
11 177.) After distribution of the class notice and an objection period, a motion for final approval of
12 the settlement and certification of the settlement class was filed on August 1, 2017. (Doc. No.
13 179.) This motion was granted by order on September 21, 2017. (Doc. No. 189.)

14 Of primary importance to this dispute, that order also granted class counsel’s application
15 for attorneys’ fees, awarding them one-third of the common fund, which in this case amounted to
16 \$8,333,333. (*Id.* at 11–17.) Class counsel requested that the court approve the allocation of
17 attorneys’ fees amongst the three different firms who comprised class counsel, and the court did
18 so. (*Id.* at 17.) Further, class counsel sought to have the court approve class counsels’ expressed
19 intent to voluntarily pay attorney Frank Owen, who was not class counsel, 3.33 percent of their
20 respective shares from the settlement. (*Id.* at 18.) At the final fairness hearing, the court
21 commented that it was unsure of the need to approve this sharing of funds, but given counsel’s
22 representations regarding the distribution of work in this case and the voluntarily nature of the
23 agreement, the court could glean no reason to refuse counsels’ request. (*Id.* at 19.)

24 At no point during the approval process did class counsel advise the court of a potential
25 dispute related to attorneys’ fees with another attorney who had previously represented the named
26 plaintiff. However, following entry of judgment on October 11, 2017, class counsel moved to
27 enjoin a state court action brought by attorney Zimmerman in which he sought to be paid for his
28 prior work in both this and another class action matter pursuant to a state law claim of *quantum*

1 *meruit*.¹ (Doc. No. 194.) In their pending motion class counsel seek to enjoin Zimmerman’s
2 lawsuit on the basis of the All Writs Act, 28 U.S.C. § 1651(a) and the Anti-Injunction Act, 28
3 U.S.C. § 2283 because, they contend, doing so is necessary “in aid of” this court’s jurisdiction in
4 this class action and in order to prevent relitigation of issues already decided by this court. (*Id.* at
5 15–24.) Class counsel also seeks the award of sanctions against Zimmerman for filing such an
6 action in state court. (*Id.* at 24–25.) Zimmerman, specially appearing in this matter, opposes the
7

8 ¹ Though not strictly necessary to the resolution of the pending motion, the court will synopsise
9 its understanding of the relationship between these various attorneys. According to Zimmerman,
10 he was approached by attorney Cordero about co-counseling on TCPA cases in 2006, and the two
11 started working together as co-lead counsel in a number of cases. (Doc. No. 199 at 2.) Attorneys
12 Magolnick and Owen joined them as co-counsel in several of these actions. (*Id.* at 2.) In
13 particular, Zimmerman and Cordero were co-lead counsel, and Magolnick and Owen were co-
14 counsel, in another suit brought against RehabCare Group and Cannon & Associates in the U.S.
15 District Court for the Southern District of Florida which was filed in January 2014 (“RHC I”).
16 (*Id.*) The attorneys purportedly had an agreement to share fees from that suit. (*Id.* at 2–3.) The
17 court in RHC I denied a class certification motion in June 2014, effectively ending that action.
18 (*Id.* at 3.) However, records discovered during the proceedings in RHC I led attorneys
19 Zimmerman, Cordero, Owen, and Magolnick to conclude they would have a better chance for
20 success in a separate class action suit against these defendants than they would in further
21 litigating RHC I. (*Id.*) Thereafter, attorneys Cordero and Zimmerman were retained by the
22 named plaintiffs in this action as co-lead counsel. (*Id.*) Attorney Magolnick and the firm of
23 Dowling Aaron were also retained as co-counsel. (*Id.*) This case—which Zimmerman refers to
24 as “RHC II”—was commenced in December 2014. (*Id.* at 4.) In the spring of 2015, a dispute
25 arose between attorneys Zimmerman and Cordero regarding the division of fees in earlier cases,
26 culminating in an arbitration in August 2015. (*Id.*) The named plaintiffs in this action dismissed
27 Zimmerman as one of their attorneys in March 2016, and Zimmerman filed a notice with the
28 court to that effect that same month. (*Id.*; *see also* Doc. No. 108.) Around the same time,
Zimmerman was also discharged as counsel in another case in which Cordero and he were co-
counsel, *Craftwood Lumber Co. v. Senco Brands, Inc.*, filed in the U.S. District Court for the
Northern District of Illinois. (Doc. No. 199 at 4–5.) Following a successful mediation in the
Senco case, Zimmerman requested that he be included in the application to that court for fees
even though he had been discharged, a request attorney Cordero accommodated. (*Id.*)
Zimmerman similarly requested, initially in June 2016, that he be included in any calculation of
attorneys’ fees filed in connection with this action. (Doc. No. 194-2 at 8.) Class counsel
apparently did not immediately respond to that request. Approximately one year later, they
notified Zimmerman of the June 2017 preliminary approval of the settlement in this case. (*Id.*)
Zimmerman reiterated his request to be included in attorneys’ fee calculations, which class
counsel refused. (*Id.* at 11.) Zimmerman responded in July 2017, again requesting to be included
in the calculation of fees or, alternatively, to be paid separately for his work in both RHC I and
RHC II. (*Id.* at 14–15.) Class counsel again refused, stating they would seek attorneys’ fees only
for class counsel in the motion they intended to present to this court. (*Id.*) Zimmerman did not
file his state court action for *quantum meruit* until shortly after judgment was entered in this case.

