

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

SHAYLA MARCOTTE, individually
and on behalf of all others similarly situated,

Plaintiff,

v.

CAVU ECOMMERCE (AMER) LLC,

Defendant.

Civil Action No.: 2025CH06466

Hon. David B. Atkins

Calendar 16

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SERVICE AWARD,
ATTORNEYS' FEES, COSTS, AND EXPENSES**

Dated: October 23, 2025

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INTRODUCTION

In this putative class action, Plaintiff Shayla Marcotte (“Plaintiff”) alleges that Defendant CAVU Ecommerce (Amer) LLC (“CAVU” or “Defendant”) (Plaintiff and Defendant are collectively referred to as the “Parties”), violated California’s Honest Pricing Law, Cal. Civ. Code § 1770(a)(29)(A) and California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*, by charging Plaintiff and all similarly situated consumers a mandatory “Service Charge” at checkout that was never disclosed (or included) with the initially advertised price of a reservation on Defendant’s Websites, airportparkingreservations.com and airportparking.com.

Defendant collected \$540,818.19 in service charges from California consumers from July 1, 2024 through March 10, 2025. And after more than three months of arm’s-length negotiations, the Parties have reached a proposed \$425,000 non-reversionary settlement (“Settlement” or “Agreement”) from which Class Members who file a valid claim will receive *pro rata* cash payments. And equally important, Defendant modified the purchase flows on its Websites as of March 11, 2025, and as part of the Settlement, Defendant agrees to clearly and conspicuously disclose Service Charges to consumers with the initially advertised price in the first instance, unless and until California’s Honest Pricing Law is amended, repealed, or otherwise invalidated.

Plaintiff and Class Counsel respectfully request that the Court approve a Service Award of \$5,000 to Plaintiff and an award of attorneys’ fees, costs, and expenses of thirty five percent (35%) of the Settlement Fund (or \$148,750.00). As detailed below, the requested awards are appropriate under Illinois law, consistent with the amounts awarded in prior similar settlements, and fairly compensate Class Counsel and Representative Plaintiff for the work they performed and commendable result they achieved in this high-risk litigation.

FACTUAL AND PROCEDURAL BACKGROUND

On or about January 29, 2025, Plaintiff Marcotte sent Defendant a Notice and Demand for Corrective Action as required by California’s Consumers Legal Remedies Act (the “CLRA Letter”). *See* Declaration of Philip L. Fraietta (“Fraietta Decl.”) ¶ 4. The CLRA Letter informed Defendant that the checkout flows on its Websites, airportparkingreservations.com and airportparking.com (together, the “Websites”), violated California’s Honest Pricing Law and were unfair and unlawful under California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* *Id.* California’s Honest Pricing Law prohibits businesses from advertising, displaying, or offering a service “that does not include all mandatory fees or charges other than” taxes, government fees and/or postage and shipping charges. *See* Cal. Civ. Code § 1770(a)(29). The CLRA Letter informed Defendant that it was in violation of the Honest Pricing Law by providing consumers a host of airport parking reservation options at stated prices while failing to include the “Service Charge” with those prices. Fraietta Decl. ¶¶ 4, 7. That Service Charge is only added to the transaction at the checkout pages; several pages after Plaintiff and consumers have already selected a reservation option at an initially advertised price. *Id.* ¶ 7.

Over the next several months, the Parties engaged in good faith settlement discussions culminating in the Settlement here. *Id.* ¶¶ 5-6. On June 18, 2025, Plaintiff filed the operative Class Action Complaint. *Id.* ¶ 7. The Complaint seeks actual damages, restitution and disgorgement, injunctive relief, and seeks certification of a class of California residents who paid Defendant’s “Service Charge” at checkout. *Id.* ¶ 7.

On August 26, 2025, the Court granted preliminary approval of this Settlement. *Id.* at Exhibit 3.

SUMMARY OF THE SETTLEMENT

The Settlement provides an exceptional result for the Class by creating a non-reversionary \$425,000 Settlement Fund from which approximately 60,231 class members can make a claim for a *pro rata* payment. *Id.* ¶¶ 5, 9. The Class is defined as:

All California residents who made a reservation through airportparkingreservations.com or airportparking.com and paid a mandatory “Service Charge” at checkout from July 1, 2024 to March 10, 2025.¹

Fraietta Decl., Ex. 1, ¶ 1.36; Fraietta Decl. ¶ 5. Moreover, as part of the settlement, CAVU has agreed that it will clearly and conspicuously disclose Service Charges to the consumer with the advertised price presented to a consumer in the first instance, unless and until California’s Honest Pricing Law, Cal. Civ. Code § 1770(a)(29)(A), is amended, repealed, or otherwise invalidated.

ARGUMENT

I. THE REQUESTED ATTORNEYS’ FEES, COSTS, AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

“Illinois follows the ‘American Rule,’ which provides that absent statutory authority or a contractual agreement, each party must bear its own attorney fees and costs.” *McNiff v. Mazda Motor of Am., Inc.*, 384 Ill. App. 3d 401, 405 (4th Dist. 2008) (quoting *Negro Nest, L.L.C. v. Mid-Northern Mgmt., Inc.*, 362 Ill. App. 3d 640, 641-2 (4th Dist. 2005)) (quotations omitted). “If a statute or contractual agreement expressly authorizes an award of attorney fees, the court may award fees ‘so long as they are reasonable.’” *Id.* (citing and quoting *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (1st Dist. 2007)). Here, the Parties have entered into a

¹ Excluded from the Class are (1) any Judge or Magistrate presiding over this Action and members of their families; (2) CAVU, CAVU’s subsidiaries, parent companies, successors, predecessors, and any entity in which CAVU or its parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) Persons who properly execute and file a timely request for exclusion from the Class; and (4) the legal representatives, successors or assigns of any excluded Persons.

contractual agreement – the Settlement Agreement – expressly authorizing an award of attorney fees, costs, and expenses up to \$148,750.² Settlement Agreement ¶ 8.1.

A. The Court Should Apply the Percentage-of-the-Fund Method To This Case

“When awarding attorney’s fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved.” *Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 244 (1995). “The decision to award fees based on the lodestar or percentage method is a matter within the sound discretion of the trial court, considering the particular facts and circumstances of each case.” *Id.* However, the Court is not required to perform a lodestar cross-check on Class Counsel’s fees. *McCormick v. Adtalem Glob. Educ., Inc.*, 2022 IL App (1st) 201197-U, ¶ 24 (rejecting an objector’s argument that failure to perform lodestar cross-check rendered class counsel’s fee unreasonable and awarding class counsel fees totaling 35% of the common fund, or \$15,7000,00); *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58, 52 N.E.3d 427, 441 (citing *Brundidge*, 168 Ill.2d at 246) (rejecting an objector’s argument that the trial court was required to perform a lodestar cross-check on class counsel’s fees and awarding class counsel fees totaling 33% of the

² See William B. Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:12 (5th ed. 2019) (parties to suit may have private agreements concerning fees which may include agreement between class counsel and defendant whereby defendant agrees to pay a certain fee requested by class counsel); see also *Evans v. Jeff D.*, 475 U.S. 717, 738 n.30 (1986) (parties may simultaneously negotiate a “defendant’s liability on the merits and his liability for his opponents’ attorney’s fees”); *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App’x 53, 60 (3d Cir. 2014) (awarding \$500,000 in fees for injunctive class settlement where defendant agreed to change its misleading labels); *Wing v. Asacro Inc.*, 114 F.3d 986, 988 (9th Cir. 1997) (“At the outset, we note that the fee dispute in this case arises [not from a statute or common fund, but] out of a contract: in the Settlement Agreement, Asacro agreed to pay the reasonable attorney fees and expenses as determined and awarded by the court.”); *Browne v. Am. Honda Motor Co., Inc.*, No. CV 09-06750 (C.D. Cal. Oct. 10, 2010) (“A settlement agreement is a binding contract” and “contractual provisions providing for the payment of attorneys’ fees . . . provide a basis for awarding fees.”); *In re TJX Cos. Retail Secs. Breach Litig.*, 584 F. Supp. 2d 395, 399 (D. Mass. 2008) (noting that basis for awarding fees was “part of the Agreement, [in which Defendant] agreed to pay court-approved attorneys’ fees not to exceed \$6,500,000”); *Deloach v. Philip Morris Cos.*, 2003 WL 23094907, at *4 n.2 (M.D.N.C. Dec. 19, 2003) (“the present petition [for attorney fees] was brought pursuant to a private [settlement] agreement among the parties”) (citation omitted).

common fund, or \$7,600,000). Indeed, the “[p]ercentage analysis approach eliminates the need for additional major litigation and further taxing of scarce judicial resources.” *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 924–25 (1st Dist. 1995). “Accordingly, most federal circuits ... have abandoned the lodestar in favor of a percentage fee in common fund cases.” *Id.*

In “choosing between the percentage and lodestar approaches,” courts “look to the calculation method most commonly used in the marketplace at the time such a negotiation would have occurred.” *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-01 (N.D. Ill. 2015) (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)); *see also McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 814-15 (E.D. Wis. 2009). In class action litigation, where “the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs’ ultimate recovery,” *Kolinek*, 311 F.R.D. at 500-01, state and federal courts in Illinois and throughout the country are in near unanimous agreement “the percentage approach is likely what the class members and counsel would have negotiated when counsel agreed to take on the case.” *McCormick*, 2022 IL App (1st) 201197-U, ¶ 26; *see also Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (“When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the ‘market rate.’”); *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923 (1st Dist. 1995) (noting that “a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases”) (citation omitted); *In re Continental Illinois Securities Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (market for legal services paid on a contingency basis shows the proper percentage to apply in a class action that creates a common fund for the benefit of the class)); *Williams v. Gen. Elec. Capital Auto Lease*, 94 C 7410, 1995 WL 765266, at *9 (N.D. Ill. Dec. 26, 1995) (noting that “[t]he approach favored in the Seventh Circuit is to compute attorney’s fees as a percentage of the benefit conferred upon the class”); *see also, e.g., Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (explaining that

where “a class suit produces a fund for the class,” as is the case here, “it is commonplace to award the lawyers for the class a percentage of the fund,” and affirming fee award of 38%) (citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)); *Sutton v. Bernard*, 504 F.3d 688, 693 (7th Cir. 2007) (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) (“[T]he court agrees with Class Counsel that the fee award . . . should be calculated as a percentage of the money recovered for the class.”).

This Court should likewise apply the percentage-of-the-fund method. The percentage-of-the-fund method best replicates the *ex ante* market value of the services that Class Counsel provided to the Settlement Class. It is not just the typical method used in contingency-fee cases generally, see *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998), but it is also the means by which an informed Settlement Class and Class Counsel would have established counsel’s fee *ex ante*, at the outset of the litigation. See *Kolinek*, 311 F.R.D. at 500-01 (“[T]he normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs’ ultimate recovery”). The percentage-of-the-fund method also better aligns Class Counsel’s interests with those of the Settlement Class because it bases the fee on the results the lawyers achieve for their clients rather than on the number of motions they file, documents they review, or hours they work, and it avoids some of the problems the lodestar-times-multiplier method can foster (such as encouraging counsel to delay resolution of the case when an early resolution may be in their clients’ best interests). *McCormick*, 2022 IL App (1st) 201197-U, ¶ 26 (“Peart’s argument that a method that is disfavored in class actions should have been used at least for a cross-check of the fee award is an argument for inefficiency. He is proposing what the supreme court disapproved of in *Brundidge*: ‘protracted satellite litigation involving the attorney fees award’ as the trial

court determines ‘the reasonable fees to be awarded based upon hourly rates and the reasonable number of hours expended.’”); *Brundidge*, 168 Ill.2d at 242; *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 720–21 (7th Cir. 2001).³ And it is also simpler to apply. *Id.*; see also, e.g., *Kolinek*, 311 F.R.D. at 501 (percentage of the ultimate recovery method appropriate for awarding fees in TCPA class action “because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of nine million lightly-injured plaintiffs likely would not be interested in doing”). Accordingly, the Court should apply the percentage-of-the-fund method.

B. The Requested Attorneys’ Fees, Costs, and Expenses Are Reasonable As A Percentage Of The Class Benefit

In class action settlements, courts typically award attorneys’ fees based on a percentage of the total settlement, which includes any litigation expenses incurred. *Brundidge*, 168 Ill.2d at 238. “[T]he percentage of the fund method...reflects the results achieved.” *Id.* at 244. An award to Class Counsel of 35% of the Settlement Fund is well within the range of fees typically awarded to class counsel by Illinois courts in comparable all-cash class action settlements.⁴ See, e.g., *Retsky Family Ltd. P’ship v. Price Waterhouse LLP*, 2001 WL 1568856,

³ In this case for example, a lodestar approach would have created a perverse incentive for Class Counsel to reject or delay entering into the Settlement offer set forth in the Settlement Agreement merely to bill more hours through more unnecessary, wasteful, and inefficient litigation—an approach that, had it been adopted by Class Counsel, may have resulted in no recovery for all or some of the Settlement Class Members based on the novelty of California’s Honest Pricing Law and the issues Defendant intended to raise in defense.

⁴ The requested award of fees to Class Counsel of 35% of the settlement fund is inclusive of \$257.22 in out-of-pocket litigation expenses incurred in the prosecution of this action to date, not including those that will accrue as the Settlement process continues. Fraietta Decl. ¶ 23. Although typically awarded in addition to the requested fee award, in this case Class Counsel do not seek reimbursement of these expenses on top of the requested Fee Award. See, e.g., *Kaplan v. Houlihan Smith & Co.*, 2014 WL 2808801, at *4 (N.D. Ill. June 20, 2014) (awarding expenses “for which a paying client would reimburse its lawyer”); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation).

at *4 (N.D. Ill. Dec. 10, 2001) (noting that a “customary contingency fee” ranges “from 33 1/3% to 40% of the amount recovered”) (citing *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 599 (N.D. Ill. 2011) (same); *Meyenburg v. Exxon Mobil Corp.*, 2006 WL 2191422, at *2 (S.D. Ill. July 31, 2006) (“33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation”); *see also, e.g., Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding an attorneys’ fees award of one-third of a reversionary fund recovered in light of the “substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted”).

1. The Value of the Settlement Is At Least \$425,000

To calculate attorneys’ fees based on the percentage of the benefit, the Court must first determine the value of the Settlement Fund. In doing so, the Court must include the value of the benefits conferred to the Class, including any attorneys’ fee, expenses, service award and notice and claims administration payments to be made. *See, e.g., Brundidge*, 168 Ill.2d at 238. Thus, the Court should consider the entire benefit conferred by the Settlement, including the benefit fund, agreed on attorneys’ fees, costs, and expenses, cost of notice and claims administration, and the Plaintiff’s incentive award, amounting to a total value of at least \$425,000. The injunctive relief in this Settlement adds significant value as it ensures Defendant’s compliance with the law and eliminates the risk of deception to consumers going forward. *See, e.g., In re TikTok, Inc., Consumer Priv. Litig.*, 617 F. Supp. 3d 904, 935 (N.D. Ill. 2022) (“Furthermore, TikTok must implement a privacy compliance and training program for all of its employees, and its compliance with the program will be verified a third-party auditor for the first three years after the settlement is finalized. These injunctive remedies confer substantial benefits to the class.”).

2. The Requested 35% Of the Settlement Fund Is Reasonable

Here, the requested \$148,750 fee, inclusive of costs and expenses, is 35% of the \$425,000 Settlement Fund generated on behalf of the Settlement Class, which falls within the range awarded in class actions by courts throughout the country. Courts have recognized that fee awards as high as 50% of the gross settlement fund are reasonable. *See Newburg on Class Actions, supra*, §15:83 (5th ed. Dec. 2016 update) (“Usually, 50 percent of the fund is the upper limit on a reasonable fee award from a common fund, . . . though somewhat larger percentages are not unprecedented.”); *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 7-8 (D.D.C 2008) (noting that fee awards may range up to 45%, and approving fee request of 45% of the total gross recovery); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 499 (D.D.C. 1981) (awarding 45% of \$7.3 million gross settlement fund as attorneys’ fees). The requested fee of 35% of the Settlement Fund is reasonable in light of the substantial monetary relief obtained by Class Counsel here – despite significant risk – and should be awarded.

Indeed, the amount sought is almost identical to that granted in another junk fees case: *Chambers v. Together Credit Union*, where the court awarded plaintiffs’ counsel \$163,909.33 or 33% of the \$525,000 common fund. 3:19-cv-00842-SPM, ECF No. 85 (S.D. Ill. 2021), 1-2. Similarly, in a second junk fee case, *Charles v. Color Factory*, the court granted a fee of \$238,235.22 of \$714,705.68 common fund. 1:24-cv-00322-JSR, ECF Nos. 44, 48 (S.D.N.Y. 2024). And “[c]ourts within the Seventh Circuit, and elsewhere, regularly award percentages of 33.33% or higher to counsel in class action litigation.” *Hale v. State Farm Mut. Automobile Ins. Co.*, 2018 WL 6606079, at *10 (S.D. Ill. Dec. 16, 2018). And given that the common fund amount here is slightly smaller, a nominally higher award is justified. *See e.g., Martin v. AmeriPride Servs, Inc.*, 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) (“Other case law surveys suggest that 50% is the upper limit, 30-50% commonly being awarded in cases in which

the common fund is relatively small.”). And where—like here—there is a risk of no recovery at all because of the outstanding issues of fact and novelty of the law, a simple 2% higher award is justified for the extraordinary results and certainty obtained for the Class. *See e.g., McCormick*, 2022 IL App (1st) 201197-U, ¶ 32 (affirming 35% award where “the attorneys were skilled litigators who undertook significant risk in overcoming DeVry’s thin liability and achieving an extraordinary settlement for the class.”).

“When assessing the reasonableness of fees, a trial court may consider a variety of factors, including the nature of the case, the case’s novelty and difficulty level, the skill and standing of the attorney, the degree of responsibility required, the usual and customary charges for similar work, and the connection between the litigation and the fees charged.” *McNiff*, 384 Ill. App. 3d at 407 (quoting *Richardson v. Haddon*, 375 Ill. App. 3d 312, 314-5 (1st Dist. 2007)) (quotations omitted). Here, each of these factors shows the requested fee is reasonable.

a. *Plaintiff’s Claims Carried Substantial Litigation Risk*

This case presented substantial litigation risk. Class Counsel took on this case knowing that California’s Honest Pricing Law had only been in effect for approximately seven months at the time the demand letter was sent to Defendant. Aside from the typical risks associated with class action litigation, such as certifying a class, this case presented several matters of first impression under California law. *See, e.g., Schmitt v. Kaiser Foundation Health Plan of Washington*, 2024 WL 1676754, at *4 (W.D. Wash. Apr. 18, 2024) (approving fee request where “[t]he case was novel” and “turn[ed] on issues of first impression[.]”). Nonetheless, despite knowing the risks, Class Counsel took on the case, worked on the case, and even undertook a significant financial risk, with no upfront payment, and no guarantee of payment absent a successful outcome. In addition to attorney time spent on the case, Class Counsel also advanced a total of \$257.22 in out-of-pocket expenses, again with no guarantee of repayment. Fraietta

Decl. ¶ 23. If the case had advanced through class certification, these expenses would have increased many-fold, and Class Counsel would need to advance these expenses potentially for several years to litigate this action through judgment and appeals.

Further, Defendant would have contested class certification, and Plaintiff would have faced serious risks even before getting to class certification. Defendant most certainly would have sought summary judgment, as well as engaged in extensive and protracted discovery. Despite these risks, the Settlement Agreement provides every Settlement Class Member who completes an approved Claim Form with a *pro rata* cash payment equal to that Settlement Class Member's out-of-pocket percentage multiplied by the available settlement fund. This is an excellent result. It ensures that Settlement Class Members are equitably compensated for their injuries where such compensation is far from certain. *See e.g., Chambers*, 3:19-cv-00842-SPM, ECF No. 86 at ¶ 11 (granting final approval of settlement where "the proposal treats the Class members equitably to one another because the Net Settlement Fund will be divided pro rata based on the number of Multiple NSF Fees each member was charged[.]").

b. *The Skill and Standing of the Attorneys Supports
The Requested Fee*

The attorneys handling this case are in good standing in their respective jurisdictions. Class Counsel are well-respected attorneys with significant experience litigating similar class action cases in federal and state courts across the country, including other junk fee cases. Fraietta Decl. ¶ 11, Ex. 2 (firm resume of Bursor & Fisher, P.A.). Indeed, Class Counsel has been recognized by courts across the country for their expertise. *See id*; *see also Famular v. Whirlpool Corp.*, 2019 WL 1254882, at *4 (S.D.N.Y. Mar. 19, 2019) ("Class counsel are experienced and qualified class action lawyers. Bursor & Fisher, P.A., has been appointed class counsel in dozens of cases in both federal and state courts, and has won several multi-million dollar verdicts or recoveries.") (internal quotation omitted); *Ebin v. Kangadis Food Inc.*, 297

F.R.D. 561, 566 (S.D.N.Y. 2014) (Rakoff, J.) (“Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. ... The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in [six] class action jury trials since 2008.”).

Furthermore, “[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs’ counsel’s performance.” *In re MetLife Demutalization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Here, Defendant was represented by the prominent and well-respected law firm of Squire Patton Boggs, LLP. Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) (“The high quality of defense counsel opposing Plaintiffs’ efforts further proves the caliber of representation that was necessary to achieve the Settlement.”).

II. THE REQUESTED SERVICE AWARD IS REASONABLE AND SHOULD BE APPROVED

A service award of \$5,000.00 for Plaintiff is appropriate here. Courts routinely approve service awards to compensate named plaintiffs for the work, burden, and public role they take on in getting relief for the Class. “Many cases note the public policy reasons for encouraging individuals with small personal stakes to serve as class plaintiffs in meritorious cases.” 299 F.R.D. 160, NACA Guideline 5 Discussion (citing cases).

Here, without the Class Representative, there would be no recovery at all. Before and during the litigation and settlement, the Class Representative consolidated with Class Counsel, provided documentation, reviewed the Complaint and participated in the decision to accept the proposed settlement. Through this process, the Class Representative spent her own valuable time to represent the interests of the Class which ultimately provided a substantial benefit to its Members. In similar “junk fee” cases, at least \$5,000 has been found reasonable. *See e.g.*,

Charles, 1:24-cv-00322-JSR, ECF Nos. 44 at n.4, 48 (approving \$5,000 incentive award);
Chambers, 3:19-cv-00842-SPM, ECF No. 85, at 7 (approving \$7,500 incentive award).

CONCLUSION

For the reasons described above, Plaintiff respectfully requests that the Court grant Plaintiff's Motion for Service Award, Attorneys' Fees, Costs, and Expenses.

Dated: October 23, 2025

Respectfully submitted,

BURSOR & FISHER, P.A.

By: /s/ Philip L. Fraietta

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Class Counsel

Individual Rule VIII(c) Westlaw Citations

168 Ill.2d 235

Supreme Court of Illinois.

Helen BRUNDIDGE et al., Appellants,

v.

GLENDALE FEDERAL BANK, F.S.B., Appellee.

No. 78132.

I

Nov. 22, 1995.

Synopsis

Customer's class action against bank, which alleged unfair and deceptive practices in the computing of escrow accounts for payment of real estate taxes in connection with residential mortgages, resulted in settlement under which bank agreed to pay refunds. Customer's attorneys filed fee petition seeking fixed percentage of the refund amounts. The Circuit Court, Cook County, Edward C. Hofert, J., denied petition, and the Appellate Court affirmed. After petition for leave to appeal was allowed, 159 Ill.2d 564, 207 Ill.Dec. 514, 647 N.E.2d 1007, the Supreme Court, McMorrow, J., held that in determining amount of attorney fees to be granted plaintiffs' counsel in common fund class action litigation, circuit court is vested with discretionary authority to choose either percentage-of-the-award method or lodestar method, based on facts and circumstances of each case.

Reversed and remanded.

Attorneys and Law Firms

****910 ***564 *236** Daniel A. Edelman, Cathleen M. Combs and James O. Latturmer, Edelman & Combs, and Lawrence Walner (James P. Arndt, of counsel), all of Chicago, for appellants.

Gerald L. Angst, of Sidley & Austin, Chicago, for appellee.

Alvin D. Meyers and Steven J. Teplinsky, Fagel & Haber, and James D. Holzhauer and Javier H. Rubinstein, Mayer, Brown & Platt, all of Chicago, for amicus curiae Firemen's Annuity & Benefit Fund of Chicago.

Opinion

Justice McMORROW delivered the opinion of the court:

In this appeal we are asked to reconsider *Fiorito v. Jones* (1978), 72 Ill.2d 73, 18 Ill.Dec. 383, 377 N.E.2d 1019, and *Leader v. Cullerton* (1976), 62 Ill.2d 483, 343 N.E.2d 897. In *Fiorito* and *Leader*, this court adopted the lodestar method for awarding attorney fees to plaintiffs' counsel in class action litigation where the plaintiffs' recovery results in the creation of a common fund from which attorney fees are awarded. The question presented is whether we should grant the trial court the discretion to award attorney fees based on a percentage of the common fund recovered in the class action suit.

BACKGROUND

The pertinent facts are undisputed. In June 1991, plaintiff Helen Brundidge filed suit against the defendant, Glendale Federal Bank (the Bank). The complaint alleged that the Bank's methods of computing mortgage escrow accounts for the payment of residential real estate taxes were unfair and amounted to deceptive practices. The litigation was brought as a class action suit on behalf of all residential mortgage customers of the Bank who had been affected by the allegedly deceptive manner of computing mortgage escrow accounts.

237** In June 1992, plaintiff and the Bank entered into a settlement agreement pursuant to which the Bank agreed to refund to all of its customers the sums that represented overpayments they had made into their mortgage escrow accounts. The Bank further agreed to follow certain procedures in its future collection of customers' mortgage escrow payments. The agreement provided a right to plaintiff's counsel to monitor the *911 ***565** Bank's implementation of the new procedures.

With regard to attorney fees, the agreement recited that the Bank would pay a set sum to plaintiff's counsel. The Bank also agreed not to oppose an additional attorney fee petition from plaintiff's attorneys. Thereafter plaintiff's lawyers filed a fee petition in which they requested that they be awarded a percentage of the amounts that the Bank would pay in refunds and interest to the plaintiff class members. The trial court denied the fee petition on the ground that this court rejected use of a percentage method when it adopted the lodestar method of awarding attorney fees in class action litigation in *Fiorito*, 72 Ill.2d 73, 18 Ill.Dec. 383, 377 N.E.2d 1019.

Plaintiff appealed from the trial court's ruling that disallowed a percentage award of attorney fees. The appellate court affirmed, relying on the precedent of *Fiorito*. (No. 1-92-

3559 (unpublished order under [Supreme Court Rule 23](#).) However, the appellate court noted several deficiencies in the lodestar method of awarding fees and suggested that this court reconsider the doctrine. We allowed the plaintiff's petition for leave to appeal. (145 Ill.2d R. 315(a).) Because the propriety of the lodestar method was questioned in *Ryan v. City of Chicago* (1995), 274 Ill.App.3d 913, 211 Ill.Dec. 21, 654 N.E.2d 483, we allowed the motion of one of the litigants in that case, Firemen's Annuity and Benefit Fund of Chicago, to file an *amicus curiae* brief in the instant appeal. The remaining litigant in *Ryan*, attorney Clinton A. Krislov, was permitted to file a response to Firemen's Fund's *amicus* brief.

*238 ANALYSIS

Illinois has long adhered to the general American rule that the prevailing party in a lawsuit must bear the costs of litigation, unless a statutory provision or an agreement between the parties allows the successful litigant to recover attorney fees and the expenses of suit. (*Saltiel v. Olsen* (1981), 85 Ill.2d 484, 488, 55 Ill.Dec. 830, 426 N.E.2d 1204; *Hamer v. Kirk* (1976), 64 Ill.2d 434, 437, 1 Ill.Dec. 336, 356 N.E.2d 524.) However, where the outcome of the litigation has created a common fund, this court has adopted the “common fund doctrine.” (*Saltiel*, 85 Ill.2d at 489–91, 55 Ill.Dec. 830, 426 N.E.2d 1204; *Hamer*, 64 Ill.2d at 437, 1 Ill.Dec. 336, 356 N.E.2d 524.) The common fund doctrine allows one who “creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees.” (*Swedish Hospital Corp. v. Shalala* (D.C.Cir.1993), 1 F.3d 1261, 1265; see *Central R.R. & Banking Co. v. Pettus* (1885), 113 U.S. 116, 126–27, 5 S.Ct. 387, 392–93, 28 L.Ed. 915, 918–19.) The doctrine finds its source in the court's inherent equitable powers (*Sprague v. Ticonic National Bank* (1939), 307 U.S. 161, 167, 59 S.Ct. 777, 780, 83 L.Ed. 1184, 1187) and is founded on the rationale that successful litigants would be unjustly enriched if their attorneys were not compensated from the common fund created for the litigants' benefit (*Mills v. Electric Auto-Lite Co.* (1970), 396 U.S. 375, 392, 90 S.Ct. 616, 625, 24 L.Ed.2d 593, 606). By awarding fees payable from the common fund created for the benefit of the entire class, the court spreads the costs of litigation proportionately among those who will benefit from the fund. *Boeing Co. v. Van Gemert* (1980), 444 U.S. 472, 478, 100 S.Ct. 745, 749, 62 L.Ed.2d 676, 682; see generally Silver, *A*

Restitutionary Theory of Attorneys' Fees in Class Actions, 76 Cornell L.Rev. 656 (1991).

At one time, attorney fees in Illinois common fund cases were awarded based upon a percentage of the amount recovered on behalf of the plaintiff class. (See *239 *Fiorito*, 72 Ill.2d at 88, 18 Ill.Dec. 383, 377 N.E.2d 1019; *Leader*, 62 Ill.2d at 488, 343 N.E.2d 897.) Approximately two decades ago, this court questioned the percentage method of assessing fees and began to follow the Federal courts' approach of using a lodestar method to award attorney fees.

This court's adoption of the lodestar method of awarding attorney fees in class action litigation began in a trilogy of cases commencing with *Flynn v. Kucharski* (1974), 59 Ill.2d 61, 319 N.E.2d 1. In *Flynn*, the court held that attorney fees were properly awarded for plaintiffs' counsel in class action litigation that challenged the diversion of tax monies ***912 ***566 from countywide agencies to units of local government. However, this court found that the trial court had not properly considered the various factors that influence the amount of attorney fees that should be awarded to plaintiffs' counsel in class action litigation. The court discerned error in the trial court's failure to give greater importance to the amount of time which plaintiffs' counsel had devoted to the cause, stating,

“In a case of this kind the fee is not, as it is in the usual contingent-fee case, an amount that has been fixed by voluntary agreement between the client and his attorney. Rather, it is the amount taken, by order of the court, from money that belongs to others. The rights of those others must be carefully considered as well as those of the attorneys. In our opinion the time expended in such a case is not to be relegated to a secondary or minor position; it is a highly significant factor in determining the fee.” *Flynn*, 59 Ill.2d at 66–67, 319 N.E.2d 1.

In both *Leader* and *Fiorito*, this court relied upon *Flynn* to hold that the reasonable hours devoted by plaintiff's attorneys should be the starting point in assessing fees (*Fiorito*, 72 Ill.2d at 88–89, 18 Ill.Dec. 383, 377 N.E.2d 1019; *Leader*, 62 Ill.2d at 488, 343 N.E.2d 897.) The court decided that, to determine an appropriate computation, the reasonable value of the services rendered should be increased by a weighted multiplier representing the significance of other pertinent *240 considerations, such as the contingency nature of the proceeding, the complexity of the litigation, and the benefits that were conferred upon the class members. (*Fiorito*, 72 Ill.2d at 91, 18 Ill.Dec. 383, 377 N.E.2d 1019; *Leader*, 62

Ill.2d at 489, 343 N.E.2d 897.) The court declined to adopt any set guidelines with respect to the value attributable to these additional considerations and stressed that each case must be considered on its own merits. *Fiorito*, 72 Ill.2d at 92, 18 Ill.Dec. 383, 377 N.E.2d 1019.

In so ruling, this court criticized the percentage-of-the-recovery method of awarding fees, noting that “[s]uch computation in many cases resulted in exorbitant fees, sparking criticism of courts and of the legal profession. [Citations.]” (*Leader*, 62 Ill.2d at 488, 343 N.E.2d 897.) The court also expressed its concern that the interests of absent class members should be protected, observing,

“[A]lthough class action attorney's fees are contingent upon success, a class action is not a typical contingent-fee case because the amount of the fee is not the result of a voluntary agreement between the client and his attorney. Rather, the fee is an amount taken, by order of the court, from money that belongs to others, and the amount is dependent upon the exercise of the court's sound discretion.” *Fiorito*, 72 Ill.2d at 87–88, 18 Ill.Dec. 383, 377 N.E.2d 1019.

This court's decisions since *Fiorito* have continued to use and apply this lodestar method of determining attorney fees in class action litigation. (*Lurie v. Canadian Javelin, Ltd.* (1982), 93 Ill.2d 231, 239, 66 Ill.Dec. 666, 443 N.E.2d 592 (applying lodestar method, but noting that it “is hardly suited to a case in which a large amount of time has been spent for a disproportionately modest benefit for the class”); *Saltiel v. Olsen* (1981), 85 Ill.2d 484, 55 Ill.Dec. 830, 426 N.E.2d 1204.) Similarly, our appellate court has followed this court's pronouncements of the lodestar doctrine in *Flynn*, *Leader* and *Fiorito*. See, e.g., *Langendorf v. Irving Trust Co.* (1992), 244 Ill.App.3d 70, 184 Ill.Dec. 822, 614 N.E.2d 23; *Board of Education of the Aptakisic–Tripp School District No. 102 v. County of Lake* (1987), 156 Ill.App.3d 1064, 109 Ill.Dec. 249, 509 N.E.2d 1088; *241 *Board of Commissioners v. County of Will* (1987), 154 Ill.App.3d 395, 107 Ill.Dec. 153, 506 N.E.2d 1044; *DeBruyn v. Elrod* (1983), 121 Ill.App.3d 290, 76 Ill.Dec. 836, 459 N.E.2d 971.

The lodestar method of awarding attorney fees adopted by this court in *Fiorito* and its predecessors was utilized in the Federal courts. (See, e.g., *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.* (3d Cir.1973), 487 F.2d 161 (*Lindy I*), *appeal following remand* (3d Cir.1976), 540 F.2d 102 (*Lindy II*)). The movement to a lodestar regime was predicated on concerns that “percentage-

of-recovery * * * sometimes resulted in strikingly large fee **913 ***567 awards,” generating criticism from the press and those within the legal profession “that the fees were disproportionate to the actual efforts expended by the attorneys.” (*Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 242 (October 8, 1985) (hereinafter *Third Circuit Task Force Report on Attorney Fees*)). In the few years following its birth, the lodestar method of *Lindy I* was adopted by many Federal and State jurisdictions, including our own in *Fiorito*. See generally Comment, *Attorney's Fees in Common Fund Actions*, 59 Fordham L.Rev. 843 (1991).

Despite its widespread adoption, the lodestar doctrine has been the object of increasing criticism. Some Federal courts have abandoned lodestar altogether in favor of the percentage method of awarding fees in common fund cases (*Swedish Hospital Corp. v. Shalala* (D.C.Cir.1993), 1 F.3d 1261; *Camden I Condominium Association, Inc. v. Dunkle* (11th Cir.1991), 946 F.2d 768), while others have reinstated percentage fee awards as an alternative to lodestar computations and have granted the district court the discretion to use either the lodestar or the percentage method (*In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation* (1st Cir.1995), 56 F.3d 295; *Rawlings v. Prudential–Bache Properties, Inc.* (6th Cir.1993), 9 F.3d 513; *Florin *242 v. Nationsbank of Georgia, N.A.* (7th Cir.1994), 34 F.3d 560; *In re Washington Public Power Supply System Securities Litigation* (9th Cir.1994), 19 F.3d 1291; *Gottlieb v. Barry* (10th Cir.1994), 43 F.3d 474). Only a few Federal circuit courts have continued to adhere exclusively to lodestar computations in awarding attorney fees from a common fund. (*Longden v. Sunderman* (5th Cir.1992), 979 F.2d 1095; *Walitalo v. Iacocca* (8th Cir.1992), 968 F.2d 741.) State-court decisions reflect a similar divergence with respect to the proper formulation. See, e.g., *Kuhnlein v. Department of Revenue* (Fla.1995), 662 So.2d 309; *Bowles v. Washington Department of Retirement Systems* (1993), 121 Wash.2d 52, 847 P.2d 440 (percentage); *Gigot v. Cities Service Oil Co.* (1987), 241 Kan. 304, 737 P.2d 18 (hybrid between lodestar and percentage).

Plaintiffs' counsel suggests that the criticisms leveled against lodestar are legitimate concerns that should prompt this court to reinstate the circuit court's discretion to award percentage-of-the-recovery attorney fees in common fund class action litigation. We agree that the lodestar method of awarding attorney fees from common funds is not without fault. One of the major flaws of the lodestar doctrine is that it creates

a disincentive for early settlement of disputes. An attorney who believes that fees will be based on the number of hours devoted to the litigation may be hesitant to settle the matter at an early stage in the proceeding. In addition, an attorney may be more inclined to spend excessive hours on the case and inflate a fee petition in the hopes of increasing the ultimate fee award.

The lodestar method of awarding attorney fees is also open to valid criticism because it may “produce results that are far from homogeneous.” (Third Circuit Task Force Report on Attorney Fees at 246–47.) Fees for hourly rates can be set differently by different judges. Evaluating the hours actually expended is a laborious, *243 burdensome, and time-consuming task that may be biased by hindsight. In addition, determining the reasonable fees to be awarded based upon hourly rates and the reasonable number of hours expended may generate protracted satellite litigation involving the attorney fees award. Moreover, it may be difficult to ascertain the appropriate weighted multiplier to be applied in a given case. As stated in one commentary, “The risk multiplier is little short of a wild card in the already uncertain game of assessing fees under the lodestar calculation.” Macey & Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U.Chi.L.Rev. 1, 54 (1991).

Although these concerns with respect to lodestar awards of attorney fees are valid, it is also true that percentage attorney fee awards suffer from certain deficiencies. For example, awarding a percentage of the common fund in attorney fees heaps a windfall on plaintiffs' counsel when the damages awarded are high but the costs and length of the **914 ***568 litigation were comparatively slight. The appearance of impropriety is most pronounced when the individual claimants will receive only a small amount of the final award. In addition, awarding attorney fees based on a percentage of the recovery may provide an incentive to plaintiffs' counsel to settle cases prematurely rather than continue the litigation. Also, percentage awards may prompt attorneys to be more receptive to representing class members when the issues are relatively straightforward and can be disposed of quickly, and may cause attorneys to decline representation when the issues appear complicated and the litigation protracted.

Bearing in mind all of these considerations, we hold that the circuit court is vested with the discretionary authority

to choose the percentage-of-the-award method *244 or the lodestar method to determine the amount of fees to be granted plaintiffs' counsel in common fund class action litigation. Awarding attorney fees to plaintiffs' counsel based on a percentage of the fund held by the court is, overall, a fair and expeditious method that reflects the economics of legal practice and equitably compensates counsel for the time, effort, and risks associated with representing the plaintiff class. However, because percentage-of-the-fund recovery suffers from certain infirmities, there may be circumstances where the lodestar method will remain the more appropriate method of awarding fees. The decision to award fees based on the lodestar or percentage method is a matter within the sound discretion of the trial court, considering the particular facts and circumstances of each case. As observed in *Rawlings*, 9 F.3d at 516:

“When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved. [Citation.] The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved. For these reasons, it is necessary that the district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them.”

Neither the lodestar method nor the percentage method is necessarily superior in all instances, and to decree that one or the other shall be used in all circumstances would, in our view, needlessly curtail the trial court's discretionary equitable powers. Judge Richard Curry sapiently and sagaciously expressed a similar rationale in his memorandum decision in *Ryan v. City of Chicago* (Cir.Ct. Cook Co. December 14, 1992), No. 83–CH–390, slip op. at 21 (mem.):

“The judge who arrives at a percent of recovery fee is engaged in no higher degree of mysticism than the judge *245 who satisfies the lodestar by guessing his way through the time and labor component and then subjectively justifies his multiplier. Both must guard against avarice depleting the common fund, both must reward the attorney for excellence, both must be concerned with the credibility of the award and both must be perceived as having achieved a just result.”

We believe that the approach we adopt today will permit the circuit court to more fully perform its obligation to ascertain a fee award that justly and equitably compensates plaintiffs' counsel and yet protects the interests of the members of the plaintiff class for whose benefit the common fund was created. By taking into account the unique circumstances of each case in order to exercise its discretionary authority to choose either the percentage or lodestar method of awarding fees, the trial court will be able to protect the interests of absent class members who have not voiced an opinion with respect to the amount of fees to be awarded class counsel.

We decline to adopt the position suggested by the Firemen's Fund, as *amicus curiae*, that there is no principled basis for applying the percentage method in common fund cases as opposed to statutory fee-shifting cases. The United States Supreme Court has held that the lodestar method of computing fees must be used in fee-shifting cases (*i.e.*, where a statute clearly provides for an award to compensate counsel for the prevailing class). (See, *e.g.*, **915 ***569 *City of Burlington v. Dague* (1992), 505 U.S. 557, 112 S.Ct. 2638,

120 L.Ed.2d 449.) However, the Court has not expanded this holding to apply to common funds cases. We believe that fee-shifting cases are materially different from common fund cases, such as the case at bar, most notably because fee-shifting cases do not involve a common fund from which attorney fees may be awarded. Given this critical distinction, we conclude that principles announced by the Court in *Dague* are inapplicable to our present inquiry. *246 Accord *Swedish Hospital*, 1 F.3d at 1268; *In re Thirteen Appeals*, 56 F.3d at 308.

We further reject the Firemen's Fund's argument that a percentage-of-the-fund recovery is inconsistent with Illinois law and ignores the time and effort devoted by counsel as required by *quantum meruit* principles. Awards of attorney fees in common fund cases are guided by equitable principles similar to those of *quantum meruit*, but are not confined by the precise rules of *quantum meruit*. Indeed, in *Fiorito* and *Leader*, this court permitted the application of a weighted multiplier to determine the amount of attorney fees, although *quantum meruit* principles make no reference to such a multiplier.

In the instant cause, the circuit court denied plaintiff's counsel's motion for attorney fees based on a percentage of the award. The trial court believed its ruling was dictated by this court's ruling in *Fiorito*, which adopted the lodestar method of awarding attorney fees. Because we hold that the circuit court has the discretionary authority to award fees based on a percentage of the recovery, we reverse the rulings of the appellate and circuit courts and remand the matter for further proceedings consistent herewith.

Appellate court reversed; circuit court reversed; cause remanded.

All Citations

168 Ill.2d 235, 659 N.E.2d 909, 213 Ill.Dec. 563

372 Ill.App.3d 395

Appellate Court of Illinois,
First District, Third Division.

CAREER CONCEPTS, INC., Plaintiff–Appellee,

v.

SYNERGY, INC., Defendant–Appellant.

No. 1–06–0993.

|

March 28, 2007.

Synopsis

Background: Employee placement agency brought action for breach of contract against employer, seeking payment of placement fee. After a bench trial, the Circuit Court, Cook County, Paddy H. McNamara, J., entered judgment for plaintiff and awarded attorney fees to plaintiff. Defendant appealed.

Holdings: The Appellate Court, Greiman, J., held that:

defendant did not establish that plaintiff, a foreign corporation, transacted business in violation of Illinois Business Corporation Act;

defendant's sales manager had apparent authority to sign placement contract; but

amount of attorney fees awarded was not reasonable.

Affirmed as modified.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****387** Brad S. Grayson of Strauss & Malk LLP, Northbrook, for Appellant.

Teller, Levit & Silvertrust, P.C., Chicago, for Appellee.

Opinion

Justice GREIMAN delivered the opinion of the court:

*****63 *397** Defendant Synergy, Inc., appeals from the judgment of the trial court in favor of plaintiff Career

Concepts, Inc. (CCI), on its breach of contract action. On appeal, defendant contends that: (1) the trial court erred in allowing the case to proceed to a trial on the merits; (2) the court's liability finding was against the manifest weight of the evidence; and (3) the court abused its discretion by awarding plaintiff attorney fees.

Briefly stated, plaintiff, an employee placement agency, filed the underlying action in order to recover a placement fee allegedly owed by defendant, a professional employer organization (PEO). ¹ Plaintiff claimed that the parties had a valid contract and defendant was in breach thereof because it failed to pay a placement fee after hiring Diane Takacs, an individual previously connected with plaintiff. In response *****64 **388** defendant argued that the purported contract was invalid because John Driscoll, the signator, did not have authority to enter into contracts on the company's behalf. Moreover, defendant maintained that Diane Takacs was hired as a result of wholly unrelated circumstances.

Prior to trial, on June 17, 2005, defendant filed an “Emergency Motion *in Limine*, for Directed Verdict and Entry of Judgment” on the basis that plaintiff violated [Supreme Court Rule 213\(f\)](#) (210 Ill.2d R. 213(f)) by failing to adequately and completely disclose its intended witnesses. Specifically, defendant argued that plaintiff's three witness disclosures were inadequate and incomplete because: (1) Diane Takacs' address was not provided and her testimony was not divulged in appropriate detail; (2) the testimony of the remaining two witnesses, Amber Campbell and Keri Burton, was not divulged at all; and (3) John Driscoll was not listed as a potential witness. Accordingly, defendant requested that the court bar plaintiff from presenting any witnesses at trial. In the alternative, defendant argued that plaintiff could not support its claim solely based upon the witnesses and minimal subjects disclosed; therefore, the court should direct a verdict and enter judgment in defendant's favor. After considering the motion, the trial court granted plaintiff 28 days to supplement its witness disclosures and comply with [Rule 213](#).

On September 29, 2005, defendant filed a “Renewed Motion *in Limine*, for Directed Verdict and Entry of Judgment” on the basis that plaintiff failed to follow the trial court's prior order to supplement its witness disclosures. At the subsequent hearing, plaintiff provided timely-filed copies of its supplemental witness disclosures. ***398** Plaintiff maintained that it had previously faxed the document to defendant. The trial court ultimately denied defendant's motion.

Then, on November 23, 2005, defendant filed an “Emergency Motion to Dismiss” pursuant to sections 13.70 and 15.85 of the Business Corporation Act of 1983(Act) (805 ILCS 5/13.70, 15.85 (West 2004)). Defendant argued that plaintiff, an Indiana corporation, was not registered or authorized to do business as a foreign corporation in Illinois and therefore could not file the underlying lawsuit. Without ruling, the trial court took the motion under advisement and proceeded to trial.

At trial, Amber Campbell testified that she was employed by plaintiff as an account executive in 2001. Campbell stated that she initiated the relationship with defendant by “cold-calling” the company, and, after describing the nature of her call, she was directed to Driscoll. Driscoll stated that defendant was interested in hiring sales personnel; therefore, Campbell forwarded a contract to him via facsimile. Campbell testified that she asked whether Driscoll had authority to sign the contract. Driscoll responded in the affirmative and signed and returned the contract.

Under the terms of this standard contract, if defendant hired a candidate sent by plaintiff within one year, it was required to pay a placement fee, which was 30% of the hired candidate's first year compensation, including bonuses. In addition, the contract stated that, in the event that plaintiff was forced to pursue collection remedies, defendant agreed to “pay all expenses thereof, including reasonable attorney's fees.”

Thereafter, in 2001, Campbell sent Takacs to interview with Driscoll and Jon Skulborstad, defendant's founder and president. Campbell spoke directly to Skulborstad after the interviews, and he indicated that the company was not interested in hiring Takacs at that time. Takacs ***65
**389 subsequently ended her relationship with plaintiff. Approximately two years later, she contacted plaintiff again for employment assistance. At that time, the company learned that defendant had hired Takacs later in 2001.

On cross-examination, Campbell testified that Driscoll signed the contract at issue in his capacity as hiring manager. Campbell admitted, however, that she did not know whether Driscoll actually was the hiring manager and she did not attempt to verify his title or position. She further admitted that she was never told by anyone within the company that Driscoll had contract-signing or hiring authority. When Campbell spoke to Skulborstad, she never mentioned the contract between the parties nor inquired into Driscoll's

position or authority. Campbell stated that plaintiff was no longer in business.

*399 Arnie Eastburn, plaintiff's owner and president, testified that Campbell was responsible for the formation and oversight of the relationship with defendant. In 2002, Eastburn called Skulborstad, whom he had known for years, to inquire whether he would be interested in potentially hiring any candidates. According to Eastburn, Skulborstad responded that he would be interested if there was a suitable candidate, and Eastburn alerted Skulborstad to the existing contract between their companies. Then, in 2003, after learning that Takacs had been hired by defendant in 2001, Eastburn sent Skulborstad an invoice for the outstanding placement fee of \$30,000 based on the belief that Takacs earned \$100,000 in her first year. In response, Skulborstad called Eastburn, announcing his refusal to pay the fee because the parties did not have a contract for services.

On cross-examination, Eastburn admitted that he never contacted Skulborstad when the parties entered into the contract at issue. He further admitted that he did not attempt to verify whether Driscoll had contract-signing authority. Eastburn denied that plaintiff conducted business in Illinois, but admitted that plaintiff worked with Illinois residents to find employment positions in Illinois “on a regular basis.” Eastburn acknowledged attending a “couple” of industry meetings in Illinois to “drum up” business. Eastburn further admitted that plaintiff was not registered to conduct business in Illinois and never paid franchise fees or taxes to the Illinois Secretary of State.

John Driscoll testified that he was employed by defendant in 2001 as a sales manager. Driscoll recalled being contacted by Campbell in early 2001 to begin a relationship between plaintiff and defendant. Driscoll stated that he presented the contract at issue to Skulborstad and was given authority to sign it. Driscoll recalled that Takacs was subsequently sent as a candidate, and he and Skulborstad interviewed her, but she was not hired. Driscoll further stated that, while he was employed by defendant, the company paid a fee to hire Melissa Donahue through a search firm. Driscoll left defendant's company around June 1, 2001.

On cross-examination, Driscoll admitted that he never held the position of hiring manager with defendant and did not have contract-signing authority. Driscoll further admitted that he signed the contract at issue on behalf of defendant as its hiring manager; however, he denied that this was a

misrepresentation. Driscoll admitted that, prior to leaving defendant's company without any advance notice, he was in an altercation with Skulborstad. He further admitted that he attempted to recruit defendant's employees away from the company. Driscoll, however, stated that he did not harbor any ill-will toward defendant.

****390 ***66 *400** On redirect examination, Driscoll maintained that Skulborstad authorized him to sign another contract in addition to the one at issue. More specifically, the contract was for a sales presentation. On re-cross-examination, Driscoll admitted that he was required to seek Skulborstad's approval before signing the sales presentation contract. Driscoll also admitted that Melissa Donahue was hired as a temporary employee.

Diane Takacs had no recollection of Campbell, but someone at plaintiff's company arranged an interview for her at defendant's company in February 2001. Takacs only recalled interviewing with Driscoll. She denied that she had a follow-up interview with Skulborstad. When defendant did not hire her initially, Takacs ended her relationship with plaintiff. Takacs admitted that she was hired by defendant several months later. However, immediately prior to accepting a position with defendant, Takacs was employed by another company. While employed there, she made a sales presentation to defendant that Skulborstad attended. Shortly thereafter, Joe Fife, defendant's director of sales, contacted Takacs and asked whether she would be interested in working for defendant. Takacs subsequently interviewed with Fife and accepted a position with defendant in July, 2001. Her base salary was approximately \$70,000, plus bonus. Ultimately, Takacs was compensated \$89,000 in total for her first year. On cross-examination, Takacs stated that she did not believe plaintiff contributed to her hiring.

Jon Skulborstad testified that, during the time frame in question, he had complete hiring and firing authority and was the only employee with contract-signing authority. Until abruptly leaving the company, Driscoll was a sales manager for defendant. In that capacity, Driscoll was required to find potential candidates for sales positions; however, only Skulborstad could hire an acceptable candidate. Driscoll never held the position of hiring manager. Driscoll was aware of defendant's hiring and firing and contract-signing restrictions, as well as the company's policy against using placement firms to find full-time employees because of the accompanying placement fees. Skulborstad admitted that defendant used temp firms to hire temporary employees,

which required a fee; however, Skulborstad maintained that using temp firms was the only method for obtaining temporary employees. He further stated that some temporary employees had become full-time employees, such as Melissa Donahue. Skulborstad admitted that he authorized Driscoll to hire Donahue as a full-time employee, but only after she demonstrated satisfactory performance in her temporary capacity.

Skulborstad stated that he had known Eastburn for years, and ***401** that the pair would see each other at industry functions at least once per year. Skulborstad recalled receiving a phone call from Eastburn regarding his company when it was in its infancy. Skulborstad relayed his company's policy against using placement firms, but told Eastburn to contact him if there was an exceptional candidate. Eastburn never contacted Skulborstad after the parties allegedly entered into the contract at issue. Skulborstad first became aware of the alleged contract in 2003 when he received Eastburn's invoice. Skulborstad admitted that he authorized Fife to hire Takacs in 2001 based on her sales presentation while employed elsewhere. Skulborstad had no recollection of being introduced to Takacs by Driscoll or interviewing her earlier in the year. Because of defendant's policy against using placement firms, he never would have hired Takacs if he thought she was connected to plaintiff. Takacs was employed by defendant *****67 **391** for a little over one year and left the company on good terms. Skulborstad denied authorizing Driscoll to sign the contract at issue. He did, however, recall authorizing Driscoll to sign one unrelated sales contract. Further, Skulborstad denied ever speaking with Campbell about an interview with Takacs.

Joe Fife testified that, as director of defendant's sales, he was Driscoll's direct supervisor. Fife reiterated that Skulborstad had sole contract-signing authority. Fife stated that Driscoll neither held the position of hiring manager nor had contract-signing or hiring authority while working under him. Moreover, Driscoll never told Fife that he had signed a contract with plaintiff. Fife reiterated defendant's well-known policy against using placement firms for full-time employees. Fife recalled the circumstances of Takacs' hiring in the same manner as Skulborstad.

The trial court ultimately found in favor of plaintiff. During defendant's closing argument, the court advised defense counsel to limit his argument to the issue of damages because it had already determined that defendant was liable under the contract. Specifically, the trial court found that Driscoll

had apparent authority to enter into the contract at issue on defendant's behalf. Moreover, the trial court announced that Skulborstad and Takacs were not credible witnesses. In particular, the court determined that both individuals were lying when they denied that the initial interview took place while Takacs was involved with plaintiff. The court awarded plaintiff damages in the amount of \$26,700² plus attorney fees, but denied prejudgment interest. The court then ordered plaintiff to file its petition for attorney fees.

***402** Plaintiff subsequently filed its fee petition in the amount of \$14,730.70 for attorney fees and costs. Defendant responded by filing a memorandum in opposition to the fee petition, arguing that plaintiff was not entitled to recover because it was unsuccessful in proving the entire amount of requested damages in the underlying complaint, and the petition failed to include the information necessary to satisfy its burden for proving that the fees were reasonable. In addition, defendant filed a motion for a ruling on its prior motion to dismiss pursuant to plaintiff's violation of sections 13.70 and 15.85 of the Act.

According to defendant, during the hearing, the trial court advised plaintiff's counsel to withdraw the contingency fee agreement that he previously entered with his client because it would constrain the court's ability to award attorney fees.³ Plaintiff's counsel eventually agreed. The trial court then reviewed each entry of the fee petition, striking an undisclosed number of entries that apparently were too vague or excessive. Ultimately, the trial court denied defendant's motion to dismiss and entered a final order for \$39,275⁴ in total damages in favor of plaintiff. Defendant subsequently filed motions to reconsider all of the court's judgments, including those related to the pretrial motions. According to the parties, following a brief hearing, the court denied the motions to reconsider.⁵ This timely appeal followed.

****392 ***68** Defendant first argues that the trial court committed reversible error by denying its pretrial motions *in limine*, for directed verdict and entry of judgment on the basis that plaintiff failed to timely and adequately disclose witnesses in accordance with [Rule 213](#). Because a trial court's ruling on a motion *in limine* is subject to reconsideration throughout the trial, the movant must object to the evidence when it is introduced at trial otherwise the issue is waived for purposes of appeal. [Ford v. Herman](#), 316 Ill.App.3d 726, 736, 249 Ill.Dec. 942, 737 N.E.2d 332 (2000). Although defendant filed the pretrial motions and filed a posttrial

motion to reconsider, defense counsel failed to object to the witnesses' testimony when offered at trial and, therefore, did not preserve the issue for appeal. *Cf. Jarke v. Jackson Products, Inc.*, 282 Ill.App.3d 292, 295, 217 Ill.Dec. 861, 668 N.E.2d 46 (1996) (despite the defense counsel's failure to contemporaneously object to witness testimony, the issue was sufficiently preserved where ***403** the defendant filed a pretrial motion *in limine* and the defense counsel made a belated objection to the testimony during the course of trial). Accordingly, we find that defendant waived this issue for purposes of our review.

Notwithstanding defendant's waiver, we would affirm the trial court's denial of defendant's motions *in limine*, for directed verdict and entry of judgment because plaintiff sufficiently complied with [Rule 213\(f\)](#).

Defendant next contends that the trial court erred in denying its motion to dismiss based on plaintiff's violation of sections 13.70 and 15.85 of the Act. Plaintiff responds that defendant failed to satisfy its burden of proving that plaintiff was transacting business in Illinois in violation of the Act.

Pursuant to the Act, in order to transact business in Illinois, a foreign corporation must obtain authority from the Secretary of State. See [805 ILCS 5/13.05 \(West 2004\)](#). Further, the Act posits that, unless it obtained the requisite authority, a foreign corporation may not maintain a civil action in any Illinois court. See [805 ILCS 5/13.70 \(West 2004\)](#). In addition, if a corporation is required to pay a "franchise tax, license fee, penalty, or interest" under the Act and has failed to do so, the corporation may not maintain a civil action. See [805 ILCS 5/15.85 \(West 2004\)](#). The defendant bears the burden of proving that a corporation transacted business in violation of the Act. [Subway Restaurants, Inc. v. Riggs](#), 297 Ill.App.3d 284, 289, 231 Ill.Dec. 437, 696 N.E.2d 733 (1998). A foreign corporation may engage in occasional and isolated transactions in Illinois without being required to obtain authorization. [Riggs](#), 297 Ill.App.3d at 289, 231 Ill.Dec. 437, 696 N.E.2d 733. Moreover, a foreign corporation need not obtain authorization if it simply conducts interstate commerce. [Riggs](#), 297 Ill.App.3d at 289, 231 Ill.Dec. 437, 696 N.E.2d 733.

In the instant case, defendant failed to satisfy its burden of demonstrating that plaintiff violated the Act. Defendant attached an affidavit to its motion to dismiss indicating that an online search and telephone confirmation revealed that plaintiff was a corporation registered in Indiana, but not

listed as a foreign corporation authorized to conduct business in Illinois. Defendant's burden of proof, however, is not satisfied with this information alone. See *Mass Transfer, Inc. v. Vincent Construction Co.*, 223 Ill.App.3d 746, 751–52, 166 Ill.Dec. 264, 585 N.E.2d 1286 (1992). Defendant additionally argues ***69 **393 that the trial evidence “indisputably” demonstrated that plaintiff was regularly transacting business in Illinois as an unauthorized foreign corporation. At trial, Eastburn testified that his Indiana company was not registered to conduct business in Illinois. However, he stated that plaintiff assisted Illinois residents with finding employment in Illinois on a regular basis and that he attended *404 industry meetings to solicit business “a couple of times.” We disagree that this evidence “indisputably” satisfies defendant's burden. Rather, defendant has merely demonstrated that plaintiff worked with Takacs in Illinois and some unknown number of other individuals. Without more, we cannot assume that plaintiff violated the Act simply based on Eastburn's use of the words “regular basis.”

Defendant additionally contends that the trial court erred in finding it liable for breach of contract. Specifically, defendant argues that the contract at issue was invalid because Driscoll did not have the authority, apparent or otherwise, to enter into it on defendant's behalf.

An agent may bind his principal by acts which he appears authorized to perform. *Lundberg v. Church Farm, Inc.*, 151 Ill.App.3d 452, 461, 104 Ill.Dec. 309, 502 N.E.2d 806 (1986). The scope of an agent's purported authority is a question of fact; therefore, we will reverse the court's finding on the issue only if it is against the manifest weight of the evidence. *Progress Printing Corp. v. Jane Byrne Political Committee*, 235 Ill.App.3d 292, 306, 176 Ill.Dec. 357, 601 N.E.2d 1055 (1992). Only when an opposite conclusion is apparent or the finding appears unreasonable, arbitrary or not based on the evidence will a finding be deemed against the manifest weight of the evidence. *Amcore Bank, N.A. v. Hahnman–Albrecht, Inc.*, 326 Ill.App.3d 126, 135, 259 Ill.Dec. 694, 759 N.E.2d 174 (2001).

Apparent authority arises when the principal knowingly permits the agent to assume authority or when he holds his agent out as possessing authority, and “ ‘a reasonably prudent man, exercising diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess.’ ” *Lundberg*, 151 Ill.App.3d at 461, 104 Ill.Dec. 309, 502 N.E.2d 806, quoting *Hofner v. Glenn Ingram & Co.*, 140 Ill.App.3d 874, 882, 95 Ill.Dec. 90, 489 N.E.2d 311 (1985). In

order to prove the existence of apparent authority, the plaintiff must demonstrate that: (1) the principal consented to or knowingly acquiesced in the agent's exercise of authority; (2) the third person reasonably concluded, based on the actions of the principal and agent, that the party was an agent of the principal; and (3) the third person justifiably relied on the agent's apparent authority to his detriment. *Letsos v. Century 21–New West Realty*, 285 Ill.App.3d 1056, 1065, 221 Ill.Dec. 310, 675 N.E.2d 217 (1996).

In the case at bar, we determine that defendant remains liable under the contract. Review of the record demonstrates that, prior to submitting the contract to Driscoll, Campbell was assured that he was authorized to sign on behalf of defendant. Driscoll admitted that he was not a hiring manager, despite signing the contract as such; however, he concluded that he did not misrepresent himself. He maintained that he received authorization from Skulborstad. In addition, Driscoll interviewed Takacs and then forwarded her to Skulborstad *405 for another interview. After the interviews, Campbell contacted Skulborstad directly and learned that they were not interested in hiring Takacs at that time. Moreover, Skulborstad admitted that he expressly authorized Driscoll ***70 **394 to enter into at least one contract and to hire Melissa Donahue as a full-time employee. Further, although the exact timing of the conversation is unclear, Skulborstad and Eastburn spoke at some point about plaintiff's services and, at the very least, Skulborstad told Eastburn to forward exceptional candidates to defendant.

We recognize that defendant presented contradicting evidence; however, the trier of fact determines the credibility of the witnesses, resolves conflicts in the evidence and attaches relevant weight to the witness testimony. *Seldin v. Babendir*, 325 Ill.App.3d 1058, 1063, 259 Ill.Dec. 548, 759 N.E.2d 28 (2001). The trial court specifically announced that Skulborstad and Takacs did not testify credibly. Furthermore, we may not reverse a judgment merely because the trial court could have drawn different inferences and conclusions from the conflicting testimony. See *Rainey v. City of Salem*, 209 Ill.App.3d 898, 905, 154 Ill.Dec. 463, 568 N.E.2d 463 (1991). Despite the delay in Takacs' actual hiring, in that she was no longer affiliated with plaintiff and worked for an unrelated company at the time, the contract remained in effect. According to its terms, “service fees are on a contingency basis and are payable only if a candidate enters into a service relationship with [defendant] within one year after our most recent communication relating to the candidate.” There is no dispute that Takacs was hired within one year of Campbell and

Driscoll's first communication. Accordingly, we do not find that a different result is clearly apparent or that the trial court's judgment, based on the evidence, was palpably erroneous and wholly unwarranted or arbitrary and unsubstantiated by the evidence. See *Amcore Bank, N.A.*, 326 Ill.App.3d at 135, 259 Ill.Dec. 694, 759 N.E.2d 174.

Defendant finally contends that the trial court erred in awarding plaintiff attorney fees. The decision whether to award attorney fees is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Med+Plus Neck & Back Pain Center, S.C. v. Noffsinger*, 311 Ill.App.3d 853, 861, 244 Ill.Dec. 712, 726 N.E.2d 687 (2000). Usually parties are responsible for their own attorney fees; however, if expressly authorized by statute or by agreement, the court may award attorney fees so long as they are reasonable. *Collins v. Hurst*, 316 Ill.App.3d 171, 173, 249 Ill.Dec. 406, 736 N.E.2d 600 (2000).

Defendant relies on *Med+Plus* to argue that the court's award was erroneous because plaintiff failed to prevail on all aspects of its complaint. However, the instant case is distinguishable because no evidence was presented that the parties' had a fee-shifting provision *406 nor can defendant reasonably argue that the court's reduction in award in compliance with the terms of the contract and refusal to award prejudgment interest were "significant issues" in the case. *Med+Plus*, 311 Ill.App.3d at 861, 244 Ill.Dec. 712, 726 N.E.2d 687 (defining a prevailing party for purposes of a fee-shifting provision as one that is successful on any significant issue).

Notwithstanding, we must reduce the award pursuant to the terms of the contingency fee agreement between plaintiff and its attorney. The record demonstrates that plaintiff and its attorney agreed to a contingency fee arrangement, and plaintiff does not dispute that the agreement called for a one-third contingency fee. In the majority of case

law analyzing contingency fees, courts are concerned that contingency fees are unreasonable because they would allow for the award of excessive fees. See, e.g., ***71 **395 *Collins*, 316 Ill.App.3d at 173, 249 Ill.Dec. 406, 736 N.E.2d 600; *Blankenship v. Dialist International Corp.*, 209 Ill.App.3d 920, 927, 154 Ill.Dec. 503, 568 N.E.2d 503 (1991) (courts should consider contingency fee agreements as only one factor in determining whether the attorney fees are reasonable). The instant case is unique, however, in that plaintiff was awarded attorney fees in excess of its contingency fee agreement. We presume that the contingency fee agreement between plaintiff and its attorney was reasonable and find it enforceable. Consequently, the trial court erred in allowing plaintiff's attorney to unilaterally waive the contingency fee in favor of the court's own award. This court has a duty to guard against the collection of excessive attorney fees, and we will generally enforce a reasonable contract between an attorney and his client. See *Corcoran v. Northeast Illinois Regional Commuter R.R. Corp.*, 345 Ill.App.3d 449, 452, 280 Ill.Dec. 857, 803 N.E.2d 87 (2003). Accordingly, we reduce plaintiff's award of attorney fees to one-third of its damage recovery pursuant to the contingency fee agreement. Therefore, because plaintiff recovered \$26,700, it is entitled to \$8,900 in attorney fees.

Accordingly, we affirm the judgment of the circuit court of Cook County, but modify the attorney fee award in accordance herewith.

Affirmed; modified as instructed.

KARNEZIS and CUNNINGHAM, JJ., concur.

All Citations

372 Ill.App.3d 395, 865 N.E.2d 385, 310 Ill.Dec. 61

Footnotes

- 1 A PEO provides employee-related services for smaller businesses.
- 2 This amount was calculated based on 30% of Takacs' first year earnings of \$89,000 in salary and bonuses.
- 3 The record on appeal contains a bystander's report of the trial (see 210 Ill.2d R. 323); however, the record does not contain a transcript, or acceptable substitute, of the posttrial proceedings.

4 Plaintiff was therefore awarded \$12,575 in attorney fees.

5 The record does not contain a transcript or an acceptable substitute of this proceeding.

See 210 Ill.2d R. 323.

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297 F.R.D. 561

United States District Court, S.D. New York.

Joseph EBIN, Yeruchum Jenkins, et al., Plaintiffs,

v.

KANGADIS FOOD INC. d/b/

a [The Gourmet Factory](#), Defendant.

No. 13 Civ. 2311 (JSR)

|

Feb. 25, 2014.

|

Order Denying Stay March 24, 2014.

Synopsis

Background: Olive oil buyers brought putative class action against seller, alleging, inter alia, fraud and negligent misrepresentation under New York and New Jersey law based on seller marketing pomace oil as “100% Pure Olive Oil.” Buyers moved to certify class.

Holdings: The District Court, [Jed S. Rakoff](#), J., held that:

class was sufficiently numerous;

questions of law or fact were common to class;

each class member's claims arose out of same course of conduct by seller and were based on same legal theories;

class representatives would fairly and adequately protect interests of class;

difficulties in ascertaining members of class did not warrant denying buyers' motion to certify class;

buyers' consumer protection claims involved common questions that predominated over individual issues;

buyers' breach of express and implied warranty claims involved common questions that predominated over individual issues;

buyers' fraud and negligent misrepresentation claims involved common questions that predominated over individual issues; and, on seller's motion for stay pending resolution of its petition for appeal,

action would not be stayed, since, inter alia, seller was not likely to succeed on merits.

Buyers' motion granted; seller's motion denied.

Attorneys and Law Firms

***564** [Joseph Ignatius Marchese](#), [Neal Jamison Deckant](#), [Scott A. Bursor](#), [Yitzchak Kopel](#), Bursor & Fisher, P.A., New York, NY, for Plaintiffs.

[Daniel Adam Schnapp](#), [John Aubrey Wait](#), Fox Rothschild, Attorneys at Law, New York, NY, [George J. Krueger](#), [Gerald Arth](#), Fox Rothschild LLP, Philadelphia, PA, for Defendant.

MEMORANDUM

[JED S. RAKOFF](#), District Judge.

Lead plaintiffs Joseph Ebin and Yeruchum Jenkins bring this consumer class action against defendant Kangadis Food Inc., doing business as The Gourmet Factory (“Kangadis”), asserting numerous causes of action for breach of express warranty and breach of the implied warranty of merchantability under New Jersey law, violation of the New Jersey Consumer Fraud Act, violation of the [New York General Business Law § 349](#), and fraud and negligent representation under New York and New Jersey law. All of plaintiffs' claims relate to Kangadis's alleged practice of selling containers of Capatriti-brand “100% Pure Olive Oil” that actually contain an industrially processed substance known as “olive-pomace oil,” “olive-residue oil,” or “pomace.”

On November 1, 2013, plaintiffs moved pursuant to [Fed.R.Civ.P. 23\(b\)\(3\)](#) for certification of a class defined as “all persons in the United States who purchased Capatriti 100% Pure Olive Oil packed before March 1, 2013” (the “Class”). Ebin, who purchased Capatriti 100% Pure Olive Oil at a Key Food store in the Bronx, New York in August 2012, also moved to certify a subclass of class members who purchased in New York (the “New York Subclass”). Deposition of Joseph Ebin (“Ebin Dep.”) at 34:11–19, 36:6–7, Declaration of Joseph Marchese dated November 1, 2013 (“Marchese Decl.”) Ex. B. Jenkins, who purchased Capatriti 100% Pure Olive Oil in January 2013 at a Shop Rite in Nutley, New Jersey, seeks to represent a subclass of Class members

who purchased in New Jersey (the “New Jersey Subclass”). Deposition of Yeruchum Jenkins (“Jenkins Dep.”) at 41:17–42:11, 83:11–12, Marchese Decl. Ex. A. After full briefing, the Court heard oral argument on Wednesday December 4, 2013, and issued a “bottom line” Order on December 11, 2013 granting plaintiffs’ motion. This Memorandum explains the reasons for that ruling.

The pertinent facts are as follows. Kangadis is a food import and distribution company formed in 2003. Complaint ¶ 10. Since 2006, Kangadis has sold, under the brand name Capatriti, a product labeled “100% Pure Olive Oil.” *Id.* Plaintiffs allege that the oil contained in Capatriti containers is not in fact olive oil, but pomace. Plaintiff Ebin allegedly purchased a 101 fluid ounce container of this product at a local grocery store in Bronx County, New York in “late 2012” for “approximate \$16.49.” *Id.* ¶ 8. Plaintiff Jenkins also allegedly purchased a container of Capatriti “100% Pure Olive Oil,” though the complaint does not allege in what volume or what price he paid. *Id.* ¶ 9. The two plaintiffs allegedly saw the labeling of the product, understood it as a representation that the product consisted of 100% pure olive oil, and would not have gone through with their respective purchases if they had known that the product was not 100% pure olive oil. The plaintiffs also allegedly “understood that in making the sale, the retailer was acting with the knowledge and approval of [Kangadis] and/or as the agent of [Kangadis].” *Id.* ¶¶ 8–9.

The complaint references an expert report by Professor Lanfranco Conte, regarding the chemical properties of the product Kangadis sells as “100% Pure Olive Oil.” The Conte Report explains that pomace is fundamentally different from what is commonly known as “olive oil.” As Conte explains, what consumers generally know of as “olive oil” comes from olives that are harvested, quickly carried to a mill, washed, crushed, and spun to separate out excess water. Conte Report ¶¶ 9–14. This process is entirely mechanical, and involves no heat or chemicals. *Id.* ¶ 12. The product resulting from this process is commonly called “virgin olive oil.” *Id.* ¶¶ 15–17. *565 If “virgin olive oil” undergoes refining to remove impurities, then it is no longer called “virgin,” but remains “olive oil.” Pomace, by contrast, is made from the residue materials left over after all of the olive oil has been mechanically extracted from the flesh of the olives. Leftover skins and olive pits are sent to specialized facilities where they undergo superheating, bleaching, deodorizing, steaming, and treatment with industrial solvents. *Id.* ¶¶ 22, 39–40. To be made fit for human consumption, the resulting liquid must be refined to remove the solvents. *Id.* ¶ 21. Pomace’s different

production process makes it significantly cheaper than what is traditionally known as olive oil. The Conte Report represents that pomace typically sells in bulk quantities for 50% less than bulk refined olive oil, which is cheaper still than bulk virgin olive oil. Conte Report ¶ 24.

To qualify for certification, plaintiffs must demonstrate by a preponderance of the evidence that the putative class action meets each of the four requirements of Rule 23(a) and also satisfies at least one of the categories provided in Rule 23(b). See *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 132–33 (2d Cir.2001). Rule 23(a) sets forth four prerequisites: numerosity, commonality, typicality, and adequacy. Fed.R.Civ.P. 23(a). The Court is satisfied that these four prerequisites are met. To begin, a presumption of numerosity attaches to classes of more than forty in the Second Circuit. See *Consol. Rail Corp. v. Hyde Park*, 47 F.3d 473, 473 (2d Cir.1995) (“[N]umerosity is presumed at a level of 40 members”). The Court has already found that the Class exceeds one hundred members in its Memorandum Order on subject matter jurisdiction, noting that “defendant does not contest that this consumer class action involves more than 100 members.” See Memorandum Order, 5/12/13, at 3. In addition, retail sales of Capatriti during the class period were roughly \$81.24 million, suggesting more than forty purchasers. Declaration of Colin Weir dated August 26, 2013 (“Weir Decl.”) ¶ 16.

Commonality is met when “there are questions of law or fact common to the class.” Fed.R.Civ.P. 23(a)(2). The common questions in this case are whether the pomace packed into Capatriti tins was “100% Pure Olive Oil,” whether Gourmet Factory negligently misrepresented that Capatriti was “100% Pure Olive Oil,” and whether Gourmet Factory defrauded purchasers by labeling Capatriti as “100% Pure Olive Oil.” With respect to the New York subclass, an additional common question is whether Gourmet Factory’s conduct violated New York’s General Business Law § 349. With respect to the New Jersey Subclass, an additional common issue is whether Gourmet Factory breached express warranties, breached the implied warranty of merchantability, and violated the New Jersey Consumer Fraud Act, N.J.S.A. §§ 56:8–1, *et seq.*

Defendant argues that the nature of the claims and the proposed class is so fractured that commonality is not possible. Capatriti was sold in at least five states, and defendant contends that a hodgepodge of standards varying among these states would preclude a common answer to the question of whether the pomace oil in Capatriti tins

was 100% Pure Olive Oil. Defendant further contends that resolution of issues here will require evaluating millions of individual, unique consumer purchasing decisions at once. These arguments are unpersuasive. The commonality requirement may be met where the individual circumstances of class members differ but their “injuries derive from a unity course of conduct by a single system.” *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir.1997). Here, despite the variations in state standards, the injuries being litigated all derive from the alleged misrepresentation of what is pomace as 100% Pure Olive Oil, which would arguably violate all the varying state requirements.

Typicality is satisfied when “each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.” *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir.1993). Here, the lead plaintiffs' and other class members' claims arise out of the same course of conduct by the defendant and are based on the same legal theories. Every tin was labeled *566 “100% Pure Olive Oil” and every tin in fact contained pomace. Lead plaintiffs have been injured in the same manner as other class members. *See, e.g.*, Jenkins Dep. at 41:17–22, Marchese Decl. Ex. A.; Ebin Dep. at 47:25–48:10, Marchese Decl. Ex. B. Plaintiffs furthermore seek redress through common legal claims: all class members seek redress for breach of express warranty, breach of the implied warranty of merchantability, negligent misrepresentation, and fraud. New York subclass members seek redress for violation of *New York's General Business Law* § 349 and New Jersey subclass members seek redress for New Jersey's Consumer Fraud Act N.J.S.A. §§ 56:8–1, *et seq.*

Defendant also argues that plaintiffs' typicality argument rests on the contention that all Capatriti tins contained pomace. However, the testimony of Themis and Dennis Kangadis suggest that when Kangadis ran out of pomace, it filled Capatriti tins with extra virgin or refined olive oil. *See* Deposition of Themis Kangadis (“Themis Kangadis Dep.”) at 192:18–20; Deposition of Dennis Kangadis (“Dennis Kangadis Dep.”) at 63:13–64:6. Defendant contends that the plaintiffs cannot prove whether the Capatriti purchased did in fact contain pomace and therefore cannot carry their burden of proving that their claims are typical of those of the purported class. Defendant also notes that plaintiffs never tested the Capatriti they purchased, *see* Jenkins Dep. at 145:13–15; Ebin Dep. at 50:14–20, nor do they currently possess the Capatriti that they purchased, *see* Declaration of Ryan T. Becker dated November 15, 2013 (“Becker Decl.”) Ex. M.

(Jenkins's Responses to Kangadis Requests for Admissions) at No. 16; Becker Decl. Ex. N (Ebin's Responses to Kangadis Requests for Admissions) at No. 16.

However, “[t]ypicality refers to the nature of the claim of the class representatives and not to the specific facts from which the claims arose,” suggesting that whether or not the Capatriti purchased by the class representatives contained pomace is not dispositive. *Civic Ass'n of the Deaf v. Giuliani*, 915 F.Supp. 622, 633 (S.D.N.Y.1996). Additionally, plaintiffs allege that the testimony of the Kangadis brothers is allegedly not credible because it contradicts the party-admissions and their prior sworn testimony and furthermore is not supported by any documentary evidence. *See* Supp. Marchese Decl. ¶ 2 Ex. A (Themis Kangadis Dep. at 121:4–122:23). Finally, plaintiffs' testimony suggests that the Capatriti they purchased was indeed pomace, and not virgin or refined olive oil, as evidenced by its lack of taste and flavor. Under the circumstances, the Court finds the typicality requirement is met.

Finally, the Court finds the adequacy requirement is also met. Adequacy requires that “the representative parties will fairly and adequately protect the interests of the class.” *Fed.R.Civ.P.* 23(a)(4). “Generally, adequacy of representation entails an inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced, and able to conduct the litigation.” *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir.2000). As for the plaintiffs, both Jenkins and Ebin have demonstrated their commitment to pursue these claims on behalf of class members by responding to extensive written discovery requests and sitting for lengthy depositions. During his deposition, Jenkins stated that he had reviewed and commented on the complaint before it was filed, Jenkins Dep. at 51:9–14, Marchese Decl. Ex. A, and that he is willing to testify at trial, *id.* at 233:4–7. Ebin testified that he is “committed” to the case and that he understands he is responsible to the class going forward. Ebin Dep. at 70:13–24, Marchese Decl. Ex. A. As for plaintiffs' counsel, Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims including claims against food manufacturers. *See* Bursor & Fisher, P.A. Firm Resume, Marchese Decl. Ex. M. The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in five class action jury trials since 2008. *Id.*

Defendant contends that courts recognize a fifth pre-condition to class certification: the identity of class members must be ***567** reasonably ascertainable by reference to objective criteria. See *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir.2006) (recognizing Rule 23's "implied requirement of ascertainability"); *Stinson v. City of New York*, 282 F.R.D. 360, 373 (S.D.N.Y.2012) ("[T]he ascertainability requirement means that 'the class description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member'"); *Weiner v. Snapple Beverage Corp.*, No. 07-CV-8742, 2010 WL 3119452 at *12 (S.D.N.Y. Aug. 5, 2010) ("To be ascertainable the class must be readily identifiable, such that court can determine who is in the class and, thus, bound by the ruling.").

Plaintiffs argue that the ascertainability requirement here is met. The standard for ascertainability is "not demanding" and is "designed only to prevent the certification of a class whose membership is truly indeterminable." *Gortat v. Capala Bros., Inc.*, 2010 WL 1423018, at *2 (E.D.N.Y. Apr. 9, 2010). The class and subclasses consist of persons in the United States who purchased Capatriti packed before March 1, 2013, and plaintiffs allege there is nothing subjective about that class definition. The declaration of class action administrator Steven Weisbrot proposes three ways to identify class members: (1) provide a claim form and receipt; (2) submit the unique ID stamped on each tin; and/or (3) provide a sworn affidavit identifying the particulars of the purchase. See Declaration of Steven Weisbrot dated November 1, 2013 ("Weisbrot Decl.") at ¶ 11. While plaintiffs acknowledge that there are some burdens to easily identifying all the class members, they maintain that retention of receipts is not an essential element for the management of a class action, or for establishing proof of injury or damages. Nor does the possibility that class members will have discarded the product render the class unascertainable.

Defendant replies that *Weiner v. Snapple Beverage Corp.* is a particularly instructive case as plaintiffs sought certification for claims of a violation of *New York General Business Law* § 349, unjust enrichment, and breach of warranties, alleging that they paid a premium for Snapple based on its allegedly misleading "All Natural" label. 2010 WL 3119452 at *2 (S.D.N.Y. Aug. 5, 2010). The court denied certification, finding that the ascertainability requirement was not met because plaintiffs could not prove that the class members could be ascertained by reference to objective criteria. *Id.* at *12. Plaintiffs proposed that class members could produce

a receipt or product label or sign a declaration that they purchased Snapple in the class period. *Id.* at *13. The court rejected this as unrealistic as there was no basis to believe that the proposed class members would have kept such evidence and the proposed class members were also unlikely to remember details of their Snapple purchase so declarations would be unreliable. *Id.* Here as in *Snapple* plaintiffs do not point to any records that can objectively determine membership in the proposed class. Nor is it likely that consumers consistently maintain receipts of their purchase or the actual tins or bottles. Indeed, plaintiffs here have neither the Capatriti they purchased nor any receipts or documentation proving their purchases. The process described by class action administrator Steven Weisbrot to identify class members is very similar to the process found inadequate in *Snapple*. See Weisbrot Decl. at ¶ 11.

Although *Snapple* is not binding on this Court, it raises concerns. However, the Second Circuit has instructed that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir.2001). Against this background, the Court finds that, in the end, *Snapple* goes further than this Court is prepared to go, and, indeed, would render class actions against producers almost impossible to bring. Yet the class action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit. Against this background, the ascertainability difficulties, while formidable, should not be made into a device for defeating the action.

***568** Rule 23(b)(3) requirements in this case are also met. Rule 23(b)(3) authorizes class certification where "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed.R.Civ.P.* 23(b)(3). "Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir.2002).

Plaintiffs assert that the elements of the New York and New Jersey consumer protection claims can be established through common proof. Plaintiff Ebin alleges violations of [New York General Business Law § 349](#) (“NYGBL”) on behalf of a subclass of all members who purchased Capatriti in New York. Complaint ¶ 54. Plaintiff Jenkins alleges violations of the New Jersey Consumer Fraud Act §§ 56:8–1, *et seq.* (“NJCFA”) on behalf of a subclass of all class members who purchased Capatriti in New Jersey. *Id.* ¶ 55. These claims, plaintiffs allege, involve common questions that predominate over any individual issues. Under the NJCFA, plaintiffs must establish “1) unlawful conduct by defendant[s]; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and ascertainable loss.” [Bosland v. Warnock Dodge, Inc.](#), 197 N.J. 543, 557, 964 A.2d 741 (2009). Elements of NYGBL § 349 are very similar to the NJCFA; [section 349](#) defines a deceptive act or practice using an “objective definition” whereby deceptive acts or practices are “limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances.” [Leider v. Ralfe](#), 387 F.Supp.2d 283, 292 (S.D.N.Y.2005). Here, every class member saw the same representation that Capatriti was “100% Pure Olive Oil” because the statement appeared in large letters on the front, back, left, right, and top of the tin. *See* Marchese Decl. Ex. N (photos of these five surfaces of the Capatriti tin). The same generalized evidence will be used to establish whether Capatriti’s label is false, and if so, whether it was likely to mislead a reasonable consumer acting under the circumstances.

Defendant replies that plaintiffs cannot prove the elements of the NJCFA or NYGBL claims on a class-wide basis because a determination of whether a consumer was actually harmed by Capatriti’s allegedly misleading label is individualized. While some members of the class may have purchased Capatriti because of the labeling, others may have bought Capatriti without looking at the label, because they liked they taste, because they liked the price, or because they liked the shape or color of the tin. Defendant proffers for consideration that the New Jersey Supreme Court recently considered whether to certify an NJCFA class that dealt with a prescription drug manufacturers’ alleged uniform misrepresentations. [Int’l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.](#), 192 N.J. 372, 929 A.2d 1076, 1080 (2007). The court concluded that individual reactions of the proposed class members to the drug company’s advertising would predominate over common questions such as the defendant’s behavior. *Id.* at 1088. With

regards to [NYGBL § 349](#), in [Vaccariello](#), the court held that the proposed class of purchasers of satellite radio service whose service was automatically renewed did not satisfy the predominance requirement because any customer who wanted their subscription renewed did not suffer an actual injury and determining who fell into that category would require individual inquiry. [Vaccariello v. XM Satellite Radio, Inc.](#), 295 F.R.D. 62, 74 (S.D.N.Y.2013).

Here, the Court finds defendant’s comparison to the recent New Jersey Supreme Court ruling unpersuasive; in the case of medicine, the negative impact of individual injury varies far more significantly than the injury incurred from buying an overpriced product alleging to be olive oil, which was actually pomace oil. The [Vaccariello](#) case in New York is also unavailing because in that case, there were individuals included in the class who did not suffer injury, whereas here, even if a class member actively wanted to buy *569 pomace instead of 100% pure olive oil, they nevertheless paid too much for it.

Plaintiffs additionally allege that the breach of express and implied warranties claims on behalf of a subclass which purchased Capatriti in New Jersey involve common questions that predominate over any individual issues that may arise. With regard to the express warranty, however, courts have found that predominance exists over claims for breach of express warranties because an “expressed promise” on the packaging “has been breached” and therefore “no individual inquiry” is “needed to resolve plaintiff’s claim.” [Elias v. Ungar’s Food Products, Inc.](#), 252 F.R.D. 233, 250 (D.N.J.2008). Here every tin sold to class members had a material, express promise in large letters on the front, back, left, right, and top of the tin that the contents inside were 100% Pure Olive Oil. Marchese Decl. Ex. N (photographs of five surfaces of the tin). The same evidence will determine whether the substance inside conforms to the express warranty. With regard to the breach of implied warranty of merchantability, goods that are deemed merchantable must “pass without objection in the trade under the contract description ... [be] fit for the ordinary purposes for which such goods are used; and ... conform to the promises or affirmations of fact made on the container or label.” [N.J. Stat. Ann. § 12A:2–314](#). Again, the same evidence will be used to determine whether this implied warranty was breached in selling the Capatriti product.

Defendant alleges that to prove either express or implied warranty claims under New Jersey law, plaintiffs must show

both proximate causation and damages and a determination of whether class members suffered any damages requires an individual inquiry into the nature of their purchase. *See Marcus v. BMW of North Am., LLC*, 687 F.3d 583 (3d Cir.2012). Defendant again asserts that many class members who purchased Capatriti did so based on factors that had nothing to do with those labels and thus did not suffer any damages as a result of their purchase. Thus defendant alleges the predominance requirement of [Rule 23\(b\)\(3\)](#) is not met.

Plaintiffs reply, and the Court agrees, that because 100% Pure Olive Oil is the name of the product itself (and appears on all five sides of the tin), class members necessarily had to rely on it when shopping. Furthermore, where “the representations are in written and uniform materials presented to each prospective plaintiff, there is a presumption of causation in NJCFA Cases.” *Elias v. Ungar's Food Products, Inc.*, 252 F.R.D. 233, 249 (D.N.J.2008). Plaintiffs further assert, and the Court again agrees, that the common actual injury consisted of the payment of the price of olive oil for a product that was pomace oil and the associated receipt of an inferior product different from that which the consumers purchased.

Finally, plaintiffs allege that predominance is met for the nationwide class for plaintiffs' claims for fraud and negligent misrepresentation. The Second Circuit has held that the predominance requirement is met for claims sounding in fraud that are based on uniform representations made to all members of the class. *See Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1253 (2d Cir.2002) (“Fraud actions must ... be separated into two categories: fraud claims based on uniform misrepresentations made to all members of the class and fraud claims based on individualized misrepresentations. The former are appropriate subjects for class certification because the standardized misrepresentations may be established by generalized proof.”). Here, because defendant uniformly misrepresented its pomace oil to be 100% Pure Olive Oil to all class members, this action with its standardized misrepresentations established by generalized proof is appropriate for class certification.

Defendant contends that a nationwide class for fraud and negligent misrepresentation is not appropriate. The Southern District has found, in considering certification of a nationwide consumer class of purchasers of telecommunications products where plaintiffs asserted claims for fraud, that “a nationwide class action in which plaintiffs raise claims of fraud would require the application of the law of at least fifty jurisdictions and would make class action inappropriate.” *570 *Lewis*

Tree Serv. Inc., et al. v. Lucent Tech., Inc., 211 F.R.D. 228 (S.D.N.Y.2002). Here, plaintiffs allege Capatriti was sold to distributors and retailers in at least five different states and was “stocked on supermarket shelves throughout the Northeast.” Plaintiffs' Memorandum at 1. Thus, defendant alleges that the Court will need to apply the law of numerous states to decide these claims, with legal standards varying by state, ensuring that common issues do not predominate.

Plaintiffs reply and the Court agrees that New York law governs the common law claims and that even if the Court must apply the law of numerous states, common issues still predominate. *See, e.g., Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 58 (S.D.N.Y.1993) (finding “application of the laws of different states, if necessary, does not preclude class action litigation.”); *Elias*, 252 F.R.D. at 249–50 (D.N.J.2008) (applying forum law because defendant did not “point out or establish any difference in the laws of the various jurisdictions”). Additionally, a survey of potentially applicable state laws reveals no material difference that would affect the merits of the class's common law claims at trial; elements of the common law of fraud are sufficiently similar across jurisdictions where Capatriti was sold. *See, e.g., Gentile v. Olan*, 2013 WL 1880771, at *3 (S.D.N.Y. May 6, 2013) (“In New York, ‘[t]he elements of common law fraud are (1) a misrepresentation of material fact, (2) made with fraudulent intent, (3) upon which the plaintiff reasonably relies to his (4) economic detriment.’ ”); *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 172–73, 876 A.2d 253 (2005) (stating that to establish common-law fraud, a plaintiff must prove (1) a material misrepresentation of a presently existing or past fact, (2) knowledge or belief by the defendant of its falsity, (3) an intention that the other person rely on it, (4) reasonable reliance thereon by the other person, and (5) resulting damages); *DMG Studio Holdings, Inc. v. N. Bay S. Corp.*, 2013 WL 3992402, at *9 (D.Conn. Aug. 2, 2013) (“The essential elements of a fraud claim in the state of Connecticut are: ‘(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury.’ ”); *Fidelity Nat. Title Ins. Co. v. Craven*, 2013 WL 3778388, at *5 (E.D.Pa. July 18, 2013) (“Under Pennsylvania law, the six elements of a common law fraud action are: (1) a misrepresentation; (2) material to the transaction; (3) made falsely; (4) with the intent of misleading another to rely on it; (5) justifiable reliance resulted; and (6) injury was proximately caused by reliance”); *Kellogg v. Wyeth*, 762 F.Supp.2d 694, 704 (D.Vt.2010) (stating that an

action for fraud under Vermont law requires an intentional misrepresentation of existing fact, affecting the essence of the transaction, so long as the misrepresentation was false when made and known to be false by the maker, was not open to the defrauded party's knowledge, and was relied on by the defrauded party to his damage).

Accordingly, for the foregoing reasons, the Court by its Order of December 11, 2013, granted plaintiffs' motion for class certification.

MEMORANDUM ORDER

Lead plaintiffs Joseph Ebin and Yeruchum Jenkins bring this consumer class action against defendant Kangadis Food Inc., doing business as The Gourmet Factory ("Kangadis"), asserting numerous causes of action for breach of express warranty and breach of the implied warranty of merchantability under New Jersey law, violation of the New Jersey Consumer Fraud Act, violation of the [New York General Business Law § 349](#), and fraud and negligent representation under New York and New Jersey law. All of plaintiffs' claims relate to Kangadis's alleged practice of selling containers of Capatriti-brand "100% Pure Olive Oil" that actually contain an industrially processed substance known as "olive-pomace oil" or "pomace."

On November 1, 2013, plaintiffs moved pursuant to [Fed.R.Civ.P. 23\(b\)\(3\)](#) for class certification. After full briefing, the Court heard oral argument on Wednesday December 4, 2013, and issued a "bottom line" Order on December 11, 2013, granting plaintiffs' motion, followed by a full Memorandum *571 Order on February 25, 2014 delineating the reasons for its decision. Defendant's motion for partial reconsideration of the Class Notice was also denied. See Memorandum Order, March 19, 2014. Defendant now moves to stay this action pending resolution of Kangadis's Petition (to the Second Circuit) for Permission to Appeal this Court's order granting class certification.

The Second Circuit identifies four factors to consider when reviewing a motion to stay pending appeal:

(1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits;

(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

In re World Trade Center Disaster Site Litig., 503 F.3d 167, 170 (2d Cir.2007) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)).

Regarding the first factor, defendant contends that it is likely to succeed on the merits because this Court's February 25 Memorandum Order failed to cite, or grapple with, the Supreme Court's decision *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Like every federal judge, this Court is well aware of *Dukes*, but the Court saw no need to cite *Dukes* in its February 25 opinion because it had no bearing on the instant certification dispute. *Dukes*, which dealt with the requirement of [Rule 23\(a\)\(2\)](#) that "there are questions of law or fact common to the class," specifies that rote recitation of common questions is not enough to obtain class certification, but that, rather, "commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Dukes*, 131 S.Ct. at 2551. Here, the injury alleged as to all class members is that they were misled into believing that its product Capatriti consisted of "100% Pure Olive Oil," when, in fact, it consisted of pomace. This alleged misrepresentation—going to the very essence of what was being purchased—easily meets the *Dukes* requirement that the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S.Ct. at 2545. Accordingly, the Court saw no reason to raise a "*Dukes*" issue in its February 25 decision.

Instead, so far as commonality is concerned, the Court focused on defendant's argument that standards for what constitutes olive oil vary across states, an argument the Court rejected because there also exist national and international olive oil standards promulgated by the Food and Drug Administration, the United States Department of Agriculture, and the International Olive Council, and furthermore because the critical question is whether pomace qualifies as what consumers reasonably *perceive* to be "100 Pure Olive Oil." See, e.g., Olive Oil; [Termination of Consideration of Codex Standard](#), 47 Fed.Reg. 42,123 (Sept. 24, 1984); 7 C.F.R. § 52.1535; IOC Trade Standard Applying to Olive Oils and

Olive–Pomace Oils, COI/T.15/NC No 3/Rev.6 § 2.2 (Nov. 2011).

Defendant also contends that it will prevail on appeal on the merits because the Supreme Court requires as part of the “predominance inquiry,” *see* [Rule 23\(b\)\(3\)](#), that plaintiffs put forth a workable damages model capable of being measured class-wide, *see, e.g., Comcast Corp. v. Behrend*, —U.S.—, —, —, 133 S.Ct. 1426, 1429–30, 185 L.Ed.2d 515 (2013), whereas here, defendant contends, individualized mini-trials must be held to determine each class member's actual damages in their purchase of Capatriti. However, as the Court stated in its February 25, 2014 Memorandum Order at 2–3, “[t]he report of damages expert Colin Weir details several models for calculating damages for this alleged misrepresentation, based on three relevant numbers: the average price of 100% pure olive oil, the average price of pomace advertised as such (non-Capatriti), and the average price of Capatriti.... The “Benefit of the Bargain” model calculates damages based on the cash difference between the price of the product that was advertised, here 100% pure olive oil, and what was received, here the price of pomace that should have been advertised as pomace. *Id.* The “Price Premium” model calculates damages as the difference between what was paid, here the price of *572 Capatriti, and what was received, here the price of pomace which should have been advertised as pomace.” This is more than sufficient to obviate the problems of which defendant complains.

In its final argument as to the first factor for a stay, defendant contends that because this Court disagreed with *Weiner v. Snapple Beverage Corp.*, No. 07–cv–8742, 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010), there now exists a split within the Second Circuit concerning [Rule 23](#)'s implied “ascertainability” requirement, a pre-condition to certification closely tied to the manageability requirements of [Rule 23\(b\)\(3\)](#). *See In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir.2006) (recognizing [Rule 23](#)'s “implied requirement of ascertainability”). No such split exists, nor would it warrant a stay if it did exist. To be sure, the Court did indicate its disagreement with those aspects of *Snapple* discussing ascertainability that were seemingly at odds with the Second Circuit's prior indication that denial of certification on the grounds of manageability alone is disfavored. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir.2001), *over'd on other grounds by Brown v. Kelly*, 609 F.3d 467 (2d Cir.2010). But the heart of the *Snapple* case was a conclusion that predominance had not been shown because the submissions

of plaintiff's expert on injury and damages were unreliable and had to be excluded, whereas here, as noted above, the submissions of plaintiff's expert remain intact for present purposes. The two cases are therefore plainly distinguishable.

Regarding the second factor to consider when reviewing a motion to stay pending appeal, defendant argues that it will be irreparably injured absent a stay because class certification creates pressure on the defendant to settle rather than risk a trial, regardless of the merits of the claim. But their alleged “pressure” problem, even if credited, is common to virtually all class actions, so that if it were a sufficient argument to defeat certification, virtually no class actions would ever be certified. Thus, this alleged “pressure” could not be what the Second Circuit had in mind when it created the second prong of its four prong test.

The third factor appears to be irrelevant to this particular case.

Regarding the fourth factor, defendant Kangadis argues that the public interest will be advanced by a stay, allegedly because it will conserve the resources of the Court and the parties and ensure that the judicial system operates efficiently. *See, e.g., Sutherland v. Ernst & Young LLP*, 856 F.Supp.2d 638, 643 (S.D.N.Y.2012) (“[C]onsiderations of judicial economy counsel, as a general matter, against investment of court resources in proceedings that may prove to have been unnecessary.”). However, this presupposes a likelihood of success on the merits, for otherwise a stay would serve only to delay and complicate the litigation, rather than make it more efficient. Thus “courts tend to find that a stay is against the public interest where the moving party has not shown a sufficient likelihood of success on the merits.” *Richards v. Ernst & Young LLP*, 2012 WL 92738 (N.D.Cal. Jan. 11, 2012). Here, as above indicated, plaintiff has a minimal chance of success on the merits.

For the foregoing reasons, three of the four factors weigh against granting a stay and the fourth factor is largely irrelevant. Accordingly, the defendant's motion to stay is hereby denied. The Clerk of the Court is ordered to close docket number 101.

SO ORDERED.

All Citations

297 F.R.D. 561, 87 Fed.R.Serv.3d 1302

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2019 WL 1254882

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

Walt FAMULAR, individually and on behalf
of all others similar situated, Plaintiffs,

v.

WHIRLPOOL CORPORATION, Defendant.

16 CV 944 (VB)

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Signed 03/18/2019

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Filed 03/19/2019

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OPINION AND ORDER

[Vincent L. Briccetti](#), United States District Judge

*1 Plaintiff Walt Famular, individually and on behalf of all others similarly situated, brings this action against defendant Whirlpool Corporation for allegedly misrepresenting the water and energy efficiency of three models in Whirlpool's Maytag Centennial line of washing machines. Plaintiff brings state law claims for breach of express warranty, unjust enrichment, and violations of [New York's General Business Law](#) ("GBL") Sections 349 and 350.

Now pending is plaintiff's motion for class certification. (Doc. #89). For the following reasons, the motion is GRANTED IN PART and DENIED IN PART.

Also pending are defendant's motions (i) to exclude the opinions of plaintiff's experts Dr. J. Michael Dennis and Dr. Ramamirtham Sukumar (Doc. #100); (ii) to strike certain opinions offered by plaintiff's expert Dr. Colin Weir (Doc. #103); and (iii) for reconsideration of the Court's January 19,

2017 Opinion and Order (Doc. #113). The motions to exclude or strike the opinions of plaintiff's experts are DENIED WITHOUT PREJUDICE, and the motion for reconsideration is DENIED, for the reasons set forth below.

The Court has subject matter jurisdiction pursuant to [28 U.S.C. § 1332\(d\)](#).

BACKGROUND

This case arises from the purchase of Whirlpool's Maytag Centennial line of residential washing machines, with model numbers MVWC6ESWW1, MVWC6ESWW0, and MVWC7ESWW0 (the "allegedly mislabeled washing machines") in New York from 2009 to the present.¹ The allegedly mislabeled washing machines were marketed as ENERGY STAR® compliant and displayed the ENERGY STAR® label. Plaintiff purchased an allegedly mislabeled washing machine in 2010.

The ENERGY STAR® program is administered by the United States Department of Energy and the United States Environmental Protection Agency and is intended "to identify and promote energy-efficient products ... to reduce energy consumption, improve energy security, and reduce pollution through voluntary labeling of, or other forms of communication about, products ... that meet the highest energy conservation standards." [42 U.S.C. § 6294a](#). To that end, to qualify for the ENERGY STAR® program, residential washing machines must meet energy- and water-efficiency criteria, using approximately 37% less energy and 50% less water than standard models.

*2 In July 2010, the Department of Energy clarified its guidance on how to calculate ENERGY STAR® qualifications for washing machines. See [77 Fed. Reg. 13888, 13917](#). Thereafter, the Department of Energy tested the allegedly mislabeled washing machines to ensure compliance with ENERGY STAR® standards. In 2012, the allegedly mislabeled washing machines were disqualified from the ENERGY STAR® program because results showed these models failed to meet ENERGY STAR® standards.

The crux of plaintiff's case is that plaintiff and the proposed class members were injured when they (i) paid a premium for the ENERGY STAR® qualification when, in reality, the washing machines did not meet ENERGY STAR® standards,

and (ii) purchased washing machines that resulted in higher than anticipated utility bills over their lifetime.

DISCUSSION

I. Legal Standard

To qualify for certification, a plaintiff must demonstrate by a preponderance of the evidence that the putative class meets the four requirements set forth in Rule 23(a):

- (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); see [Wal-Mart Stores, Inc. v. Dukes](#), 564 U.S. 338, 345 (2011). A plaintiff must also demonstrate the proposed class satisfies “at least one of the three requirements listed in Rule 23(b).” [Wal-Mart Stores, Inc. v. Dukes](#), 564 U.S. at 345.

The Supreme Court has cautioned that “Rule 23 does not set forth a mere pleading standard.” [Wal-Mart Stores, Inc. v. Dukes](#), 564 U.S. at 350. Instead, “[t]he party seeking ‘class certification must affirmatively demonstrate ... compliance with the Rule,’ and a district court may only certify a class if it ‘is satisfied, after a rigorous analysis,’ that the requirements of Rule 23 are met.” [In re Am. Int’l Grp., Inc. Sec. Litig.](#), 689 F.3d 229, 237–38 (2d Cir. 2012) (quoting [Wal-Mart Stores, Inc. v. Dukes](#), 564 U.S. at 350). “Such an analysis will frequently entail overlap with the merits of the plaintiff’s underlying claim ... because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” [Comcast Corp. v. Behrend](#), 569 U.S. 27, 34 (2013) (quotation marks and citations omitted).

II. Rule 23(a) Factors

A. Numerosity

Rule 23(a)(1) requires a finding that “the class is so numerous that joinder of all members is impracticable.” Courts in the Second Circuit have found this requirement met by a class consisting of forty or more members. See [Consol. Rail Corp. v. Hyde Park](#), 47 F.3d 473, 483 (2d Cir. 1995).

Defendant does not contest the numerosity requirement. Plaintiff demonstrates 15,380 allegedly mislabeled washing machines were sold in New York. These numbers suggest far more than forty individuals comprise the class; therefore, the numerosity requirement is met.

B. Commonality

Rule 23(a)(2) requires a showing of “questions of law or fact common to the class.” “Commonality is satisfied where a single issue of law or fact is common to the class.” [In re IndyMac Mort.-Backed Sec. Litig.](#), 286 F.R.D. 226, 233 (S.D.N.Y. 2012) (citing [Wal-Mart Stores, Inc. v. Dukes](#), 564 U.S. at 359 (“[E]ven a single common question will do.”) (quotation marks and brackets omitted)). However, class certification requires not only “common questions,” but “the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” [Wal-Mart Stores, Inc. v. Dukes](#), 564 U.S. at 350.

*3 Defendant argues these “common answers” cannot be generated by the proposed class’s questions.²

But common questions abound: whether the ENERGY STAR® logo was material to class members’ decisions to purchase the washing machine at issue, and whether the class members paid a higher price for the washing machine because of the logo. See [Dzielak v. Whirlpool Corp.](#), 2017 WL 6513347, at *5 (D.N.J. Dec. 20, 2017) (“Dzielak”) (noting commonality is satisfied); [Ebin v. Kangadis Food Inc.](#), 297 F.R.D. 561, 565 (S.D.N.Y. 2014) (noting commonality is satisfied by whether a product’s manufacturer “defrauded purchasers” by making a specific claim on the product’s label). The determination of these common questions will certainly resolve issues central to the validity of plaintiff’s and class members’ claims. Therefore, the commonality requirement is met.

C. Typicality

Rule 23(a)(3) requires “the claims of the class representatives be typical of those of the class, and is satisfied when each class

member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.” [Robinson v. Metro-North Commuter R.R.](#), 267 F.3d 147, 155 (2d Cir. 2001), [abrogated on other grounds by Wal-Mart Stores, Inc. v. Dukes](#), 564 U.S. at 362, as recognized in [Amara v. Cigna Corp.](#), 775 F.3d 510 (2d Cir. 2014). “Minor variations in the fact patterns underlying individual claims” do not preclude a finding of typicality. [Robidoux v. Celani](#), 987 F.2d 931, 937 (2d Cir. 1993). Instead, [Rule 23\(a\)\(3\)](#) requires “only that the disputed issues of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class.” [Fort Worth Emps.’ Ret. Fund v. J.P. Morgan Chase & Co.](#), 301 F.R.D. 116, 132 (S.D.N.Y. 2014).

Here, the claims of the named plaintiff and the proposed class members arise from the same alleged misrepresentation—that the allegedly mislabeled washing machines failed to comply with ENERGY STAR® standards. Each class member will make similar legal arguments to prove defendant's liability, specifically that the ENERGY STAR® logo was material in their purchase, and as a result, they paid a higher price for the washing machine. Thus, all class members will marshal the same evidence and arguments in support of their claims.

Defendant argues the named plaintiff cannot meet the typicality requirement because he is subject to a unique standing defense atypical of the class. According to defendant, plaintiff's purchase of a qualifying washing machine will be a factual dispute for the jury, because plaintiff's sales receipt and invoice show a different model number “MVWC6ESVW,” not the “MVWC6ESWW” at issue here. (See Doc. #107 (“Bellamy Decl.”) Ex. CC (unintelligible receipt) & Ex. DD (purchase invoice showing -VW model but -WW on lid)).

*4 Plaintiff can affirmatively demonstrate, however, by a preponderance of the evidence, that he purchased one of the washing machines at issue here, namely, the “MVWC6ESWW” model. A photograph shows the washing machine itself is labeled with a qualifying model number. (See Bellamy Decl. Ex. EE). At his disposition, plaintiff testified he purchased a brand-new “MVWC6ESWW” model; he did not know why the model number on the invoice was different; and he offered his washing machine to defendant for an inspection. (Plaintiff Dep. at 156–58, 164–65). Notably, defendant does not argue plaintiff purchased a non-qualifying washer, much less that Whirlpool manufactured a “MVWC6ESVW” model washing machine.

(See, e.g., Bellamy Decl. Ex. A at 12 (listing conventional washing machines' model numbers)). Nor did defendant choose to inspect plaintiff's washing machine. Plaintiff has demonstrated, by a preponderance of the evidence, that he purchased a qualifying washing machine, and therefore, that he can overcome this potential defense.

D. Adequacy

Under [Rule 23\(a\)\(4\)](#), the Court must examine whether the named plaintiff's interests “are antagonistic” to those of the other proposed members of the class. [Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.](#), 222 F.3d 52, 60 (2d Cir. 2000); see also [Amchem Prods., Inc. v. Windsor](#), 521 U.S. at 625–26 (“The adequacy inquiry under [Rule 23\(a\)\(4\)](#) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” (internal quotation marks and citations omitted)). Class representatives must have a sufficient interest in the outcome of the case to ensure vigorous advocacy. See [Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. LaBranche & Co.](#), 229 F.R.D. 395, 413 (S.D.N.Y. 2004). Plaintiff must also have attorneys who are “qualified, experienced, and generally able to conduct the litigation.” [In re Drexel Burnham Lambert Grp., Inc.](#), 960 F.2d 285, 291 (2d Cir. 1992) (internal quotation marks omitted).

For the reasons discussed, the named plaintiff will serve as an adequate representative of the class. He has demonstrated his commitment by assisting with the investigation, reviewing the complaint, and sitting for a lengthy deposition. Nothing in the record suggests the named plaintiff's interests are antagonistic to those of the proposed class members.

In addition, class counsel are experienced and qualified class action lawyers. Bursor & Fisher, P.A., “has been appointed class counsel in dozens of cases in both federal and state courts, and has won several multi-million dollar verdicts or recoveries.” See [Ebin v. Kangadis Food Inc.](#), 297 F.R.D. at 566. Indeed, this Court appointed Bursor & Fisher, P.A., as class counsel in [In re Scotts EZ Seed Litig.](#), 304 F.R.D. 397, 407 (S.D.N.Y. 2015), in which, following settlement, final judgment was entered on December 19, 2018.

E. Ascertainability

The Second Circuit has recognized a fifth pre-condition to class certification: “[t]he implied requirement of ascertainability.” [In re Initial Pub. Offerings Sec. Litig.](#), 471

F.3d 24, 30 (2d Cir. 2006). “To be ascertainable, the class must be readily identifiable, such that the court can determine who is in the class and, thus, bound by the ruling.” [Charron v. Pinnacle Grp. N.Y. LLC](#), 269 F.R.D. 221, 229 (S.D.N.Y. 2010) (internal quotation marks omitted). “The standard for ascertainability is not demanding and is designed only to prevent the certification of a class whose membership is truly indeterminable.” [Ebin v. Kangadis Food Inc.](#), 297 F.R.D. at 567.

Defendant does not dispute the ascertainability of the class, and the Court finds plaintiff's proposed class meets the ascertainability criteria. Plaintiff proposes a class consisting of individuals who purchased the allegedly mislabeled washing machines in New York as well as a method by which to identify proposed class members from the records of defendant and four primary retailers and distributors in New York. While proposed class members are more likely to retain a receipt for a big-ticket item like a washing machine than other everyday household products, plaintiff's proposed method properly accounts for the fact some may not have retained their receipts. See, e.g., [Forcellati v. Hyland's, Inc.](#), 2014 WL 1410264, at *5 (C.D. Cal. Apr. 9, 2014) (certifying proposed class of individuals who purchased homeopathic products although “purchasers likely have not retained proof of purchase”); [McCrary v. Elations Co.](#), 2014 WL 1779243, at *7–9 (C.D. Cal. Jan. 13, 2014) (finding ascertainable a proposed class of individuals who purchased over-the-counter supplement bearing the claim “clinically-proven” despite the likelihood of lack of proof of purchase). This definition and proposed method is sufficiently specific to satisfy the ascertainability requirement.

*5 In sum, plaintiff has satisfied all four requirements of [Rule 23\(a\)](#), and the additional implied requirement of ascertainability.

III. [Rule 23\(b\)\(2\)](#)

If [Rule 23\(a\)](#) is satisfied, [Rule 23\(b\)\(2\)](#) provides for certification when “final injunctive relief ... is appropriate respecting the class as a whole.” [Fed. R. Civ. P. 23\(b\)\(2\)](#). To the extent plaintiff seeks to have defendant remove the ENERGY STAR® label from the allegedly mislabeled washing machines, defendant stopped manufacturing the washing machines more than seven years ago. It is not clear what additional injunctive relief plaintiff seeks. Thus, certification of a 23(b)(2) class does not appear necessary. See [Spagnola v. Chubb Corp.](#), 264 F.R.D. 76, 98 (S.D.N.Y. 2010)

(declining to certify a [Rule 23\(b\)\(2\)](#) class when the challenged “language ha[d] already been eliminated”).

IV. [Rule 23\(b\)\(3\)](#) Factors

A class may be certified under [Rule 23\(b\)\(3\)](#) if the Court finds “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” [Fed. R. Civ. P. 23\(b\)\(3\)](#).

A. [Predominance](#)

[Rule 23\(b\)\(3\)](#) requires only “a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.” [Amgen Inc. v. Conn. Ret. Plans & Tr. Funds](#), 568 U.S. 455, 459 (2013) (emphasis in original). However, a district court has a “duty to take a close look at whether common questions predominate over individual ones.” [Comcast Corp. v. Behrend](#), 569 U.S. at 34 (quotation marks omitted). “Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.” [Moore v. PaineWebber, Inc.](#), 306 F.3d 1247, 1252 (2d Cir. 2002).

1. [Classwide Theories of Injury](#)

Plaintiff bring several different claims for relief, each of which requires slightly different proof. While each of plaintiff's claims for relief will be analyzed in turn to ensure classwide evidence predominates, see, e.g., [Guido v. L'Oreal, USA, Inc.](#), 284 F.R.D. 468, 481 (C.D. Cal. 2012), [on reconsideration](#), 2012 WL 2458118 (C.D. Cal. June 25, 2012), plaintiff seeks to proceed under two main theories of injury: proposed class members were injured because (i) they overpaid or paid a premium for the allegedly mislabeled washing machine (“price premium”), and (ii) they did not receive the promised energy savings and incurred higher utility bills as a result (“energy expense”). Because the viability of these theories affect all of plaintiff's claims, they will be analyzed first.

a. Price Premium

Defendant argues plaintiff's price premium theory is not appropriate for certification, because (i) determining whether the proposed class members paid a premium would necessarily require an individualized inquiry, and in any event, (ii) common evidence shows proposed class members did not actually pay a premium for the allegedly mislabeled washing machines.

*6 The Court disagrees.

The question whether proposed class members were injured by overpayment can be answered with classwide evidence. See, e.g., [Kurtz v. Kimberly-Clark Corp.](#), 321 F.R.D. 482, 549 (E.D.N.Y. 2017) (certifying class and finding common questions predominate for price premium theory of injury); [Ebin v. Kangadis Food Inc.](#), 297 F.R.D. at 568–69 (same); see also [In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.](#), 722 F.3d 838, 857 (6th Cir. 2013) (“Because all Duet owners were injured at the point of sale upon paying a premium price for the Duets as designed, even those owners who have not experienced a mold problem are properly included within the certified class.”) (emphasis in original), cert. denied sub nom. [Whirlpool Corp. v. Glazer](#), 571 U.S. 1196 (2014). Here, plaintiff offers defendant's internal documents, public statements, and retail sales figures to demonstrate the allegedly mislabeled washing machines commanded a premium price.³

Even if each purchaser's exact premium differed by retailer and date of purchase, all proposed class members need not pay an identical premium for common questions to predominate at the certification stage. See [Butler v. Sears, Roebuck & Co.](#), 727 F.3d 796, 801 (7th Cir. 2013) (“It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages.”). Not only is this argument premature, but it confuses a theory of injury with a damages calculation.

Defendant argues even if classwide evidence could conceivably show a price premium; in reality, such evidence actually demonstrates the opposite: an allegedly comparable non-ENERGY STAR® washing machine (model no. MVWC500, or the “C500”) sold at a higher price, on average, than one ENERGY STAR® washing machine at

issue here. Again, this argument is premature. [Rule 23\(b\)\(3\)](#) requires only that common questions can be answered, “not that those questions will be answered, on the merits, in favor of the class.” [Amgen Inc. v. Conn. Ret. Plans & Tr. Funds](#), 568 U.S. at 459. Moreover, putting aside the baseline question whether those washers are in fact comparable, defendant's argument is misleading—purchasers paid more for the ENERGY STAR® washer in nineteen of twenty months at Home Depot and nine of eleven months at Lowe's. The lower average price of the ENERGY STAR® washer resulted from a few months of deep discounts from Black Friday promotions around November 2009. (See Scott Rep. ¶ 79 n.105). Therefore, whether the proposed class members were injured by paying a premium price for the allegedly mislabeled washing machines can be established by common proof.

b. Energy Expense

*7 Plaintiff's energy expense theory of injury, however, is ill-suited for certification. There is simply no indication that common evidence can sufficiently demonstrate classwide injury to proposed class members through increased utility bills.

Plaintiff argues proposed class members were injured when the allegedly mislabeled washing machines did not provide the promised energy savings and members incurred higher utility bills as a result. To demonstrate that injury, plaintiff first finds the “additional energy use” by comparing what was allegedly promised by the ENERGY STAR® standard and what the Department of Energy found the allegedly mislabeled washing machines actually used in a 2010 test. Dr. Weir assumes that all proposed class members performed 392 cycles a year.⁴ (See Doc. #91 (“Weir Decl.”) ¶¶ 9–14). After determining the “additional energy use,” Dr. Weir multiplied it by current and historic New York electricity and water prices over the eleven-year lifespan of the washing machine to calculate the energy expense damages. (*Id.* ¶¶ 15–19).

The problem—which the [Dzielak](#) court pointed out and with which this Court agrees—is that plaintiff has not demonstrated that common questions predominate over individualized inquiries. [Dzielak](#), 2017 WL 6513347, at *11. “Many factors determine the energy and water costs for each putative plaintiff. Plaintiffs used different temperature and cycle settings, fill levels, and utility companies.” *Id.* The differences are apparent from simply looking to the number of

annual wash cycle by certain users. For example, in plaintiff's deposition, he said he ran his washing machine 260 times per year. (Def. Br. at 24 n.19). In the Dzielak action, plaintiff Reid performed 52 cycles a year, plaintiff Parsons performed 130 cycles a year, plaintiff Maxwell performed 546 cycles a year. Dzielak, 2017 WL 6513347 at *12 n.13. Plaintiff does not even attempt to rely on proposed class members' utilities bills in support—because utility bills do not break out energy use by appliance. Plaintiff has not demonstrated that energy expense injury can be shown through generalized proof without the need for individual inquiries of every proposed class member.

Without demonstrating proposed class members were similarly situated, plaintiff seeks to use “representative” evidence to show injury and damages on a classwide basis. Representative evidence is proper if a plaintiff could rely on the representative evidence if he or she brought an individual action. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1043, 1046–47 (2016) (allowing representative evidence of the time employees spent donning and doffing protective gear based on an expert's calculation after viewing 744 videotaped observations). However, representative evidence is not always appropriate. In Wal-Mart Stores, Inc. v. Dukes, the Court denied certification on commonality grounds when plaintiffs proposed using a “sample set of the class members” to determine valid claims and damages, and then apply that finding proportionately against defendant for all class members. 564 U.S. at 367. Such a use of representative evidence was simply “trial by formula.” Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. at 1048 (alterations omitted). As Tyson explained: “The underlying question in Wal-Mart, as here, was whether the sample at issue could have been used to establish liability in an individual action. Since the Court held that the employees were not similarly situated, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers.” Id. (emphasis added).

*8 Plaintiff has not shown that proposed class members' individual use (and resulting energy expense) was comparable enough to justify the use of representative evidence. As the Dzielak Court noted, it is much more problematic to compare the “individual variability in the energy use by owners of washers” than it is to compare the time it takes for trained and experienced employees to change into the same protective clothing gear. Dzielak, 2017 WL 6513347 at *12. It seems unlikely that in an individual action, a plaintiff who ran his

washing machine 52 times a year could rely on representative evidence based on 392 cycles a year.

Accordingly, the Court finds common questions do not predominate as to plaintiff's energy expense theory.

2. Plaintiff's Claims

a. GBL Sections 349 and 350

GBL Section 349 provides that “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.” To establish a prima facie case under Section 349, “a plaintiff must demonstrate that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result.” Maurizio v. Goldsmith, 230 F.3d 518, 521 (2d Cir. 2000). GBL Section 350 prohibits “[f]alse advertising in the conduct of any business ... or in the furnishing of any service” in New York. “The standard for recovery under [Section] 350, while specific to false advertising, is otherwise identical to [Section] 349.” Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 324 n.1 (2002). Neither Section 349 nor 350 requires proof of reliance. See Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 941 (2012); Petrosino v. Stearn's Prod., Inc., 2018 WL 1614349, at *6 (S.D.N.Y. Mar. 30, 2018).⁵

Defendant does not dispute its acts were directed at consumers, and as discussed, common questions predominate for plaintiff's price premium theory of injury. Defendant argues individualized inquiries will outweigh common evidence in determining whether consumers found the labels materially misleading.

The Court disagrees.

Materiality under Sections 349 and 350 is an objective inquiry; a deceptive act is defined as one “likely to mislead a reasonable consumer acting reasonably under the circumstances.” Maurizio v. Goldsmith, 230 F.3d at 521. Thus, consumers do not have to prove that they actually relied on a misrepresentation.

Defendant nonetheless argues classwide evidence cannot be used to satisfy the materiality requirement, because

determining whether a reasonable consumer found the ENERGY STAR® logo misleading necessarily depends on each individual purchaser's date of purchase. Defendant maintains a jury could find the ENERGY STAR® logo was materially misleading only after the Department of Energy reinterpreted the term “clothes container” on July 6, 2010, or after the Department of Energy concluded defendant's washing machines did not meet the revised ENERGY STAR® criteria on January 19, 2011. Defendant further argues it has a “safe harbor” defense against the proposed class members who bought the washing machine before the Department of Energy reinterpreted the term or disqualified the allegedly mislabeled washing machines. See [N.Y. GBL Section 349\(d\)](#) (“[I]t shall be a complete defense that the act or practice is ... subject to and complies with the rules and regulations of, and the statutes administered by ... any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by ... such department, division, commission or agency or the federal courts.”).

*9 As a general matter, materiality under [Sections 349 and 350](#) is an objective question that does not depend on the mindset of each individual purchaser. Indeed, the Supreme Court has held that materiality “is a question common to all members of the class” when, as here, the materiality of an alleged misrepresentation is judged according to an objective standard. [Amgen Inc. v. Conn. Ret. Plans & Tr. Funds](#), 568 U.S. at 459 (“The alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all investors composing the class.”). Therefore, whether the ENERGY STAR® logo was misleading before or after a certain date, will not call for individualized factual determinations. See [Dzielak](#), 2017 WL 6513347, at *17. It is a question that can be answered with common proof and applied to the class. Cf. [Glatt v. Fox Searchlight Pictures, Inc.](#), 811 F.3d 528, 539 (2d Cir. 2016) (individualized inquiries predominate when individualized inquiries cannot be answered with generalized proof). The same rationale applies to defendant's safe harbor defense: the viability of the defense does not depend on facts particular to each proposed class member's case. See [In re Visa Check/MasterMoney Antitrust Litig.](#), 280 F.3d 124, 138 (2d Cir. 2001) (noting the presence of affirmative defenses does not automatically render class certification inappropriate).

If a factfinder's determination later bars claims by some proposed class members because of the date of purchase, the Court “has available adequate procedural mechanisms.”

[Smilow v. Sw. Bell Mobile Sys., Inc.](#), 323 F.3d 32, 39–40 (1st Cir. 2003). The application to the class itself can be accomplished using “computer records, clerical assistance, and objective criteria—thus rendering unnecessary an evidentiary hearing on each claim.” [Soutter v. Equifax Info. Servs., LLC](#), 307 F.R.D. 183, 214 (E.D. Va. 2015) (quoting [2 Newberg on Class Actions](#) § 4:50 (5th ed.)) (internal quotation marks omitted); see also [Minns v. Advanced Clinical Emp. Staffing LLC](#), 2015 WL 3491505, *8 (N.D. Cal. June 2, 2015) (“[T]he necessity of making individualized factual determinations does not defeat class certification if those determinations are susceptible to generalized proof like employment and payroll records.”).

Therefore, common questions predominate over individualized inquiries in determining whether consumers found the labels materially misleading.

Accordingly, plaintiff's claims under [GBL Sections 349 and 350](#) may proceed.

b. Breach of Express Warranty Claim

To state a claim for breach of express warranty under New York law, “a plaintiff must allege (1) the existence of a material statement amounting to a warranty, (2) the buyer's reliance on this warranty as a basis for the contract with the immediate seller, (3) breach of the warranty, and (4) injury to the buyer caused by the breach.” [Goldemberg v. Johnson & Johnson Consumer Cos.](#), 8 F. Supp. 3d 467, 482 (S.D.N.Y. 2014). A buyer must also “within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.” [N.Y. U.C.C. § 2–607\(3\)\(a\)](#). Unlike the [Sections 349 and 350](#) claims, breach of warranty claims require proof of reliance. See [Weiner v. Snapple Beverage Corp.](#), 2010 WL 3119452, at *11 (S.D.N.Y. Aug. 5, 2010).

Under New York law, “a buyer may enforce an express warranty even if it had reason to know that the warranted facts were untrue.” [Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.](#), 500 F.3d 171, 186 (2d Cir. 2007); see also [CBS Inc. v. Ziff–Davis Publ'g Co.](#), 75 N.Y.2d 496, 503–04 (1990). However, if a buyer actually had “full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty,” the buyer cannot later assert a breach of warranty. [Galli v. Metz](#), 973 F.2d 145, 151 (2d Cir. 1992). This is known as the “basis of the bargain conception

of reliance for express warranty claims.” [Weiner v. Snapple Beverage Corp.](#), 2010 WL 3119452, at *11.

Under this conception of reliance, individual questions predominate because each proposed class member's knowledge of the truth or falsity of defendant's advertising claims requires evaluation. Class certification is therefore inappropriate for these claims. See, e.g., [Weiner v. Snapple Beverage Corp.](#), 2010 WL 3119452, at *11 (declining to certify a class claiming a violation of New York express warranty law because plaintiffs’ “reliance on Snapple’s ‘All-Natural’ label cannot be the subject of generalized proof”); [Klein v. Robert's Am. Gourmet Food, Inc.](#), 28 A.D.3d 63, 72 (2d Dep't 2006) (reversing lower court's decision that common questions predominated with respect to reliance in a New York express warranty claim).

*10 Accordingly, the Court declines to certify plaintiff's claim for breach of express warranty.

c. Unjust Enrichment Claim

“To prevail on a claim for unjust enrichment in New York, a plaintiff must establish (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution.” [In re Mid-Island Hosp., Inc.](#), 276 F.3d 123, 129 (2d Cir. 2002). “Thus, plaintiffs must show that the benefits that the members of the plaintiffs' class received were less than what they bargained for.” [Weiner v. Snapple Beverage Corp.](#), 2010 WL 3119452, at *10 (quoting [Vigiletti v. Sears, Roebuck & Co.](#), 838 N.Y.S.2d 785 (2d Dep't 2007)).

Class certification of unjust enrichment claims is appropriate when, as here, “the crux of plaintiffs' claims is that defendant unjustly retained the benefits of its sale of ... products to consumers after it failed to disclose material facts about the defective nature of those products.” See [In re Scotts EZ Seed Litig.](#), 304 F.R.D. at 412 (certifying unjust enrichment claims under California law) (quoting [Cartwright v. Viking Indus., Inc.](#), 2009 WL 2982887, at *13 (E.D. Cal. Sept. 14, 2009)). Defendant's argument that plaintiff has not demonstrated required restitution on a classwide basis is premature. Whether defendant was unjustly enriched at the proposed class members' expense by selling the allegedly mislabeled washing machines can succeed or fail on common evidence.

Accordingly, plaintiff's claim for unjust enrichment may proceed.

3. Classwide Damages

Defendant argues plaintiff's proposed damages models are not tied to the proposed theories of liability, and thus, cannot support class certification. (Def. Br. at 20).⁶

To satisfy the predominance requirement, plaintiff must propose a damages model consistent with the proposed theory (or theories) of liability. [Comcast Corp. v. Behrend](#), 569 U.S. at 34. A damages model must measure only damages attributable to plaintiff's theory of liability; “[i]f the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of 23(b)(3).” [Id.](#) at 35.

Because the Court has already determined plaintiff's energy expense theory of liability does not satisfy the predominance requirement, the Court examines plaintiff's two remaining damages models: (i) statutory damages for violations of [GBL Section 349](#) (\$50) and [Section 350](#) (\$500); and (ii) price premium damages. For the following reasons, the Court finds the models are adequately tied to plaintiff's theory of liability.

a. Statutory Damages

*11 Statutory damages are permissible in class actions alleging [Sections 349](#) and [350](#) violations brought in federal court. See [Kurtz v. Kimberly-Clark Corp.](#), 321 F.R.D. at 551 (noting statutory damages under [section 349\(h\)](#) are available on a class basis in federal court, even though they would be barred if the same action were to proceed in New York state court); [Guido v. L'Oreal, USA, Inc.](#), 2013 WL 3353857, at *16–17 (C.D. Cal. July 1, 2013) (same). The statutory damage calculation is the number of units sold in New York (15,380) multiplied by the \$50 statutory minimum for [GBL Section 349](#) violations and \$500 statutory minimum for [GBL Section 350](#) violations, which equals \$769,000 and \$7,690,000, respectively.

Accordingly, plaintiff's statutory damages model is consistent with the proposed theory of liability.

2. Price Premium Damages

Courts routinely reject price premium methodologies under Comcast when the proposed methodologies do not attempt to isolate the premium due only to the allegedly misleading marketing statement. See, e.g., Brazil v. Dole Packaged Foods, LLC, 2014 WL 2466559, at *16 (N.D. Cal. May 30, 2014), class decertified 2014 WL 5794873 (N.D. Cal. Nov. 6, 2014); Werdebaugh v. Blue Diamond Growers, 2014 WL 2191901, at *23 (N.D. Cal. May 23, 2014), class decertified, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014). These courts correctly point out consumers may pay a higher price for a product for many reasons that have nothing to do with specific advertising claims, including, for example, brand loyalty and product quality.

Plaintiff must be able to show the damages “stemmed from the defendant's actions that created the legal liability.” In re POM Wonderful LLC, 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014). In other words, plaintiff must demonstrate that defendant's alleged misrepresentations caused the proposed class members to pay a price premium that they otherwise would not have paid for the allegedly mislabeled washing machine in the absence of the misrepresentation. Id.

Thus, for Dr. Weir's price premium model adequately to match plaintiff's theory of liability—that proposed class members were injured when they paid a premium for an allegedly mislabeled washing machine—Dr. Weir must show other features are not included in his calculation of the price premium. Dr. Weir proposes three ways in which to calculate the price premium: (i) a 55.7% price premium purportedly calculated by Whirlpool;⁷ (ii) a 48.5% price premium based on a continent valuation methodology, or (iii) a 44.3% price premium based on conjoint analysis.

The continent valuation methodology study is based on a consumer survey regarding the prices of washing machines labeled and sold as ENERGY STAR® compliant. The 1,095 respondents were United States residents who purchased a top-loading washing machine after 2005. The respondents' preference for an ENERGY STAR® labeled top-loading machine over a similar non-ENERGY STAR® machine was nearly unanimous. The average respondent required an average 48.5% discount to buy the machine without the ENERGY STAR® label.

*12 The conjoint survey, on the other hand, looks at how much the price of an ENERGY STAR® washing machine would need to be reduced to retain the same volume of sales without the ENERGY STAR® logo. The 530 respondents repeatedly ranked various features of a hypothetical washing machine, including its ENERGY STAR® status, and then valued products containing only certain features they have already ranked by indicating how likely they are to purchase the hypothetical washing machine. Each individual's valuation of these hypothetical washing machines was then analyzed specifically to compare ENERGY STAR® status.

These calculations, which are based on sound and accepted methodologies, seek to isolate the alleged damage that stemmed directly from defendant's alleged misrepresentation. Thus, at this stage, Dr. Weir has identified statistical methodologies and demonstrated it is possible to isolate the price premium associated with the ENERGY STAR® label.

Defendant argues the price premium damages theory does not match plaintiff's theory of liability, because it does not account for the value proposed class members actually received from the performance of the allegedly mislabeled washing machines. In other words, defendant argues the proposed class cannot recover the entire cost of the price premium when some utilities savings were, in fact, delivered. (Def. Br. at 21).

Plaintiff's theory of liability, however, does not turn on the performance of the washing machine. Plaintiff alleges he paid the premium because the washing machine had an ENERGY STAR® logo. See In re POM Wonderful LLC, 2014 WL 1225184, at *5 (“Plaintiffs must demonstrate, therefore, that Defendant's alleged misrepresentations caused Plaintiffs to pay a ‘price premium’ of \$290 million more than Plaintiffs otherwise would have paid for Defendant's products in the absence of the misrepresentations.”). This an all-or-nothing theory—or as plaintiff describes it, a binary one. Without the logo, plaintiff claims he would not have paid the price premium.

In sum, plaintiff's statutory and price premium damages models match plaintiff's theories of liability and satisfy Comcast.

B. Superiority

Rule 23(b)(3) requires a class action to be “superior to other available methods for fairly and effectively adjudicating the controversy.” The Court must consider:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Defendant does not dispute all four factors weigh in favor of class certification. When, as here, “proceeding individually would be prohibitive for class members with small claims ... the class action device is frequently superior to individual actions.” Seijas v. Republic of Argentina, 606 F.3d at 58. Additionally, while the Dzielak class action is already pending in the District of New Jersey, this action includes a proposed class only in New York, which is not a state represented in the Dzielak action. See Bustillos v. Board of County Com'rs of Hidalgo County, 310 F.R.D. 631, 656–57 (D.N.M. 2015) (“Furthermore, the Court concludes that, if a class has already been certified to pursue certain claims, redundant classes should generally not be certified. Subsequent proposed classes should either be defined to avoid class member-overlap with previously certified classes or else should assert different claims.” (citing 2 Newberg on Class Actions § 4:70 (5th ed.))). Finally, any concerns about manageability “rely, almost entirely, on a premise [the Court has] already rejected—namely, that innumerable individualized inquiries will swallow common ones.” Haddock v. Nationwide Fin. Servs., Inc., 293 F.R.D. 272, 287 (D. Conn. 2013).

V. Motion for Reconsideration

*13 Lastly, defendant moves for reconsideration of the Court's January 19, 2017, Opinion and Order (Doc. #45), in light of the Supreme Court's decision in China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018), which, defendant argues, is an intervening change in the law that implemented a “blanket no-

tolling-of-class-claims-ever” rule, rendering plaintiff's claims untimely.

The Court disagrees.

The decision to grant or deny a motion for reconsideration lies squarely within the discretion of the district court. See Devlin v. Transp. Comm'ns Int'l Union, 175 F.3d 121, 132 (2d Cir. 1999). The standard for a motion for reconsideration “is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or [factual] data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995); see also U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 182 F.R.D. 97, 100 (S.D.N.Y. 1998) (a motion for reconsideration “provides the Court with an opportunity to correct manifest errors of law or fact, hear newly discovered evidence, consider a change in the applicable law or prevent manifest injustice”).

In China Agritech, the Supreme Court limited the permissive tolling rule announced in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), which tolls the applicable statute of limitations for all persons encompassed by the class complaint and, if class status is denied, allows them to join an existing suit or file an individual action. China Agritech, Inc. v. Resh, 138 S. Ct. at 1804. Faced with the question whether a putative class member could commence a new class action outside the statute of limitations, the Court found the American Pipe tolling rule “does not permit the maintenance of a follow-on class action past expiration of the statute of limitations” upon the denial of class certification. Id.

This holding, however, does not alter this Court's prior opinion that “American Pipe tolling ... applies only to cases with federal question jurisdiction over federal claims.” (Doc. #45 at 14). See Chavez v. Occidental Chem. Corp., 300 F. Supp. 3d 517, 529 (S.D.N.Y. 2018), reconsideration denied, 2018 WL 620488 (S.D.N.Y. Jan. 29, 2018) (“The American Pipe rule, however, applies only to claims arising under federal law and thus implicating federal question jurisdiction.”); Vincent v. Money Store, 915 F. Supp. 2d 553, 560 (S.D.N.Y. 2013) (“The American Pipe case concerned the tolling of claims under a federal statute, the Sherman Act. It did not purport to announce a rule that would apply to state law claims.”); see also 1 McLaughlin on Class Actions § 3:15 (14th ed.) (“American Pipe did not itself announce any tolling rule applicable to state law claims.”). China Agritech

only concerned the tolling rule announced in American Pipe, and therefore, only applies to cases with federal question jurisdiction over federal claims.

Here, plaintiff's claims arise under state law and implicate diversity jurisdiction. China Agritech does not apply, and plaintiff's claims are timely.

Accordingly, defendant's motion for reconsideration is denied.

CONCLUSION

The motion for class certification is DENIED with respect to the proposed Rule 23(b)(2) class and the breach of warranty claim. In addition, plaintiff may not utilize the energy expense theory of injury or damages model. The motion for class certification is otherwise GRANTED.

***14** The motions to exclude or strike the opinions of plaintiff's experts are DENIED WITHOUT PREJUDICE.

The motion for reconsideration is DENIED.

The Clerk is instructed to terminate the motions. (Docs. ## 89, 100, 103, 113).

All counsel are directed to appear for an in-person status conference on May 30, 2019, at 2:15 p.m. By no later than May 23, 2019, counsel are directed to submit a joint letter addressing all case management issues going forward, including a proposed schedule for discovery on the merits of plaintiff's claims.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 1254882

Footnotes

- 1 Plaintiff was a member of a putative nationwide class in Dzielak v. Whirlpool Corp., Case No. 2:12-cv-00089-KM-JBC, filed on January 5, 2012, in the United States District Court for the District of New Jersey. On February 5, 2016, the Dzielak plaintiffs voluntarily narrowed their proposed class by seeking certification of only seven state classes, not including New York. On February 8, 2016, plaintiff and seven other Dzielak plaintiffs from various states filed the complaint in this case, amending the complaint on March 9, 2016 (Doc. #5). By Opinion and Order dated January 19, 2017, the Court dismissed the seven non-New York plaintiffs for lack of personal jurisdiction. (Doc. #45). The only surviving claims are plaintiff's claims against Whirlpool.
- 2 Defendant vigorously disputes that common questions predominate in the context of the additional class certification requirement under [Rule 23\(b\)\(3\)](#), but notes its arguments also apply to commonality under [Rule 23\(a\)](#). Commonality under [Rule 23\(a\)](#), however, is less stringent than predominance under [Rule 23\(b\)\(3\)](#), and therefore, the Court will focus its attention on the predominance inquiry. [Amchem Prod., Inc. v. Windsor](#), 521 U.S. 591, 609 (1997).
- 3 E.g., Doc. #90 ("Deckant Decl.") Ex. 6 at 13 (2008 Whirlpool presentation estimating a \$200 "initial purchase price premium" for ENERGY STAR® washing machines); Deckant Decl. Ex. 7 at 3 (2008 investor call transcript, noting "there is a slight premium that customers will pay for energy appliances"); Deckant Decl. Ex. 8 at 13 (2009 Whirlpool presentation showing a generally higher purchase price for ENERGY STAR® appliances); Deckant Decl. Ex. 9 at 8 (2009 investors' conference transcript, noting purchasers "pay a little bit more on the front end" for energy efficient models).

- 4 Dr. Weir states he uses 392 cycles because it was the number “specified by” the Code of Federal Regulations that was used, in part, to generate the energy guide labels presented to the class. (Doc. #98 (“Weir Rebuttal Decl.”) ¶ 98).
- 5 Defendant argues proof of individualized reliance is necessary for [Section 350](#) claims, relying on a First Department decision and other non-binding precedent. This Court disagrees. The Court of Appeals noted plainly, “To the extent that the Appellate Division order imposed a reliance requirement on [General Business Law §§ 349 and 350](#) claims, it was error. See [Koch v. Acker, Merrall & Condit Co.](#), 18 N.Y.3d 940, 941 (2012) (emphasis added). The court relied on its earlier decision in [Small v. Lorillard Tobacco Co.](#), which, in parsing a [Section 350](#) claim, noted “[i]ntent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim.” 94 N.Y.2d 43, 55 (1999) (noting, however, that reliance was necessary for plaintiff’s common-law fraud claim).
- 6 Defendant also moves to exclude or strike the opinions of plaintiff’s experts Dr. Dennis, Dr. Sukumar, and Dr. Weir under [Federal Rule of Evidence 702](#) and [Daubert v. Merrell Dow Pharm.](#), 509 U.S. 579 (1993). The Second Circuit has not yet decided whether [Daubert](#) motions are appropriate at the class certification stage; however, [Comcast](#) requires the Court ensure that plaintiff’s proposed damages methodologies match plaintiff’s theories of liability. [Comcast Corp. v. Behrend](#), 569 U.S. at 34–35. Defendant’s motions to exclude Dr. Dennis and Dr. Sukumar and to strike certain opinions offered by Dr. Weir are DENIED WITHOUT PREJUDICE; instead, the Court has considered whether each of Dr. Weir’s proposed methodologies satisfies [Comcast](#).
- 7 Although the Court has denied without prejudice defendant’s motions to exclude or strike the opinions of plaintiff’s experts at this stage of the case, the Court is highly dubious of defendant’s purported calculation of a “55.7% price premium,” because the Whirlpool document is undated, the author is unknown, and it depicts two contradictory premiums (66% in the text description and 55.7% in the chart). (See Doc. #91 (“Weir Decl.”) ¶ 32–34 & n.24).

34 F.3d 560

United States Court of Appeals, Seventh Circuit.

Jennifer A. FLORIN and Alan L. Mundt, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

NATIONSBANK OF GEORGIA, N.A., Robert K. Barton, Leonard S. Gaby, et al., Defendants.
Appeal of COHEN, MILSTEIN, HAUSFELD & TOLL; Lawton & Cates, S.C.; Opperman, Heins & Paquin; and Robins, Kaplan, Miller & Ciresi.

No. 93–2062

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Argued Nov. 12, 1993.

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Decided Sept. 8, 1994.

Synopsis

Four law firms representing plaintiffs in class action under Employee Retirement Income Security Act (ERISA) appealed order of the United States District Court for the Western District of Wisconsin, [John C. Shabaz](#), J., awarding attorney fees. The Court of Appeals, [Kanne](#), Circuit Judge, held that: (1) common fund principles governed attorney fee award; (2) risk multiplier was available and would be mandated if counsel had no sure source of compensation; and (3) whether to use percentage of recovery method or lodestar method was within district court's discretion.

Vacated and remanded.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***561** [Bruce M. Davey](#), [Kent I. Carnell](#), Mark W. Ratten, Lawton & Cates, Madison, WI, [Lowell E. Sachnoff](#), [Gary S. Caplan](#), Sachnoff & Weaver, Chicago, IL, [Herbert E. Milstein](#), [Lisa M. Mezzetti](#), [Cyrus Mehri](#), Cohen, Milstein, Hausfeld & Toll, Washington, DC, [Samuel D. Heins](#), [Eric L. Olson](#), Opperman, Heins & Paquin, Minneapolis, MN, [Thomas J. Gallo](#), [Robert W. Fisher](#), Robins, Kaplan, Miller & Ciresi, Atlanta, GA, for plaintiffs.

[Brady C. Williamson](#), Lafollette & Sinykin, Madison, WI, [John A. Busch](#), [Peter L. Coffey](#), Michael, Best & Friedrich, Milwaukee, WI, [Peter Q. Bassett](#), [Philip C. Cook](#), [John E.](#)

[Stephenson, Jr.](#), Alston & Bird, Atlanta, GA, for Nationsbank of Georgia, N.A.

[Robert H. Frieber](#), Frieber, Finerty & St. John, [John A. Busch](#), [Peter L. Coffey](#), Michael, Best & Friedrich, Milwaukee, WI, for Robert K. Barton.

[John A. Busch](#), [David J. Cannon](#), [Peter L. Coffey](#), Michael, Best & Friedrich, Milwaukee, WI, for Leonard S. Gaby, Allen G. Lacoe, Robert A. Magnusson, Anthony A. Saliture, Harlan B. Smith, Thomas F. Stutzman.

[Barry Levenstam](#), [Jerold S. Solovy](#), [William D. Heinz](#), Jenner & Block, Chicago, IL, [Robert H. Frieber](#), Frieber, Finerty & St. John, [John A. Busch](#), [Peter L. Coffey](#), Michael, Best & Friedrich, Milwaukee, WI, for Raymond G. Chambers, Frank E. Richardson, E. Burke Ross, Jr., William E. Simon, Frank E. Walsh, Jr.

[Lowell E. Sachnoff](#) (argued), [Gary S. Caplan](#), Sachnoff & Weaver, Chicago, IL, for Cohen, Milstein, Hausfeld & Toll, Lawton & Cates, S.C., Opperman, Heins & Paquin, Robins, Kaplan, Miller & Ciresi.

***562** Before GIBSON, * [KANNE](#), and [ROVNER](#), Circuit Judges.

Opinion

[KANNE](#), Circuit Judge.

Four law firms representing class plaintiffs in this case appeal from the district court's order allowing fees to be paid out of a fund created by the settlement of the class action suit.¹

Participants in and beneficiaries of the Simmons Mattress Company's employee stock ownership plan ("ESOP"), brought this action alleging that the defendants² violated their fiduciary obligations under the Employee Retirement Income Security Act ("ERISA") by causing or permitting shares of Simmons stock to be sold to the ESOP at a price above fair market value. The class plaintiffs sought to recover damages from the sale of stock. In March 1993, the parties settled the suit for a total of \$15,448,304.66. A settlement fund was created for the benefit of the plaintiff class, and the parties agreed that class counsel would seek its fees and expenses from the fund.

Plaintiffs' counsel then petitioned the district court for an award of fees and expenses from the settlement fund. Counsel requested attorney's fees of \$2.85 million, which represented

18.45% of the fund, or the lodestar figure³ of \$1,863,838.75 enhanced by a risk multiplier of 1.53.⁴

The district court first determined that the rates and hours documented by the attorneys for use in calculating the lodestar were “fair and reasonable.” Thus, it approved counsel's suggested lodestar of \$1,863,838.75. The court then turned to decide whether it would increase the award with a multiplier to reflect the risk the plaintiff's lawyers undertook when they decided to pursue the case. The court stated that it was “of the opinion that counsel have billed at their usual hourly rates and have been recompensed with this fee award for the full fees for services expended in this matter,” and found “no compelling reason to provide that multiplier which has been requested in this matter.” Having denied counsel the multiplier, the district court accordingly awarded attorney's fees only in the amount of the lodestar.

Standard of Review

We review a district court's award of attorney's fees for abuse of discretion. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 973 (7th Cir.1991). We will find an abuse of discretion when the district court reaches an erroneous conclusion of law. *Id.*; see also *Skelton v. General Motors Corp.*, 860 F.2d 250, 257 (7th Cir.1988), cert. denied, 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989). We review de novo the court's method of determining fees, to determine that it comports with approved procedures for calculating awards. *Harman*, 945 F.2d at 973.

Analysis

In the United States, parties to a lawsuit usually bear their own expenses, regardless of which party prevails. This is sometimes called the “American Rule.” See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975). Congress, however, has created exceptions to the American Rule, by inserting fee-shifting provisions in certain statutes, such as the one in ERISA, at 29 U.S.C. § 1132(g). These fee-shifting statutes were enacted for the purpose of encouraging the private prosecution of certain favored actions, by requiring defendants who have violated plaintiffs' rights to compensate plaintiffs *563 for the costs they incurred to enforce those rights. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1327 (2d Cir.1990); *Skelton*, 860 F.2d at 253.

Courts may also make an exception to the American rule based on equitable doctrines, such as the “common fund” or “equitable fund” doctrine.⁵ When a case results in the creation of a common fund for the benefit of the plaintiff class, the common fund doctrine allows plaintiffs' attorneys to petition the court to recover its fees out of the fund. In such a case, the defendant typically pays a specific sum into the court, in exchange for a release of its liability. The court then determines the amount of attorney's fees that plaintiffs' counsel may recover from this fund, thereby diminishing the amount of money that ultimately will be distributed to the plaintiff class. The common fund doctrine is based on the notion that not one plaintiff, but all “ ‘those who have benefitted from litigation should share its costs.’ ” *Skelton*, 860 F.2d at 252 (citations omitted).

I.

The issue in this case is whether the district court abused its discretion by failing to award appellants a multiplier for risk. However, we must first determine whether this case should be governed by common fund principles or by statutory fee-shifting principles, for “when a case is initiated under a statute with a fee-shifting provision [but] is settled with the creation of common fund, the question may arise whether statutory fee principles should govern in whole or in part the attorney fee award.” *Skelton*, 860 F.2d at 254. In such a situation, “the statute must control and the doctrine must be deemed abrogated to the extent necessary to give full effect to the statute.” *Long Island Lighting*, 907 F.2d at 1327.

In *Skelton v. General Motors Corp.*, plaintiffs brought a class action against GM under the Magnuson–Moss Warranty–Federal Trade Commission Improvement Act. The Magnuson–Moss Act contained a fee-shifting provision; however, the plaintiff class settled the case through the creation of a common fund. We held there that “when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorney's fees, equitable fund principles must govern the court's award of the attorney's fees.” *Skelton*, 860 F.2d at 256 (citing *In re Fine Paper*, 751 F.2d 562, 582–84 (3d Cir.1984); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 164–65 (3d Cir.1973)).

Our holding in *Skelton* applies to this case. Even more so than the fee-shifting provision in *Skelton*, the terms of ERISA's

fee-shifting provision do not purport to control fee awards in cases settled with the creation of a common fund, nor does the operation of common fund principles in this case conflict with the provision's intended purpose. [Section 1132\(g\)\(1\)](#) provides simply, "... [i]n any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." This fee-shifting provision is unusual because it does not specify that prevailing plaintiffs may be awarded attorney's fees, but instead states that attorney's fees may be awarded to either party.⁶ However, we have interpreted the provision to mean that although winning defendants may, in rare cases, collect fees from losing plaintiffs, the ERISA fee-shifting statute primarily benefits winning plaintiffs. *See generally Chicago Painters & Decorators Pension, Health and Welfare, and Deferred Savings Plan Trust Funds v. Karr Bros.*, 755 F.2d 1285 (7th Cir.1985); *564 *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820 (7th Cir.1984); *Marquardt v. North Amer. Car Corp.*, 652 F.2d 715 (7th Cir.1981).

The settlement agreement approved by the court provides that the defendants are released from potential liability for statutory attorney's fees and that class counsel may instead petition the court for an award of fees from the settlement fund. Thus, the settlement agreement seems to anticipate that the amount paid by the defendants into the fund includes an unspecified sum for class counsel's fees.

An award of attorney's fees from the fund would therefore be consistent with the goal of the fee-shifting provision to allow " 'the offending party [to] bear the costs of the award rather than ... plan participants.' " *Bowen v. Southtrust Bank of Alabama*, 760 F.Supp. 889, 894 (M.D.Ala.1991) (citing *Eaves v. Penn.*, 587 F.2d 453, 464 (10th Cir.1978)). Furthermore, an award of fees from the settlement fund comports with the fee-shifting policy of enabling meritorious plaintiffs who would not otherwise be able to afford to bring a lawsuit under ERISA, to pursue their claims. *See Berland, supra* note 6, at 1060–61 ("Applying the common benefit doctrine reflects the statute's purpose.... Nothing in ERISA indicates that Congress intended to preempt the common benefit doctrine.").

II.

Our determination that common fund principles control this case is crucial in the risk multiplier context, because in *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), the Supreme Court has held that when

granting attorney's fees under the fee-shifting provisions of the Solid Waste Disposal Act and the Clean Water Act, courts may not enhance a fee award above the lodestar amount to reflect risk of loss or contingency. The fee-shifting provisions in the statutes in *Dague* are "typical of most federal fee-shifting provisions," and the decision has been interpreted to preclude generally the use of risk multipliers in fee-shifting cases. *See, e.g., Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir.1993).

Although the district court in this case awarded class counsel an amount of fees from the settlement fund, the court seemed to regard this case as governed at least in part by statutory fee-shifting principles. To support its denial of class counsel's risk multiplier, it referred to *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974) and *Gusman v. Unisys Corp.*, 986 F.2d at 1146. *Johnson* and *Gusman* are both statutory fee-shifting cases, and neither case involves a settlement fund created for the benefit of a plaintiff class. Furthermore, in *Gusman*, we noted parenthetically that *Dague* would have precluded the granting of a risk multiplier under a fee-shifting statute. 986 F.2d at 1150.

In any event, we conclude that the holding in *Dague* should not extend to this case. As we have explained, common fund principles properly control a case which is initiated under a statute with a fee-shifting provision, but is settled with the creation of a common fund. *Dague*, by its terms, applies only to statutory fee-shifting cases, and its reasoning is largely based on the statutory language of fee-shifting provisions.

Moreover, the policy considerations in *Dague* that militate for forbidding risk multiples in statutory fee-shifting cases have little force in common fund cases. Unlike in fee-shifting cases, the fee award in a common fund case is ultimately charged against the plaintiffs' fund, rather than directly against the defendant. Thus, the defendant's liability is fixed—it cannot exceed the amount of the common fund the defendant has agreed to pay. Because of this feature of common fund cases, "there is no direct or immediate danger of unduly burdening the defendant" with a multiplier to compensate for risk of loss. *Skelton*, 860 F.2d at 254. The awarding of a multiplier simply diminishes the amount ultimately recovered by each member of the plaintiff class.

For example, in a common fund case, there is a diminished fear that by awarding a multiplier to plaintiffs' counsel, a defendant "would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail."

Dague, 505 U.S. at —, 112 S.Ct. at 2643. The *Dague* Court explained *565 that “[a]n attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not.” *Id.* Thus, by requiring defendants to compensate plaintiffs’ counsel for their risk of loss, the Court concluded, defendants would essentially be subsidizing plaintiffs’ attorneys for unsuccessful lawsuits against other defendants. In a common fund case, however, because compensation for risk is charged against the plaintiff class, defendants would not be forced to subsidize directly plaintiffs’ attorneys’ losing endeavors. Further, there is no injustice in requiring plaintiff class members to shoulder the burden of compensating counsel for prosecuting the class’ case without any assurance of compensation.

Having determined that risk multipliers remain available in common fund cases after *Dague*, we further note that we have held, in a pre-*Dague* case, that a risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel “had no sure source of compensation for their services.” *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 569 (7th Cir.1992); see also *Harman*, 945 F.2d at 975–76; *Skelton*, 860 F.2d at 257–58. Moreover, we have observed that “the need for such an adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent.” *In re Continental Illinois Securities Litigation*, 962 F.2d at 569. Hence, because we conclude that this case is properly controlled by common fund principles and that *Dague* has no application to common fund cases, we must vacate the district court’s award.

III.

On remand, the district court must consider how much compensation class counsel should receive for incurring the risk of nonpayment when it took the suit. Because the district court has already computed and approved of counsel’s lodestar, the court may, under the “lodestar method,” need only determine what multiplier to use to adequately compensate counsel for contingency.

Although this determination is inevitably somewhat subjective, we have set some guidelines for district courts to follow. “The district court must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of the

class members in the fund.” *Skelton*, 860 F.2d at 258 (citation omitted). A court must assess the riskiness of the litigation by measuring the probability of success of this type of case *at the outset* of the litigation. *Harman*, 945 F.2d at 976; *Skelton*, 860 F.2d at 258. Because class counsel have requested a multiplier of 1.53, the district court need not worry about exceeding what we have suggested is a sensible ceiling of double the lodestar. See *Skelton*, 860 F.2d at 258.

Class counsel have urged us to declare a rule in this case that would compel district courts to use the “percentage-of-recovery method” to award attorney’s fees in all common fund cases. They point out that at least two other circuits have done so, citing *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261 (D.C.Cir.1993) and *Camden I Condominium Ass’n v. Dunkle*, 946 F.2d 768 (11th Cir.1991). We, however, have already considered this suggestion and rejected it in *Harman v. Lypomed, Inc.* There, we stated:

Although the lodestar approach certainly has problems, we think it premature to banish it now. First, the lodestar process initially responded to concerns that a percentage approach resulted in over-compensation for attorneys. Requiring an explicit accounting of hours and rates provides greater accountability. Second, the separation of multiplier and lodestar provides—in theory at least—a means of accounting both for the hours and rate reasonable in the type of case and for the risk an attorney assumes in undertaking a case.

In addition, the lodestar encourages attorneys to assess the marginal value of continuing to work on the case. Assured of recovering a “reasonable fee” if victorious, an attorney will not find it worthwhile to spend time that does not add to the *566 value of the suit, since there is significant risk that the court will in the end disapprove such time. A frequently cited advantage to the percentage method—its alignment of class attorney’s interests with those of the client—may, as the district court noted, encourage holding out or early settlement on the basis of the expected value of the recovery. These incentive effects ... indicate at least that the door should not be closed on lodestar awards.

Harman, 945 F.2d at 974.

It bears reiterating here that we do not believe that the lodestar approach is so flawed that it should be abandoned. Instead, we are of the opinion that both the lodestar approach and the percentage approach may be appropriate in determining attorney’s fee awards, depending on the circumstances. We

therefore restate the law of this circuit that in common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court. We recognize here, as we did in *In re Continental Illinois Securities Litigation*, that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration. However, because of the district court's familiarity with this litigation, we leave the decision as to which method is the most efficient and suitable to this case up to the district court.

Conclusion

For the foregoing reasons, the district court's award of attorney's fees is VACATED, and the matter is REMANDED for proceedings consistent with this opinion.

All Citations

34 F.3d 560

Footnotes

- * The Honorable Floyd R. Gibson of the United States Court of Appeals for the Eighth Circuit is sitting by designation.
- 1 There is no respondent in this case. The parties agreed that attorney's fees were to come out of the settlement fund. Defendants have satisfied their obligation to pay into the settlement fund, and thus have no interest in the amount of fees class counsel want to extract from the fund. Further, no member of the plaintiff class has objected to class counsel's appeal for more fees from the fund.
- 2 Nationsbank of Georgia, N.A. succeeded the original defendant, C & S Sovran Trust Company, by merger.
- 3 The lodestar is calculated by multiplying the number of hours expended by the attorney's hourly rate.
- 4 Counsel also requested expenses of \$646,204.33, which the district court granted in full.
- 5 The Supreme Court described these equitable doctrines as "unquestionably assertions of inherent power in the courts to allow attorney's fees in particular situations, unless forbidden by Congress...." *Alyeska*, 421 U.S. at 259, 95 S.Ct. at 1622.
- 6 One commentator has noted that "[t]he lack of legislative history makes it impossible to determine the actual 'intent' Congress had when it enacted section 502(g)(1)." Mark Berlind, *Attorney's Fees under ERISA: When is an Award Appropriate?*, 71 Cornell L.Rev. 1037, 1049 (1986). He concludes that from the statutory language and judicial opinions interpreting the provision, "the section is a relatively weak fee-shifting provision." *Id.*

160 F.3d 361

United States Court of Appeals, Seventh Circuit.

Paul GASKILL and Alan L. Hess, on
behalf of themselves and all others
similarly situated, Plaintiffs–Appellees,

v.

Earl D. GORDON, et al., Defendants–Appellants,
Appeal of Jeffrey Cagan, et al.

Nos. 96–1115, 96–3759

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Argued Oct. 2, 1998.

|

Decided Nov. 3, 1998.

Synopsis

In class action arising from pyramid investment scheme, professionals, including receiver, attorneys, and accountants, sought payment from fund created by litigation. The United States District Court for the Northern District of Illinois, [Ann Claire Williams, J.](#), 1995 WL 746091, awarded professionals 33 percent of fund. Professionals moved for reconsideration. The District Court granted motion and increased award to 38 percent of fund. Professionals appealed. The Court of Appeals, [Posner](#), Chief Judge, held that: (1) professionals were not entitled to payment on hourly basis, and (2) benefits conferred on secured creditors as result of professionals' efforts did not warrant increased fees.

Affirmed.

Procedural Posture(s): On Appeal.

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[Ronald R. Peterson](#) (argued), [Timothy J. Chorvat](#), Jenner & Block, Chicago, IL, [Stephen B. Diamond](#), [Lawrence W. Schad](#), Beeler, Schad & Diamond, Chicago, IL, for Jeffrey Cagan in No. 96–3759.

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Before [POSNER](#), Chief Judge, and [CUMMINGS](#) and [EVANS](#), Circuit Judges.

Opinion

[POSNER](#), Chief Judge.

In 1988 a class action was filed in federal district court on behalf of a number of investors who had bought limited partnership interests from Earl Gordon and Kenneth Boula. The suit claimed that the defendants had defrauded the members of the class by a Ponzi scheme, in violation of federal and state law. The court appointed Jeffrey Cagan as receiver of the properties controlled by the defendants. In seven years of litigation, primarily against secured creditors who had claims against the properties, Cagan and the lawyers and accountants retained by him managed to liquidate the defendants' properties for some \$40 million. Of this total, about \$10 million went to secured creditors and another \$10 million to pay various administrative expenses, leaving \$20 million for the investors and for Cagan and the other professionals who had assisted him in creating this fund. The judge awarded the professionals (for simplicity we'll pretend

they're all lawyers and discuss this as a pure attorneys' fee case) 38 percent of the fund, or roughly \$8 million; they seek another \$2 million in this appeal. There are no appellees. The appellants notified the members of the class that they were seeking additional fees, which would of course reduce the net recovery of the class members, but no one has filed a brief in opposition to the appeal. Perhaps none of the members has a large enough stake to make participating in the appeal worthwhile, but that is only a conjecture. Or perhaps they are puzzled at being notified by the class lawyers that these lawyers are now taking an adversary position to them, so that they would have to go out and hire new lawyers to defend the fund against the claims of their old lawyers. We have previously expressed, and here repeat, our concern about the lack of adversary procedure in class action fee matters. *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 573–74 (7th Cir.1992).

When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund, *Blum v. Stenson*, 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (dictum); *In re Continental Illinois Securities Litigation*, *supra*, 962 F.2d at 572–73; *In re Thirteen Appeals*, 56 F.3d 295, 305–06 (1st Cir.1995); *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1299–1301 (9th Cir.1994); *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774–75 (11th Cir.1991), in recognition of the fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis. The typical contingent fee is between 33 and 40 percent; but in recognition of the fixed-cost component in litigation, it is usually smaller when as in this case a multimillion dollar judgment is obtained. *In re Continental Illinois Securities Litigation*, *supra*, 962 F.2d at 572. Some courts have suggested 25 percent as a benchmark *363 figure for a contingent-fee award in a class action. *In re Coordinated Pretrial Proceedings*, 109 F.3d 602, 607 (9th Cir.1997); *Camden I Condominium Ass'n, Inc. v. Dunkle*, *supra*, 946 F.2d at 775. So at first glance the district judge's award of 38 percent of \$20 million was generous. But against this the appellants make two points.

The first is that they were acting on behalf of the receivership and not just the class, and they say that receivers like bankruptcy trustees are entitled to be paid on an hourly basis; it is on that basis that they compute the proper fee as \$10 million. But we cannot see what there is about receiverships, or for that matter about trusteeships in bankruptcy, that should exclude the use of the contingent-fee methodology. When a

fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market would set. *In re Continental Illinois Securities Litigation*, *supra*, 962 F.2d at 572; *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir.1986). The judge, in other words, is trying to mimic the market in legal services. The principle is fully applicable to bankruptcy, *In re Taxman Clothing Co.*, 49 F.3d 310, 313 (7th Cir.1995), so that if in a particular bankruptcy the principal service performed by the trustee is to litigate a tort claim on the debtor's behalf, then to compensate him on a contingent-fee basis, just as if he had been hired by the debtor, would be entirely appropriate and is expressly authorized. 11 U.S.C. § 328(a). That is not the situation here. Less than 20 percent of the value generated by the appellants' efforts came from money judgments in lawsuits. The rest came from warding off foreclosures, managing property, and liquidating assets. And so the tort parallel fails. But contingent fees are used in a wide variety of legal settings besides tort litigation, not only as an efficient risk-shifting and litigation-financing device but also as a method of more closely aligning the lawyer's interests with those of his client by giving him a stake in a successful outcome.

Because they shift part of the risk of loss from client to lawyer, contingent-fee contracts usually yield a larger fee in a successful case than an hourly fee would. And this was a successful case. So there is a paradox in the lawyers' seeking compensation on an hourly basis. No doubt if they had spent relatively few hours to generate the fund they would be asking for a value-based, contingency-type award to compensate them for the risk of loss. They want to be allowed to choose between the hourly and value-based method on the basis of which yields the higher fee. That is not a reasonable choice to give them and nothing in the law of bankruptcy or receivership entitles them to it.

The appellants' second objection to the district judge's approach is that it ignores the benefit they conferred on the secured creditors—a cool \$10 million. It is certainly the case that when lawyers or other professionals confer benefits in circumstances in which they can reasonably be expected to be compensated, they have a legal claim against the beneficiaries for a reasonable fee. *Maksym v. Loesch*, 937 F.2d 1237, 1246 (7th Cir.1991). That is an important part of the law of restitution. One peculiarity here, however, is that these lawyers were litigating against, not for, the secured creditors; the management of the properties by the receiver and his agents may have benefited the secured creditors, but the litigation may have imposed an offsetting cost on them.

Another peculiarity is that the appellants are seeking the additional fees not from the secured creditors but from the investors. We do not see why the investors should be asked to pay for benefits conferred on the secured creditors. Of course there is a sense in which the investors benefited from the payments to those creditors, because the secured creditors have superior claims to the defendants' assets. But if the appellants really conferred benefits on the secured creditors, surely the latter should pick up at least part of the cost of obtaining those benefits. We suspect that the appellants are not seeking fees from the secured creditors because they fear that the latter may squawk (especially since these lawyers were their adversaries!), whereas the investors' stakes may, as we speculated earlier, be too slight (or being abandoned

by their lawyers too confusing) to have incited any of them to protest. This is an additional reason not to allow the *364 appellants to obtain fees from the investors for benefits conferred on the secured creditors. Cf. *Mars Steel Corp. v. Continental Illinois National Bank & Trust Co.*, 834 F.2d 677, 681 (7th Cir.1987).

We conclude that there is no basis for upsetting the district judge's fee award.

AFFIRMED.

All Citations

160 F.3d 361, Fed. Sec. L. Rep. P 90,315

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2018 WL 6606079

United States District Court, S.D. Illinois.

Mark HALE, Todd Shadle, and Laurie

Loger, on Behalf of Themselves and

All Others Similarly Situated, Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, Edward Murnane,
and William G. Shepherd, Defendants.

No. 12-0660-DRH

|

Signed 12/16/2018

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AMENDED MEMORANDUM and ORDER

David R. Herndon, United States District Judge

Introduction

*1 Now before the Court are Plaintiffs' Motion for Final Approval of Settlement (Doc. 953) and Plaintiffs' Motion for Attorneys' Fees and Costs (Doc. 952). The Court has also received Defendant State Farm Mutual Automobile Insurance Company's Brief in Support of Final Approval of Class Settlement (Doc. 971). On December 13, 2018, the Court held a hearing on the motions and orally granted the motions in detail. Based on the reasons stated in the record and the following, the Court concludes that under the facts of this case: (1) the Settlement is fair, reasonable, and adequate; and (2) Class Counsel's requested fees and expenses are reasonable and reflect a fair *ex ante* price for their services.

Out of the approximately 4.7 million class members—many of whom received direct, individual notice—only one person, Lisa Marlow, objected to the proposed Settlement and fee request (Doc. 961). The Court has carefully considered the arguments raised in Ms. Marlow's objection and finds them unpersuasive.