1 motion to enjoin his pending action in state court, asserting that this court lacks jurisdiction over
2 both him and his dispute with class counsel. (Doc. No. 198.)

3 **LEGAL STANDARD**

4 The All Writs Act states that the federal courts “may issue all writs necessary or
5 appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of
6 law.” 28 U.S.C. § 1651. The Supreme Court has noted that the purpose of the All Writs Act is to
7 allow federal courts to issue commands “as may be necessary or appropriate to effectuate and
8 prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise
9 obtained.” *United States v. N.Y. Tele. Co.*, 434 U.S. 159, 172 (1977); *see also ARCO*
10 *Environmental Remediation, L.L.C. v. Department of Health & Environmental Quality of*
11 *Montana*, 213 F.3d 1108, 1117 n. 10 (9th Cir. 2000). However, the All Writs Act is not a source
12 of jurisdiction unto itself. *United States v. Denedo*, 556 U.S. 904, 914 (2009); *Syngenta Crop*
13 *Prot., Inc. v. Henson*, 537 U.S. 28, 32–34 (2002); *see also ARCO Environmental Remediation,*
14 *L.L.C.*, 213 F.3d at 1117, n.10. Because of this, the All Writs Act only provides the power to
15 issue writs that are “designed to preserve jurisdiction that the court has acquired from some other
16 independent source in law.” *Taiwan v. U.S. Dist. Court for the N. Dist. of Cal.*, 128 F.3d 712,
17 717 (9th Cir. 1997) (quoting *Jackson v. Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993)); *see also*
18 *United States v. Bravo-Diaz*, 312 F.3d 995, 997 (9th Cir. 2002).

19 While the All Writs Act may appear expansive, another federal act known as the Anti-
20 Injunction Act, 28 U.S.C. § 2283,² “limits the All Writs Act by prohibiting federal courts from
21 enjoining state court actions except in three narrow circumstances.” *California v. IntelliGender,*
22 *LLC*, 771 F.3d 1169, 1176 (9th Cir. 2014). Specifically, the Anti-Injunction Act permits such
23 injunctions only where: (1) “expressly authorized” by Congress; (2) “where necessary in aid of
24 [the court’s] jurisdiction”; and (3) “to protect or effectuate its judgments.”³ 28 U.S.C. § 2283;

25 _____
26 ² Another federal statute, 26 U.S.C. § 7421, is also frequently referred to as the Anti-Injunction
27 Act. That provision prohibits suits brought “for the purpose of restraining the assessment or
collection of any tax,” 26 U.S.C. § 7421(a), and is not at issue in this case.

28 ³ This final exception is frequently called the “relitigation” exception.

1 *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). By providing only these narrow
2 exceptions, the Anti-Injunction Act “creates a presumption in favor of permitting parallel actions
3 in state and federal court.” *Bennett v. Medtronic, Inc.* 285 F.3d 801, 806 (9th Cir. 2002); *see also*
4 *Atlantic Coast Line R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 297 (1970) (“Any doubts
5 as to the propriety of a federal injunction against state court proceedings should be resolved in
6 favor of permitting the state courts to proceed in an orderly fashion to finally determine the
7 controversy.”).

8 ANALYSIS

9 Class counsel argue here that two of the exceptions to the Anti-Injunction Act—the
10 necessary in aid of jurisdiction exception and the relitigation exception—apply here, permitting
11 this court to enjoin the state court action. It is unclear under Ninth Circuit authority whether the
12 analysis with respect to these two exceptions is the same or different. *Compare Montana v.*
13 *BNSF Ry. Co.*, 623 F.3d 1312, 1315 n.1 (9th Cir. 2010) (“The ‘necessary in aid of’ jurisdiction
14 exception is similar to the ‘protect or effectuate’ judgments exception. Accordingly, we do not
15 conduct separate analyses here.”) (internal citations omitted), *with Sandpiper Vill. Condo. Ass’n,*
16 *Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831, 843–53 (9th Cir. 2005) (undertaking separate
17 analyses with respect to the two exceptions). In the interest of thoroughness, and because the
18 parties here have addressed the exceptions separately, this court will likewise address each
19 argument separately below.