Background

The facts underlying this lawsuit stretch back more than twenty years. In 1997, consumers filed a proposed nationwide class action, *Avery v. State Farm Mutual Automobile Insurance Co.* (“*Avery*”), alleging that State Farm violated consumer protection laws and breached its contracts with policy holders by equipping their vehicles with sub-standard non-OEM parts. A class of approximately 4.7 million insureds was certified and, after a multi-week trial in 1999, they secured a \$1.18 billion verdict. That verdict was reduced to \$1.056 billion by the intermediate court of appeals but otherwise upheld. State Farm then petitioned for review in the Illinois Supreme Court, and shortly thereafter, in 2002, it

was announced that there would be a vacancy on that Court in 2004.

At that time, as Plaintiffs alleged in this lawsuit, State Farm and its co-defendants engaged in a scheme to (1) secretly recruit then-trial Judge Karameier to run for the open seat on the Illinois Supreme Court, before which the billion-dollar judgment against State Farm in *Avery* was pending; (2) help organize and manage his campaign behind the scenes; (3) covertly funnel millions of dollars (well over a majority of all reported campaign funds) to support the Karameier campaign through intermediary organizations over which it exerted considerable influence; and (4) after helping to secure Justice Karameier's election, obscure, conceal, and misrepresent the degree and nature of their support so that Justice Karameier could participate in the *Avery* deliberations. In this *Hale* action, filed in 2012, Plaintiffs maintained that this scheme violated the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c)-(d), and deprived them of an impartial forum and their property interest in the *Avery* judgment. The operative Complaint in this case, which was entered as part of the Settlement, the Second Amended Complaint, includes both RICO and unjust enrichment claims.

Defendants denied—and continue to deny—any wrongdoing and vigorously opposed all of Plaintiffs' claims. Defendants have asserted myriad defenses in this litigation, including *Rooker-Feldman*, *res judicata*, collateral estoppel, *Noerr-Pennington*, statute of limitations, and various other RICO element specific defenses. State Farm considers this settlement to be one which it is settling under the unjust enrichment claim rather than the alleged RICO claims.

***2** The litigation that ensued was long and extremely hard-fought. The discovery process involved dozens of disputes overseen by Magistrate Judge Williams, including no less than 50 discovery conferences, the production and review of hundreds of thousands of pages of documents, and 68 depositions. Furthermore, over the course of more than six years of litigation, the parties briefed approximately 100 contested motions, including: (1) motions to dismiss by each defendant and a petition for a writ of mandamus to the Seventh Circuit from the order denying the motions; (2) a motion for class certification, and two petitions to the Seventh Circuit for permission to leave to appeal from the orders granting class certification and later clarifying the order granting class certification; (3) two separate and extensive summary judgment motions on, among other issues, *Rooker-*

Feldman, claim and issue preclusion, *Noerr-Pennington*, statute of limitations, and RICO causation and injury; and (4) dozens of motions *in limine* and *Daubert* motions. The parties then prepared fully for what was to be a six-week trial and selected a jury. On the day of opening statements—and with the assistance of a Court-appointed settlement master—the parties announced a proposed settlement.

The proposed Settlement secures a non-reversionary cash fund of \$250 million. Doc. 941 ¶ 8. Each member of the class—the definition of which was set forth both in the order certifying the identical litigation class and in the Court's preliminary approval order—is entitled to an equal, pro-rata share of the fund. *Id.* § A(l). Settlement checks will be delivered automatically to the approximately 1.43 million class members whose addresses are known. *Id.*; see also Doc. 973 at 4. The remaining class members must submit relatively simple claim forms to establish class membership. Doc. 941 § A(l). If any funds remain after initial distributions, efforts at re-distribution to Class members—including redistribution to claimants—will continue until redistribution become impracticable. *Id.* ¶ 15. In no event will there be a reversion to Defendants. *Id.*

The common fund will also cover the cost of settlement notice and administration as well as attorneys' fees and costs. Here, Class Counsel has requested 33.33% of the common fund—net of the \$2.1 million in estimated costs for settlement notice and administration, but inclusive of interest accrued on the fund at the time of payment. Doc. 954 at 3. They also seek reimbursement of \$6,971,852.80 in litigation costs and expenses and awards of \$25,000 for each of the three Class Representatives. *Id.*

The Court previously granted preliminary approval to the Settlement and the notice plan (Docs. 942, 947), after which comprehensive direct and publication notice was implemented to reach the approximately 4.7 million class members. Pursuant to a schedule set by this Court, Plaintiffs moved for final approval of the Settlement and Class Counsel moved for an award of attorneys' fees and costs. Docs. 953-54. As noted above, one person objected to the terms of the Settlement and Class Counsel's fee request (Doc. 961), and her objection was thoroughly addressed in separate filings submitted by both Plaintiffs and Defendants (Docs. 971-73). The Court then held a fairness hearing and has considered all arguments raised at the hearing and in the written submissions before the Court.

Analysis

I. Final Approval of the Settlement

The newly amended Rule 23 requires courts to determine whether a proposed settlement is “fair, reasonable, and adequate” after considering whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

[Fed. R. Civ. P. 23\(e\)\(2\)](#). These considerations overlap with the factors previously articulated by the Seventh Circuit, which include: (1) the strength of the plaintiff's case compared to the terms of the settlement; (2) the complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement; (4) the presence of collusion in gaining a settlement; (5) the stage of the proceedings and the amount of discovery completed. *See, e.g., Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997). All of these factors, whether in [Rule 23](#) or Seventh Circuit jurisprudence, favor approval of the Settlement.

A. Adequacy of Representation—[Rule 23\(e\)\(2\)\(A\)](#)

***3** At the initial class certification stage, when class certification was granted for trial purposes, the Court concluded that the Class Representatives and Class Counsel were adequate. Doc. 556 at 15-18. This remains true. The Class Representatives have “no conflicts of interest” (*id.* at

16) and have invested significant time and resources in this litigation for more than six years (Doc. 954-4 ¶ 11). Class Counsel have “extensive experience in prosecuting RICO claims, class actions, and various complex cases” (Doc. 556 at 17) and have litigated this case intensively, and successfully, for almost seven years (Doc. 954 at 5-6). Adequacy of representation is uncontested and favors approval.

B. Arm's Length Negotiations and Non-Collusiveness of Settlement Process—[Rule 23\(e\)\(2\)\(B\)](#) and the Seventh Circuit's First Factor

The settlement negotiations were conducted at arm's length and overseen by two experienced, Court-appointed mediators. The first mediation, overseen by Judge James F. Holderman (Ret.), failed after more than a year of effort, after which the Parties remained far apart. In the weeks leading up to trial, the Parties revived the negotiations under the guidance of Court-appointed settlement master Randi Ellis, and reached an agreement on the eve of opening statements. After considering the extensive record, the Court previously found that “the Settlement Agreement has been negotiated in good faith at arms' length between experienced attorneys familiar with the legal and factual issues of this case, and overseen by experienced and Court-appointed mediators.” Doc. 942 at 2. No objector offers any reason to disturb this conclusion. This factor, therefore, strongly favors final approval. *See Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002) (citation omitted) (“A strong presumption of fairness attaches to a settlement agreement when it is the result of this type of [arm's length] negotiation.”).

C. Adequacy of the Relief Provided by the Settlement—[Rule 23\(e\)\(2\)\(C\)](#) and the Seventh Circuit's Second Factor

As noted above, the Settlement secures a non-reversionary, \$250 million common fund that—after deducting the cost of settlement notice and administration, attorneys' fees and costs, and class representative service awards—will be available in equal shares to all class members. The Court concludes that this relief is more than adequate taking into account each of the [Rule 23\(e\)\(2\)\(C\)](#) factors.

1. The Costs, Risks, and Delay of Trial and Appeal—[Rule 23\(e\)\(2\)\(C\)\(i\)](#)

As noted above, this case settled after a jury had been empaneled and after more than six years of intensive and extremely hard-fought litigation. Over the course of this litigation, the Court ruled on motions to dismiss filed by all Defendants, a heavily contested class certification motion, two different summary judgment motions and accompanying *Daubert* motions, and literally dozens of pre-trial *Daubert* motions and motions in limine, among many other disputed issues. The Court also oversaw and regularly communicated with Magistrate Judge Williams, who handled literally dozens of discovery disputes and held almost monthly hearings and status conferences. The Court, along with the parties, also prepared for what was to be a six-week trial. As a result of these efforts, the Court is completely, fully, and thoroughly familiar with the many complex factual and legal issues involved in this case. Indeed, the Court's and the parties' knowledge in this case is likely as close to complete as one could ever achieve in a piece of litigation, short of knowing what the jury and the court of appeals would do with the trial for which the parties, and the Court, had fully prepared.

***4** Based on this knowledge and history, the Court concludes that the Settlement provides fair, adequate, and reasonable relief to the class in light of the costs, risks, and delay of trial and appeal. Plaintiffs faced many significant risks at trial such as, among others, establishing all the elements of their causes of action, including the disputed RICO proximate causation requirement, and a fact-based statute of limitations inquiry. On appeal (which, given the history of this litigation, would be inevitable), Plaintiffs faced additional significant and difficult issues, including *Rooker-Feldman*, *Noerr-Pennington*, res judicata, and, again, statute of limitations and RICO-causation, among others. These points are well captured in State Farm's brief in support of final approval, which details what State Farm believed was “the strength of [its] powerful factual and legal defenses and the serious obstacles Plaintiffs would have faced at trial and on appeal.” Doc. 971 at 2. This brief makes clear both that significant risks remained and that, absent resolution, State Farm was fully committed to continuing its spirited defense at trial and on appeal.

Regardless of the outcome of these proceedings, there can be no question that they would have added significant costs and delay. The parties settled at the beginning of what was to be a long and undoubtedly expensive trial. Moreover, absent this proposed resolution, and considering the strong likelihood of post-trial motions and appeals, the parties were unlikely to achieve a final disposition any time soon. This factor strongly

favours final approval of the Settlement and is particularly compelling given the length both of this litigation and the underlying *Avery* litigation.

The sole objector, Marlow, makes two points in arguing otherwise. First, she believes that Plaintiffs had little risk because, among other reasons, many of the issues discussed above “made their way to the Seventh Circuit, ... and on each occasion, Plaintiffs were the victors.” Doc. 961 at 7. Second, she claims that the proposed settlement secures only a miniscule percentage of the over \$7 billion, including interest and trebled damages, “the jury (or the Court)” had “few, if any, alternatives but to award.” *Id.* at 5-6. Neither argument is persuasive.

As noted above, real risk remained at trial on, among other issues, the statute of limitations, RICO causation, and RICO injury. On appeal, moreover, all issues were fair game, because, contrary to Marlow's mistaken belief, the Seventh Circuit did not issue any definitive rulings in its three orders denying State Farm's petitions for interlocutory appeal. As to the amount of the Settlement, Marlow's assumption that post-judgment interest would automatically have been applied is incorrect. The Court had yet to decide that issue (Doc. 905 at 31-32), and State Farm adamantly maintained that such interest was unsupported by the law (Doc. 880 at 2). Finally, Marlow's suggestion that the adequacy of the relief secured by the Settlement must be measured against potential treble damages contravenes established authority. *See, e.g., Carnegie v. Household Int'l, Inc.*, 445 F. Supp. 2d 1032, 1035 (N.D. Ill. 2006) (“[I]n determining a settlement value, the potential for treble damages should not be taken into account.”).¹

***5** To reiterate, based on its extensive history and intimate familiarity with this litigation, the Court easily concludes that the relief secured by the proposed settlement is fair, adequate, and reasonable in light of the costs, risks, and delay of trial and appeal. *See In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (quoting *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996)) (in evaluating a proposed settlement, the court must recognize that the “ ‘essence of settlement is compromise’ ” and will not represent a total win for either side); *Van Lith v. iHeartMedia + Entm't, Inc.*, No. 1:16-CV-00066-SKO, 2017 WL 4340337, at *12 (E.D. Cal. Sept. 29, 2017) (“ ‘It is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial.’ ”) (citations omitted).

2. The Effectiveness of Any Proposed Method of Distributing Relief to the Class, Including the Method of Processing Class-Member Claims—Rule 23(e)(2)(C)(ii)

Under the terms of the proposed Settlement, settlement funds will be distributed automatically, with no need for a claim form, to the approximately 1.43 million class members whose contact information is known to the parties. The remainder of the class has only to submit a relatively simple claim form with basic questions about class membership. This procedure is claimant-friendly, efficient, cost-effective, proportional and reasonable under the particular circumstances of this case.

3. The Terms of any Proposed Award of Attorney's Fees, Including Timing of Payment—Rule 23(e)(2)(C)(ii)

The Court analyzes the terms of Class Counsel's request for attorneys' fees and expenses below. In short, the Court finds the requested fees and costs are reasonable and concludes that the relief that remains for the class—all of which will be distributed without any possibility of reversion—is adequate in light of all the additional factors discussed herein. This factor favors final approval.

4. Any Agreement Required To Be Identified Under Rule 23(e)(3)—Rule 23(e)(2)(C)(iv)

The parties have not identified, nor is the Court aware of, any agreement—other than the Settlement itself—that must be considered pursuant to Rule 23(e)(3). This factor is neutral.

D. Equitable Treatment of Class Members—Rule 23(e)(2)(D)

All class members are entitled to the same relief under the proposed Settlement. This proposal is fair and equitable because the class members' interests in the *Avery* judgment were undivided when they were lost and, thus, each class member's damages were identical. The proposed Settlement therefore entitles each class member to an equal, pro-rata share of the Settlement fund. Doc. 941 § A(l).

Objector Marlow does not dispute that the Settlement's allocation is equitable. She does, however, claim that the objection process is unduly burdensome because it requires

objectors, and not other class member claimants, to produce “proof of class membership.” Doc. 961 at 17. According to Marlow, “[s]addling objectors with burdens not imposed on all class members is punitive, intended to intimidate class members from objecting.” *Id.* The Court disagrees. Asking objectors to provide “proof of class membership ... is not burdensome and is a reasonable safeguard against manipulation of the process by non-class members.” *See, e.g., Mexico Money Transfer*, 164 F. Supp. 2d at 1032. The Court observes that objectors can play an important role in the settlement approval process. But, by appealing from a trial court order approving a settlement, objectors can also significantly delay the implementation of a settlement and the distribution of the settlement funds for the entire class—which here includes millions of class members who have voiced no opposition to the Settlement and who have waited for over 20 years for relief. Marlow has not convinced the Court that it erred in determining that those who wish to wield this leverage must demonstrate their standing to do so—and may be cross-examined on their standing and motives to object—particularly when, as here, there is but one objector out of millions of class members and she initially swore under penalty of perjury that she was not a class member. Marlow has advanced no evidence or compelling argument in support of her claim that this provision is in any way “punitive” or “intended to intimidate class members from objecting,” and the Court soundly rejects such a claim.

*6 This factor favors final approval as well.

E. The Amount of Opposition to the Settlement—the Seventh Circuit's Third Factor

The Court must independently analyze all factors relevant to the settlement approval inquiry. Nevertheless, the response from the class can provide insight into the fairness of both the settlement and, as discussed below, the requested attorney's fees and costs.

The Class here is estimated to include approximately 4.7 million members. Approximately 1.43 million of them received individual postcard or email notice of the terms of the proposed Settlement, and the rest were notified via a robust publication program “estimated to reach 78.8% of all U.S. Adults Aged 35+ approximately 2.4 times.” Doc. 966-2 ¶¶ 26, 41. The Court previously approved the notice plan (Doc. 947), and now, having carefully reviewed the declaration of the Notice Administrator (Doc. 966-2), concludes that it was fully and properly executed, and reflected “the best notice that is practicable under the circumstances, including

individual notice to all members who can be identified through reasonable effort.” See [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#). The Court further concludes that CAFA notice was properly effectuated to the attorneys general and insurance commissioners of all 50 states and District of Columbia.

Of the millions of Class members and more than a hundred senior government officials who received notice, only *one person*—and not a single government official—objected or otherwise criticized the Settlement. This lone voice of opposition represents a mere 0.00002% of the estimated Class. Adding the 471 people who previously opted out after the Class was initially certified, the percentage of the Class that has expressed any disapproval of the litigation or settlement is 0.001%. Doc. 935 ¶ 6. This remarkably low level of opposition is “strong circumstantial evidence in favor of the settlement,” especially considering that nearly one-and-a-half million class members received individual, direct notice. See, e.g., [Mexico Money Transfer](#), 164 F. Supp. 2d at 1021 (the fact that more than “99.9% of class members have neither opted out nor filed objections ... is strong circumstantial evidence in favor of the settlement[]”).² This factor strongly favors settlement approval.

F. The Stage of the Proceedings and the Amount of Discovery Completed—the Seventh Circuit's Fifth Factor

*7 “The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims.” [Armstrong v. Bd. of Sch. Dirs.](#), 616 F.2d 305, 325 (7th Cir. 1980). Here, the parties settled after trial had begun and after more than six years of intensive litigation. The discovery process was exhaustive, and involved: hundreds of thousands of documents exchanged and reviewed, including many documents from third parties; dozens of depositions; and dozens of discovery hearings and disputes resolved by Magistrate Judge Williams. The motion practice was also extensive. Indeed, there were approximately 100 contested motions filed in this litigation, including motions to dismiss, motions for class certification, motions for summary judgment, many *Daubert* motions and motions *in limine*, and three separate petitions to the Seventh Circuit. Finally, the parties were fully prepared for, and had in fact begun, what was to be a six-week trial that was to involve dozens of witnesses and thousands of documents. Thus, as this Court previously noted, the parties' knowledge of this case was likely as close to complete as one could ever achieve in a

piece of litigation, short of knowing what the jury and the appellate court would do. This factor also strongly favors final approval.

G. Opinion of Qualified Counsel

In assessing the fairness of a proposed settlement, courts are “entitled to rely heavily on the opinion of competent counsel.” [Gautreaux v. Pierce](#), 690 F.2d 616, 634 (7th Cir. 1982) (citation omitted); accord [Isby](#), 75 F.3d at 1200. As noted above, Class Counsel are experienced class action litigators whose knowledge of this case was built on years of intensive litigation and was about as complete as can ever be achieved in litigation short of completing a trial and appeal. Indeed, some of the Parties' counsel had tried the underlying *Avery* case and/or were involved in the underlying appeals. This track record of familiarity spans three decades of first-hand experience. Class Counsel's unanimous and strong endorsement therefore further supports the fairness, reasonableness, and adequacy of the proposed Settlement.

For all these reasons, and after considering all relevant factors set forth in [Rule 23](#) and the Seventh Circuit's jurisprudence, the Court concludes that the Settlement is “fair, adequate, and reasonable” and should be granted final approval.

II. Class Counsel's Request for Attorneys' Fees and Costs

“[L]awyer[s] who recover[] a common fund ... [are] entitled to a reasonable attorney's fee from the fund as a whole.” [Boeing Co. v. Van Gemert](#), 444 U.S. 472, 478 (1980); see also [Sutton v. Bernard](#), 504 F.3d 688, 691 (7th Cir. 2007). “[W]hen deciding on appropriate fee levels in common-fund cases,” like this one, courts in the Seventh Circuit “must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.” [In re Synthroid Mktg. Litig.](#) (“*Synthroid I*”), 264 F.3d 712, 718 (7th Cir. 2001); accord [Williams v. Rohm & Haas Pension Plan](#), 658 F.3d 629, 635 (7th Cir. 2011) (“[T]he district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys.”).

Although courts in this Circuit have the discretion to use either a percentage of the fund or lodestar methodology, [Florin v. Nationsbank of Georgia, N.A.](#), 34 F.3d 560, 566 (7th Cir. 1994), the percentage method is employed by “the vast majority of courts in the Seventh Circuit (like other Circuits).” Doc. 954-2 ¶ 13 (citing empirical studies); *C.f.*

Beesley v. Int'l Paper Co., No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) (Herndon, J.) (“When determining a reasonable fee, the Seventh Circuit Court of Appeals uses the percentage basis rather than a lodestar or other basis.”).³ The percentage method makes sense because “it is essentially unheard of for sophisticated lawyers to take on a case of this magnitude and type on any basis other than a contingency fee, expressed as a percentage of the relief obtained.” *In re Payment Card Interchange Fee and Merch. Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014), *rev'd on other grounds*, 827 F.3d 223 (2d Cir. 2016). Thus, where, as here, “the ‘prevailing’ method of compensating lawyers for ‘similar services’ is the contingent fee, then the contingent fee *is* the ‘market rate.’ ” *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (emphasis in original).

*8 Having concluded that the percentage method is appropriate, the Court must next determine whether Class Counsel's request of one-third of the common fund is reasonable and reflective of the *ex ante* market price for Class Counsel's services. This analysis is informed by a number of factors, including: (1) the actual agreements between the parties as well as fee agreements reached by sophisticated entities in the market for legal services; (2) the risk of non-payment at the outset of the case; (3) the caliber of Class Counsel's performance; and (5) information from other cases, including fees awarded in comparable cases. *See, e.g., Synthroid I*, 264 F.3d at 719. These factors, when viewed separately and together, support Class Counsel's request.

A. Fee Agreements from the Named Plaintiffs and Sophisticated Entities in Other Litigation.

“The first benchmark” of the market rate “is actual agreements” between plaintiffs and counsel. *Id.*, at 719. Here, all named plaintiffs signed agreements calling for attorneys' fees of 40%. Doc. 954-4 ¶ 11. Perhaps more importantly, Class Counsel have advanced significant evidence and empirical analysis—much of which is reflected in the declaration of Professor Charles Silver—demonstrating that sophisticated clients and sophisticated class representatives regularly agree to pay 33.33% or more in risky, complex litigation, even when potential rewards are very large. *See* Doc. 954-1 at 17-26. This in-depth analysis confirms that the market that this Court must mimic—one formed by sophisticated entities in comparable contexts—routinely produces fee agreements at or above the percentage Class Counsel request here. Moreover, as Professor Fitzpatrick

observed, sophisticated entities in the market for legal representation often negotiate fee agreements that call for higher percentages—sometimes reaching as high as 50%—of any resolution obtained after a trial begins, as was the case here. *See, e.g.,* Doc. 954-2 ¶ 20 (citing empirical data). This factor, therefore, supports Class Counsel's requested fees.

B. Risk of non-payment

“The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel.” *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013); *accord, e.g., Synthroid I*, 264 F.3d at 721 (The market rate must account for the “risk of nonpayment a firm agrees to bear.”). Thus, “[w]hen determining the reasonableness of a fee request, courts put a fair amount of emphasis on the severity of the risk (read: financial risk) that class counsel assumed in undertaking the lawsuit.” *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 847-48 (N.D. Ill. 2015). “[T]his consideration incentivizes attorneys to accept and (wholeheartedly) prosecute the seemingly too-big-to-litigate wrongs hidden within the esoteric recesses of the law, ensuring that the attorneys are compensated for their work at the end of the day.” *Id.* at 848.

It would be difficult to overstate the risk that this case presented at the outset. As a threshold matter, successful RICO actions are exceedingly rare. *Gross v. Waywell*, 628 F. Supp. 2d 475, 480 (S.D.N.Y. 2009) (“[T]he statistical record indicates that in 98 percent of the RICO appellate cases surveyed, which do not include RICO actions dismissed by the district courts but not appealed, plaintiffs and counsel invested extensive time and energies in litigation only to come away with a total loss.”). Successful RICO class actions are rarer still. *See, e.g.,* Doc. 954-1 at 34-36 (discussing study of RICO class actions). Moreover, the particular theory presented by this case was without precedent and presented a host of unique factual and legal challenges.

*9 On the facts, it is important to note that unlike many cases where attorneys seek a substantial fee, Class Counsel here were not assisted by any governmental investigations or prosecution, for example, as is often the case large class actions. *See, e.g.,* Doc. 954-2 ¶ 23 (discussing a study finding that “private lawyers ... were the first to discover fraud only 3% of the time”); *see also In Re: Syngenta Ag Mir 162 Corn Litig.*, No. 14-MD-2591-JWL, 2018 WL 6436074, at *12 (D. Kan. Dec. 7, 2018) (concluding that attorney fee award of 1/3 in super-mega-fund case was justified, in part, by the fact that the “case did not involve a government investigation

or prosecution of the defendant”). As a result, the burden of building this case was borne entirely by Plaintiffs, and there was certainly no guarantee when they took the case that they would prevail. According to Magistrate Judge Williams, who closely oversaw the discovery in this case, Plaintiffs did not have enough evidence to “connect the dots” of their case two years in, much less at the time they filed. Doc. 300 at 5. Plaintiffs did, ultimately, marshal enough evidence to defeat two summary judgment motions, but that does not mean that they would have triumphed at trial and on appeal, and more to the point, it does not undermine the complexity and uncertainty of the challenges Plaintiffs faced when they filed suit.

On the law, too, Plaintiffs faced significant risks at the outset of this case. Defendants repeatedly advanced a number of strong challenges on complex issues of law, any one of which could have resulted in complete dismissal of the case. Those challenges included, among others: *Rooker-Feldman*, claim and issue preclusion, RICO proximate cause, RICO injury, *Noerr-Penington*, and the statute of limitations. As noted herein, these challenging issues were briefed extensively in a motion to dismiss, a petition for writ of mandamus, class certification filings, two petitions for leave to appeal pursuant to [Rule 23\(f\)](#), and two summary judgment motions. Plaintiffs largely prevailed on these issues before this Court, but this was far from a foregone conclusion at the outset of this litigation, and many more obstacles remained at trial and on appeal.

For all these reasons, the three class action attorney fee experts supporting Class Counsel's motion—three of the most experienced and respected experts in this field—all opined that this case was as risky as they come. *See, e.g.*, Doc. 954-1 at 33 (“[T]his is one of the most important lawsuits of my lifetime[, and] ... also one of the riskiest, as every relevant metric shows.”); Doc. 954-3 ¶ 36 (identifying “[a] dozen independent factors [that] demonstrate the riskiness of this case viewed *ex ante* – and [that were] borne out by the arc of the litigation”); Doc. 954-2 ¶ 21 (“[I]t is a *gross* understatement to say that this case involved above-average risks.”) (emphasis in original). This Court agrees and concludes that the risk of non-payment at the outset of the case overwhelmingly favors Class Counsel's requested one-third fee.

Marlow's arguments to the contrary miss the mark entirely. She acknowledges that, in determining the market price for counsel's service, courts must assess the risk that existed “at

the outset of the case” (Doc. 961 at 8 (quoting *Synthroid I*, 264 F.3d at 718)), but her actual analysis focuses only on “the risks of proceeding to trial with the evidence [Class Counsel] amassed during over six years of litigation” (*id.* at 15). While the risk that remained at the time of resolution remained significant, as noted above, that level of risk—after having achieved victories on motions to dismiss, class certification, summary judgment and more—is irrelevant to the *ex ante* market price inquiry required in this Circuit. Moreover, Marlow's observation that more attorneys joined the litigation as it progressed overlooks the fact that some of the firms initially prosecuting this case later withdrew. *See* Docs. 439 and 455. Regardless, this point is, at best, evidence that Plaintiffs' case got stronger over the course of litigation. Finally, Marlow ignores the undisputed fact that no other lawyers were interested in taking this case when it was filed, and none opposed or otherwise contested Plaintiffs' Motion for Appointment of Co-Lead and Liaison Counsel. Doc. 179. There was no such competition, notwithstanding the potential size of the case, presumably because of the extremely high level of risk. Again, this factor strongly favors approval of Class Counsel's requested fees.

C. The Quality of Class Counsel's Performance

*10 Also relevant to this analysis is the quality of Class Counsel's work. *Taubenfeld v. AON Corp.*, 415 F.3d 597, 600 (7th Cir. 2005) (noting that the “evidence of the quality of legal services rendered” is among the “type[s] of evidence needed to mimic the market per *Synthroid I*”); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 597 (N.D. Ill. 2011) (Compensation also depends on “the quality of [counsel's] performance.”). Class Counsel's work here, and the results they obtained, are both exemplary. As described above, over the course of more than six years and approximately 100 contested motions, Counsel achieved many significant victories. They survived motions to dismiss, two independent motions for summary judgment, and three trips to the Seventh Circuit; achieved certification of a nationwide class; and also secured a series of important wins on pre-trial motions in limine and *Daubert* motions before taking the case through the beginning of trial. These were all significant achievements, given the complexity and difficulty of both the factual and legal issues involved in this novel case. In sum, Class Counsel worked hard on this litigation and the caliber of that work was consistently first rate. This factor, too, supports Class Counsel's request.

D. Information from Other Cases

Another relevant data point for the market price for attorneys' fees is those awarded in "analogous class action settlements." *Taubenfeld*, 415 F.3d at 600; accord *Silverman*, 739 F.3d at 958. Although it is difficult to find cases that compare to this one, this factor too supports Class Counsel's request.

Courts within the Seventh Circuit, and elsewhere, regularly award percentages of 33.33% or higher to counsel in class action litigation.⁴ Professor Rubenstein—drawing upon his analysis of recent empirical studies on class action fee awards—observed that the *average* awarded fee in the Seventh Circuit is 31.6%, only slightly below the percentage requested here. Doc. 954-3 ¶ 17 (citing studies); see also 954-2 ¶ 18 (discussing empirical study demonstrating that fees in the 30-35% range were the most common). These statistics, however, do not account for the riskiness of this case, and this case was extremely risky. The statistics also do not account for the quality of counsel's performance, which again, was noteworthy here. And finally, they do not account for the stage at which the case resolved. This is relevant because, as discussed previously, sophisticated market players typically set higher fee percentages when a case resolves during or after trial. Courts recognize this as well, and award fees reflecting this market tendency. While trials are rare and the data limited, of the 11 cases proceeding to trial that Professor Rubenstein found in his database, the "mean fee award ... was 36%, with five cases having awards of 38.9% or more and three of those having fee awards of 40% or more. The median fees and costs awarded in the 11 cases that progressed to trial with applicable data was 45%." Rubenstein Decl. ¶ 18. Class Counsel's fee request is reasonable when viewed in the context of this data.

***11** Marlow nevertheless argues that an award of 33.33% would be unreasonable here because "megafund settlements are different." Doc. 961 at 13. The Court acknowledges that some empirical studies of class action fee awards—including ones conducted by Class Counsel's expert, Professor Fitzpatrick—demonstrate that as recoveries increase attorney fee percentages tend to decrease. See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 839 (2010). The Court also understands that courts in other circuits have, in some situations, enforced a "megafund cap" that limits the percentage that attorneys can recover in large cases. On this issue, however, the Seventh Circuit found reversible error for "follow[ing] decisions of district courts in other jurisdictions, rather than decisions of the ... Seventh Circuit" and rejected a percentage cap on megafund recoveries because "[p]rivate parties would never contract for such an arrangement."

Synthroid I, 264 F.3d at 718; see also *In re FedEx Ground Package Sys., Inc., Emp't Practices Litig.*, 251 F. Supp. 3d 1225, 1239 (N.D. Ind. 2017) ("Our court of appeals ... has rejected the concept behind the 'megafund' theory").

Professor Silver's declaration supports this conclusion and details many examples in which sophisticated parties—both in non-class fee agreements and when negotiating fee arrangements as lead plaintiffs in class actions—agree to flat percentages at or above 33.33% in cases that yield significant recoveries. See Doc. 954-1 at 17-28. Courts regularly follow suit, even in megafund cases. Indeed, Professor Silver's declaration cites at least 20 cases in which courts awarded 33% or more of recoveries between \$105 and \$974 million (not accounting for inflation). *Id.* at 39-45 (Table 2). One of those cases, *In re U.S. Foodservice, Inc. Pricing Litig.*, shares notable similarities with this case. No. 3:07-md-1894 (AWT) (D. Conn.), Doc. 510-1 (Aug. 29, 2014) (fee motion); Doc. 523 (Dec. 9, 2014) (order granting fee motion) (RICO class action with sophisticated lead plaintiffs that resulted in a \$297 million settlement from which the court awarded class counsel 33.33% in fees and \$7,941,358.41 litigation expenses). *Syngenta*, 2018 WL 6436074, decided after Class Counsel submitted their reply brief, provides further support. There, the court awarded counsel one-third of a \$1.5 billion settlement and concluded that "a one-third fee is customary in contingent-fee cases (factor 5), or is even on the low side, as that figure is often higher in complex cases or cases that proceed to trial." *Id.* at *14. This Court agrees.

The Seventh Circuit's decision in *Silverman* does not mandate otherwise. 739 F.3d 956. In *Silverman*, the court noted that 27.5% of \$200 million "may be at the outer limit of reasonableness," but it did not dispense with the Seventh Circuit's overarching instruction to "approximate the market rate that prevails between willing buyers and willing sellers of legal services." *Id.* at 959, 957. The outer limits of a reasonable *ex ante* fee negotiation in one case may be the inner limits in another. Indeed, as the Seventh Circuit noted in *Synthroid II*, "if securities suits present less risk to the plaintiff class than does a fraud suit against a drug manufacturer, it is unsound to use a contingent fee appropriate to the former as the measure in the latter." 325 F.3d 974, 979 (7th Cir. 2003). Likewise, if *Silverman* presented less risk to the plaintiff class than did this completely novel RICO class action—as it certainly did—then here, too, "it is unsound to use a contingent fee appropriate to the former as the measure in the latter." See *id.* The Court agrees with Professor Fitzpatrick's observation that *Silverman* "presented none of the *ex ante*

risks of this case (for example, *Silverman* was a securities fraud case, where class certification is relatively perfunctory), and, perhaps even more importantly, did not go to trial.” Doc. 954-2 ¶ 25. The Court therefore concludes that the extraordinary facts of this case—and the novel risks it entailed—set it apart from *Silverman*, and that sophisticated parties would have negotiated no less than a fee arrangement of 1/3 for a resolution reached after the case progressed to trial.

***12** For similar reasons, this Court declines to adopt a decreasing sliding scale fee structure. The Seventh Circuit explained the rationale for this approach in *Synthroid I*, but also cautioned that “systems with declining marginal percentages are [not] always best” because they “create declining marginal returns to legal work, ensuring that at some point attorneys’ opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client.” 264 F.3d at 721. Thus, while the Seventh Circuit, and courts within it, have applied the declining scale to large recoveries in some circumstances, the Court rejects Marlow’s suggestion that it is the only permissible model.

Silverman itself, which affirmed a flat percentage in a megafund case, confirms this. 739 F.3d at 956. So does *Dairy Farmers*, 80 F. Supp. 3d at 845. There, the court observed that the declining percentage approach “is not a one-size-fits-all recovery scheme, and there are many other factors to consider before declaring this pricing grid the Cinderella slipper.” *Id.* Ultimately, in that case, the court concluded that a flat 33.33% fee was appropriate even though the risk was relatively low and notwithstanding a “seemingly tailor-made tiered-pricing arrangement” set by the Seventh Circuit in *Synthroid II*. *Id.* at 845, 848.

Similarly, in *Young v. County of Cook*, No. 06 C 552, 2017 WL 4164238 (N.D. Ill. Sept. 20, 2017), Judge Kennelly concluded that the circumstances of that case placed it “squarely within the category of cases for which the use of a declining marginal percentage scale *is not appropriate*.” *Young*, 2017 WL 4164238, *5 (emphasis added). This was true, the court found, because of the “high risk of non-payment,” the “enormous amount of work [that] went into” the litigation, and the fact that counsel had turned down an earlier settlement offer in a successful effort to obtain more for the class. *Id.* at *4-5.

The Court finds this reasoning persuasive. As in *Young*, this case presented an extremely high risk of non-payment and

required an enormous amount of work. And like counsel in *Young*, Class Counsel here turned down settlement offers that were significantly lower than the \$250 million settlement that was ultimately reached. “Class Counsel rejected that offer in order to obtain a better recovery for the Class, and, after considerable additional litigation, pre-trial proceedings, and after jury selection once trial had commenced, they did just that.” Doc. 973-1 ¶ 2. Thus, Judge Kennelly’s conclusion that a “33% contingent fee of the total recovery is on the low end of what is typically negotiated *ex ante* by plaintiffs’ firms taking on large, complex cases” applies with equal force here, and justifies Class Counsel’s requested fees. See *Young*, 2017 WL 4164238, *6; see also, e.g., *Standard Iron Works*, 2014 WL 7781572, at *1 (awarding a flat 33% of \$163.9 million settlement); *City of Greenville*, 904 F. Supp. 2d at 908-09 (awarding 33% of \$105 million plus roughly \$8.5 million in costs); *Cent. Laborer’s Pension Fund v. Sirva, Inc.*, No. 1:04-cv-07644, Doc. 249 (N.D. Ill. Oct. 31, 2007) (awarding a flat 29.85% percent of \$53.3 million).

In sum, the Court agrees that with Class Counsel that

[T]his case is in a league of its own. It was brought under a statute that almost never rewards plaintiffs. It relied on a novel, untested theory. It was accompanied by extreme risk of non-payment. It required an enormous amount of work. And it settled only after trial had begun. In light of these factors, Class Counsel’s request of a flat 33.33% award is reasonable and, if anything, “is on the low end” of what sophisticated parties would have negotiated for a recovery during trial.

***13** Doc. 973 at 15. The Court therefore concludes that Class Counsel’s request for one-third of the common fund is reasonable and supported by the facts of this case.

Finally, the Court rejects Marlow’s contention that the percentage must be calculated after deducting any awarded expenses. Courts in this Circuit routinely award a percentage of the gross common fund without netting out separately awarded costs, and this Court sees no reason to depart from that approach here. See, e.g., *Spano*, 2016 WL 3791123, at *4 (awarding 33.33% of \$57 million fund in addition to costs for

a total of 36.51% of fund); *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, No. 10-CV-426-WMC, 2015 WL 13546111, at *6 (W.D. Wis. Jan. 5, 2015) (awarding 27.5% of \$82 million settlement fund plus in costs for total of 29.66% of the fund); *Silverman*, 2012 WL 1597388, at *5 (N.D. Ill. May 7, 2012), *aff'd sub nom. Silverman v. Motorola Sols., Inc.*, 739 F.3d 956 (7th Cir. 2013) (“The Court awards attorney’s fees in the amount of 27.5% of the Settlement Amount and awards \$4,729,743.16 in costs.” (29.86% of settlement fund)); *Martin*, 2010 WL 11614985, at *6 (awarding 33.33% of gross settlement fund in addition to costs for a total of 35.24% of the fund).

E. Lodestar Cross-Check

A lodestar cross-check is not required in this Circuit. *Rohm & Haas Pension Plan*, 658 F.3d at 636 (“[C]onsideration of a lodestar check is not an issue of required methodology.”); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500 (N.D. Ill. 2015) (“[N]o Seventh Circuit case law suggests that a percentage-of-the-fund approach will yield a reasonable result only where it satisfies a lodestar cross-check.”). Indeed, the “use of a lodestar cross-check has fallen into disfavor,” *Beesley*, 2014 WL 375432, at *3 (citing *Synthroid II*, 325 F.3d at 979-80), and, in some cases, can be “counterproductive,” *Gen. Dynamics Corp.*, 2010 WL 4818174, at *3 (collecting cases). Nevertheless, because an objection to the requested fees has been raised, the Court conducts this additional analysis to further confirm that Class Counsel’s fees are reasonable and will not result in a windfall.

The Court first finds that the records submitted by Counsel are sufficient for this analysis and rejects Marlow’s argument that “full billing records” are necessary. Contrary to Marlow’s assertion, it is well established that courts “may rely on summaries ... and need not review actual billing records.” See *Beesley*, 2014 WL 375432, at *3, n.1; accord *Gen. Dynamics*, 2010 WL 4818174, at *3 (same); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015) (“The lodestar cross-check calculation need entail neither mathematical precision nor bean counting.... [Courts] may rely on summaries submitted by the attorneys and need not review actual billing records.”) (citation omitted).

The Court further concludes that the hours worked, rates billed, and resulting multiplier are all customary and reasonable for cases of this complexity. According to their declarations, Class Counsel worked approximately 55,000 hours (totaling \$29,163,729.05 in lodestar) in the seven years from pre-filing investigation to the date the settlement was

announced. This number of hours is not, as Marlow suggests, “extraordinarily high” in the context of this case. In fact, it is well below the mean in cases in the \$250 million range that progressed to trial, and even lower after accounting for the number of years this case was litigated. See Doc. 954-3 ¶¶ 29-32. It is also about 20% less than hours that have been recently approved in this district. See, e.g., *City of Greenville*, 904 F. Supp. 2d at 909 (finding reasonable 83,300 hours for two firms over 8 years—approximately 10,412 hours/year). Given the complexity of this litigation, and the tremendous amount of work it involved, the Court has no trouble concluding that Class Counsel worked a reasonable number of hours to prosecute this case.

*14 Class Counsel’s historical billing rates are also reasonable. The reported blended average is \$527.34. As Professor Rubenstein’s analysis demonstrates, this is typical of rates approved in 22 recent class action fee awards in the Northern District of Illinois. Furthermore, courts in this District (including this Court) have recently approved a billing structure and rates that would, if applied to Class Counsel’s time here, result in a blended average rate approximately 1/3 higher than what Class Counsel have reported. See *Beesley*, 2014 WL 375432, at *3; *Spano*, 2016 WL 3791123, at *4. With these guideposts in mind, and given the complexity of this case and participation of highly-experienced lawyers with national practices and expertise, the Court concludes that the billed rates are reasonable.

The multiplier that results from Class Counsel’s reported lodestar is 2.83, or if applying the rates approved in *Spano*, 2.11. Doc. 954 at 17; Doc. 954-4 ¶ 10. This is reasonable under the facts of this case. Risk multipliers are “mandated” where, as here, counsel “had no sure source of compensation for their services.” *Florin*, 34 F.3d at 565; accord *City of Greenville*, 904 F. Supp. 2d at 909 (“[W]here counsel ‘had no sure source of compensation for their services,’ the Court must apply a risk multiplier to compensate the attorneys for the risk of nonpayment in the event the litigation were unsuccessful.”). Moreover, multipliers should reflect the risks counsel faces *ex ante*. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) (“The [multiplier] level selected should, to the extent possible, be without regard to most developments during discovery and litigation because it is designed to reflect the riskiness of the case at the outset.”). “The multiplier is” therefore “determined by dividing 1 by the probability of success” at the outset of the case. *City of Greenville*, 904 F. Supp. 2d at 909 (quoting *Florin*, 60 F.3d at 1248 n. 3). Thus, the 2.83 multiplier is justified here if

Plaintiffs had less than a 35% chance of prevailing when they filed suit ($1/2.83=0.3533$). For all the reasons detailed above, this is undoubtedly the case here.

The lodestar cross-check therefore confirms the reasonableness of Class Counsel's request.

III. Class Counsel's Requested Costs Are Reasonable.

"It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses, which includes such things as expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses and mediation." *Beesley*, 2014 WL 375432, at *3 (citing *Boeing*, 444 U.S. at 478); see also Fed. R. Civ. P. 23(h). Here, Class Counsel seek reimbursement of \$6,971,852.80 in litigation expenses. No objector challenges the fairness or reasonableness of the requested expenses.

As a threshold matter, the Court concludes that the billing records provided—which broke the costs down into 16 separate categories of litigation expenses—include sufficient detail to allow the Court to perform its oversight function. See, e.g., *Schulte*, 805 F. Supp. 2d at 600 (noting that a "summary document" of expenses would suffice); see also *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble*, 924 F.2d 633, 643 (7th Cir. 1991).

The Court further concludes that the requested expenses are reasonable under the facts of this case. As noted throughout this Order, this case was particularly hard-fought over more than six years. During that time, Counsel: secured the services of a number of highly-qualified experts, many of whom submitted multiple reports, were deposed, and prepared for trial; paid for the development and implementation of the litigation notice program; traveled to well over a hundred hearings and depositions; employed a discovery vendor to host and help analyze hundreds of thousands of pages of documents over more than six years; and worked extensively with jury consultants and other trial-preparation experts to achieve the best result for the Class. Doc. 954 at 18-21; Doc. 954-4 ¶ 12. These are but a few examples of the costs of doing business in a complex and high-stakes case such as this.

*15 Yet, while this was certainly an expensive case to prosecute, the requested expenses are only 2.8% of the common fund, which is significantly less than the average of "4 percent of the relief for the class." *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp.

2d 1028, 1041 (N.D. Ill. 2011) (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 70 (2004)). Moreover, as this Court previously recognized in a different case, "Class Counsel had a strong incentive to keep expenses at a reasonable level due to the high risk of no recovery when the fee is contingent." *Beesley*, 2014 WL 375432, at *3. Furthermore, here, as in *Beesley*, "the fact that Class Counsel does not seek interest as compensation for the time value of money or costs associated with advancing these expenses to the Class makes this fee request all the more reasonable." *Id.* Finally, Class Counsel incurred significant costs after submitting their motion—and will continue to do so until the settlement is finalized—for which they have not sought reimbursement. See Doc. 973-1 ¶ 3.

Class Counsel's expenses are therefore justified in the context of this case.

IV. Service Awards for the Class Representatives

Plaintiffs request service awards of \$25,000 for each of the three Class Representatives: Mark Hale, Todd Shadle, and Laurie Loger. As demonstrated by their Declarations, each of them has invested time and resources in this litigation by, among other things: reviewing pleadings, responding to discovery requests, producing documents, sitting for depositions, preparing for trial, remaining in contact with Class Counsel, and overseeing the litigation. Doc. 973-1, Exhibits 1-3. Furthermore, each of them served as a class representative in the underlying *Avery* action and thus have been representing this same group of policyholders for more than 20 years. *Id.* Service awards of \$25,000 are within the range of awards granted in similar situations, and are reasonable and appropriate under the facts of this case. See, e.g., *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (upholding award of \$25,000 to class representative); *Spano*, 2016 WL 3791123, at *4 (awarding \$25,000 to two representatives and \$10,000 to a third); *Beesley*, 2014 WL 375432, at *4 (awarding \$15,000 and \$25,000); *Abbott v. Lockheed Martin Corp.*, No. 06-CV-701-MJR-DGW, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (awarding \$25,000); *Nolte v. Cigna Corp.*, No. 07-cv-2046, Doc. 413 at 9 (C.D. Ill. Oct. 15, 2013) (same); *Gen. Dynamics*, 2010 WL 4818174, at *4 (awarding \$25,000 each to three named plaintiffs, and finding such awards are "well within the ranges that are typically awarded in comparable cases"); *Heekin v. Anthem, Inc.*, No. 1:05-cv-01908-TWP-TAB, 2012 WL 5878032, at *1 (S.D. Ind. Nov. 20, 2012) (awarding

\$25,000 each to two class representatives based on extensive involvement over seven years of litigation).

Marlow's challenge to this request is unpersuasive. She points to no authority suggesting that under comparable facts such an award is inappropriate. Instead, her primary argument is that the Class Representatives did not themselves submit declarations attesting to the work they performed. But this very information was included in the one of Class Counsel's declarations attached to the initial motion and, in any case, in response to Marlow, all three Class Representatives have submitted their own declarations. All of them confirm that they performed significant work on behalf of the class and have earned the requested service awards.

CONCLUSION

Accordingly, the Court hereby orders, adjudges, finds and decrees as follows:

1. The Court hereby **GRANTS** Plaintiffs' motion for final approval of the Settlement.⁵ The Court fully and finally approves the Settlement in the form contemplated by the Settlement Agreement (Doc. 941) and finds its terms to be fair, reasonable and adequate within the meaning of [Rule 23 of the Federal Rules of Civil Procedure](#). The Court directs the consummation of the settlement pursuant to the terms and conditions of the Settlement Agreement.
- *16 2. The Court finds that the Notice given to the Class Members constituted the best notice practicable under the circumstances and complied in all respects with the requirements of [Rule 23](#) and due process.
3. The Court hereby dismisses this Action with prejudice as to the defendants, and, except as provided under the Settlement Agreement, without costs.

4. The Court hereby discharges and releases the Released Claims as to the Releasees, as those terms are used and defined in the Settlement Agreement (Doc. 941).
5. The Court hereby permanently bars and enjoins the institution and prosecution by Class Plaintiffs and any Class Member of any other action against the Releasees in any court or other forum asserting any of the Released Claims, as those terms are used and defined in the Settlement Agreement (Doc. 941).
6. The Court further reserves and retains exclusive and continuing jurisdiction over the Settlement concerning the administration and enforcement of the Settlement Agreement and to effectuate its terms.
7. The Court finds and determines pursuant to [Rule 54\(b\) of the Federal Rules of Civil Procedure](#) that there is no just reason for delay and directing entry of final judgment.

Further, the Court also **GRANTS** Class Counsel's motion for attorneys' fees and costs. Class Counsel are awarded (1) \$6,971,852.80 as reimbursement of reasonable litigation costs; and (2) attorneys' fees in the amount of one-third (33.33%) of the \$250 million common fund, net of the \$2.1 million estimated for settlement notice and administration, but inclusive of interest accrued on the fund at the time of distribution. The three Class Representatives—Mark Hale, Todd Shadle, and Laurie Loger—are each awarded service awards of \$25,000.

A separate judgment consistent with this Memorandum and Order will issue pursuant to [Fed. R. Civ. P. 58](#).

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 6606079, RICO Bus.Disp.Guide 13,111

Footnotes

- 1 See also, e.g., [Rodriguez v. W. Publ'g Corp.](#), 563 F.3d 948, 964 (9th Cir. 2009) ("[C]ourts do not traditionally factor treble damages into the calculus for determining a reasonable settlement value."); [Lorazepam & Clorazepate Antitrust Litig.](#), 205 F.R.D. 369, 376, n.12 (D.D.C. 2002) ("[T]he standard for evaluating

settlement involves a comparison of the settlement amount with the estimated single damages.”); *Cnty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1324 (2d Cir. 1990) (“[T]he district judge correctly recognized that it is inappropriate to measure the adequacy of a settlement amount by comparing it to a possible trebled base recovery figure.”); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 458-59 (2d Cir. 1974) (“[T]he vast majority of courts which have approved settlements ... have given their approval ... based on an estimate of single damages only.”), *overruled on other grounds as recognized by U.S. Football League v. Nat’l Football League*, 887 F.2d 408, 415-16 (2d Cir. 1989). Although a small minority of district courts has evaluated treble damages in a settlement context, there is “no authority that requires a district court to assess the fairness of a settlement in light of the potential for trebled damages.” *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 325 (3d Cir. 2011) (quoting *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 312 (3d Cir. 2010) (emphasis in original)).

- 2 See also *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, No. 16-CV-488-SMY-RJD, 2017 WL 5724208, at *2 (S.D. Ill. Apr. 26, 2017) (“The lack of opposition from any settlement class member also militates in favor of settlement.”), *aff’d*, 897 F.3d 825 (7th Cir. 2018); *Kleen Prod. LLC v. Int’l Paper Co.*, No. 1:10-CV-05711, 2017 WL 5247928, at *3 (N.D. Ill. Oct. 17, 2017) (one objector out of 158,500 class members “attests to” the “fairness” of the settlement); *In re Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, at *7 (N.D. Ill. Aug. 26, 2013) (concluding that objections and opt outs “amount[ing] to less than 0.01%” is a “low level of opposition [that] supports the reasonableness of the settlement”), *aff’d as modified*, 799 F.3d 701 (7th Cir. 2015); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 964-65 (N.D. Ill. 2011) (concluding that 10 objections and “less than 0.01%” of opt outs was “remarkably low level of opposition” that “supports the Settlement”); *Henry v. Sears Roebuck & Co.*, No. 98-cv-4110, 1999 WL 33496080, at *11 (N.D. Ill. July 23, 1999) (twenty-four objections was “extremely small number” and “weighs in favor of Court approval”); *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313-14 (3d Cir. 1993) (“Less than 30 of approximately 1.1 million shareholders objected. This is an infinitesimal number” that “does not favor derailing settlement.”); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990) (where 29 of 281 (10.3%) class members objected, finding that the “response of the class members, both in numbers and in rationale, strongly favors settlement”); *Van Lith*, 2017 WL 4340337, at *14 (“Indeed, ‘[i]t is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members.’”) (citation omitted); *Office & Prof’l Emps. Int’l Union v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 311 F.R.D. 447, 458 (E.D. Mich. 2015) (objection from “[o]nly one class member[]” is “extremely minimal level of opposition” and “is an indication of [the] settlement’s fairness”) (citations omitted); *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (“It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.”).
- 3 See also, e.g., *Cooper v. IBM Pers. Pension Plan*, No. CIV. 99-829-GPM, 2005 WL 1981501, at *3 (S.D. Ill. Aug. 16, 2005), *rev’d and remanded on other grounds*, 457 F.3d 636 (7th Cir. 2006) (“The approach favored in the Seventh Circuit is to compute attorney’s fees as a percentage of the benefit conferred on the class.”); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *2 (S.D. Ill. Mar. 31, 2016) (same); *Nolte v. Cigna Corp.*, No. 2:07-CV-2046-HAB-DGB, 2013 WL 12242015, at *2 (C.D. Ill. Oct. 15, 2013) (same).
- 4 See, e.g., *Young v. Cnty. of Cook*, No. 06 C 552, 2017 WL 4164238, at *6 (N.D. Ill. Sept. 20, 2017) (awarding 33.33% of \$52 million common fund and overruling objections calling for sliding scale approach); *Spano*, 2016 WL 3791123, at *2 (“A one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law.”); *Dairy Farmers*, 80 F. Supp. 3d at 862 (awarding one third plus expenses of \$46 million common fund); *Standard Iron Works v. ArcelorMittal*, No. 08 C 5214, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014) (“The Court finds that a 33% fee [of \$163.9 million common fund] comports with the prevailing market rate for legal services of similar quality in similar cases.”); *Beesley*, 2014 WL 375432, at

*4 (Herndon, J.) (awarding one third of common fund); *Fosbinder-Bittorf v. SSM Health Care of Wis., Inc.*, No. 11-CV-592-WMC, 2013 WL 5745102, at *1 (W.D. Wis. Oct. 23, 2013) (same); *George v. Kraft Foods Global, Inc.*, No. 1:07-CV-1713, 2012 WL 13089487, at *4 (N.D. Ill. June 26, 2012) (same); *City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 908-09 (S.D. Ill. 2012) (awarding one-third of \$105 million settlement plus roughly \$8.5 million in costs and holding that “[w]here the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market is 33.33% of the common fund recovered.”); *Schulte*, 805 F. Supp. 2d at 601 (awarding one third of common fund); *Will v. Gen. Dynamics Corp.*, No. CIV. 06-698-GPM, 2010 WL 4818174, at *4 (S.D. Ill. Nov. 22, 2010) (same); *Martin v. Caterpillar Inc.*, No. 07-CV-1009, 2010 WL 11614985, at *2 (C.D. Ill. Sept. 10, 2010) (“[C]ourts in the Seventh Circuit award attorney fees ‘equal to approximately one-third or more of the recovery.’ The Seventh Circuit itself has specifically noted that ‘the typical contingent fee is between 33 and 40 percent.’ ”); *Harzewski v. Guidant Corp.*, No. 05-cv-01009, Doc. 194 (S.D. Ind. Sept. 10, 2010) (awarding 38% of the common fund).

- 5 The Court notes that attorney Gordon Ball, co-lead counsel for plaintiffs, is also one of the responsible attorneys for the settlement-fund account.

526 F.Supp. 494

United States District Court, District of Columbia.

In re AMPICILLIN ANTITRUST LITIGATION.

M.D.L. Docket No. 50. Misc. No. 45-70.

|

Oct. 29, 1981.

Synopsis

Following approval of settlement of various claims in antitrust litigation, attorneys representing the plaintiff class applied for payment of their attorney fees and costs from the settlement fund. The District Court, Charles R. Richey, J., held that award of attorney fees equal to 45 percent of antitrust settlement fund of \$7,300,000 to attorneys representing class consisting of state and local governments was reasonable since amount awarded represented reasonable hourly rate of \$55 and attorneys received on the average 72 percent of their requested fees.

Ordered accordingly.

Attorneys and Law Firms

***494** David I. Shapiro, James vanR. Springer, Sallie H. Helm, Arthur J. Galligan, Peter W. Morgan, Daniel Stark, Dickstein, Shapiro & Morin, Washington, D.C., Lee A. Freeman, Lee A. Freeman, Jr., Freeman, Rothe, Freeman & Salzman, Chicago, Ill., Robert A. Hammond, III, Washington, D.C., Michael Spiegel, Patricia Cutler, Deputy Attys. Gen., San Francisco, Cal., George Deukmejian, California Atty. Gen., Sacramento, Cal., Linda Aaker, Asst. Atty. Gen., Austin, Tex., Mark White, Texas Atty. Gen., Austin, Tex., Steven J. Greenfogel, Alan L. Kovacs, Francis X. Bellotti, Massachusetts Atty. Gen., Boston, Mass., H. Laddie Montague, Jr., Warren D. Mulloy, Merrill G. Davidoff, Berger & Montague, Philadelphia, Pa., Jerry S. Cohen, Herbert E. Milstein, Michael D. Hausfeld, Kohn, Milstein & Cohen, Washington, D.C., Mark I. Harrison, Harrison, Myers, Singer & Lerch, P.C., Phoenix, Ariz., Thomas L. Boeder, John H. Bright, John R. Ellis, Seattle, Wash., Kenneth O. Eikenberry, Washington Atty. Gen., Olympia, Wash., Jack L. Chestnut, Floyd E. Boline, Thomas M. Stringer, Chestnut & Brooks, P.A., Minneapolis, Minn., for CCS plaintiffs.

Jerome G. Shapiro, Susan L. Thorner, Alan H. McLean, New York City, for Bristol-Myers Co.

***495** Robert Dobbin, Richard Whiting, Daniel Plaine, Washington, D.C., for Beecham Group Ltd. and Beecham Inc.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

The Court has before it eleven¹ applications for attorneys' fees and costs to be paid from the \$7,300,000.00² fund created from the settlement of the claims of the plaintiff classes composed of cities, counties, states, and other political subdivisions ("CCS") against the defendants, Beecham, Inc., Beecham Group ("Beecham"), and Bristol-Myers. On September 21, 1981, immediately after the presentation of evidence concerning the fairness of the Bristol settlement and the interstate allocation of the funds, the Court heard arguments in support of the fee applications, with no opposition thereto. Having heard no opposition to the settlement, and having determined from the papers and the representations of counsel that the settlement was fair, reasonable and adequate, the Court issued an Order on October 2, 1981, approving the settlement and the interstate allocation of the settlement funds.

BACKGROUND

This litigation commenced with the filing of the civil complaint of the United States Department of Justice on March 19, 1970. That complaint alleged that Bristol-Myers Company and the Beecham companies had violated [Sections 1 and 2](#) of the Sherman Act in the manufacture, marketing and sale of ampicillin and other semisynthetic penicillin products. The complaint also challenged the validity of certain patents owned by the defendants and the legality of certain agreements relating to those patents.

The federal complaint was followed by the filing of private treble damage actions in several jurisdictions. These included actions brought as class actions on behalf of various CCS plaintiffs, on behalf of consumers, and on behalf of wholesale and retail druggists and non-governmental hospitals ("WRPH"), as well as claims filed on behalf of two competitor plaintiffs.

By Order of July 22, 1970, the Judicial Panel on Multi-district Litigation transferred all of the cases to the District of

Columbia for pretrial purposes. Other “tag-along” cases were later transferred here. The cases were originally assigned to former Chief Judge Sirica (now Senior Judge), and were later reassigned to this Judge some three years later.

On April 16, 1978, Bristol offered \$6 million for settlement of the claims based on both direct and indirect purchases of the WRPH classes. On June 16, 1978, Beecham offered \$1.93 million for a similar settlement with the WRPH class. After a hearing on June 16, 1978, the Court approved the proposed form of notice and set September 29, 1978, as the date for a hearing on whether the settlement was fair, reasonable and adequate. The WRPH settlement agreement was found fair, reasonable and adequate and was approved by the Court on October 20, 1978. With the exception of the issues of attorneys' fees and distribution of the settlement fund, that settlement eliminated seven cases from the Ampicillin litigation. None of the parties appealed the settlement and, in an opinion dated November 22, 1978, fees were awarded.

The attorneys for the WRPH class requested fees totaling \$1,550,000.00 out of a total settlement fund of \$11 million (including interest). The Court awarded \$1,140,000.00 to the Committee of counsel for the WRPH class, as well as costs of \$33,246.95. This amounted to 10.6% of the settlement fund, with a range of fees from \$15.00 to \$200.00 an hour for counsel. The average *496 hourly rate for that award was \$121.00 before a multiple and \$181.00 an hour after. *In Re Ampicillin Antitrust Litigation*, 81 F.R.D. 395 (D.D.C.1978).

As a result of the Supreme Court's decision in *Illinois Brick Company v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the consumer claims were dismissed by Court Order of July 5, 1978. This left the CCS plaintiffs and the United States as the remaining principal plaintiffs.

In the fall of 1978, it appeared to the Court that there was a likelihood of separate settlements of the claims of the CCS plaintiffs and the United States against the Beecham defendants. Accordingly, a preliminary hearing on the proposed CCS settlement was held on November 8, 1978, and the Court determined that the proposed settlement was within the range of possible approval. In addition, the Court ordered a hearing, pursuant to *Fed.R.Civ.P. 23(e)*, to be held on April 6, 1979, for the purposes of determining whether the proposed CCS-Beecham settlement was fair, reasonable and adequate. The form of notice was approved on November 17, 1978, and mailed to all potential members of the litigating CCS class on or before January 15, 1979.

The Court approved the CCS-Beecham settlement on May 2, 1979, thereby eliminating Beecham as a principal defendant from the case.

On September 22, 1980, the Court issued its mode of trial order with respect to the CCS-Bristol case. That Order provided, inter alia, for separate trials of the CCS plaintiffs' [section 1](#) Sherman Act case, the Government's [sections 1 and 2](#) Sherman Act case,³ and finally the Biocraft⁴ and Zenith⁵ cases. It set the trial date for May 18, 1981. The trial of the CCS case was bifurcated first into a liability stage with damages to be tried later, if liability was found. In addition, there were only a limited number of representative CCS cases selected for participation in the initial trial. (All CCS entities that were not originally transferred to this district for consolidated pretrial proceedings pursuant to [28 U.S.C. s 1407](#) were transferred to this district for a consolidated trial with the consent of the parties on October 21, 1980, pursuant to [28 U.S.C. s 1404\(a\)](#)). Those bellwethers were selected from those CCS entities with relatively complete bid records. On January 7, 1981, the Court selected New York City, Michigan, Washington, Texas, and Minnesota as the bellwethers for the May 18, 1981, trial.

Jury selection began on May 19, 1981 (one day late) for the commencement of this liability trial. After two weeks of trial under a very strenuous schedule, the parties reached a settlement agreement.

SETTLEMENT

The CCS plaintiffs and the Beecham defendants entered into a settlement agreement on November 1, 1978. The Court approved the CCS-Beecham settlement on May 2, 1979. That agreement provided for settlement of claims based on the antitrust violations with regard to ampicillin and other semisynthetic penicillin drugs which have been or might be asserted against the Beecham defendants by the CCS plaintiffs and classes in this litigation, and by potential similar plaintiffs in other political entities of the United States. Beecham gave the plaintiffs certain economic relief and other cooperation in return for its dismissal. Beecham established a fund of \$2,070,000.00, with interest at the average prime rate from November 1, 1978, on behalf of the classes. That amount was not to be distributed to class members until the settlement or final adjudication of the CCS *497 case against Bristol, so as to preserve the fund against the expense of two separate distributions. The fund continues to earn interest until final

distribution. The settlement agreement also contained a most-favored-nations clause, by which the fund would have been reduced proportionally if the CCS plaintiffs had settled with Bristol for less than \$6.44 million before October 31, 1980, or more than 30 days before a firm trial date. In addition, Beecham assisted the plaintiffs in the prosecution of their case against Bristol, by helping them to obtain the deposition and trial testimony of certain Beecham employees and former employees.

The settlement agreement with Bristol, approved by the Court on June 18, 1981, provided that Bristol would pay the sum of \$4 million to the CCS plaintiffs in full and final settlement of all their claims based on the alleged violations of the antitrust laws with regard to ampicillin and other semisynthetic drugs which have been or might have been asserted against Bristol by the CCS plaintiffs and classes in this litigation and by potential similar plaintiffs in other political entities of the United States. Since this was a class action, the Court held three hearings on September 22, 1981, for the purposes of considering: (1) whether the proposed

Bristol-CCS Settlement Agreement was fair, reasonable and adequate; (2) what allowances should be made for the fees and expenses of the various attorneys for the CCS class representatives chargeable to the settlement funds generally and the manner in which such allowances should be allocated among the various CCS plaintiffs and classes; and (3) whether the interstate allocation of the settlement funds was fair, reasonable and adequate and thus should be approved. The proposed settlement of the CCS claims and the proposed interstate allocation of the settlement funds were approved by the Court on October 2, 1981, without objection. This leaves only the question of allowances for attorneys' fees and costs, which will be hereinafter discussed.

DISCUSSION

The parties have submitted the following schedule in their request for attorneys' fees:

Dickstein, Shapiro and Morin

Attorney	Hours	Rate	Total
Shapiro	3,378.75	200	\$675,750.00
Springer	5,236.75	135	706,961.25
Galligan	381.00	135	51,435.00
Helm	6,494.50	90	584,505.00
Morgan	2,947.25	85	250,516.25
Stark	1,281.75	85	108,948.75
Ruben	72.75	90	6,547.50
Schaeffer	25.75	85	2,188.75
Stevens	21.50	85	1,827.50
Mack	160.50	85	13,642.50
Adams	167.75	85	14,258.75
Perrin	370.75	85	31,513.75
O'Leary	506.00	100	50,600.00

Flegal	111.25	100	11,125.00
Student Law Clerks	980.25	35	34,308.75
Summer Associates	67.00	35	2,345.00
Paralegals	14,733.00	35	515,655.00
	36,936.50		\$3,062,128.75
Less ⁶	2,108.43 ⁷		175,000.00
	34,828.07		\$2,887,128.75 ⁸

Lane, Aitken, Dunner & Ziems⁹

Attorney	Hours	Rate	Total
Dunner	622.97	165	\$102,790.05
Aitken	10.50	165	1,732.50
Hennessey	15.90	95	1,510.50
Krieger	68.20	95	6,479.00
Loud	31.80	80	2,544.00
Boland	54.75	95	5,201.25
Bajefshy	773.94	95	73,524.30
Paralegals	115.53	35	4,043.55
	1,693.59		197,825.15

Freeman, Roth, Freeman, & Salzman

Attorney	Hours	Rate	Total
Freeman	288.50	200	57,700.00

Hammond, III	74.60	175	13,055.00
Freeman, Jr.	708.00	155	109,740.00
Lewis	258.60	155	40,083.00
Salzman	36.15	155	5,603.25
Myer	45.50	150	6,825.00
Voortman	825.70	120	99,084.00
Colleton	28.70	115	3,300.50
Kinney	88.50	105	9,292.50
Krammer	53.50	100	5,350.00
Paralegals	493.50	35	17,272.50
Paralegals	18.50	30	555.00
	2,919.75		\$ 367,860.75

Kohn, Milstein, & Cohen

Attorney	Hours	Rate	Total
Kohn	12.00	270	\$ 3,240.00
Cohen	649.00	165	107,085.00
Milstein	16.00	145	2,320.00
Toll	162.50	85	13,812.50
Baizer	268.00	55	14,740.00
Hausfeld	734.00	120	88,080.00
Van Susteren	899.00	35	31,465.00
	2,740.50		\$ 260,742.50

State of California

Attorney	Hours	Rate	Total

Spiegel	276.00	110	\$ 30,360.00
Cutler	1,804.00	90	162,360.00
Jones	100.00	25	2,500.00
Wychoff	50.00	25	1,250.00
	2,230.00		\$ 196,470.00

Chestnut & Brooks

Attorney	Hours	Rate	Total
Chestnut	49.60	175	\$ 8,680.00
Beline	405.90	150	60,885.00
Stringer	424.00	100	42,400.00
Cambronne	138.90	100	13,890.00
Malone	26.60	60	1,596.00
Kilgriff	7.60	100	760.00
Nolte	125.30	35	4,385.50
Wahl	41.20	35	1,442.00
Oberle	2.50	35	87.50
	1,221.60		\$ 134,126.00

State of Washington¹⁰

Attorney	Hours	Rate	Total
Boeder	391.95	75	\$ 29,396.25
Bright	25.25	75	1,893.75
Ellis	17.50	75	450.00

Ferguson	56.00	75	4,162.50
Hereford	.50	75	37.50
Ross	15.90	60	954.00
Welch	74.00	30	2,220.00
McLean	8.00	20	160.00
	589.10		\$ 39,274.00

Berger & Montague

Attorney	Hours	Rate	Total
Montague, Jr.	50.75	175	\$ 8,881.25
Mulloy	8.50	160	1,360.00
Davidoff	2.00	125	250.00
Meredith	25.50	110	2,805.00
Steifel	2.00	90	180.00
McMahon	14.25	75	1,068.75
Paralegals	141.50	35	4,952.50
	244.50		\$ 19,497.50

State of Massachusetts

Attorney	Hours	Rate	Total
Greenfogel	22.75	90	\$ 2,047.50
Kovacs	53.75	75	4,031.25
Rosen	7.00	60	420.00
Bishop	8.00	60	480.00
Kelly	25.00	5	125.00

Dillon	25.00	5	125.00
Trahon	25.00	5	125.00
	166.50		\$ 7,353.75

State of Texas

Attorney	Hours	Rate	Total
Aaker	56.25	100	\$ 5,625.00
Thomas	8.50	25	212.50
Henley	84.25	5	421.25
	149.00		\$ 6,258.75

Harrison, Myers, Singer, & Lerch

Attorney	Hours	Rate	Total
Harrison	5.70	125	\$ 712.50
Paralegals	8.70	35	304.50
	14.40		\$ 1,017.00

^{F N7} This is a proportionate reduction of hours based on an \$83.00 average hourly rate, i. e.

$$3,062,128.75/36,936.50 = 83.00$$

$$- 175,000.00/ 2,108.43 = 83.00$$

$$2,887,128.75/34,828.07 = 83.00$$

***498** As shown above, the attorneys seek \$4,117,553.65 in fees, as well as out-of-pocket expenses of \$332,714.85 for a total award of \$4,450,268.50. This total amounts to approximately 61% of the settlement fund of \$7.3 million, which is more than the 50% maximum as set forth in the notice of settlement. See June 18, 1981 General Settlement

and Order No. 1, Exhibit C, page 4 and Exhibit D, page 5. Accordingly, the first step the Court must undertake is a determination of the percentage of the settlement fund to be used for fees and expenses. In examining fee awards in other antitrust actions, the Court finds that the bulk of the fee awards are less than 25% of the settlement fund. See [In re Armored](#)

Car Antitrust Litigation, 472 F.Supp. 1357 (N.D.Ga.1979) (2.2% of the settlement fund); *499 *In re Anthracite Coal Antitrust Litigation*, 81 F.R.D. 499 (M.D.Pa.1979) (20% of the settlement fund); *In re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305 (D.Md.1979) (22.2% of the settlement); *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245 (N.D.Ill.1979) (6.6% of the settlement fund); and *Trist v. First Federal Savings and Loan Ass'n. of Chester*, 89 F.R.D. 8 (E.D.Pa.1980) (25% of the settlement fund). However, this is not to say that the Court is bound by any set limitation on the fee award. There have been several cases where courts have awarded more than 40% of the settlement fund for fees and expenses. See *Beech Cinema Inc. v. Twentieth Century Fox Film Corp.*, 480 F.Supp. 1195 (S.D.N.Y.1979) (53.2% of the settlement fund) and *Aamco Automatic Transmissions Inc. v. Tagloe*, 82 F.R.D. 405 (E.D.Pa.1979) (43.87% of the settlement fund). Indeed, some courts have awarded fees merely for the injunctive relief that was attained. In *Cantor v. Detroit Edison Co.*, 86 F.R.D. 752 (E.D.Mi.1980), the Court awarded fees in the amount of \$679,488.10 and costs in the amount of \$51,711.65 even though the plaintiff class received no monetary award. See also, *Knutson v. Daily Review, Inc.*, 479 F.Supp. 1263 (N.D.Ca.1979) (61,000% of the settlement fund).

Based upon a careful review of the facts of this case and the entire record herein, the Court will award 45% of the settlement fund of \$7.3 million for a total of \$3,285,000.00.

Upon a determination of the applicable percentage to be used for the award, the Court is faced with the arduous task of cutting the total fee request of the attorneys involved by at least 16%. In attempting to arrive at an appropriate award, the general fee-setting inquiry usually begins with the “lodestar”: the number of hours reasonably expended multiplied by a reasonable hourly rate. *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C.Cir.1980) (en banc).

The first problem is determining the reasonable number of hours expended by the plaintiffs' attorneys. See *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiators & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). Upon careful consideration of the hours claimed by all of the attorneys involved and the fact that there was no opposition, the Court finds the hours to be reasonable. Indeed, the Court is impressed by the efficiencies of counsel in presenting their case without duplication of effort,¹¹ despite the tenacity of defense counsel.

Upon determining the reasonable hours expended by plaintiffs' attorneys, the remaining element in fixing a lodestar fee is the reasonable hourly rate. *Copeland v. Marshall*, supra at 892. However, this is complicated by the fact that the Court would have to drastically cut the hourly rate charged by all counsel. This would result in inequities for those counsel who requested a more reasonable hourly rate. This is further complicated by the fact that the Court has already awarded a maximum of \$200.00 an hour in the fee award for the WRPH case, which would lead to a consistency problem. One option open to the Court is to follow the opinion of Judge Freeman in the Armored Car Litigation, supra, in which he chastised many of these same attorneys for their exorbitant fee request and then cut their request 77%- from \$1,127,500.00 to \$259,655.50. While the Court shares the view that attorneys' fees must be checked, the Court does not find such drastic action necessary here. However, the Court would be remiss if it did not point out that under no circumstances would it award a \$275.00 hourly rate. Thus, the Court must adopt a different approach in order to arrive at an appropriate attorneys' fee award.

The Court finds that the best method will be to assign an average hourly rate for all *500 compensable hours worked. Presently, each application can be broken down as follows:

Firm	Average Hourly Rate
Dickstein, Shapiro & Morin	\$ 83.00
Lane, Aitken, Dunner & Ziems	117.00
Freeman, Roth, Freeman & Salzman	126.00
Kohn, Milstein & Cohen	95.14
State of California	88.10
Chestnut & Brooks	110.00

State of Washington	67.00
Berger & Montague	80.00
Commonwealth of Massachusetts	44.00
Attorney General of Texas	42.00
Harrison, Singer & Lerch	71.00

Total Average Hourly Rate	\$ 88.00 ¹²

Based upon the record herein and the pleadings, the Court will adopt an average hourly rate of \$55.00 per hour as a fee award

of less than forty-five per cent (45%) of the total settlement fund:

Firm	Amount
Dickstein, Shapiro & Morin	\$1,915,543.85
Lane, Aitken, Dunner & Ziems	93,147.45
Freeman, Roth, Freeman & Salzman	160,586.25
Kohn, Milstein & Cohen	150,727.50
State of California	122,650.00
Chestnut & Brooks	67,188.00
State of Washington	32,400.50
Berger & Montague	13,447.50
Commonwealth of Massachusetts	7,353.75
Attorney General of Texas	6,258.75
Harrison, Singer & Lerch	792.00

Total	\$2,570,095.55

As seen above, the total amount of attorneys' fees is \$2,570,095.55, plus costs of \$332,714.85 for a total of \$2,902,810.40. This leaves a balance of \$382,189.60 when 45% of the settlement fund is used. While the parties agreed not to seek a multiple, the Court finds that such a system is necessary in order to appropriately divide the remaining funds and create a more equitable distribution of the settlement fund.

In determining how to divide up the remaining balance of \$382,189.60, the Court will follow and expand on the guidelines of Copeland, supra at 906-7. That is, the Court will award points¹³ to each of the firms that meet the following criteria:

- (1) the contingent nature of success;
- (2) the delay in receipt of payment for services rendered;
- (3) quality of representation; and
- (4) the number of hours worked with particular emphasis on the later years of this litigation.

In dividing up this amount, the Court will first exclude from the sharing of the remainder each of the states, California, Washington, Massachusetts, and Texas. Indeed, each of the states except California received a higher proportionate share of their request than the average proportionate share of total fees awarded. Moreover, two states, Massachusetts and Texas, which should be commended for the reasonableness of their request, received 100% of their request; and a third, Washington, received 82% of their request. It is also shown below that the award to the State of California is also very reasonable.

The Court will eliminate the Harrison firm as well. As shown below, the Harrison firm received a proportionate share of their request higher than the average proportionate share of total fees awarded. The Court will likewise refuse to grant any incentive award to Lane, Aitken, Dunner & Ziems, as they were compensated by Dickstein, Shapiro & Morin for all hours expended at the rate of \$50.00 per hour. See July 31, 1981 Fee Petition of Dickstein, Shapiro & Morin, Exhibit C. Moreover, the total fee award to the Lane firm of \$55.00 per hour exceeds the total amount they were originally paid. The Court is satisfied that the fees awarded are more than reasonable. While the Court recognizes the valuable contributions each of the attorneys for each of the above provided, the size of the remainder is insufficient to satisfy the total fee requests of each counsel. Moreover, the risk of litigation for each of the states was diminutive as the attorneys were to be compensated regardless of the outcome, as employees of *501 the states. Additionally, it was their employers, the individual states that were to receive the major benefits of this litigation, i. e., sharing in the settlement.

The Court will first award points to the remaining private firms for the risk factor that the lawsuit would be unsuccessful and that no fee at all would be obtained. The first problem that is presented to the Court, however, is the contractual arrangements each firm had with its clients. Dickstein, Shapiro & Morin provided that information in which they pointed out that they received only \$63,000.00 from the

State of Wisconsin for all of their work, along with the \$175,000.00 from the WRPB settlement. The rest of their compensation was to come from the settlement fund. Further, it was the Dickstein firm that had the most to lose in the event that the litigation proved unsuccessful as they expended the highest number of hours. Accordingly, the Court finds that the Dickstein, Shapiro & Morin firm will be accorded twenty (20) points for the risk factor.

The firm of Freeman, Roth, Freeman & Salzman represented five CCS plaintiffs in this consolidated litigation, the States of Illinois, Indiana, Tennessee, West Virginia and the Commonwealth of Pennsylvania. The firm of Kohn, Milstein & Cohen represented the State of Michigan, Chestnut & Brooks represented the State of Minnesota, and Berger & Montague represented the State of Delaware and certain other CCS plaintiffs. While the Court recognizes that each of these firms were on a contingency basis, as were the other firms who received no bonus points, there simply is not enough money to give them any bonus points for this factor. Moreover, it was the Dickstein, Shapiro & Morin firm that had the greatest number of hours involved and therefore the greatest risk. As shown below, the Court finds that the total fee award to each of the firms is completely fair, reasonable and adequate. Indeed, the purpose of the bonus system is to achieve an equitable distribution of the fee award, which is why the other law firms have not been accorded any bonus points at all. Thus, whether a firm was on a contingency fee basis is not determinative of the award under the circumstances of this case. Accordingly, the Court will award zero (0) points for this factor to the Freeman firm, the Kohn firm, the Chestnut firm, and the Berger firm.

The second factor that this Court will award points for is the delay in receipt of payment. As shown from the discussions above, this case was originally filed in 1970. Since that time, with the exception of the \$175,000.00 received by Dickstein, Shapiro & Morin, and the Kohn firm's share of the WRPB fee award, counsel for these firms have received no compensation. Thus, the Court will award each of the firms named above, except the Berger firm, a five (5) point bonus for the work done on behalf of the CCS plaintiffs. Additionally, the Court will award an additional five (5) points to the Freeman firm, as most of their work was pre-1976.

The third factor which this Court will award points for is the quality of representation. It is unquestioned that all counsel throughout this litigation displayed a high degree of skill and

competence in the representations of their respective clients. The lion's share of the points, however, for this factor must go to the Dickstein, Shapiro & Morin firm, for it was that firm that was lead counsel and at the forefront until the very end. It was principally that firm that dealt with able counsel for the defendant and was principally responsible for bringing about the settlement. Accordingly, the Court will award Dickstein, Shapiro & Morin twenty (20) bonus points. The remaining two firms, Freeman, Roth, Freeman & Salzman and Kohn, Milstein & Cohen, will receive five (5) points.

The final factor to be considered by the Court is the amount of time expended in the later years of the litigation. Unquestionably, the Dickstein, Shapiro & Morin and Kohn, Milstein & Cohen firms put in a tremendous number of hours

in the later years. The Court will award twenty (20) points to the Dickstein, Shapiro & Morin firm, for it was they who put in the most time in the later years, to the exclusion of *502 other work for the attorneys involved, as well as throughout this litigation. Despite the fact that the Kohn, Milstein & Cohen firm put in 90% of their hours in 1980-81, the Court will not award any additional points, as it would result in an inequitable total fee award. The remaining five (5) points will be awarded to the Freeman firm in order to make their award more equitable.

Based upon the foregoing, the Court will award the following points:

Dickstein, Shapiro & Morin	65 points
Freeman, Roth, Freeman & Salzman	20 points
Kohn, Milstein & Cohen	10 points
Chestnut & Brooks	5 points
This amounts to an additional fee award of:	
Dickstein, Shapiro & Morin	\$248,423.24
Freeman, Roth, Freeman & Salzman	76,437.92
Kohn, Milstein & Cohen	38,218.96
Chestnut & Brooks	19,109.48

Accordingly, based upon the foregoing and the entire record herein, the Court will award the following total fees:

Firm	Total Fee Award	Percentage of Request
Dickstein, Shapiro & Morin	\$2,163,967.09	75%
Lane, Aitken, Dunner & Ziems	93,147.45	47%
Freeman, Roth, Freeman & Salzman	237,024.17	64%
Kohn, Milstein, & Cohen	188,946.46	72%
State of California	122,650.00	62%

Chestnut & Brooks	86,297.48	64%
State of Washington	32,400.50	82%
Berger & Montague	13,447.50	69%
Commonwealth of Massachusetts	7,353.75	100%
State of Texas	6,258.75	100%
Harrison, Singer & Lerch	792.00	78%
Total	\$2,952,285.15	72% ¹⁴

In determining the fees applicable to each firm, the Court is not insensitive to the fact that certain firms were cut back more than others. However, in determining the adequacy of the fees awarded, the Court first examined the percentage of the original fee request awarded. That is, the Court awarded fees amounting to 72% of the total amount of fees requested. Of the eleven fee petitions received, five firms received more than the 72%, one firm received exactly 72% and one firm received only 3% less than the 72% average. However, for purposes of this award, a three percent plus or minus difference falls within the relevant range of allowable fees. It is no coincidence that the remaining firms have four of the top five average hourly rates. Indeed, the adequacy of this award is even more obvious when based on the following.

The first firm, Freeman, Roth, Freeman & Salzman claimed the highest average hourly rate of \$126.00. Had the Freeman firm used a more reasonable rate, such as the \$83.00 rate claimed by the Dickstein firm,¹⁵ their total fee request would have been \$242,339.25, which would have led to an award of 98% of their request. Even if the Freeman firm had used the second highest average hourly rate of \$117.00, their total fee request would have amounted to \$341,610.75 or 69% of their request. This would have fallen within the Court's plus or minus 3% figure.

The second highest average hourly rate is claimed by Lane, Aitken, Dunner & Ziems of \$117.00. For the reasons as set forth above, the Court did not add any incentive award to

Dickstein, Shapiro & Morin ¹⁶	\$264,326.21
Freeman, Roth, Freeman & Salzman	19,631.73
Kohn, Milstein & Cohen	8,257.55

their request. However, the Court notes that had the Lane firm used the \$83.00 average of the Dickstein firm, their total fee request would have amounted to \$140,567.97 or 66% of their request. While this is less than the plus or minus 3% range as imposed by the Court, it shows that the award is more than reasonable.

The third highest average hourly rate of \$110.00 belongs to Chestnut & Brooks. Once again, the Court notes that had the Chestnut firm used the \$83.00 rate, their total fee request would have amounted to \$101,392.80 or 76% of their total request.

The last "firm" is the State of California. The Court again denied an incentive award as explained above. Nevertheless, if the State of California had used the \$83.00 rate, their total fee request would have amounted *\$503 to \$185,090.00 or 71%, which is only 1% less than the average reduction.

Accordingly, upon consideration of the entire record herein, the Court is satisfied that the fees awarded are fair and reasonable.