20 A. Necessary in Aid of Jurisdiction Exception

21 The first of the exceptions, the necessary in aid of jurisdiction exception, authorizes
22 injunctive relief to prevent interference from a state court that would “seriously impair the federal
23 court’s flexibility and authority to decide that case.” *Sandpiper Vill. Condo. Ass’n, Inc.*, 428 F.3d
24 at 843 (quoting *Atlantic Coast Line R. Co.*, 398 U.S. at 295). “This exception ‘arose from the
25 settled rule that if an action is *in rem*, the court first obtaining jurisdiction over the *res* may
26 proceed without interference from actions in other courts involving the same *res*.” *Id.* (quoting
27 *Alton Box Bd. Co. v. Esprit de Corp.*, 682 F.2d 1267, 1272 (9th Cir. 1982)); *see also Bennett*, 285
28 F.3d at 807 (“[I]njunctive actions are permitted where an *in personam* action bears substantial similarity

1 to an *in rem* action.”). While the action has been expanded to include some *in personam* actions,
2 it does so only where a parallel state action “threatens to render the exercise of the federal court’s
3 jurisdiction nugatory.” *Sandpiper Vill. Condo. Ass’n, Inc.*, 428 F.3d at 843–44 (quoting *Bennett*,
4 285 F.3d at 806) (internal quotations omitted). Thus, a state court lawsuit may not be enjoined
5 under necessary in aid of jurisdiction exception unless it “ousts the jurisdiction of the court in
6 which the first suit was brought.” *Id.* at 844 (quoting *Kline v. Burke Constr. Co.*, 260 U.S. 226,
7 232 (1922)). For example, this exception has been held not to bar a state action seeking to raise
8 claims based on the same facts as a previously settled class action, *id.*, or an action filed in state
9 court alleging securities law violations similar to those pending in federal court. *See Lou v.*
10 *Belzberg*, 834 F.2d 730, 740 (9th Cir. 1987). “[T]he mere fact that the actions of a state court
11 might have some effect on the federal proceedings does not justify interference.” *Negrete v.*
12 *Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1101–02 (9th Cir. 2008) (noting also that this
13 exception is most frequently applied in multi-district litigation, though not exclusively).
14 Meanwhile, this exception has been found to allow injunctions where necessary to effectuate a
15 settlement agreement over which the court had retained jurisdiction, to preserve the integrity of
16 exclusive federal jurisdiction, in school desegregation cases, and in multi-district litigation. *See*
17 *Bennett*, 285 F.3d at 806 (collecting cases); *see also United States v. Alpine Land & Reservoir*
18 *Co.*, 174 F.3d 1007, 1015 (9th Cir. 1999) (finding the Anti-Injunction Act did not bar an
19 injunction when the district court retained jurisdiction to enforce dispute arising from a settlement
20 agreement).

21 Here, class counsel argues that the “necessary in aid of jurisdiction” exception applies for
22 four separate reasons: (1) the state court action “threatens to frustrate proceedings and disrupt the
23 orderly resolution” of this case; (2) the state court action “undermines the due process rights of
24 class members to receive notice of and object to attorneys’ fees”; (3) allowing the state court
25 action to proceed undermines the procedures set forth in Rule 23 for the awarding of attorneys’
26 fees; and (4) the state court action unfairly penalizes named plaintiff and class representative
27 Dakota Medical. (Doc. No. 194-1 at 15–18.)

28 ////

1 The first of these reasons cited by class counsel is unpersuasive because mere frustration
2 and even some disruption of a federal case is insufficient to justify such an injunction: rather, for
3 the necessary in aid of jurisdiction exception to apply the state court action must “threaten[] to
4 render the exercise of the federal court’s jurisdiction nugatory.” *Sandpiper Vill. Condo. Ass’n,
5 Inc.*, 428 F.3d at 843–44. Unless the state court action would “seriously impair the federal court’s
6 flexibility and authority to decide” the case in front of it, the state court action should proceed.
7 *Id.* at 843. Here, it is far from clear that a dispute between attorneys concerning their fees would
8 damage the settlement of this action in any way. Zimmerman claims a legal right to be paid by
9 co-counsel and the named plaintiff⁴ for his work pursuant to a state law theory of *quantum meruit*.
10 (Doc. No. 194-3 at 14–15.) Nothing about the state court action would alter or amend the total
11 amount awarded in attorneys’ fees under the settlement in this action, impact the amount paid out
12 to the class in this case, or limit or change the scope of the settled claims here. Zimmerman’s sole
13 claim is that, under state law, class counsel and plaintiff should be required to pay him for the
14 work he previously performed in this and another case. (Doc. No. 194-3 at 15–16.)⁵ There is no
15 indication the state court would invade the funds set aside for the class or otherwise augment the
16 outcome of this case in order to pay Zimmerman; rather, if Zimmerman prevailed, the state court
17 would presumably award a money judgment in his favor.

18 //////

20 ⁴ Zimmerman’s naming of the plaintiff in this action as a defendant in his *quantum meruit* claim
21 in state court appears to the undersigned to be clearly misguided. Zimmerman’s dispute appears
22 to clearly be with class counsel and, in particular, attorney Cordero with whom he apparently
once worked as co-counsel in this and other cases. However, that is a matter for the state court to
resolve.