The final element for the Court to consider is the issue of reasonable expenses. In reviewing the fee petitions, the Court is satisfied that the requests for costs are totally reasonable. Accordingly, the Court will reimburse the firms for costs as follows:

State of California	9,730.00
Chestnut & Brooks	15,556.66
State of Washington	7,552.18
Berger & Montague	3,558.77
Commonwealth of Massachusetts	808.20
State of Texas	3,257.78
Harrison, Singer & Lerch	35.77
Total Costs	\$332,714.85

Thus the total amount of fees and expenses to be awarded by the Court to each firm is as follows:

Dickstein, Shapiro & Morin	\$2,428,293.30
Lane, Aitken, Dunner & Ziems	93,147.45
Freeman, Roth, Freeman & Salzman	256,655.90
Kohn, Milstein & Cohen	197,204.01
State of California	132,380.00
Chestnut & Brooks	101,854.14
State of Washington	39,952.68
Berger & Montague	17,006.27
Commonwealth of Massachusetts	8,161.95
State of Texas	9,516.53
Harrison, Singer & Lerch	827.77
Total	\$3,285,000.00

The total of \$3,285,000.00 in fees and expenses shall be allocated among the residual classes¹⁷ and the litigating CCS plaintiffs and classes¹⁸ as follows:

(a) Sixty-five (65) percent of the residual class share¹⁹ of the CCS settlement fund will be used for the payment of common fees and expenses.²⁰

(b) The remaining fees and expenses will be charged pro rata among the litigating CCS plaintiffs and classes.²¹

An Order in accordance with the foregoing shall be issued at the time the settlement becomes final and the settlement fund exceeds \$7.3 million. Accordingly, during the interim, liaison counsel is to advise the Court, within five days from the date hereof, ***504** when the two above-mentioned events are to occur.

All Citations

526 F.Supp. 494

Footnotes

- 1 The fee application of Lane, Aitken, Dunner & Ziems is counted as separate and apart from the fee application of Dickstein, Shapiro & Morin.
- 2 This is the estimated value of the settlement fund which includes the \$2.07 million from the Beecham defendants and \$4 million from Bristol plus interest through mid-November. See September 14, 1981, Memorandum for Plaintiff Class Representative in Support of Settlement at 3.
- 3 The [U.S. v. Bristol-Myers](#), 82 F.R.D. 655, settlement was approved by the Court on October 13, 1981, wherein Bristol paid to the United States the sum of \$3 million, plus other injunctive relief.
- 4 Biocraft Laboratories, Inc. v. Bristol-Myers Company, et al., No. 70-1002, which is the only active case left in the Ampicillin litigation.
- 5 Beecham Group, Ltd. v. Zenith Laboratories, Inc., 70-2453, which settled on September 28, 1981. (Consent decree approved by the Court on October 27, 1981).
- 6 The Court must take into account the \$175,000.00 partial fees already awarded in the WRPB settlement.
- 8 The total amount of fees sought in this application for Dickstein, Shapiro & Morin is \$2,887,128.75. This is calculated by deducting the \$175,000.00 previously awarded to the firm by Court Order dated July 27, 1979.
- 9 Though this application is included in the Dickstein, Shapiro & Morin application, the Court will segregate it as a separate application in order to make a specific award to the Lane firm.
- 10 Though the hourly rates claimed are historical, the Court finds that it is unnecessary to convert to current hourly rates as the Court will use the same average hourly rate for all counsel as explained below.
- 11 While the Court presumes that there are some duplicative and/or unproductive hours included in each of the fee petitions, deletion of these hours would be an exercise in futility, as the Court is awarding a set percentage of the settlement fund.
- 12 Computed as follows: total fee request, \$4,117,553.65 divided by total number of hours, 46,797.01 equals \$88.00. These average hourly rates include the time of law clerks and paralegal assistants as well as attorneys.
- 13 Points are to be defined as percentages of the settlement fund. It is necessary that the settlement fund be divided through the distribution of the 100 points in lieu of multiples of each firm's fee request so as to ensure the exact distribution of the remaining funds.
- 14 The average percentage of the total fee requested awarded was computed as follows: total fees awarded divided by the total fees requested, or \$2,952,285.15 divided by \$4,117,553.65, which equals 72%.
- 15 This is not to say that the Court is in total agreement with their request; it is merely used for comparison purposes.
- 16 For purposes of costs, the Court will include the application of Lane, Aitken, Dunner & Ziems in the application of Dickstein, Shapiro & Morin since the Dickstein firm indicated that it will allocate the total costs awarded in the appropriate manner.
- 17 The residual CCS settlement class is defined as follows: the Commonwealth of Massachusetts (as class representative), the States of Alaska, Idaho, Maine, Maryland, Montana, Nebraska, New Hampshire, New

Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Utah and Wyoming, the Territories of Guam and the Virgin Islands, and all cities, counties and other political subdivisions (including hospital and welfare districts) in the aforesaid States and Territories and in the State of Connecticut that have purchased or paid for ampicillin or other semisynthetic penicillin drugs.

- 18 The litigating CCS settlement class is defined as those entities that were a part of this litigation, i. e., had filed suit or were members of the class.
- 19 The residual CCS class members' share in the settlement fund is 15.4463%. See Final Judgment, October 2, 1981, at 5. Thus, based on a \$7.3 million settlement fund, the residual CCS class members are to receive \$1,127,579.90, of which 65% will be used to pay the common fees and expenses as set out above, or \$732,926.94. This leaves a balance of \$394,652.96 for distribution to the residual CCS class members per the allocation schedule as set out in the Final Judgment, *supra*. (The figures will, of course, be adjusted depending on the actual settlement fund.)
- 20 The Court notes that a straight pro rata distribution among all CCS entities would have the effect of giving the residual class members a larger net recovery than the litigating class members, since the residual class members have had no expenses at all for deduction from their individual shares of the funds. See July 31, 1981, Shapiro Affidavit P 35C. Moreover, the residual class members incurred no risk in this litigation with respect to costs, and, thus, any money received is a "windfall."
- 21 The litigating CCS plaintiffs' and classes' share in the settlement fund of \$7.3 million is 84.5537% or \$6,172,420.10. The remaining fee and expenses of \$2,552,073.06 will be allocated on a pro rata basis among the litigating CCS classes and individual CCS plaintiffs. (The figures will, of course, be adjusted depending on the actual settlement fund.)

80 F.Supp.3d 781

United States District Court, N.D. Illinois, Eastern Division.

IN RE CAPITAL ONE TELEPHONE
CONSUMER PROTECTION ACT LITIGATION,

Bridgett Amadeck, et al.,

v.

Capital One Financial Corporation,
and Capital One Bank (USA), N.A.

Nicholas Martin, et al.,

v.

Leading Edge Recovery Solutions, LLC,
and Capital One Bank (USA), N.A.

Charles C. Patterson,

v.

Capital Management Services, L.P.
and Capital One Bank (USA), N.A.

Master Docket No. 12 C 10064

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MDL No. 2416

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No. 12 C 10135, No. 11 C 5886, No. 12 C 1061

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Signed February 12, 2015

Synopsis

Background: Consumers filed several class actions against credit card company and its telemarketers alleging that use of automatic telephone dialing systems or artificial or prerecorded voice messages to contact consumers' cellular telephones for debt collection purposes, without prior express consent, violated Telephone Consumer Protection Act (TCPA). Following transfer to Judicial Panel on Multidistrict Litigation (JPML) and consolidation of the cases, plaintiffs moved for final approval of class action settlement, attorney fees, and incentive awards.

Holdings: The District Court, [James F. Holderman](#), J., held that:

proposed settlement was fair, reasonable, and adequate;

court would utilize percentage-of-the-fund method, rather than lodestar method, to determine reasonable attorney fees; and

award of attorney fees at 20.77 percent of adjusted settlement fund was reasonable.

Motion for final approval granted; motion for attorney fees and incentive awards granted in part.

***784 MEMORANDUM OPINION AND ORDER**

[JAMES F. HOLDERMAN](#), District Judge:

The three above-captioned, nationwide class actions were filed against Capital One, its subsidiaries, and its Participating Vendors (collectively, “Defendants”),¹ as a result of the Defendants' allegedly using automatic telephone dialing systems or artificial or prerecorded voice messages to contact consumers' cell phones without prior express consent, in alleged violation of the Telephone Consumer Protection Act (“TCPA”), [47 U.S.C. § 227\(b\)\(1\)\(A\)](#). (Dkt. No. 120.) On December 10, 2012, the United States Judicial Panel on Multidistrict Litigation (the “JPML”) selected this court to coordinate pursuant to [28 U.S.C. § 1408](#) the pretrial proceedings in these three class actions, along with other individual lawsuits filed throughout the United States. (Dkt. No. 1.) The cases filed outside this district were transferred to this district and assigned to this court's calendar. On February 28, 2013, Plaintiffs filed a Consolidated Master Class Action Complaint (“Master Complaint”) superseding the complaints filed in the three class actions. (Dkt. No. 19.) On June 13, 2014, after reaching a settlement in principle, Plaintiffs filed an Amended Consolidated Master Class Action Complaint (“Amended Master Complaint”). (Dkt. No. 120 (“Am.Compl.”).)

On July 29, 2014, the court granted Plaintiffs' unopposed request for preliminary approval of class settlement,² (Dkt. No. 129), and entered an Order (Dkt. No. 137) conditionally certifying a settlement class, preliminarily approving the class action settlement, approving the notice plan, and appointing a claims and notice administrator. Since then, the parties have filed ***785** memoranda in support of Plaintiffs' motion (Dkt. No. 260) for final approval of the class action settlement. Class Counsel, consisting of the attorneys who collectively represent the class, have also filed a motion for approval of attorneys' fees and for service awards to the class representatives (the “Named Plaintiffs”). (Dkt. No. 175.)

Fourteen people out of the more than 17 million settlement class members filed briefs or statements in opposition to the Amended Settlement Agreement and Release (“Settlement Agreement”) (Dkt. No. 131 Ex. 1) and Class Counsel’s requested fee award. The court, after notice was provided, conducted a fairness hearing on January 15, 2015 to allow any class members who expressed the desire to address the court regarding the settlement to do so. (Dkt. No. 320.)

For the reasons explained below, the court grants the motion for final approval of the class action settlement, (Dkt. No. 260), because under the circumstances and the law the settlement reached in these three consolidated class action cases is fair, reasonable, and adequate. The court grants in part and denies in part Class Counsel’s motion for approval of attorneys’ fees, and grants Class Counsel’s requested incentive awards to the five Named Plaintiffs in the amount of \$5,000 each. (Dkt. No. 175.)

BACKGROUND

I. History of the Litigation

In 1991, Congress enacted the TCPA “to address telephone marketing calls and certain telemarketing practices that Congress found to be an invasion of consumer privacy.” *Jamison v. First Credit Servs.*, 290 F.R.D. 92, 96 (N.D.Ill.2013) (Kendall, J.). The “certain telemarketing practices” that drew Congress’s legislative action were automatic telephone dialing systems and prerecorded voices. 47 U.S.C. § 227. The two technologies were relatively new in 1991 and greatly improved telemarketers’ ability to contact consumers on their phones. In response to the “national outcry over the explosion of unsolicited telephone advertising,” Congress passed the TCPA. See 137 Cong. Rec. 30,817 (1991) (statement of Senator Pressler). The TCPA prohibits callers from using “any automatic telephone dialing system or an artificial or prerecorded voice” to make any non-emergency call to a cell phone, unless they have the “prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(A)(iii). The penalties Congress enacted to answer the public outcry are harsh: the TCPA imposes on callers statutory damages of \$500 per call, which can be trebled if the court finds the violation to have been willful or knowing. 47 U.S.C. § 227(b).

The calls at issue in these three consolidated class actions were made for the decidedly non-emergency purpose of debt collection. According to the Amended Master Complaint,

between January 18, 2008 and June 20, 2014, Capitol One or one of its Participating Vendors (on behalf of Capital One) called class members’ cell phones using an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt. (Am.Compl.¶ 52.)

After Plaintiffs filed their Master Complaint on February 28, 2013, the parties engaged in six months of class-wide discovery “sufficient to engage in meaningful settlement discussions.” (Dkt. No. 129 at 13.) On July 2, 2013, November 4, 2013, and January 29, 2014, the parties participated in mediation sessions with retired United States Magistrate Judge Edward A. Infante. The parties also spoke with Judge Infante by phone on two other occasions. (*Id.*) Capital One and Plaintiffs agreed thereafter to a settlement in February *786 2014. (*Id.* at 14.) The Participating Vendors agreed to join the settlement in the months thereafter. (*Id.*)

On June 13, 2014, Plaintiffs filed their request for an order certifying the proposed class for settlement purposes, preliminarily approving the settlement agreement, approving the notice plan, ordering the dissemination of notice as set out in the Settlement Agreement, and appointing BrownGreer as the Notice and Claims Administrator. (Dkt. No. 121.) Plaintiffs filed an amended motion seeking the same relief on July 13, 2014 and, on July 29, 2014, the court granted Plaintiffs’ amended motion. (Dkt. No. 137.)

On August 12, 2014, BrownGreer began implementing the parties’ notice plan, which entailed: (1) sending 12,342,000 summary notices via email to all potential class members who had email addresses reflected in Capital One’s records; (2) mailing 4,303,218 postcard notices via first class mail to class members who had opted out of receiving email from Capital One, who did not have email addresses on file, or whose emails were undeliverable; (3) running internet banner notices on 40 websites BrownGreer determined class members were likely to visit; (4) establishing a settlement website and toll-free information telephone number dedicated to answering telephone inquiries; and (5) providing notice of the settlement to the officials designated pursuant to Class Action Fairness Act, 28 U.S.C. § 1715. (Dkt. No. 264.)

BrownGreer provided a thorough summary of its execution of the notice plan in two separate declarations provided to the court. (Dkt.Nos. 264, 305.) Here, it is sufficient to note that the notice plan reached 15,983,613 known, unique settlement class members, a figure that represents 96.03%

of the known settlement class and 91.22% of the estimated total settlement class.³ (Dkt. No. 305 ¶ 6.) Despite the robust and effective notice plan, only 1,378,534 unique claimants—7.87% of the estimated class—filed claims with the administrator by the filing deadline. (*Id.* ¶ 14.) 462 class members have submitted valid opt-out requests and another 103 claimants have submitted opt-out requests that are invalid, either because they are incomplete or untimely. (*Id.* ¶ 8.) BrownGreer estimated that as of December 23, 2014 its total notice and administration costs were \$5,093,000. (*Id.* ¶ 16.) No updated figures have been provided to the court.

II. The Settlement Agreement

The important provisions of the Settlement Agreement provide for both monetary and injunctive relief to class members.

The Settlement Agreement defines the settlement class as follows:

All persons within the United States who received a non-emergency telephone call from Capital One's dialer(s) to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from January 18, 2008 through June 20, 2014, and all persons within the United States who received a non-emergency telephone call from a Participating Vendor's dialer(s) made on behalf of Capital One to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from February 28, 2009, through June 20, 2014.

*787 (Settlement Agreement § 2.39.) Plaintiffs estimate that the class includes 17,522,049 members.⁴

The Settlement Agreement requires Defendants to establish a non-reversionary settlement fund of \$75,455,099.⁵ (Settlement Agreement § 2.42.) After subtracting notice and administration costs (\$5,093,000), Class Counsel's requested service awards for the five Named Plaintiffs (\$25,000), and Class Counsel's requested fee award (\$22,636,530)—all of which will be paid out of the settlement fund—the value of the settlement to class members is \$47,700,569. (Dkt. No. 305.); see *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780–81 (7th Cir.2014) (citing *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir.2014) (holding notice costs, administration costs, and attorneys' fees are not part of the value received from the settlement by class members). If all 17,522,049 class members had filed a claim, they would have received \$2.72 each. But because only a fraction of class members filed a claim, as is often the case in consumer class actions, the 1,378,534 timely claimants will receive at least \$34.60 each, and possibly more if some claimants fail to cash their settlement checks within 210 days, allowing for a second *pro rata* distribution to class members who filed a claim and deposited their settlement checks on time. (Settlement Agreement § 7.04(e).) If, following the second *pro rata* distribution, there remain undeposited settlement checks, the remainder of the settlement fund will go to a *cy pres* recipient. The Settlement Agreement does not identify the recipient of the *cy pres* award because the parties decided to wait until after the claims period to gauge the potential size of any *cy pres* award. (Settlement Agreement § 7.04(f).) In their response to objectors, however, Class Counsel agreed to name the Electronic Frontier Foundation. (Dkt. No. 269 at 33.)

The Settlement Agreement also requires Capital One to institute a protocol under which it uses an automatic dialer to call a customer's (or debtor's) cell phone number only in cases where the individual provided the cell phone number on his or her credit application. Capital One will further refrain from calling a cell phone number unless either the cell phone number is linked to the customer's name based on third party research or Capital One has made contact with the customer on the cell phone number within the past 90 days. (Dkt. No. 262 ¶ 21.) As discussed below, this change would bring Capital One's use of an automatic dialer within Plaintiffs' interpretation of the statutorily undefined term “prior express consent,” which is excluded from the prohibitions of the TCPA, 47 U.S.C. § 227(b)(1).

The court, at final approval hearing on January 15, 2015, (Dkt. No. 320), heard from Class Counsel, counsel for Capital One, and counsel for objector Jeffrey Collins. Although the court

invited specific objectors by name and anyone else present in the courtroom to speak, no other objector addressed the court even though some of the objectors had previously indicated their intent to address the court at the final approval hearing.⁶

*788 LEGAL STANDARDS

I. Approval of a Proposed Settlement in Class Actions

A court may approve a settlement that would bind class members only if, after proper notice and a public hearing, the court determines that the proposed settlement is “fair, reasonable, and adequate.” *Fed. R. Civ. P. 23(e)(3)*. Under Seventh Circuit law, a district court must, in evaluating the fairness of a settlement, consider “the strength of plaintiffs’ case compared to the amount of defendants’ settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement.” *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir.2006) (quoting *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir.1996)).

“The ‘most important factor relevant to the fairness of a class action settlement’ is the first one listed: ‘the strength of plaintiff’s case on the merits balanced against the amount offered in the settlement.’” *Synfuel*, 463 F.3d at 653 (quoting *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir.1979)). Furthermore, “[i]n conducting this analysis, the district court should begin by ‘quantifying the net expected value of continued litigation to the class.’ To do so, the court should ‘estimate the range of possible outcomes and ascribe a probability to each point on the range.’” *Id.* (quoting *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 284–85 (7th Cir.2002)).

“Federal courts naturally favor the settlement of class action litigation.” *Isby*, 75 F.3d at 1196. Nevertheless, the Seventh Circuit has warned that “the structure of class actions under Rule 23 ... gives class action lawyers an incentive to negotiate settlements that enrich themselves but give scant reward to class members, while at the same time the burden of responding to class plaintiffs’ discovery demands gives defendants an incentive to agree to early settlement that may treat the class action lawyers better than the class.” *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289, 293 (7th Cir.2010) (emphasis omitted). District courts must therefore “exercise

the highest degree of vigilance in scrutinizing proposed settlements of class actions.” *Synfuel*, 463 F.3d at 652. This court has endeavored to do that.

II. Attorneys’ Fees in Class Actions

“In a certified class action, the court may award reasonable attorney’s fees ... that are authorized by law or by the parties’ agreement.” *Fed. R. Civ. P. 23(h)*. In determining a reasonable fee, the court “must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of the class members in the fund.” *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 258 (7th Cir.1988), *cert. denied*, 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989). To determine the reasonableness of the sought-after fee in a common-fund case, “courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.” *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir.2001) (*Synthroid I*). The probability of success at the outset of *789 the litigation is relevant to this inquiry. See *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565 (7th Cir.1994).

In *Synthroid*, the Seventh Circuit held that the “market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case.” *Synthroid I*, 264 F.3d at 721. The Seventh Circuit has further explained that “[t]he object in awarding a reasonable attorney’s fee ... is to give the lawyer what he would have gotten in the way of a fee in arm’s length negotiation, had one been feasible.” *In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir.1992). See also *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir.2011) (recognizing that “[s]uch [an] estimation is inherently conjectural”).

The Federal Rules of Civil Procedure allow the court, in a certified class action, to “award reasonable ... nontaxable costs that are authorized by law or by the parties’ agreement.” *Fed.R.Civ.P. 23(h)*. The Seventh Circuit has instructed that district courts must exercise their discretion to “disallow particular expenses that are unreasonable whether because excessive in amount or because they should not have been incurred at all.” *Zabkowicz v. W. Bend Co., Div. of Dart Indus., Inc.*, 789 F.2d 540, 553 (7th Cir.1986) (quoting *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir.1984)).

ANALYSIS

I. Approval of the Class Settlement in This Litigation

Applying the five factors identified in *Synfuel*, the court concludes that the settlement is “fair, reasonable, and adequate,” and therefore meets the requirements of [Rule 23](#).

A. Potential of Class Members' Recovery through Continued Litigation Balanced Against Settlement Amount Offered

As noted above, “[t]he most important factor” in determining whether a proposed settlement satisfies [Rule 23](#) is the “strength of [Plaintiffs’] case on the merits balanced against the amount offered in the settlement.” *Synfuel*, 463 F.3d at 653 (citations omitted). The Settlement Agreement, as it stands, requires Defendants to pay \$75.5 million into the settlement fund out of which all eligible class members who made a timely claim will receive their *pro rata* share, and maybe more if fellow claimants are delinquent in depositing their checks. At the time the court granted preliminary approval, Defendants stated that the settlement constituted the largest cash sum in the 22-year history of the TCPA, (Dkt. No. 129 at 7). That fact, though true, is slightly deceiving because the size of the settlement amount is attributable mainly to the large size of the class—17.5 million people. The recovery per class member—excluding administrative costs, Named Plaintiff awards, and attorneys’ fees—is a relatively diminutive \$2.72. The court does not have the necessary data to compare this proposed settlement to other TCPA actions based on the recovery per *class member*. There are, however, a number of benchmark settlements to which the court can compare the recovery *per claimant*. The recovery per claimant here is \$34.60. That number falls within the range of recoveries in other TCPA actions but, as Judge Davila noted in discussing a similarly sized settlement last year, it falls on the “lower end of the scale.” *Rose v. Bank of Am. Corp.*, Nos. 11 C 2390 & 12 C 4009, 2014 WL 4273358, at *11 (N.D.Cal. Aug. 29, 2014). The settlement also falls far short of the \$500 statutory recovery available for each phone call, of which there were many: *790 Capital One or its Participating Vendors made approximately 1.9 billion phone calls in alleged violation of the TCPA. (Dkt. No. 324 at 11:3.) So if Plaintiffs were to litigate their claims successfully through trial, Capital One would be on the hook for a minimum of \$950 billion. Moreover, Plaintiffs’ recovery could possibly be as high as \$2.85 trillion if Plaintiffs proved the violations were knowing or willful.

But a settlement is a compromise, and courts need not—and indeed should not—“reject a settlement solely because it does not provide a complete victory to plaintiffs.” *In re AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D.Ill.2010) (St.Eve, J.). This is especially true when complete victory would most surely bankrupt the prospective judgment debtor. It also bears mention that the \$34.60 per claimant recovery in this case does not seem so miniscule in light of the fact that class members did not suffer any actual damages beyond a few unpleasant phone calls, which they received ostensibly because they did not pay their credit card bills on time.

More importantly, \$34.60 per claimant is not insignificant considering Capital One’s counsel’s estimate that Plaintiffs will recover nothing through continued litigation. (Dkt. No. 267.) The court recognizes that Plaintiffs would indeed face myriad hurdles by proceeding to trial.

First, at a trial, Plaintiffs would have the burden to effectively rebut Capital One’s chief defense that the class members’ consented to be contacted on their cell phones. Capital One argues that it obtained consent to call from each class member because every version of Capital One’s standard cardholder agreement contained provisions expressing that Plaintiffs consented to receive calls through an autodialing technology. (Dkt. No. 267 at 2.) Plaintiffs admit that they agreed to the terms of their cardholder agreements, but argue they did not agree to be contacted “in violation of the TCPA.” (Dkt. No. 262.) Many class members, however, even provided their cell phone numbers to Capital One as their primary contact numbers. (*Id.*) Under an FCC order in 2008 implementing the TCPA, autodialed collection calls to “wireless numbers provided by the called party in connection with an existing debt are made with the ‘prior express consent’ of the called party,” and are therefore permissible. *In re Rules and Regulations Implementing the Telephone Consumer Prot. Act of 1991*, 23 F.C.C.R. 559 ¶ 9 (2008) (“2008 TCPA Order”); 47 U.S.C. § 227(b)(1)(A)(iii). The FCC’s same 2008 TCPA Order, however, states that “prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.” 2008 TCPA Order ¶ 10. Plaintiffs interpret the FCC’s 2008 TCPA Order to mean that the cell phone number must have been provided during the origination of the credit relationship, *i.e.*, during the transaction. (Dkt. No. 262 at 21.) As United States District Judge J.P. Stadtmueller commented in a recent

opinion, however, the 2008 TCPA Order is “far from clear.” *Balschmiter v. TD Auto Finance LLC*, 303 F.R.D. 508, 517, 2014 WL 6611008, at *8 (E.D.Wis.2014). Furthermore, in this district, the only district judge to have addressed the issue held that a caller is entitled to summary judgment against a TCPA claim when it can show the plaintiff provided a cell phone number as a contact number. See *Greene v. DirecTV*, No. 10 C 117, 2010 WL 4628734, at *3 (N.D.Ill. Nov. 8, 2010) (Kocoras, J.). The parties' disparate interpretations of the 2008 TCPA Order are reflective of the split opinion among practitioners and the courts, a split that at least injects uncertainty *791 into this litigation and will continue to warrant caution by plaintiffs and defendants until clearer guidance is provided. See, e.g., *Baird v. Sabre, Inc.*, 995 F.Supp.2d 1100, 1106 (C.D.Cal.2014) (noting the FCC's series of TCPA Orders are not “model[s] of clarity”).

Second, should Plaintiffs proceed to trial, there would be manageability concerns that may pose serious obstacles to class certification, thus depriving Plaintiffs of the benefits of a class action. Rule 23(b)(3) requires that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). In assessing predominance, a court must analyze “the likely difficulties in managing a class action,” *id.* 23(b)(3)(D), which “encompass[] the whole range of practical problems that may render the class action format inappropriate for a particular suit.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Identifying consenting class members and the precise timing and nature of that consent would require Capital One to locate documents and analyze call recordings for nearly all of the 17.5 million class members. These individual determinations do not always comport with Rule 23(b)(3)'s manageability requirement and have caused some courts to reject class certification on numerous occasions. See, e.g., *Balschmiter*, 303 F.R.D. at 527–29, 2014 WL 6611008, at *19–20; see also *Jamison*, 290 F.R.D. at 107 (denying certification of TCPA litigation where “parties would need to scour [defendant's] records” to determine consent).

Third, without the prompt and final resolution a settlement provides, Plaintiffs run the risk that forthcoming FCC orders may extinguish their claims. There are three sets of petitions currently before the FCC, all of which would eliminate or reduce Capital One's TCPA liability in this case. The first is the FCC's definition of an autodialer. Although the TCPA

defines an autodialer as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers,” 47 U.S.C. § 227(a)(1), the FCC has expanded the definition to cover predictive dialers that can “store or produce telephone numbers,” even if they do not “us[e] a random or sequential number generator.” See *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 14091–93 (2003). The FCC is considering petitions seeking to exclude from the TCPA predictive dialers used for non-telemarketing purposes, such as debt collection. (See Dkt. No. 267 (collecting petitions).) The second and, perhaps, more pressing set of petitions to the FCC ask the FCC to clarify how and when consent may be expressed by consumers. See Michael O'Rielly, FCC Commissioner, *TCPA: It is Time to Provide Clarity*, FCC Blog (Mar. 25, 2014) (available at <http://www.fcc.gov/blog/tcpa-it-time-provide-clarity>) (asserting that “the FCC needs to address this inventory of petitions as soon as possible,” and “answer ... whether consent can be inferred from consumer behavior or social norms”). The final set of petitions seeks to clarify that a caller does not violate the TCPA when it makes autodialed calls to another cell phone subscriber by mistake. (See Dkt. No. 267 (collecting petitions).) If the FCC were to issue orders favoring callers in connection with any of the issues discussed above, Plaintiffs claims would be completely barred or materially limited.

In light of Capital One's potentially meritorious defenses and the legal uncertainty concerning the application of the TCPA, *792 the court concludes that Plaintiffs would probably face an uphill battle proceeding to trial and, once there, obtaining relief. The settlement provides value that is fair considering the very real possibility that Plaintiffs may recover nothing if they were to proceed further with the litigation.

B. Likely Complexity, Length and Expense of Litigation

In *Synfuel*, the Seventh Circuit instructed that the likely complexity, length, and expense of continued litigation are relevant factors district court should consider in determining whether a class action settlement satisfies Rule 23. *Synfuel*, 463 F.3d at 653. All of these factors when considered in this litigation strongly weigh in favor of approval of the proposed settlement. Although the parties have conducted limited discovery for the purpose of evaluating settlement, they would need to engage in significant additional discovery of Capital One's millions (or billions) of call records, if the litigation were to proceed further. This would likely require

each side to retain experts to analyze the mountains of data. There would be significant motion practice, and any judgment in favor of Plaintiffs would be further delayed by any appeal taken from the entry of a final judgment.

C. Scant Opposition to Settlement

The Seventh Circuit has held that the amount of opposition to a settlement among affected parties is yet another factor district courts should consider in deciding whether to approve a class action settlement. *Synfuel*, 463 F.3d at 653. Only 565 class members have requested to be excluded from the settlement, representing approximately 0.0032% of all class members.⁷ Of the approximately 17.5 million class members, the court has received 14 timely objections to the Settlement Agreement and only 9 of those objections take issue with the value of the settlement; the other 5 objectors limit their concerns to Class Counsel's requested fee award. Such a low percentage of opposition favors a finding that the settlement is fair, reasonable, and adequate under Rule 23. See, e.g., *In re AT & T Mobility Wireless Data Services Sales Tax Litigation*, 789 F.Supp.2d 935, 965 (N.D.Ill.2011) (citations omitted) (finding opt-out or objection by 0.01% of class members was "remarkably low" and supported the settlement).

D. The Experience and Views of Counsel

Under *Synfuel*, the opinion of competent counsel is relevant to determining whether a class action settlement is fair, reasonable, and adequate under Rule 23. *Synfuel*, 463 F.3d at 653. The court accepts that Class Counsel in this case are experienced litigators, especially in the TCPA context, and that they strongly support the settlement. (Dkt. No. 262 at 20.) Even though Class Counsel may be considered biased because they stand to benefit from approval, under *Synfuel*, this factor weighs in favor of approval.

E. Stage of the Proceedings and the Amount of Discovery Completed

The final factor the court is to consider under *Synfuel* concerns the stage of the proceedings and the amount of discovery completed at the time of the settlement. *Synfuel*, 463 F.3d at 653. The parties in this case engaged in substantial motion practice and discovery in two of the individual class actions before the JPML transferred the cases to this court. Class Counsel have analyzed a complete set of the contractual language Capital One offers *793 as the basis for class members' consent to be contacted. And

prior to the mediation proceedings before retired Magistrate Judge Infante, the parties exchanged discovery over a six-month period sufficient to engage in "meaningful settlement discussions." Although this settlement-directed discovery is not identical to the type of full discovery that counsel may desire "to evaluate the merits of plaintiffs' claims," *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 325 (7th Cir.1980), the court is not convinced that extensive formal discovery, when measured against the cost that would be incurred, would place the parties in a proportionally better position than they are now to determine an appropriate settlement value of this litigation. Evaluating the merits of Plaintiffs' claims would, as discussed above, require an arduous scouring of Capital One's records for individual plaintiffs, undermining the cost-saving benefits of the settlement. The court finds that the parties have completed a sufficient amount of discovery to be able to place value on their respective positions in this case. The final *Synfuel* factor weighs in favor of settlement.

F. Objections Presented Are Not Well Founded Under the Applicable Law

For the reasons explained above, the factors set out by the Seventh Circuit in *Synfuel* support approving the Settlement Agreement in this case. Notwithstanding the court's conclusion that the Settlement Agreement is fair, reasonable, and adequate under Rule 23, there are 14 class members who have filed timely objections, although only a subset of those 14 take issue with the amount of the settlement. (Dkt.Nos.144, 152, 184, 189, 193, 196, 199, 202, 215, 225, 227, 228.) These objections collectively state a number of arguments the court will discuss briefly below.

First, some objectors argue that class members are not receiving enough money in light of the available statutory damages. As the court discussed above, a class-wide recovery in line with the statutory awards is unrealistic and would ultimately result in class members finding their place in line among Capital One's unsecured creditors in a bankruptcy proceeding. Moreover, as discussed above, the strength of Plaintiffs' case did not warrant a settlement anywhere close to the statutory award, which is what Plaintiffs would have sought had they prevailed at trial on the liability issue.

Second, certain objectors complain that they should be able to make claims against the settlement fund for every call they received, consistent with the framework of the TCPA. Although the court inquired of counsel about the possibility of a call-based claims process as well, the court ultimately

accepts the representations of Class Counsel and Capital One that it is unlikely that a material portion of the class had an average call volume greater or lesser than any other class member. The court also accepts Class Counsel's representation that a call-based claims process would be extremely costly to administer and is inadvisable given the fact that increased administration costs would result in a corresponding decrease in the money available to the class.

Lastly, the court rejects the complaints of the objectors who have any issue with the notice and claims process. The court agrees with Class Counsel that the notice provided by BrownGreer was state of the art and well-tailored to reach the maximum number of class members. Lead counsel for Capital One represented to the court that percentage of class members reached through the notice process was the highest he had ever seen. (Dkt. No. 324 at 35:16–20.) Submitting a claim, in this court's experienced view, was exceedingly easy for the class members. Each *794 class members needed only to complete a short online form or return a postcard.

Accordingly, the court finds that none of the objections to the total amount of the settlement or its administration are well-founded and, for the reasons explained in detail above, the court grants the motion (Dkt. No. 260) for final approval of the class action Settlement Agreement.

II. Attorneys' Fees

Although certain of 14 timely objectors contend that Class Counsel's requested fee is excessive, the court need not engage in a lengthy analysis of each objector's argument because the Seventh Circuit has directed district courts, when deciding whether requested fees are excessive, to estimate the contingent fee that the class would have negotiated with Class Counsel at the outset of the litigation, “had negotiations with clients having a real stake been feasible.” *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir.2011). The court endeavors to approximate such a market fee below.

A. Class Counsel's Requested Fees

Class Counsel in this case represent that they have spent 4,268 hours in professional time over a three-year period litigating and settling this case on a contingent fee basis. (Dkt. No. 252.) They seek for their efforts an award of attorneys' fees equal to 30% of the \$75,455,099 settlement fund or \$22,636,530. They do not seek additional payment or reimbursement for any of their expenses on top of the requested fee award, nor do they seek compensation for the injunctive relief barring

Capital One from calling an individual's cell phone without prior express consent.

To justify their request, Class Counsel argue that their requested fee is less than the 33.3% fee “consistently” awarded in TCPA and non-TCPA class action litigation in this district. (See Dkt. No. 176 at 19–20 (collecting cases).) They further argue that the substantial risk they assumed in prosecuting the litigation on a purely contingent basis supports a 30% fee because there is a reasonable chance that this case, if litigated, could result in no recovery at all for the class. Class Counsel urge the court to adopt their preferred approach to calculating fees based on a percentage of the settlement fund rather than through a lodestar analysis, and to calculate that percentage from the total settlement fund inclusive of administrative costs, *cy pres* awards, and incentive awards.

B. Fee Calculation Method

Although the court granted limited discovery regarding Class Counsel's lodestar data, the court agrees with Class Counsel that the fee award in this case should be calculated as a percentage of the money recovered for the class. It has long been the law in the Seventh Circuit that in common fund cases like this one, district courts have discretion to choose either the lodestar or a percentage approach to calculating fees. *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir.1994) (“It bears reiterating here that we do not believe that the lodestar approach is so flawed that it should be abandoned.... We therefore restate the law of this circuit that in common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court. We recognize here ... that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration.”). Ultimately, the district judge's job is to approximate the market rate between willing buyers and willing sellers that would have prevailed had the parties negotiated the rate at the outset of the representation. *795 *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 957 (7th Cir.2013) (citations omitted). Although the court need not adopt the calculation method that is most prevalent in the marketplace as it existed at the time of the hypothetical negotiation, see *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir.1998), such an approach is more efficient for the court and more likely to yield an accurate approximation of the market rate.

Here, had an arm's length negotiation been feasible, the court believes that the class would have negotiated a fee arrangement based on a percentage of the recovery, consistent with the normal practice in consumer class actions. An *ex ante* agreement based on lodestar requires a client to monitor counsel, and the class-member "clients" here had little incentive to do so. There are approximately 17.5 million class members in this case, the prospective relief is minimal, and none of the class members suffered tangible damages beyond the inconvenience of receiving one or more debt-collection calls to their cell phones on ostensibly overdue credit card bills. The class would not have negotiated a compensation scheme that required a level of monitoring the class members were not interested in or capable of providing. Instead, the class would have chosen the compensation scheme that required the least monitoring to align the incentives of the class and its counsel—the percentage method. The court will therefore apply the percentage method as well.

The court does not, however, agree with Class Counsel's assertion that "it is appropriate—and the norm in the Seventh Circuit—to include administrative and notice costs when calculating fees based on a percentage-of-the-fund." (Dkt. No. 269 at 17.) The Seventh Circuit has instructed district courts that the "ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack*, 768 F.3d 622, 630 (7th Cir.2014). Administration and notice costs, although paid through the settlement fund, are not benefits to the class and thus not part of "what the class members received." *Id.* Class Counsel argue that the Seventh Circuit's recent instruction in *Redman* applies only in cases involving a fund that must be monetized from coupon redemptions. The settlement in this case, by contrast, is a non-reversionary cash fund. (Dkt. No. 269 at 18.) The court does not agree with Class Counsel's limited interpretation of *Redman*. In *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir.2014), decided two months after *Redman*, the Seventh Circuit applied its holding in *Redman* to a reversionary cash fund and clarified that costs incurred as part of the settlement do not shed light on the fairness of the split between Class Counsel and class members. *Id.* at 781 (citing *Redman*, 768 F.3d at 630). The Seventh Circuit also extended its analysis to *cy pres* and service awards because neither award directly benefits the class, or at least the whole class, and therefore should not be included in the court's assessment of the settlement's value to the class. *Id.* at 784.

In order to evaluate the fairness of Class Counsel's fee request consistent with the Seventh Circuit's recent guidance, the court must recalculate the percentage fee sought by Class Counsel. After subtracting administration and notice costs (\$5,093,000) and the Named Plaintiff service awards (\$25,000), the total money available to split among the class and Class Counsel is \$70,337,099. Class Counsel seeks 22,636,530 of that total, or slightly above 32%.

C. Class Counsel's Requested 32% Fee Exceeds the Market Rate

The Seventh Circuit has instructed district courts to approximate the market rate that would have prevailed at the *796 outset of the litigation had negotiations between Class Counsel and "clients having a real stake" been feasible. *Trans Union Corp. Privacy Litig.*, 629 F.3d at 744. The Seventh Circuit, however, has not expressed a preference for a particular method of determining that market fee. The market-mimicking approach is, as the Seventh Circuit acknowledged, "inherently conjectural." *Id.*; see also *Synthroid I*, 264 F.3d at 719 ("[I]t is indeed impossible to know *ex post* the outcome of a hypothetical bargain *ex ante*."). In *Synthroid I*, however, the Seventh Circuit explained that it is possible to learn about "similar bargains" and set forth three "guides" or "benchmarks" to help district courts estimate the market fee: (1) actual fee contracts between plaintiffs and their attorneys; (2) data from similar common fund cases where fees were privately negotiated; and (3) information from class-counsel auctions. *Synthroid I*, 264 F.3d at 719. At least two judges presiding in this district, and one judge from another district employing the Seventh Circuit's market-mimicking approach, have applied these three benchmarks to determine *ex post* the market contingent fee. See *In re AT & T Mobility Wireless Data Services Sales Tax Litigation*, 792 F.Supp.2d 1028, 1033–1034 (N.D.Ill.2011); *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *10–13 (N.D.Ill. Dec. 9, 2009) (Gettleman, J.), *rev'd on other grounds*, 629 F.3d 741 (7th Cir.2011); *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 40–45 (D.N.H.2006) (Smith, J.). This court will likewise analyze each benchmark to estimate the prevailing market rate for TCPA class action litigation generally, and then adjust that rate based on the risk of nonpayment in this case.

1. Class Counsel's Contingent Fee Agreements

The first benchmark is any actual agreement between plaintiffs and attorneys in this case. This was a useful starting point in *Synthroid* because one group of sophisticated plaintiffs had negotiated a fee agreement at the outset and set the opening price. *Synthroid I*, 264 F.3d at 720. That, however, is not the case here. Like most consumer class actions, the only fee agreements are Class Counsel's retainer agreements with the Named Plaintiffs, which provide for contingent fees ranging from 33.3% to 40% of the settlement fund. (Dkt. No. 176 at 22.) These retainer agreements are of little value to determining the market rate because named plaintiffs are less often sophisticated buyers of legal services and more often “the cat's paws of the class lawyers.” *In re Trans Union*, 629 F.3d at 744. Moreover, the agreements here were between Class Counsel and five individual plaintiffs who, individually, did not have “a sufficient stake to drive a hard—or any—bargain with the lawyer[s].” *Continental*, 962 F.2d at 572. The court therefore finds that Class Counsel's contingent fee agreements with the Named Plaintiffs do not inform the court's estimation sufficiently as to what Class Counsel would have received in an *ex ante* negotiation with the entire class, has such a negotiation occurred.

2. Data on Fee Awards in Other Cases

The second and third *Synthroid* benchmarks concern data from similar common fund cases where the parties set fee schedules *ex ante*, either through a private negotiation or a judicially conducted “auction.” Because data from pre-suit negotiations and auctions tend to be sparse—and with regard to TCPA class actions, nonexistent—district courts have also examined empirical data analyzing fee awards in other class actions where fees were awarded at the end of the case. *See, e.g., AT & T Mobility*, 792 F.Supp.2d at 1033; *Trans Union*, 2009 WL 4799954, at *11–13. The Seventh Circuit has relied on the same *797 empirical data to determine the “norm” for fee awards, *see Silverman*, 739 F.3d at 958, and this court will do so as well. While large-scale empirical studies necessarily include *ex post* fee awards from other circuits that may not be reflective of the market price at the time those cases were filed, the awards likely affect the price at which national class action lawyers are willing to provide their services going forward. *See, e.g., Trans Union*, 2009 WL 4799954, at *11 (noting awards in class actions generally may influence expectations of a lawyer and client engaging in negotiation); *Nilsen v. York County*, 400 F.Supp.2d 266, 282–83 (D.Me.2005) (“Other courts' awards necessarily affect the

expectations of lawyers and, therefore, what they might agree to in voluntary negotiation.”)

i. Empirical Studies

In 2004, Theodore Eisenberg and Geoffrey Miller examined two data sets covering class actions from 1993 to 2002 and found that the mean fee award from settlements in the \$38 to \$79 million range was 16.9% and the median was 15.5%. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Studies 27, 73 (2004). In 2010, Eisenberg and Miller updated their study in to analyze class action settlements from 1993 to 2008. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Studies 248 (2010). The updated study found that the mean award from settlements in the \$38.3 to \$69.6 million range, the third highest decile, was 20.5% and the median was 21.9%; the mean award from settlements in the \$69.6 to \$175.5 range, the second highest decile, was 19.4% and the median was 19.9%. *Id.* at Tab. 7.

In the same year as Eisenberg and Miller published their updated 2010 study, Brian Fitzpatrick, who filed a declaration in this case on behalf of Class Counsel, (Dkt. No. 270), published a paper analyzing every federal class action settlement in 2006 and 2007. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Studies 811 (2010). Fitzpatrick found that the mean award from settlements in the \$72.5 to \$100 million range was 23.7% and the median was 24.3%. *Id.* at 839.

All three studies confirm Eisenberg and Miller's original finding of a scaling effect whereby the percentage fee decreases as the class recovery increases. *See* 1 J. Empirical Legal Stud. At 28 (“[A] scaling effect exists, with fees constituting a lower percent of the client's recovery as the client's recovery increases.”) In Eisenberg and Miller's 2010 study, they found that settlements in the top decile by total recovery yielded a median and mean fee percentage that was less than one-third of the median and mean percentage fee in settlements in the lowest decile. 7 J. Empirical Legal Studies at 264. Fitzpatrick found a similar, although less pronounced scaling effect: settlements in the top decile by recovery yielded a mean fee of 18.4% and a median of 19%, whereas settlements in the lowest decile yielded a mean fee of 28.8% and a median of 29.6%. 7 J. Empirical Legal Studies at

839; see also [Silverman](#), 739 F.3d at 958 (observing that the empirical data show that the percentage of the fund awarded to counsel declines as the size of the fund increases).

Accordingly, if past awards are reflective of the market for this case and its \$75.5 million negotiated settlement fund, and if the published empirical data discussed above accurately reflect the fees awarded in TCPA class actions, it is fair to conclude that class members would have negotiated an across-the-board fee somewhere between 20% and 24% of the settlement *798 fund. Class Counsel's requested 32% fee (or 30% fee, depending on the denominator) exceeds that across-the-board range.

ii. The Court's TCPA Class Action Settlement Analysis

To assist the court in determining whether the findings from the above empirical studies are indeed representative of the across-the-board percentage fees awarded in TCPA class actions, the court requested class counsel in another settled TCPA case, *Wilkins v. HSBC Bank*, No. 14 C 190 (N.D.Ill.), pending on this court's docket, to submit data from other finally approved TCPA class action settlements since 2010. Class counsel in *HSBC*, many of whom also represent class members in this case, diligently compiled publicly available summary information contained in 73 TCPA class action settlements approved since 2010. See *HSBC*, No. 14 C 190 (N.D.Ill.) (Dkt. No. 109–1). The court has now analyzed the data from 72 of the cases—one case lacked publicly available fee information—and has attempted in the table below to recreate the Eisenberg–Miller and Fitzpatrick summaries for TCPA class action settlements. Like the empirical analyses discussed in the previous section, the table below reports the mean and median fee percentage, as well as the standard deviation, for each total recovery decile of the TCPA class action settlements provided by class counsel in *HSBC*.

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Decile Recovery Range (Start/End) ⁸	Mean Fee (%)	Median Fee (%)	Standard Deviation	Number of Cases
Less than \$345,000	31.2	31.5	3.1	8
\$345,000 \$510,000	33.1	33.3	2.8	7
\$510,000 \$1.1 Million	37.1	33.0	18.1	7
\$1.1 million \$1.6 million	29.4	33.3	6.3	7
\$1.6 million \$2.6 million	30.7	30.7	4.1	7
\$2.6 million \$4.6 million	26.1	33.0	10.2	7
\$4.6 million \$7.0 million	24.1	25.0	9.8	7
\$7.0 million \$9.8 million	25.8	25.0	4.6	7
\$9.8 million \$15.9 million	23.7	25.0	8.6	7
\$15.9 million \$39.9 million	17.2	17.7	4.8	8

[Editor's Note: The preceding image contains the reference for footnote ⁸]

*800 *HSBC*, No. 14 C 190 (N.D.Ill.) (Dkt. No. 109–1). Because this court lacks the technical expertise of Eisenberg, Miller, or Fitzpatrick, and because the sample size of cases (72) is quite small, the statistics set forth above are but an informal analysis.⁹ The data similarly fail to provide a meaningful benchmark for a case like this one, where the \$75.5 million recovery begins to approach what many courts consider a “megafund.” Despite these shortcomings, the available TCPA data offer two important insights. First, the across-the-board percentage awards in TCPA class actions roughly track the fee awards in other types of cases, after controlling for class recovery amount. Second, TCPA class actions exhibit the same relationship between fee awards and recoveries as other types of cases: that is, the percentage of the fund awarded to counsel generally declines as the size of the fund increases.

iii. Competitive Fee Structures Negotiated Ex Ante

The analysis desired by Seventh Circuit authority is not at an end, however, because the second and third benchmarks from *Synthroid* —*ex ante* arrangements and judicially overseen “auctions”¹⁰ —reveal that sophisticated parties engaged in an pre-filing fee negotiations rarely agree to a single, across-the-board percentage fee structure, and rarely pay a percentage of the recovery equal to the benchmark established by past awards. The court has not uncovered any data about *ex ante* fee arrangements or auctions in the consumer class action context, let alone data on TCPA class actions. Data from published opinions in securities and antitrust cases do exist where district courts utilized a competitive approach to negotiate a fee structure on behalf of the class at the outset. As far as the court can tell, there are at least fourteen class action cases—twelve securities actions and two antitrust actions—where district court judges have selected lead counsel and negotiated a fee structure using a competitive process. See *In re Oracle Sec. Litig.*, 131 F.R.D. 688 (N.D.Cal.1990); *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467 (N.D.Cal.1994); *In re Amino Acid Lysine Antitrust Litig.*, 918 F.Supp. 1190 (N.D.Ill.1996) (Shadur, J.); *In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257 (N.D.Cal.1996); *In re Cendant Corp. Litig.*, 182 F.R.D. 144 (D.N.J.1998); *In re Network Assocs., Inc., Sec. Litig.*, 76 F.Supp.2d 1017 (N.D.Cal.1999); *Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc.*, 184 F.R.D. 688 (S.D.Fla.1999); *In re Lucent Techs. Inc. Sec. Litig.*, 194 F.R.D. 137 (D.N.J.2000); *In re Bank One Shareholders Class Actions*, 96 F.Supp.2d 780 (N.D.Ill.2000) (Shadur, J.); *Wenderhold v. Cylink Corp.*, 188 F.R.D. 577 (N.D.Cal.1999); *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y.2000); *801 *In re Quintus Sec. Litig.*, 201 F.R.D. 475 (N.D.Cal.2001); *In re Commtouch Software Ltd. Sec. Litig.*, No. 01C-00719, 2001 WL 34131835, Order Re Lead Plaintiff Selection and Class Counsel Selection (N.D.Cal. June 27, 2001); *In re Comdisco Sec. Litig.*, 141 F.Supp.2d 951 (N.D.Ill.2001) (Shadur, J.) (Memorandum Opinion entering attached Apr. 6, 2001, Memorandum Order).

The data from these securities and antitrust cases, where available, do not shed light on the market rate in consumer class actions, but they do illustrate that (1) negotiated fee agreements regularly provide for a recovery that increases at a decreasing rate and (2) negotiated fee agreements frequently result in lower fee awards than those suggested by the empirical data on past awards granted after the fact. In 2006,

United States District Judge William Smith conducted a survey of the fee structures adopted in some of the cases listed above. *Cabletron*, 239 F.R.D. at 43. The findings of Judge Smith's survey are reprinted in part below and supplemented by this court's independent research. Because the case before Judge Smith was a securities class action, Judge Smith applied the negotiated fee schedule of each surveyed case to the settlement amount in *Cabletron*. This court will not conduct a similar analysis because, as discussed above, the court cannot impute the market rate for attorneys' fees charged in securities and antitrust cases onto a consumer class action. It is sufficient to note that in nearly every case, the presiding judge selected a bid with a declining contingent-fee scale.¹¹ See *Cabletron*, 239 F.R.D. at 44 (“[T]he competitive fee structures uniformly reflect a downward scaling as the settlement fund increases.”).

Instead, the court compares the prevailing fee percentage (*i.e.*, the “blended” rate) in each case to the mean and median set forth in Eisenberg and Miller's 2010 study for the corresponding recovery amount. Such a comparison should help the court determine whether and to what extent the empirical data—which largely reflect past fee awards determined *ex post*—overestimate the contingent fees parties agree to when they actually negotiate at the outset of a case.

The summary is as follows:

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Case Name	Total Recovery	Actual Fee Award ¹²	Eisenberg & Miller Mean/Median
<i>In re Oracle Sec. Litig.</i> , No. 90-CV-931 (N.D. Cal., Judge Vaughn Walker)	\$25 million	22.5%	22.1% (mean) 24.9% (median)
<i>In re Wells Fargo Sec. Litig.</i> , No. 91-CV-1944 (N.D. Cal., Judge Vaughn Walker)	\$13.7 million	22%	23.8% (mean) 25.0% (median)
<i>In re California Micro Devices Sec. Litig.</i> , No. 94-CV-2817 (N.D. Cal., Judge Vaughn Walker)	\$26 million	15.7%	22.1% (mean) 24.9% (median)
<i>In re Amino Acid Lysine Antitrust Litig.</i> , No. 95-CV-7679 (N.D. Ill., Judge Milton Shadur)	\$49 million	7.0%	20.5% (mean) 21.9% (median)
<i>In re Cendant Corp. PRIDES Litig.</i> , No. 98-CV-2819 (D.N.J., Judge William H. Walls)	\$341 million	6.0%	12.0% (mean) 10.2% (median)
<i>In re Cendant Corp. Non-PRIDES Litig.</i> , No. 98-CV-2819 (D.N.J., Judge William H. Walls)	\$3.2 billion	8.7%	12.0% (mean) 10.2% (median)
<i>In re Auction Houses Antitrust Litig.</i> , No. 00-CV-648 (S.D.N.Y., Judge Lewis Kaplan)	\$512 million	5.2%	12.0% (mean) 10.2% (median)
<i>In re Bank One Shareholders Class Actions</i> , No. 00-CV-880 (N.D. Ill., Judge Milton Shadur)	\$45 million	7.0%	20.5% (mean) 21.9% (median)
<i>In re Network Associates, Inc.</i> , No. 99-CV-1729 (N.D. Cal., Judge William Alsup)	\$30 million	8.0%	22.1% (mean) 24.9% (median)
<i>In re Quintus Corp. Sec. Litig.</i> , No. 00-CV-4263 (N.D. Cal., Judge Vaughn Walker)	\$10 million	11.3%	22.8% (mean) 22.1% (median)

[**Editor's Note:** The preceding image contains the reference for footnote ¹²]

Cabletron, 239 F.R.D. at 44; Laural L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, Washington, D.C.: Federal Judicial Center, 2001 (supplementing Judge Smith's analysis).

As discussed earlier, the foregoing analysis is merely illustrative and does not purport to approximate the contingent fee for a TCPA class action, had that fee been *803 negotiated at the outset of the case with a “client” having a real stake in the outcome. The analysis does, however, suggest that selecting competent counsel using a competitive process generates a lower percentage-of-the-fund fee arrangement than Eisenberg and Miller's mean and median percentages, which mostly reflect awards granted *ex post*. The spreads between the negotiated fees and Eisenberg and Miller's estimates vary from 0% to 17% and are especially pronounced for settlements that produced large recoveries. The particular spread depends on the unique facts and risk factors of each case, but the court's finding here is generally consistent with the experience of district court judges who have used a competitive-bid approach to select counsel in the past. *See, e.g., In re Comdisco Sec. Litig.*, 150 F.Supp.2d 943, 947 n. 7 (N.D.Ill.2001) (“[T]his Court's prior experience as well as the bidding results in the present case confirm that the cited mythic norm [of 25 percent to 35 percent] is

grossly excessive even where substantially smaller [than \$100 million] amounts are at stake.”)

The remaining question is whether the findings discussed above apply to a hypothetical *ex ante* negotiation in the consumer class action context, or merely to securities and antitrust cases. The court believes the findings from securities and antitrust cases provide some guidance regarding the *ex ante* negotiation in any type of class action. As Eisenberg and Miller concluded in 2004 and again in 2010, “the overwhelmingly important determinant of the fee is simply the size of the recovery obtained by the class,” not the subject matter of the litigation. 7 J. Empirical Legal Studies at 250. All of the empirical studies surveying past awards found similar across-the-board percentage awards for securities, antitrust, and consumer class actions. *Id.* at 264 (Tab.5); 7 J. Empirical Legal Studies at 835 (Tab.8). Additionally, this court's informal analysis discussed earlier in this opinion, and which the court could not have conducted without the diligent assistance of counsel, confirmed that the same conclusion applies to the TCPA subset of consumer class actions. Furthermore, the court has no reason to believe that securities or antitrust cases are any more or less predictable than consumer class actions, such that counsel would be willing to negotiate a scaled fee schedule in one set of cases but not the other. As the Seventh Circuit explained in *Silverman*, a downward scaling fee arrangement is well-suited to securities litigation because a large portion of class counsel's expenses must be devoted to establishing liability, whereas damages can be calculated mechanically from movements in stock prices. *Silverman*, 739 F.3d at 959. That applies equally, if not more, to TCPA cases because nearly all of counsel's efforts are devoted to determining liability. Damages are fixed by statute.

3. Court's Estimation of the Market Rate for TCPA Class Actions Exclusive of Risk

The Seventh Circuit acknowledged in *Synthroid I* that it is, of course, “impossible to know *ex post* the outcome of a hypothetical bargain *ex ante* [b]ut a court can learn about similar bargains.” *Synthroid I*, 264 F.3d at 719 (emphasis original). That is what the court has endeavored to do in the preceding sections and the court now draws the following conclusions. First, given the class's inability to effectively monitor counsel, an *ex ante* negotiation would have produced a fee arrangement based on a percentage of the recovery. Second, the data available on past awards in TCPA cases and other class actions show that the mean and median

recovery for a \$75.5 million TCPA case are between 20% and 24% of the settlement fund. Third, an *ex ante* negotiation between Class Counsel and class *804 members in this case, had individual class members had a real stake in the litigation, would have produced a downward scaling fee arrangement. See *Silverman*, 739 F.3d at 959 (“The [empirical data] reinforce the observation in the *Synthroid* opinions that negotiated fee agreements regularly provide for a recovery that increases at a decreasing rate.”) Fourth, given the \$75.5 million recovery, the downward scaling fee arrangement would have produced an actual percentage award below or toward the bottom of Eisenberg and Miller's 20% to 24% range for similarly sized settlements.

The special master appointed by Judge Gettleman in *Trans Union* observed, correctly, that determining the criteria for the hypothetical negotiation is the easy part; attaching actual numbers to the hypothetical downward scaling fee agreement is “more art than science.” *Trans Union*, 2009 WL 4799954, at *15. As a starting point, the court applies a slightly modified version of the fee schedule set out by the Seventh Circuit in *Synthroid II* because *Synthroid II* is the only consumer class action known to this court where the parties (or in this case the court) estimated a downward scaling fee agreement in a consumer class action.¹³ *Synthroid II*, 325 F.3d at 980. As demonstrated in the table below, applying the modified *Synthroid II* scale to the total recovery in this case yields a result that is largely consistent with the conclusions drawn from the court's analysis in Section II.C.2. The fee structure affords Class Counsel a relatively high rate for the initial recovery consistent with Class Counsel's need to devote most of their efforts to determining liability. The marginal rates diminish as the recovery increases because, notwithstanding the class's desire to incentivize counsel to seek a higher award, the measure of damages depends more on the number of class members (or phone calls) than the additional efforts of counsel. Finally, the modified *Synthroid II* structure produces an actual percentage fee of 19.97%, which is .03% below Eisenberg and Miller's 20% to 24% range for similarly sized settlements.

Application of Modified <i>Synthroid II</i> Structure		
Recovery	Fee Percentage	Fee
First \$10 million	30%	\$3,000,000
Next \$10 million	25%	\$2,500,000
\$20 – 45 million	20%	\$5,000,000
Excess above \$45 million (\$30,455,099)	15%	\$4,568,265
Total Fee	19.97%	\$15,068,265

In light of the *Synthroid II* structure's fit with this court's observations about the *805 TCPA class-action market, and the fact that the *Synthroid II* structure resembles the fee schedules actually put forth by lawyers in an *ex ante* negotiations (although it is admittedly less tailored), the court adopts the *Synthroid II* structure as its estimation of the market contingent fee for a \$75.5 million TCPA class action independent of the risks associated with a particular case.

4. Risk of the Litigation

The last factor the Seventh Circuit instructs a district court to consider is the risk plaintiffs' lawyers face of possibly losing the litigation when they undertake class representation. The estimated magnitude of the risk necessarily affects the price at which Class Counsel in this case would have been willing to offer their services in an *ex ante* negotiation, had such a negotiation occurred. See *Synthroid I*, 264 F.3d at 721. The Seventh Circuit has explained the risk premium in fee negotiations with the following hypothetical: “[I]f the market-determined fee for a sure winner were \$1 million the market-determined fee for handling a similar suit with only a 50 percent change of a favorable outcome should be \$2 million.” *Trans Union*, 629 F.3d at 746 (citations omitted).

As this court discussed earlier in this opinion, Class Counsel in this case faced a variety of serious obstacles to success in bringing the lawsuit, and faced the real prospect of recovering nothing. First, it was quite possible that the discovery may have revealed that many class members acquiesced to receiving calls on their cell phones when they agreed to their cardholder agreements with Capital One. Some customers provided Capital One with their cell phone numbers as their primary contact numbers, arguably waiving any right not to receive debt-collection calls on their cell phone from Capital One. Second, at the outset of the litigation there was a serious question whether the Plaintiffs' claims could meet Rule 23's manageability requirement given that Capital One would have to review its records to determine which class members provided consent through cardholder agreements, which class members actually provided their cell phone numbers to Capital One, and whether each class member actually owned their cell phone number at the time Capital One called it using an autodialer. Third, as Capital One has noted throughout this litigation, there are presently petitions before the FCC urging the FCC to (1) revise the TCPA's definition of “automatic telephone dialing system” to exclude dialers like those used by Capital One, and (2) provide a

safe harbor for all calls that Capital One inadvertently made to wrong numbers. Consequently, the longer this litigation were to continue, the longer Plaintiffs would be exposed to the possibility that the FCC would take action that might extinguish Plaintiffs' claims.

On the flip side, Capital One's potential monetary liability in this litigation is staggering. Even if each of the 7.5 million class members in this case had only received one phone call a piece and could not prove that any of the calls were made in willful violation of the TCPA, Capital One's exposure is still greater than \$8.7 billion. That type of potentially bankruptcy-level exposure is sufficient to compel an *in terrorem* settlement before a liability determination is made and is accordingly a factor that reduces Class Counsel's risk of non-payment. See *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 1752, 179 L.Ed.2d 742 (2011) (noting class actions can produce *in terrorem* settlements).

The precise level of risk faced by Class Counsel more than two years ago, when the cases were filed, is difficult for a district court to determine and quantify after the fact. The Seventh Circuit, however, *806 has criticized at least one district court for failing to make an attempt to do so. See *Trans Union*, 629 F.3d at 746–48. As hard as the task may be, this court will endeavor to determine an appropriate risk multiplier. After preliminary approval of the Class Settlement and after the court granted limited discovery of Class Counsel's lodestar information in this case and other TCPA cases, Professor Todd Henderson submitted a report on behalf of class member objector Jeffery Collins. Professor Henderson's report calculated that Class Counsel recovered on behalf of the various classes they had represented (and themselves) in about 43% of past TCPA cases.¹⁴ (Dkt. No. 294 ¶ 10.) Professor Henderson's determination was based on the limited sample of TCPA cases in which Class Counsel participated. It is, however, the best information available to court. As a result, the court assumes the average TCPA case carries a 43% chance of success, and the question the court ultimately must answer is whether Class Counsel in this case faced a greater or lesser chance of prevailing. Considering the circumstances of this case, the court believes that the class members' consent issues made the representation riskier than a typical TCPA class action, but only slightly so after considering the strong incentives to settlement created by the magnitude of Capital One's potential liability.

The next question the court now faces is how to adjust the market fee structure the court has determined, as discussed

earlier in this opinion, to account for the increased risk Class Counsel faced of losing. Eisenberg and Miller in their 2010 study concluded that “high risk” consumer class actions yield a percentage fee premium of about 6% above the “low or medium risk” cases. 7 J. Empirical Legal Studies at 265 (Tab.8). Absent better information and in light of the court's determination that this case was only slightly riskier than a typical TCPA class action, the court adopts Eisenberg and Miller's risk premium and applies it to the court's estimated market rate. Although Eisenberg and Miller's 6% premium applied to the entire fee award, such an application does not make sense in a case like this one, where the risk existed only with regard to liability, not damages. Each of the potential impediments to establishing Capital One's liability: the class members' alleged consent to be called; Rule 23 manageability issues; and potentially forthcoming FCC orders; only affected Class Counsel's ability to prove their case on liability and consequently their ability to recover any damages. Once the risk resulting from the impediments to establishing liability was overcome and Capital One's liability established, Class Counsel's ability to obtain a large recovery was no longer materially affected by that risk. As discussed above, one of the purposes of a downward scaling fee schedule is to account for cases where the marginal costs of increasing the class's damages recovery are low. Class counsel in an *ex ante* negotiation must nevertheless be provided an incentive to take the case at the outset and seek the highest award on behalf of the class that is reasonable under the facts and law of the case.

Because all of the risk factors in this case were limited to the question of Capital One's liability, it follows that the risk premium related to Class Counsel's fees should apply only to the attorneys' fees *807 associated with the initial recovery tier negotiated between Class Counsel and the sophisticated class members before the case was filed. In the hypothetical *ex ante* negotiation, Class Counsel would have desired compensation for their enhanced risk regardless of the eventual level of recovery; the way to affect that desire is by incorporating the risk premium into the attorney fee percentage related to the first recovery tier. Sophisticated class members, by contrast, would have balked at agreeing to a similar adjustment to the second, third, and fourth recovery tiers, because the risk factors present in this case related only to establishing liability and would not have affected Class Counsel's ability to achieve the additional damages recovery reflected in second, third and fourth tiers. The court therefore applies the 6% premium only to the first \$10 million in the first tier of the market fee structure. The court's risk-adjusted

market contingent fee structure is set forth in the table below, and nets Class Counsel an additional \$600,000.

Risk-Adjusted Fee Structure		
Recovery	Fee Percentage	Fee
First \$10 million	36%	\$3,600,000
Next \$10 million	25%	\$2,500,000
\$20 to \$45 million	20%	\$5,000,000
Excess above \$45 million (\$30,455,099)	15%	\$4,568,265
Total Fee	20.77%	\$15,668,265

5. Professor Henderson's Model

Lastly, as discussed earlier, the court granted objector Jeffrey Collins's request for discovery of information from Class Counsel regarding Class Counsel's hours and hourly fees to calculate the lodestar in this case and in Class Counsel's previous TCPA class cases. Collins sent Class Counsel's information to Professor Henderson, who in turn filed a report analyzing the data and proposing an alternative method for approximating the *ex ante* market rate at the conclusion of a case. Collins's counsel acknowledged at the final approval hearing that no district court or court of appeals has ever adopted Professor Henderson's methodology. (Dkt. No. 324 at 54:17–19.) This court similarly declines to apply Professor Henderson's method of estimating the appropriate fee award in this case. Professor Henderson's model, though not applied, nevertheless merits a brief discussion.

Using Class Counsel's lodestar data, Professor Henderson determined that Class Counsel, who are highly experienced, achieve a recovery for their “clients” in approximately 43% of their TCPA cases. (Dkt. No. 294 ¶ 10.) But after adjusting for Class Counsel's tendency to devote substantially more professional time to their winning cases than to their losing cases, Henderson concluded that Class Counsel have a 64% chance of obtaining recovery for any given dollar of lodestar invested in TCPA litigation. Given a 64% chance of recovery, Henderson determined that Class Counsel need only obtain a ***808** weighted average 1.57 lodestar multiplier in successful cases to compensate Class Counsel for their lodestar investment and the contingent risk Class Counsel faces in TCPA class action litigation. (*Id.*) Applying that multiplier to this case, Professor Henderson concluded that Class Counsel would have represented the class in this case for 4.6% of the total recovery had they been forced to compete for the legal work at the outset of the case.¹⁵

Professor Henderson's model may possibly be a good predictor of the going rate in a competitive market of homogeneous plaintiffs lawyers. It does not, however, comport with the Seventh Circuit's guidance requiring the court to hypothetically approximate an *ex ante* fee negotiation. As a threshold matter, Professor Henderson's model relies exclusively on data relating to cases that were resolved after Class Counsel filed this case. That is not a criticism of Professor Henderson's methodology—he had no choice because he was limited to the data available through discovery. The limitation, however, does undermine the applicability of Professor Henderson's model to this case. Class Counsel did not know, at the outset of the litigation, that they needed only to achieve a 1.57 lodestar multiplier to compensate themselves for the contingent risk, and accordingly could not have relied on that multiplier to formulate their hypothetical *ex ante* bid for the legal work in this case. Professor Henderson's model also assumes “a hypothetical competitive market for plaintiffs' lawyers' services,” without ever establishing that such a market exists. (Dkt. No. 294 ¶ 64.) The court's job is to approximate the market as it existed before the litigation, including the degree of competition. In doing so, the court cannot assume a perfectly competitive market without the benefit of reviewing additional evidence that is absent from this record. Indeed, the joint representation model present in this case and many of the comparable TCPA cases suggests that the market among plaintiffs class action lawyers, at least for large TCPA cases, may not be highly competitive. *See also* Joseph Ostoyich and William Lavery, *Looks Like Price-Fixing Among Class Action Plaintiffs Firms*, Law360 (Feb. 12, 2014 11:30 AM), <http://www.law360.com/-articles/542260/looks-like-price-fixing-among-class-action-plaintiffs-firms>.

Ultimately, the court must follow the Seventh Circuit's guidance in approximating the fee that would have been negotiated *ex ante* in this TCPA case had such a negotiation occurred. Unfortunately for Professor Henderson, his model is not among the methods accepted by the Seventh Circuit. Using the benchmarks set forth in *Synthroid I*, as explained above, the court concludes that the tiered fee arrangement displayed above, which approximates the agreed-upon negotiated percentage of the attorneys' fees to be taken from a \$75.5 million settlement had Class Counsel negotiated with capable, sophisticated class members having a real stake in the litigation, is about 20%. Although the court noted earlier that the fairness of a fee percentage is to be considered against the total value of the settlement to the class less administrative and notice costs, the benchmarks

the court used to determine the market rate evaluated fees as a percentage of the total recovery. The court therefore grants Class Counsel \$15,668,265 of fees which is equal to about 20.77%, or about one fifth, of the entire \$75,455,099 settlement fund.

*809 The court further grants Class Counsel's requested incentive awards for the Named Plaintiffs in the amount of \$5,000 each. Incentive payments sufficient to induce Named Plaintiffs to participate in the lawsuit are appropriate in the Seventh Circuit and, given the circumstances in this case, were necessary. *Continental*, 962 F.2d at 571. Moreover, a \$5,000 award is consistent with the awards granted by other courts in this district in similar litigation. See *AT & T Mobility*, 792 F.Supp.2d at 1041 (collecting cases).

The Settlement Agreement states that Defendants' contributions to the settlement fund are non-reversionary, (Settlement Agreement § 2.42), and that the settlement will “continue to be effective and enforceable by the Parties,” in the event that the court declines Class Counsel's fee request or awards less than the amounts sought (*id.* § 5.03). But the Settlement Agreement is silent on the matter of who, precisely, should receive the additional funds available should the court reduce the requested fee award, as it has done

here. For the avoidance of doubt, the court orders that the additional money available as a result of its reduction to Class Counsel's requested fee should go to the class members who made timely claims. After incorporating the court's reduced fee award, the money available to class as result of the settlement is \$54,668,834, which results in a payment to each timely claimant of at least \$39.66, and possibly more if some claimants fail to deposit their settlement checks within 210 days.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for final approval of the class action settlement [260] is granted. The settlement is fair, reasonable, and adequate. Class Counsel's motion for approval of attorneys' fees [175] is granted in part and denied in part. The court awards attorneys' fees and costs in the total amount of \$15,668,265 (about 20.77% of the \$75,455,099 settlement amount) and incentive awards of \$5,000 to each of the five Named Plaintiffs.

All Citations

80 F.Supp.3d 781

Footnotes

- 1 Capitol One includes defendants Capital One Bank (USA), N.A., Capital One, N.A., Capital One Financial Corporation, Capital One Services, LLC, and Capital One Services II, LLC. The Participating Vendors include defendants Capital Management Services, LP (“CMS”), Leading Edge Recovery Solutions, LLC (“Leading Edge”), and AllianceOne Receivables Management, Inc. (“AllianceOne”).
- 2 Plaintiffs never filed a proper motion for preliminary approval, although they filed two memoranda in support of such a motion. (Dkt.Nos.121, 129.) They captioned the memoranda as “motions” in the docket text, but the actual headings of the filings reveal that neither is a motion, merely a memorandum. The court ignored Plaintiffs' oversight in light of the need for a standalone order (Dkt. No. 137) granting preliminary approval.
- 3 The parties estimate that approximately 5% of the settlement class is unknown to Capital One or Plaintiffs. (Dkt. No. 264 ¶ 11.)
- 4 The court calculated this figure using BrownGreer's number of contacted class members, 15,983,613, in conjunction with its assessment that 15,983,613 represents 91.22% of the total class. (See Dkt. No. 305 ¶ 6.)
- 5 The settlement fund is actually \$75,455,098.74. For the sake of simplicity, the court has rounded the numbers to the closest dollar, as it has done with the other figures discussed in this opinion.

- 6 The court originally set the final approval hearing for December 9, 2014, but rescheduled the hearing for January 15, 2015 after granting Collins' request for additional discovery. Class Counsel informed all objectors who had previously stated a desire to appear of the date change and, out an abundance of caution, the court's clerk waited in the courtroom designated for the hearing on December 9 to record the appearance of any objector who mistakenly appeared on that date. No objector came to the designated courtroom on December 9, 2014.
- 7 The court includes invalid and untimely opt-out requests in the total because those requests, although invalid, signal disapproval of the settlement.
- 8 In cases where any unclaimed portion of the settlement reverted to defendants, the court considered the total recovery to be the amount made available to class members before any reversion.
- 9 The court has expended considerable time and effort placing the information submitted by HSBC counsel into usable a dataset for this informal analysis. To assist judges in future cases, and to provide a starting point for more adept statisticians, the court will make its underlying dataset available in a separate order on the docket.
- 10 The Seventh Circuit has repeatedly stated that litigants do not select their own lawyers through auctions because there is no standard of quality of legal services. *Silverman*, 739 F.3d at 958; *In re Synthroid Marketing Litig.*, 325 F.3d 974, 979–80 (7th Cir.2003) (*Synthroid II*). To the extent that the term “auction” implies an iterative process where bidders compete exclusively on price, that is not the process described here. The auctions described in this section reflect cases where judges placed themselves in the “clients’ ” shoes and selected the “best bid” based on the quality of the legal work and the price offered. See *Synthroid I*, 264 F.3d at 720.
- 11 In *In re Auction Houses Antitrust Litigation*, 197 F.R.D. 71 (S.D.N.Y.2000), counsel agreed to the opposite approach, taking no fees for the first \$405 million recovered and 25% of everything above \$405 million. The government had already established liability and the lawyers (as well as the class and the court) believed that the first few hundred million would come easy. See *Synthroid I*, 264 F.3d at 721 (discussing fee structure selected in *Auction Houses*).
- 12 Unlike Judge Smith's analysis, and in recognition that Class Counsel in this case have not included a request for expenses on top of their overall fee request, the court includes expenses awarded to Class Counsel in calculating the fee award.
- 13 In *Synthroid II*, the Seventh Circuit set the third “recovery tier” of the consumer class fee schedule at \$20–\$46 million because it used the total recovery by third-party payers, \$46 million, to benchmark the consumer class scale. Here, the court adopts \$20–\$45 million as the recovery range for the third tier of the estimated fee scale because fee scales negotiated *ex ante*, including those surveyed above, generally reflect uniform recovery ranges—in this case, multiples of five.
- 14 Professor Henderson further determined that after adjusting for the amount of effort Class Counsel invested in each case, about 64% of Class Counsel's total investments were in cases in which they recovered. (*Id.* ¶ 10.) Because the court is concerned with the riskiness of this case relative to other TCPA cases, however, it adopts Professor Henderson's 43% estimate, unadjusted for Class Counsel's investment savvy.
- 15 $(\text{Multiplier } (1.57) \times \text{Lodestar } (\$2,213,769)) \div \text{Recovery } (\$75,455,099) = 4.6\%$. Professor Henderson's model is more complicated than the court's basic description here. For purposes of this opinion, however, and because the court did not apply Professor Henderson's approach, the court's summary will suffice.

265 F.R.D. 128
United States District Court, S.D. New York.

In re MARSH ERISA LITIGATION.

No. 04 Civ. 8157(CM)

I
Jan. 29, 2010.

Synopsis

Background: Participants in stock investment plan for company which, along with its insurance brokerage subsidiary, was subject of civil action by Office of New York State Attorney General (NYAG) alleging they had engaged in fraudulent business practices, filed suit against company, chief executive officer (CEO), board of directors, and investment, administrative and oversight committees alleging breach of fiduciary duty under Employee Retirement Income Security Act (ERISA). Defendants filed motions to dismiss portions of consolidated class action complaint. The District Court, [Shirley Wohl Kram, J.](#), 2006 WL 3706169, granted motions in part and denied them in part. Named plaintiffs moved for final approval of proposed settlement, certification of class for settlement purposes, and final approval of revised plan of allocation.

Holdings: The District Court, [Colleen McMahon, J.](#), held that:

Grinnell factors weighed in favor of approving settlement;

proposed settlement was procedurally fair;

prerequisites for certification of settlement class had been met;

class action was maintainable on ground that claims of each named plaintiff would be dispositive of claims of other class members and that disparate lawsuits by individual participants would raise specter of varying adjudications, and certification as non-opt-out class was appropriate;

requirements for class counsel were met;

transmission of notice to class satisfied both preliminary approval order and applicable law;

proposed plan of allocation was fair, reasonable and equitable, was not unduly complicated or expensive, and would be approved;

participants were entitled to award of attorney fees under *Goldberger* factors; and

reimbursement of litigation expenses, and case contribution awards for each of named plaintiffs.

Motions granted.

Procedural Posture(s): Motion to Dismiss.

***135** DECISION AND ORDER APPROVING THE CLASS ACTION SETTLEMENT; CERTIFYING THE CLASS FOR SETTLEMENT PURPOSES; APPROVING THE PLAN OF ALLOCATION; AWARDING ATTORNEYS' FEES AND EXPENSES; GRANTING CASE CONTRIBUTION AWARDS; AND REJECTING THE OBJECTIONS RECEIVED

[McMAHON](#), District Judge.

INTRODUCTION

Named Plaintiffs Donald Hundley, Conrad Simon and Leticia Hernandez (“Named Plaintiffs”), on behalf of themselves and the Class (as defined herein), move for (1) final approval of a proposed settlement of \$35 million (the “Settlement”) with Marsh & McLennan Companies, Inc. (“MMC”) and the various other individuals and entities named as defendants in this consolidated litigation (collectively, “Defendants”); (2) certification of the Class for Settlement purposes; and (3) final approval of the Revised Plan of Allocation (the “Plan of Allocation”).

The Court preliminarily approved the Settlement in its Preliminary Approval Order of November 10, 2009 (Docket No. 131.) Not one potential Class member objects to the amount of the proposed Settlement or to any of its terms; only two potential Class members have objected to the amount of attorneys' fees requested. For the reasons stated below, the Court approves the Settlement, concluding that it is fair, reasonable and adequate. The Court also certifies the Class for Settlement purposes and approves the Plan of Allocation.

In addition, Plaintiffs' Counsel¹ move for (1) an award of attorneys' fees in the amount of \$11,665,500 (33.33% of the recovery); (2) reimbursement of litigation expenses of \$1,270,915.40; and (3) case contribution awards of \$15,000 for each of the Named Plaintiffs. For the reasons stated below, the Court grants all three requests.

*136 BACKGROUND

I. Summary of Plaintiffs' Claims

This litigation arises out of the underlying allegation that MMC engaged in a systematic plan to increase insurance placement revenues through improper bid manipulation and illicit client steering, all designed to generate a critical source of income known as “contingent commissions.” Plaintiffs allege that Defendants violated their fiduciary and co-fiduciary duties under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (“ERISA”), by, inter alia: (1) failing to prudently and loyally manage the Marsh & McLennan Companies 401(k) Savings & Investment Plan (formerly the Marsh & McLennan Companies Stock Investment Plan or “SIP,” herein referred to as the “Plan”) and the Plan's assets; (2) failing to properly monitor the performance of their fiduciary appointees; and (3) failing to provide participants with complete and accurate information regarding the MMC Stock Fund. Plaintiffs claim that Defendants knew or should have known that the Plan's investment in MMC stock was not a prudent retirement investment during the Class Period, and that Defendants acted imprudently by continuing to hold MMC stock in the Plan.

II. Procedural History

In 2004, numerous complaints were filed against MMC and the Plan's other fiduciaries. On February 9, 2005, Judge Kram consolidated those complaints into this action, styled *In re Marsh ERISA Litigation* (the “ERISA Action”). (Docket No. 17.) Plaintiffs filed their Consolidated Class Action Complaint (the “Complaint”) on June 21, 2005. (Docket No. 32.)

A. Coordination with the Securities Action

Judge Kram coordinated the schedules of this ERISA Action and *In re Marsh & McLennan Companies, Inc. Securities Litigation*, No. 04 Civ. 8144 (the “Securities Action”). Although the plaintiffs' interests in the two actions overlapped, they were far from identical. Extensive

negotiation was required to reach an agreement all of plaintiffs' counsel could live with—and Judge Kram would accept. (Lead Counsel's Corrected Mem. in Supp. of Mot. for Award of Attorneys' Fees, Expenses and Case Contribution Awards, Dec. 30, 2009 (“Fees Mem.”), at 3.) Ultimately, under the scheduling order adopted on April 18, 2007 (Docket No. 91), the ERISA and Securities Actions were to be litigated simultaneously, with the same motion deadlines and discovery timeline. Only the trial dates were different—the Securities Action would be tried first, with the ERISA Action (a bench trial) to follow a month later.

B. The Motions to Dismiss

Defendants vigorously contested Plaintiffs' allegations from the outset and, in September 2005, moved to dismiss the Complaint. The motions were fully briefed by January 2006. Eleven months later, Judge Kram ruled on the motions, denying them in most respects. (Docket No. 76.) Because the motions were under submission for such a long period of time, and because of the rapidly evolving law concerning ERISA fiduciary duty issues in the context of company stock in 401(k) plans, Plaintiffs supplemented their papers on six occasions. (Decl. of Lynn L. Sarko in Supp. of Mot. for Final Approval of Class Action Settlement, Settlement Class Cert. and Plan of Allocation and Mot. for Award of Attorneys' Fees, Expenses and Case Contribution Awards, Dec. 29, 2009 (“Sarko Decl.”), ¶¶ 12–23.)

C. Class Certification

Following class document discovery, the three class representatives were deposed in Florida and Virginia in May and June 2008. Plaintiffs filed their motion for class certification on August 4, 2008, and briefing was complete in November 2008. Thereafter, both sides submitted several supplemental letter briefs, again reflecting the rapidly developing law in ERISA company stock litigation. (*See id.* ¶¶ 54–58.) The class certification motion was still pending at the time the proposed Settlement was reached.

D. Merits Discovery

Lead Counsel engaged in thirty-one months of merits discovery, which included *137 reviewing many millions of pages of documents and participating in about 100 depositions. (Fees Mem. at 4–6.) There were numerous discovery disputes, many of which involved motion practice. Judge Kram appointed a Special Master, L. Peter Parcher, to hear and rule on disputed discovery issues.

Lead Counsel describe the document discovery in this case as “all but overwhelming.” (*Id.* at 4.) More than thirty million pages of documents were assimilated; the documents included not only ERISA-specific documents produced in this case, but all of the documents produced by MMC in the Securities Action. (*See* Sarko Decl. ¶¶ 29–42 (detailing massive document review effort).)

The depositions in this litigation were “extensive, exhaustive, and expensive.” (Fees Mem. at 5.) All told, Lead Counsel led or participated in about 100 depositions: the three Named Plaintiffs; twenty of the thirty-three individual defendants; eight depositions of non-defendant Plan personnel or employees of Plan service providers; and another sixty to seventy depositions of witnesses where the Securities plaintiffs took the lead and ERISA Plaintiffs’ Counsel questioned the witness at the end. (Sarko Decl. ¶¶ 43–48.) Lead Counsel, an experienced ERISA plaintiffs’ firm, believes that, with “the possible exception of *Enron*, ... it did more oral discovery in this case than in any other company stock case.” (Fees Mem. at 6.)

Merits discovery concluded on September 25, 2009; however, expert discovery was still ongoing (and substantially completed) when the Settlement was reached. Plaintiffs’ Counsel retained six ERISA experts, one expert on contingent commissions, and another on the factors that led to the drop in MMC’s stock price. When the case settled, all expert reports and rebuttal reports had been submitted, and expert depositions had begun. (Sarko Decl. ¶¶ 49–52.)

E. Settlement Negotiations and the Resulting Agreement

This Settlement is the product of hard-fought, arm’s-length negotiations assisted by the experienced mediator and retired Judge of the Superior Court of California, Judge Daniel H. Weinstein. The parties attended one in-person mediation session and countless phone meetings with Judge Weinstein. In addition, Lead Counsel negotiated directly with MMC’s General Counsel. Ultimately, the parties accepted Judge Weinstein’s proposal, and in the days following engaged in extensive negotiations over the specific terms of the agreement. On November 9, 2009, the parties executed the Settlement Agreement. (*Id.* ¶¶ 60–64.)

This is a global Settlement—it releases all claims against Defendants and brings this litigation to a close. The amount of the Settlement is \$35 million. The \$35 million, minus

attorneys’ fees and expenses and certain other expenses described in paragraph 3.3 of the Settlement Agreement, will be directed to the accounts of Class members pursuant to the proposed Plan of Allocation.

F. Preliminary Approval and Notice to the Class

In its November 10, 2009 Preliminary Approval Order, the Court preliminarily approved the Settlement Agreement, approved the form of Notice and scheduled the Fairness Hearing for January 29, 2010. Pursuant to that Order, Lead Counsel, through the Settlement Administrator, provided notice of the Settlement to Class members by (1) mailing the Court-approved Notice to the last known address of each Class member who could be identified with reasonable effort; (2) publishing the Publication Notice in the *The New York Times* and on *Business Wire*; and (3) creating and administering a website to provide current information to Class members. (*See* Sarko Decl. Ex. C (Aff. of Eric Schachter, Dec. 22, 2009 (“Schachter Aff.”) (describing dissemination and publication of notice)).) Because the Class does not allow for opting out, all Class members will be eligible to receive a distribution from the Settlement regardless of their actual notice.

G. Objections Received

More than 30,000 Class Notices were mailed. (*Id.* ¶ 8.) No Class members object to the Settlement itself. Only two object to the requested fee award.

***138 DISCUSSION**

I. The Settlement Is Fair, Reasonable and Adequate

There is a “strong judicial policy in favor of settlements, particularly in the class action context.” *In re PaineWebber Ltd. P’ships Litig.*, 147 F.3d 132, 138 (2d Cir.1998). “Settlement approval is within the Court’s discretion, which should be exercised in light of the general judicial policy favoring settlement.” *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y.1999) (internal quotations omitted). In a class action settlement, there is a presumption of fairness, reasonableness and adequacy when the settlement is the product of “arms-length negotiations between experienced, capable counsel after meaningful discovery.” *Id.* at 280 (citing *Manual for Complex Litigation* (Third) § 30.42 (1995)).

A. Standards for Approval of a Class Action Settlement

In evaluating a proposed settlement under [Federal Rule of Civil Procedure 23](#), the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir.1995); see *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2004 WL 2591402, at *10 (S.D.N.Y. Nov. 12, 2004). It is well-established that courts in this Circuit examine the fairness, adequacy and reasonableness of a class action settlement according to the “Grinnell factors”:

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class action through the trial;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement fund in light of the best possible recovery;
- and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir.1974) (citations omitted). “In finding that a settlement is fair, not every factor must weigh in favor of settlement, ‘rather the court should consider the totality of these factors in light of the particular circumstances.’ ” *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y.2004) (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y.2003)). In deciding whether to approve a settlement, a court “should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another.” *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611, 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

B. Application of the Grinnell Factors Supports Approval of the Settlement

1. The Complexity, Expense and Likely Duration of the Litigation

Many courts have recognized the complexity of ERISA breach of fiduciary duty company stock claims. In *In re WorldCom, Inc. ERISA Litigation*, No. 02 Civ. 4816, 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004), Judge Cote noted that there is a “general risk inherent in litigating complex claims such as these to their conclusion.”

This case, even more than many other ERISA class action cases, was enormous in scope and extremely complicated. Plaintiffs’ breach of fiduciary duty claims revolve around the allegedly fraudulent business practices at one of the world’s largest insurance brokers. It is not surprising that the case involves scores of witnesses, more than thirty million pages of documents and extensive expert discovery.

This Settlement cuts short the costly and time-consuming expert discovery that remains, and eliminates the time and expense of the substantial additional briefing that undoubtedly would occur going forward. Moreover, even if the Class were to win a judgment at trial, the additional delay of trial, post-trial motions and appeals could deny the Class any actual recovery for years, further *139 reducing its value. See *Strougo v. Bassini*, 258 F.Supp.2d 254, 261 (S.D.N.Y.2003).

Thus, the first *Grinnell* factor weighs in favor of approving the Settlement.

2. The Reaction of the Class to the Settlement

The Class’s reaction to the Settlement also supports approval. Lead Counsel have kept the three Named Plaintiffs informed of the settlement negotiations with Defendants throughout the negotiating process, and all three Named Plaintiffs now fully support the Settlement. (Mem. in Supp. of Named Pls.’ Mot. for Final Approval of Class Action Settlement, Settlement Class Cert. and Plan of Allocation, Dec. 29, 2009 (“Settlement Mem.”), at 7.)

The Independent Fiduciary appointed to review the Settlement, Ms. Nell Hennessey of Fiduciary Counselors,

also supports the Settlement. (Sarko Decl. Ex. B) (Report of the Independent Fiduciary for the Settlement of *In re Marsh ERISA Litigation*, Dec. 10, 2009 (“Independent Fiduciary Rpt.”).) The Independent Fiduciary’s approval is critically important. Under well-established ERISA law, an ERISA plan that gives a litigation release to a “party of interest,” such as the company itself or its employees, engages in a prohibited transaction under ERISA § 406, 29 U.S.C. § 1106. In 2003, the Department of Labor (“DOL”) promulgated a Prohibited Transaction Exemption permitting such releases, but only if an independent fiduciary approves the terms of the settlement that include the release. See Prohibited Transaction Exemption 2003–39, 68 Fed.Reg. 75632–01 (Dec. 31, 2003). In other words, the independent fiduciary must determine that the plan received fair value for the release. Ms. Hennessey has done so in this case.

Pursuant to the Court-approved notice plan, the Notice was mailed to more than 30,000 potential Class members, and the Publication Notice was published in *The New York Times* and distributed via *Business Wire*. As set forth in the Preliminary Approval Order, the deadline for filing and serving objections was January 15, 2010. There has not been a single objection to the amount of the Settlement, to any of its terms, or to the adequacy of the Notice or Publication Notice.² The lack of any objections from Class members is an extremely strong indication that the Settlement is fair.

3. The Stage of the Proceedings and the Amount of Discovery Completed

At the time of the Settlement, Plaintiffs’ Counsel had reviewed millions of pages of documents, participated in 100 depositions, exchanged expert reports and rebuttal reports, and fully briefed the issue of class certification. The advanced stage of the litigation and extensive amount of discovery completed weigh heavily in favor of approval. The parties’ counsel were clearly in a position to realistically evaluate the strengths and weaknesses of the claims, and to evaluate the fairness of the proposed Settlement. See *In re Lloyd’s Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *15 (S.D.N.Y. Nov. 26, 2002); see also *In re Sumitomo*, 189 F.R.D. at 281–82 (finding that the stage of the proceedings “strongly” favored approval of settlement reached after “[p]laintiffs had conducted extensive discovery, investigation and analyses, and the proceedings were in the advanced stage of pointing or preparing for trial”). This is not a case where

the parties engaged only in “settlement discovery.” Thus, the third *Grinnell* factor strongly supports approval.

4. The Risks of Establishing Liability

In assessing the Settlement, the Court balances the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. See *Grinnell*, 495 F.2d at 463. Here, the Class would have faced many hurdles *140 going forward—for example, achieving and maintaining class certification, avoiding summary judgment, proving liability and damages at trial and then preserving any favorable judgment on appeal.

Contributing to Plaintiffs’ risk is the fact that ERISA company stock cases involving 401(k) plans are quite new—the pioneering cases in this field were not filed until the late 1990s. The results in these cases have been decidedly mixed. Some complaints have been dismissed on motion, while others have not. And relatively few such cases have made it to the summary judgment stage, let alone trial. In those cases that have gone to trial or reached an appellate court, the results for plaintiffs have not, on balance, been favorable. Defendants surely would have raised a host of defenses as this action progressed, any one of which might have ended or significantly limited Plaintiffs’ case.

In short, there exists a substantial risk that Plaintiffs ultimately might have failed to establish Defendants’ liability, and that the Class would have received nothing at all. Accordingly, the Court finds that the fourth *Grinnell* factor weighs in favor of approving the Settlement.

5. The Risks of Establishing Damages

Establishing damages in this case would have been a complicated endeavor. The complex damages calculations in ERISA cases like this one are expert-intensive. The calculations require a computer model that tracks the plan’s holdings of company stock, and is then compared with the performance of alternative investments on specified breach dates, subject to various additional factors and assumptions. Here, the parties have exchanged expert damages reports that reach widely divergent conclusions. (Settlement Mem. at 10.)

Moreover, the damages issue is uncertain because courts have not had occasion to apply a damages measure in a case like

this after a trial. That uncertainty, coupled with Defendants' vigorous dispute of the damages issue, make establishing damages a risky proposition for Plaintiffs.

The presentation of expert testimony on complex damages issues inevitably creates significant risks that Plaintiffs avoid with this Settlement. See *In re Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 54 (S.D.N.Y.1993) (approving settlement amounting to small percentage of total damages sought because magnitude of damages often becomes “battle of experts ... with no guarantee of the outcome”). Thus, the fifth *Grinnell* factor weighs in favor of approving the Settlement.

6. The Risk of Maintaining the Class Action Through Trial

There is also the risk that the Court would have denied Named Plaintiffs' motion for class certification on certain or all of their claims, thereby limiting or even precluding any possible recovery for the Class. The class certification motion was pending before the Court at the time of the Settlement. Thus, the uncertainty surrounding class certification supports approval of the Settlement. See *In re AOL Time Warner, Inc.*, No. 02 Civ. 5575, 2006 WL 903236, at *12 (S.D.N.Y. Apr. 6, 2006) (finding that risk of plaintiffs not succeeding in certifying class supported approval of settlement); *In re Global Crossing*, 225 F.R.D. at 460 (same).

7. The Ability of Defendants to Withstand a Greater Judgment

It is undeniable that the current economic climate is not strong. MMC's financial condition undoubtedly has been adversely affected by the economic turmoil of the past year. Moreover, the value of MMC stock has not recovered since the alleged wrongdoing giving rise to this litigation. Accordingly, there is at least some risk that MMC would not have been able to pay an award higher than the Settlement. The Court agrees with Lead Counsel, however, that any such risk is remote. (See Settlement Mem. at 12 (“Accordingly, this factor was not a focus of the settlement negotiations.”).) Thus, the seventh *Grinnell* factor is neutral or, if anything, weighs slightly in favor of approval.

8. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The determination of a “reasonable” settlement “is not susceptible of a *141 mathematical equation yielding a particularized sum.” *In re Milken*, 150 F.R.D. at 66; *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F.Supp. 1099, 1103 (S.D.N.Y.1989). Rather, “in any case there is a range of reasonableness with respect to a settlement.” *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.1972). “The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” *Grinnell*, 495 F.2d at 455 & n. 2 (“In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.”)

This Settlement is well within the range of reasonableness. Several factors dictated a relatively wide range of potentially recoverable damages in this case. For example, one significant factor would have been the Court's determination of the “breach” date—that is, the date on which Defendants knew or should have known that MMC stock was an imprudent investment for participants' retirement assets. Plaintiffs allege that MMC common stock was an imprudent investment for the Plan from the beginning of the Class Period, and that losses to the Plan therefore should be calculated from July 1, 2000 to January 31, 2005. Defendants almost certainly would have attempted to establish a breach date far later in the Class Period.

In addition, the amount of any recovery would have depended on various other circumstances and determinations, such as the possibility that MMC's stock price would increase, causing the Plan's losses to decrease accordingly; the Court's decision as to which measure to use when calculating damages; and the Court's determination as to whether “holder” losses are available.

In sum, the \$35 million Settlement falls squarely within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. The final two *Grinnell* factors therefore weigh in favor of approving the Settlement.

C. The Proposed Settlement Is Procedurally Fair

“In addition to ensuring the substantive fairness of the settlement through full consideration of the *Grinnell* factors, the Court must also ‘ensure that the settlement is not the product of collusion.’ ” *In re Global Crossing*, 225 F.R.D. at 461 (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y.1998)). However, “As long as the integrity of the negotiating process is ensured by the Court, it is assumed that the forces of self-interest and vigorous advocacy will of their own accord produce the best possible result for all sides.” *Banyai v. Mazur*, No. 00 Civ. 9806, 2007 WL 927583, at *12 (S.D.N.Y. Mar.27, 2007) (approving settlement reached after months of good-faith, arm's-length negotiations) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 132 (S.D.N.Y.1997)).

Where, as here, “the settlement is the result of arm's length negotiations conducted by experienced counsel after adequate discovery and the settlement provokes only minimal objections, then it is entitled to ‘[a] strong initial presumption of fairness.’ ” *In re Global Crossing*, 225 F.R.D. at 461 (citation omitted). As set forth in the Sarko Declaration, this Settlement is the product of a rigorous and adversarial process.

Moreover, the negotiations were conducted with the assistance of Judge Weinstein, a highly regarded mediator with extensive experience in complex ERISA breach of fiduciary duty class actions. Judge Weinstein has submitted a declaration in strong support of the Settlement. (See Decl. of Hon. Daniel H. Weinstein in Supp. of Mot. for Final Approval of Class Action Settlement, Jan. 20, 2010, ¶¶ 17–18 (“[B]ased on my knowledge of this action, all of the materials provided to me, the efforts of counsel, the intensity of the negotiations, the litigation risks, and the benefits reached in the proposed settlement, I believe that this is a fair, reasonable and adequate settlement ..., and I respectfully recommend that it be approved by the District Court.”).) In light of the foregoing, the Court has no reason to doubt that the Settlement is procedurally fair.

*142 II. Certification of a Settlement Class Is Appropriate Under Rule 23

The Preliminary Approval Order preliminarily certified the following Class:

(a) all current and former participants and beneficiaries of the Plan whose individual Plan account(s) included investments in MMC stock at any time during the Class Period and
(b) as to each Person within the scope of subsection (a) of this, his, her or its beneficiaries, alternate payees (including spouses of deceased Persons who were participants of the Plan), Representatives and Successors-In-Interest, provided, however, that the Class shall not include any Defendant or any of their Immediate Family, beneficiaries, alternate payees (including spouses of deceased Persons who were Plan participants), Representatives or Successors-In-Interest, except for spouses and immediate family members who themselves are or were participants in the Plan, who shall be considered members of the Class with respect to their own Plan accounts.

(Prelim. Approval Order at 3.) The Court also appointed the three Named Plaintiffs as Class Representatives and Keller Rohrback L.L.P. as Lead Counsel for the Class. (*Id.* at 4.)

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. See *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir.1982). Classes certified for settlement purposes, like all other classes, must meet the requirements of Rule 23(a) and at least one of three requirements set forth in Rule 23(b). See *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205–10 (S.D.N.Y.1995).

Here, Plaintiffs' ERISA breach of fiduciary duty claims are particularly appropriate for class certification. See, e.g., *In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816, 2004 WL 2211664, at *3 (S.D.N.Y. Oct. 4, 2004) (certifying for class treatment similar ERISA claims). Indeed, the Advisory Committee Notes to the 1966 Amendment of Rule 23(b)(1)(B) specifically state that certification is especially appropriate in cases charging breach of trust by a fiduciary

to a large class of beneficiaries. Moreover, Congress has embraced the principle that ERISA “actions for breach of fiduciary duty [should] be brought in a representative capacity on behalf of the plan as a whole.” See *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n. 9, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). Moreover, in the class certification briefing in this case, Defendants did not object to certification of Plaintiffs’ prudence claims. (See Defs.’ Opp. to Mot. for Class Cert., Sept. 18, 2008, at 1.)

A. The Requirements of Rule 23(a) Are Satisfied

Certification under Rule 23(a) is proper if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and (4) the class representatives will fairly and adequately protect the interests of the class.

1. The Settlement Class Is Sufficiently Numerous

Numerosity is generally presumed when a class consists of forty or more members. See *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995). The proposed Class numbers in the thousands, easily meeting the numerosity requirement.

2. There Are Questions of Law or Fact Common to the Class

Rule 23(a)(2) requires a showing that common issues of fact or law affect all Class members. Commonality does not demand that every question of law or fact be common to every class member, but instead merely requires that the claims arise from a common nucleus of operative facts. See *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir.1997) (“The commonality requirement is met if plaintiffs’ grievances share a common question of law or of fact.”).

By their very nature, ERISA actions often present common questions of law and fact, and are therefore frequently certified as *143 class actions. “In general, the question of defendants’ liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries.” *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y.2002).

There are several common questions in this case with respect to each Class member, including (1) whether Defendants were fiduciaries of the Plan; (2) whether Defendants breached their fiduciary duties; (3) whether the Plan and its participants and beneficiaries were injured by Defendants’ breaches; and (4) whether the Class is entitled to damages and, if so, the proper measure of damages. These common questions satisfy Plaintiffs’ burden under Rule 23(a) (2).

3. Named Plaintiffs’ Claims Are Typical of Those of the Class

Rule 23(a)(3) requires that the class representatives’ claims are “typical” of those of the class. The typicality requirement does not require that all of the putative class members’ claims are identical. *E.E.O.C. v. Local 638*, No. 71 Civ. 2877, 2004 WL 2414013, at *5 (S.D.N.Y. Oct. 28, 2004). Rather, “the focus of the typicality inquiry concerns whether ‘each class member’s claim arises from the same course of events, and [whether] each class member makes similar legal arguments to prove the defendant’s liability.’ ” *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 122 (S.D.N.Y.2001) (citation omitted). The typicality requirement is often met in putative class actions brought for breaches of fiduciary duty under ERISA. See e.g., *Koch v. Dwyer*, No. 98 Civ. 5519, 2001 WL 289972, at *3 (S.D.N.Y. Mar.23, 2001).

In this case, Named Plaintiffs’ claims—for Defendants’ alleged breach of their duties to the Plan and to all Plan participants whose accounts held MMC stock—are typical of the Class’s claims, as all of the claims are effectively the same unitary claim asserted on behalf of the same Plan. In short, Named Plaintiffs and the absent Class members seek the same relief for the same wrongs by the same Defendants. Accordingly, Rule 23(a)(3)’s typicality requirement is met.

4. Named Plaintiffs Will Fairly and Adequately Protect the Interests of the Class

Rule 23(a)(4) is satisfied if “the representative parties will fairly and adequately protect the interests of the class.” Courts consider two factors in measuring adequacy of representation: (1) whether the claims of the lead plaintiffs conflict with those of the class; and (2) whether the lead plaintiffs’ counsel is qualified, experienced and generally able to conduct the litigation. See *In re Drexel Burnham Lambert Group, Inc.*,

960 F.2d 285, 291 (2d Cir.1992); *In re Oxford Health Plans*, 191 F.R.D. 369, 376 (S.D.N.Y.2000). As many courts have observed, “the issues of typicality and adequacy tend to merge because they ‘serve as guideposts for determining whether ... the named plaintiff’s claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence.’ ” *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 85 (S.D.N.Y.2007) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

First, Named Plaintiffs’ claims and interests are aligned with those of the Class, as they are all seeking to prove Defendants’ liability based on common facts and claims. Moreover, where, as here, Named Plaintiffs and absent Class members share the common goal of maximizing recovery, there is no conflict of interest between them. See *In re Drexel Burnham Lambert*, 960 F.2d at 291.

Second, Named Plaintiffs’ counsel are highly qualified and experienced in this type of litigation, and undoubtedly capable of prosecuting this action to adequately protect the interests of the Class. (See Sarko Decl. ¶¶ 112, 143–50.) Accordingly, Named Plaintiffs and Lead Counsel meet the requirements of Rule 23(a)(4).

B. The Requirements of Rule 23(b)(1) Are Satisfied

To satisfy Rule 23(b)(1), Named Plaintiffs must show that the prosecution of separate *144 actions would create either (A) the risk of “inconsistent or varying adjudications with respect to individual class members,” Fed.R.Civ.P. 23(b)(1)(A), or (B) the risk of “adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests,” Fed.R.Civ.P. 23(b)(1)(B).

In this case, any one participant’s claim would, as a practical matter, be dispositive of the interests of fellow Plan members because § 502(a)(2) claims must be brought in a representative capacity on behalf of the entire plan, and the relief granted by the Court to remedy a breach of fiduciary duty would “inure[] to the benefit of the plan as a whole,” not to the individual plaintiff. See *Russell*, 473 U.S. at 140, 105 S.Ct. 3085. Here, the three Named Plaintiffs were participants in the Plan during the Class Period. Consequently, the claims of each Named Plaintiff would be dispositive of the claims of the other Class members. Additionally, where, as here, “the allegations in the Complaint implicate misconduct in the

management in the Plan [s] as a whole, disparate lawsuits by individual participants would raise the specter of ‘varying adjudications.’ ” *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 78 (S.D.N.Y.2006).

Courts considering whether to certify ERISA breach of fiduciary duty claims have consistently followed the reasoning of the drafters of the Federal Rules of Civil Procedure in concluding that subsection 23(b)(1)(B) is the most appropriate basis for class certification. See Fed.R.Civ.P. 23(b)(1)(B) adv. comm. note, 1966 amend. (stating that certification under 23(b)(1)(B) is appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries); see, e.g., *AOL Time Warner ERISA Litigation*, No. 02 Civ. 8853, 2006 WL 2789862, at *3 (S.D.N.Y. Sept. 27, 2006); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y.2004). Certification of the Class as a non-opt-out class under Rule 23(b)(1)(B) is therefore appropriate.

C. The Requirements of Rule 23(g) Are Met

Finally, the requirements of Rule 23(g) are met because Lead Counsel will provide adequate representation to the Class. Lead Counsel include some of the preeminent ERISA class action attorneys in the country, with many years of experience in ERISA law and in litigating complex actions. There is no question that Lead Counsel have effectively prosecuted this action. They prepared a detailed and thorough Complaint, responded to multiple motions to dismiss, moved for class certification, conducted extensive discovery, consulted with numerous experts and exchanged expert reports with Defendants, and engaged in hard-fought and ultimately successful settlement negotiations with Defendants. Lead Counsel’s efforts in prosecuting this case, together with their background and experience in ERISA class action litigation, satisfy the requirements of Rule 23(g).

III. Transmission of the Notice to the Class Satisfied Both the Preliminary Approval Order and Applicable Law

In accordance with the Preliminary Approval Order, the Class has been provided with ample and sufficient notice of this Settlement, and has been afforded an appropriate opportunity to voice objections. The notice plan fully informed Class members of the lawsuit and proposed Settlement, and enabled them to make informed decisions about their rights.

To satisfy due process, notice to class members must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y.1996) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)), *aff’d*, 107 F.3d 3 (2d Cir.1996). To satisfy Rule 23, “For non-opt out cases, such as the ERISA Actions, [all that is required is] such unspecified ‘appropriate notice’ as ‘the court may direct.’ ” *145 *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448 (S.D.N.Y.2004) (quoting Fed.R.Civ.P. 23(c)(2)(A)).

Here, the forms and methods of notice of the proposed Settlement satisfy due process considerations and meet the requirements of Rule 23. The notice plan, as approved by the Court and implemented by Lead Counsel, consisted of (1) mailing the Class Notice on December 8, 2009 to more than 30,000 potential Class members at their last known addresses; (2) publishing the Publication Notice in *The New York Times* and distributing it via *Business Wire*; (3) creating and administering a website to provide information to Class members; and (4) providing a toll-free telephone number that participants can call (and have called) to obtain information about the Settlement. (See Sarko Decl. ¶ 74; Schachter Aff.)

The Notice mailed to potential Class members provided important information regarding the proposed Settlement, including (1) a comprehensive summary of its terms; (2) notice of Lead Counsel's intent to request attorneys' fees, reimbursement of expenses and case contribution awards; and (3) detailed information about the Released Claims. In addition, the Class Notice provided information about the Fairness Hearing (including its date and time), Class members' rights to object (and deadlines and procedures for objecting), and the procedure to follow to receive additional information. Further, the Notice gave Class members contact information for Lead Counsel, the toll-free phone number and an email address for inquiries, and a website for further information. The Publication Notice summarized the above information for purposes of publication.

The notice forms and methods employed here are substantially similar to those successfully used in many previous ERISA class settlements. They “fairly, accurately, and neutrally describe the claims and parties in the litigation as well as the terms of the proposed settlement and the identity of persons entitled to participate in it.” *Foe v. Cuomo*,

700 F.Supp. 107, 113 (E.D.N.Y.1988), *aff’d*, 892 F.2d 196 (2d Cir.1989). Accordingly, the notice provided to the Class satisfies due process and Rule 23.

IV. The Plan of Allocation Is Reasonable, Fair and Equitable

A district court has broad supervisory powers with respect to allocating a class action settlement and wide latitude in determining what to consider in approving a settlement allocation. *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 179, 181 (2d Cir.1987). “When formulated by competent and experienced class counsel, an allocation plan need have only a ‘reasonable, rational basis.’ ” *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y.2004) (quoting *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F.Supp.2d 418, 429–30 (S.D.N.Y.2001)). In determining whether a plan of allocation is fair, courts give substantial weight to the opinions of experienced counsel. See *In re PaineWebber Ltd. P’ships. Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y.1997).

Here, the Plan of Allocation was designed by experienced Lead Counsel who have prepared similar plans for numerous other cases. It provides recovery to Class members, net of administrative expenses and attorneys' fees and expenses, on a pro rata basis.

The Plan of Allocation was described in the Notice approved by the Court and mailed to Class members. As stated in the Notice, the Net Settlement Fund will be allocated to Class members on a pro rata basis such that the amount received by each Class member will depend on his or her calculated loss—relative to the losses of other Class members—related to the Plan's investments in MMC stock.

Payments will be made by crediting the accounts of active Plan participants with the appropriate amount, and by creating or recreating an account for Class members who are no longer active participants and then crediting their accounts in the same manner. This is substantially the same methodology used in other company stock ERISA cases in which the private litigants were joined by the DOL as plaintiffs. In those cases, the methodology was employed without objection from the DOL or any independent fiduciary, and *146 was approved by the court. See, e.g., *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, No. 02 Civ. 5575, 2006 WL 903236, at *17 (S.D.N.Y. Apr. 6, 2006). Here, Lead Counsel has not received a single objection to the proposed Plan of Allocation.

The proposed Plan of Allocation also provides for the appointment of a Settlement Administrator, who will perform the allocation calculation described in the Plan of Allocation, “shall be responsible for administering the Settlement pursuant to the requirements of ERISA and any other applicable law or regulation, and shall be a fiduciary under ERISA with respect to such action.” (Plan of Allocation ¶ 8.) Lead Counsel have selected A.B. Data, Ltd., an experienced settlement administrator in complex class action litigation like this, to serve as Settlement Administrator.

For the reasons set forth above, the Court concludes that the proposed Plan of Allocation is fair, reasonable and equitable, and that it is not unduly complicated or expensive. Accordingly, the Court approves the Plan of Allocation.

V. Attorneys' Fees

Lead Counsel move for (1) an award of attorneys' fees in the amount of \$11,665,500 (33.33% of the recovery); (2) reimbursement of litigation expenses of \$1,270,915.40; and (3) case contribution awards of \$15,000 for each of the Named Plaintiffs. For the reasons set forth below, the Court grants all three requests.

A. Lead Counsel Are Entitled to an Award of Attorneys' Fees from the Settlement Fund

When attorneys create a settlement fund for the common benefit of members of a class, “the attorneys whose efforts created the fund are entitled to a reasonable fee—set by the court—to be taken from the fund.” *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir.2000) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980)). “The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefiting from a lawsuit without contributing to its cost.” *Id.* Common fund fee awards are therefore a common feature of class litigation. Here, Plaintiffs' Counsel successfully created a common fund of \$35 million plus interest, and accordingly are entitled to a reasonable share of that fund as compensation for their work. See *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 584–85 (S.D.N.Y.2008).

The Second Circuit approves two ways of determining a reasonable attorney's fee in common fund cases: the “percentage” method and the “lodestar” method. Under the percentage method, the fee is calculated simply as a percentage of the recovery. Under the “lodestar” method, the court determines the lodestar—that is, the number of

hours reasonably expended on the case multiplied by the appropriate hourly rates—based on submissions from counsel regarding the work they performed. This lodestar is then adjusted, usually upward (by a “multiplier”), to arrive at the appropriate fee award for the case. See *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir.2005); *Goldberger*, 209 F.3d at 50.

A district court has discretion to use either method, although the trend in this Circuit is toward the percentage method. See *Wal-Mart*, 396 F.3d at 121. Regardless of which method is used, several factors identified by the Second Circuit in *Goldberger* (the “Goldberger factors”), discussed below, ultimately determine what is a reasonable fee. *Masters v. Wilhelmina Model Agency*, 473 F.3d 423, 436 (2d Cir.2007).

As detailed in the Sarko Declaration, Plaintiffs' Counsel have invested about 45,000 hours in this case. The rates range from \$125 for certain administrative personnel to \$775 for the most senior lawyers; the blended rate for the case as a whole is less than \$300. The lodestar (as of December 29, 2009) is \$13,311,054.80. (Sarko Decl. ¶¶ 124–28.) The Court is satisfied that the lodestar is reasonable. The fee requested (\$11,665,500) is significantly less than the lodestar, which strongly suggests that the requested fee is reasonable.

When expressed as a percentage of the recovery—33.33%—the requested fee is reasonable *147 under the circumstances of this case, consistent with the *Goldberger* factors.

B. The Fee Application Is Reasonable Under the Goldberger Factors

The *Goldberger* factors are:

- (1) “the time and labor expended by counsel”;
- (2) “the magnitude and complexities of the litigation”;
- (3) “the risk of the litigation”;
- (4) “the quality of the representation”;
- (5) “the requested fee in relation to the settlement”; and
- (6) “public policy considerations.”

209 F.3d at 50 (internal quotations omitted); see also *In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816, 2005 WL 3116188, at *7 (S.D.N.Y. Nov. 22, 2005).

In approving the ERISA and securities settlements in *In re Global Crossing Securities & ERISA Litigation*, Judge Lynch observed that “the Second Circuit [in *Goldberger*] has identified the risk of success as perhaps the foremost factor to be considered in determining a reasonable award of attorneys’ fees.” 225 F.R.D. 436, 467 (S.D.N.Y.2004) (internal quotations omitted). Because that factor is particularly important in this case, the Court addresses it first, and then turns to the other *Goldberger* factors.

1. The Risks of the Litigation Support the Requested Fee

Risk is not uniform in all class actions. For example, in *Goldberger* itself the panel noted that some securities fraud class actions are, in truth, really not that risky. See 209 F.3d at 52. Particularly when there has been a large accounting restatement, government enforcement action or criminal prosecution, it can be argued that plaintiffs have a strong likelihood of securing a substantial settlement. The same argument can be made with respect to certain antitrust class actions filed in the wake of a Department of Justice consent decree, or products-liability cases filed shortly after a government-ordered recall. These cases all have risk, the argument goes, but the risk is limited.

That argument does not apply to ERISA class actions like this one. There is, for example, a sharp contrast between ERISA and securities fraud class actions. On the securities side, the securities laws have been around for more than seventy-five years; securities fraud class actions have been litigated since at least the early 1940s, see, e.g., *Deckert v. Indep. Shares Corp.*, 39 F.Supp. 592 (E.D.Pa.1941); there is a large body of appellate case law on the issues that arise over and over in securities fraud class actions; and, over the years, tens of billions of dollars have been paid in securities fraud settlements and judgments, yielding meaningful comparison cases to guide settlement discussions and enable parties to assess litigation risk.

Company stock fiduciary litigation provides a stark contrast. ERISA is a relatively new statute (1974), and the laws creating 401(k) plans are even newer (1981). Company stock actions involving 401(k) plans are newer still. The first cases in this field were not filed until the late 1990s, only several years before this case was filed. ERISA case law remains thin in comparison to securities and antitrust jurisprudence. There have been some substantial settlements, but nothing to rival those in the securities field. In short, ERISA litigation has

nothing like the mature body of law and practice present in the securities and antitrust fields.

Further, ERISA law is still developing. One reason is the newness of the statute, but it is also true that ERISA was designed primarily to regulate traditional defined benefit plans, as opposed to 401(k) plans, which did not even exist when ERISA was enacted. The unsettled nature of the law applicable to Plaintiffs’ claims—especially as it existed more than five years ago when this case was filed—increases the risks for Plaintiffs’ Counsel.

Because this case settled before the summary judgment stage, it is impossible to know precisely what defenses Defendants would have asserted. However, it seems almost certain that they would have argued that MMC stock was a mandatory feature of the Plan—a feature that the defendant fiduciaries had no power to remove or restrict—such *148 that Defendants were not fiduciaries as to company stock and could not be liable. While that argument has been rejected by some courts, it was recently accepted by Judge Stein of this court in a well-reasoned opinion, *In re Citigroup ERISA Litig.*, No. 07 Civ. 9790, 2009 WL 2762708 (S.D.N.Y. Aug.31, 2009). Were this Court to have reached the same conclusion as Judge Stein (which would have depended on many factors, including but not limited to any dissimilarities in the facts of the cases), it would have had to dismiss Plaintiffs’ case.

Defendants also likely would have argued that the fiduciaries were shielded from liability by ERISA § 404(c), 29 U.S.C. § 1104(c), which provides a defense in certain cases for fiduciaries of individual account plans; that steering and bid-rigging were never widespread in the company such that MMC stock was never imprudent; and that even if the stock were imprudent, the Plan suffered no loss (because other equity investments in the Plan also fared badly). These potential arguments created substantial litigation risk for Plaintiffs’ counsel.

In sum, the risk for Plaintiffs’ Counsel in this ERISA company stock case was significant. Moreover, in addition to the risks discussed above, Plaintiffs’ Counsel had to contend with the traditional risks inherent in any contingent litigation. Lead Counsel accepted this case on a contingent basis, with the attendant risk that they would receive nothing at all. There was significant risk of non-payment in this case, and Plaintiffs’ Counsel should be rewarded for having borne and successfully overcome that risk. Cf. *Blum v. Stenson*, 465 U.S. 886, 902, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (Brennan,

J., concurring) (“[T]he risk of not prevailing, and therefore the risk of not receiving any attorney’s fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee.”); *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir.1998) (“Because they shift part of the risk of loss from client to lawyer, contingent-fee contracts usually yield a larger fee in a successful case than an hourly fee would.”). The risk factor, then, strongly supports the requested fee.

2. Lead Counsel's Time and Labor and the Magnitude and Complexities of this Case Support the Requested Fee

As detailed in the Sarko Declaration, and as discussed at various points above, this is a complex case both legally and factually, and Plaintiffs' Counsel have dedicated an enormous amount of time and labor to prosecuting this case since it was filed more than five years ago. Thus, these *Goldberger* factors also support the requested fee.

3. The Quality of Plaintiffs' Counsel's Representation of the Class Supports the Requested Fee

Lead Counsel are national leaders in this type of litigation. Keller Rohrback has served as lead or co-lead counsel in numerous ERISA fiduciary breach cases, including, in this District alone, the *WorldCom*, *Polaroid* and *Merrill Lynch* cases. (Sarko Decl. ¶¶ 145–46.) As lead or co-lead counsel, it has recovered over \$900 million in company stock litigation. (*Id.* ¶ 145.)

Izard Nobel and Cohen Milstein, two other members of the Executive Committee representing Plaintiffs, also have extensive experience in this type of litigation, including many cases in which they have served together as co-lead counsel. Labaton Sucharow, an Executive Committee member and liaison counsel, has a strong and well-deserved reputation for representing plaintiffs in complex class litigation. (Fees Mem. at 15–16.)

The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement. The O'Melveny & Myers ERISA group, headed by Robert Eccles, is an unquestioned national leader in ERISA fiduciary breach litigation. The ability of Plaintiffs' Counsel to obtain a favorable settlement

for the Class in the face of such formidable legal opposition confirms the quality of their representation of the Class.

Accordingly, the Court finds that this *Goldberger* factor weighs in favor of approving the requested fee award.

*149 4. The Fee Request Is Fair and Reasonable in Relation to the Settlement Amount

The requested fee of \$11,665,500 represents one-third of the recovery and about 87.6% of the lodestar. It is fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in this Circuit and elsewhere.

In *Wal-Mart*, the Second Circuit stated that “the percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement.” 396 F.3d at 96 (quoting *In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689, 2003 WL 22244676 (S.D.N.Y. Sept. 29, 2003)). Several decisions in this District have applied this principle. See, e.g., *Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 351 (S.D.N.Y.2005); *In re AOL Time Warner Sec. Litig.*, No. 02 Civ. 5575, 2006 WL 3057232, at *13 (S.D.N.Y. Oct 25, 2006). The empirical data attests that federal courts do, in fact, award larger percentage fees in smaller recoveries and smaller percentage fees in larger recoveries. See Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Stud. 27 (2004).

In light of this sliding-scale approach, the fee requested by Plaintiffs' Counsel is reasonable, and well within the range of awards made by district courts in this Circuit. In *In re Warner Communications Securities Litigation*, 618 F.Supp. 735, 749 (S.D.N.Y.1985), *aff'd*, 798 F.2d 35 (2d Cir.1986), the court noted that “Traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%–50% range in class actions.”

Many non-ERISA cases in this Circuit have awarded percentage fees equal to or greater than that requested here. E.g., *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 188–89 (W.D.N.Y.2005) (awarding 38.26%); *Strougo v. Bassini*, 258 F.Supp.2d 254, 262 (S.D.N.Y.2003) (33.33%); *Maley v. Del Global Tech. Corp.*, 186 F.Supp.2d 358, 370–71 (S.D.N.Y.2002) (awarding 33.33%; noting “modest multiplier of 4.65 [was] fair and reasonable”); *Becher v. Long Island Lighting Co.*, 64 F.Supp.2d 174, 182 (E.D.N.Y.1999)

(33.33%); *In re Crazy Eddie Sec. Litig.*, 824 F.Supp. 320, 326 (E.D.N.Y.1993) (33.8%).

Courts have also awarded percentage fees of one-third or higher in ERISA company stock cases in appropriate circumstances, and especially when, as here, the fund is not a “mega” recovery. For example, in the *EDS* ERISA litigation, the settlement was “only” \$12.5 million. The court awarded the requested one-third fee, taking into account, among other things, that the awarded fee was only 70% of the lodestar. *See In re EDS ERISA Litig.*, No. 03 Civ. 126, Order (E.D.Tex. Aug. 6, 2008). Further, in many ERISA company stock cases, courts have awarded fees of 30%, which yielded multipliers of over 1.0, and in some cases well over. *E.g.*, *In re AIG ERISA Litig.*, No. 04 Civ. 9387, Order (S.D.N.Y. Oct. 7, 2008) (30% fee of \$24.2 million; 1.1 multiplier); *In re Xerox Corp. ERISA Litig.*, No. 02 Civ. 1138, Order (D.Conn. Apr. 14, 2009) (30% fee of \$51.0 million; 1.6 multiplier); *In re Household Int'l ERISA Litig.*, No. 02 Civ. 7921, Minute Entry Order (N.D.Ill. Nov. 22, 2004) (30% fee of \$46.5 million; 4.8 multiplier); *Kling v. Fidelity Mgmt. Trust Co.*, No. 01 Civ. 11939, Order (D. Mass. June 29, 2006) (30% fee of \$10.85 million; 1.3 multiplier); *In re Westar Energy ERISA Litig.*, No. 03 Civ. 4032, Order & Final Judgment (D.Kan. July 27, 2006) (30% fee of \$9.25 million; 1.9 multiplier). In some ERISA company stock cases, courts have awarded fees well over these percentages. *See, e.g.*, *Kolar v. Rite-Aid*, No. 01 Civ. 1229, 2003 WL 1257272, 2003 U.S. Dist. LEXIS 3646 (E.D.Pa. Mar. 11, 2003) (49% of monetary recovery; 2.5 multiplier).

Of course, all of these numerical comparisons, while helpful, only take the Court so far. Ultimately, the subjective factors discussed above—and especially the risk present in this litigation—are the heart of the analysis. Based on those factors, and in light of the comparative data from other cases, a 33.33% fee, yielding a below-lodestar recovery, is well warranted here.

5. Public Policy Supports Granting the Requested Fee Award

Congress passed ERISA to promote the important goals of protecting and preserving *150 the retirement savings of American workers. The ERISA statute itself specifically encourages private enforcement. *See, e.g.*, ERISA § 502(a), 29 U.S.C. § 1132(a). The Supreme Court has noted (in the context of securities class actions) that private actions provide

“a most effective weapon in the enforcement” of federal statutes that provide for both governmental and private rights of action. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964)).

Particularly in the securities context, courts “have recognized the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis ... on behalf of those who otherwise could not afford to prosecute.” *Maley*, 186 F.Supp.2d at 373; *see Eltman v. Grandma Lee's, Inc.*, No. 82 Civ.1912, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986) (“To make certain that the public [interest] is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.”) (internal quotations omitted); *Spann v. AOL Time Warner Inc.*, No. 02 Civ. 8238, 2005 WL 1330937, at *3, 9 (S.D.N.Y. June 7, 2005) (awarding 33.33% fee in ERISA fiduciary breach case; noting that such lawsuits create incentives for fiduciaries to comply with ERISA).

In this case, the DOL took no action against Defendants. Without the efforts of Plaintiffs' Counsel, the participants in MMC's Plan would not have obtained any relief at all. They should receive a reasonable attorney's fee for their efforts. Thus, this *Goldberger* factor, like the others, supports awarding the requested fee.

VI. The Expenses Incurred by Lead Counsel Were Reasonable and Necessary to the Effective Prosecution of this Action

It is well-established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses. *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05 Civ. 01695, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007). The expenses that may be reimbursed from the common fund encompass “all reasonable” litigation-related expenses. *See Trustees v. Greenough*, 105 U.S. 527, 533, 26 L.Ed. 1157 (1882).

Litigating complex contingent cases such as this one requires counsel to incur significant expenses. Plaintiffs' Counsel have advanced \$1,270,915.40 (Sarko Decl. ¶¶ 159–60), and they are entitled to reimbursement of those expenses, *see Mililand Raleigh–Durham v. Myers*, 840 F.Supp. 235, 239 (S.D.N.Y.1993) (“Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients.”). Because Plaintiffs' Counsel was

proceeding on a contingent-fee basis, they had a strong incentive to keep expenses at a reasonable level, and the Court concludes that they did so. The expenses incurred by Plaintiffs' Counsel are itemized in detail in the Sarko Declaration, and are largely attributable to ordinary and necessary costs such as court reporters, expert fees, computer-assisted document organization, travel and copying.

The Court finds that the expenses incurred by Plaintiffs' Counsel were reasonable and necessary to the effective prosecution of this action. Accordingly, the Court orders reimbursement of expenses in the amount of \$1,270,915.40.

VII. Named Plaintiffs Are Entitled to the Requested Case Contribution Awards

Case law in this and other circuits fully supports compensating class representatives for their work on behalf of the class, which has benefited from their representation. *See, e.g., Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 124–25 (S.D.N.Y.2001). Such awards are compensatory in nature, reimbursing class representatives who “take on a variety of risks and tasks when they commence representative actions, such as complying with discovery requests and often must appear as witnesses in the action.” *Strougo v. Bassini*, 258 F.Supp.2d 254, 264 (S.D.N.Y.2003) (granting award of \$15,000 to class representative). In this case, the three *151 Named Plaintiffs request modest case contribution awards of \$15,000 each.

Named Plaintiffs Mr. Hundley, Mr. Simon and Ms. Hernandez have been active, hands-on participants in this litigation, expending significant amounts of their own time to benefit the Class. They came forward to initiate this action, and thereafter remained in frequent contact with Plaintiffs' Counsel. (Fees Mem. at 21.) They responded to document requests and interrogatories; reviewed and approved pleadings; assisted with discovery; and were involved in settlement discussions. (*Id.*) They prepared for, traveled to and sat for full-day depositions. (*Id.*) All of this can be unpleasant for people inexperienced in litigation. The Court easily concludes that Mr. Hundley, Mr. Simon and Ms. Hernandez should be compensated for their efforts on behalf of the Class, which has benefited greatly from their representation.

Accordingly, the Court grants case contribution awards in the amount of \$15,000 to each of the three Named Plaintiffs.

VIII. The Two Objections to Attorneys' Fees and Expenses Are Rejected

Notice was provided to more than 30,000 potential Class members, and only two objections have been lodged to the requested award of fees and expenses. The first objection was filed by William H. McIntyre, a retired MMC employee. (*See* Sarko Decl. Ex. A (McIntyre Objection).) Mr. McIntyre states that fees “should not simply be a flat percentage, but rather determined on a more reasonable decrimental [sic] scale to be in closer alignment with actual professional services rendered.” (*Id.*) Plainly, Mr. McIntyre presumes that the fee requested exceeds the value of the “actual professional services rendered.” As the Court has explained above, it does not. In fact, the lodestar in this case is above the requested fee. Thus, Mr. McIntyre's objection is rejected.

The other objection was filed by Anthony Meerpohl, another former MMC employee. (*See* Objections Mem. Ex. D (Meerpohl Objection).) Mr. Meerpohl objects to both the requested fees and expenses (he does not object to the case contribution awards). Mr. Meerpohl's objection is less an objection to this case than to class litigation in general. Mr. Meerpohl asserts that “the fact that any Attorney can get both expenses that they generated without oversight other than by the Judicial system as well as a high percentage of the award is more of a conflict of interest than the laws should allow.” (*Id.*) Ironically, this is one of the few cases in which there has been oversight other than by the “Judicial system,” as the Independent Fiduciary, Ms. Hennessey, has approved the requested fee.

Mr. Meerpohl also opines that former New York Attorney General Eliot Spitzer used the MMC case as “a springboard to Governor of New York,” and that an award of roughly 33% is an “irony” and “too great an issue to overlook by any justice, no matter how blind.” (*Id.*) Mr. Meerpohl is, of course, entitled to vent his frustration, but he fails to articulate any reason why the requested fee and expenses are excessive. His suggestion that an award of “95% of expenses plus a reasonable finder's fee of 5 to 10% of the award would be fair,” misunderstands the litigation process. Plaintiffs' Counsel are not requesting a “finder's fee,” nor would it be appropriate to give them one. They are seeking a fee to be paid for the work they have done litigating this case. Accordingly, the Court rejects Mr. Meerpohl's objection to the requested fees and expenses.

Finally, the Court reiterates that the Independent Fiduciary has reviewed Lead Counsel's requests, and that she has no

objection to the requested fees, expenses or case contribution awards. (Objections Mem. at 7.) The Independent Fiduciary's approval, together with the fact that only two objections have been filed—both meritless—weigh heavily in support of the Court's decision to award the requested fees and expenses.

Class was appropriate and sufficient; (4) approves the Plan of Allocation; (5) awards attorneys' fees in the amount of \$11,655,500; (6) orders *152 reimbursement of \$1,270,915.40 in expenses advanced by Plaintiffs' Counsel; and (7) awards \$15,000 to each of the three Named Plaintiffs, Donald Hundley, Conrad Simon and Leticia Hernandez, in recognition of their efforts on behalf of the Class.

CONCLUSION

For the reasons stated above, the Court (1) approves the Settlement; (2) certifies the Class for Settlement purposes; (3) determines that the notice provided to the

All Citations

265 F.R.D. 128

Footnotes

- 1 Capitalized terms not otherwise defined herein have the meanings assigned to them in the Stipulation and Agreement of Settlement (the "Settlement Agreement") (Docket No. 128–2).
- 2 One potential Class member, Lois Waldvogel, "objected," but only in the sense that she was concerned that she was not permitted to share in the Settlement because she had executed a severance agreement with MMC when she left in 2004. (Pls.' Supplemental Mem. Concerning Objections, Jan. 22, 2010 ("Objections Mem."), Ex. A (Waldvogel Objection).) Lead Counsel discussed the matter with Ms. Waldvogel, explaining that the severance agreement is not a bar to her participation. (*Id.* at 3.) Ms. Waldvogel has withdrawn her objection. (*Id.* Ex. C.)

689 F.Supp.2d 297

United States District Court, E.D. New York.

In re METLIFE DEMUTUALIZATION LITIGATION.

No. 00 CV 2258

|

Feb. 12, 2010.

Synopsis

Background: Policyholders of a mutual life insurance company which converted to a stock life insurance company through process of demutualization sued the company, asserting violations of Securities Act in connection with alleged nondisclosure of material information. Parties sought approval of settlement.

Holdings: The District Court, [Jack B. Weinstein](#), Senior District Judge, held that:

proposed settlement was entitled to presumption of fairness;

proposed allocation of settlement funds was fair and reasonable;

notice of settlement was appropriate and adequate;

approval of counsel's requested fee of 21% was warranted; and

award of \$25,000 in attorney fees to class member objector's attorney was warranted.

Settlement approved.

Attorneys and Law Firms

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Roy Jacobs & Associates, by [Roy L. Jacobs](#), Esq., New York, NY, Attorneys for Steven Waldman.

[John J. Pentz](#), Esq., Maynard, MA, Attorney for Thomas Bell & John Pentz, Jr.

[Richard J. Davis](#), Esq., Special Master.

***305 MEMORANDUM, ORDER AND JUDGMENT
ON FINAL APPROVAL OF SETTLEMENT, FEES,
EXPENSES AND COMPENSATION AWARDS**

[JACK B. WEINSTEIN](#), Senior District Judge:

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*306 I. Introduction

This case and a related case in New York Supreme Court, *Fiala v. Metropolitan Life Ins. Co.*, Index No. 601181/2000, are class actions arising out of Metropolitan Life Insurance Company's ("MetLife") demutualization—its conversion from a mutual insurance company to a stock corporation. *307 The classes consist of individuals who held MetLife mutual insurance policies at the time of the demutualization in 2000 who were allegedly harmed by the demutualization. The parties in this action and the *Fiala* action have arrived at a joint proposed settlement disposing of all claims in both cases.

The parties seek final approval of the proposed settlement. Plaintiffs' counsel, and counsel for one objector to the settlement, have applied for attorneys' fees and expenses, to be paid out of the settlement fund. Named plaintiffs in both actions have applied for compensation in recognition of time and effort expended in participating in these cases.

It is the policy of the federal courts to encourage coordination of pending state and federal cases concerning the same and closely related transactions. *See, e.g., In re Zyprexa Prods. Liab. Litig.*, 467 F.Supp.2d 256, 262 (E.D.N.Y.2006) ("Cooperation with state courts will continue to be stressed."); *In re Zyprexa Prod. Liab. Litig.*, No. 04-MD-1596, 2006 WL 898105, at *1 (E.D.N.Y. Apr. 6, 2006) ("Coordination and cooperation between state and federal courts has been encouraged."). In this instance close cooperation between the Supreme Court of the State of New York and the United States District Court for the Eastern District of New York, utilization of a single special settlement master, and joint hearings on the settlement permitted termination of this litigation with minimal transaction costs, on the merits.

For the reasons indicated below, after full hearings, the proposed settlement of these actions is found to be fair,

reasonable, and adequate to all parties and to all persons who might be directly or indirectly affected. *See Fed.R.Civ.P. 23(e)*. The fees and expenses of class counsel are approved as fair, reasonable, and fully supported. Objector's counsel's fees are approved in part. Named plaintiffs' applications for compensation are approved in part and denied in part. Disposition of the amounts approved in the settlement is properly provided for.

For the convenience of the reader, parts of prior memoranda and orders of this court are incorporated in the present document. Relevant documents issued in the state case have been considered as if they were admitted in the federal action. Hearings conducted jointly with the New York Supreme Court and evidence reviewed in such joint hearings are relied upon in the findings of this court.

This Memorandum, Order and Judgment is not effective until the New York Supreme Court's judgment of approval of the settlement is issued in the *Fiala* case.

II. Facts

Detailed information concerning the factual and procedural history of these related litigations is provided in prior decisions of this court and the state court. *See, e.g., In re MetLife Demut. Litig.*, 156 F.Supp.2d 254 (E.D.N.Y.2001) (denying MetLife's motion to dismiss); *In re MetLife Demut. Litig.*, 322 F.Supp.2d 267 (E.D.N.Y.2004) (denying MetLife's second motion to dismiss); *In re MetLife Demut. Litig.*, 229 F.R.D. 369 (E.D.N.Y.2005) (certifying plaintiff class), *pet. for interlocutory appeal denied* No. 05-8020 (2d Cir. Mar. 29, 2009); *In re MetLife Demut. Litig.*, 624 F.Supp.2d 232 (E.D.N.Y.2009) (denying cross-motions for partial summary judgment); Order Appointing Special Settlement Master, *In re MetLife Demut. Litig.*, No. 00-cv-2258, Docket Entry No. 501 (E.D.N.Y. Oct. 16, 2009); Order Regarding Motions In Limine, *In re MetLife Demut. Litig.*, No. 00-cv-2258, Docket Entry No. 537 (E.D.N.Y.

Oct. 30, 2009); *In re MetLife Demut. Litig.*, 262 F.R.D. 205 (E.D.N.Y.2009) (Mem. & Order Regarding *308 Notice & Hearing on Approval of Proposed Settlement); Order Approving Form of Class Notice, *In re MetLife Demut. Litig.*, No. 00-cv-2258, Docket Entry No. 540 (E.D.N.Y. Nov. 11, 2006); *Shah v. Metropolitan Life Ins. Co.*, Nos. 108887/2000 & 601181/200, 2003 WL 728869 (N.Y.Sup.Ct. Feb. 21, 2003) (granting MetLife's motion to dismiss); *Fiala v. Metropolitan Life Ins. Co.*, 6 A.D.3d 320, 776 N.Y.S.2d 29 (N.Y.App.Div.2004) (reversing in part decision on MetLife's motion to dismiss); *Fiala v. Metropolitan Life Ins. Co.*, 235 N.Y.L.J. 106, No. 601181/2000, 2006 N.Y. Misc. LEXIS 4092 (N.Y. Sup.Ct. June 2, 2006) (certifying plaintiff class); *Fiala v. Metropolitan Life Ins. Co.*, 17 Misc.3d 1102(A), No. 601181/2000, 2007 WL 2772230 (N.Y.Sup.Ct. Aug. 28, 2007) (unreported disposition) (approving procedure for class notification); *Fiala v. Metropolitan Life Ins. Co.*, 52 A.D.3d 251, 859 N.Y.S.2d 426 (N.Y.App.Div.2008) (affirming class certification as modified); Order Regarding Notice & Hearing on Approval of Proposed Settlement, *Fiala v. Metropolitan Life Ins. Co.*, No. 601181/2000 (N.Y.Sup.Ct. Nov. 5, 2009).

A. MetLife's Plan of Reorganization

MetLife, a New York corporation, was founded in 1868, and in 1915 became a mutual insurance company—that is, a non-stock corporation whose policyholders were its members. *See* Oct. 30, 2009 Stipulation of Agreed Facts, Docket Entry No. 530–9, ¶¶ 1–2 (“Parties’ Stip.”); April 4, 2000 Opinion and Decision of New York State Superintendent of Insurance Neil D. Levin, Docket Entry No. 578–9, at 1 (the “Superintendent’s Opinion” or “Sup. Opinion”). In 1998, MetLife’s Board of Directors (the “Board”) authorized management to pursue demutualization—that is, conversion to a stock life insurance company. *See* Parties’ Stip. ¶ 10; Sup. Opinion ¶ 15. This process was governed by [section 7312 of the New York Insurance Law](#). On September 28, 1999, MetLife’s Board adopted a Plan of Reorganization (the “Plan”). *See* Metropolitan Life Ins. Co., Plan of Reorganization Under [Section 7312 of the New York State Insurance Law](#), as Adopted on Sept. 28, 1999 (and as amended and restated by amendments dated Nov. 3, 1999 and Nov. 16, 1999) by the Board of Directors, Docket Entry No. 578–9. After appropriate consideration, the Board determined that the Plan was in the best interests of the company and its policyholders, and that it was fair and equitable to the policyholders. *See* Sup. Opinion ¶ 31.

1. New York Insurance Law § 7312

Demutualization is authorized by [section 7312 of the New York Insurance Law](#). The state legislature found that:

“[I]t is in the interest of the state to maintain a financially sound and competitive life insurance industry in this state and to provide statutory authority for domestic mutual life insurance companies that find it in the best interest of the company and its policyholders to convert to stock form to do so pursuant to this legislation.... [F]lexibility of corporate form can be an important factor in an environment of rapidly changing economic conditions.

Section 1 of L.1988, ch. 683; amended L.1988, ch. 684, § 1 (Sept. 1, 1988), *reprinted in* [N.Y. Ins. Law § 7312](#) note (McKinney 2000) (legislative findings).

To demutualize, a mutual life insurance company must adopt, by action of three-fourths of its entire board of directors, a detailed plan of reorganization that is consistent with the statute and “fair and equitable” to policyholders. [N.Y. Ins. Law § 7312\(e\)\(1\)](#). The plan must: “(1) demonstrate a purpose and specify reasons for the proposed reorganization; (2) be in the *309 best interest of the mutual life insurer and its policyholders; (3) be fair and equitable to policyholders; (4) provide for the enhancement of the operations of the reorganized insurer; and (5) not substantially lessen competition in any line of insurance business.” *Id.* [§ 7312\(c\)](#). It must provide, among other things: (1) “the manner and basis by which the reorganization shall take place;” (2) “the consideration to be given to policyholders;” (3) “the method of allocating the consideration among policyholders;” and (4) “a plan of operation for the reorganized insurer including actuarial projections.” *Id.* [§ 7312\(e\)\(1\)](#).

Four different methods of demutualization are specified. The fourth encompasses “[a]ny method approved by the [New York State Superintendent of Insurance (the “Superintendent”)] under which the policyholders’ membership interest is converted into or exchanged for consideration determined by the superintendent to be fair and equitable to policyholders and meeting the requirements of this section.” *Id.* [§ 7312\(d\)\(4\)](#).

In order to become effective, the demutualization plan must be approved by two-thirds of votes cast by policyholders entitled to vote. *Id.* [§ 7312\(k\)\(2\)](#). The Superintendent controls the voting procedure, including the notice that must be sent

to policyholders before the vote. *Id.* § 7312(k)(3). Notice must be “preceded or accompanied by a true and complete copy of the plan, or by a summary thereof approved by the superintendent, and such other explanatory information as the superintendent shall approve or require.” *Id.* § 7312(k)(1).

The Superintendent's approval of the demutualization plan must also be obtained:

The superintendent shall ... approve the plan of reorganization if he finds that the proposed reorganization, in whole and in part, does not violate this chapter, is fair and equitable to the policyholders and is not detrimental to the public and that, after giving effect to the reorganization, the reorganized insurer will have an amount of capital and surplus ... reasonably necessary for its future solvency.

Id. 7312(j). Broad authority to review a proposed demutualization is provided to the Superintendent. Before issuing written approval, the Superintendent must hold a public hearing on the fairness of the plan, the reasons and purposes for the demutualization, and whether it is in the best interests of the insurer and its policyholders. *Id.* § 7312(i). The Superintendent may “appoint one or more qualified disinterested persons or institutions as consultants to advise him on any matter related to the reorganization.” *Id.* § 7312(h)(1). These advisors may request access to the mutual company's books and records and any other information in its possession. *Id.* § 7312(h)(4). The Superintendent may “request any additional documents or information and may examine the mutual life insurer or any of its affiliates, to the extent he may determine necessary to enable him to make the findings required ... for the approval by him of the plan of reorganization.” *Id.* § 7312(g).

These provisions are consistent with the plenary authority the state legislature has delegated to the Superintendent to “make an examination into the affairs of any insurance corporation or other insurer doing or authorized to do any insurance business in this state ... as often as he deems it expedient for the protection of the interests of the people of this state, in addition to examinations authorized by other provisions of [the Insurance Law].” *Id.* § 309(a); *see also id.* § 401(b)

(granting Superintendent “broad authority ... to investigate activities which may be fraudulent *310 and to develop evidence thereon”); *id.* § 201 (“The Superintendent shall possess rights, powers, and duties ... expressed or reasonably implied by any applicable law of this state”).

2. Features of the Plan

The Plan adopted by MetLife's Board provided for the fourth statutory method of demutualization. *See* Plan at 6 (§ 3.2, “Basis for Choice of Method”); *N.Y. Ins. Law* § 7312(d)(4). The major features of the Plan included:

- 1) a requirement that consideration be given to policyholders in the form of shares of common stock, cash, or policy credits, allocated among policyholders based on an actuarial calculation, as detailed in a separate Actuarial Contribution Memorandum, Plan at 18 (§ 7.1, “Allocation of Allocable Common Shares”);
- 2) the creation of a MetLife Policyholder Trust (the “Trust”) to hold the common stock that would be issued to eligible policyholders in consideration for their extinguished membership interests, *id.* at 6 (§ 3.3, “Establishment and Operation of the Trust.”);
- 3) the establishment of an accounting mechanism known as the “Closed Block,” the stated purpose of which was “to ensure [] the reasonable dividend expectations of policyholders,” *id.* at 2 (defining “Closed Block”); *id.* at 22 (Article VIII, “Method of Operation for Participating Business”);
- 4) a condition that the demutualization would not be effective unless it received the approval of the Superintendent, *id.* at 10 (§ 5.2, “Effectiveness of Plan”);
- 5) an initial public offering (“IPO”) to take place simultaneously with the effective date of the demutualization, *id.* at 10–12 (§ 5.2, “Effectiveness of Plan”); and
- 6) a caveat that the Board had authority to withdraw the Plan at any time prior to its effective date, *id.* at 27 (§ 10.4, “Amendment or Withdrawal of the Plan”).

The sixth aspect was particularly significant for purposes of the instant case. The Superintendent's public hearing, the circularization of voters with a package of explanatory materials approved by the Superintendent, the availability

of a telephone hotline to answer questions of voters, and the Opinion and Decision of the Superintendent approving the Plan and notice to policyholders all occurred before the Board's power to withdraw the Plan expired. *See* Parts II.B–C, *infra*.

3. Exercise of Board's Business Judgment in Selecting Method of Demutualization

After considering the limitations of alternate statutory methods of demutualization one and two, *see* N.Y. Ins. Law §§ 7312(d)(1) & (2), the Board determined that the flexibility of the fourth method, *id.* § 7312(d)(4), was “best suited to provide [MetLife's] policyholders with a fair and equitable result.” Plan at 6 (§ 3.2, “Basis for Choice of Method”). The Board concluded that it was “the most appropriate method of reorganization under Section 7312 for [MetLife].” *Id.* (noting that the third statutory method, N.Y. Ins. Law § 7312(d)(3), is available only to insurers with less than \$50 million of surplus).

Under the business judgment rule, the Board had broad discretion in adopting policy, strategy, and tactics. *See, e.g., Clifford v. Metropolitan Life Ins. Co.*, 264 A.D. 168, 170, 34 N.Y.S.2d 693 (N.Y.App.Div.1942) (“Directors are presumed to act honestly and in accordance with their best judgment[.] ... [In matters] of internal management ... courts seldom interfere *311 with the discretion so exercised by directors.”); *see also* James A. Smallenberger, *Restructuring Mutual Life Insurance Companies: A Practical Guide Through the Process*, 49 Drake L.Rev. 513, 541–42 (2001) (noting that demutualization approval process is structured to ensure that boards are protected by business judgment rule).

Based on the evidence presented, the court finds that the Board appropriately exercised its discretion in choosing method four and in selecting the detailed means of execution of the proposed demutualization.

4. Reliance on Superintendent

In late 1998, soon after the Board authorized management to develop a plan of reorganization, MetLife notified the Superintendent of its intention to demutualize. *See* Sup. Opinion ¶ 15; Parties' Stip. ¶ 10. Because the Board opted for the fourth method, which lacked statutory detail, it had to ensure that the details of the Plan satisfied the Superintendent.

MetLife personnel and advisors worked closely with the Superintendent and his staff and advisors for over a year in developing the Plan's details. There were, for example, meetings regarding what the Plan was going to provide to policyholders, how the Plan would be explained to policyholders, and the contents of the explanatory materials that would be sent to policyholders. *See, e.g.,* Apr. 10, 2002 Tr. of Joseph Reali Dep. 59:8–62:13, Docket Entry No. 363–35 (stating that MetLife representatives met and corresponded with Insurance Department representatives regarding terms of the Plan and contents of materials sent to policyholders); *id.* at 37:23–25 (stating that MetLife “discussed issues time and again with the New York Insurance department”); *id.* at 83:8–20 (stating that MetLife personnel kept its own advisors apprised of “where [it was] on discussions with the Insurance Department”); *see also* Nov. 5, 2002 Tr. of Michael Harwood Dep. 22:6–21, Docket Entry No. 431–2 (stating that MetLife representatives met weekly with Insurance Department regarding formation of closed block and calculation of actuarial equity share).

MetLife's Board and management relied on the Superintendent's review and expertise in assuring themselves that the demutualization was being conducted properly—particularly with respect to critical actuarial calculations and the formation of the closed block that would assure future dividends to policyholders. *See, e.g.,* May 25, 2006 Tr. of Robert G. Schwartz Dep. 78:22–79:11, Docket Entry No. 508–4 (“I relied ... on the insurance department, who in turn hired, as I recall, outside professionals, actuaries. You know, we were extremely well-regulated and constantly under their supervision and review, so I felt very comfortable that it was being done well and properly”); May 11, 2006 Tr. of Stewart Nagler Dep. 202:20–203:14, Docket Entry No. 508–5 (stating that Board adopted Plan when Superintendent had indicated that Plan was “approvable ... [and MetLife] could go ahead and just plan that it would be approved”); Mar. 9, 2006 Tr. of Robert H. Benmosche Dep. 61:9–14, Docket Entry No. 508–6 (stating that, in connection with technical and actuarial matters, “you have to rely on the advisers and the Insurance Department. The Insurance Department has a large number of people that go through the details of how you calculate it and review the calculations”).

The Plan adopted by the Board—and then approved by voting policyholders—reflected MetLife's responses to the Insurance Department's “comments on elements of the plan,

suggestions, [and] questions.” May 17, 2006 Tr. of Joseph Reali Dep. 9:17–23, Docket Entry No. 363–37.

***312** The Board was aware that MetLife's demutualization could not be effective without the Superintendent's approval. By its own terms, the Plan could be amended, withdrawn, or altered in response to any concerns the Superintendent might raise before the IPO. *See* Plan at 27 (§ 10.4, “Amendment or Withdrawal of Plan”); *see also* Oct. 13, 2009 Hr'g Tr. at 56:16–57:8 (statement of MetLife's counsel). Any amendments would have required the Superintendent's approval to become effective. Plan at 27.

B. Solicitation of Policyholder Votes

1. Mailings

On November 24, 1999, MetLife began mailing a package of explanatory materials (the “Policyholder Packet”) to policyholders describing the Plan in advance of the policyholder vote. *See* Parties' Stip. ¶ 20; Sup. Opinion ¶¶ 20–21. The mailing was completed on December 21, 1999, having by then reached substantially all of the 11 million policyholders entitled to vote on and receive compensation under the Plan. *See* Parties' Stip. ¶¶ 17, 20; Sup. Opinion ¶ 24.

Each Policyholder Packet contained:

- a cover letter from MetLife's Chairman of the Board;
- a brochure titled “Important! Read Me First”;
- a two-part Policyholder Information Booklet;
- a ballot for voting on MetLife's demutualization plan;
- a card listing the policies for which a policyholder was eligible to receive compensation and the form of compensation to be received;
- a card that allowed policyholders eligible to receive compensation in the form of stock to elect instead to receive compensation in the form of cash;
- an Internal Revenue Service Form W–9, along with a return envelope for returning the ballot, the Form W–9, and/or the card electing cash compensation.

See Policyholder Packet, Docket Entry Nos. 530–12 & 530–13; *see also* Parties' Stip. ¶ 19 (listing contents of Policyholder Packet).

Featured in the Policyholder Packet was a notice of the purpose, date, time, and location of the policyholder vote:

In order for the Plan to be approved, at least two-thirds of the votes validly cast by eligible policyholders must be in favor of the Plan. You may cast your vote in person at MetLife or return your ballot by mail using the postage-paid envelop enclosed. You may vote in person at the offices of MetLife:

Place: MetLife

One Madison Avenue, 1st Floor

New York, New York

Date: February 7, 2000

Time: 10:00 a.m. to 4.00 p.m. (EST)

* * *

You must either vote in person or mail the ballot card (card # 2) so that we receive it by 4:00 p.m. (EST) February 7, 2000 in order for your vote to count.

Policyholder Packet, Docket Entry No. 530–12, at 5; *see also id.* at 9–10 (letter of Insurance Department stating, time, date, and place of vote).

Included was notice of the public hearing to be conducted by the Superintendent in advance of the policyholder vote. It stated that policyholders could make oral statements or written submissions in connection with the hearing:

The Superintendent of Insurance of the state of New York has scheduled a public ***313** hearing to consider the Plan of Reorganization adopted by the Board of Directors of Metropolitan Life Insurance Company (MetLife) on September 28, 1999 and as amended by amendment adopted on November 16, 1999.

THE PUBLIC HEARING WILL BE HELD AT THE GRAND HYATT NEW YORK, PARK AVENUE AT GRAND CENTRAL (AT EAST 42ND STREET), IN THE EMPIRE STATE BALLROOM, NEW YORK, NEW YORK, BEGINNING AT 10:00 A.M. (EST) ON JANUARY 24, 2000.

* * *

If you would like to submit a written statement concerning the Plan to the New York State Superintendent, you may do so.... If you would like to make an oral statement at the public hearing, you should register [to do so] by January 20, 2000.

Id. at 8 (emphasis in original).

The bulk of the Policyholder Packet consisted of the two-part, 350-plus page Policyholder Information Booklet (PIB). Part One summarized the Plan, including a complete copy of the Plan of Reorganization (with some exhibits and schedules in summary form). Policyholder Packet, Docket Entry No. 530-12, at 20-50 & Docket Entry No. 530-13, at 1-114. Part Two contained information about MetLife's business and finances. Policyholder Packet, Docket Entry No. 530-13, at 115-338. The stated purpose of the PIB was to "give [policyholders] information to help [them] decide how to vote." Policyholder Packet, Docket Entry No. 530-12, at 6.

The Policyholder Packet was designed to provide information necessary for an informed decision and to convince policyholders to vote for the Plan. It assured them that the Plan, though adopted by the Board, was subject to final approval by the Superintendent. The Chairman's Letter supported a favorable vote, explaining:

In electing to demutualize, the Board was guided by one overriding concern: the best interests of our policyholders.

* * *

The Board of Directors has determined that the reorganization is in the best interests of MetLife and its policyholders, and has found the demutualization to be fair and equitable to policyholders. Therefore, the Board urges you to vote YES in favor of approving the demutualization plan.

Id. at 1.

The pivotal role of the Superintendent was highlighted throughout the Policyholder Packet. A letter from the Insurance Department—embossed with the state agency's seal—was enclosed with the Read-Me-First brochure at the front of the Policyholder Packet. Signed by the Deputy Superintendent, the letter described the Insurance Department's involvement in the process and made clear that, even if policyholders were to vote in favor of the transaction, MetLife's demutualization would not become

effective without final approval by the Superintendent. *Id.* at 10-11. Similar statements were contained throughout. *See, e.g., id.* at 4, 5, 37-38.

The Superintendent reviewed, commented upon, and approved the Policyholder Packet. Sup. Opinion ¶ 216 ("The policyholder notices and accompanying documents, including the Policyholder Information Booklets, Parts One and Two ... were approved by the Superintendent[.]"); Apr. 10, 2002 Tr. of Joseph Real Dep. 61:23-62:13, Docket Entry No. 363-35 ("Everything that was sent out [to policyholders] was discussed with the Insurance Department").

*314 2. Telephone

Included in the Policyholder Packet were toll-free telephone numbers for policyholders to call if they had questions, needed assistance, or wanted additional information. *See, e.g.,* Policyholder Packet, Docket Entry No. 530-12, at 1, 2, 57, Docket Entry No. 530-13, at 31. Prospective voters took advantage of this telephone hotline:

MetLife received **over 2.5 million phone calls** from policyholders with questions about the demutualization, from the time of the mailing until after the initial public offering. To handle those calls, MetLife had a voice response unit that will [sic] allow policyholders to get answers to the frequently asked questions at any time. In addition, MetLife had 500 customer service representatives available to answer further questions.

* * *

As of April 11, 2000, the call centers had received 2,513,183 calls (including 66,183 calls in Canada). 41.9% of these inquiries were satisfied through the voice response unit.

Apr. 4, 2008 Aff. of Jared Stamell, Ex. 2 at 29, Docket Entry No. 360-13 ("MetLife Overview: Corporate Information," attached to Apr. 24, 2000 email from Cristina Amodeo to Christina Y. Tso) (emphasis in original).

MetLife prepared scripts to be used at call centers, with answers to expected queries. *See* Oct. 14, 2009 Defs.' Letter to the court, Docket Entry No. 499 (attaching scripts). The prepared responses directed callers to the New York insurance law, and emphasized that the demutualization could not become effective without approval by the Superintendent.

See id. The Superintendent and his advisors reviewed and commented on drafts of the telephone scripts before they were used. *See id.*

C. Superintendent's Investigation and Approval

1. Appointment and Reliance on Advisors

Four outside advisors were appointed by the Superintendent to assist in the review of MetLife's proposed demutualization: legal consultant Fried, Frank, Harris, Shriver & Jacobson LLP; financial consultant The Blackstone Group L.P.; actuarial consultant Milliman & Robertson, Inc., and accounting consultant Ernst & Young LLP. *See* Sup. Opinion ¶ 16; N.Y. Ins. L. § 7312(h) (authorizing appointment of outside consultants).

With the help of these advisors, the Superintendent posed searching questions to, and requested detailed information from, MetLife about the substantive details of the transaction. Actuarial and other documentation was requested to facilitate analysis. *See, e.g.*, July 6, 1999 Letter from N.Y. Ins. Dep't to MetLife, Docket Entry No. 431–5 (requesting actuarial information on behalf of consultant and stating that “[t]he department will not be in a position formally or informally to approve any aspect of the proposed transaction which is dependent upon matters which the department and its advisors have not had an adequate time to review, including any necessary revisions”); Jan. 12, 1999 Letter from MetLife to N.Y. Ins. Dep't and its Consultants, Docket Entry No. 531–4 (containing responses to information request from the Department). The Superintendent and appointed consultants reviewed and relied upon information MetLife provided voluntarily as well as in response to the Insurance Department's specific requests. *See* Sup. Opinion ¶¶ 17, 127, 131.

*315 2. Public Hearing

On January 24, 2000, the Superintendent held a public hearing, at which policyholders and members of the public were invited to speak on the proposed demutualization. He put critical questions to MetLife management and directed them to answer inquiries from policyholders and the public. *See* Jan. 24, 2000 Metropolitan Life Demutualization Transcript of Proceedings, Docket Entry No. 499–4 (“Public

Hr'g Tr.”), available at http://www.ins.state.ny.us/life/demut/met_trans.pdf (last accessed Jan. 25, 2010).

Approximately 150 people attended the hearing. Sup. Opinion ¶ 25. It lasted for some three hours. *Id.* ¶ 26. The Superintendent was present, accompanied by five officials from the Insurance Department. *See* Public Hr'g Tr. at 2:4–13.

A video of the hearing was posted on the Insurance Department's website. *See id.* at 114:16; Press Release, N.Y. Dep't Ins., “Department Makes Video of Public Hearing Available on Web Site for First Time: Consumers Can Access Video and Audio of MetLife's Demutualization Hearing” (Jan. 27, 2000), available at <http://www.ins.state.ny.us/press/2000/p0001272.htm> (last accessed Jan. 25, 2010).

Anyone who registered to pose a question was provided with ten minutes to make an oral statement. Public Hr'g Tr. at 5:5–10. Twenty members of the public registered with the Insurance Department as speakers, and nine actually presented statements. *See* Sup. Opinion ¶ 26; *see also* Public Hr'g Tr. at 52:18–113:22 (statements of Richard Norton, Ralph Kabrinik, V.J. Shah, Lance Gad, Paul Benton Weeks III, Tom Tierney, Anita Kartalopoulos, Phillip Bieluch, and Thomas Welling).

Each of these speakers criticized the Plan and its various components, including the methods used to calculate policyholder compensation and the adequacy of the Policyholder Packet. *See e.g., id.* at 52:18–58:11 (statement of Richard Norton) (policyholder criticizing, among other things, valuation of “right to vote”); *Id.* at 62:14–65:4 (statement of V.J. Shah) (policyholder criticizing lack of subscription rights); *id.* at 65:7–70:19 (statement of Lance Gad) (policyholder and self-described expert, criticizing methods of allocation as unfair and inequitable); *id.* at 70:20–80:12 (statement of Paul Benton Weeks III) (attorney representing policyholders criticizing adequacy of disclosures); *id.* at 80:13–92:25 (statement of Tom Tierney) (actuary criticizing, on behalf of policyholders, adequacy of closed block and compensation to each policyholder); *id.* at 99:19–109:16 (statement of Phillip Bieluch) (actuary criticizing efficacy of closed block and adequacy of disclosures); *id.* at 109:21–113:22 (statement of Thomas Welling) (chartered underwriter and financial consultant criticizing 10–share fixed minimum allocation of compensation).

Robert Benmosche, MetLife's then Chief Executive Officer and Chairman of the Board, reiterated at the hearing the favorable conclusion in his letter included in the Policyholder Packet:

Based on our extensive analysis and consultation with independent financial, actuarial, legal and other advisors [and] based on careful consideration of various elements of the plan over the preceding months, our board of directors unanimously adopted our demutualization plan. Our directors concluded, among other things, that the plan is in the best interests of MetLife and our policyholders, and that it is fair and equitable to our policyholders.

Id. at 10:21–11:1; *cf.* Policyholder Packet at 1, Docket Entry No. 530–12 (cover letter from Chairman Robert Benmosche) (“The Board of Directors has determined *316 that the reorganization is in the best interests of MetLife and its policyholders, and has found the demutualization plan to be fair and equitable to policyholders.”).

MetLife Chief Financial Officer Stuart Nagler discussed the Trust, the closed block, and the method of calculating and allocating policyholder compensation. *See* Public Hr'g Tr. at 14:2–23:4. MetLife General Counsel Gary Beller “reviewed how MetLife's demutualization plan and related actions taken by MetLife will have satisfied each and every requirement of New York Insurance Law.” *Id.* at 23:14–23:18. Beller emphasized that the Superintendent had reviewed and approved the Policyholder Packet, *id.* at 26:22–27:1, and that the Plan would not be effective without ultimate approval from the Superintendent, *id.* at 30:2–30:14.

A representative of MetLife's financial advisors, Goldman Sachs & Company and Credit Suisse First Bank Boston, reiterated the essence of their fairness opinions, that “the exchange of the aggregate policyholders' membership interests in MetLife for shares of holding company stock, cash or policy credits in accordance with the plan is fair from a financial point of view to [eligible] policyholders.” *Id.* at 39:16–40:4. The financial advisors stated that they expected to coordinate the IPO with the Superintendent, who would

be given an opportunity to monitor that component of the transaction. *Id.* at 38:18–28.

MetLife's actuarial advisor, Kenneth Beck, a principal of PricewaterhouseCoopers (“PWC”), reiterated the content of PWC's fairness opinion, that “the plan for allocating compensation to eligible policyholders is fair and equitable,” and that “the plan makes appropriate provisions with regard to the objective funding and operations for the closed block, as well as providing a vehicle to make appropriate adjustments to further policy dividends if the underlying experience changes.” *Id.* at 45:19–46:1.

The Superintendent directed MetLife to answer five questions, regarding, among other things, the Plan's absence of subscription rights, the anticipated timing of the IPO, and the efforts MetLife was making to find policyholders for whom MetLife had no address. *Id.* at 46:10–5:24. Statements made at the public hearing were submitted to the Insurance Department and became part of the written record of the proceedings. Sup. Opinion ¶¶ 26, 28.

3. Written Submissions

The record of the public hearing remained open until February 14, 2000 so that the Superintendent could obtain additional written comments, questions, or statements about MetLife's demutualization plan from policyholders and others. *Id.*; Public Hr'g Tr. at 115:25–116:2. A total of 165 letters were received by the Department. Sup. Opinion ¶ 28. Many of the letters criticized policyholder compensation and the adequacy of materials mailed in solicitation of their votes. *See* Oct. 13, 2009 Defs.' Letter to the court, Docket Entry No. 512 (attaching written objections submitted by MetLife policyholders to the Superintendent).

The written submissions and responses became part of the public record of the Insurance Department's hearing. *See* Sup. Opinion ¶ 28. They were reviewed by the Superintendent and his advisors during their investigation of MetLife's proposed demutualization. *See id.*

4. Opinion and Decision

On April 4, 2000, the Superintendent issued his Opinion and Decision approving MetLife's demutualization. The Superintendent's Opinion contains conclusions with respect

to the fairness and equity of the demutualization and the adequacy of *317 the disclosure materials sent to policyholders, *see generally* Sup. Opinion ¶¶ 198–238 (section titled “Conclusions and Decision”), including the following:

- 1) “The reorganization of MetLife from a mutual insurer to stock company form, as set forth in the Plan, is in the best interests of MetLife and its policyholders, in compliance with Section 7312(c)(2).” *Id.* ¶ 200.
- 2) “The provisions of the Plan are fair and equitable to the policyholders of MetLife, in compliance with Section 7312(c)(3).” *Id.* ¶ 201.
- 3) “The Policyholders’ Membership Interests will be exchanged for an aggregate amount of consideration that is fair and equitable to the policyholders of MetLife and meets the requirements of Section 7312, in compliance with Section 7312(d)(4)(A).” *Id.* ¶ 204.
- 4) “The consideration to be given to the policyholders of MetLife will be allocated among such policyholders in a manner which is fair and equitable in compliance with Section 7312(d)(4)(B).” *Id.* ¶ 205.
- 5) “The provisions of the Plan are fair and equitable to the policyholders of MetLife, taking into account the legitimate economic interests of participating policyholders as delineated in Section 7312, in compliance with Section 7312(d)(4)(D).” *Id.* ¶ 207.
- 6) “The policyholder notices and accompanying documents, including the Policyholder Information Booklets, Parts One and Two, contained sufficient information about the proposed reorganization to enable Eligible Policyholders to make an informed decision regarding the Plan, and, for that reason, were approved by the Superintendent pursuant to Section 7312(i), (k) (1).” *Id.* ¶ 216.

The sixth point, on the adequacy of the information supplied to prospective voters, is critical in rebutting any contention that notice was insufficient, unfair, or fraudulent. Other sections of the Superintendent’s Opinion provide the facts and the law supporting the Superintendent’s conclusions. The first three sections summarize applicable provisions of the New York Insurance Law and provide an overview of the process of MetLife’s demutualization. *Id.* at ¶¶ 1–14 (“I. Legislative Background and Statutory Requirements”), ¶¶ 15–30 (“II. Procedural History”), ¶¶ 31–42 (“III. Plan of

Reorganization”). The Superintendent’s detailed findings and analysis with respect to specific components of MetLife’s Plan are included in the following sections. *See id.* at ¶¶ 43–71 (“IV. The Trust”), ¶¶ 72–79 (“V. Purchase and Sale Program”), ¶¶ 80–112 (“VI. The IPO, Private Placements, and the Other Capital Raising Transaction”), ¶¶ 113–141 (“VII. Eligibility and Policyholder Consideration”), ¶¶ 142–161 (“VIII. The Closed Block”), ¶¶ 162–176 (“IX. Restrictions on Acquisition of Securities by MetLife Personnel”), ¶¶ 177–181 (“X. Future Operations and Solvency”), ¶¶ 182–188 (“XI. Corporate Governance”), ¶¶ 189–191 (“XII. Tax Matters”), ¶ 192 (“XIII. Department of Labor Exemption”), ¶¶ 193–194 (“XIV. Securities Law Matters”), ¶ 195 (“XV. Expenses”), ¶¶ 196–197 (“XVI. Notice of Pendency”).