23 ⁵ Zimmerman filed a notice of lien in the state court proceeding, noting that he “claim[ed] a lien
24 on any award, judgment, or other payment of attorneys’ fees to plaintiff, plaintiff’s counsel, class
25 counsel and/or Frank Owen in the RHC II Case.” (Doc. No. 194-3 at 19.) Such liens are merely
26 security interests that arise in California as a matter of law, whether or not the attorney files a
27 notice of them. *S. Cal. Gas Co. v. Flannery*, 5 Cal. App. 5th 476, 494 (2016). In cases involving
28 contingency fee contracts, these liens arise only when the contingency occurs, and survive the
discharge of the attorney, though they are limited to *quantum meruit* recovery, rather than the full
value of the contracted contingency. *Id.* Even if a security is sought based on this court’s award,
it is not tantamount to this court awarding Zimmerman attorneys’ fees under Rule 23.

1 Class counsel next argue that this state lawsuit invades the due process rights of the absent
2 class members here. Class counsel cite only the decision in *In re Mercury Interactive*
3 *Corporation Securities Litigation*, 618 F.3d 988 (9th Cir. 2010) for the proposition that the
4 *division* of attorneys’ fees presents a due process concern for absent class members. In that suit, a
5 securities class action settled early on in the litigation. *Id.* at 990–91. Two objections were raised
6 to the attorneys’ fees sought by plaintiffs’ counsel, generally requesting that any amount awarded
7 be no more than 18 percent, instead of 25 percent, of the settlement amount. *Id.* at 991. Neither
8 of the two objectors appeared at the final fairness hearing, and the district court awarded 25
9 percent of the fund as attorneys’ fees. *Id.* at 991–92. On appeal, the Ninth Circuit held that the
10 district court had abused its discretion specifically because it set “the objection deadline for class
11 members on a date before the deadline for lead counsel to file their fee motion.” *Id.* at 993. In so
12 holding, the Ninth Circuit observed that the manner in which the settlement proceedings were
13 scheduled “borders on a denial of due process because it deprives objecting class members of a
14 full and fair opportunity to contest class counsel’s fee motion.” *Id.* The Ninth Circuit stated that
15 it was important to “[a]llow[] class members an opportunity thoroughly to examine counsel’s fee
16 motion, inquire into the bases for various charges and ensure that they are adequately documented
17 and supported.” *Id.* at 994.

18 The court in *In re Mercury* did not hold that due process requires class members to be
19 notified of how attorneys’ fees are to be divided among various class counsel. Rather, in that case
20 the Ninth Circuit held only that class members must be able to examine the propriety of the total
21 amount of attorneys’ fees sought, which they cannot do if the objection deadline is set prior to the
22 date on which counsel must file their fee motion. *See id.* at 993. Simply put, no authority has
23 been presented to this court demonstrating that due process requires class members to know the
24 manner in which attorneys’ fees are to be divided among counsel, so long as the overall award
25 and payment structure is proper. *See Fed. R. Civ. P. 23(h)*, advisory committee’s notes to 2003
26 amendment (“In a class action, the district court must ensure that the *amount and mode of*
27 *payment* of attorney fees are fair and proper whether the fees come from a common fund or are
28 otherwise paid.”) (emphasis added).

1 The third argument asserted by class counsel in support of their motion is that Federal
2 Rule of Civil Procedure 23 requires Zimmerman’s lawsuit in state court to be enjoined, because it
3 seeks what are, in essence, attorneys’ fees. (Doc. No. 194-1 at 18.) Rule 23 permits this court to
4 “award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the
5 parties’ agreement,” and sets out certain procedures to be followed when doing so. *See* Fed. R.
6 Civ. P. 23(h)(1)–(4). Attorneys’ fee awards under Rule 23 are not strictly limited to class
7 counsel. In this regard, the advisory committee notes to Rule 23 observe that, “[i]n some
8 situations, there may be a basis for making an award to other counsel whose work produced a
9 beneficial result for the class,” including “attorneys who acted for the class before certification
10 but were not appointed class counsel.” Fed. R. Civ. P. 23(h), advisory committee’s notes to 2003
11 amendment. Thus, the term “attorney’s fees” as used in Rule 23 is more expansive than simply
12 the fee to be paid to class counsel.