Throughout, the Superintendent’s Opinion describes the careful steps the Superintendent took to investigate and determine whether to approve the Plan, including a description of the public hearing and the appointment of advisors to aid in the investigation. *See id.* ¶¶ 15–17, 21. Described were the facts and materials the Superintendent relied on in rendering his Opinion, including:

- The oral and written comments and objections on the demutualization submitted *318 to the Insurance Department by policyholders and members of the public. *See, e.g., id.* ¶¶ 34, 37, 50, 54, 66, 84, 86, 106, 125, 128, 145, 153, 188, 237.
- The opinions of actuaries and other consultants. *See, e.g., id.* ¶¶ 15–17, 42, 83, 126, 127, 129, 131, 144, 160, 161, 194.
- The compensation given to policyholders and the allocation of that compensation among those policyholders, *see, e.g., id.* ¶¶ 119–131, 205, including the fixed share component and the actuarial formula used to calculate the variable component, *see id.* ¶¶ 122–124, 126–128.
- The structure and funding of the closed block. *See id.* ¶¶ 142–161.
- The information on the demutualization that was disclosed to policyholders. *See e.g., id.* ¶¶ 66, 216, 238.

D. Demutualization Procedure

The Plan was approved by 93% of the approximately 2.7 million policyholders who voted. Parties’ Stip. ¶ 23; Sup. Opinion ¶ 27. The Superintendent also approved the Plan,

after exhaustive review and a public hearing as required by New York law, *see* Sup. Opinion ¶¶ 16–17, 25–26, as being “in the best interest of MetLife and its policyholders,” “fair and equitable to the policyholders,” “not detrimental to the public,” not hazardous to MetLife's solvency, and otherwise in compliance with applicable law. *Id.* ¶¶ 200, 201, 238.

Demutualization became effective on April 7, 2000. Parties' Stip. ¶ 3. As a result of the conversion from mutual to stock form, policyholders' “membership interests” were extinguished. *See* N.Y. Ins. Law §§ 7312(d)(4)(A), (m), (r); Plan §§ 3.1(c), 5.2(d)(iii). The term “membership interests” is defined by New York statute and the Plan to mean policyholders' rights as members of the mutual company by law or by the company's charter, and any right to vote conferred by their policies. N.Y. Ins. Law § 7312(a)(3); Plan, Art. II (defining “Policyholders' Membership Interests”). Membership interests do not include any rights expressly conferred by the insurance policies, other than the right to vote. *Id.* The demutualization did not change policyholders' premiums, benefits or eligibility for policy dividends. Sup. Opinion ¶ 154; *see* N.Y. Ins. Law § 7312(r) (“[T]he rights of all policyholders ... shall be as specified in their policies or contracts ... except for the elimination of the right to vote[.]”); *id.* § 7312(m) (“[T]he reorganized insurer shall be deemed a continuation of the corporate existence of the mutual life insurer.... [The reorganized insurer] shall be deemed to have assumed all of the obligations and liabilities of the mutual life insurer ... other than obligations and liabilities with respect to the policyholders' membership interest eliminated by the plan of reorganization.”). Membership interests include the right to vote for company directors and a contingent interest in a possible distribution of surplus in the event of a solvent liquidation. Plan, Art. II (defining “Policyholders' Membership Interests”). Membership interests did not include eligibility for policy dividends, which is a contractual right that persists after demutualization. *Id.* (“The term ‘Policyholders' Membership Interests’ does not include rights expressly conferred upon the policyholders by their policies or contracts ... such as the right to any declared policy dividends.”); *see also id.* § 3.1(b).

Under New York law and the Plan, policyholders whose policies were in force on the September 28, 1999 adoption date of the Plan (called “Eligible Policyholders” in *319 the Plan) were entitled to receive consideration in exchange for their membership interests. *See* N.Y. Ins. Law § 7312(e)(3); Plan, Art. II (defining “Eligible Policyholder”), §§ 3.1(c), 5.2(d)(iii). Following the precedent established by prior

demutualizations, MetLife's Plan allocated to the eligible policyholders 100% of the stock of the company prior to the sale of additional shares in the IPO. *See* Sup. Opinion ¶¶ 15, 39; Plan § 3.1. A minority of the policyholders elected to receive cash at the IPO price in lieu of stock, and an even smaller minority were required for tax or regulatory reasons to receive cash or credits to their policies, determined at the IPO price of \$14.25 per share. *See* Parties' Stip. ¶¶ 27, 39, 43–44; Plan § 7.3(a)–(d).

The majority of Eligible Policyholders received shares of stock in MetLife's new holding company, MetLife, Inc., held in a trust for their benefit. Parties' Stip. ¶ 43; *see* Plan § 7.3. The trust was designed to minimize the administrative costs associated with having millions of shareholders. Sup. Opinion ¶¶ 43–44. Beginning shortly after the demutualization and continuing to the present day, these policyholders were able to sell their shares, subject to certain restrictions, from the trust at the market price free of commissions. Parties' Stip. ¶ 70; Sup. Opinion ¶ 51. One year after the demutualization, policyholders could elect to withdraw their shares from the trust and hold the shares directly (for example, through their own broker) like any other shareholder, or could leave the shares in the trust so that they could take advantage of the commission-free sale program in the future. Parties' Stip. ¶ 72; Sup. Opinion ¶ 51.

MetLife, Inc.'s stock price rose to \$70 per share in 2007, and is now trading at approximately \$34 per share. MetLife, Inc. has paid cash dividends on the stock every year. These cash dividends are in addition to the policy dividends that MetLife continues to pay to class members who have retained their insurance policies. MetLife contends that those who sold their stock when it was trading at a lower price, or who took cash or policy credits in lieu of their allocated shares at the IPO price of \$14.25 per share, benefited from the transaction, because they received tangible value in exchange for their illiquid membership interests. *See* Plan, Art. I (“Purpose of Reorganization”).

The Plan's method of allocating shares among policyholders followed established precedent. Every eligible policyholder received a “fixed component,” consisting of an allocation of 10 shares, which accounted for about 16% of the total consideration. *See* Sup. Opinion ¶ 122; Plan § 7.1(b)(i). The remaining 84% was allocated under the Plan according to an actuarial formula, in proportion to each participating policy's actuarial contribution to surplus. *See* Sup. Opinion ¶ 124; Plan §§ 7.1(b)(ii), 7.2(a)(i). “Actuarial contribution

to surplus” is an estimate of the policy's past contributions and the projected present value of future contributions to MetLife's surplus. Parties' Stip. ¶¶ 54, 57. As defined in the Plan, a “participating” policy is one that either (i) contains an express provision for policy dividends or (ii) does not expressly state that it is nonparticipating. Plan, Art. II (defining “Participating Policy”). Policyholders who held only nonparticipating policies, or whose participating policies had zero or negative estimated actuarial contribution to surplus, received only the fixed component of ten shares and no variable component. Sup. Opinion ¶¶ 123–24.

In accordance with [section 7312\(d\)](#), MetLife's Plan established a dividend-protection mechanism known as a “closed block.” Plan §§ 3.1(a), 8.1 (“Establishment of the Closed Block”). A closed block is an accounting mechanism designed to protect ***320** reasonable policyholder dividend expectations by “provid[ing] for continuation of current payable dividend scales, if the experience underlying such scales continues and for appropriate adjustments in such scales if the experience changes.” [N.Y. Ins. Law § 7312\(d\)\(5\) \(B\)](#); see Sup. Opinion ¶¶ 142–144; Plan § 8.1(a). The closed block includes, substantially, the individual policies that had dividends payable at the time of the demutualization. See Plan, Art. II (defining “Closed Block Business”). Assets are allocated to the closed block that have been determined to be sufficient to pay benefits and to continue the current dividend scale, assuming that the experience underlying that dividend scale remains the same. See Sup. Opinion ¶ 142; Plan § 8.1(a). Assets allocated to the closed block can only be used for the benefits, dividends, and certain expenses of the policyholders covered by the closed block; these assets do not revert to the benefit of MetLife stockholders. See Plan § 8.2(g).

E. Related Lawsuits

Out of a number of suits filed in the wake of MetLife's demutualization, it appears that only the instant action and the *Fiala* state action remain pending. A purported derivative action was filed shortly before the parties reached the proposed settlement in this case and the *Fiala* case. See *Waldman v. Benmosche*, Index No. 650643/2009 (N.Y. Sup.Ct., filed Aug. 26, 2009).

The instant action was filed on April 18, 2000. Compl., Docket Entry No. 1. Plaintiffs allege: incomplete disclosure of the basis for determining the fixed 10-share allocation to policyholders; misrepresentation or incomplete disclosure about the effect of the closed block on policyholder dividends; misrepresentation of the reasons for choosing statutory

method four for demutualization, see [N.Y. Ins. Law § 7312\(d\) \(4\)](#); and incomplete disclosure of the role and amount of actuarial contribution to surplus. See generally Second Consolidated Am. Compl., Docket Entry No. 120 (“Am. Compl.”). Additional claims about the policyholder trust were deleted by amendment. See Oct. 7, 2009 Stip. and Order Amending the Compl., Docket Entry No. 491.

In 2003 the New York Supreme Court dismissed in their entirety claims against MetLife in *Fiala* and *Shah*, another case that was subsequently consolidated into *Fiala*. See *Shah v. Metro. Life Ins. Co.*, 2003 N.Y. Slip Op. 50591(U), 2003 WL 728869 (N.Y.Sup.Ct. Feb. 21, 2003), modified sub nom. *Fiala v. Metro. Life Ins. Co.*, 6 A.D.3d 320, 776 N.Y.S.2d 29 (N.Y.App.Div.2004). On appeal, the Appellate Division reinstated two claims: a claim under [Insurance Law section 7312](#) based on the alleged allocation of excessive shares to a large policyholder, and a common-law fraud claim based on nondisclosure of an alleged plan to buy back stock after the IPO. *Fiala*, 6 A.D.3d at 321–23, 776 N.Y.S.2d 29. After remand, the *Fiala* plaintiffs recast their claim for failure to disclose the alleged share buyback plan as a [section 7312](#) claim. See Revised Third Consolidated Am. Compl. ¶¶ 65–68, *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/00 (N.Y.Sup.Ct., Dec. 22, 2005) (Ex. G to Dec. 28, 2009 Aff. and Decl. of Carl Micarelli in Supp. of Approval of Stip. of Settlement and in Response to Objections, Docket Entry No. 578–5 (“Micarelli Aff.”)). The “excessive allocation” claim was later discontinued for lack of evidence, see Stip. and Withdrawal of Certain Claims, *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/00 (N.Y.Sup.Ct., Feb. 22, 2008) (Ex. H to Micarelli Aff.), leaving only the “buyback” claims. MetLife filed a motion for summary judgment as to those remaining claims, which was pending at the time the parties settled. Dec. 28, 2009 Aff. and ***321** Decl. of Kevin S. Finnegan in Supp. of Approval of the Stip. of Settlement ¶ 11, Docket Entry No. 578–1 (“Finnegan Aff.”).

F. Class Certification and Notice

In the instant action a class was certified as to all claims. The class consists of

all persons who were participating Metropolitan Life Insurance Co. (“MetLife Co.”) policyholders on or about September 28, 1999, for whom MetLife Co. calculated a positive

actuarial equity share ... and whose rights as participating policyholders were exchanged for shares of stock in MetLife Co., pursuant to defendants' plan of demutualization ..., excluding defendants, their officers, directors, subsidiaries and affiliates[.]

July 19, 2005 Mem. and Order 4, Docket Entry No. 181 (*In re MetLife Demut. Litig.*, 229 F.R.D. 369, 372 (E.D.N.Y.2005)). The trial court interpreted the class as including those who received cash or policy credits in addition to those who received stock. See August 29, 2006 Mem. and Order, Docket Entry No. 254 (*In re MetLife Demut. Litig.*, No. 00–CV–2258, 2006 WL 2524196, 2006 U.S. Dist. LEXIS 97633 (E.D.N.Y. Aug. 29, 2006)). In effect, the class consists of all policyholders who received more than 10 shares of stock, or more than \$142.50 in cash or policy credits, in the demutualization (except those who opted out and certain persons associated with defendants).

Pursuant to the court's August 2, 2008 Order, Docket Entry No. 358, individual notice was mailed to approximately 6.7 million members of the class with known addresses that could be obtained through reasonable efforts, in addition to publication notice and the establishment of a toll-free number and a dedicated website. See Oct. 20, 2009 Decl. of Eric H. Newman Regarding Distribution of Notice of Pendency, Docket Entry No. 503; Oct. 16, 2009 Decl. of Daniel R. Burke, Docket Entry No. 503–1 (describing work done by Gilardi & Co. LLC to distribute notice of pendency to the class). MetLife has represented that it understands that nearly 13,000 class members submitted timely exclusions. See MetLife's Dec. 28, 2009 Mem. of Law in Supp. of Approval of the Settlement and in Response to Objections at 10, Docket Entry No. 578 ("MetLife Mem.").

In the *Fiala* state action, a class was certified as to the section 7312 cause of action only and denied as to the common-law fraud cause of action. See *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/1812, 2006 WL 6190175 (N.Y.Sup.Ct. May 2, 2006), *aff'd as modified*, 52 A.D.3d 251, 859 N.Y.S.2d 426 (N.Y.App.Div.2008) (removing plaintiff Smilow as a class representative). The class in *Fiala* consists of

[a]ll Eligible Policyholders of
MetLife, who owned and had

in force, as of September 28, 1999, life insurance policies, annuity contracts, or accident and health insurance policies issued by MetLife, or other certificates of interest identified in the Plan. The Class will exclude therefrom the defendants, their officers, directors, subsidiaries, affiliates and legal representatives, and those who request exclusion from the Class within a specified time after notice to be set forth in a further order of this Court.

Order, *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/00 (N.Y.Sup.Ct. Mar. 12, 2008) (Ex. K to Micarelli Aff.).

The New York Supreme Court, after considering the substantial expense of individually notifying the class members of the *Fiala* suit, ordered notice by publication in the *Wall Street Journal* and the *New York Post* once per week for three weeks, and notice by mail to a random sample of 500,000 class members. See *322 *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/2000, 2007 N.Y. Slip Op. 51797(U), 17 Misc.3d 1102(A), 2007 WL 2772230, at *2–3 (N.Y.Sup.Ct. Aug. 28, 2007). Notice was given in accordance with the court's instructions. See Decl. of Alan Vasquez Re: Notice Procedures, *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/2000 (N.Y.Sup.Ct. July 25, 2008) (Ex. M to Micarelli Aff.). All class members had at least 45 days to request exclusion from the class. See Ex. M. to Micarelli Aff. (attaching copies of published notice). MetLife has represented that it understands that 256 class members submitted timely exclusions in *Fiala*. See MetLife Mem. at 10.

G. Discovery and Preparation for Trial

Over the course of nearly eight years, the parties engaged in extensive discovery. More than 50 depositions were taken in the two actions, and hundreds of thousands of pages of documents were produced. Finnegan Aff. ¶ 7. Over sixty thousand pages were designated as trial exhibits in the instant case. *Id.* The parties in both cases retained experts, who were prepared to testify on issues involved in the cases. *Id.* Trial in the instant action was bifurcated into liability and damages phases, see Oct. 15, 2009 Order, Docket Entry No. 498 ("Oct.

15, 2009 Order”). Trial on the liability phase was due to begin on November 2, 2009.

H. Settlement Negotiations

There had been, from time to time since this case and the *Fiala* case were filed, discussions between the parties regarding the possibility of settling one or both cases. These discussions, both between the parties alone and before U.S. Magistrate Judge A. Kathleen Tomlinson, United States District Judge Thomas C. Platt, and New York Supreme Court Justice Herman Cahn (then in charge of the state case), did not lead to any agreement on settlement prior to October 2009. *See* Finnegan Aff. ¶¶ 8–9.

After the case was reassigned to the undersigned, on the disability of Judge Platt, by Order of October 16, 2009, Docket Entry No. 501, Richard J. Davis, Esq., a prominent member of the law firm of Weil, Gotshal & Manges LLP, was appointed as Special Master to facilitate settlement. Mr. Davis acted as mediator between the parties, discussing settlement with the representatives of each of them. *See* Finnegan Aff. ¶ 9.

Jury selection in this case was completed on Friday, October 30. *See* Oct. 30, 2009 Minute Entry, Docket Entry No. 547. Trial was scheduled to start on Monday, November 2.

On the evening of Saturday, October 31, 2009, after two weeks of arm's length negotiations, the parties reached agreement, with the help of Mr. Davis, on the basic terms of a settlement, including amount and structure. *See* Finnegan Aff. ¶ 10. Mr. Davis put the terms of the parties' agreement in principle on the record on November 2, and recommended approval of the settlement. *See* Nov. 4, 2009 [Mem. and Order Regarding Notice and Hearing on Approval of Proposed Settlement 5](#), Docket Entry No. 536 (*In re MetLife Demut. Litig.*, 262 F.R.D. 205 (E.D.N.Y.2009)) (the “Nov. 4, 2009 Order”). The parties submitted a Stipulation of Settlement to both the state and federal courts for approval on November 5, 2009. *See* Stip. of Settlement, Docket Entry No. 539–2 (the “Settlement”).

I. Terms of Settlement

The proposed Settlement provides for a total allocation of \$50 million by defendants in the federal and state cases, combined. Settlement ¶ 15. This sum is deemed to be characterized as compensatory money damages by the parties.

*323 Distribution will be made as follows: (i) \$2,500,000 will be paid in cash as a *cy pres* payment to a health-based or other not-for-profit organization or organizations; (ii) reasonable attorneys' fees and litigation expenses of the classes, as determined by this court and the *Fiala* court, will be paid in cash up to \$15 million; and (iii) the remainder will be allocated in assets to the closed block established by the Plan of Reorganization. *See* Settlement ¶¶ 16–20. In exchange for these allocations, the proposed Settlement releases all claims of the plaintiffs and class members asserted in the state and federal cases, as well as any other claims concerning the demutualization and related transactions. *Id.* ¶¶ 21–22.

J. Notice of Settlement

Notice by publication was approved by the court. *See* Nov. 4, 2009 Order at 2–5 (*In re MetLife Demut. Litig.*, 262 F.R.D. 205, 207–08 (E.D.N.Y.2009)); Nov. 6, 2009 Order Approving Form of Class Notice, Docket Entry No. 540. The same notice was approved in the *Fiala* case by orders of November 5 and 6, 2009. *See* Order Regarding Notice & Hearing on Approval of Proposed Settlement at 2, *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/2000 (N.Y.Sup.Ct. Nov. 5, 2009) (Ex. O to Micarelli Aff.); Order Approving Form of Class Notice, *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/2000 (N.Y.Sup.Ct. Nov. 6, 2009) (Ex. Q to Micarelli Aff.). The orders approving notice in this action and the *Fiala* state action directed notice to be made four times (twice per week for two weeks) in each of the *New York Times*, the *Wall Street Journal*, the *New York Law Journal*, and *USA Today*. *See, e.g.*, Nov. 4, 2009 Order at 3 (*In re MetLife Demut. Litig.*, 262 F.R.D. at 207).

A joint hearing on the fairness of the proposed Settlement was scheduled for December 30, 2009 at the United States Courthouse in Brooklyn. A December 24, 2009 deadline was set for the receipt of written objections to the proposed Settlement by class members. *See, e.g.*, Nov. 4, 2009 Order at 4 (*In re MetLife Demut. Litig.*, 262 F.R.D. at 207). Notice was published as required on November 12, 13, 17 and 19, 2009. *See* Finnegan Aff. ¶ 2 & Exs. A–1 to A–16 (copies of notice as published). Notice also was given to the Superintendent of Insurance. *Id.* ¶ 3. The form of notice and the Stipulation of Settlement were made available on the “Notices” page of the Eastern District of New York's website, which is reachable by a link from the court's home page, the address of which was included in the published notice. *Id.* ¶ 4.

K. Objections

Five objections were submitted on behalf of six class members, by (1) Steven Waldman, (2) John J. Pentz, Jr. and Thomas Sterrett Bell, (3) Robert Gould, (4) Christopher J. Mueller, and (5) Lawrence Kuczynski. Actuary Thomas P. Tierney made an additional submission at the request of Mr. Mueller and in support of Mr. Mueller's objection. Several of these objections may have been submitted after December 24, 2009. Several of them may be directed only to the instant action or to the *Fiala* action, but not both. Setting aside issues of timeliness and treating all objections as directed to both actions, none of the objections warrants denial of approval of the proposed Settlement. *See* Part IV.F, *infra*.

III. Hearings on Proposed Settlement and Related Applications

A. Trial and November 2, 2009 Preliminary Fairness Hearing

Trial commenced in this action on Monday, November 2, 2009, with the swearing *324 in of a jury. *See* Nov. 4, 2009 Order at 1 (*In re MetLife Demut. Litig.*, 262 F.R.D. at 206). Out of the presence of the jury, the court requested a report from Special Master Richard J. Davis, Esq. Mr. Davis reported that the parties had agreed to a joint settlement of this action and the *Fiala* action. *Id.* at 2. With the parties' consent the jury was then dismissed. *Id.* Counsel for the plaintiffs in this action, counsel for the plaintiffs in *Fiala*, and counsel for MetLife all confirmed on the record that all parties had agreed to the terms of the proposed Settlement. *Id.* at 3. Terms of the settlement were read into the record. *Id.* at 2–3.

State and federal civil rules authorize, but do not require, a court to conduct a preliminary review of the settlement agreement for probable reasonableness before notice is sent to the class. Based on the information available as of November 2, 2009, it was found probable that the settlement was fair, reasonable, and adequate. *Id.* at 5. In making this preliminary finding, the court relied upon key documents in the record, and upon an extended series of hearings held and rulings made in preparation for trial. *Id.*

In particular, this court made preliminary findings, which were stated on the record and summarized in the Nov. 4, 2009 Order as follows:

The Special Master for settlement, Richard J. Davis, is a distinguished and experienced counsel appointed at the parties' unanimous suggestion. The Special Master has

engaged in extensive discussions with the parties. He recommends approval of the settlement.

This case and *Fiala* have been pending for some nine years. During that time, the facts and the law have been thoroughly explored under adversarial conditions. There has been extensive litigation in the trial court and Appellate Division in the state case and in the District Court and Court of Appeals for the Second Circuit in the federal case, including, among other matters, summary judgment, class certification, and an attempted appeal of certification of a class.

Settlement negotiations have been conducted at arm's length, after full discovery. Counsel for the parties are experienced in similar litigation. They have been able to accurately assess the merits of their positions and to determine what is a reasonable settlement.

Several considerations are relevant to whether a settlement is fair, reasonable and adequate. First is the strength or weakness of the case on the merits, in comparison to the amount offered in settlement. The state substantive law on corporate functions and on demutualization has a strong bearing on the case, but the substance of this case is controlled by federal substantive statutes and the regulations of the Securities and Exchange Commission. The parties appear to have reached an appropriate balance of risks and benefits for all of those involved in this complex litigation. The total settlement amount and its division recognizes this practical balance in a pragmatic way. It provides advantages to all parties at relatively small additional cost to any of them. The cy pres portion of the settlement provides indirect benefit to those relatively few members of the class who will not benefit from the closed block portion of the settlement. That latter portion of the settlement will benefit a large number of class members who hold policies, without substantially adversely affecting shareholders of defendant.

The second consideration is whether there has been collusion. There has been no evidence of collusion. Each *325 side has been strongly opposed by the other.

A third element is the reaction of the class members to the settlement. The courts will decide this matter based upon the hearing on approval of the settlement. It is expected that the number of objections will be minimal relative to the size of the class.

A fourth criterion is the stage of the litigation. Here the cases are fully matured. The parties conducted discovery in a highly skillful and thorough manner. This case was settled as the trial began. All parties were thoroughly prepared on the law and the facts.

An additional factor in determining the fairness of the settlement is the amount of the class counsel's fees. The state and federal courts will ensure that the fees of the state and federal plaintiffs' counsel are reasonable. Plaintiffs' counsel shall inform the court of any agreement as to division of fees. The communication may be filed under seal, with the understanding that the documents may be unsealed by order at any time.

The courts will approve the settlement only after a hearing and a finding that the settlement is fair, reasonable and adequate. The only finding that the courts are making now is that approval is probable, based on the available information, subject to a further hearing.

Any agreement between or among the parties or counsel bearing on the settlement's reasonableness shall be filed with this court. Filing may be under seal, subject to the courts' power to order unsealing.

Where, as here, a class action has been certified and class members have had a previous opportunity to request exclusion by opting out of the class, the court may afford individual class members a new opportunity to request exclusion, but it is not required to do so. In the present cases there shall not be provided a second opportunity for exclusion. The administration of any new exclusions procedure would be expensive. The number of policyholders who would opt out now, after failing to exclude themselves previously, is likely to be minimal to the vanishing point.

Id. at 5–8 (*In re MetLife Demut. Litig.*, 262 F.R.D. at 208–09).

The state and federal courts set a combined schedule and procedures for: submission of a proposed Stipulation of Settlement; notice to class members; objections by class members to the proposed Settlement; and a hearing on the fairness of the proposed Settlement. This schedule and procedure were summarized in the November 4, 2009 Order of this court as follows:

The courts direct the parties to submit a proposed Stipulation of Settlement and a proposed Order regarding

notice to the class members not later than November 5, 2009. The notice will be published in a form to be set out in the proposed Order, twice in the week of November 9 and twice in the week of November 16, in each of *USA Today*, *The Wall Street Journal*, *The New York Times*, and *The New York Law Journal*. The notice shall be combined for this action and the *Fiala* action. The defendants shall give notice of the settlement, no later than November 19, 2009, to the Superintendent of Insurance of the State of New York.

...

Arranging for notice by publication to class members and to the Superintendent of Insurance shall be defendants' responsibility. In accordance with the parties' agreement and the courts' discretion, the defendants shall bear the ***326** costs of notice. Plaintiffs' counsel shall cooperate with defendants to facilitate the giving of notice. Counsel for the defendants shall notify the court promptly after notice has been completed.

Class members' objections to the settlement shall be in writing received by the Clerk of this court or of the New York Supreme Court, New York County, not later than December 24, 2009, or orally at the fairness hearing.

...

The joint fairness hearing shall be held in the United States Courthouse in Brooklyn, New York, on December 30, 2009 at 10:00 A.M. The parties shall submit a proposed order of approval of the settlement prior to December 31, 2009. The two courts will make a joint final decision on whether or not to approve the settlement as soon as practicable thereafter.

In accordance with the broad discretion in directing class notice under the Federal Rules of Civil Procedure and the New York Civil Practice Law and Rules, notice shall be given in a reasonable manner. Reasonable notice shall include the time and place of the hearing, the time and method for making objections and enough information about the proposed settlement to permit class members to form objections in an informed manner.

The best practicable notice under the circumstances is notice by publication in newspapers. In view of the millions of members of the class, notice to class members by individual postal mail, email, or radio or television advertisements, is neither necessary nor appropriate. The publication notice ordered is appropriate and sufficient

in the circumstances. The timeline for notice provides reasonable, appropriate and ample opportunity for class members to oppose the settlement if they wish to do so. *See County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. 1422, 1424 (E.D.N.Y.1989).

Id. at 3–5 (*In re MetLife Demut. Litig.*, 262 F.R.D. at 207–08).

With the consent of the parties, the undersigned and the Honorable Shirley Kornreich, Justice of the New York Supreme Court, consulted in private. *Id.* at 4. The judges and the parties agreed that all of those concerned waived any venue and jurisdiction objections to a joint hearing on the settlement of this action and the *Fiala* action in the Eastern District of New York and of the instant action in New York County. *Id.*

B. December 30, 2009 Fairness Hearing

Argument on the fairness of the proposed Settlement was heard on December 30, 2009 in a joint hearing before this court and Justice Shirley Kornreich of the New York Supreme Court in the United States District Courthouse in Brooklyn. The New York State Department of Insurance was notified of the hearing, and acknowledged receipt of the notice. Dec. 30, 2009 Hr'g Tr. at 9. The case docket and the ordered hearing notice were electronically available to the United States Attorney's Office and the Securities and Exchange Commission; those offices were deemed to have been notified and to be aware of the hearing. *Id.* at 9–10. No representative of the New York Insurance Department or of any agency of the United States government appeared at the hearing.

1. History of Litigation, Discovery and Readiness for Trial

United States magistrate judge A. Kathleen Tomlinson addressed the history of the litigation, the state of discovery, and *327 the readiness of the case for trial. *Id.* at 7–8. Magistrate judge Tomlinson had supervised discovery and preliminary motions in the case starting in 2006. In connection with her involvement in the case, she reviewed and became familiar with the full history of the litigation. *Id.* at 7. The magistrate judge reported that discovery in this case had been comprehensive and complete. *Id.* at 8. She noted that a pretrial order had been submitted, that the case had been ready for trial, and that a jury had been summoned and empanelled prior to the parties' reaching a settlement. *Id.*

2. Arguments of Parties

Arguments were heard in support of the settlement by counsel for the plaintiffs in this case, by counsel for the plaintiffs in *Fiala*, and by counsel for MetLife. *Id.* at 13–20. All of the parties acknowledged the critical role played in settlement negotiations by Special Master Richard Davis. It was emphasized by both parties in the instant case that the proposed Settlement's use of the closed block to allocate settlement funds “ensures that the maximum amount of settlement funds will go to the benefit of the class and not be consumed through things such as administration of the settlement.” *Id.* at 19 (statement of MetLife's counsel); *see id.* at 19–20 (statement of federal class counsel) (placing funds in the closed block is the most efficient way to distribute funds to the class).

3. Statements of Objectors

Objectors Robert A. Gould and Lawrence Kuczynski, were not present at the hearing. *Id.* at 32, 34.

a) Thomas Sterrett Bell and John J. Pentz, Jr.

Objectors Thomas Sterrett Bell and John J. Pentz, Jr. were heard through counsel. *See id.* at 21–32. Mr. Bell and Mr. Pentz's objection was made only in the instant action, not in the *Fiala* action. *Id.* at 23.

A possible conflict between Mr. Bell and Mr. Pentz was noted. *Id.* at 22. Counsel was permitted to proceed for purposes of this argument only, based upon counsel's conclusion that no conflict existed that would prevent him from representing both Mr. Bell and Mr. Pentz. *Id.* at 22–23.

It was argued that the proposed Settlement was insufficient for all class members, in light of the class's potential recovery at trial. In particular, with respect to class members who are not current policyholders, recovery in the form of the \$2.5 million *cy pres* payment was said to be inadequate. *See id.* at 23–24.

b) Steven Waldman

Objector Steven Waldman was heard through counsel. *See id.* at 32–34. Mr. Waldman's objection was made in both the instant action and the *Fiala* action. *Id.* at 32.

Counsel for Mr. Waldman stated that MetLife's written submission in response to his objection had “in effect” made changes to the settlement. *Id.* at 33. It was argued that “[a]s a result of the objection, MetLife has come forward and said things they probably otherwise would not have said which they probably didn't want to say and this settlement has been improved based on this objection.” *Id.*

The objection was said no longer to be necessary. Counsel for Mr. Waldman withdrew his objection in both the *Fiala* action and, with permission of this court, the instant action. *Id.* at 33–34.

c) Thomas Tierney

Non-attorney Thomas Tierney appeared and stated that he had been asked to speak by objector Christopher Mueller, who had been unable to obtain counsel. *Id.* at 34. Mr. Tierney was requested to ***328** make a written submission on behalf of Mr. Mueller within ten business days. *Id.*

4. Statement of State Plaintiff Mark Smilow

Class member Mark Smilow appeared through counsel. *See id.* at 36–37. Mr. Smilow was not an objector, but he wished to be heard with respect to applications for incentive awards by named plaintiffs in the *Fiala* action. Mr. Smilow's counsel reserved argument until the February 9, 2009 hearing on applications for fees, expenses, and compensation. *Id.*

5. Continuance of Hearing

The December 30, 2009 fairness hearing was continued until February 9, 2009, in the Supreme Court, New York County, for argument on applications for attorneys' fees and expenses and other compensation. A deadline of February 5, 2009 was set for submission of any objections to applications for fees, expenses, or other compensation. *Id.* at 38. MetLife was ordered to issue a press release announcing continuance of the hearing and the schedule for objections and arguments. *Id.* at 39; *see also* Dec. 30, 2009 Mem. and Order of Hearing on Fees, Expenses, and Incentive Awards, Docket Entry No. 585.

C. February 9, 2009 Hearing on Applications for Fees, Expenses, and Compensation

Argument on individual plaintiffs' compensation applications and counsel's applications for fees and expenses was heard on February 9, 2010 in a joint hearing before this court and the New York Supreme Court, in the New York State Courthouse at 60 Centre Street in Manhattan. Prior to the hearing written submissions were received.

The parties were represented at the hearing. Mark Smilow, a plaintiff in the state case, was present with separate counsel. Also present was a representative of objector Steven Waldman.

Waldman's counsel and the parties were heard on Waldman's application for attorneys' fees. *See* Feb. 9, 2010 Hr'g Tr. at 4–7. Class counsel's applications for fees and expenses were addressed by the parties. *Id.* at 7–9. Mr. Smilow and the parties were heard on individual plaintiffs' applications for compensation. *Id.* at 9–24. No other person requested to be heard on these or any other subject. The parties were directed to submit to the state and federal courts an agreed upon short form judgment incorporating the payment decisions described in the present document. *See id.* at 24–32; *see also* Part VII, *infra*.

IV. Law and Application of Law to Facts

The Federal Rules of Civil Procedure require a court that has certified a class to approve any proposed settlement as “fair, reasonable, and adequate.” [Rule 23\(e\)](#) provides:

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or *329 compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

Pursuant to Rule 23(e), reasonable notice was given to class members, informing them of the proposed Settlement and their right to object. Evidentiary hearings were held to consider the fairness of the proposed Settlement and related applications. Class members who objected to the proposed Settlement made written submissions. Objectors were provided the opportunity to be heard at the December 30, 2009 fairness hearing, and several objectors were heard through counsel. This court and the *Fiala* court jointly received and fully considered extensive evidence on the merits of the proposed Settlement and related applications.

Based upon consideration of that evidence and of the extensive records in this case and the *Fiala* case, the proposed Settlement is found to be fair, adequate, and reasonable. The settlement is approved in this case, subject to the New York Supreme Court's concurrent approval of the settlement in the *Fiala* state action.

A. Standard of Review

The federal court must determine that the settlement is “fair, reasonable, and adequate” before it may approve it. Fed.R.Civ.P. 23(e)(2); see *McReynolds v. Richards–Cantave*, 588 F.3d 790, 803 (2d Cir.2009). “Whether to approve a settlement normally rests in the discretion of a district judge.” *Denney v. Deutsche Bank AG*, 443 F.3d 253, 273 (2d Cir.2006); see also *McReynolds*, 588 F.3d at 800 (“A district court's determination that a settlement in a class action lawsuit is ‘fair, reasonable, and adequate,’ ... is reviewed for abuse of discretion.”).

In its exercise of that discretion, the court must engage in careful balancing. “The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.” *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir.1974), *abrogated on other grounds*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000).

It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement.... Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.

Id. (original ellipsis; quoting *Young v. Katz*, 447 F.2d 431, 433 (5th Cir.1971)); see also *In re Luxottica Group S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y.2006) *330 (quoting *Grinnell*); *Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 361 (S.D.N.Y.2002) (quoting *Grinnell*).

In making its fairness determination, the Court should consider both the process by which the settlement agreement was negotiated and the substantive fairness of the agreed-upon terms in light of the circumstances of the litigation. See, e.g., *McReynolds*, 588 F.3d at 803–04; *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85–86 (2d Cir.2001); *Farinella v. Paypal, Inc.*, 611 F.Supp.2d 250, 264–68 (E.D.N.Y.2009). “[G]reat weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.” *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 576 (S.D.N.Y.2008) (internal quotation marks omitted).

There is a “strong judicial policy in favor of settlements, particularly in the class action context.” *McReynolds*, 588 F.3d at 803; see also *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir.1998) (same); *In re WorldCom, Inc. Sec. Litig.*, 388 F.Supp.2d 319, 337 (S.D.N.Y.2005).

("[P]ublic policy favors settlement, especially in the case of class actions." (citing *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir.1982)). "[C]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Top Tankers, Inc. Sec. Litig.*, No. 06 Civ. 13761, 2008 WL 2944620, at *3 (S.D.N.Y. July 31, 2008) (quoting *In re Luxottica Group S.p.A. Sec. Litig.*, 233 F.R.D. at 310).

Approval of a class action settlement under New York law similarly requires a determination of whether the proposed Settlement is "fair, reasonable, and adequate." *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 70, 808 N.Y.S.2d 766 (N.Y.App.Div.2006) (citing *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir.1982)); see also *Colt Indus. Shareholder Litig. v. Colt Industries, Inc.*, 77 N.Y.2d 185, 565 N.Y.S.2d 755, 566 N.E.2d 1160, 1167 (1991); N.Y. C.P.L.R. 908 (requiring court approval but not specifying a standard).

B. Presumption of Fairness

There is "a presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement is reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *McReynolds*, 588 F.3d at 803 (internal quotation marks and alteration omitted); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir.2005) (same); see also *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d at 576 ("[A] strong presumption of fairness attaches to a class action settlement reached in arm's-length negotiations among able counsel.").

The lengthy history of this hard-fought litigation justifies a presumption of fairness. "[T]here could not be any better evidence of procedural integrity than the aggressive litigation spanning nearly a decade and the impassioned settlement negotiations that produced an agreement on the brink of trial, ... collusion or coercion could not conceivably have tainted the process." *Wal-Mart Stores*, 396 F.3d at 117 (internal quotation marks and alteration omitted).

As detailed above, over the course of this decade-old case, the parties have engaged in comprehensive discovery and motion practice, before both trial and appellate courts. See Parts II.E–G, *supra*. Experienced, highly-qualified counsel have represented both parties. The quality of counsel's work has been outstanding. After repeated efforts to negotiate a settlement at various stages in the litigation, *331 Special Master Richard Davis, a prominent law firm partner and

mediator, guided the parties through extensive arm's-length discussions on the eve of trial that culminated in the proposed Settlement. See Part II.H, *supra*.

There is no indication of any collusion. The proposed Settlement leaves the amount of attorneys' fees to the discretion of the federal and state courts. It provides that "[a]n award of attorneys' fees or litigation expenses is not a necessary term of this Stipulation of Settlement and is not a condition of settlement." Settlement ¶ 16(b). "[B]ecause class counsel left the issue of attorney's fees to the discretion of the District Court, there was no indication that the Settlement was the product of bad faith or collusion." *McReynolds*, 588 F.3d at 804 (internal quotation marks omitted).

The presumption of fairness is particularly strong in the present case because the Superintendent of Insurance supervised and approved the procedures for demutualization used by MetLife. In an analogous case, the Securities and Exchange Commission supported a corporation's omission of information in registration and prospectus statements. The Commission "opined" that the law did not require "defendants to disclose the information that plaintiffs allege was omitted." The Court of Appeals for the Second Circuit held that "the Commission's position ... is entitled to judicial deference [and is] persuasive." See *In re Morgan Stanley Information Fund Sec. Litig.*, 592 F.3d 347, 352 (2d Cir.2010).

Based on extensive discussions with the parties, Special Settlement Master Davis, a skilled neutral, recommended approval of the settlement as fair and reasonable. See Nov. 4, 2009 Order at 5 (*In re MetLife Demut. Litig.*, 262 F.R.D. at 208).

C. Criteria for Approval of Settlement

The factors to be considered by a district court in making a Rule 23(e) fairness determination are:

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class action through trial;
- (7) the ability

of the defendant to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463 (citations omitted); *see also McReynolds*, 588 F.3d at 804; *In re Currency Conversion Fee Antitrust Litig.* 263 F.R.D. 110, 122–23 (S.D.N.Y.2009). In applying these factors, “not every factor must weigh in favor of the settlement, but rather the court should consider the totality of these factors in light of the particular circumstances.” *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d at 575 (internal quotation marks omitted).

Even setting aside the presumption of fairness that applies in this case, *see* Part IV.B, *supra*, the facts and law strongly support a finding that the proposed Settlement is fair, reasonable, and adequate in all respects.

1. Complexity, Expense, and Likely Duration of Litigation

The complexity, expense, and likely duration of the litigation favor the proposed Settlement.

This case involves complex legal and factual issues. This complexity is reflected *332 in the many fully-briefed motions argued in the District Court and the Court of Appeals for the Second Circuit in the nine years since the original complaint was filed. *See e.g., In re MetLife Demutualization Litig.*, 156 F.Supp.2d 254 (E.D.N.Y.2001) (denying MetLife's motion to dismiss); *In re MetLife Demutualization Litig.*, 322 F.Supp.2d 267 (E.D.N.Y.2004) (denying MetLife's second motion to dismiss); *In re MetLife Demutualization Litig.*, 229 F.R.D. 369 (E.D.N.Y.2005) (certifying plaintiff class), *pet. for interlocutory appeal denied* No. 05–8020 (2d Cir. Mar. 29, 2009); *In re MetLife Demutualization Litig.*, 624 F.Supp.2d 232 (E.D.N.Y.2009) (denying cross-motions for partial summary judgment); Order Regarding Motions In Limine, *In Re MetLife Demutualization Litig.*, No. 00–cv–2258 (E.D.N.Y. Oct. 30, 2009) (Docket Entry No. 537).

Were it not for the settlement, the case would have continued to be fiercely contested. MetLife has demonstrated a commitment to defend the case through and beyond trial, if necessary. The liability phase of trial was projected to last several weeks and would have occupied many attorneys for each party. The parties' witness lists contemplated potential testimony from nearly forty witnesses, including four experts, and over sixty thousand pages of documents had been designated as trial exhibits. *See Micarelli Aff.* ¶ 5. The proof on many disputed issues—which involve complex financial concepts—would likely have included a battle of experts, leaving the trier of fact with difficult questions to resolve. *See* Oct. 15, 2009 Order at 3 (stating court was disinclined to grant parties' *Daubert* motions to exclude expert testimony).

In the event that the plaintiffs prevailed in the liability phase, a damages phase of the trial would then follow. *See* Oct. 15, 2009 Order (bifurcating trial into liability and damages phases). Regardless of the outcome at trial, post-trial motions and an appeal by the losing party were likely, possibly followed by a new trial in the event of a reversal. *See In re Crazy Eddie Sec. Litig.*, 824 F.Supp. 320, 324 (E.D.N.Y.1993) (detailing risks of further litigation and delay in absence of settlement). “[V]ictory—even at the trial stage—is not a guarantee of ultimate success.” *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y.1993) (noting that likelihood of appeals and resultant delay favored settlement). The litigation would have been likely to continue for many more years. There was a serious risk of no recovery for the classes and an insubstantial risk of billions in damages for defendants.

The *Fiala* state case presents similar complexities. *See* Part II, *supra* (citing decisions on significant motions over the course of the case). As in the federal case, expensive litigation would have been likely to drag on for an extended period. MetLife's summary judgment motion was pending. Regardless of the outcome of that motion, an appeal, either interlocutory or otherwise, was likely. If summary judgment were denied, there would then be a trial, perhaps comparable to the federal trial in length and complexity. There would then be a likely appeal, possibly followed by a new trial or trials.

The proposed Settlement provides an immediate and certain benefit to members of the classes. Avoided are the substantial burdens and costs that continued and uncertain litigation would impose on the parties, non-party witnesses, and the courts. Delay at the trial stage and through post-trial motions and the appellate process might have forced class members

to wait years longer for any recovery. This would have increased the fees and expenses of plaintiffs' counsel and reduced the value of *333 any award to the class. Settlement of this action before significant additional resources have been expended benefits the class. Class members will receive compensation now rather than rely on an uncertain recovery of an unknown sum at some point in the future.

The possibility of an adverse result to defendant was minimal. But the overhanging possibility of a huge award could not be ignored by responsible persons. And the cost of the litigation and lost time of executives of MetLife would likely be no less than the cost of the settlement.

2. Favorable Reaction of Class

The reaction of the class members favors the proposed Settlement.

"It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy. In fact, the lack of objections may well evidence the fairness of the Settlement." *Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d at 362 (citations and internal quotation marks omitted); see also *In re Am. Bank Note Holographics*, 127 F.Supp.2d 418, 425 (S.D.N.Y.2001) (same).

This proposed Settlement has been well received by the class: Five objections to the proposed Settlement were submitted by six of the approximately 11 million members of the federal and state classes—a rate of objection of well below .000001%. This ratio of objectors compares favorably with settlements approved in other class actions. See, e.g., *Wal-Mart Stores*, 396 F.3d at 118 (settlement is fair where "[o]nly eighteen class members out of five million objected to the Settlement"); *In re Sony SXRDRear Projection Television Class Action Litig.*, No. 06 Civ. 5173, 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) ("Of approximately 175,000 class members, only 22 (0.0126%) have chosen to opt out of the class, and only 45 have voiced objections. The small number of opt-outs and objections relative to the size of the class in this case supports approval of the Settlement."); *In re AOL Time Warner ERISA Litig.*, No. 02 Civ. 8853, 2006 WL 2789862, at *6 (S.D.N.Y. Sept. 27, 2006) (settlement warrants approval where, of a putative class of approximately 65,000 members, "the Court received only two objections, and only one directed at the nature of the Settlement or the Class");

In re Am. Bank Note Holographics, 127 F.Supp.2d at 425 (settlement warrants approval where there were no objections and five shareholders sought exclusion out of a class of more than 5,000 members).

Objections to the proposed Settlement were addressed in briefs submitted by the parties. In light of the parties' responses, one of the five objections was withdrawn at the December 30, 2009 fairness hearing. See Part III.B.3.b, *supra*. The substance of class members' objections is addressed below. See Part IV.F, *infra*.

3. Stage of Proceedings and Amount of Discovery Completed

The stage of the proceedings and the amount of discovery favor the proposed Settlement.

"This factor relates to whether the plaintiffs had sufficient information on the merits of the case to enter into a settlement, and whether the Court has sufficient information to evaluate such a settlement." *Parker v. Time Warner Entertainment Co., L.P.*, 631 F.Supp.2d 242, 259 (E.D.N.Y.2009) (citation omitted). "If all discovery has been completed and the case is ready to go to trial, the court obviously has sufficient evidence to determine the adequacy of settlement." *Wal-Mart Stores*, 396 F.3d at 118 (internal quotation marks omitted; quoting 4 *Alba Conte & Herbert B. Newberg, Newberg on Class Actions* § 11:45, at 129 (4th ed.2002)). Extensive *334 discovery ensures that the parties have had access to sufficient material to evaluate their case and to assess the adequacy of the settlement proposal in light of the strengths and weaknesses of their positions. See *Parker*, 631 F.Supp.2d at 259.

The parties were at an advanced stage in the case, and fully prepared for trial. They were able to make an informed decision on the merits of the Settlement. Defense and class counsel have "had sufficient information to act intelligently." *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y.1997). The court has sufficient evidence to determine the adequacy of the Settlement.

After over nine years of litigation, the parties agreed to the proposed Settlement just as trial in the federal case was beginning, and when summary judgment after close of discovery in the *Fiala* state case was pending. The parties engaged in thorough and exhaustive discovery. Plaintiffs took over 50 depositions and obtained hundreds of thousands of

pages of documents in discovery. *See* Part II.G, *supra*. Both plaintiffs and defendants retained experts who reviewed and opined on the merits of the case. *Id.* The parties briefed and argued a motion to dismiss, motions for summary judgment, a motion for class certification, and others. *See* Part II, *supra* (citing trial and appellate court decisions on parties' motions).

Critical evidentiary rulings on the parties' motions in limine in the weeks before trial in this action served to clarify the parties' relative likelihood of success. *See, e.g.*, Oct. 15, 2009 Order. After extensive briefing and argument, the Superintendent's Order approving the Plan of demutualization was ruled admissible as non-hearsay evidence of MetLife's scienter—a critical factual issue. *See* Nov. 24, 2009 Mem. and Order on Admissibility of New York Insurance Superintendent's Opinion, Docket Entry No. 555 (“Nov. 24, 2009 Order”). It was determined that the information MetLife was supplied by the Superintendent and his advisors, and transmitted to potential voters, was central to the defendants' state of mind. *Id.* at 4. “This evidentiary ruling favoring defendants [made] it almost impossible for plaintiffs to prove their case.” *Id.*

4. Risks of Establishing Liability and Risks of Establishing Damages

The risks of establishing liability and risks of establishing damages favor the proposed Settlement. The risk that plaintiffs would fail to establish liability or damages was high.

“The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.” *American Medical Ass'n v. United Healthcare Corp.*, No. 00 Civ. 2800, 2009 WL 4403185, at *4 (S.D.N.Y. Dec. 1, 2009) (quoting *Grinnell*, 495 F.2d at 455). In making this evaluation, “the Court's primary concern is with the substantive terms of the settlement and how they compare to the likely result of a trial.” *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y.2004) (internal quotation marks omitted).

The essence of a settlement agreement is compromise, “a yielding of absolutes and an abandoning of highest hopes.” *United States v. N.Y. City Bd. of Educ.*, 85 F.Supp.2d 130, 157 (E.D.N.Y.2000) (quoting *Milstein v. Werner*, 57 F.R.D. 515, 524–25 (S.D.N.Y.1972)). Each side gains the benefit of immediate resolution of the litigation and some

measure of vindication for its position while foregoing the opportunity to achieve an unmitigated victory. *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir.1985) (citing *335 *United States v. Armour & Co.*, 402 U.S. 673, 681, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971); *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 429 (7th Cir.1977); and *United States v. Jackson*, 519 F.2d 1147, 1152 (5th Cir.1975)).

In re Luxottica Group S.p.A. Sec. Litig., 233 F.R.D. at 316. “The fact that the class potentially could have achieved a greater recovery at trial is not dispositive and does not preclude the court from finding that the settlement is within a ‘range of reasonableness’ that is appropriate for approval.” *Id.* The apparent weakness of plaintiffs' claims in this action has been repeatedly noted. In denying MetLife's motion to dismiss the original complaint, Judge Platt observed that the only remedy available under section 12(a)(2) of the Securities Act for plaintiffs who retained their stock was rescission in exchange for the purchase price. July 23, 2001 Mem. and Order, Docket Entry No. 34 (*In re MetLife Demut. Litig.*, 156 F.Supp.2d 254, 269 (E.D.N.Y.2001)). This could result in no damages to most of the class because the stock price rose above what plaintiffs said their interests had been worth. In denying summary judgment, Judge Platt stated that MetLife had “strong factual support for its argument that it conducted its demutualization properly,” and that plaintiffs' “theories appear increasingly desperate in light of the factual record accumulated so far.” May 27, 2009 Mem. and Order 52, Docket Entry No. 386 (*In re MetLife Demut. Litig.*, 624 F.Supp.2d 232, 264 (E.D.N.Y.2009)). It was noted that “[i]t appears that the demutualization process has been an overall boon to policyholders, at least insofar as those who took stock have seen the price of the stock rise appreciably and have also kept the benefits of their life insurance policies.” *Id.* at 53 (624 F.Supp.2d at 264).

Shortly before trial, the court reiterated that that “[t]he defendants' evidence with respect to no fraud is very strong” and “[t]he defendants' view of no damages is very strong.” Oct. 13, 2009 Hr'g Tr. at 13:14–16. The ruling that the Superintendent's Opinion's was admissible at trial made “it almost impossible for plaintiffs to prove their case.” Nov. 24, 2009 Order at 4. Had the parties not reached a settlement, the court would be obliged to revisit the prior ruling denying MetLife's motion for summary judgment in light of the decision on admissibility of the Superintendent's Opinion.

a) Difficulty of Establishing Material Misrepresentation or Omission

Available to MetLife at trial were several strong defenses to plaintiffs' allegations of material misrepresentations or omissions.

First, plaintiffs alleged that the demutualization documents “misled policyholders regarding the value of the variable component of policyholder consideration in relation to the estimated value of policyholders' contribution to surplus, specifically, by omitting the fact that MetLife had calculated policyholders' contribution to surplus at over \$15 billion, while the value of the stock distributed to policyholders was less than \$10 billion.” Dec. 22, 2009 Mem. in Supp. of Final Approval of Settlement and Plan of Allocation of Settlement Proceeds at 7–8, Docket Entry No. 560 (“Fed. Pl. Mem.”); *see also* Am. Compl. ¶¶ 55–56.

Defendants proposed to argue that the “contribution to surplus” number was not a fund held by the company, but an actuarial estimate of the past and expected future profit that the company would earn from policies under certain assumptions. *See* MetLife Mem. at 17; *see also* Plan § 7.2. The figure is said not to have been used for the purpose of valuing the company, the company's stock, or the dollar *336 value of any particular policyholder's consideration. MetLife Mem. at 17 (citing Actuarial Standards Board, Actuarial Standard of Practice No. 37, *Allocation of Policyholder Consideration in Mutual Life Insurance Company Demutualizations* § 3.2.4 (June 2000), available at http://www.actuarialstandardsboard.org/pdf/asops/asop037_070.pdf (last accessed Dec. 28, 2009)). MetLife could also have argued that under no law, either state or federal, and in no transaction, has a demutualizing company been required to distribute to policyholders the full value of the contribution to surplus. *See* Fed. Pl. Mem. at 10.

Plaintiffs' theory was undermined by the court's finding that, as a matter of law, policyholders “were not ‘owners’ of the mutual insurance company.” Oct. 15, 2009 Order at 2; *see also* *Murray v. Metro. Life Ins. Co.*, 583 F.3d 173, 177 (2d Cir.2009) (“‘[I]n a mutual company ... the relation between the policy-holder and the company [is] one of contract, measured by the terms of the policy.’” (quoting *Uhlman v. N.Y. Life Ins. Co.*, 109 N.Y. 421, 17 N.E. 363, 365 (1888))).

Plaintiffs would have faced substantial difficulty in showing that the alleged misrepresentations or omissions relating to the “contribution to surplus” calculation were misleading or material to policyholders' vote on the demutualization. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 231, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (“An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” (internal quotation marks omitted)).

Second, plaintiffs alleged that the demutualization documents “misled policyholders as to why MetLife chose one method of demutualization as opposed to another available method by suggesting that the chosen method was the most appropriate option, without revealing that the method not chosen would have resulted in greater consideration for policyholders.” Fed. Pl. Mem. at 7; *see also* Am. Compl. ¶¶ 56(g).

The court's decision denying summary judgment pointed out that “[t]here is clearly no absolute requirement to disclose any business plan considered alongside the disclosed plan, particularly where the facts show that consideration of the alternative plan was quickly discarded.” May 27, 2009 Mem. and Order at 63, Docket Entry No. 386 (*In re MetLife Demut. Litig.*, 624 F.Supp.2d at 270). Plaintiffs “ha[d] not established that MetLife's real reason for not pursuing Method 2 was a desire to reduce the amount of equity in the IPO.” *Id.* “MetLife [had] provide[d] convincing evidence that Method 2 would not have worked and would have been untenable for a variety of reasons.” *Id.*

Third, plaintiffs alleged that the demutualization documents “misled policyholders regarding the calculation of the fixed component of policyholder consideration by suggesting that the determination of 10 shares as the fixed component was based on actuarial concepts and standards of practice rather than an arbitrary rule of thumb.” Fed. Pl. Mem. at 8; *see also* Am. Compl. ¶¶ 55–56.

MetLife was prepared to persuasively argue that nothing in the Policyholder Packets mailed to policyholders suggested that the fixed component was based on an actuarial formula. *See* MetLife Mem. at 19. The Policyholder Packet stated only that the fixed component was equal to 10 shares per policyholder, *see* Plan § 7.1(b)(i), and that statement is said to have been accurate and complete. Thus, it was contended that plaintiffs could not prove a material misrepresentation or omission. In its decision on summary judgment the court declared that plaintiffs' *337 position that “the

fixed component created a windfall to non-participating policyholders” is “unsupported by any facts.” May 27, 2009 Order at 53 (*In re MetLife Demut. Litig.*, 624 F.Supp.2d at 264).

Fourth, plaintiffs alleged that the demutualization documents “misled policyholders by claiming that future dividends would not be diminished in any way, without disclosing that the Closed Block constituted a limitation on the dividends that would be paid.” Fed. Pl. Mem. at 8; *see also* Am. Compl. ¶¶ 55(j), 56(b)-(c).

The Policyholder Information Booklet informed policyholders that (i) the assets allocated to the closed block were expected to maintain the 1999 dividend scales; and (ii) if the assets in the closed block perform better than expected, the dividends paid would be more, and conversely, if the assets return less than expected, the dividends paid would be lower. Policyholder Packet, Docket Entry No. 530–13 at 19. The closed block is properly argued by MetLife to be consistent with the requirements of New York law. MetLife Mem. at 20 (citing N.Y. Ins. Law § 7312(d)(5)). The Superintendent’s actuarial consultant found that the closed block was adequately funded for these purposes. Sup. Opinion ¶ 161. Nothing in the Plan prevented MetLife from exercising its discretion to pay dividends on closed block policies from outside the closed block, and dividends are not limited to the assets in the closed block. *See* MetLife Mem. at 21 (citing Plan Art. VIII).

b) Difficulty of Establishing Intent to Deceive

To succeed on their Rule 10b–5 claims plaintiffs must prove that MetLife acted with intent to deceive. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007); *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir.2001). MetLife has marshaled strong evidence that it believed the challenged disclosures were complete and accurate, and that deceptive intent was lacking.

MetLife developed the Plan of Reorganization and the Policyholder Information Booklet under the intense scrutiny of the Department of Insurance, which provided the necessary approval only after reviewing and commenting on virtually every aspect of the transaction, including several revisions of the Policyholder Information Booklet and other materials sent to policyholders. *See generally* Nov. 24, 2009 Order (detailing the Insurance Department’s pivotal role in the

demutualization). In its review, the Insurance Department was assisted by a number of experienced professionals—including actuaries, financial advisors, accountants, and attorneys. *See* Sup. Opinion ¶¶ 16–17. In approving the demutualization, the Superintendent not only found that the Plan of Reorganization was “fair and equitable to policyholders,” *id.* ¶ 238, but explicitly found that the Policyholder Information Booklet “contained sufficient information about the proposed reorganization to enable the Eligible Policyholders to make an informed decision regarding the Plan and, for that reason, [was] approved by the Superintendent,” *id.* ¶ 216. MetLife could have argued at trial that its Board and management relied on the Superintendent’s review and expertise in assuring themselves that the demutualization was being conducted properly.

c) Difficulty of Proving Injury to Class Members

For the plaintiffs’ Rule 10b–5 claim—and arguably for the *Fiala* state plaintiffs’ Section 7312 claim—the measure of damages is out-of-pocket loss. *See, e.g., GVA Market Neutral Master Ltd. v. Veras Capital Partners Offshore Fund, Ltd.*, 580 F.Supp.2d 321, 333 (S.D.N.Y.2008) (Rule 10b–5 damages) (citing *338 *Panos v. Island Gem Enters. Ltd.*, 880 F.Supp. 169, 176 (S.D.N.Y.1995)); *see also, e.g., Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 646 N.Y.S.2d 76, 668 N.E.2d 1370, 1373 (1996) (“In an action to recover damages for fraud ... [t]he true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the out-of-pocket rule.”) (internal quotation marks omitted).

For plaintiffs’ claim under section 12(a)(2), *see* 15 U.S.C. § 77l (a)(2), the remedy is limited to rescission, meaning that class members would be entitled to surrender their stock (or the sale price, if they sold it) and recover what they paid for it, adjusted for interest and dividends. 15 U.S.C. § 77l (a); July 23, 2001 Mem. and Order, Docket Entry No. 34 (*In re MetLife Demut. Litig.*, 156 F.Supp.2d at 269). On plaintiffs’ own view, the value of their membership interests was no more than \$25.54 per share—and the stock is now trading above \$34. Stockholder dividends have been paid in the meantime, and at one time the stock was trading as high as \$70. *See* Part II.D, *supra*. The evidence suggests that the demutualization was a benefit, not a detriment, to policyholders. *See* May 27, 2009 Mem. and Order 53, Docket Entry No. 386 (*In re MetLife Demut. Litig.*, 624 F.Supp.2d at 264) (“[I]t also

appears that the demutualization process has been an overall boon to policyholders[.]”).

Because the MetLife stock appreciated in value, the rescission remedy would appear to have no value for class members who chose to retain the stock or who sold when the market was up. Plaintiffs also faced significant difficulties in proving their valuation of membership interests in the mutual insurance company since MetLife argued that such interests are essentially worthless. *See* MetLife Mem. at 25–26 & n. 5 (citing *Soc’y for Savs. v. Bowers*, 349 U.S. 143, 150, 75 S.Ct. 607, 99 L.Ed. 950 (1955); *Tancredi v. Metro. Life Ins. Co.*, 149 F.Supp.2d 80, 87 (S.D.N.Y.2001); *Grobe v. Erie County Mut. Ins. Co.*, 39 A.D. 183, 186, 57 N.Y.S. 290 (N.Y.App.Div.1899), *aff’d on op. below*, 169 N.Y. 613, 62 N.E. 1096 (1902)).

Proof is lacking to support a theory that dividends were reduced as a result of the closed block, or that any plan to repurchase shares harmed class members. *See, e.g., Shah v. Metro. Life Ins. Co.*, Index Nos. 108887/00, 601181/00, 2003 WL 728869, at *16 (N.Y.Sup.Ct. Feb. 21, 2003) (Cahn, J.) (“Plaintiffs assert that, following the announcement of the share repurchase in June 2000, the price of MetLife shares increased. Policyholders who held onto their shares presumably benefitted thereby.”)

d) Other Defenses

MetLife has asserted other defenses to liability and damages, set out at length in its motions to dismiss and for summary judgment. *See* MetLife Mem. at 27. Some of those arguments were rejected by the court, but remain open to MetLife at trial, post-trial, and on appeal. Because a fairness determination on a class settlement is not meant to be an adjudication of the merits, it is not necessary to rehearse all of the defenses here. They might have posed additional risks to any recovery by the class. MetLife could have pursued these and other legal issues at trial, in post-trial motions, and on appeal. The risks and costs of establishing liability were enormous.

Even if plaintiffs had succeeded in establishing defendants' liability, a substantial dispute on the measure of damages would have remained. The damage assessments of plaintiffs' and defendant's trial experts varied substantially. In such a “battle of the experts,” the jury could well ***339** have been swayed by defendants' experts, finding that the plaintiffs were entitled to little or no recovery even if liability were

established. *See, e.g., PaineWebber*, 171 F.R.D. at 129 (noting unpredictability of outcome of battle of damage experts).

e) Difficulty of Proving Claims in State Action

For the reasons discussed above, the *Fiala* plaintiffs faced substantial difficulties in proving their remaining [section 7312](#) claim based on an undisclosed stock buyback scheme. Difficulties of proving injury to class members similar to those in the instant case faced the state plaintiffs. Strong defenses were available to MetLife that might have prevented the state plaintiffs from establishing necessary elements of their [section 7312](#) claim. *See, e.g.,* MetLife Mem. at 23–25.

5. Risks of Maintaining Action Through Trial

The risks of maintaining the class action through trial favor the proposed Settlement.

In light of the difficulty plaintiffs faced in proving injury to class members, there appeared to be some doubt whether the class representatives sustained injury. In the event named plaintiffs could show no injury, a conflict of interest could potentially arise between the class representatives and other class members who may have been injured, raising concerns about the ability of the class representatives to try the damages phase of the case, in the event that the liability phase terminated in favor of the class. *See* Oct. 13, 2009 Hr'g Tr. at 4:19–5:18 (statement of the court).

Where initial certification is proper, “the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims.” *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir.1982) (citing *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 406 n. 12, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977)). Rather, an opportunity to substitute a new named plaintiff should be provided. *McAnaney v. Astoria Financial Corp.*, No. 04–CV–1101, 2007 WL 2702348, at *13 (E.D.N.Y. Sept. 12, 2007). Nonetheless, the risk of having to seek out a new class representative after so many years of litigation, and the further delay that could be occasioned by discovery and motion practice with respect to any new representative, weigh in favor of settlement.

The risks posed by post-trial motions and appeals, and by delay generally, have already been discussed. *See* Part IV.C.1, *supra*. Likely delay, and uncertain prospects of recovery even if plaintiffs should prevail at trial, weigh in favor of settlement rather than maintaining the action through trial.

6. Ability of MetLife to Withstand a Greater Judgment

MetLife's ability to withstand a greater judgment weighs neither in favor of nor against the proposed Settlement.

MetLife is a multi-billion dollar corporation. It might have withstood a greater judgment. The ability of the defendant to withstand a greater judgment is not relevant under these circumstances. Courts have recognized that the defendant's ability to pay is much less important than other factors, especially where “the other *Grinnell* factors weigh heavily in favor of settlement approval.” *Global Crossing*, 225 F.R.D. at 460; *Telik*, 576 F.Supp.2d at 580 (“[T]his factor alone does not prevent the Court from approving the Settlement where the other *Grinnell* factors are satisfied.”). “[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate.” *340 *Global Crossing*, 225 F.R.D. at 460 (internal quotation marks omitted); *see also Parker v. Time Warner Entertainment Co.*, 631 F.Supp.2d at 261 (same).

MetLife is a large, stable insurance company, and the settlement was not driven by any concern about MetLife's ability to pay. Under these circumstances, ability to pay is not a factor in the settlement, and does not weigh either for or against approval. *See Telik*, 576 F.Supp.2d at 580.

7. Range of Reasonableness of Settlement Fund in Light of Possible Recovery and Risks of Litigation

The range of reasonableness of the settlement fund in light of the possible recovery at trial, and in light of the risks of litigation, support approval of the settlement.

The determination of a “reasonable” settlement “is not susceptible of a mathematical equation yielding a particularized sum, but turns on whether the settlement falls within a range of reasonableness.” *PaineWebber*, 171 F.R.D. at 130 (internal quotation marks omitted). This “range of reasonableness” “recognizes the uncertainties of law and fact

in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.1972).

“[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.” *Grinnell*, 495 F.2d at 455 n. 2; *see also Telik*, 576 F.Supp.2d at 580 (“[G]iven the problems with the case, almost any amount could be deemed reasonable[.]”); *Conolly v. Universal Am. Fin. Corp.*, Index No. 13422/07, 2008 N.Y. Slip. Op. 52018(U), 21 Misc.3d 1109(A), 2008 WL 4514098, at *8–11 (N.Y.Sup.Ct. Oct. 8, 2008) (approving settlement that provided for modification of corporate governance provisions and no payment of money to plaintiffs, because “[p]laintiffs are represented by very experienced counsel and the Court accepts their collective judgment that they confront serious obstacles to recovery and that, if the case is pursued, there is a significant risk that the class might recover nothing, a result that could only be achieved at significant expense to both [litigants].”).

“The fact that the class potentially could have achieved a greater recovery at trial is not dispositive and does not preclude the court from finding that the settlement is within a ‘range of reasonableness’ that is appropriate for approval.” *In re Luxottica Group S.p.A. Sec. Litig.*, 233 F.R.D. at 316; *see also Grinnell*, 495 F.2d at 455 (“The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.”).

The proposed Settlement is reasonable for MetLife because it allows MetLife to avoid the expense and distraction resulting from a trial, appeal, and possible retrial in two separate cases, and to eliminate the miniscule risk of a substantial verdict for the classes.

The proposed Settlement is reasonable for plaintiffs in light both of the meaningful benefit to the classes that it represents, and of the substantial obstacles to proving critical elements of plaintiffs' claims with respect to liability and damages. *See* Part IV.C.4, *supra*. Under the circumstances arguably any settlement, no matter how small, would be reasonable. *See Telik*, 576 F.Supp.2d at 580; *Conolly*, 2008 N.Y. Slip Op. 52018(U), at *10–11; *see also In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145, 150–51 (2d Cir.1987) (approving

“essentially a payment of nuisance value” *341 where plaintiffs faced “many factual and legal difficulties”).

8. Attorneys' Fees and Expenses

The amount of attorneys' fees is not a relevant factor in approval of the settlement.

Left to the courts' discretion are fees. The Settlement provides that “[a]n award of attorneys' fees or litigation expenses is not a necessary term of this Stipulation of Settlement and is not a condition of settlement.” Settlement ¶ 16(b). Because no specific fee request is part of the Settlement, the reasonableness of the fees requested by plaintiffs has no bearing, one way or the other, on the fairness of the total Settlement. If anything, the absence of a specific determination of attorneys' fees as part of the Settlement favors the Settlement by demonstrating a lack of collusion between the parties. *See* Part II.I, *supra*; *see also* [McReynolds](#), 588 F.3d at 804 (“[B]ecause class counsel left the issue of attorney's fees to the discretion of the District Court, there was no indication that the Settlement was the product of bad faith or collusion.” (internal quotation marks omitted)).

The parties have addressed fees and expenses in plaintiff's counsel's application for fees and expenses, and in defendants' separate brief. Fees are discussed in Part V, *infra*.

D. Manner of Allocation of Settlement Funds

The proposed Settlement's allocation of settlement funds is fair and reasonable. Allocated would be at least \$32.5 million of the \$50 million settlement fund to the closed block, \$2.5 million to a health-based nonprofit organization in the form of a *cy pres* award, and up to \$15 million to attorneys' fees, reimbursement of expenses, and related compensation. *See* Stipulation ¶¶ 15–20; Dec. 22, 2009 Lead Counsel's Joint Application for an Award of Attorneys' Fees and Reimbursement of Expenses 1, Docket Entry No. 562 (“Fed. Pl. Fee App.”).

“[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information. In particular, the opinion of experienced and informed counsel is entitled to considerable weight.” [Alleyne v. Time Moving & Storage Inc.](#), 264 F.R.D. 41, 52 (E.D.N.Y.2010); *see also* *In re*

[Sterling Foster & Co., Inc. Sec. Litig.](#), 238 F.Supp.2d 480, 486 (E.D.N.Y.2002) (allocation of settlement must be “fair and reasonable” (citing [PaineWebber](#), 171 F.R.D. at 133)). The purpose of developing a plan of allocation is to devise a method that permits the equitable distribution of limited settlement proceeds to eligible class members. [Beecher v. Able](#), 575 F.2d 1010, 1016 (2d Cir.1978).

Trial courts have broad discretion in approving plans for the allocation of settlement funds. To be found “fair and reasonable,” the plan for distribution “need have only a reasonable, rational basis,” when recommended “by competent and experienced class counsel.” [Global Crossing](#), 225 F.R.D. at 462 (internal quotation marks omitted); [Maley v. Del Global Techs. Corp.](#), 186 F.Supp.2d 358, 367 (S.D.N.Y.2002) (same).

The Settlement's allocation plan meets these requirements and warrants approval.

1. \$32.5 Million Allocation to the Closed Block

The settlement delivers settlement funds to class members primarily through an allocation to the closed block worth, in light of class counsel's application for up to \$15 million in fees and expenses, *342 at least \$32.5 million. The money in the closed block can only be used to pay dividends and benefits on policies in the closed block—that is, policies that were in force on the record date of the demutualization that fall within the class definition. *See* Plan Art. II (defining “Closed Block Business”) & § 8.2 (“Operation of the Closed Block”); *see also* Dec. 18, 2009 Decl. of Michael Harwood in Supp. of Approval of the Stip. of Settlement and in Response to Objections ¶ 6, Docket Entry No. 578–4 (“Harwood Decl.”). The \$32.5 million allocation will, through the closed block, go to members of the state and federal classes, in proportion to their pre-demutualization contributions to surplus. A negligible portion of this amount may incidentally benefit those who opted out or were otherwise excluded from the class.

“Fluid recoveries” of this type, which do not call for direct calculation and distribution of precise recoveries to the class members, can be a fair means of delivering value to class members without undue administrative costs. *See, e.g.,* [Schwab v. Philip Morris USA, Inc.](#), No. CV 04–1945, 2005 WL 3032556, at *4–17 (E.D.N.Y. Nov. 14, 2005) (discussing legal basis for fluid recovery and citing authorities); [Weber](#)

v. Goodman, No. CV-97-1376, 1998 WL 1807355, at *5 (E.D.N.Y. June 1, 1998) (“[T]he Second Circuit has not allowed for fluid recovery, *see, e.g., Van Gemert v. Boeing Co.*, 553 F.2d 812, 815 (2d Cir.1977), except where made pursuant to a settlement agreement. *See Beecher v. Able*, 575 F.2d 1010, 1015 (2d Cir.1978).”). “[F]luid recovery has been accepted in some contexts by nearly all federal circuits that have considered it. It is most commonly employed by federal courts for damage distribution in settled cases.” *Schwab*, 2005 WL 3032556, at *7 (citing cases).

The closed block provides the opportunity to distribute settlement funds to the majority of class members while incurring almost no incremental administrative costs, since the process of investing closed block funds and determining closed block dividends is one that MetLife already carries out as part of its regular business operations; adding \$32.5 million to the closed block will not alter the process or its cost. The Plan requires that MetLife manage dividend payments from the closed block in an equitable manner, subject to monitoring by the New York Insurance Department. *See* Plan § 8.2 (“Operation of the Closed Block”). The assets added to the closed block by the settlement, and the income earned from investment of those assets, will reach millions of class members. *See* Harwood Decl. ¶ 6.

Given the size of the classes—about 11 million members in the aggregate—the cost of calculating, printing and mailing individual checks to class members would run into millions of dollars, and would eat up a substantial amount of the settlement fund. Even assuming optimistically that the administrative cost of preparing and mailing about 11 million checks, including postage, material and labor costs, would be only \$2.00 per class member (a minimal estimate), the costs of administering the settlement payout would deplete more than half of the settlement funds remaining after payment of fees and expenses of class counsel and the *cy pres* allocation. Utilization of the closed block technique means that much more of the settlement fund will benefit class members than would otherwise be possible.

If individual checks were mailed as hypothesized above, average class members would be left with a payment of less than \$2.00. Payments in such small amounts create “excessive and unnecessary expenses” that are not “in the overall interests of the class as a whole.” *See Global Crossing*, 225 F.R.D. at 463 (agreeing with *343 party’s contention that “settlements that distribute checks for less than \$10 require disproportionately more follow-up, have a disproportionately

high number of uncashed checks, require more checks to be reissued, and often involve second or third distributions of settlement funds”).

2. \$2.5 Million *Cy Pres* Allocation

A small portion of class members will not benefit from the allocation to the closed block. They include class members who have died or whose policies have lapsed. With these class members in mind, the settlement includes a *cy pres* allocation of \$2.5 million to a health-based nonprofit organization in lieu of a direct payment to the former and non-closed-block policyholder class members.

A *cy pres* allocation is warranted in this case. *See Fears v. Wilhelmina Model Agency*, 315 Fed.Appx. 333, 336 (2d Cir.2009). *Cy pres* remedies are appropriate “in circumstances in which direct distribution to individual class members is not economically feasible” and where “the proof of individual claims would be burdensome or the distribution of damages costly.” *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir.2007) (internal quotations and citations omitted). A *cy pres* payment, as an adjunct to a payment by other means to some members of the class, is warranted where the amount to be distributed to the remaining class members is small relative to the administrative costs of a direct distribution. *See Id.*; *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 33–34 (1st Cir.2009); *In re “Agent Orange” Prod. Liab. Litig.*, 611 F.Supp. 1396, 1403 (E.D.N.Y.1985), *aff’d*, 818 F.2d 179, 181–82 (2d Cir.1987); *Klein v. Robert’s Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 73–74, 808 N.Y.S.2d 766 (N.Y.App.Div.2006); *see also* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:20, at 28–31 (4th ed.2002) (“[C]y pres distributions are proper in connection with a class settlement, subject to court approval of the particular application of the funds. Thus, even in circuits that have ruled that cy pres or fluid class recovery distributions are not valid in contested adjudications, *these distributions have obtained a stamp of approval as part of a class settlement.*” (emphasis added; footnotes omitted)).

Criteria for a *cy pres* payment are satisfied here. The non-closed-block portion of the settlement fund is only \$2.5 million, and would probably have to be distributed among millions of former and non-closed-block policyholders. The administrative cost of direct payments would deplete available funds for this group. The administrative burden is aggravated by the fact that the non-closed-block portion of

the class includes former policyholders whose policies went out of force after the demutualization. Because MetLife does not maintain current addresses for the former policyholders, determining their present location (assuming they were alive), and mailing individual small checks to them would be substantially more burdensome than a mailing to the current policyholders.

The parties and the court agree that the appropriate *cy pres* donee shall be the Foundation for the National Institutes of Health. The research it finances is health-related and will redound to the benefit of the members of the class on whose behalf it is made. A request was received from the Ovarian Cancer Research Fund (“OCRf”) to be considered as a possible recipient of the *cy pres* allocation. OCRf appears to be a highly reputable organization doing useful work. The state and federal courts and parties believe, however, that the *cy pres* allocation should be made to a national and impartial body, with a broad mandate, devoted to the distribution *344 of such funds. It has the expertise to allocate to particular worthwhile health-related research projects.

3. Division of Settlement Amount Between Closed-Block and Non-Closed-Block Allocations

Allocation of a smaller amount of recovery to former policyholders and other non-closed-block policyholders than to the closed-block policyholders is fair and reasonable.

“[N]othing requires a settlement to benefit all class members equally. Such a rule would itself result in an inequitable windfall to certain class members, to the detriment of others.” *Global Crossing*, 225 F.R.D. at 462 n. 14; see also *In re Enron Corp. Sec. Litig.*, No. MDL-1446, Civil Action No. H-01-3624, 2008 WL 4178151, at *2 (S.D.Tex. Sept. 8, 2008). Relative strength and value of different categories of claims may be considered. See, e.g., *Global Crossing*, 225 F.R.D. at 462 & n. 14.

Considered as a group, the claims of former policyholders and non-closed-block policyholders are weaker than those of closed-block policyholders. The non-closed-block policyholders include (1) institutional (*i.e.*, group) policyholders, (2) individual holders of nonparticipating and other non-dividend-paying policies, and (3) former policyholders. See Plan Art. II (defining “Closed Block Business”).

First, the institutional policyholders include large and sophisticated business entities—many of which are highly knowledgeable about insurance matters and employ analysts to help administer their pension and insurance plans. It would be particularly difficult to show that these policyholders were deceived by MetLife's alleged misrepresentations or omissions. It is notable that no group policyholder mounted a legal challenge to the demutualization, notwithstanding their generally greater level of sophistication and resources to finance a lawsuit.

Second, the nonparticipating policyholders are not part of the federal class—the federal plaintiffs contend that nonparticipating policyholders received an unfair windfall as a result of the alleged misrepresentations and omissions. And holders of non-dividend-paying policies were not adversely affected by the demutualization or utilization of the closed block.

Third, the former policyholders do not fully share in all of plaintiffs' claims. It is alleged that policyholders' membership interests were extinguished for inadequate consideration. Former policyholders—whose policies lapsed or otherwise went out of force within a few years after the demutualization—arguably would not have retained membership interests even if MetLife remained a mutual company. Former participating policyholders gave up any claims to future dividends, which the federal plaintiffs alleged might be unfairly reduced, once their policies were no longer in force.

The certified class representatives include members of both the closed-block and non-closed-block groups. In this action, named plaintiff Mary DeVito is a former policyholder; in the *Fiala* action named plaintiff Vijay Shah is a former policyholder. See Finnegan Aff. ¶ 13 & Ex. B. The conclusion is warranted that class representatives adequately took into account the interests of both groups of class members in negotiating the Settlement. Any conflict of interest between the two groups is *de minimis* in view of the relatively small benefit to each member of the class.

For these reasons, it is within the range of reasonable settlements to allocate less to the *cy pres* payment for non-closed-block class members than to the closed-block class members.

*345 E. Notice of Settlement

Notice of the Settlement was appropriate and adequate. The Superintendent was notified directly. Class members were

notified by publication over a two-week period, four times in each of four widely read newspapers. *See* Part II. J, *infra*; Finnegan Aff. ¶ 2 & Ex. A–1 through A–16 (copies of notice as published). The form of notice and the Stipulation of Settlement were made available on the “Notices” page of the Eastern District of New York’s website, which is reachable by a link from the court’s home page, and the address of which was included in the published notice. *See* Part II.J, *infra*.

Rule 23(e)(1) of the Federal Rules of Civil Procedure requires notice of a settlement to be made “in a reasonable manner.” Individual notice of a settlement reached after notice of pendency was previously mailed is not required. “[T]he district court has virtually complete discretion as to the manner of giving notice to class members.” *Handschu v. Special Services Div.*, 787 F.2d 828, 833 (2d Cir.1986). Notice by publication is appropriate where individual notice would be burdensome or expensive. *Handschu*, 787 F.2d at 832–33; *W. Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1090 (2d Cir.1971).

New York law requires notice of a settlement “in such manner as the court directs.” CPLR 908. Courts have broad discretion to order notice by publication. *See, e.g., In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154, 160, 553 N.Y.S.2d 138 (N.Y.App. Div. 1st Dep’t 1990), *aff’d as modified*, 77 N.Y.2d 185, 565 N.Y.S.2d 755, 566 N.E.2d 1160 (1991).

In the present case,

[i]n view of the millions of members of the class, notice to class members by individual postal mail, email or radio or television advertisements, is neither necessary nor appropriate. The publication notice ordered is appropriate and sufficient in the circumstances. The timeline for notice provides reasonable, appropriate and ample opportunity for class members to oppose the settlement if they wish to do so.

Nov. 4, 2009 Order at 5 (*In re MetLife Demut. Litig.*, 262 F.R.D. at 208); *see also* Order Regarding Notice & Hearing on Approval of Proposed Settlement at 2, *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/2000 (N.Y.Sup.Ct. Nov. 5, 2009)

(Ex. O to Micarelli Aff.) (“In accordance with Article 9 of the [New York] CPLR and specifically CPLR 907 and 908, the court determines that notice by publication in the manner specified, is reasonable and appropriate.”).

It is not necessary to provide the class members with an opportunity to opt out of the Settlement. *See* Fed.R.Civ.P. 23(e)(4) (court “may” allow a new opportunity to request exclusion); CPLR 903 (court “may” allow class members to request exclusion); *see also Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir.2006) (“The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court’s discretion.” (quoting Adv. Comm.2003 Notes to Fed.R.Civ.P. 23(e)(3))). Because the class members were given “notice of the action[s], the opportunity to opt out, notice of the proposed Settlement, and the opportunity to object,” the court is not required to afford “a second opportunity to opt out.” *See Wal-Mart Stores*, 396 F.3d at 114 (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir.1992)). If any class members wished to control the prosecution or settlement of their own claims, they could have opted out or sought to intervene after notice of pendency was given. *See id.* at 115 (class members were “required to opt out at the class notice stage if [they] did not wish to *346 be bound by the Settlement”). The enormous cost of further prosecuting this action as well as the lack of any realistic probability of success make it almost certain that no one would want to opt out at this point in the litigation and carry it on in her or his individual behalf.

F. Objections to Settlement

None of the five objections filed in these cases offers any valid reason to withhold approval of the Settlement.

1. Steven Waldman

On December 28, 2009, objector Steven Waldman submitted a written objection to the proposed Settlement. *See* Dec. 22, 2009 Objection to Proposed Class Action Settlement by Class Member Steven Waldman, Request for Discovery and Application for Adjournment of Settlement Hearing Pending Discovery, Docket Entry No. 571 (“Waldman Obj.”). MetLife responded to Waldman’s objection on several grounds, and offered relevant clarifications of the terms of the proposed Settlement. *See* MetLife Mem. at 39–45. Waldman appeared at the December 30, 2009 fairness hearing and stated that MetLife’s clarifications had satisfied his objections. *See* Dec.

30, 2009 Hr'g Tr. at 33. He then withdrew his objection with respect to the state case, and his request to withdraw his objection with respect to the federal case was granted pursuant to [Rule 23\(e\)\(5\) of the Federal Rules of Civil Procedure](#). *Id.* at 33–34.

Waldman's written submission argued: (1) that MetLife had discretion to choose and value assets added to the closed block, with no independent check on its valuation, *see* Waldman Obj. at 4; (ii) that MetLife had discretion to distribute, or not distribute, the closed block assets at any time over the life of the closed block, potentially permitting none of the assets to be distributed to living class members, *see id.* at 4–5; (iii) that because the closed block's liabilities exceeded its assets, and because the performance of the closed block assets left some question whether the shortfall would ever be made up, it was doubtful whether it would ever be possible to distribute closed block assets to policyholders, *see id.* at 5–6; and (iv) that notice to the class was inadequate. Waldman sought discovery related to these issues. *See id.* at 6–8.

At the December 30 hearing Waldman's counsel endorsed MetLife's response to Waldman's objection:

In making the objection, we had several concerns.

One of the principal concerns was paragraph 16C of the stipulation which provided that MetLife could value the assets going into the so-called closed block.

And human nature being what it was, since they had the discretion, we were concerned what would be going in there and the value of it.

The second major concern was the so-called tontine issue, that the assets would sit for a hundred years and not benefit the current class and then be a windfall at the very, very end.

Now, in addressing these issues, defendants have come forward and they have made changes in effect. They have said no, we're now public[]ly disclosing that these assets will in fact either be mark-to-market, i.e. securities, or they will be valued by an independent person.

Now, that is a sea change. That improves the settlement and absent the objection, this wouldn't have happened.

The second thing they say of significance in their objection is that there won't be a tontine effect because they will carefully monitor the fund so the assets are paid out appropriately.

***347** Now, what I'm saying is thus, as a result of the objection, MetLife has come forward and said things they probably otherwise would not have said which they probably didn't want to say and this settlement has been improved based on this objection.

As a result therefore, objector Waldman would like to seek to withdraw his objection because I think the result of the objection has resulted in an improvement of the settlement and therefore, there is no need to continue the objection.

Dec. 30 Hr'g Tr. at 32–33. At the hearing Waldman did not address or renew his objection based on the performance of the closed block assets, his objection to class notice, or the request for further discovery.

Because Waldman declared that he was fully satisfied by MetLife's responses to the issues raised in his objection, and formally withdrew the objection on the record, MetLife's cogent and fully convincing response to Waldman's objection is reproduced below in full:

A. The Objection by Steven Waldman is Without Merit

Objector Steven Waldman has recently commenced a purported derivative suit against certain of MetLife's directors, claiming (among other things) that the alleged wrongdoing pleaded in the *In re MetLife* and *Fiala* complaints harmed MetLife by resulting in the expenses of this very litigation. *Waldman v. Benmosche*, Index No. 650643/2009 (N.Y. Sup.Ct. N.Y. County, filed Aug. 26, 2009). The suit was filed over nine years after the litigation supposedly causing the harm had commenced. On December 8, 2009, Waldman's counsel provided the parties with an objection to the proposed settlement.

In opposition to the proposed settlement, Waldman makes four allegations: (i) that MetLife has unfettered discretion to choose and value assets that are added to the closed block under the agreement; (ii) that MetLife has unfettered discretion to distribute, or not distribute, the assets added to the closed block and may begin to do so in 100 years or more, (iii) that the closed block is in “dire financial straits” and is unable to pay annual policy dividends; and (iv) that notice to the class was inadequate. The Waldman objection also seeks discovery and further notice to the class. None of these objections is well taken.

1. Waldman's Objection Misunderstands How the Closed Block Works.

Fundamentally, Waldman's objection to the operation of the closed block misunderstands the rules governing the operation of the closed block.

First, Waldman's objection regarding the assets to be allocated to the closed block rests on a misunderstanding of the regulatory constraints that apply to MetLife. The Stipulation of Settlement requires the assets to be valued at their “current market value as calculated by MetLife.” Stipulation of Settlement ¶ 16(c). That calculation, in turn, is governed by rules established by the New York Insurance Department, which require that assets added to the closed block be valued either by established public markets or through an arms' length third-party valuation. [Dec. 18, 2009 Decl. of Michael Harwood in Supp. of Approval of the Stip. of Settlement an in Response to Objections ¶ 4, Docket Entry No. 578–4 (“Harwood Decl.”)]. Because of these rigid valuation rules, MetLife does not have the discretion in valuing the assets of the closed block that (for example) an ordinary business corporation would have in valuing assets *348 on its books. MetLife also does not have unfettered discretion in choosing the assets to allocate to the closed block. The Plan of Reorganization requires that the majority of the closed block assets be investment grade quality, [Plan] § 8.2(b)(1), and that the closed block be managed in good faith and “as if it were an independent entity apart from the Company.” *Id.* § 8.2(b)(iv).

Second, Waldman asserts that “[i]t is unclear whether or not the Settlement at bar actually requires any assets contributed to the Closed Block ever be distributed to any living class member,” and that “it appears that MetLife has discretion to distribute the assets to policyholders, or not to distribute them, providing them with nothing.” Waldman Obj. at 2. Waldman further contends that the clause in the Stipulation of Settlement that provides that assets added to the closed block may be distributed at any time “over the remaining life of the Closed Block” means that MetLife could “begin[] a distribution 100 years hence ... and continue[] it for 50 years after that.” *Id.* at 3.

Again, this objection fundamentally misunderstands the operation of the closed block and is fully disposed of by Article VIII of the Plan of Reorganization, which was designed to ensure that MetLife does not operate the closed block in the manner that Waldman posits. Under the Plan

of Reorganization, no assets in the closed block may be used for the benefit of the shareholders, [Plan] § 8.2(g), and any asset transfers between the closed block and the remainder of the company must be to the benefit of the closed block. [*Id.*] § 8.2(b)(v). Any assets added to the closed block as part of the proposed settlement are thus certain to be distributed to the millions of class members whose policies are in the closed block. Harwood Decl. ¶ 5–6.

Moreover, the dividends paid to closed block policyholders are calculated annually with the goals of (i) exhausting the closed block assets with the last claim, and (ii) avoiding unreasonable buildups of assets benefiting only the later-to-die policyholders, known as “tontine effects.” [Plan] § 8.2(d)(i). To that end, MetLife, in consultation with the New York Insurance Department has established a “glidepath” to guide the amount of assets and liabilities retained in the closed block toward meeting these goals. Harwood Decl. ¶¶ 9, 12. The Insurance Department, through annual reporting and quinquennial on-site reviews, has been closely monitoring the closed block to ensure that it is properly managed. [Plan] § 8.2(d)(ii) and (iii).

The rules governing the closed block ensure that any assets added to the closed block, at any time, will be distributed to closed block policyholders. Any assets added to the closed block as part of the proposed settlement are thus certain to be distributed to the millions of class members whose policies are in the closed block. Harwood Decl. ¶ 6. Assets placed in the closed block in connection with the proposed settlement will be commingled with the existing assets, Harwood Decl. ¶ 5, and the newly added assets will be paid out according to the governing principles of the closed block along with all the existing closed block assets. [Plan] § 8.2(b)(ii) and (iii); Harwood Decl. ¶ 5. Because money is fungible, it would be a meaningless abstraction to earmark the settlement funds for payment separate from the other funds.

Third, the allegation that the closed block is in “dire financial straits” and has suffered a “multi-billion dollar shortfall,” Waldman Obj. n. 4, is without basis in fact. The closed block is healthy and *349 operating well within the very conservative range established by the Department of Insurance, which continues to closely monitor the closed block's operations. Harwood Decl. ¶ 12. There has been no “multi-billion dollar shortfall.” *Id.*

Waldman's misunderstanding of accounting terminology used in the Company's quarterly financial statements is responsible for his misplaced assertion that "billions of dollars in accrued dividend obligations have now been erased, and the dividend obligations for 2008 and the first nine months of 2009 have been set at zero." Waldman Obj. n. 3 (emphasis in original). He apparently draws this statement from the note to MetLife, Inc.'s financial statements that refers to a Policyholder Dividend Obligation, or PDO, of zero. *See Id.* at n. 6 (citing MetLife, Inc.'s Form 10-Q filed 11/04/09 at F-66-67). PDO, however, is a GAAP accounting concept that has no direct relationship to the amount of annual dividends paid to policyholders. Harwood Decl. ¶ 7. A PDO of zero indicates only that the closed block did not operate at a surplus over the "GAAP-determined glidepath"—which would be the case if the company was right on target in paying projected closed block dividends, converted to a GAAP basis. It does *not* mean that the company will be paying zero dollars in annual dividends to closed block policyholders. *Id.* ¶ 11. Contrary to Waldman's implication, MetLife paid approximately \$1.5 billion in annual dividends to closed block policyholders in 2008, will pay approximately the same amount in 2009, and has approved the payment of over \$1.3 billion for 2010. *Id.* And, in any event, adding funds to the closed block would be expected to increase dividends to closed-block policyholders regardless of the closed block's current financial state.

Finally, Waldman's objections ignore the costs that would be imposed by requiring entirely new procedures for dealing with the small additional amount that the settlement will contribute to the closed block. Cost efficiency is the reason for distributing the settlement funds through the closed block, and establishing burdensome new requirements would eliminate some of the benefits of that efficiency. Moreover, given that the settlement is distributing value in exchange for essentially worthless nuisance claims, Waldman's objections—even if they had merit, which they do not—would be trivial. Any amount, or no amount at all, would be a fair settlement of the claims in these actions. *See supra* pp. 316-17.

2. Publication Notice of the Proposed Settlement was Constitutionally Adequate

Waldman relies on the 1950 Supreme Court decision *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), to support his position that publication notice

was constitutionally inadequate. *See* Waldman Obj. at 9. Waldman's reading of *Mullane* amounts to a claim that publication is *never* adequate. *See id.* (referring to the "general inadequacy of publication notice"). Waldman ignores, however, that the Second Circuit has repeatedly held that notice of a settlement by publication is adequate, once class members have been given notice of pendency and an opportunity to opt out. *See Handschu*, 787 F.2d at 832-33; *W. Va. v. Chas.*, 440 F.2d at 1090; *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710 at 800 [(E.D.N.Y.1991)]; *Dolgow v. Anderson*, 43 F.R.D. [472,] 497-498 [(E.D.N.Y.1968)]; *see* *350 *also supra* p. 321. Indeed, Waldman acknowledges an exception in "cases ... where the costs of such notice would eviscerate the settlement fund," Waldman Obj. at 10, ignoring the massive expense of administering individual notice and opt-outs for a class of over 11 million people.

Waldman also argues that because many Americans receive their news on the Internet, MetLife should have released a press release to ensure Internet coverage of the settlement. *Id.* at 10. However, he identifies no basis for requiring such notice in addition to publication notice; and in any event, news of the settlement is reported on a number of publicly accessible Internet sites. *See, e.g.,* <http://www.law.com/jsp/article.jsp?id=1202435311218> (posted Nov. 10, 2009, last accessed Dec. 28, 2009).

The Waldman objection further alleges that MetLife misdirected class members who read the notice of settlement because "[t]he printed *New York Law Journal*, *New York Times*, [and] *Wall Street Journal* notices filed with the District Court on November 12-13, 2009 direct readers to 'http://nyed.uscourts.gov/Notices. cfm,' which returns no Internet page." Waldman Obj. n. 10. This allegation is simply false. Each of the sixteen instances of the Notice of Settlement published by MetLife contained a correct, working URL (web page address): <http://www.nyed.uscourts.gov/Notices>. None of the notices contains the URL to which Waldman refers. *See* Finnegan Aff., exs. A-1 to A-16. In any event, even if any class members had been confused by seeing a supposedly incorrect URL, they could still easily access the information by the "Notices" link from the Court's home page. The published notice also contained a telephone number and address at which class members could contact class counsel for information. In addition, we understand that the federal and state courts each had multiple hard copies of the Stipulation of Settlement on hand to give out to class members who requested them. Finally, attorneys

and others with accounts on PACER (the federal courts' electronic docketing system), could always obtain a copy of the Stipulation of Settlement through that avenue in the unlikely event that they could not figure out any other way to obtain a copy.

MetLife Mem. at 39–45 (footnotes omitted).

2. John J. Pentz, Jr. and Thomas Sterrett Bell

John J. Pentz, Jr. and Thomas Sterrett Bell filed an objection on December 18, 2009. *See* Dec. 18, 2009 Objection to Class Action Settlement and Request for Attorneys' Fees and Notice of Intention to Appear, Docket Entry No. 558 (“Pentz–Bell Obj.”). Counsel for objectors Pentz and Bell appeared at the December 30, 2009 fairness hearing to argue in support of their objection. Their objections are meritless.

Pentz and Bell's written submission argues: (1) that no more than \$15 million in combined fees and expenses should be awarded to class counsel, *see id.* at 5–6; (2) that notice of and opportunity to object to class counsel's motions for attorneys' fees were insufficient under [Rule 23\(h\) of the Federal Rules of Civil Procedure](#), *see id.* at 2–3; and (3) that “[t]he settlement must be rejected because of the failure to formally certify a former policyholder subclass, as well as the patently inequitable settlement allocation that completely excludes that subclass from any substantial benefits,” *see id.* at 3–4. At the December 30, 2009 fairness hearing, the third argument was expanded and clarified. In particular, recovery for former policyholders *351 in the form of the \$2.5 million *cy pres* payment was said to be inadequate, in light of a possible recovery at trial. *See* Dec. 30, 2009 Hr'g Tr. at 23–24, 31–32.

Pentz and Bell's first issue concerning the overall amount of attorneys' fees and expenses is moot. As discussed below, \$15 million will be awarded in combined attorneys' fees, expenses, and compensation to named plaintiffs. *See* Parts V–VI, *infra*. This is consistent with Pentz and Bell's position.

Pentz and Bell's second argument, concerning notice and opportunity to object to counsel's applications for fees and expenses, is based in part upon the misconception that the notice provided to class members by publication on November 12, 13, 17 and 19, 2009 and the December 30, 2009 fairness hearing concerned class counsel's applications for attorneys' fees and expenses, rather than only the proposed overall Settlement. *See* Pentz–Bell Obj. at 1–3. A separate

hearing was held on February 9, 2010 regarding applications for attorneys' fees and expenses. *See* Part III.C, *supra*. Class members were provided with separate notice and an opportunity to object to applications for fees and related costs. *See* Part III.B.5, *supra*.

As discussed below, notice and opportunity to object to counsel's applications for fees and expenses were proper and adequate. *See* Part V.D, *infra*. Individual notice of a motion for attorneys' fees and expenses is not required—[Rule 23\(h\)](#), like [Rule 23\(e\)\(1\)](#), requires only notice to the class “in a reasonable manner.”

Pentz and Bell's third point, regarding the desirability of a subclass and the adequacy of the \$2.5 million *cy pres* recovery for former policyholders, is not persuasive. For reasons already discussed, the Settlement's *cy pres* allocation is warranted. *See* Part IV.D.2, *supra*. Allocation of a smaller amount of recovery to former and non-closed-block policyholders than to closed-block policyholders is fair and reasonable. *See* Part IV.D.3, *supra*.

Certification of a subclass of former policyholders is not warranted. Fracturing the class into subclasses whenever groups receive different treatment under a plan of distribution would place undesirable obstacles in the way of class action settlements, and is unnecessary as a matter of law. “[T]here is no rule that settlements benefit all class members equally.” *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165, 2007 WL 4115809, at *13 (S.D.N.Y. Nov. 7, 2007) (quoting *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir.1983)); *see also In re Enron*, 2008 WL 4178151, at *2 (“[A] class action settlement need not necessarily treat all class members equally.” (internal quotation marks omitted)); *In re Cendant Corp. Sec. Litig.*, 109 F.Supp.2d 235, 252 (D.N.J.2000) (“[U]nless the court reviewing settlement finds ... ‘stark conflicts of interest ...,’ a settlement which contains class members who may recover different amounts is acceptable.” (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1146 (8th Cir.1999))); *Petruzzi's, Inc. v. Darling–Delaware Co.*, 880 F.Supp. 292, 300–01 (M.D.Pa.1995) (“[D]isparate treatment of class members may be justified by a demonstration that the favored class members have different claims or greater damages[.]”). In view of plaintiffs' likelihood of success at trial, creation of subclasses would waste resources and needlessly interfere with the achievement of a settlement.

3. Robert Gould

Robert Gould filed an objection on December 23, 2009. *See* Objection to Proposed Settlement, and Objection to Attorneys' Fees Request, Docket Entry No. 564 *352 (“Gould Obj.”). Gould’s objection argues: (1) that “[c]lass members who no longer obtain a benefit from the closed block receive no benefit from the settlement,” *see id.* at 1; (2) that “the settlement takes \$2.5 million owed to the class and gives it instead to a third party as *cy pres*,” but that “[u]nclaimed funds should be paid to class members, not third parties,” *see id.* at 2; (3) that it is unfair for the class members’ releases to become effective as of the date of the entry of the final judgment in either the state or federal action (whichever is later), while defendants are not required to pay or allocate the settlement amount until all appeals of the approval of the settlement date are final, *see id.* at 2; (4) that class members should have been provided an opportunity to opt out of the Settlement and that notice was inadequate, *see id.* at 2–3; and (5) that notice and opportunity to object to counsel’s applications for fees and costs prior to the December 30, 2009 hearing were inadequate, *see id.* at 3–4.

Gould’s first two arguments, concerning the treatment of former policyholders and the *cy pres* allocation, are not persuasive for reasons already discussed. *See* Parts IV.D & F.2, *supra*. The Settlement’s *cy pres* allocation is warranted. *See* Part IV.D.2, *supra*. Allocation of a smaller amount of recovery to former and non-closed-block policyholders than to closed-block policyholders is fair and reasonable. *See* Part IV.D.3, *supra*.

Gould’s third argument, concerning the timing of events prescribed by the Settlement, is without merit. The Settlement provides for class members’ releases to become effective as of the date of entry of the final judgment in either the state or federal action (whichever is later). Settlement ¶ 21. MetLife is not required to distribute the settlement amount until all appeals of the approval of the Settlement are final. *Id.* ¶¶ 14(s), 18. This schedule is sensible because if the settlement were rejected on appeal, the task of retroactively unwinding the allocation of assets to the closed block could be complex and administratively costly, and the recovery of fees and expenses paid to class counsel—and the *cy pres* donation to a non-profit organization—would be difficult if not impossible. Under the timing of payments pursuant to the Settlement, the releases can easily be undone if the settlement approval is reversed on appeal.

Gould suggests that MetLife pay interest on the settlement amount during the period between the effective date of the releases and the date of distribution. First, this is contrary to the bargain the parties struck in arm’s length negotiations. Second, if there are appeals they will be by class member objectors—not MetLife, who supports the settlement. If the issue was of moment, the court would consider requiring an appealing objector to post an appropriate bond to protect the value of the settlement to the class members. *See, e.g., Allapattah Services, Inc. v. Exxon Corp.*, No. 91–0986–CIV, 2006 WL 1132371, at *18 (S. Fla. April 7, 2006) (\$13.5 million bond; “[T]he highly detrimental impact of an appeal of the settlement agreement as to the entire class renders it appropriate for the Court to require [an objector] to post an appeal bond pursuant to Federal Rule of Appellate Procedure 7.”). The absence of a requirement that MetLife pay interest is fair and reasonable in light of the weakness of plaintiffs’ underlying claims and the improbability that MetLife would want to utilize any (unlikely) appeal for delay.

Gould’s fourth and fifth arguments, concerning notice of the settlement and opportunity to opt out, and notice and opportunity to object to applications for attorneys’ fees, are without merit for the reasons already discussed. *See* Parts IV.E & F.2, *353 *supra*. Notice of the settlement was appropriate and adequate; a second opportunity to opt out was not required. *See* Part IV.E, *supra*. Gould apparently did not understand that there would be a separate opportunity to object to applications for attorneys’ fees and expenses, and a second hearing on this issue. *See* Part III.C, *supra*. Notice of applications for attorneys’ fees was adequate, for reasons discussed below. *See* Part V.D, *infra*.

4. Christopher P. Mueller

Christopher P. Mueller served a *pro se* written submission on MetLife’s counsel on December 25, 2009. *See* Objection of Policyholder Christopher Mueller to Pending Settlement and Request to the Court that it Appoint Counsel to Argue on his Behalf at the Dec. 30, 2009 Fairness Hr’g, Docket Entry No. 580 (“Mueller Obj.”).

Mueller contends: (1) that the Settlement is “woefully inadequate,” because plaintiffs alleged billions of dollars in damages, *see* Mueller Obj. ¶ 3; (2) that the settlement amount has “no rational basis,” because damages should be calculated by comparing plaintiffs’ financial situation after

the demutualization with what would have happened without demutualization, and “[t]his natural actuarial process was not followed in developing the proposed settlement,” *see id.* ¶ 1; and (3) that allowing the case to go to trial could have set precedent addressing perceived shortcomings in the current laws pertaining to demutualization, *see id.* ¶ 5. Mueller incorporated by reference arguments previously made to the court by Thomas Tierney. *See id.* ¶ 6; Oct. 6, 2009 Amicus Curiae Br. of Thomas Tierney, Docket Entry No. 492 (“Tierney Amicus Br.”).

Mueller's first argument, concerning the difference between the damages alleged and the settlement amount, ignores the weakness of plaintiffs' claims. “[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.” *Grinnell*, 495 F.2d at 455 n. 2. For the reasons already discussed, the proposed Settlement is reasonable in light both of the meaningful benefit to the class that it represents, and of the substantial obstacles to proving critical elements of plaintiffs' claims with respect to liability and damages. *See* Parts IV.C.4 & 7, *supra*.

Mueller's second argument, concerning the actuarial methods used to arrive at the settlement amount, is unfounded. Both parties did perform the kind of calculation Mueller proposes. MetLife contends that such a calculation “reveals that the class members benefited from the demutualization, and have no damages whatsoever.” MetLife Mem. at 50. The Settlement, reached through arms' length negotiations, represented what plaintiffs' excellent counsel concluded was in the interests of the class in light of the lack of strength of their claims.

Mueller's third argument, concerning the precedent that a trial of this case might have set, is irrelevant to the fairness of the proposed Settlement vis-à-vis the class members in this case. Neither Mueller, nor anyone else, was willing to finance further litigation. Since there would be no party in interest, there would be no claim or controversy under the Constitution, *see* [Const. Art. III, § 2](#); such abstract litigation as Mueller requests would be without jurisdictional basis. *Cf. In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 118–19 (2d Cir.2010) (refusing advisory mandamus).

The arguments offered by Thomas Tierney, which Mueller incorporates in his objection by reference, are addressed below. *See* Part IV.F.6, *infra*.

5. Lawrence Kuczynski

Lawrence Kuczynski faxed a *pro se* letter to the court on December 27, 2009, and *354 a follow-up letter was received on February 5, 2009. *See* Dec. 23, 2009 Letter from Lawrence Kuczynski to Clerk of Court, E.D.N.Y., Docket No. 568; Feb. 5, 2009 Email from Lawrence Kuczynski to the court (together, the “Kuczynski Obj.”). Kuczynski alleges that MetLife did not adequately disclose its former ownership of the Stuyvesant Town and Peter Cooper Village apartment complexes in connection with the demutualization or in documents filed with the Securities and Exchange Commission (“SEC”). *See id.*

MetLife's disclosures, or failures to disclose, relating to its real estate assets are not relevant to the fairness of the proposed Settlement in this case. Plaintiffs have alleged: incomplete disclosure of the basis for determining the fixed 10–share allocation to policyholders; misrepresentation or incomplete disclosure about the effect of the closed block on policyholder dividends; misrepresentation of the reasons for choosing statutory method four for demutualization, *see* [N.Y. Ins. Law § 7312\(d\)\(4\)](#); incomplete disclosure of the role and amount of actuarial contribution to surplus; and, in the *Fiala* case, misrepresentation or incomplete disclosure regarding an alleged share buyback scheme. *See generally* Second Consolidated Am. Compl., Docket Entry No. 120 (“Am. Compl.”); Revised Third Consolidated Am. Compl. ¶¶ 65–68, *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/00 (N.Y.Sup.Ct., Dec. 22, 2005) (Ex. G to Micarelli Aff.). These allegations do not touch on MetLife's real estate assets or related disclosures. Kuczynski's objection is not on point.

6. Thomas P. Tierney, in Support of Mueller's Objection

On January 19, 2009, at the invitation of the courts, *see* Dec. 30, 2009 Hr'g Tr. at 35, actuary Thomas P. Tierney made a written submission in support of Mueller's objection. *See* Jan. 9, 2010 Actuary Thomas P. Tierney's Objection to the Pending Settlement, Docket Entry No. 590 (“Tierney Obj.”). Tierney had previously made a written submission to the court styled as an “Amicus Curiae Brief,” arguing that the MetLife demutualization was flawed. *See* Tierney Amicus Br. The arguments stated in Tierney's amicus brief were incorporated into Mueller's written objection by reference. *See* Mueller Obj. ¶ 6.

At the time of the demutualization, Tierney appeared as an objector at the Superintendent's January 24, 2000 hearing. *See* Public Hr'g Tr. at 80:13–92:25 (statement of Tom Tierney) (criticizing adequacy of closed block and compensation to each policyholder). He later submitted a letter to the Superintendent further elaborating upon his objection. *See* Tierney Amicus Br., Attachment at 6–7 (Feb. 14, 2000 Letter to Superintendent Neil Levin).

Tierney's submissions in this case, consistent with objections he made at the time of the demutualization, argue that the MetLife demutualization was flawed because: (1) shares of MetLife stock were not distributed to MetLife policyholders according to an appropriate actuarial formula, *see* Tierney Amicus Br. ¶¶ 21, 23–25; Tierney Obj. ¶ 4; and (2) the demutualization violated participating policyholders' rights to receive insurance at an at-cost basis and to have MetLife's surplus returned to them in the form of policyholder dividends, *see* Tierney Amicus Br. ¶ 21; Tierney Obj. ¶ 4.

Tierney's first argument rests on his assertion that the distribution of MetLife stock using a formula based on actuarial equity share was both “a breach of contract” and “actuarially unsound.” Tierney *355 Amicus Br. ¶ 25 & Attachment at 6–7. Tierney proposes an alternative actuarial formula which he considers more sound. *Id.* ¶ 23 & Attachment at 6–7.

Whatever the merits of Tierney's actuarial argument, it is not relevant to the fairness of the proposed Settlement. Plaintiffs in this action have challenged both the use of the 10–share fixed component of policyholder compensation and the disclosures relating to the role and the amount of the actuarial contribution to surplus calculation. *See* Part II.E, *supra*. They have not challenged the formula, based on actuarial equity share, that was used to allocate the variable component of compensation. Tierney's argument does not speak to the strength of plaintiffs' claims.

Tierney's second argument appears to reflect disapproval, not of the MetLife demutualization in particular, but of the statutory demutualization process in general as it is implemented in New York. The MetLife demutualization is described in the following terms:

What MetLife did when it demutualized was to change its dividend formulae so that the value of

future dividends that would be paid on its in-force policies at that time would be \$15.34 Billion [i.e., the amount of MetLife's then-existing book surplus, plus the present value at that time of expected contributions to surplus] less than what it would have been had the company not demutualized and had it remained true to its at-cost contractual pledge to policyholders. What it did through actuarial manipulation of its dividend formulae was to convert what should have been \$15.34 Billion of (mostly after-tax) policyowner dividends into \$15.34 Billion of (mostly pre-tax) stockholder dividends—an event which, of course, ballooned the value of the newly issued MetLife stock.

Tierney Amicus Br. ¶ 28. Tierney objects that this process was a “scam,” but not because of any specific features of the MetLife demutualization: “The process described [in the passage quoted above] is the essence of the demutualization scam as it's been practiced in North America for most of the past 20 years—monies that are contractually required to be paid as policyholder dividends are converted (via actuarial skullduggery and smoke-‘n-mirrors) to stockholder dividends; the associated stock rises in price; and the owners of same reap a windfall.” *Id.* ¶ 29 (emphasis added).

It must be conceded by Tierney that the demutualization method used by MetLife was correct as a matter of New York insurance law: “The Court's recent observation that ‘MetLife marshals a convincing body of evidence that its demutualization was conducted in accordance with standard actuarial practices and in compliance with New York insurance law’ is *nominally correct*[.] ... New York law ... was *technically complied with*[.]” *Id.* ¶ 33 (emphases added). Not only insurance company executives, but also “regulators [and] legislators” are said to be among those responsible for the demutualization “scam.” *Id.* ¶ 30.

Tierney's argument thus places him at odds with the substantive law of New York, the practices of the Superintendent and the New York Insurance Department, and the standards of the actuarial profession governing demutualization and the calculation of policy dividends.

Tierney appears to object to the demutualization practice which in effect converts part of the mutual insurance policyholder dividends to corporate shareholders profits. But this conversion seems the essence of demutualization—approved as legislative policy by New York statute.

***356** Tierney has a long history of objecting to demutualizations, as documented in the *curriculum vitae* attached to his brief. See Tierney Amicus Br., Attachment at 1–5. Whether his positions attacking New York substantive law are sound as a matter of policy or actuarial principle is not at issue in this case. Tierney's arguments are not relevant to the claims plaintiffs have asserted or to the fairness of the proposed Settlement of those claims.

V. Fees and Expenses

A. Class Counsel's Joint Application for Fees and Expenses

Class counsel in this action and the *Fiala* state action submitted integrated applications for attorneys' fees and expenses. See Fed. Pl. Fee App.; Dec. 22, 2009 Mem. in Supp. of Final Approval of the Settlement, Awarding Attorneys' Fees and Reimbursement of Expenses, and Granting Compensatory Awards to the Representative Pls., Docket Entry No. 563–1 (“State Pl. Mem.”).

Pursuant to [Rule 23\(h\) of the Federal Rules of Civil Procedure](#) and [Rule 909 of the New York Civil Practice Law and Rules](#), federal and state class counsel jointly request an award of attorneys' fees and reimbursement of expenses in the amount of \$15 million, consisting of approximately \$10.5 million (or 21%) of the total settlement amount for fees (to be distributed as federal and state counsel have agreed among themselves) after deducting reimbursement of expenses of approximately \$4.5 million. See Fed. Pl. Fee App. at 1; State Pl. Mem. at 4–5.

B. Standard of Review for Award of Fees and Expenses to Class Counsel

“[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); see also *In re Ashanti Goldfields Sec. Litig.*, No. 00–CV–717, 2005 WL 3050284, at *2 (E.D.N.Y. Nov. 15, 2005); *Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 369 (S.D.N.Y.2002) (“[C]lass counsel who create a settlement fund for the benefit of a class are entitled

to be compensated for their services from that settlement fund.”); *Sternberg v. Citicorp Credit Servs., Inc.*, 110 Misc.2d 804, 809, 442 N.Y.S.2d 1017 (N.Y.Sup.Ct.1981) (“[T]he judgment fund and its accrued interest is the appropriate source for the payment of the attorneys' fees.”).

Awards of fair attorneys' fees from a common fund encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and therefore discourage future misconduct of a similar nature. See *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (“To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.” (citation and internal quotation marks omitted)); *Michels v. Phoenix Home Life Mut. Ins. Co.*, Index No. 5318–95, 1997 WL 1161145, at *31, 1997 N.Y. Misc. LEXIS 171, at *92 (N.Y.Sup.Ct. Jan. 3, 1997) (“[G]enerous fee awards in cases such as this serve the dual purpose of encouraging plaintiffs' attorneys to act as private attorneys general and discouraging wrongdoing.”); see also *In re Visa Check/Mastermoney Antitrust Litig.*, No. 96–CV–5238, 2008 WL 1787674, at *8 (E.D.N.Y. Apr. 14, 2008) (finding that there is “commendable sentiment in favor of providing lawyers with sufficient incentive to undertake the complex task of competently representing the financial interests *357 of class members once settlement has resulted in the creation of a significant common fund” (internal quotation marks omitted)).

Under both federal and New York law, the amount of an attorney's fee to be awarded from the common fund created in a class action must be “reasonable.” [Fed.R.Civ.P. 23\(h\)](#); [N.Y. C.P.L.R. 909](#); see also *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir.2000); *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 56 A.D.3d 162, 164–65, 865 N.Y.S.2d 706 (N.Y.App. Div.3d Dep't 2008), *leave to appeal granted*, 13 N.Y.3d 710, 890 N.Y.S.2d 448, 918 N.E.2d 963 (2009). The fees must be “assessed based on scrutiny of the unique circumstances of each case, and a jealous regard to the rights of those who are interested in the fund.” *Goldberger*, 209 F.3d at 53 (internal quotation marks omitted); see also *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 75, 808 N.Y.S.2d 766 (N.Y.App. Div.2d Dep't 2006) (“The amount awarded in attorneys' fees must be based on the ‘reasonable value of the legal services rendered.’” (quoting [N.Y. C.P.L.R. 909](#))). An appropriate fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *Missouri v.*

Jenkins, 491 U.S. 274, 285, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989).

The following criteria must be considered in evaluating a request for attorneys' fees in a common fund case:

- (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50 (citation and internal quotation marks omitted; ellipsis in original). State courts in New York have cited similar factors to consider. See *Sternberg*, 110 Misc.2d at 810, 442 N.Y.S.2d 1017 (noting derivation of factors used in N.Y. state cases from federal case law).

In considering these factors, courts should avoid benchmarks, *Goldberger*, 209 F.3d at 51–52, and remain cognizant of the “overarching concern for moderation” in awarding attorneys' fees, *id.* at 53. New York courts generally follow the same approach as federal courts in the Second Circuit, including *Goldberger*, in determining a reasonable fee to award to class counsel. See, e.g., *Nager v. Teachers' Retirement Sys. of City of N.Y.*, 57 A.D.3d 389, 390, 869 N.Y.S.2d 492 (N.Y.App. Div. 1st Dep't 2008) (citing *Goldberger*); *Ciura v. Muto*, 24 A.D.3d 1209, 1210, 808 N.Y.S.2d 842 (N.Y.App. Div. 4th Dep't 2005) (in awarding class counsel fees, court “should consider factors such as the novelty and difficulty of the questions presented [and] the skill requisite to perform the legal services properly” (internal quotation marks omitted)).

The Court of Appeals for the Second Circuit has authorized district courts to employ either the percentage-of-the fund method or the lodestar method when awarding fees in common fund cases. See *Goldberger*, 209 F.3d at 47–50. New York state courts are also permitted to use either or both methods. See *Flemming*, 56 A.D.3d at 165, 865 N.Y.S.2d 706.

In expressly approving the percentage method, the Court of Appeals for the Second Circuit recognized that “the lodestar method proved vexing” and had resulted in “an inevitable waste of judicial resources.” *Goldberger*, 209 F.3d at 48–49; see also *Savoie v. Merchs. Bank*, 166 F.3d 456, 460

(2d Cir.1999) (“The percentage-of-the-fund method has been deemed a solution to *358 certain problems that may arise when the lodestar method is used in common fund cases.”). Thus, the trend among district courts in the Second Circuit is to award fees according to the percentage-of-the-fund method, rather than the lodestar method. See, e.g., *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir.2005) (“The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.” (internal quotation marks omitted)); *Ashanti*, 2005 WL 3050284, at *2; *In re Elan Sec. Litig.*, 385 F.Supp.2d 363, 373 (S.D.N.Y.2005).

New York state courts have “note[d] that federal courts around the country, including federal district courts in New York, appear to be turning away from the lodestar/multiplier approach, and are returning to the more traditional percentage of the recovery approach.” *Willson v. New York Life Ins. Co.*, Index No. 94/127804, 1995 N.Y. Misc. LEXIS 652, at *90–91 (N.Y.Sup.Ct. Nov. 8, 1995); see also *Michels*, 1997 WL 1161145, at *30–31, 1997 N.Y. Misc. LEXIS 171, at *91. These New York state courts have tested the reasonableness of a fee by “first look[ing] to the percentage of the recovery approach” and then applying the lodestar method. *Willson*, 1995 N.Y. Misc. LEXIS 652, at *90–93; see also *Michels*, 1997 WL 1161145, at *31–32, 1997 N.Y. Misc. LEXIS 171, at *93–94. Other state courts in New York have continued to employ the lodestar method of determining reasonable fees. See *Ousmane v. City of New York*, Index No. 402648/04, 22 Misc.3d 1136(A), 2009 WL 722294, at *9 (N.Y.Sup.Ct. Mar. 17, 2009).

When considering hourly rates for attorneys the court need not take into account the location of the attorneys' offices or the venue of the case. See, e.g., Mark Fass, *Circuit's Approach to Calculation of Attorneys' Fees*, N.Y.L.J., Jan. 27, 2010, p. 1; cf. *Simmons v. New York City Transit Auth.*, 575 F.3d 170, 177 (2d Cir.2009) (considering venue in calculating fees). Judicial notice is taken of the fact that the plaintiff class action securities bar consists of skilled counsel who litigate nationally, requiring—and obtaining—high fees based on relatively uniform hourly rates wherever the cases they bring are prosecuted. All class counsel in the present case were of Cadillac limousine quality. They are entitled to high hourly rates in computing compensation, at least to the extent that it is available from this recovery.

C. Criteria for Approval of Fees and Expenses

Class counsel's requested attorneys' fees are justified under both the percentage-of-the-fund method and the lodestar method. Other factors relevant to the evaluation of an application for fees and expenses favor the fee request.

1. Percentage-of-the-fund Method

The compensation requested here, 21% of the \$50 million settlement fund (to be divided as federal and state counsel have agreed), is reasonable and within the normal range of percentage fees awarded in the federal courts in the Second Circuit and the New York State courts. The requested award is also consistent with statistical trends in class action attorneys' fee awards, as documented in a recent empirical study.

Relevant federal decisions include, e.g., *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 1695, 2007 WL 4115808, at *12 (S.D.N.Y. Nov. 7, 2007) (30% of \$5.5 million settlement); *359 *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529, 2006 WL 3378705, at *5 (S.D.N.Y. Nov. 16, 2006) (21.4% of \$454 million settlement); *In re Oxford Health Plans, Inc. Sec. Litig.*, No. MDL 1222, 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (28% of unspecified total settlement); *Kurzweil v. Philip Morris Cos.*, Nos. 94 Civ. 2373, 94 Civ. 2546, 1999 WL 1076105, at *1 (S.D.N.Y. Nov. 30, 1999) (30% of \$123 million settlement); *Hicks*, 2005 WL 2757792, at *9–11 (30% of \$10 million settlement); *In re Blech Sec. Litig.*, No. 94 Civ. 7696, 2002 WL 31720381, at *1–2 (S.D.N.Y. Dec. 4, 2002) (33–1/3% of \$2.795 million settlement); *Maley*, 186 F.Supp.2d at 374 (33–1/3% of \$11.5 million settlement).

Comparable New York state court decisions include, e.g., *Flemming*, 56 A.D.3d at 166, 865 N.Y.S.2d 706 (45% of \$950,000 settlement); *Mark Fabrics Inc. v. GMAC Commercial Credit LLC*, Index No. 604631/02, 2005 WL 6216029, 2005 N.Y. Misc. LEXIS 3566, at *5 (N.Y. Sup. Ct. Dec. 22, 2005) (approximately 30% of \$850,000 settlement). In both the federal and state cases cited above, expenses incurred by class counsel were reimbursed from the settlement.

A recent empirical study of published decisions in federal and state class action cases from 1993 through 2008 found that “regardless of the methodology for calculating fees ostensibly employed by the courts, the overwhelmingly important determinant of the fee was simply the size of the recovery obtained by the class.” Theodore Eisenberg &

Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Stud. 248, 250 (2010) (“Eisenberg & Miller 2009”); *see also generally* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27 (2004); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. (Forthcoming 2010). Overall, Eisenberg and Miller found that, for cases in which the class recovery was between \$38.3 million and \$69.6 million, the mean fee award was 20.5% of the total recovery; the median fee award was 21.9%. *See* Eisenberg & Miller 2009 at 17–18 & Table 7. The fees requested in this case, amounting to approximately 21% of the class recovery, are squarely within this range.

2. Lodestar Method

Cross-checking a fee awarded under the percentage-of-the-fund method against counsel's lodestar helps to ensure the reasonableness of the proposed award. *See, e.g., Goldberger*, 209 F.3d at 50. New York courts have tested the reasonableness of a fee award by using both methods. *See, e.g., Willson*, 1995 N.Y. Misc. LEXIS 652, at *93–95.

Fees representing multiples above the lodestar are often awarded to reflect the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney's work. *See, e.g., Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167–69 (3d Cir.1973), subsequently refined in *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116–18 (3d Cir.1976) (en banc). “[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.” *In re Cendant Corp., Derivative Action Litig.*, 232 F.Supp.2d 327, 341–42 (D.N.J.2002) (citations omitted); *see also In re Interpublic Sec. Litig.*, No. 03–CV–1194, 2004 WL 2397190, at *12, 2004 U.S. Dist. LEXIS 21429, at *36–37 (S.D.N.Y. Oct. 26, 2004) (awarding multiplier of 3.96 and noting that in recent years, multipliers of between 3 and 4.5 have been common in securities class actions); *360 *Willson*, 1995 N.Y. Misc. LEXIS 652, at *93–95 (approving multiplier of 4.6 times lodestar and noting multipliers in other cases ranging from 6 to 12 times the lodestar); *Michels*, 1997 WL 1161145, at *32, 1997 N.Y. Misc. LEXIS 171, at *93–95 (approving multiplier of 3.3, noting range of 6 to 12). *Cf.* Eisenberg & Miller 2009 at 25–26 & Table 15 (finding that, for cases in which the class

recovery was between \$38.3 million and \$69.6 million, the mean lodestar multiplier used was 1.98; the median lodestar multiplier used was 1.75).

The total lodestar of counsel, derived by multiplying the hours and current hourly rates reported by each firm, is \$42,842,818.25. *See* Dec. 22, 2009 Decl. of Jared B. Stamell in Supp. of Attorneys' Fees and Reimbursement of Expenses ¶ 15, Docket Entry No. 562–3 (“Stamell Fee Decl.”). The hours spent on the case were required. They were charged at customary rates for lawyers and other personnel of the experience and skill of those in this litigation. When appropriate, work was assigned to junior partners, associates and paraprofessionals to limit costs. The charges are supported by contemporaneous records.

The requested 21% fee, which amounts to approximately \$10.5 million (without interest), represents a fraction rather than a multiple of counsel's accumulated lodestar. The relatively modest fee relative to lodestar is warranted based upon the recovery actually achieved. A full lodestar award with an adequate multiplier would have left almost nothing for the class. The lodestar cross-check supports the requested percentage fee.

3. Other Factors

Other criteria to be considered in evaluating a request for attorneys' fees include:

- (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50 (citation and internal quotation marks omitted). Analysis of these factors supports approval of class counsel's fee request.

a) Time and Labor Expended

The significant effort devoted to this case by class counsel supports the requested fee.

In prosecuting this action and the *Fiala* state action over some ten years, class counsel have, among other things: located and interviewed witnesses; retained and consulted with outside damages experts, including actuarial and valuation experts; consulted with outside insurance industry experts; reviewed relevant publicly available information and materials produced by MetLife and other parties in discovery; engaged in protracted discovery; and, in the instant action, prepared for and begun trial. Counsel filed amended complaints, moved for class certification, and opposed multiple motions to dismiss, motions for summary judgment, and appeals. *See generally* Dec. 22, 2009 Decl. of Jared B. Stamell in Supp. of Lead Plaintiffs' Mot. for Final Approval of Settlement and Plan of Allocation of Settlement Proceeds ¶¶ 1–172, Docket Entry No. 560–2 (“Stamell Decl.”). Multiple time-consuming formal mediation sessions and additional negotiations have taken place. *Id.* ¶¶ 158, 169. Counsel devoted time and skill to negotiating the specific terms of the proposed Settlement, documenting it in the Stipulation of Settlement, and preparing for the fairness hearings. *See id.* ¶¶ 169, 170.

*361 b) Magnitude and Complexity of the Litigation

The magnitude and complexity of these cases required intensive efforts by counsel, and support the requested fee.

Securities class actions are often complex. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02–CV–5575, 2006 WL 903236, at *8, 2006 U.S. Dist. LEXIS 17588, at *31 (S.D.N.Y. Apr. 6, 2006). This action and the *Fiala* action were no exception. MetLife is one of the largest insurance companies in the United States. Plaintiffs alleged that MetLife had deceived members of huge classes—its policyholders—in its demutualization.

Building a case based on this contention required sophistication and an extensive investigation to understand the circumstances surrounding the alleged fraud. The efforts required of counsel are apparent from the record in the instant case, including numerous memoranda and motion papers and voluminous discovery materials. Counsel analyzed, among other things, the contents of the Policyholder Information Booklet and other demutualization materials sent to policyholders. MetLife policyholders and former

MetLife employees were located and interviewed or deposed. Demutualization disclosures, detailed financial information, and other public statements were investigated to evaluate the significance of MetLife's disclosures and to determine the value of the consideration tendered to class members. Insurance industry and damages experts had to be consulted regarding the complex issues presented. *See* Parts II.G, IVC.1 & 4, *supra*.

c) Risk of the Litigation

The significant risks associated with continuing prosecution of these cases through to trial support the requested fee.

The risk of the litigation is often cited as the “first, and most important, *Goldberger* factor.” *In re Bristol–Myers Squibb Sec. Litig.*, 361 F.Supp.2d 229, 233 (S.D.N.Y.2005); *see also Goldberger*, 209 F.3d at 54; *Washington Fed. v. Village Mall Townhouses, Inc.*, 90 Misc.2d 227, 394 N.Y.S.2d 772, 776 (1977) (“The foremost of these factors is the attorney's ‘risk of litigation’, i.e., the fact that despite the most vigorous and competent of efforts success is never guaranteed”) (citation omitted).

No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir.1974) (citation omitted). “Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.” *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *3, 2004 U.S. Dist. LEXIS 8608, at *11 (S.D.N.Y. May 14, 2004); *see also In re Am. Bank Note Holographics Sec. Litig.*, 127 F.Supp.2d 418, 433 (S.D.N.Y.2001) (finding it is “appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award”). In particular, “securities actions have become more difficult from a plaintiff's perspective in

the wake of the [Private Securities Litigation Reform Act].” *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D.Pa.2000).

For reasons already discussed, this case presented significant risks with respect to establishing both liability and damages. *See* Part IV.C.4, *supra*. Plaintiffs faced *362 challenges in (1) proving misrepresentations or omissions; (2) demonstrating that those misrepresentations or omissions were actionable, particularly in light of the Superintendent's Opinion; (3) substantiating that the classes' losses were caused by MetLife's misrepresentations and omissions; and (4) proving scienter and materiality given difficult legal standards and MetLife's strong defenses. *See id.*

Defendants denied all claims against them and asserted that the documents sent to policyholders before the demutualization were complete, accurate, and not misleading. It was argued that there were no misleading omissions or misrepresentations on which the class members could have relied when deciding how to vote. The demutualization was also said to be fair and equitable to as well as beneficial for policyholders. MetLife was prepared to present strong evidence, including expert testimony, in support of these and other defenses to plaintiffs' claims. *See id.* Plaintiffs faced particular difficulties in establishing damages and proving scienter. *See* Part IV.C.4.b-c, *supra*.

From the outset, these actions were difficult, with no assurance that counsel would see any compensation for the time and resources they expended on behalf of the classes.

d) Quality of Representation

The quality of class counsel's representation favors the requested fee.

Quality of representation is an important factor in considering a fee request. *See Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D.Fla.1992). “[P]rosecution and management of a complex national class action requires unique legal skills and abilities.” *Edmonds v. United States*, 658 F.Supp. 1126, 1137 (D.S.C.1987); *see also Flemming*, 865 N.Y.S.2d at 709 (approving fees in a “complex case” that transpired “over the course of six years and involved an area of law without much case law to lend guidance”). The quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance. *See In re*

Warner Communications Sec. Litig., 618 F.Supp. 735, 749 (S.D.N.Y.1985); see also *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y.2008); *Flemming*, 865 N.Y.S.2d at 709 (in awarding fee, noting “defendant’s tenacious fight against plaintiff on every issue”).

This case required a thorough investigation, extensive discovery, and the skill to respond to complex legal and factual defenses raised by highly qualified defense counsel. Given the complexity of the causes of action, the presence of numerous contested issues (including scienter, causation, and damages), and the Superintendent’s formal conclusion that the demutualization was “fair and equitable” to policyholders, only well-qualified counsel could have litigated this case and achieved the proposed Settlement.

Plaintiffs were opposed in this litigation by highly skilled defense counsel well-versed in the defense of complex civil cases. Counsel’s victories in opposing MetLife’s motions to dismiss and for summary judgment, and in winning certification for the classes, clearly indicate the skill with which the cases were prosecuted. See Part II, *supra* (citing state and federal decisions in plaintiffs’ favor).

Counsel litigated vigorously in an effort to obtain the maximum possible recovery. That the case did not settle until trial had begun demonstrates counsel’s willingness to continue to litigate rather than accept a settlement that they perceived to be unfavorable to the classes.

e) Requested Fee in Relation to the Settlement

Comparison of the requested fee in relation to the settlement favors the requested fee.

***363** There are two possible benchmarks for comparing the relationship of the requested fee to the settlement: comparison to fee awards in comparable cases, see, e.g., *Taft v. Ackermans*, No. 02–CV–7951, 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007), or “the unique circumstances of each case,” see *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 174 (S.D.N.Y.2007) (citations and quotations omitted); see also, e.g., *Ling v. Cantley & Sedacca, L.L.P.*, No. 04–CV–4566, 2006 WL 290477, at *3 (S.D.N.Y. Feb. 8, 2006) (stating that relationship of fee request to settlement should be “based on the characteristics of [each] particular case”). Courts in New York State have compared fees to those awarded in other cases. See *Michels*, 1997 WL

1161145, at *32, 1997 N.Y. Misc. LEXIS 171, at *93; *Willson*, 1995 N.Y. Misc. LEXIS 652, at *92–93.

The fee request is justifiable relative to either benchmark. First, as detailed above, the present request for a fee award of 21% of the settlement amount is reasonable in relation to the fees typically awarded in similar complex class actions. See Part V.C.1, *supra*. Second, the difficult challenges faced by plaintiffs in this case—such as the risks of proving critical elements of their claims with respect to liability and damages—increased the litigation risks and support the requested fee. See Part IV.C.4, *supra*.

f) Public Policy Considerations

Public policy considerations support the requested fee.

“A strong public policy concern exists for rewarding firms for bringing successful securities litigation.” *Ashanti*, 2005 WL 3050284, at *5; see also *Bristol–Myers Squibb*, 361 F.Supp.2d at 236 (“[P]ublic policy supports granting attorneys fees that are sufficient to encourage plaintiffs’ counsel to bring securities class actions that supplement the efforts of the SEC.”); *Basic Inc. v. Levinson*, 485 U.S. 224, 230–31, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (the federal securities laws are remedial in nature, and the courts must encourage private lawsuits to effectuate their purpose of protecting investors); *Michels*, 1997 WL 1161145, at *31, 1997 N.Y. Misc. LEXIS 171, at *92 (noting that “generous fee awards in cases such as this serve the dual purpose of encouraging plaintiffs’ attorneys to act as private attorneys general and discouraging wrongdoing”).

Private securities actions provide “a most effective weapon in the enforcement of the securities laws and are a necessary supplement to [SEC] action.” *Eichler v. Berner*, 472 U.S. 299, 310, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985) (internal quotation marks and citation omitted); see also *Tellabs*, 551 U.S. at 313, 127 S.Ct. 2499. Lawyers that pursue private suits on behalf of investors augment the SEC by “acting as ‘private attorneys general.’” *Ressler*, 149 F.R.D. at 657 (citation omitted). In addition, the typical class representative is unlikely to be able to pursue long and protracted litigation at his or her own expense. “[P]ublic policy favors the granting of counsel fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions.” *Id.*

4. Class Counsel's Expenses

Class counsel's request for reimbursement of approximately \$4.5 million in expenses is fair and reasonable.

In connection with settlement of a class action, counsel's reasonable out-of-pocket expenses are properly awarded. *See In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F.Supp.2d 180, 183 n. 3 (S.D.N.Y.2003) (the court may compensate class counsel for reasonable out-of-pocket expenses necessary to the representation of the class); *see also* *364 *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05-CV-10240, 2007 WL 2230177, at *18, 2007 U.S. Dist. LEXIS 57918, at *58 (S.D.N.Y. July 27, 2007) (approving class counsel's expenses that "were essential to the successful prosecution and resolution of the Action"); *Flemming*, 865 N.Y.S.2d at 708–09. *Cf.* Part V.C.1, *supra* (citing federal and New York state cases awarding expenses to class counsel).

Class counsel have satisfactorily demonstrated that they incurred a total of approximately \$4.5 million in litigation expenses on behalf of the classes in the prosecution of these actions. *See* Stamell Fee Decl. ¶ 16 & Ex. E; *see also* Feb. 9, 2010 Supplemental Decl. of Jared B. Stamell in Supp. of Attorneys' Fees and Reimbursement of Expenses & Ex. A, Docket Entry No. 605. The expenses for which reimbursement is sought are of the type that are necessarily incurred in litigation and routinely charged to clients billed by the hour. Stamell Fee Decl. ¶ 12. Counsel's expenses are set forth in detail in each firm's affidavit. *Id.* ¶ 17. These expenses include, among others things: expert fees, electronic research charges, long distance telephone and facsimile charges, postage and delivery expenses, discovery costs, filing fees, photocopying, expenses associated with locating and interviewing dozens of witnesses, and out-of-town travel expenses. *Id.* ¶¶ 12–13, 16.

The expenses charged are supported by proper records. They are necessary and appropriate. They were actually incurred on the class's behalf.

5. Reaction of the Classes to Fee and Expense Application

No relevant objection to class counsel's joint application for fees and expenses was made by any class member. The favorable reaction of the class supports counsel's application.

Adequate notice and opportunity to object to applications for fees and expenses was provided to the class. *See* Part V.D, *infra*. Despite this notice, only one objection was submitted by class members concerning the fees and expenses to be awarded to class counsel. Objectors John Pentz and Thomas Sterrett Bell argued that no more than \$15 million in combined fees and expenses should be awarded to class counsel. *See* Pentz–Bell Obj. at 5–6. No other objection concerning applications for fees and expenses has been received.

Because class counsel has requested only \$15 million in combined attorneys' fees, expenses, and compensation to named plaintiffs, *see* Part V.A, *supra*, and the court is approving this request, *see* Part V.C.6, *infra*, Pentz and Bell's objection is moot.

6. Award of Fees and Expenses to Class Counsel

In light of the criteria considered above, the fees and expenses requested by class counsel are reasonable. Class counsel's joint application warrants approval.

The plaintiff law firms that participated have agreed to divide the fee and expense awards in a reasonable and appropriate way. *See* Feb. 9, 2009 Hr'g Tr. at 28–32; *see also* Dec. 22, 2009 Stip., Docket Entry No. 574 (stipulating any fee award to be allocated 62% to federal counsel and 38% to state counsel). The fee splits will be based on a pro rata share of time and hourly rates; the expenses are apportioned by actual costs advanced. *See* Feb. 9, 2010 Hr'g Tr. at 28–32.

Attorneys' fees and expenses are awarded from the Settlement fund in the total amount of \$15 million. Some \$4.5 million of this amount is awarded for class counsel's expenses. Amounts awarded for objector Steven Waldman's counsel's fees and for compensation to named plaintiffs, *see* Parts V.F & VI, *infra*, also shall be *365 deducted from the \$15 million total. The remainder of the award, approximately \$10.5 million, is awarded to class counsel as fees.

D. Notice of Applications for Fees and Expenses

Notice and opportunity to object to counsel's applications for fees and expenses were proper and adequate.

[Rule 23\(h\) of the Federal Rules of Civil Procedure](#) requires notice to the class of a motion for attorneys' fees by class counsel. Individual notice is not required—[Rule 23\(h\)\(1\)](#), like [Rule 23\(e\)\(1\)](#) concerning notice of settlement, requires only notice to the class “in a reasonable manner.” See Part IV.E, *supra*. For the same reasons applicable in the [Rule 23\(e\)\(1\)](#) context, “the district court has virtually complete discretion as to the manner of giving notice to class members.” *Handschu v. Special Services Div.*, 787 F.2d 828, 833 (2d Cir.1986). Notice by publication is appropriate where individual notice would be burdensome or expensive. *Id.* at 832–33; *W. Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1090–91 (2d Cir.1971).

Notice that counsel intended to apply for an award of attorneys' fees not to exceed 30% of the Settlement Funds and up to \$5 million in expenses was published twice in each of the weeks of November 9, 2009 and November 16, 2009 in the following publications: *USA Today*, *The Wall Street Journal*, *The New York Times*, and *The New York Law Journal*. See Part II.J, *supra*. Class counsel's joint application for an award of fees and expenses was filed in both this court and the state court on December 22, 2009. All submissions concerning the joint application were publicly available at the time of filing on the Eastern District of New York's Electronic Case Filing (“ECF”) system.

The December 30, 2009 fairness hearing was continued until February 9, 2010 for argument on plaintiffs' counsel's applications for attorneys' fees, any applications on behalf of individual plaintiffs for compensation, and any other applications for fees and expenses. See Dec. 30, 2009 Order, Docket Entry No. 585 (“Dec. 30, 2009 Order”). A deadline of February 5, 2010 was set for objections to applications for fees, expenses, or other compensation. *Id.*

The December 30, 2009 Order, which provided the schedule and procedures for objections to fee applications, was filed and docketed on the ECF system, where it is available to the public. *Id.* Plaintiffs' counsel were directed to provide a copy of this Order to each of the named plaintiffs, and to class members or their counsel who submitted objections to the proposed Settlement. *Id.* MetLife was directed to issue a press release stating the schedule for argument and objections concerning applications for fees, expenses, and incentive awards. *Id.* MetLife issued a press release consistent with these instructions on January 8, 2010. See Jan. 8, 2010 Notice of Issuance of Press Release & Ex. (Press Release, MetLife, Inc., “Courts Set Deadline for Objections to Fee Applications

in Class Action Settlement,” Jan. 8, 2010), Docket Entry Nos. 589 & 589–1. The December 30, 2009 Order concluded:

Individual notice has already been provided to class members upon certification of the class in the federal case, and notice has been given by publication and otherwise of the proposed settlement and fairness hearing. These measures constitute adequate notice to class members in a reasonable manner for purposes of [Rule 23\(h\) of the Federal Rules of Civil Procedure](#).

In their objections filed on December 18 and December 23, 2009, objectors Robert Gould and John Pentz and Thomas Sterrett *366 Bell objected to the notice and opportunity to object to applications for fees and expenses. See Pentz–Bell Obj. at 1–3; Gould Obj. at 3–4. These objections were based in part upon the misconception that the notice provided to class members by publication in November 2009 and the December 30, 2009 fairness hearing concerned class counsel's applications for attorneys' fees and expenses, rather than only the overall fairness of the proposed Settlement. Because class members were provided with separate notice and an opportunity to object to fees applications, these objections are moot. No other objection to the notice or opportunity to object to fee applications was received.

E. MetLife's Objections to Class Counsel's Application for Fees and Expenses

MetLife objects to class counsel's applications for fees and expenses, arguing that the requested amounts are excessive. See Dec. 28, 2009 MetLife's Mem. of Law in Opp. to Pls.' Application for Incentive Payments to Named Pls. and in Partial Opp. to Pls.' Application for an Award of Attorneys' Fees and Litig. Expenses, Docket Entry No. 577 (“MetLife Fees Mem.”).

These objections are without merit. A number of arguments are advanced, asserting that this action and the *Fiala* action were “meritless and wasteful” and “attorney-driven,” that plaintiff's claims were frivolous and should never have been brought, that class counsel's efforts were often wasteful or duplicative, and that the quality of class representation was low. MetLife contends that class counsel should be awarded no more than 10% of the settlement fund, or \$5 million, plus reasonable and verifiable expenses. *Id.* at 1.

Defendant advances the following specific arguments.

- “Because so much of class counsel's effort was wasteful and unnecessary, the time and labor expended does not favor a large fee award.” Class counsel in either the federal or state action are alleged to have, for example: taken cumulative or unnecessary depositions, wasted time during depositions on pointless questions, and filed a tactical motion to disqualify MetLife's counsel shortly before trial. *See* MetLife Fees Mem. at 4–6.
- “The size and complexity of the litigation and the burden imposed on the courts and defendants, favors a smaller rather than a larger fee award here.” The complexity of the case is said to derive from class counsel's “kitchen sink” approach and unwillingness to eliminate meritless claims. *Id.* at 6–7.
- “The risks of litigation favor a smaller rather than a larger fee award here, because plaintiffs never should have brought this litigation.” Class counsel are alleged to have brought these actions on the assumption that even a meritless claim would settle for at least nuisance value. A large fee award is discouraged in order to avoid incentivizing lawsuits of dubious merit. *Id.* at 7–8.
- “Quality of representation does not favor the fee application because class counsel's efforts did not lead to a large recovery.” The settlement for less than one percent of alleged damages is said to reflect poorly on the quality of representation. *Id.* at 9.
- “Although the proportion of the settlement fund being sought is similar to fee awards in other cases, this case warrants a smaller fee.” *Id.* at 9.
- “Public policy favors reducing the requested fees because there is no need *367 for ‘private attorneys’ general in policing demutualizations, and because of the interest in discouraging frivolous litigation.” New York law is said to commit oversight of demutualizations to the Superintendent. Plaintiffs' claims are characterized as “dubious” in light of the Superintendent's approval of MetLife's demutualization. *Id.* at 10–11.

These arguments are unpersuasive. They provide no valid basis for reducing the fees and expenses awarded to class counsel. The allegedly wasteful efforts of class counsel are not relevant because the fee award is well below class counsel's lodestar calculation, and is primarily based on the percent-of-the-fund method of calculating fees. MetLife appears to concede that the litigations were large and

complex, and does “not dispute that the requested 21% fee falls within the range of fees that have been awarded in prior cases.” *Id.* at 6, 9. Plaintiffs' claims, though weak, *see* Part IV.C.4, *supra*, may have a scintilla of merit. That they survived many years of litigation and numerous dispositive motions by an able and vigorous defense team attests to this, and to the adequacy of the representation provided by class counsel. *See* Part II.E & IV.C.3, *supra*.

F. Objector Steven Waldman's Application for Attorney's Fees

Objector Steven Waldman moves for a joint award of attorneys' fees in the adjusted lodestar amount of \$42,816.50. *See* Jan. 21, 2010 Mem. in Supp. of Mot. for a Joint Award of Attorneys' Fees to Counsel for Objector Steven Waldman at 1, Docket Entry No. 596. No multiplier is requested and no expenses are sought. *Id.* at 7.

MetLife and the federal plaintiffs oppose Waldman's request for attorneys' fees. *See* Feb. 5, 2010 MetLife Mem. in Opp. to Objector Steven Waldman's Mot. for a Joint Award of Attorneys' Fees to Counsel, Docket Entry No. 600; Feb. 5, 2010 Pls.' Opp. to Objector Steven Waldman's Application for Attorneys' Fees, Docket Entry No. 601.

The parties' objections to Waldman's application are persuasive in part. The request for fees warrants approval in part. Attorneys' fees are awarded in the amount of \$25,000.

“[O]bjectors have a valuable and important role to perform in preventing collusive or otherwise unfavorable settlements, and ... they are entitled to an allowance as compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts.” *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir.1974). “Ordinarily, the trial judge has broad discretion in deciding whether, and in what amount, attorneys' fees should be awarded, since he is in the best position to determine whether the participation of objectors assisted the court and enhanced the recovery.” *Id.*

An award of attorneys' fees for an objector does not require that an economic benefit to the class occur, or that the objection influence the court's decision. *See Park v. Thomson Corp.*, 633 F.Supp.2d 8, 11 (S.D.N.Y.2009). “[S]ome courts have ... rewarded objectors' counsel for advancing non-frivolous arguments and transforming the settlement hearing into a truly adversarial proceeding.” *Id.* (internal quotation marks omitted); *accord*, *Howes v. Atkins*, 668 F.Supp. 1021,

1027 (E.D.Ky.1987) (“Objectors’ counsel ably performed the role of devil’s advocate in this litigation and is deserving of a fee award for this service, even though the settlement was not improved.”).

*368 The parties point out that the terms of the Settlement did not change as a result of Waldman’s objections. No change has been made concerning the assets that will be placed into the closed block pursuant to the Settlement. The administration of the closed block and the distribution of dividends to closed block policyholders have not been affected.

Waldman’s objections were nonetheless of some use. They served to clarify the proposed Settlement and MetLife’s positions regarding implementation of the Settlement. In particular, Waldman’s arguments led MetLife to elaborate on the record upon: (1) the checks in place to ensure that the choice and valuation of assets to be transferred into the closed block are not left to the sole discretion of MetLife; and (2) the provisions that protect against a “tontine” effect—an unreasonable build-up of assets over time benefitting only later-to-die policyholders—and ensure the settlement consideration will be distributed to class members in the form of dividends from the closed block within a reasonable time. *See* Part IV.F.1, *supra*; *see also, e.g., Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 354 (S.D.N.Y.2005) *aff’d in part, vacated in part on other grounds*, 443 F.3d 253 (2d Cir.2006) (awarding fees to objectors’ counsel, finding that objections “served to generate debate and focus the issues before the Court[]” and “conferred a benefit on the class by forcing the settling parties to clarify the judgment credit provision, removing certain ambiguities that might have worked to the detriment of class members in subsequent proceedings”).

Compensation for an objector who has made no contribution except to attempt to hijack the settlement for ransom purposes is not encouraged. But in this case, Waldman’s objection resulted in MetLife’s clarifying and placing on the record exactly how the closed block would be handled to protect the class.

Objector’s counsel reviewed the voluminous case record in this action and the *Fiala* action, including key pleadings and decisions of the court, examined the structure and history of the closed block, reviewed the class notice provided, examined the terms of the Settlement, researched relevant legal issues, drafted Waldman’s objection, and prepared for and appeared at the December 30, 2009 fairness hearing. *See*

Jan. 21, 2010 Decl. of Roy L. Jacobs in Supp. of Mot. for a Joint Award of Attorneys’ Fees to Counsel for Objector Steven Waldman ¶ 3, Docket Entry No. 594 (“Jacobs Decl.”); Jan. 21, 2010 Decl. of Laurence D. Paskowitz in Supp. of Mot. for a Joint Award of Attorneys’ Fees to Counsel for Steven Waldman ¶ 2, Docket Entry No. 595 (“Paskowitz Decl.”).

Counsel’s combined overall lodestar was \$50,551.50. *See* Jacobs Decl. ¶ 4; Paskowitz Decl. ¶ 3. This lodestar figure was reduced to \$42,816.50 to account for time expended on notice issues, which were briefed in Waldman’s Objection but produced no benefit to the class. *Id.* The lodestar calculation is supported by proper records.

Given the complexity of this case, and the very limited contribution of Waldman towards clarification of the settlement, an award of a portion of the requested fee in the amount of \$25,000, as an expense of attorneys for the classes, is reasonable and comparable to the fees awarded to objectors’ counsel in similar circumstances. *See e.g., In re Elan Sec. Litig.*, 385 F.Supp.2d 363, 377 (S.D.N.Y.2005) (\$85,050 in fees); *Denney*, 230 F.R.D. at 354 (\$81,665 in fees); *Howes v. Atkins*, 668 F.Supp. 1021, 1027 (E.D.Ky.1987) (\$100,000 in fees). The sum of \$25,000 is awarded to Waldman.

*369 VI. Compensation to Class Representatives

A. Federal Plaintiffs’ Applications for Compensation Pursuant to PSLRA

Lead plaintiffs in this case request awards as authorized by the Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u–4(a)(4), in recognition of the time and effort they expended over the course of this nearly decade-long litigation. They request \$1,500 each—\$6,000 in the aggregate—to come out of the \$15 million approved for attorneys’ fees and expenses. *See* Part V.C.6, *supra*.

MetLife objects to the federal lead plaintiffs’ application on the ground that “none of the four federal class representatives asserts any actual lost wages or other documented expenses.” MetLife Fees Br. at 14. No objection has been made by any class member to the federal lead plaintiffs’ application.

The awards requested by federal lead plaintiffs are reasonable and are approved. The PSLRA authorizes “the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.” 15 U.S.C. § 78u–4(a)(4); *see also H.R. Conf. Rep. No. 104–369, at 35* (Nov. 28, 1995),

U.S.Code Cong. & Admin.News 1995, pp. 730, 734 (“[L]ead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and [the committee] grants the courts discretion to award fees accordingly”); *S.Rep. No. 104–98, at 10* (June 19, 1995) (“Recognizing that service as the lead plaintiff may require court appearances or other duties involving time away from work, the Committee grants courts discretion to award the lead plaintiff reimbursement for ‘reasonable costs and expenses’ (including lost wages) directly relating to representation of the class.”).

Courts “routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place.” *In re Gilat Satellite Networks, Ltd., No. CV–02–1510, 2007 WL 2743675, at *19* (E.D.N.Y. Sept. 18, 2007) (citation omitted). The considerations relevant to approving such awards include:

the existence of special circumstances including the personal risk (if any) incurred by the plaintiff applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and of course, the ultimate recovery.

Frank v. Eastman Kodak Co., 228 F.R.D. 174, 187 (W.D.N.Y.2005) (citing cases).

In class actions such as those seeking lost wages or elimination of sex and race discrimination, the named plaintiffs will often be entitled to a substantially greater award than other members of the class. *See, e.g., Sheppard v. Consolidated Edison Co. of New York, Inc.*, No. 94–CV–0403, 2002 WL 2003206, at *5 (E.D.N.Y. Aug. 1, 2002) (citing *Roberts v. Texaco, Inc.*, 979 F.Supp. 185, 200 (S.D.N.Y.1997)). They may have done substantial work in organizing other workers to support the suit, in gathering

information about the workplace, and in taking the heat of a resentful management; an assumption of an earned extra award to them is thus warranted. In most securities actions, the minor investor—or as in this litigation, one policyholder *370 among millions—does little but lend a name; proof of extra work on behalf of the class is then required for any award.

The time and effort expended by lead plaintiffs supports a very limited award. They fulfilled their obligations as representatives of the classes by consulting with counsel, contributing their time, and participating in prosecuting the case. Two of the four had insurance industry or actuarial experience and made that experience available to counsel. *See* Dec. 22, 2009 Decl. of Jared B. Stamell in Supp. of Application of Lead Pls. in the Fed. Action for an Award Under the PSLRA ¶ 4, Docket Entry No. 561–2. One resides near the Central Islip courthouse and attended hearings. *Id.* Each lead plaintiff reviewed some motions, discovery materials, and other papers submitted by the parties. *Id.* at ¶ 3. Each was deposed and produced documents pursuant to defendants’ demands. *Id.* at ¶ 4; *see also generally* Feb. 5, 2010 Decl. of Jared B. Stamell, Exs. A–D (declarations of lead plaintiffs concerning efforts undertaken in support of prosecution of the litigation).

PSLRA awards are not limited to “lost wages or other documented expenses.” *See* MetLife Fees Br. at 14. Compensation may be awarded in recognition of, for example, “the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise).” *Frank*, 228 F.R.D. at 187. MetLife’s objection to the relatively modest compensation requested by federal lead plaintiffs is rejected.

In considering PSLRA awards it is appropriate to “consider the relationship between the requested incentive award and the amounts recovered by absent class members under the settlement.” *Denney*, 230 F.R.D. at 355. By that standard, the \$1,500 compensatory awards requested by each of four federal lead plaintiffs—\$6,000 in the aggregate—are reasonable and appropriate relative to the \$50 million overall settlement. *See, e.g., In re Top Tankers, Inc. Sec. Litig.*, No. 06 Civ. 13761, 2008 WL 2944620 (S.D.N.Y. July 31, 2008) (award of \$3,000 to lead plaintiff out of \$1.2 million settlement); *Hicks v. Morgan Stanley*, No. 01 Civ. 10071, 2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005) (award of \$7,500 to lead plaintiff out of \$10 million settlement); *see also Parker v. Time Warner Entertainment Co., L.P.*, 631 F.Supp.2d 242, 276

(E.D.N.Y.2009) (“Given the minimal amount of the [\$2,500] awards [and] the time and effort the Representative Plaintiffs expended in bringing this suit on behalf of the Class ... the Court approves them.”).

The approved compensation payments are awarded in recognition of lead plaintiffs' services rendered on behalf of the class and in support of class counsel's efforts to prosecute this litigation. Awards to individual plaintiffs are considered

• Mary Adele DeVito	\$1,500.00
• Michael A. Giannattasio	\$1,500.00
• Kevin L. Hym	\$1,500.00
• Harry S. Purnell, III	\$1,500.00

B. State Plaintiffs' Applications for Compensation

Eight plaintiffs in the *Fiala* case request compensation in recognition of their efforts on behalf of the class, “under the standards set forth in the PSLRA.” State Pl. Mem. at 41–42. They seek awards ranging *371 in size from \$1,000 to \$20,000 to come out of the \$15 million approved for attorneys' fees and expenses. See Part V.C.6, *supra*. While these requested amounts arise in the state litigation, this court must consider them since they affect the size of the settlement left to the class and its counsel in this federal case.

MetLife objects to the state plaintiffs' application on the grounds, among others, that “New York law does not permit incentive payments to named plaintiffs in a class action,” that two of the applying plaintiffs are not designated class representatives, that two of the applying plaintiffs have not been employed and should therefore be ineligible to recover “lost wages,” and that one of the applying plaintiffs purchased a MetLife policy for purely speculative and opportunistic reasons. MetLife Fees Br. at 13–15. No objection has been made by any class member to the state lead plaintiffs' application.

The awards requested by state plaintiffs are approved in part and denied in part.

1. New York Law Concerning “Incentive Awards”

It appears that “incentive awards” are not available as a matter of New York law. The New York Supreme Court Appellate Division, Third Department, has held that “New

in the nature of attorneys' expenses, rather than attorneys' fees or “incentive awards.” Cf. Part VI.B, *infra* (discussing compensation payments to individual state plaintiffs).

Compensation is awarded to the following federal plaintiffs in the amounts indicated, to be treated as expenses under the \$15,000,000.00 awarded for fees and expenses:

York law does not authorize incentive awards for named plaintiffs in class actions.” *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 56 A.D.3d 162, 166, 865 N.Y.S.2d 706 (N.Y.App. Div.3d Dep't 2008). But cf. *In re Colt Indus. Shareholder Litig.*, 77 N.Y.2d 185, 193–94, 565 N.Y.S.2d 755, 566 N.E.2d 1160 (1991) (“New York's class action statute (CPLR 901–909) has much in common with Federal rule 23.”). As a result, class representatives may not recover compensation “for their time or efforts in bringing lawsuits.” *Id.* at 167, 865 N.Y.S.2d 706. The state plaintiffs acknowledge this adverse precedent. See Dec. 30, 2009 Reply Mem. in Supp. of Final Approval of the Settlement, Awarding Attorneys' Fees and Reimbursement of Expenses, and Granting Compensatory Awards to the Representative Pls. at 8, Docket Entry No. 584 (“State Pl. Reply”).

The state plaintiffs cite a favorable trial court decision. See *Id.* (citing *Mark Fabrics, Inc. v. GMAC Commercial Credit LLC*, Index No. 604631/02, 2005 WL 6216029, 2005 NY Misc. LEXIS 3566, at *5 (N.Y.Sup.Ct. Dec. 22, 2005) (Cahn, J.) (approving incentive award, without analysis)); see also Dec. 29, 2009 Pl. Mark Smilow's Mem. in Further Supp. of His Application for an Incentive Award at 1–2, Docket Entry No. 588 (“Smilow Mem.”) (same). It appears that the Third Department's *Flemming* decision is binding precedent in the *Fiala* action. See *People v. Shakur*, 215 A.D.2d 184, 185, 627 N.Y.S.2d 341 (N.Y.App.Div. 1st Dep't 1995) (“Trial courts within this department must follow the determination of the Appellate Division in another department until such time as [the Appellate Division for the First Department] or the Court of Appeals passes on the question.”) (citations omitted).

**2. Plaintiffs Theresa Hazen,
Mark Smilow, and Vijay Shah**

State plaintiffs Theresa Hazen and Mark D. Smilow are not designated class representatives. Evidence indicates that state plaintiff Vijay J. Shah joined the *Fiala* litigation for purely speculative and opportunistic reasons.

Plaintiff Smilow was designated a class representative by the New York Supreme Court on June 30, 2007, but removed by the Appellate Division on June 5, 2008. *See* Smilow Mem. at 3 (citing *Fiala v. Metro. Life Ins. Co.*, 52 A.D.3d 251, 251, 859 N.Y.S.2d 426 (N.Y.App. Div. 1st Dep't 2008)). The Appellate Division *372 noted that “the avoidance of an appearance of impropriety[] require[s] that plaintiff Mark Smilow, an associate at plaintiffs' co-lead counsel, be removed as a class representative, even though he has personally retained other counsel.” *Fiala*, 52 A.D.3d at 251, 859 N.Y.S.2d 426. In view of the relatively short period of time during which Smilow was a class representative, and the circumstances of his removal, no award of compensation to him is warranted.

Plaintiff Hanzen was conditionally allowed to serve as class representative on behalf of her husband Paul Hanzen, a class member, subject to presentation of proof that she was authorized to act as Mr. Hanzen's conservator or representative. *See* MetLife Fee Br. at 13–14; Dec. 28, 2009 Aff. and Decl. of Carl Micarelli in Response to Pls.' Requests for Fees and Compensation (“Micarelli Fees Decl.”), Ex. A at 2, Docket Entry No. 577–2 (Order, *Fiala v. Metro. Life Ins. Co.*, Index No. 601181/00 (N.Y.Sup.Ct. Jan. 30, 2007)). It appears not to be contested that no such proof was ever presented by Ms. Hanzen. *See* Micarelli Fees Aff. ¶ 10; State Pl. Mem. at 9. Because Hanzen is not a class representative, no award of compensation to her is warranted.

Plaintiff Shah acknowledged in deposition testimony that he viewed MetLife as a candidate to demutualize, and purchased the minimum annuity available in the hope of participating in such a demutualization and possibly receiving money or subscription rights. *See* Micarelli Fees Decl., Ex. B at 45 (Sept. 17, 2004 Dep. Tr. of Vijay J. Shah). Shah's speculative and self-interested conduct does not warrant compensation out of the Settlement amount.

3. Compensation for Efforts on Behalf of the Class

Intra-class conflicts may arise where class representatives are given large awards or amounts of compensation in addition to the benefits conferred on fellow class members. Apparently binding New York precedent holds that “incentive awards” are not available as a matter of New York law. For these reasons, state plaintiffs' applications are denied to the extent they seek more than de minimis amounts for time and effort actually expended, in recognition of their efforts on behalf of the class.

Consistent with the state plaintiffs' invocation of the PSLRA standards governing compensation awards, the applications of class representatives Fiala, Beliunas, Brophy, and Ira and June Gelb are deemed warranted to the extent that they seek reasonable compensation for time and effort expended in rendering essentially paraprofessional services on behalf of the class and in support of plaintiffs' counsel's efforts to prosecute the litigation. As in the case of compensation awarded to lead plaintiffs in the federal case, awards to individual state plaintiffs are considered in the nature of attorneys' expenses, rather than attorneys' fees or “incentive awards.” *See* Part VI.A, *supra*.

MetLife's contention that plaintiffs who have not been employed for pay should not be eligible to receive compensation for services rendered is not adopted. No reason is offered why compensation should be limited to lost wages. *See* Part V.A, *supra*. As was previously noted, under the PSLRA, compensation may be awarded in recognition of, for example, “the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise).” *Frank*, 228 F.R.D. at 187. For the same reasons already discussed, reasonable compensation awards to state plaintiffs who have not been employed for pay are justified.

*373 Based on the value of the work actually contributed, compensation for time expended on a paraprofessional expense-incurred basis is awarded to the following state plaintiffs in the amounts indicated, to be treated as expenses under the \$15,000,000.00 awarded for fees and expenses:

• Eugenia J. Fiala	\$1,500.00
• Paulette Beliunas	\$1,500.00
• John Brophy	\$1,500.00

- Ira J. Gelb \$1,500.00
- June Gelb \$1,000.00

VII. Conclusion

The settlement is fair and reasonable. It is approved. The case is dismissed on the merits.

The allocation of attorneys' fees and expenses is approved in the total sum of \$15,000,000.00. Individual plaintiffs' compensation is approved in part and denied in part as indicated above, in the total amount of \$13,000.00 to be charged against the \$15,000,000.00 as expenses. A legal fee of \$25,000.00 is allocated to an objector, as noted above, to be charged against the \$15,000,000.00 as expenses.

The *cypres* allocation is approved, as noted above, in the sum of \$2,500,000.00.

The allocation to the closed block of \$32,500,000.00 is approved as noted above.

The total approved as the settlement amount is \$50,000,000.00.

The parties shall submit to both courts a short form of judgment by 5:00 PM on Friday February 26, 2010. The form of judgment shall indicate the full and correct names of the recipients for, and the exact amounts of, all payments to be made by the defendant in accordance with this Memorandum, Order and Judgment.

The parties may apply to the federal and state courts should any problems arise during execution of the Settlement.

This Memorandum, Order and Judgment is stayed until a parallel judgment approving the settlement is filed and docketed by the New York Supreme Court in the *Fiala* Case.

SO ORDERED.

All Citations

689 F.Supp.2d 297

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264 F.3d 712

United States Court of Appeals, Seventh Circuit.

In the Matter of: SYNTHROID
MARKETING LITIGATION.Nos. 00–3164, 00–3183, 00–3262, 00–3285, 00–
3290 to 00–3293, 00–3302, 00–3303, 01–2000|
Argued April 20, 2001.|
Decided Aug. 31, 2001.**Synopsis**

Class of consumers and class of health insurers brought action against pharmaceutical company, alleging that company misled physicians about bioequivalence of cheaper drugs to company's drug for treatment of hypothyroidism. Plaintiffs and defendant sought approval of proposed settlement, objectors moved to intervene to object to settlement, plaintiffs' attorneys sought fees, and health insurers sought incentive awards. The United States District Court for the Northern District of Illinois, [Elaine E. Bucklo](#), J., denied motion to intervene, approved settlement, awarded fees in reduced amount, and denied incentive awards. On appeal, the Court of Appeals, [Easterbrook](#), Circuit Judge, held that: (1) objectors were entitled to intervene; (2) settlement was fair; (3) district court was required to estimate market rate for fees; and (4) insurers were not entitled to incentive awards.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

***713** [Marvin A. Miller](#), [Patrick E. Cafferty](#), [Dom J. Rizzi](#) and [Jennifer W. Sprengel](#), Miller, Faucher & Cafferty, Chicago, IL, [Pamela B. Slate](#), Donaldson, Guin & Slate, Birmingham, AL, [Joseph C. Kohn](#), Kohn, Swift & Graf, Philadelphia, PA, for Plaintiffs-Appellees.

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[Thomas C. Cronin](#) (argued), Cummins & Cronin, [Marvin A. Miller](#), Miller, Faucher & Cafferty, [Daniel J. McMahon](#), Wilson, Elser, Moskowitz, Edelman & Dicker, [Lindley J. Brenza](#) (argued), Bartlit, Beck, Herman, Palenchar & Scott, Chicago, IL, [Robert A. Wallner](#) (argued), Milberg, Weiss, Bershad, Hynes & Lerach, New York, NY, for Appellants.

[Marvin A. Miller](#), Miller, Faucher & Cafferty, [Lindley J. Brenza](#) (argued), Bartlit, Beck, Herman, Palenchar & Scott, Chicago, IL, [Robert A. Wallner](#) (argued), Milberg, Weiss, Bershad, Hynes & Lerach, New York, NY, for Plaintiffs-Appellants.

[Daniel J. Popeo](#), Washington Legal Foundation, [David L. Douglass](#) (argued), [W. Scott Simmer](#), Porter Wright Morris & Arthur, Washington, DC, for Amici Curiae-Appellees.

[Daniel J. Popeo](#), Washington Legal Foundation, [David L. Douglass](#) (argued), [W. Scott Simmer](#), Porter Wright Morris & Arthur, Washington, DC, for Amici Curiae.

***714** [Lindley J. Brenza](#) (argued), Bartlit, Beck, Herman, Palenchar & Scott, Chicago, IL, for Intervenor-Appellants.

Before [EASTERBROOK](#), [MANION](#), and [KANNE](#), Circuit Judges.

Opinion

[EASTERBROOK](#), Circuit Judge.

Hypothyroidism occurs when the thyroid gland fails to produce sufficient hormones. Symptoms include fatigue, extreme sensitivity to cold, joint pains, muscle aches, and weight gain. Left untreated, victims eventually suffer hair loss, numbness in the limbs, depression, and mental confusion. For more than 40 years hormone-replacement therapy based on **levothyroxine** sodium has been used to alleviate these symptoms. Introduced during the 1950s, **Synthroid** was the first orally administered **levothyroxine** product. This synthetic derivative of thyroxine is a “narrow therapeutic index” drug, meaning that dosage levels must be established for each recipient by trial and error, which may take several months. Too much or too little can cause heart, brain, psychological, and reproductive problems. Although **levothyroxine** sodium is not patented and is available from many vendors, **Synthroid** still represents more than two-thirds of sales. Its manufacturer, keen to maintain this lead, asserts that no other thyroid hormone drug is bioequivalent to **Synthroid** and warns physicians that switching brands may cause the side effects associated with incorrect levels of thyroid hormones in the blood, unless the patient goes through a new monitoring and calibration process.