13 California *quantum meruit* actions, however, seek an award of damages based on the
14 value of the work performed. They do not seek an award of attorneys’ fees under Rule 23. A
15 *quantum meruit* cause of action is available to discharged attorneys under California law precisely
16 because an attorney bringing such an action *cannot* recover attorneys’ fees to which they might
17 otherwise be contractually entitled. *See Fracasse v. Brent*, 6 Cal. 3d 784, 788–91 (1972) (holding
18 that a discharged attorney cannot recover in a contract action against a former client, and is only
19 entitled to the values of the services rendered in *quantum meruit*); *Alfinito v. Sater*, 246 Cal. App.
20 2d 362, 389 (1966) (citing *Kirk v. Culley*, 202 Cal. 501 (1927)) (noting the differences between
21 breach of contract and *quantum meruit* recoveries). Moreover, California courts have determined
22 that there are no ethical prohibitions related to fee-splitting when a discharged attorney brings a
23 *quantum meruit* action, further supporting the conclusion that a *quantum meruit* recovery is not an
24 award of attorneys’ fees. *Huskinson & Brown, LLP v. Wolf*, 32 Cal. 4th 453, 458–59 (2004)
25 (“The question arises whether a *quantum meruit* award for services rendered in reliance on a fee-
26 sharing agreement that lacks written client consent constitutes a division of fees within the rule’s
27 contemplation. We think not.”); *Olsen v. Harbison*, 191 Cal. App. 4th 325, 330–31 (2010)
28 (“Although an attorney who has not received this written consent cannot sue to obtain the

1 specified fees, the attorney may sue the client in *quantum meruit* to recover the reasonable value
2 of the services rendered on the client’s behalf.”); *Maridrossian & Assocs., Inc. v. Ersoff*, 153 Cal.
3 App. 4th 257, 272 (2007). Finally, the measurement of attorneys’ fees awarded under Rule 23 is
4 fundamentally distinct from the measure of recovery under *quantum meruit*. In the Rule 23
5 context, “[f]or a percentage approach to fee measurement, results achieved is the basic starting
6 point.” Fed. R. Civ. P. 23(h), advisory committee’s notes to 2003 amendment; *see also In re*
7 *Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954–55 (9th Cir. 2015) (noting that the results
8 achieved is a relevant factor in awarding attorneys’ fees in percentage of the fund awards). In a
9 *quantum meruit* action, however, the starting point for assessing damages is the value of the
10 services rendered, not the ultimate outcome of the litigation, even where an attorney has
11 specifically contracted to be paid a percentage of the recovery. *Fracasse*, 6 Cal. 3d at 788–91. In
12 short, the recovery to be achieved in a *quantum meruit* action is not synonymous with the award
13 of attorneys’ fees under Rule 23.

14 Finally, class counsel argue that the state court lawsuit “is unfair to Glenoaks [Dakota
15 Medical] and penalizes, rather than rewards, Glenoaks’ service to the class.” (Doc. No. 194-1 at
16 18.) No authority is provided indicating why this unfairness, even if true, should weigh on the
17 court’s decision whether to enjoin Zimmerman’s state court action. It is clear that the court has
18 never been fully apprised of all the potential obligations the named plaintiff and class counsel
19 may owe to other third-parties. This is unsurprising, however, as questions of third-party
20 relationships tangential to a lawsuit are typically a matter of state law, separate and apart from the
21 lawsuit itself. *See, e.g., Matter of Pac. Far East Line, Inc.*, 654 F.2d 664, 668 (9th Cir. 1981)
22 (noting California law governed the status of claims between an attorney and a client).

23 In summary, class counsel have failed to demonstrate that this court must enjoin the state
24 court proceedings under the “necessary in aid of jurisdiction” exception to the Anti-Injunction
25 Act. Thus, the court turns to the second proffered exception to the Anti-Injunction Act.

26 **B. Relitigation Exception**

27 The second exception invoked by class counsel here, the relitigation exception, “was
28 designed to permit a federal court to prevent state litigation of an issue that previously was

1 presented to and decided by the federal court” and “is founded in the well-recognized concepts of
2 *res judicata* [claim preclusion] and collateral estoppel [issue preclusion].” *Chick Kam Choo*, 486
3 U.S. at 147; *see also Smith v. Bayer Corp.*, 564 U.S. 299, 306 (2011). This exception requires
4 “that the claims or issues which the federal injunction insulates from litigation in state
5 proceedings actually have been decided by the federal court,” a “prerequisite” which “is strict and
6 narrow.”⁶ *Chick Kam Choo*, 486 U.S. at 148; *see also Smith*, 564 U.S. at 318 (“[C]lose cases
7 have easy answers: The federal court should not issue an injunction, and the state court should
8 decide the preclusion question.”). Additionally, the traditional “requirements of identity of the
9 parties, . . . adequate notice, and adequate representation apply.” *Sandpiper Vill. Condo. Ass’n,*
10 *Inc.*, 428 F.3d at 847 (quoting *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853 (9th Cir. 2000)).
11 The narrowness of the relitigation exception is critical because federal courts have no power to
12 enjoin state court proceedings “merely because those proceedings interfere with a protected
13 federal right or invade an area pre-empted by federal law, even when the interference is
14 unmistakably clear.” *Chick Kam Choo*, 486 U.S. at 149 (quoting *Atlantic Coast Line*, 398 U.S. at
15 294); *see also Smith*, 564 U.S. at 307 (“Deciding whether and how prior litigation has preclusive
16 effect is usually the bailiwick of the *second* court.”).

17 Here, class counsel argue that the state suit should be enjoined under the relitigation
18 exception because Zimmerman had “more than a ‘full and fair opportunity’ to litigate his claim to
19 attorneys’ fees” before this court during the class action settlement proceedings, specifically

20
21 ⁶ There is a circuit split over whether the relitigation exception allows federal courts to enjoin
22 state suits concerning any claims and issues that *could have been brought* in the prior federal
23 litigation, or only claims that actually were litigated. However, under binding Ninth Circuit
24 precedent the relitigation exception is not limited to “issues ‘actually litigated’ in a prior court
25 proceeding.” *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 869–70 (9th Cir. 1992) (noting that the
26 First, Fifth, Fourth, Sixth, and Second Circuits had all concluded the relitigation exception is
27 narrower than claim preclusion, and therefore is limited only to issues actually litigated). The
28 Supreme Court has not explicitly resolved this circuit split, though it recently suggested this
exception is limited only to issues actually litigated. *See Smith*, 564 U.S. at 308–11 (noting again
that the exception applies only to issues that “actually have been decided by the federal court,”
and declining to apply it where the federal and state courts would apply different law in reaching
a decision). Nevertheless, this court recognizes that binding precedent compels the conclusion
that the relitigation exception bars claims that were litigated *or could have been litigated*,
consistent with claim preclusion principles. *See Western Sys., Inc.*, 958 F.2d at 869–70.

1 because he was provided notice of the settlement and informed that class counsel would not file a
2 claim for attorneys' fees on his behalf. (Doc. No. 194-1 at 19–24.) According to class counsel,
3 Zimmerman's *quantum meruit* claim represents an effort to relitigate this court's decision with
4 respect to the award of attorneys' fees, which the court arrived at after "a thorough, painstaking
5 analysis." (*Id.* at 21–22.)

6 As noted, in the Ninth Circuit the relitigation exception is co-extensive with claim
7 preclusion principles and covers claims that could have been, but were not, litigated.
8 Nonetheless, class counsel fall far short of establishing the applicability of that exception here.
9 The standard elements of establishing claim preclusion are well known. The party invoking claim
10 preclusion must show an "identity of claims," a "final judgment on the merits," and "identity or
11 privity between the parties." See *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 855 (9th Cir.
12 2016) (quoting *Cell Therapeutics, Inc. v. Lash Grp. Inc.*, 586 F.3d 1204, 1212 (9th Cir. 2009)).
13 These elements are required because, as a general matter, non-parties and third-parties to
14 litigation are not bound by a judgment in a given case. See *Smith*, 564 U.S. at 312 (noting that
15 "another basic premise of preclusion law" is that "[a] court's judgment binds only the parties to a
16 suit, subject to a handful of discrete and limited exceptions"); *Sandpiper Vill. Condo. Ass'n, Inc.*,
17 428 F.3d at 848–49 (observing that a judgment in a lawsuit resolves the issues as to the parties of
18 the suit, "but it does not conclude the rights of strangers to those proceedings") (quoting *Richards*
19 *v. Jefferson County*, 517 U.S. 793, 798 (1996)). Here, class counsel have not demonstrated either
20 that there was privity between the parties or that there is an identity of claims.

21 Claim preclusion principles apply only when there is either "identity or privity between
22 parties." *Stewart v. U.S. Bancorp.*, 297 F.3d 953, 956 (9th Cir. 2002) (quoting *Owens v. Kaiser*
23 *Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001)). Class counsel has failed to explain
24 how any parties to the class action settlement were in privity with Zimmerman, who was not a
25 party to that suit. See *United States v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008) ("Privity 'is a
26 legal conclusion designating a person so identified in interest with a party to former litigation that
27 he represents *precisely the same right in respect to the subject matter involved.*'") (emphasis
28 added) (quoting *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (internal quotations omitted);

1 *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir.
2 2003) (“Even when the parties are not identical, privity may exist if ‘there is substantial identity
3 between parties, that is, when there is sufficient commonality of interest.’”) (quoting *In re*
4 *Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983)) (internal quotations omitted). The reason for
5 this is obvious: none of the parties to the settlement in this action represented Zimmerman’s
6 interest in the outcome of the attorneys’ fees dispute at all. Some of those involved in the
7 settlement of this action, such as class counsel, were in fact directly adversarial to Zimmerman’s
8 interests. Indeed, class counsel specifically told Zimmerman they would not include any request
9 for attorneys’ fees for him in the motion for attorneys’ fees which they presented to this court.
10 (See Doc. No. 194-2 at 11.)

11 Class counsel also fail to demonstrate that there was an identity of issues, as required to
12 invoke claim preclusion. In this regard, the Ninth Circuit considers four factors in determining
13 whether there is an “identity of claims”:

14 (1) whether rights or interests established in the prior judgment
15 would be destroyed or impaired by prosecution of the second
16 action; (2) whether substantially the same evidence is presented in
17 the two actions; (3) whether the two suits involve infringement of
the same right; and (4) whether the two suits arise out of the same
transactional nucleus of facts.

18 *Turtle Island Restoration Network v. U.S. Dep’t of State*, 673 F.3d 914, 917–18 (9th Cir. 2012)
19 (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201–02 (9th Cir. 1982)). “The last
20 of these criteria is the most important.” *Id.*; see also *Tahoe-Sierra Pres. Council, Inc.*, 322 F.3d
21 at 1078. Put another way, where a party is asking for relief based on the same facts that gave rise
22 to the wrongs alleged in the first suit, the suits arise from the same “nucleus of facts” and may be
23 barred by claim preclusion. *Turtle Island Restoration Network*, 673 F.3d at 918–19; *Tahoe-*
24 *Sierra Pres. Council, Inc.*, 322 F.3d at 1078.

25 Here, the facts giving rise to the two suits in question are clearly vastly different. As
26 described above, this class action case concerned alleged violations of the TCPA by defendants
27 RehabCare Group and Cannon & Associates based on the sending of junk faxes advertising
28 seminars and workshops on Medicare and Medicaid billing and other issues to healthcare

1 facilities. (See Doc. No. 1.) In contrast, the state action brought by Zimmerman concerns what
2 compensation, if any, should be paid to a former attorney of the named plaintiff for his work
3 allegedly performed in connection with both this and another lawsuit. (See Doc. No. 194-3 at 9–
4 16.) Those two suits obviously do not arise out of the same transactional nucleus of facts. Other
5 factors, such as whether the same evidence would be presented and whether the two suits
6 involved infringement of the same rights, similarly do not support a finding that there is an
7 “identity of claims.” See *Turtle Island Restoration Network*, 673 F.3d at 917–18.

8 Class counsel have pointed to several cases they claim establish the applicability of the
9 relitigation exception to this case. See *Golden v. Pacific Maritime Ass’n*, 786 F.2d 1425 (9th Cir.
10 1986); *In re Linerboard Antitrust Litig.*, 361 Fed. App’x 392 (3d Cir. 2010); *Silcox v. United*
11 *Trucking Servs., Inc.*, 687 F.2d 848 (6th Cir. 1982); *Milliron v. T-Mobile USA, Inc.*, No. 08-4149
12 (JLL), 2009 WL 4798240 (D.N.J. Dec. 8, 2009); and *In re Nat’l Student Mktg. Litig.*, 655 F.
13 Supp. 659 (D.D.C. 1987). (Doc. No. 194-1 at 22–24.) Only one of the cited cases is of
14 precedential value. In *Golden*, class members had sued class counsel for fraud and malpractice in
15 state court following a class action settlement. 786 F.2d at 1426. In holding that the class
16 members had already had a full and fair opportunity to litigate their claims, the Ninth Circuit
17 noted that these same class members had objected to the settlement and to class counsel’s
18 representation at the final approval hearing on the settlement. *Id.* at 1428. The class members
19 filed multiple declarations supporting their argument, and class counsel and other class members
20 filed declarations refuting those arguments. *Id.* Having considered these filings, the district court
21 made specific findings concerning that counsel’s competency in its order granting final approval
22 of the settlement. *Id.* The district court subsequently heard further argument on the matter in
23 connection with both a motion for substitution and a motion for reconsideration. *Id.*
24 Unsurprisingly in light of this background, the Ninth Circuit concluded that those class members
25 had “a fair and full opportunity to litigate” the issues raised by them in their action filed in state
26 court. *Id.* at 1429.

27 In stark contrast, class counsel in this case never advised the court of the possible need to
28 resolve a fee dispute between class counsel and a former attorney for the named plaintiff.

1 Zimmerman was not counsel of record in this case at the time of settlement or subsequent thereto.
2 Indeed, class counsel did not even mention either Zimmerman or the potential dispute to this
3 court, despite having communicated with him about this issue shortly before the final fairness
4 hearing in this action. (See Doc. No. 194-2) (including e-mails from June and July 2017 between
5 class counsel and Zimmerman discussing Zimmerman’s belief that he was owed compensation
6 for his work). This court was entirely unaware of Zimmerman’s claims. Class counsel did not
7 mention Zimmerman and the court did not hear from him prior to issuing its final approval order.
8 Moreover, class counsel never sought to join Zimmerman as a required party under Rule 19, as
9 they could have done had they truly believed any subsequent claims of his would have resulted in
10 a party being subject to inconsistent obligations. See Fed. R. Civ. P. 19(a); *United States v.*
11 *Bowen*, 172 F.3d 682, 688 (9th Cir. 1999) (noting that joinder under Rule 19 is required when
12 “the absent party claims a legally protected interest in the action”); see also *Cachil Dehe Band of*
13 *Wintun Indians of the Colusa Indian Comm. v. California*, 547 F.3d 962, 970–71 (9th Cir. 2008)
14 (discussing mandatory joinder).⁷ The decision in *Golden* is thus readily distinguishable from the
15 situation presented here.

16 The other cases cited by class counsel are similarly distinguishable. In the unpublished
17 decision in *In re Linerboard Antitrust Litigation*, the district court specifically retained

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19 ⁷ It would appear to the court that the obvious reason class counsel did not seek mandatory
20 joinder here is that Zimmerman was not a necessary party to this action because subsequent
21 disputes between attorneys or between attorneys and their clients are regularly addressed separate
22 and apart from the initial underlying case. See, e.g., *K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d
23 963, 970 (9th Cir. 2014) (distinguishing between attorneys’ fees sought pursuant to federal law
24 and “an attorney-client fee dispute that could be resolved in state court as a breach of contract
25 claim”); *Dryer v. Nat’l Football League*, No. 09-cv-2182 (PAM/FLN), 2016 WL 6609182, at *2
26 (D. Minn. Nov. 7, 2016) (finding a dispute between co-counsel over attorneys’ fees was a “run-
27 of-the-mill contract action” not falling within the “necessary in aid of jurisdiction” exception);
28 *Ralston v. Mortg. Inv’rs Grp., Inc.*, No. 08-CV-00536-JF (LHK), 2015 WL 5027603, at *6 (N.D.
Cal. Aug. 25, 2015) (concluding the court lacked jurisdiction over a dispute amongst class
counsel regarding how attorneys’ fees were to be apportioned). Indeed, it is far from certain that
Zimmerman would have even been allowed to intervene in this action had he attempted to do so.
See *In re Nucoa Real Margarine Litig.*, No. CV 10-00927 MMM (AJWx), 2012 WL 12854896,
at *17–22 (C.D. Cal. June 12, 2012) (noting concerns with allowing discharged counsel to
intervene in a class settlement, denying motion to intervene, and suggesting discharged counsel’s
interests “can be sufficiently protected by filing a separate action seeking fees”).

1 jurisdiction over fee allocation “and any related disputes” following a settlement that yielded an
2 award of approximately \$60 million in attorneys’ fees. *See* 361 Fed. App’x at 394. Here, the
3 court retained jurisdiction only over “further applications arising out of or in connection with the
4 settlement.” (Doc. No. 189 at 24.) Zimmerman was not mentioned in the settlement agreement
5 in this action,⁸ was no longer counsel of record at the time settlement was reached and a class was
6 certified, and has brought state claims concerning work allegedly done prior to settlement on this
7 and another case. (*See* Doc. Nos. 108, 171, 194-3.) Zimmerman’s claims do not “aris[e] out of
8 or in connection with” the settlement of this case, and are therefore not within the jurisdiction that
9 this court retained in approving the settlement of this action. Moreover, in each of the other cases
10 identified by class counsel, the party filing the state court lawsuit was known to and heard by the
11 federal court during class settlement proceedings in connection with their claim of entitlement to
12 fees. *See Silcox*, 687 F.2d at 849–50, 852 (concluding a dispute between a plaintiff and her
13 attorneys had been “fully litigated” where the defendants paid the settlement money into the court
14 and the court heard from both plaintiff and her counsel prior to ordering its distribution); *Milliron*,
15 2009 WL 4798240, at *2, *5–6 (noting that the court specifically retained jurisdiction over
16 disputes regarding the fee allocation following settlement, and the attorneys disputing that
17 allocation had appeared before the district court, been heard, and ultimately argued the award was
18 fair and reasonable); *In re Nat’l Student Mktg. Litig.*, 655 F. Supp. at 662–63 (enjoining a state
19 court case filed by executrix of accountant’s estate disputing the amount to be paid to the estate
20 following a class action settlement because the accountant had presented evidence to and received
21 an award directly from the federal court).

22 To summarize, class counsel have not demonstrated that two of the three elements of
23 claim preclusion are met here. Because class counsel cannot meet the elements of claim
24 preclusion, they cannot demonstrate the applicability of the relitigation exception, which is
25 “designed to implement well-recognized concepts of claim and issue preclusion.” *Smith*, 564
26 U.S. at 306; *see also Chick Kam Choo*, 486 U.S. at 147. Therefore, the relitigation exception

27 ⁸ In contrast, the settlement agreement specifically included an agreement to the appointment of
28 Cordero, Fischbach, and Magolnick as class counsel. (Doc. No. 171 at 6.)

1 provides no basis to enjoin the state court action at issue here.

2 **CONCLUSION**

3 The briefing submitted by class counsel in support of their motion to enjoin is thorough
4 and well done. Based upon their performance in this action, the court would expect no less.
5 However, the law does not support the position they have taken as to the issue now before the
6 court. Their dispute with attorney Zimmerman over fees in this and an earlier case is a matter
7 wholly separate from this action as well as the settlement and award of attorneys' fees which this
8 court approved. Accordingly, for all of the reasons set forth above, the motion to enjoin
9 Zimmerman's state court proceeding (Doc. No. 194) is denied. Because the motion itself is
10 denied, the sanctions requested by class counsel against Zimmerman are unwarranted and will
11 also be denied.

12 IT IS SO ORDERED.

13 Dated: January 30, 2018

14 
UNITED STATES DISTRICT JUDGE

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