If Synthroid is bioequivalent to other drugs containing levothyroxine, the tedious and costly calibration step can be omitted, and its less-expensive rivals would be likely

to claim a greater share of the market. In 1990 Betty J. Dong, a professor of clinical pharmacy at the University of California, San Francisco, concluded that Synthroid and its rivals are interchangeable. To publish a paper based on the data collected in her study, Dong needed the permission of Knoll Pharmaceuticals, Synthroid's owner at the time. Knoll's predecessor Flint Laboratories had financed Dong's work under condition that she secure its approval before making any public disclosures. Knoll objected to publication, asserting that it found Dong's work methodologically subpar. The conclusions nonetheless found their way to the press after Dong decided to dishonor the promises she had made to Flint. See *Editorial: Thyroid Storm*, 277 J. Am. Medical Ass'n 1238 (1997). Embarrassed by the accusation of covering up unfavorable information, Knoll permitted Dong to release the study. It was published as Dong, *et al.*, *Bioequivalence of Generic and Brand-name Levothyroxine Products in the Treatment of Hypothyroidism*, 277 J. Am. Medical Ass'n 1205 (1997).

After the article's publication, lawyers across the country began filing class action suits. They sought relief under a variety of state and federal law theories, including antitrust, RICO, and state consumer-fraud statutes. These theories had in common the contention that Knoll misled physicians into keeping patients on Synthroid despite knowing (as Dong had concluded) that the physicians could have switched their patients to less costly but equally effective drugs. These suits were transferred to the Northern District of Illinois for consolidated pretrial proceedings under 28 U.S.C. § 1407. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998). Settlement talks ensued, and in mid-1998 the parties presented a compromise to the district judge. She rejected it, finding that too little discovery had been completed, that the size of the class was still *715 unknown, and that the insurance companies that had actually paid for much of the Synthroid were not parties. 1998 WL 526566, 1998 U.S. Dist. LEXIS 12936 (N.D.Ill. August 14, 1998). The court then split the plaintiffs into two classes: one of consumers and the other of insurance companies (also known as third-party payors or TPPs). 188 F.R.D. 287, 295 (N.D.Ill.1999). After additional negotiations the parties submitted a second proposed settlement, under which Knoll and its former parent BASF Corporation would pay approximately \$88 million to consumers and \$46 million to the insurance companies in exchange for a release of all claims. (Abbott Laboratories, which purchased BASF's pharmaceutical business in March 2001, is not a party to the suit.) The district court

rejected motions to intervene filed by several dissatisfied consumers and approved the settlement. 110 F.Supp.2d 676 (N.D.Ill.2000). The court then awarded attorneys' fees from these common funds at a level significantly below what the lawyers had requested.

We deal first with the proposed intervention. The objectors, who call the settlement a sell-out, wanted to intervene so that they could obtain appellate review of any decision approving the deal. Status as a party is a condition to taking an appeal. See *Marino v. Ortiz*, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988); *Felzen v. Andreas*, 134 F.3d 873 (7th Cir.1998), affirmed by an equally divided Court under the name *California Public Employees' Retirement System v. Felzen*, 525 U.S. 315, 119 S.Ct. 720, 142 L.Ed.2d 766 (1999). The district judge's order approving the class-fund settlement devoted one sentence to intervention: "All pending motions to intervene ... are denied." 110 F.Supp.2d at 686. That's all she said, either orally or in writing. This decision, which puts the objectors behind the eight ball, is impossible to reconcile with *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877 (7th Cir.2000), which holds that "it is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision." 201 F.3d at 881. See also *Griffith v. University Hospital, LLC*, 249 F.3d 658, 661-62 (7th Cir.2001); *Southmark Corp. v. Cagan*, 950 F.2d 416, 419 (7th Cir.1991); *Keith v. Daley*, 764 F.2d 1265, 1272 (7th Cir.1985). The district judge may have worried that, if she allowed intervention, objectors would enter the case and, as parties, block the settlement by withholding agreement to its terms. But as *Crawford* observed that worry is insubstantial; a judge can solve the problem by limiting intervenors to the privilege of appealing. For this limited-purpose intervention, it is irrelevant whether the class members come in under Rule 24(a) (intervention as of right) or Rule 24(b) (permissive intervention). See *Crawford*, 201 F.3d at 881; *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 707 (7th Cir.2001). District judges are not entitled to block appellate review of their decisions by the expedient of denying party status to anyone who seems likely to appeal, as the district judge apparently tried to do in this case. *Crawford's* requirement that "district courts freely allow the intervention of class members who object to proposed settlements" means that the intervenors must be given their say in this case. We reverse the district court and grant the objecting class members a place at the table.

Whether we can do anything for the intervenors now that they are parties is the next question. The intervenors appealed from the district court's denial of their motions to intervene, but not from the final judgment embodying the settlement.

***716** A decision reversing an order denying intervention usually leads to a remand, not to a decision on the merits. See *Jessup v. Luther*, 227 F.3d 993, 998–99 (7th Cir.2000). Yet there would be nothing to do on remand here; the settlement's approval ended the case. No further appealable judgment could be entered, so the objecting class members seem to be out of luck. This problem has a ready solution, however. *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir.1999), instructs putative intervenors that, when a substantive appeal is contingent on the success of the intervention appeal, they should file two notices of appeal: one from the denial of intervention and a second springing or contingent appeal from the final judgment—which will kick in if they are successful on the first. The approach is used elsewhere too, see *Purcell v. BankAtlantic Financial Corp.*, 85 F.3d 1508, 1510–11 nn. 1, 2 (11th Cir.1996), and has been obvious to class members in other cases. See Crawford; *Cusack v. Bank United of Texas FSB*, 159 F.3d 1040 (7th Cir.1998). Our intervenors, however, failed to file a contingent appeal and called the approach of *Blair* and *Cusack* nonsensical. Why they spent time and money arguing the point rather than filing a precautionary springing notice of appeal from the final judgment is puzzling. After oral argument, however, the objectors took our advice. They filed a contingent notice of appeal with the district court. With today's decision that notice springs into effect (it is timely by analogy to Fed. R. App. P. 4(a)(2) because, until today, the objectors have not been entitled to appeal) and brings the district court's approval of the settlement before us.

Although officially in the game, the objectors have not presented any objection to the settlement that was not convincingly addressed by the district court. The objectors contend that the settlement should have been larger, that the notice was not sufficient, and that the release of liabilities is too broad. Yet it seems to us, as it did to the district judge, that the settlement is generous in light of the difficulties facing the class. Knoll owned the Dong study and cannot be required to pay damages for exercising its contractual rights. It might be held liable for fraud, if Dong's work proved to Knoll's satisfaction that Synthroid and other drugs are bioequivalent, and Knoll then tried to bamboozle the public by maintaining the opposite of what it knew to be the truth. But it would be hard to say that the study compelled Knoll to tell the public that levothyroxine products are interchangeable; other

works in the medical literature reach a contrary conclusion. The Food and Drug Administration, which has been asked repeatedly to declare that at least some other [levothyroxine](#) medications are bioequivalent to [Synthroid](#), has not done so in the four years since the Dong study's publication. (The FDA's *Approved Drug Products with Therapeutic Equivalence Evaluations* does not list any [hypothyroid](#) medications as therapeutically interchangeable.) Nor do physicians act as if they accept Dong's conclusions. The American Association of Clinical Endocrinologists recommends that patients not switch brands, and that, if they do switch, the dosage level be recalibrated. See *Clinical Practice Guidelines for Evaluation and Treatment of Hyperthyroidism and Hypothyroidism*, available at www.aace.com/clin/guides/thyroid_guide.html. [Synthroid's](#) sales are up. Although its share has dropped from 71% to 64% since Dong's study appeared, the market is growing, for all the data reveal the entire drop in market share may have been from new patients starting on different medications. Add to this the difficulty of proving damages when many of the consumers do not bear the full expense of

***717** the drugs (and often do not purchase them directly), and the plaintiffs would have had a headache trying to get any judgment on the merits. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) (federal law prohibits price fixing suits by indirect purchasers of a product); *In re Brand Name Prescription Drugs Antitrust Litigation*, 248 F.3d 668, 670 (7th Cir.2001); *Teamsters Health and Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 825–26 (7th Cir.1999) (health insurers may not pursue direct litigation against tobacco companies accused of suppressing research on the health effects of cigarettes because the injuries are too remote, the chain of causation is too long, and the damages “wickedly hard” to calculate); *Health Care Service Corp. v. Brown & Williamson Tobacco Corp.*, 208 F.3d 579 (7th Cir.2000).

Unlike members of the consumer class, TPPs are sophisticated purchasers of pharmaceuticals. Their consent to this deal shows that a larger judgment was unlikely. The objectors maintain that the consumers should have received a larger piece of the pie, but this is implausible. The settlement forecloses all subrogation rights the TPPs would have held against any consumer. Had the TPPs held back and sued in subrogation, they might well have taken almost the entire fund. Except for uninsured persons and Medicare patients without separate prescription drug coverage (who must pay for their own pills), most persons' expenses for Synthroid are paid by third parties. Insurance generally requires consumers to provide a co-payment for

prescriptions; this payment rises only marginally (if at all) for more expensive drugs. And [hypothyroid](#) sufferers are likely to meet their deductibles whether they switch from Synthroid or not. That the consumers received two-thirds of the settlement funds seems more like a gift (or a public relations gesture) by the TPPs rather than a reason to upset the deal. The objectors' other grounds are well covered by the district court's opinion. The judge did not abuse her discretion in approving this settlement. It is time for the plaintiffs to receive their payments and for their lawyers to be paid.

Unless a class contracts privately over attorneys' fees, lawyers in class-fund cases must petition the court for their compensation. See [Cook v. Niedert](#), 142 F.3d 1004, 1011 (7th Cir.1998). Counsel for the consumers have asked for \$26.3 million, about 29% of the consumers' recovery. The insurance companies' lawyers request \$10 million, approximately 22% of the insurers' fund. As the district judge saw it:

Essentially there are two very large funds created and a great many people benefited; the objections were insubstantial; the class counsel were able and efficient; the litigation was fairly complex but short; the risk of nonpayment was moderate; and the class counsel devoted a fair amount of time to the case, but not a great amount compared to the size of the settlement.

[110 F.Supp.2d at 684](#). Recoveries of “\$75–200 million and more” constitute “megafunds,” she continued. Following the approach of decisions in the Northern District of Georgia, the Southern District of Texas, and the Eastern District of Pennsylvania, the judge concluded that “fees in the range of 6–10% and even lower” are common in megafund cases. “[W]hen the figures hit the really big time,” she said, larger fees constitute a windfall. Stating that “class counsel ha[d] done a fine job in terms of a speedy and professional resolution of a major class action”, the judge awarded 10% of each fund to each set of counsel.

***718** The judge did not explain why she decided to follow decisions of district courts in other jurisdictions, rather than decisions of the United States Court of Appeals for the Seventh Circuit. For the approach that these districts take, and that our district judge followed, cannot be reconciled with

the approach our opinions adopt. We have held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time. See [Montgomery v. Aetna Plywood, Inc.](#), 231 F.3d 399, 409 (7th Cir.2000); [Gaskill v. Gordon](#), 160 F.3d 361 (7th Cir.1998); [Florin v. Nationsbank of Georgia, N.A.](#), 60 F.3d 1245 (7th Cir.1995) (*Florin II*); [Florin v. Nationsbank of Georgia, N.A.](#), 34 F.3d 560 (7th Cir.1994) (*Florin I*); [In re Continental Illinois Securities Litigation](#), 985 F.2d 867 (7th Cir.1993) (*Continental II*); [In re Continental Illinois Securities Litigation](#), 962 F.2d 566 (7th Cir.1992) (*Continental I*). Of these opinions only *Florin II* was cited or discussed by the district judge, and then for a question unrelated to the market rate of legal services. We have never suggested that a “megafund rule” trumps these market rates, or that as a matter of law no recovery can exceed 10% of a “megafund” even if counsel considering the representation in a hypothetical arms' length bargain at the outset of the case would decline the representation if offered only that prospective return.

The district judge defined megafunds as settlements of \$75 million and up. Fees in “megafund” cases should be capped at 10% of the recovery, the judge held, although she recognized that fees of 30% and more are common and proper in smaller cases. This means that counsel for the consumer class could have received \$22 million in fees had they settled for \$74 million but were limited to \$8.2 million in fees because they obtained an extra \$14 million for their clients (the consumer fund, recall, is \$88 million). Why there should be such a notch is a mystery. Markets would not tolerate that effect; the district court's approach compels it. A notch could be avoided if the 10% cap in “megafund” cases were applied only to the *portion* of the recovery that exceeded \$74 million, but that is not what the district court did; it capped fees at 10% of the whole fund. Under the court's ruling, a \$40 million settlement would have led to the same aggregate fees as the actual \$132 million settlement. Private parties would never contract for such an arrangement, because it would eliminate counsel's incentive to press for more than \$74 million from the defendants. Under the district court's approach, no sane lawyer would negotiate a settlement of more than \$74 million and less than \$225 million; even the higher figure would make sense only if it were no more costly to obtain \$225 million for the class than to garner \$74 million.

Having disapproved the megafund cap, we must remand—for the district judge did not attempt a market-based approach, even as an alternative holding. On remand the district court must estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed). The best time to determine this rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets. Individual clients and their lawyers *never* wait until after recovery is secured to contract for fees. They strike their bargains before work begins. Ethically lawyers must do ***719** this, but the same thing happens in markets for other professional services with different (or no) ethical codes. Many district judges have begun to follow the private model by setting fee schedules at the outset of class litigation—sometimes by auction, sometimes by negotiation, sometimes for a percentage of recovery, sometimes for a lodestar hourly rate and a multiplier for riskbearing. (The greater the risk of loss, the greater the incentive compensation required.) Timing is more important than the choice between negotiation and auction, or between percentage and hourly rates, for all of these systems have their shortcomings. See, e.g., *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir.1986); Winand Emons, *Expertise, Contingent Fees, and Insufficient Attorney Effort*, 20 Int'l Rev. L. & Econ. 21 (2000); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. Legal Stud. 503 (1996); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. Legal Stud. 189 (1987); Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis*, 24 RAND J. Econ. 343 (1993); Terry Thomason, *Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process*, 20 J. Legal Stud. 187 (1991). Only *ex ante* can bargaining occur in the shadow of the litigation's uncertainty; only *ex ante* can the costs and benefits of particular systems and risk multipliers be assessed intelligently. Before the litigation occurs, a judge can design a fee structure that emulates the incentives a private client would put in place. At the same time, both counsel and class members can decide whether it is worthwhile to proceed with that compensation system in place. But in this case the district judge let the opportunity slip away, turning to fees only *ex post*. Now the court must set a fee by approximating the terms that would have been agreed to *ex ante*, had negotiations occurred.

The second circuit has criticized this court's market-mimicking approach on the ground that one “cannot know

precisely what fees common fund plaintiffs in an efficient market for legal services would agree to”. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 53 (2d Cir.2000). “Instead,” that court “adhere[s] to [the] practice that a fee award should be assessed based on scrutiny of the unique circumstances of each case, and ‘a jealous regard to the rights of those who are interested in the fund.’ ” We grant the premise; it is indeed impossible to know *ex post* the outcome of a hypothetical bargain *ex ante*. But a court can learn about *similar* bargains. That is at least a starting point. The second circuit's consider-everything approach, by contrast, lacks a benchmark; a list of factors without a rule of decision is just a chopped salad. Even *Goldberger*, which resorted to using a lodestar, had to look at the market rate for lawyers' hours. Determining lawyers' fees *ex post* is a perilous process. But any method other than looking to prevailing market rates assures random and potentially perverse results.

It is impossible to be sure what would have happened earlier, but some guides are available: the fee contracts some TPPs signed with their attorneys; data from large common-pool cases where fees were privately negotiated; and information on class-counsel auctions, where judges have entertained bids from different attorneys seeking the right to represent a class.

The first benchmark is actual agreements. Before joining the class, a group of more than 100 TPPs (the “Health Benefit Payers,” as they call themselves) contracted with two law firms to represent them. Unfortunately they have not put the details in the record, but they tell us ***720** that the contracts provided for a 25% contingent fee at maximum. The “Porter Wright Group” (18 TPPs referred to collectively by their law firm's name) also negotiated with and hired counsel. Their setup allowed each insurance company to pick one of two fee options. Either the client paid Porter Wright's full costs and 70% of its normal hourly fees each month, with a 4% of recovery kicker at the end, or the client paid only costs each month but had to pony up 15% of the final settlement. Insurers are sophisticated purchasers of legal services, and these contracts *define* the market. Unfortunately, though, they identify a market mid-way through the case, after defendants already had agreed to pay substantial sums. The Porter Wright contracts provide little guidance on how to compute fees for the consumer class, because none of the consumers' lawyers was paid on an ongoing basis. For these reasons the contracts are of limited utility—but they do show that even after an initial settlement, with the TPPs' risk of loss slight, arms' length bargains did not yield a “megafund cap” on fees.

A second benchmark for determining legal fees is data from securities suits where large investors have chosen to hire counsel up front. Data about these *ex ante* arrangements have been widely available since the changes to securities practice wrought by legislation in the mid-1990s. At about the same time some district judges started conducting auctions for the right to be lead counsel, and the outcome of these auctions provide the third benchmark.

At first thought, auctions appear to be a poor mechanism for replicating the market price of legal services. Quality varies among lawyers, and awards net of fees could rise with the level of fees if a higher payment attracts the best counsel. We never see private clients auctioning off their legal work to the lowest bidder. Law firms pitch their services in negotiation—competing for business by demonstrating to potential clients that they provide quality legal work at good value. But the word “auction” is an imprecise description of the process that judges have used to choose lead counsel in class actions. Judges don't look for the lowest bid; they look for the best bid—just as any private individual would do in selecting a law firm, an advertising firm, or a construction company. See *Wenderhold v. Cylink*, 191 F.R.D. 600 (N.D.Cal.2000). Bidding law firms provide the judge with firm profiles, testimonials of former clients, predictions of expected recovery, fee proposals, and arguments on why their firm provides good value. The judge in turn acts as an agent for the class, selecting the firm that seems likely to generate the highest recovery net of attorneys' fees. The court in *Wenderhold* compared bids by evaluating how much the class would take (after attorneys' fees) at different levels of damages. The court then evaluated the firms' resumes and determined that the low bidder would do as good or better a job than the other firms. See also *In re Wells Fargo Securities Litigation*, 157 F.R.D. 467 (N.D.Cal.1994).

Auctions are less helpful *ex post*, and not only because it's too late to put the legal services up for bid. After settlement, we have lost all opportunity to put in place incentives for attorneys to secure larger awards. Courts must at this point simply determine what value the lawyers have provided. The judicial opinions from auction cases are helpful in this respect, though, because they provide detailed analysis of the market rate for attorneys facing different levels of risk. Forcing firms to bid at least approximates a market, providing the judge with multiple options. We cannot assume that judges always select the best bid. See *721 *In re Bank One Shareholders Class Actions*, 96 F.Supp.2d 780 (N.D.Ill.2000); *In re Amino Acid Lysine Antitrust Litigation*, 918 F.Supp. 1190 (N.D.Ill.1996)

(both winning bids provided the attorneys with a percentage of the recovery yet capped the fee award, eliminating any incentive for the lawyers to push for a larger recovery). But a court can examine the bids and the results to see what levels of compensation attorneys are willing to accept in competition.

The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case. Both negotiations and auctions often produce diminishing marginal fees when the recovery will not necessarily increase in proportion to the number of hours devoted to the case. In *Oracle Securities Litigation*, 132 F.R.D. 538 (N.D.Cal.1990), the judge selected a bid with a declining contingent-fee scale, plus an early-settlement discount. 132 F.R.D. at 541, 548. The schedule provided for 30% of the first million, 25% of the next \$4 million, then 20% of the next \$10 million, and 15% of everything above \$15 million. Following settlement, counsel received a total of \$4.8 million, or 19.2% of the \$25 million recovery. *In re Oracle Securities Litigation*, 852 F.Supp. 1437, 1457 (N.D.Cal.1994). The advantages of such a structure over the fee schedule laid out by the district court in our case are apparent: in *Oracle* the attorneys' fees never went down for securing a larger kitty, and counsel always had an incentive to seek more for their clients. See also *In re Bank One Shareholders Class Actions*, 96 F.Supp.2d 780 (N.D.Ill.2000) (providing for 17% of first \$5 million, 12% of next \$10 million, etc.); *Amino Acid Lysine Antitrust Litigation*, 918 F.Supp. 1190 (similar scale).

This is not to say that systems with declining marginal percentages are always best. They also create declining marginal returns to legal work, ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client. This feature exacerbates the agency costs inherent in any percentage-of-recovery system, just as the lodestar approach creates the opposite incentive to run up the billable hours. Other options are available. Suppose that recovery is certain and that the major dispute concerns its amount. A fee schedule could be created that takes the base recovery for granted (no need to pay counsel to “produce” a recovery that is there for the asking) while magnifying the incentive to seek more. This was the approach of the successful bidder in *In re Auction Houses Antitrust Litigation*, 197 F.R.D. 71 (S.D.N.Y.2000). Counsel agreed to take no fees for the first \$405 million recovered and 25% of everything above \$405 million. Because the government had already established

liability in criminal proceedings, the civil lawyers in *Auction Houses* concluded that the first few hundred million would come easy. Convinced that their superior skills could generate a larger-than-expected recovery, they agreed to be paid only for the upper tail of the distribution of possible recoveries. (If the expected damages were \$350 million, for example, then this structure would create a very powerful incentive to do well by the class; but it would be *verboten* under our district court's "megafund rule.")

Bids also differ in how they compensate lawyers for their time. "Calendar-based" bids (seen in *Oracle*) compensate lawyers for additional time spent. See also *Wells Fargo* and *Amino Acid Lysine*. Others compensate based on the stage of litigation, but not the amount of time it actually *722 takes to get there. We are skeptical of the calendar-based bids, because they do little to reduce agency costs and tempt lawyers to delay settlement talks unnecessarily. Systems where fees rise based on the stage of litigation rather than the calendar are more common in private agreements (indeed they are the norm for contingent-fee contracts in tort suits). These tie the incentives of lawyers to those of the class by linking increased compensation to extra work.

The record compiled in this case is limited. We know the agreements between some TPPs and their lawyers, but we also know that they entered the case only after a large kitty seemed likely. The district court's task on remand will be to gather such additional data as the parties provide and to approximate the arrangements that would have prevailed at the outset. The district judge should keep in mind that she separated the consumer and TPP classes. The fees of each class's group lawyers should be determined by that group's risk and productivity. The consumer and TPP classes were rivals for a limited fund, not confederates in common cause. Any use of a sliding scale should be based solely on each class's settlement, not the total amount recovered by the two classes.

Two additional issues require only brief discussion. The district court declined to authorize full reimbursement for the expenses of litigation. The judge wrote that too many claims had been lumped into broad categories, that she was perplexed by the difference between reproduction and copying expenses, and that travel and telephone costs were too high. She reduced the TPP counsels' request by one third and consumer counsels' request by one half. Reducing litigation expenses because they are higher than the private market would permit is fine; reducing them because the

district judge thinks costs too high in general is not. See *Continental I*, 962 F.2d at 570; *Dutchak v. Central States Pension Fund*, 932 F.2d 591, 597 (7th Cir.1991); *Heiar v. Crawford County*, 746 F.2d 1190, 1204 (7th Cir.1984). Likewise the amount of itemization and detail required is a question for the market. If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more. See, e.g., *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 200 F.3d 518 (7th Cir.1999).

Counsel contend that their expenses and their billing methods are normal in commercial practice. They explain that "copying" charges denote outside copy centers while "reproduction" charges denote in-house copying. They say that their telephone and travel expenses are standard fare for a case of this magnitude. Our remand instructions regarding expenses mirror those on fees. Parties should submit information on what expenses private clients in large class actions (auctions and otherwise) pay. In examining market rates the court should be careful not to pay the attorneys twice. Some cases award large percentages of the recovery in order to cover for litigation expenses as well. If the district court selects such a fee structure, it should not separately reimburse expenses.

Finally, the district court awarded incentive reimbursements to named consumer class plaintiffs but not to the TPPs' representatives. The judge explained that the "cases cited by the third-party payers involve awards to individuals who took significant risks ... not to corporations who will receive large recoveries in any event." The TPP representatives appeal this decision. Incentive awards are justified when necessary to induce individuals to become named representatives. See *Montgomery*, 231 F.3d at 410; *723 *Cook*, 142 F.3d at 1016; *Continental I*, 962 F.2d at 571–72. We see no reason why this rationale would not apply equally to corporations and other organizations. But if at least one TPP would have stepped forward without the lure of an "incentive award," there is no need for such additional compensation, as the district judge recognized. Many insurance companies entered this suit knowing that a large payment was on its way. The TPPs were "clear winners" from the start. See *Continental I*, 962 F.2d at 572. Appellants argue that some of the TPPs didn't shoulder a reasonable portion of the discovery burden. To the extent one company's law firm played a larger role than others, that difference must be accounted for in divvying up attorneys' fees. But it is evident that the prospect of recovery created enough incentive for the representative TPPs to step up even

without an additional award for doing so. The market rate for incentive reimbursements here is accordingly zero.

All Citations

AFFIRMED in part, VACATED in part, and REMANDED in part for proceedings consistent with this opinion.

264 F.3d 712, 2001-2 Trade Cases P 73,407, 51 Fed.R.Serv.3d 736

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617 F.Supp.3d 904

United States District Court, N.D. Illinois, Eastern Division.

IN RE TIKTOK, INC., CONSUMER
PRIVACY LITIGATION

This Document Relates to All Cases

MDL No. 2948

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Master Docket No. 20 C 4699

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Signed July 28, 2022

Synopsis

Background: Users of social-media platform for sharing short videos brought putative class actions in various federal courts against platform challenging its use of users' private information, bringing claims under the common law and under federal and state statutes including the federal Computer Fraud and Abuse Act (CFAA) and Video Privacy Protection Act (VPPA), Illinois's Biometric Information Privacy Act (BIPA), and California's Comprehensive Computer Data Access and Fraud Act (CCDAFA) and Unfair Competition Law (UCL). After the actions were consolidated in a multidistrict litigation (MDL), the District Court, [565 F. Supp. 3d 1076](#), [Lee, J.](#), granted users' motion for preliminary approval of settlement. Users moved for final approval of settlement, as well as for attorneys' fees, expenses, and service awards.

Holdings: The District Court, [John Z. Lee, J.](#), held that:

nationwide and Illinois classes satisfied numerosity, commonality, and typicality requirements for class certification;

inclusion of Illinois subclass in proposed settlement did not create conflict among class members that precluded finding that class representatives fairly and adequately represented class;

named plaintiffs and counsel adequately represented interests of minor class members;

nationwide and Illinois classes satisfied predominance requirement for class certification;

nationwide and Illinois classes satisfied superiority requirement for class certification;

notice program for proposed settlement was adequate; and

settlement's terms were fair, reasonable, and adequate.

Motion granted.

Procedural Posture(s): Motion for Final Approval of Class Action Settlement; Motion for Attorney's Fees; Motion for Expenses.

***912 MEMORANDUM OPINION AND ORDER**

[John Z. Lee](#), United States District Judge

Tens of millions of Americans use the social media and entertainment application now known as TikTok ("TikTok" or "the App," formerly known as "Musical.ly") to view, create, and share short videos. That is all well and good, but according to the lead plaintiffs ("Plaintiffs") in this multidistrict litigation ("MDL"), the App's widespread popularity comes at the expense of its users' privacy rights. On behalf of a putative class comprising all TikTok users in the United States (an estimated 89 million people) and a subclass of Illinois users, Plaintiffs allege that ByteDance, Inc. (the China-based company that created TikTok) and its subsidiaries—TikTok, Inc., TikTok, Ltd., ByteDance Inc., and Beijing ByteDance Technology Co., Ltd. (collectively, "Defendants")—have used the App to surreptitiously harvest and profit from collecting the private information of users in violation of numerous federal and state consumer privacy laws.

Last year, the Court granted Plaintiffs' motion for preliminary approval of a class action settlement that would provide monetary relief to class members in the form of a \$92 million settlement fund, as well as broad injunctive relief prohibiting Defendants from engaging in the alleged privacy violations going forward. See [In re TikTok, Inc. Consumer Priv. Litig.](#), [565 F. Supp. 3d 1076](#) (N.D. Ill. 2021), ECF No. 161.

Now, after disseminating notice to the class and receiving approximately 1.4 million claims, Plaintiffs have filed a motion for final approval of the settlement, as well as a motion for attorneys' fees, expenses, and service awards. Various objectors have filed objections to both motions, as well as

their own fee and service award petitions. For the following reasons, the Court certifies the Nationwide Class and Illinois Subclass for purposes of the settlement, grants Plaintiffs' motion for approval of the settlement, approves the fee and service award petitions to the extent stated below, and makes other rulings as applicable.

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I. Background¹

A. Factual and Early Procedural History

The App is a social media and entertainment platform that allows users to view, create, and share short videos. Using the App, individuals can record videos and overlay them with visual effects, background music, and other enhancements. *See* Consol. Am. Class Action Compl. ¶¶ 127–28 (“Compl.”), ECF No. 114. After recording a video, a user can either save the video to their device or “post” the video to their TikTok account. *See id.* ¶¶ 146–47.

When a user posts a video to their account, the video is shared with the user's “followers” (that is, other users who subscribe to see the user's content) and also is posted publicly and displayed to users across the world using the App's

proprietary content-delivery algorithm. *Id.* ¶¶ 2, 7–9, 128. The algorithm uses artificial intelligence technologies and machine learning to gather information about a user and to predict what types of videos the user would want to see. *Id.* ¶¶ 8–9. The App then shows the user a curated feed of content (and advertisements) based on those predictions.² *Id.* ¶ 141.

The simultaneous success and secrecy of TikTok's proprietary AI technology has prompted considerable backlash from privacy advocates, politicians, and the United States government. In February 2019, the Federal Trade Commission entered into a consent decree with several Defendants over the App's purported violations of the Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. § 6501 *et seq.*³ The *914 Department of Defense expressed concerns that its employees' use of the App raised security issues because of the App's "ability to convey location, image and biometric data to its Chinese parent company." Compl. ¶ 6. And several United States Senators called on the intelligence community to investigate TikTok's alleged ties to the Chinese government and its potential as a "target of foreign influence campaigns like those carried out during the 2016 election on United States-based social media platforms." Letter from Senator Charles E. Schumer and Senator Tom Cotton to Joseph Maguire, Acting Director of National Intelligence (Nov. 27, 2019) (on file with the United States Senate), <https://www.democrats.senate.gov/imo/media/doc/10232019%20TikTok%20Letter%20-%20FINAL%20PDF.pdf>.

These privacy concerns also prompted a wave of putative class action lawsuits against TikTok in federal courts across the country. Beginning in 2018, several plaintiffs' law firms began to investigate whether Defendants' AI and machine learning technologies violated United States privacy laws. The investigations focused in particular on whether the App's video camera collected, retained, and distributed App users' facial recognition information or other biometric information without the users' authorization. *See* Pls.' Mot. Prelim. Approval Class Action Settlement ("Mot. Prelim. Approval"), Rhow Decl. ¶¶ 8–10, ECF No. 122-8. The investigations also explored whether the App harvested other types of private information, such as geolocation data, video viewing histories, unpublished TikTok videos (*i.e.*, those not "saved" or "posted"), and personal identifying information such as email addresses, social media account information, or cell phone data, and whether Defendants transferred that data to third parties. *Id.*; *see, e.g.*, Compl. ¶¶ 155–57.

The first case against TikTok based on these allegations was filed in the Northern District of California in November 2019. *See Hong v. ByteDance, Inc.*, No. 19 C 7792 (N.D. Cal.). Other lawsuits followed in the Northern District of California, the Central District of California, the Southern District of Illinois, and the Northern District of Illinois, including one in this Court. *See E.R. v. TikTok, Inc.*, No 20 C 2810 (N.D. Ill.). Eventually, the burgeoning of litigation led the Judicial Panel on Multidistrict Litigation ("JPML") to consolidate the then-nineteen related actions and to transfer them to this Court for pretrial proceedings on August 4, 2020. *See In re TikTok, Inc., Consumer Priv. Litig.*, 481 F. Supp. 3d 1331, 1332 (J.P.M.L. 2020); JPML Transfer Order, *In re TikTok* (N.D. Ill. Aug. 12, 2020), ECF No. 2.

By that point, the political tensions surrounding TikTok had reached their zenith. Just two days after the JPML's transfer order, President Donald Trump issued an executive order declaring that TikTok's continued operation in the United States presented "a national emergency" that "threaten[ed] the national security, foreign policy, and economy of the United States." *Exec. Order No. 13,942, 85 FED. REG. 48,637 (Aug. 6, 2020)*. According to the executive order, immediate action was necessary because TikTok's "data collection threaten[ed] to allow the Chinese Communist Party access to Americans' personal and proprietary information." *Id.* The order gave ByteDance an ultimatum: sell TikTok's United States operations to an American company within forty-five days *915 or face a ban of the App in this country. *See id.*⁴

After the Trump Administration's order, Defendants' motivation to settle the newly-consolidated cases was at an all-time high given its need to shed TikTok's liabilities in preparation for its anticipated sale. *See* Pls.' Mot. Final Approval Class Action Settlement at 9–10 ("Mot. Final Approval"), ECF No. 195. The attorneys in *Hong* had already engaged in months of comprehensive settlement discussions with Defendants, including a round of mediation in April 2020 led by Layn Phillips, a prominent retired federal judge. *Id.* at 8. To that point, however, the parties had not been successful. *Id.*; *see generally* Mot. Prelim. Approval, Carroll Decl., ECF No. 122-6 (discussing pre-MDL settlement negotiations); Rhow Decl. (same).

On August 13, 2020, Plaintiffs' counsel in *E.R.*, a case originally filed in this Court, was able to assemble a coalition of attorney representatives from the various consolidated cases to attend a second round of mediation before Judge

Phillips in hopes of achieving a global settlement. Mot. Final Approval at 8–9; Carroll Decl. ¶¶ 16–19. That thirteen-hour session proved fruitful and concluded with a settlement agreement in principle and a signed term sheet. Mot. Final Approval at 10. The parties memorialized the settlement in a signed agreement on September 4, 2020. *Id.*

Meanwhile, as part of its management of the MDL, the Court solicited applications from the attorneys who represented the various plaintiff classes in the MDL to serve as Lead Counsel and in other leadership roles. In September 2020, the Court selected three attorneys—Katrina Carroll, Ekwan Rhow, and Elizabeth Fegan—to serve as Co-Lead Counsel; attorney Shannon Marie McNulty to serve as Liaison Counsel; and five attorneys—Jonathan Jagher, Megan E. Jones, Michael Gervais, Amanda K. Klevorn, and Albert Y. Chang—to serve on the Plaintiffs’ Executive Committee. *See* Case Management Order No. 3, ECF No. 94 (appointing counsel to these roles).

These attorneys worked with Defendants over the fall and winter of 2020 to assess the initial terms of settlement and negotiate revised terms to address the various concerns raised by different plaintiff groups. As part of this process, Plaintiffs’ counsel also conducted a substantial amount of confirmatory discovery, which included interrogatories, document requests, and written depositions, and arranged for a computer programming expert to inspect the App’s source code onsite. *See In re TikTok*, 565 F. Supp. 3d at 1080–81.

B. Plaintiffs’ Claims

One product of these efforts was a consolidated amended class action complaint filed towards the end of 2020. The complaint proposes two classes. First, the complaint defines a Nationwide Class comprised of all United States residents who had used the App prior to preliminary approval of the settlement. Compl. ¶ 322. Second, the complaint seeks certification of an Illinois Subclass comprised of all Illinois residents who had used the App to create one or more videos prior to the preliminary approval of the settlement. *Id.* A *916 brief summary of the classes’ claims follows.

1. Nationwide Class Claims

On behalf of the Nationwide Subclass, the complaint asserts claims under federal statutes, as well as claims under California statutes and common law.

First, the complaint asserts for the Nationwide Class that Defendants have violated the federal Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030, and its California analogue, the Comprehensive Computer Data Access and Fraud Act (“CCDAFA”), CAL. PENAL CODE § 502, by collecting personal information and data, including user or device identifiers, biometric information, and unpublished TikTok videos, from App users’ cell phones without authorization. Compl. ¶¶ 339–41, 345–46.

Next, Plaintiffs bring a claim under the Video Privacy Protection Act (“VPPA”), 18 U.S.C. § 2710, which creates a private cause of action against a “video tape service provider who knowingly discloses, to any person” the “personally identifiable information” of its consumers. *Id.* § 2710(b). According to Plaintiffs, Defendants have violated VPPA by knowingly disclosing App users’ personally identifiable information, including a record of the videos the user has watched, a record of the videos the user has “liked” or commented on, and the identities of the user’s followers, to Facebook and Google. *See* Compl. ¶ 397.

Additionally, Plaintiffs assert that, in failing to disclose that they collect and disseminate App users’ personal information, Defendants have violated two California consumer protection statutes⁵: the California Unfair Competition Law (“UCL”), CAL. BUS. & PROF. CODE § 17200 *et seq.*, which bans “unlawful, unfair, or fraudulent business act[s] or practice[s],” *id.*, and the California False Advertising Law (“FAL”), *id.* § 17500 *et seq.*, which prohibits any “unfair, deceptive, untrue, or misleading advertising.” *Id.*; *see* Compl. ¶¶ 372–78, 381–85.

Plaintiffs also assert three claims under California constitutional and common law. First, they argue that Defendants’ collection and dissemination of their private information violates the right to privacy enshrined in article I of the California Constitution. *See* CAL. CONST. art. I § 1; Compl. ¶¶ 351–53. Second, Plaintiffs raise a claim based on the common law tort of intrusion upon seclusion, arguing that the collection of App users’ personal information constitutes an “intentional interference with [their] interest in solitude or seclusion ... of a kind that would be highly offensive to a reasonable man.” RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (AM. LAW INST. 1977) (updated Oct. 2021); *see* Compl. ¶ 363.

Lastly, Plaintiffs seek recovery under a theory of unjust enrichment, contending that Defendants derived revenues

and profits from the dissemination and transfer of App users' private and personal information. Compl. ¶ 387; *see* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. LAW INST. 2011) (recovery under the doctrine of unjust enrichment is appropriate when the defendant "recei[ves] a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant").

*917 2. Illinois Subclass Claims

The Illinois Subclass asserts claims under the Illinois Biometric Information Privacy Act ("BIPA"), 740 Ill. Comp. Stat. 14/1 *et seq.*, which "embodies a fundamental policy of the state of Illinois.... of protecting its citizens' right to privacy in their personal biometric data," and in particular, its "concerns about the use of new technology by '[m]ajor national corporations' to collect personal biometric data." *In re Facebook Biometric Info. Priv. Litig.*, 185 F. Supp. 3d 1155, 1169 (N.D. Cal. 2016) ("*In re Facebook*") (quoting 740 Ill. Comp. Stat. 14/5(b)). In short, BIPA requires a private entity that collects biometric information (defined as "any information ... based on an individual's ... retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry," 740 Ill. Comp. Stat. 14/10) to "inform the subject or 'the subject's legally authorized representative' in writing about several things, such as the purpose of collecting the data and how long they will be kept, and obtain the consent of the subject or authorized representative." *Miller v. Sw. Airlines Co.*, 926 F.3d 898, 900 (7th Cir. 2019) (quoting § 14/15(b)).

BIPA also prohibits sales and limits transfers of biometric information and requires custodians to establish protocols for retaining the information and protecting it from disclosure. *See id.* at 901 (citing § 14/15(a)–(e)). Successful BIPA plaintiffs may recover either actual damages or liquidated damages—\$1,000 for negligent violations and \$5,000 for intentional or reckless violations—plus attorneys' fees, costs, and injunctive relief. *See* § 14/20.

Here, Plaintiffs claim that Defendants have violated BIPA by harvesting App users' facial scans without obtaining their consent, and by transferring and selling users' biometric information to third parties. Compl. ¶¶ 408–10. Plaintiffs also allege that Defendants routinely violate BIPA's disclosure and retention requirements. *Id.* ¶¶ 411–15.

C. Proposed Settlement Agreement

In exchange for a release of all of these claims, and any potential claims based on Defendants' collection or handling of App users' data,⁶ the Settlement Agreement provides for monetary relief in the form of a \$92 million settlement fund and a range of injunctive remedies to prevent Defendants from engaging in the alleged privacy violations in the future.

1. Monetary Relief

Pursuant to the Settlement Agreement, Defendants have agreed to pay \$92 million into an escrow account, to be distributed among class members according to a Court-approved plan of allocation. *See* Mot. Prelim. Approval Ex. C, Proposed Plan of Allocation, ECF No. 122-3. The plan provides that the settlement funds are to be paid out in the following descending order: (1) payment of expenses incurred in connection with administering the settlement; (2) taxes associated with the settlement; (3) attorneys' fees, service fees, and other fee awards; and (4) payment to class members who submitted valid claims. Settlement Agreement § 5.2.

*918 Once administration costs, taxes, and fees are distributed, the remainder of the settlement fund will be divided into prorated shares "that are equal to the sum of (1) the total number of valid claims submitted by Nationwide Class members and (2) the total number of valid claims submitted by Illinois Subclass members multiplied by five." Mot. Final Approval at 14. Each Nationwide Class member who submitted a valid claim will receive one prorated share, and each Illinois Subclass member who submitted a valid claim will receive six prorated shares—one as a member of the Nationwide Class, and five as a member of the Illinois Subclass. *See id.* Based on Plaintiffs' estimates, each Nationwide Class claimant will receive \$27.19 and each Illinois Subclass claimant will receive \$163.13 in monetary relief from the settlement. *See id.*; Platt Decl. ¶ 43, ECF No. 196.

2. Injunctive Relief

The Settlement Agreement also contains expansive injunctive remedies. As part of the settlement, Defendants have agreed to refrain, and upon approval of the settlement will be enjoined, from engaging the following conduct, unless disclosed expressly in TikTok's Privacy Policy: (1) using the App to collect or store a user's⁷ biometric information; (2) using the App to collect geolocation or GPS data; (3) using the App to collect information in users' clipboards;⁸ (4) using

the App to transmit user data outside of the United States; (5) storing user data in databases outside of the United States; and (6) uploading content generated by users to the App's servers before the user saves or publishes it. Settlement Agreement §§ 6.1–6.2; *see generally id.* at Addendum § 4.

Defendants also pledge to create, at their own expense, a comprehensive data privacy training and compliance program for all newly hired employees and contractors and to institute annual privacy training for all employees. *Id.* § 6.3. And Defendants have agreed to pay for a third party to monitor this training for three years and to provide written verification of the review. *Id.* at Addendum § 4.3.

D. Order Granting Preliminary Approval

On February 25, 2021, Plaintiffs presented the Settlement Agreement, the plan of allocation, and a proposed notice plan to this Court for preliminary approval. *See* Mot. Prelim. Approval. Three objections to the preliminary approval motion were filed: one by Mark S., ECF No. 126; one by Dennis Litteken, ECF No. 132; and one by Brian Behnken and Joshua Dugas, ECF No. 142.

After the parties submitted supplemental briefs regarding the adequacy of representation of minor class members, the possibility of in-App notice, and the process by which Plaintiffs valued the claims, the Court granted Plaintiffs' motion for preliminary approval on September 30, 2021. *See generally In re TikTok*, 565 F. Supp. 3d 1076; Order Granting Prelim. Approval Class Action Settlement, *In re TikTok* (N.D. Ill. Oct. 1, 2021) (setting forth procedures for notice, filing claims and objections, and the final approval process) ("10/1/21 Order"), ECF No. 162.

The Court made three principal findings at the preliminary approval stage. First, it *919 found that it "[would] likely be able to certify" the proposed classes for purposes of approving the settlement. *In re TikTok*, 565 F. Supp. 3d at 1087; *see* FED. R. CIV. P. 23(e)(1)(B)(ii). Second, the Court found that the proposed settlement was "within the range of fairness, reasonableness, and adequacy" in light of numerous factors, including the strength of Plaintiffs' case, the complexity of potential ongoing litigation, the amount of opposition to the settlement, and the reaction from class members. *In re TikTok*, 565 F. Supp. 3d at 1087 (citing *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014) (listing certain factors to be considered)). Finally, the Court approved the proposed notice plan because it provided the best notice practicable to all class members, with the caveat that Defendants were required to

provide in-App notice of the settlement to American users. *Id.* at 1091–92; *see id.* at 1094.

In making these findings, the Court overruled three objections to preliminary approval. The Court first overruled Litteken's objections that the Settlement Agreement undervalued Plaintiffs' claims. In doing so, the Court noted that *In re Facebook*, the case Litteken cited to support his contention that the settlement undervalued the BIPA claims, was "a poor comparator" because Defendants, unlike Facebook, do not concede that they use facial recognition technology to harvest App users' biometric information. *See id.* at 1090 (citing *In re Facebook*, No. 15-cv-3747-JD, 2018 WL 2197546, at *2 (N.D. Cal. May 14, 2018)).

The Court also rejected Mark S.'s argument that the settlement did not account for conflicts between minor and non-minor class members. It found Mark S.'s contention that minor class members should receive more compensation because they could potentially disaffirm the arbitration agreements in the App's terms of service unpersuasive, because disaffirmance would likely "require individual minor class members, at the very least, to stop using the App," which seems improbable. *Id.* at 1085–86.

Additionally, the Court rejected Mark S.'s argument that the Court should have denied preliminary approval because Plaintiffs had not undertaken a detailed quantitative analysis of the net expected value of continued litigation to the class. Instead, the Court found that there were "other reliable indicators"—including the hard-fought negotiation process, two rounds of arbitration supervised by a former federal judge, and substantial confirmatory discovery—that supported a finding of reasonableness. *Id.* at 1087 (quoting *Kaufman v. Am. Exp. Travel Related Servs. Co.*, 877 F.3d 276, 285 (7th Cir. 2017)); *see id.* at 1088–89.

Finally, the Court overruled Behnken and Dugas's objection to the opt-out procedure. Behnken and Dugas argued that the notice plan's requirement that class members who desire to opt-out of the settlement complete, sign, and mail individual opt-out request forms to Plaintiffs' counsel violated their due process rights. *Id.* at 1092. But as the Court noted, the requirement that class members individually fill out and mail an opt-out request form is "a common and practical requirement" that is "consistently enforced" in MDL settlements. *Id.* at 1093 (quoting *In re Deepwater Horizon*, 819 F.3d 190, 197 (5th Cir. 2016)); *see id.* (collecting cases).

Accordingly, the Court concluded that the opt-out procedure did not violate due process.

E. The Notice Program and Claims Submission Period

1. Notice Program

After the Court granted preliminary approval, Plaintiffs disseminated notice to *920 the class through a notice program developed by the settlement administrator, Angeion Group (“Angeion”). Mot. Final Approval at 18; *see generally* Platt Decl. Per the Court’s scheduling order, the notice period began on November 14, 2021, and concluded on March 1, 2022. *See* 10/1/21 Order at 7–8; Mot. Final Approval at 18.

Angeion created a settlement website that contained information about the claims and the settlement, a claim-submission portal, a downloadable claim form, and a list of dates and deadlines for submitting claims, filing objections, and opting out of the settlement. Platt Decl. ¶ 30; *see* www.TikTokDataPrivacySettlement.com. Angeion also established a toll-free automated hotline that provided callers with information about the settlement. *Id.* ¶ 32. Angeion then commenced a “multi-faceted campaign” that was intended to reach a majority of class members multiple times. Mot. Final Approval at 18.⁹

First, Angeion sent direct emails to nearly 81 million email addresses associated with users’ accounts. Platt Decl. ¶ 7. Seventy percent of these emails (or around 56 million) were successfully delivered. *Id.* ¶ 10.

Second, Plaintiffs purchased digital advertisements and disseminated them using a “programmatic” advertising model that uses an algorithm to place advertisements on the websites that members of a given demographic group are likely to visit. *Id.* ¶ 12. According to Plaintiffs, the digital advertising campaign served over 126 million impressions to the Nationwide Class and over 3.4 million impressions to Illinois Subclass members. *Id.* ¶ 21.

Third, Angeion launched a social media campaign using ads on Facebook, Twitter, and Instagram. *Id.* ¶ 22. The social media campaign ran concurrently with the Internet advertising campaign and provided the Nationwide Class with over 115 million impressions through Facebook and Instagram and over 39 million impressions through Twitter. *Id.* ¶ 24. At the same time, the Illinois Subclass received over 7.1 million impressions through Facebook and Instagram and over 346,000 impressions through Twitter. *Id.* ¶ 25.

Additionally, Plaintiffs implemented a “claims stimulation noticing program” that placed additional ads on Facebook, Twitter, and Instagram that were specifically designed to motivate class members to submit claims. *Id.* ¶ 27.

In total, Plaintiffs estimate that the notice program resulted in a 96.78% reach,¹⁰ with an average frequency of three impressions per person. *See id.* ¶ 36.

Finally, on November 15, 2021, Defendants provided an in-App notification of the settlement to all United States-based TikTok accounts for users aged thirteen and older via the App’s “Inbox” feature.¹¹ *921 *Id.* ¶ 11. The notification read: “Class Action Settlement Notice: United States residents who used TikTok before 01 OCT 2021 may be eligible for a class settlement payment” and listed the URL of the settlement website. *Id.* Users who clicked on the notification were automatically directed to the settlement website. *Id.*

In addition to these notice efforts, there was considerable media coverage of the settlement. News outlets such as NBC News, Business Insider, and USA Today published online articles about the settlement that included links to the settlement website.¹²

2. Claims and Opt-Outs

The deadline to submit a claim was March 1, 2022. *Id.* ¶ 37. By that date, 1,215,541 valid claims had been submitted—1,038,517 from members of the Nationwide Class, and 177,024 from members of both the Nationwide Class and the Illinois Subclass.¹³ *Id.* ¶ 38. Based on the parties’ estimate of 89 million total Nationwide Class members and 1.4 million Illinois Subclass members, it appears that approximately 1.4% of the Nationwide Class, and 13% of the Illinois Subclass, submitted a claim. *See id.*; Mot. Prelim. Approval at 17.

Requests for exclusion (“opt-outs”) were due by January 31, 2022. *Id.* ¶ 39. By that date, Angeion had received 4,068 such requests. *Id.* But Angeion determined that only twenty-eight requests were “valid,” because 4,040 requests were submitted in groups by four law firms on behalf of 2,253 individuals. Mot. Final Approval at 23. Angeion declared these requests invalid in light of the Settlement Agreement’s prohibition on “mass opt-outs.” *Id.* (citing Settlement Agreement § 10.1); *see* discussion *infra* section II.B.3.

After the notice and claims submission period closed, Plaintiffs filed a motion for final approval of the settlement and a motion for attorneys' fees on March 31, 2022. Four class members—Steven Helfand, Litteken, Jennifer Cochran, and Mark S.—filed objections. *See* ECF Nos. 182, 184, 186, 187. For the reasons set forth below, the Court overrules the objections and grants both motions.

II. Analysis

A court may approve a class action settlement if: (1) it is able to certify the settlement class; (2) the class was provided adequate notice and a public hearing; and (3) it determines that the settlement is “fair, reasonable, and adequate.” *FED. R. CIV. P. 23(e)(1)–(2)*. The Court takes these inquiries in turn, before turning to the *922 question of attorneys' fees and service awards.

A. Class Certification

1. Legal Standard

A plaintiff seeking class certification has the burden to show that their proposed class meets the requirements of *Rule 23(a)* and the requirements for one of the three types of classes identified in *Rule 23(b)*. *Dancel v. Groupon, Inc.*, 949 F.3d 999, 1004 (7th Cir. 2019). *Rule 23(a)* requires a plaintiff to show that: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” *FED. R. CIV. P. 23(a)*.

Furthermore, Plaintiffs here seek certification as a *Rule 23(b)(3)* class. This means that they also must show that “the questions of law or fact common to the class members predominate over any questions affecting only individual members,” and that “a class action is superior over other available methods for fairly and efficiently adjudicating the controversy.” *FED. R. CIV. P. 23(b)(3)*.¹⁴

2. Rule 23(a) Factors

i. Numerosity, Commonality, and Typicality

As the Court observed at the preliminary approval stage, the numerosity, commonality, and typicality requirements of *Rule 23(a)* “are readily satisfied” here. *In re TikTok*, 565 F. Supp. 3d at 1085. The 89-million-member Nationwide Class (and the 1.4 million-member Illinois Subclass) satisfies the numerosity requirement because it is far too large for joinder to be practicable. *See Anderson v. Weinert Enters., Inc.*, 986 F.3d 773, 777 (7th Cir. 2021). As to commonality, there are numerous “common contention[s] ... capable of classwide resolution” here: most notably, whether Defendants harvested class members' personal information and biometric data without their knowledge or consent, and whether Defendants transferred this data to third parties without authorization in contravention of federal and state privacy laws. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). And, as typicality requires, the named Plaintiffs' claims “share the same essential characteristics” with those of the absent class members because each named Plaintiff used the same App and was subjected to the same alleged misconduct as the absent class members. *Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587, 606 (7th Cir. 2021).

ii. Adequacy of Representation

The only *Rule 23(a)* factor in dispute is the requirement that class representatives fairly and adequately represent the class. *Rule 23(a)(4)*; *see Howard*, 989 F.3d at 609. The purpose of this requirement is to protect the rights of absent class members by “uncover[ing] conflicts of interest between named parties and the class they seek to represent” and to “screen[] for conflicts of interest among class members.” *Howard*, 989 F.3d at 609 (quoting *Amchem*, 521 U.S. at 625, 117 S.Ct. 2231).

The Court found Plaintiffs' representation of the class and subclass to be adequate *923 at preliminary approval and sees no reason why the conclusion should be any different now. The named Plaintiffs' interests are the same as those of the absent class members—both groups want to enjoy using the App without their data being collected and disseminated to third parties without authorization. And based on its prior review of Plaintiffs' counsel's qualifications, the Court is confident that they possess the necessary experience and capabilities to protect class members' interests, and that they have done so here.

Three objectors to the settlement—Helfand, Mark S., and Litteken—disagree. First, Helfand argues that the inclusion

of the proposed Illinois Subclass creates a conflict among class members. According to Helfand, because other states also have privacy statutes like BIPA, members of the Illinois subclass should not receive any more compensation than others.

As a preliminary matter, the Court notes that a number of courts have referred to Helfand as a “serial objector,” who has been disbarred for, among other things, filing groundless objections to proposed class action settlements. *See Collins v. Quincy Bioscience, LLC*, No. 19-22864-CIV, 2020 WL 7135528, at *1–2 (S.D. Fla. Nov. 16, 2020). This puts his credibility and motivations in doubt from the get-go.¹⁵

Nevertheless, putting his credibility issues to the side, the Court finds Helfand's argument to be meritless. The Illinois Subclass exists because of BIPA's uniquely comprehensive private right of action. Most of the other state statutes Helfand cites do not provide a private cause of action.¹⁶ And the only statute in his list that does—California's Consumer Privacy Act (“CCPA”), CAL. CIV. CODE § 1798.140(a)(1)—provides for such actions only in the context of a defendant's failure to prevent data breaches, not for unauthorized collection of personal information. *See id.* (allowing private suits based on “[a] business's violation of the duty to implement and maintain reasonable security procedures and practices ... to protect [the plaintiff's] personal information.”); *McCoy v. Alphabet, Inc.*, No. 20-cv-05427-SVK, 2021 WL 405816, at *8 (N.D. Cal. Feb. 2, 2021) (dismissing CCPA claim in case involving Google's alleged use of internal program to collect users' data without authorization because plaintiff did not allege a “security breach”). Accordingly, Helfand's objection is overruled.

Next, Mark S. contends that Plaintiffs and their counsel do not adequately represent the interests of minor class members. In his view, the settlement should have contained a subclass for minor class members, because their ability to *924 disaffirm the App's arbitration agreement and terms of service gives them a stronger litigation position when compared to non-minor class members.

But the Court already has rejected this argument in its preliminary approval order, *see In re TikTok*, 565 F. Supp. 3d at 1086, and Mark S. offers no new reason for the Court to hold otherwise. First, as the Court has observed, twenty-eight of the thirty-five proposed class representatives are minors and, thus, have an interest in obtaining the best settlement for themselves and of

other minor class members. Moreover, their attorneys have participated actively throughout these proceedings, including during the various settlement negotiations. To the extent that Mark S. worries that the interests of minor class members have not been protected there, such worries are baseless.

What is more, Mark S.'s argument is predicated on the idea that there are swaths of absent minor class members who either already have disaffirmed, or are willing to disaffirm, the App's arbitration agreement and terms of service. But this would likely require them to stop using the App—which, as Plaintiffs point out, is “a big ask given the App's widespread popularity” with children and teens. Pls.' Suppl. Mem. Further Supp. Mot. Prelim. Approval at 12, (“Pls.' Suppl. Mem. Supp. Prelim. Approval”) ECF No. 137; *see, e.g., C.M.D. ex rel. De Young v. Facebook, Inc.*, 621 F. App'x 488, 489 (9th Cir. 2015) (“By continuing to use facebook.com after bringing their action, Plaintiffs manifested an intention not to disaffirm the contract.”); *Doe #1 v. Coll. Bd.*, 440 F. Supp. 3d 349, 355 (S.D.N.Y. 2020) (“[A]fter disaffirmance a minor ‘is not entitled to retain an advantage from a transaction which he repudiates.’”) (quoting *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196, 208 (S.D.N.Y. 2015)); *Doe v. Epic Games, Inc.*, 435 F. Supp. 3d 1024, 1036 (N.D. Cal. 2020) (requiring minor to have stopped playing a video game in order to have disaffirmed its terms of service). Indeed, as Mark S. himself recognizes, it is unlikely that any more than a *de minimis* number of absent minor class members have exercised, or would exercise, their right to disaffirm, rendering any divergence in interests between minor and non-minor class members largely speculative and not the sort of “fundamental” intra-class conflict fatal to class certification. *Cohen v. Brown Univ.*, 16 F.4th 935, 945–46 (1st Cir. 2021) (quoting 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:58 (5th ed. 2011)); *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 813 (7th Cir. 2013) (courts should not decline to certify a class because of “the mere possibility that a trivial level of intra-class conflict may materialize”); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir. 2012) (collecting cases).¹⁷

Mark S. also argues that a concurrent proceeding, *925 *T.K. through Leshore v. Bytedance Technology Co., Ltd.*, No. 19 C 7915, 2022 WL 888943 (N.D. Ill. Mar. 25, 2022), inhibited Class Counsel's ability to aggressively advocate for the interests of the putative class here. In *T.K.*, the plaintiffs brought a putative nationwide class action on behalf of all TikTok users under the age of thirteen and their parents or legal guardians for violations of BIPA, among other things.

Id. at *1. The case eventually concluded with a \$1.1 million settlement, but when the *T.K.* court preliminarily approved the settlement, it entered a preliminary injunction that prohibited *T.K.* class members from bringing any new actions asserting a claim they had already asserted in *T.K.* See Order Granting Prelim. Approval ¶ 16, *T.K.*, No. 19 C 7915 (N.D. Ill. Dec. 19, 2019). According to Mark S., this hindered Class Counsel's ability to effectively represent minors under the age of thirteen in this case.

But this theory lacks merit for several reasons. First, far from abandoning their fiduciary duties to *T.K.* class members, Plaintiffs negotiated heavily with Defendants to ensure that the injunction in *T.K.* would not, as a practical matter, threaten the ability of under-age-13 class members to recover in this case. See, e.g., Prelim. Approval Hr'g Tr. at 8:23, *In re TikTok* (N.D. Ill. Apr. 19, 2021), ECF No. 159. In fact, Defendants notified the *T.K.* court—and Class Counsel here—that they would not seek to enforce here the release entered in *T.K.* Minute Entry, *T.K.*, No. 19 C 7915 (N.D. Ill. Apr. 28, 2021), ECF No. 68. Thus, Class Counsel was free to ignore the *T.K.* release when negotiating the settlement here.

The third objector, Litteken, argues that Class Counsel—and in particular, Co-Lead Counsel Katrina Carroll—have maneuvered behind the scenes to secure a windfall for the Illinois Subclass at the expense of the Nationwide Class. In various filings in this case, Litteken and his counsel have accused Class Counsel of: (1) conspiring to exclude competing counsel from participating in the mediation that led to the initial settlement agreement; (2) failing to disclose alleged personal and business ties between Carroll and a class representative; and (3) pressuring Litteken's counsel to drop his objection to the settlement. See, e.g., Litteken Obj. at 10–14, ECF No. 184. Having reviewed Litteken's submissions, the Court finds that they contain little more than conjecture and do not legitimately call into question the adequacy of Class Counsel's representation of the class.

Like Helfand, Litteken also contends that the allocation of the settlement fund unfairly favors the Illinois Subclass, but this is unfounded for the reasons already discussed. Undeterred, Litteken offers two additional observations in this regard, but neither helps him. First, Litteken contends that Class Counsel eliminated the value of the BIPA claims by allowing Defendants to warrant that they have not violated BIPA. Litteken Obj. at 10–11 (citing Settlement Agreement §§ 7.1–7.3). But the fact that Defendants do not admit that they violated BIPA does not mean that the BIPA claim was

meritless *ex ante*. And it is clear that Class Counsel did and will continue to do their own homework to extensively investigate the BIPA claim. See, e.g., Pls.' Suppl. Mem. Supp. Prelim. Approval at 13–14; Carroll Decl. ¶¶ 38–39. Litteken's bald assertion that these efforts were a ruse intended to cover up Plaintiffs' collusion is sheer speculation.

Second, Litteken points to “new evidence” that TikTok “indeed allows ByteDance access to U.S. consumer data.” Objector Dennis Litteken Notice of Suppl. Authority at 1, ECF No. 254 (“Notice of Suppl. Authority”). This “new evidence” comes from a recent *BuzzFeed News* investigation that revealed that some China-based *926 ByteDance employees can use a “backdoor” to access United States App users’ data. See Letter from Brendan Carr, Commissioner, FCC, to Tim Cook, CEO, Apple Inc., and Sundar Pichai, CEO, Alphabet, Inc., at 1 (June 24, 2022) (citing Emily Baker-White, *Leaked Audio From 80 Internal TikTok Meetings Shows That US User Data Has Been Repeatedly Accessed From China*, BUZZFEED NEWS (June 17, 2022, 12:31 PM), <https://www.buzzfeednews.com/article/emilybakerwhite/tiktok-tapes-us-user-data-china-bytedance-access?bfsource=relatedmanual> (“Baker-White, *Leaked Audio*”). In Litteken's view, the investigation's findings confirm that Defendants agreed to settle this case not because they believed the BIPA claims were meritorious, but instead to “keep the focus and discovery away from its provision of sensitive U.S. consumer data to the Chinese government.” Notice of Suppl. Authority at 1.

Even assuming that the Court were to take judicial notice of the investigation, Litteken cites nothing in the record to support his belief that Defendants were motivated to enter into the \$92 million settlement due to fear that this news would become public. Nor does Litteken explain how the information revealed in the investigation, if true, increases the value of the non-BIPA claims relative to the BIPA claims, when BIPA itself contains a provision prohibiting unauthorized dissemination of user data. See 740 Ill. Comp. Stat. 14/15(d).¹⁸ Accordingly, the Court overrules Litteken's objections as well.

3. Rule 23(b)(3) Factors

i. Predominance

Rule 23(b)(3) requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3). The predominance inquiry requires the Court to “understand what the plaintiffs will need to prove and [to] evaluate the extent to which they can prove their case with common evidence.” *In re Allstate Corp Sec. Litig.*, 966 F.3d 595, 603 (7th Cir. 2020). That is, “it is the method of determining the answer and not the answer itself that drives the predominance consideration.” *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839, 845 (7th Cir. 2022).

Predominance is readily satisfied here. In this case, class members allege that they were all subjected to uniform data- and information-harvesting practices as a result of their use of the App. These allegations are readily amenable to generalized proof. At trial, Plaintiffs would make their case by presenting evidence of Defendants’ data collection practices and measuring those practices against their legal obligations. They also would introduce evidence that Defendants affirmatively concealed their collection of App users’ personal information and dissemination of the same to third parties. And, to the extent that some of Plaintiffs’ state law claims require inquiry into their expectations and beliefs concerning Defendants’ handling of their data, these claims are judged by an objective, reasonable-person standard that is resolvable on a class-wide basis. *See, e.g., Edwards v. Ford Motor Co.*, 603 F. App’x 538, 541 (9th Cir. 2015) (“[A]n objective ‘reasonable person’ standard under California law [is] an inquiry that is the same for every class member.”); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 480 (C.D. Cal. 2012) (“Claims *927 under the UCL and FAL are ideal for class certification because they will not require the court to investigate class members’ individual interaction with the product.” (alterations and internal quotation marks omitted)).

To this, Helfand argues that the Illinois Subclass cannot be certified because the class definition would require the Court to conduct individualized inquiries into whether the class member used the App within the state of Illinois and whether they used it to “create videos.” These concerns are overblown.

By its terms, Rule 23 does not require the complete absence of individualized determinations, only that common questions

predominate. *See* FED. R. CIV. P. 23(b)(3) (common questions must “predominate over any questions affecting only individual members”). And the core questions at issue (whether Defendants systematically harvest user information in violation of privacy laws) could be decided through common evidence.

ii. Superiority

To certify the classes under Rule 23(b)(3), the Court also must find that a class action is “superior over other available methods for fairly and efficiently adjudicating” this case, keeping in mind “the class members’ interests in individually controlling the prosecution ... of separate actions” and “the extent and nature of any litigation concerning the controversy already begun.” FED. R. CIV. P. 23(b)(3).

This requirement also is satisfied. Individual class members would likely have little interest in prosecuting a complex data privacy case against a multinational technology company on their own, especially considering the relative sums they could expect to recover in damages. *See, e.g., 740 Ill. Comp. Stat. 14/20* (providing that successful plaintiffs may recover the higher of actual damages or liquidated damages of \$1,000 for a negligent violation and \$5,000 for a willful violation); *see also Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec. Inc.*, — U.S. —, 137 S. Ct. 2042, 2054, 198 L.Ed.2d 584 (2017) (“The very premise of class actions is that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (citation omitted)). What is more, by its very nature, class certification and settlement of this sprawling MDL will save years of costly litigation and appeals. *See In re Equifax*, 2020 WL 256132, at *14 (finding the same with respect to data security MDL with 147 million class members).

For all of these reasons, the Court concludes that Plaintiffs have satisfied their burden to show that the proposed classes meet the requirements of Rules 23(a) and 23(b)(3). Accordingly, the Court certifies the Nationwide Class and Illinois Subclass for purposes of the settlement.

B. Rule 23’s Notice Requirement

In order to approve the settlement, the Court must next find that the notice program provided to the class “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified

through reasonable effort.” [FED. R. CIV. P. 23\(c\)\(2\)](#); *see also* [FED. R. CIV. P. 23\(e\)\(1\)](#).

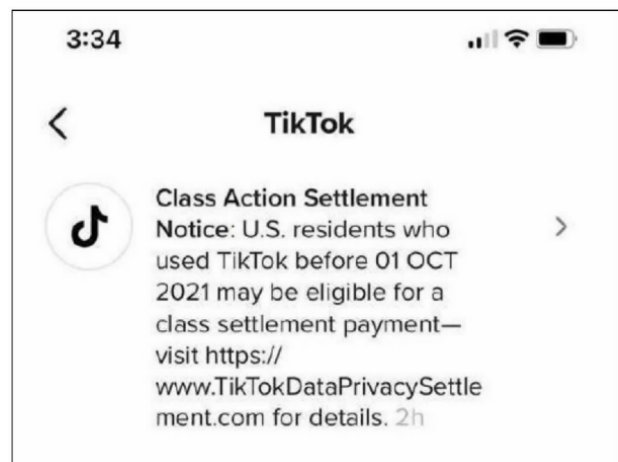
1. Adequacy of Notice

Neither [Rule 23](#) nor due process requires that every class member actually receives notice. Instead, “notice suffices if it is reasonably calculated to reach the absent parties.” [3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 8:36 \(5th ed. 2011\)](#) (updated 2021). According to the Federal Judicial Center, notice to at least seventy percent of the class generally meets this standard. *See* [FED. JUDICIAL *928 CTR., JUDGES’ CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE 3 \(2010\)](#), <https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf> (last accessed May 22, 2022).

[Rule 23\(c\)\(2\)\(B\)](#) requires “the best notice that is practicable under the circumstances. [FED. R. CIV. P. 23\(c\)\(2\)\(B\)](#). And [Rule 23\(e\)\(1\)\(B\)](#) requires “notice in a reasonable manner to all class members.” [FED. R. CIV. P. 23\(e\)\(1\)\(B\)](#). The Court finds that Plaintiffs have satisfied these requirements.

Angeion has presented evidence that its media notice campaign alone reached 96.78% of its 34.6 million-member target audience based on a data-driven demographic profile of TikTok users. *Platt Decl.* ¶¶ 13–14, 36. The direct email campaign also had tremendous impact, resulting in the delivery of the settlement notice to over 56 million email addresses, which were validated and “de-duped” to ensure that each address corresponded to a different individual App user. *Platt Decl.* ¶ 10. Even assuming a degree of crossover between the recipients of direct email notice and the target audience of the media notice campaign, the combination of these traditional notice methods clears the Federal Judicial Center’s seventy-percent threshold.

In addition, TikTok sent the following in-App notice to the “inboxes” of all United States-based TikTok accounts: ¹⁹



Platt Suppl. Decl. Ex. A, ECF No. 241; *see id.* ¶¶ 3–4. This message was sent to every TikTok account “having certain data corresponding to a United States location in the same manner that TikTok would distribute other TikTok-originated in-app notifications using the Inbox feature.” *Id.* ¶ 3. Although there is no data as to precisely how many App users actually saw the notification, the number is likely quite high, given that a typical TikTok user would regularly check the App’s inbox, which provides notifications for other in-App occurrences such as comments, likes, new followers, and direct messages. *See Notifications, TIKTOK*, <https://support.tiktok.com/en/using-tiktok/messaging-and-notifications/notifications> (last accessed *929 June 1, 2022). And this method of providing notice within the application environment has been favorably adopted by other courts. *See In re Facebook*, 522 F. Supp. 3d 617, 624 (N.D. Cal. 2021) (approving notice plan that caused notifications to be sent to Illinois-based Facebook users through the Facebook platform, where class was comprised of people who had used Facebook in Illinois); *see also Lane v. Facebook, Inc.*, No. C 08-3845 RS, 2010 WL 9013059, at *1 (N.D. Cal. Mar. 17, 2010), *aff’d*, 696 F.3d 811 (9th Cir. 2012) (approving notice plan that included platform notifications to Facebook users).

2. Objections to Notice Program

Mark S. objects to the notice program, contending that the target audience of the media notice campaign, which had a median age of 33.7, was too old. In support, he cites statistics showing that over half of TikTok users are between ten and twenty-nine years old. But as Plaintiffs point out, the notice plan was intended to give notice to the parents of many younger TikTok users, rather than the younger users themselves. This was a reasonable choice, given that parents are more likely than their children to understand their child’s rights as a class member and file a claim on their child’s behalf. *Cf.* [FED. R. CIV. P. 23\(c\)\(2\)\(B\)](#) (stating the

detailed information that must be provided in a notice of class certification). And, even assuming for the sake of argument that the media notice campaign was in some way deficient, the combination of direct email notice and in-App notice more than satisfies [Rule 23](#)'s requirements.

Taking a different tack, Litteken challenges the direct email notice campaign. In his view, Plaintiffs should have asked the Court to subpoena "app platform providers" for lists of the email addresses of every person who has downloaded the App. Litteken Obj. at 9. Litteken argues that their failure to do so resulted in a claims rate "far below the double-digit participation rate[]" that he believes should have resulted here. Litteken Resp. at 1, ECF No. 212.

As an initial matter, Litteken's proposal would have entailed additional costs to the class and created a risk of costly and distracting satellite litigation, if the subpoenas were contested. Furthermore, Litteken's assumption that his proposal would have increased the claims rate has no support in the record. Indeed, there may be "any number of reasons" why class members who receive notice do not file claims, and a low claims rate is not "necessarily indicative of a deficient notice plan." *Pollard v. Remington Arms Co., LLC*, 896 F.3d 900, 906 (8th Cir. 2018) (rejecting objectors' argument that a 0.29% claims rate was evidence of insufficient notice). And the average claims rate for class sizes over 2.7 million is about 1.4%. See *In re TikTok*, 565 F. Supp. 3d at 1090 n.6 (citing 2d Expert Decl. Prof. William B. Rubenstein ¶ 5, *In re Facebook*, No. 15-cv-3747-JD (N.D. Cal.), ECF No. 517-2).

Next, Mark S., Litteken, and Helfand all argue that the notice program violates [Rule 23](#) because the deadline for a class member to object to the motion for final approval (January 31, 2022) preceded the deadline for Class Counsel to file their petition for attorneys' fees, (March 31, 2022). Citing *Redman v. RadioShack Corp.*, the objectors contend that scheduling the objection deadline prior to the fee petition deadline contravened [Rule 23\(h\)\(2\)](#), which provides that class members must have an opportunity to object to the fee petition. See 768 F.3d 622, 637–38 (7th Cir. 2014) (citing *FED. R. CIV. P. 23(h)*).

Redman involved a class settlement of claims under the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681(g). *930 768 F.3d at 627. In response to plaintiffs' motion for final approval of the settlement, multiple objectors argued before the district court that they were prevented from meaningfully objecting to the plaintiffs' attorneys'

fee petition because the deadline to file objections to the settlement and the fee petition came before the fee petition was due. See *Redman v. RadioShack Corp.*, No. 11 C 6741, 2014 WL 497438, at *11 (N.D. Ill. Feb. 7, 2014), *rev'd*, 768 F.3d 622. The district court overruled the objections because the notice to class members included a disclosure of the amount the attorneys were seeking in fees. *Id.* Because the objectors knew the total amount that plaintiffs' attorneys would seek in fees, the district court concluded that class members were not prejudiced by the schedule. *Id.* at *12.

The Seventh Circuit reversed. It held that the schedule violated [Rule 23\(h\)](#) because setting the objection deadline before the fee petition deadline "handicapped" class members' ability to object to the petition. See *Redman*, 768 F.3d at 637–38. Although they knew the total amount the attorneys would seek in fees, they did not have the information they needed to object in a meaningful manner, including the breakdown of the attorneys' hours and expenses, and the attorneys' arguments in support of their fee petition. *Id.* at 638.

This case is readily distinguishable. In *Redman*, the objectors were not provided any opportunity to respond to the petition for attorneys' fees after it was filed. The deadline to object to the settlement and the deadline to object to the motion for attorneys' fees were one and the same and preceded the deadline for plaintiffs' fee petition. *Redman*, 768 F.3d at 637; see generally Prelim. Approval Order, *Redman*, No. 11 C 6741 (N.D. Ill. May 29, 2013), ECF No. 101. Here, the scheduling order provided class members and interested parties the opportunity to object to the fee petition by providing them an opportunity to respond to the fee petition on April 14, 2022—two weeks *after* the fee petition was due. See 10/1/21 Order ¶ 25. Accordingly, not only was the class aware in November 2021 that Plaintiffs' counsel intended to seek up to one-third of the settlement fund in fees, Mot. Prelim. Approval Ex. D, Settlement Notice ¶ 15, ECF No. 122-4, but class members had two weeks to analyze the petition after it was filed and submit a response.

The objectors acknowledge this, but still claim it is not enough. As they see it, an individual, who did not submit an objection in January but wanted to file an objection to the fee petition in April, was precluded from doing so by the schedule. But there are two problems with this argument. First, nowhere in the preliminary approval order or the Settlement Agreement does it say that a class member cannot respond to the fee petition if she did not submit an objection

by January 31. And, reading the Court's 10/1/21 Order in its entirety, a class member would have reasonably understood the opposite.²⁰ Second, under the *931 current schedule, a class member concerned about the amount of requested fees could have filed a general objection before January 31 and a more complete response after the actual fee petition was filed. And indeed, consistent with this understanding, a number of class members (including all of the objectors) did exactly that.²¹

Based upon this record, the Court finds that the schedule proposed by Plaintiffs and approved by the Court, while not a model of clarity, provided class members with sufficient notice of the request for fees and sufficient time to respond to the “specifics” of the fee petition as Rule 23(h) and due process require. See FED. R. CIV. P. 23 advisory committee's note to 2003 amendment (stating that “the court should provide sufficient time ... to enable potential objectors to examine the motion”); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (constitutional due process requires “notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”); *Cassese v. Williams*, 503 F. App'x 55, 57–58 (2d Cir. 2012) (holding that notice of attorneys’ fee motion was reasonable under the circumstances where, although objection deadline came before deadline for fee motion, class members who had filed objections “had two weeks to crystallize their objections and request further information,” *id.* at 58), *cert. denied sub nom. Komar v. Cassese*, 569 U.S. 958, 133 S.Ct. 2023, 185 L.Ed.2d 886 (2013).

3. Motion To Accept Opt-Outs

The last issue bearing on the notice and claims submission process concerns a group of 851 individuals who move the Court to honor their requests for exclusion from the settlement (“Opt-Out Movants”). Rather than individually submitting their opt-out forms, these movants retained counsel who combined the opt-out forms and submitted them *en masse*. See Hart Decl. ¶¶ 6–11, ECF No. 207-1; Swigart Decl. ¶¶ 6–10, ECF No. 207-2; Kind Decl. ¶¶ 39–43, ECF No. 207-3. As a result, Angeion refused to accept the opt-out requests on the grounds that they were “mass opt-outs,” which the preliminary approval order prohibited. Platt Decl. ¶ 40.

Opting out of a class action settlement is an “individual right” that “must be exercised individually” in order to protect

the due process rights of class members. *In re Diet Drugs*, 282 F.3d at 241. As a result, courts routinely require class members to fill out and sign individually a hardcopy opt-out form in order to be excluded from a settlement and prohibit so-called “mass opt-outs,” where an attorney or law firm files a single, unsigned opt-out form on behalf of a large group of class members. See *id.*; *In re Deepwater Horizon*, 819 F.3d at 197; see also *In re TikTok*, 565 F. Supp. 3d at 1093 (collecting cases).

For these reasons, the preliminary approval order required prospective opt-outs *932 to individually fill out an opt-out form that set forth:

- (i) the name of the Action;
- (ii) the person's or entity's full name, address, email address and telephone number;
- (iii) a specific statement of the person's or entity's intention to be excluded from the Settlement;
- (iv) the identity of the person's or entity's counsel, if represented; and
- (v) the person's or entity's authorized representative's signature and the date on which the request was signed.

10/1/21 Order ¶ 10; see Settlement Notice ¶ 10.

The Opt-Out Movants have satisfied these requirements. Each completed a form that listed the name of the case, the individual's personal information, a statement of the individual's desire to be excluded in order to retain a right to file an individual lawsuit against TikTok, an identification of their counsel, and an e-signature and corresponding timestamp. The fact that they were signed electronically is of no moment, because their counsel provided evidence under seal documenting that each e-signature came from a separate, unique IP address.

The “mass-opt outs” prohibited in the preliminary approval order are very different from the opt-outs at issue here. Two objectors to preliminary approval, Behnken and Dugas, sought to “opt out *en masse* by means of a single unsigned, electronic filing from their lawyers.” *In re TikTok*, 565 F. Supp. 3d at 1092. The Court found that permitting lawyers to submit mass opt-outs on behalf of their clients without proof of individualized consent from every client would risk violating the due process rights of individual class members, who must be afforded the opportunity to personally decide

whether to participate in the settlement. *Id.* at 1093 (citing *In re Centurylink Sales Pracs. and Sec. Litig.*, No. C 17-2832, 2020 WL 3512807, at *3–4 (D. Minn. June 29, 2020)); see also *In re Syngenta AG MIR162 Corn Litig.*, MDL No. 2591, 2016 WL 11782482, at *1 (D. Kan. Nov. 23, 2016) (an individual signature requirement “ensure[s] that those who actually may possess a potential claim are in fact the decision makers”).

By contrast, the Opt-Out Movants have individually filled out forms that comply with the preliminary approval order's requirements. These forms bear the Opt-Out Movants' e-signatures, which are the legal equivalents of their handwritten signatures. See, e.g., 15 U.S.C. § 7001(a)(1) (providing that in the commercial context, “a signature, contract, or other record relating to [a] transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form”). And their counsel have authenticated the signatures by providing documentation verifying that the signatures come from different individual IP addresses. See FED. R. EVID. 901(a) (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”).²²

***933** Accordingly, the Court concludes that Angeion erred in determining that the Opt-Out Movants' submissions violated the Settlement Agreement's prohibition on “mass opt-outs.” The Court orders Angeion to accept the 851 opt-out requests, subject to a determination that they meet the remaining opt-out criteria.

C. Rule 23(e)'s Fairness Inquiry

1. Legal Standard

The Court now turns to the adequacy of the settlement itself. Before approving the settlement, the Court must find that the terms are fair, reasonable, and adequate in light of numerous factors, including: “(1) the strength of the case for plaintiffs on the merits, balanced against the extent of [the] settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) [the] stage of the proceedings and the amount of discovery completed.” *Wong*, 773 F.3d at 863; see FED. R. CIV. P. 23(e)(2) (listing factors).²³ This analysis does not “focus on individual components of the settlement, but rather views it

in its entirety in evaluating its fairness.” *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996) (cleaned up).

In conducting the fairness inquiry, the Court “consider[s] the facts in the light most favorable to the settlement.” *Id.* (internal quotation marks omitted). But at the same time, it is mindful that, when sizeable class action settlements are concerned, the parties may have incentives to “sell out the class” by accepting a “deal that promotes the self-interest of both class counsel and the defendant[s]” at class members' expense. *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). As a result, the Court must act akin to “a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.” *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014) (internal quotation marks omitted).

2. Strength of Plaintiffs' Case And Value of the Settlement

The first and “most important” factor in the fairness inquiry asks the Court to balance the strength of the merits of Plaintiffs' case against the value that they will receive from the settlement. *Wong*, 773 F.3d at 864. Twenty years ago, in *Reynolds v. Beneficial National Bank*, the Seventh Circuit advised that, in making this inquiry, district courts should “quantify the net expected value of continued litigation” by “estimating the range of possible outcomes and ascribing a probability to each point on the range.” 288 F.3d 277, 284–85 (7th Cir. 2002) (Posner, J.). The *Reynolds* court noted that quantitative analysis was important because of the “suspicious circumstances” surrounding the settlement in that case, where the history of the parties' settlement negotiations ***934** suggested that the settlement may have been the product of collusion rather than good-faith negotiation. *Id.* at 284; see *id.* at 280–82.

More recently, the Seventh Circuit has endorsed a less formulaic scrutiny of class action settlements when indicia of trustworthiness—third-party mediation, extensive confirmatory discovery, and hard-fought, arm's-length negotiation—work against any suggestion of impropriety. See *Kaufman*, 877 F.3d at 285; *Wong*, 773 F.3d at 864; see also *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. 202, 218–19 (N.D. Ill. 2019) (approving class action settlement without quantifying net expected value where parties had reached settlement terms after prolonged, arms-length mediation sessions and extensive discovery), *aff'd sub nom. Walker v. Nat'l Collegiate Athletic Ass'n*, No. 19-2638, 2019 WL 8058082 (7th Cir. Oct. 25, 2019).

The history of this case shows a vigorously negotiated settlement reached in good faith. As recounted above, the settlement was the product of months of arms-length negotiation punctuated by two mediation sessions led by a well-respected former federal judge. It was refined through further negotiation by a Court-appointed leadership group, whose members had different views as to what constituted a favorable settlement. Additionally, the parties have conducted substantial confirmatory discovery, including a detailed expert analysis of TikTok's source code. And Defendants have raised a vigorous factual and legal defense and continue to dispute liability for every claim.

Given these indicia of an arm's length adversarial process, the Court finds it unnecessary to “undertake the type of mechanical mathematic valuation exercise” that *Reynolds* endorsed.²⁴ *In re TikTok*, 565 F. Supp. 3d at 1088. This, however, does not mean that the Court will simply rubberstamp the settlement. Rather, the Court still must consider carefully the benefits of the monetary and injunctive relief to the classes against the risks and potential benefits of potential future litigation. See *Kaufman*, 877 F.3d at 285.

The Settlement Agreement provides the classes with two substantial benefits. First is the \$92 million settlement fund, which will provide immediate monetary relief to class members. Based on Plaintiffs' estimates, each Nationwide Class member who submitted a valid claim will receive \$27.19, and each Illinois Subclass member who submitted a valid claim will receive \$163.13; both are nontrivial amounts.

Not only are these sums meaningful in their own right, but they also compare favorably to the monetary relief provided in other data privacy class settlements. See, e.g., *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 944 (N.D. Cal. 2013) (\$15 per claim in case alleging misappropriation of users' likenesses), *aff'd sub nom. Fraley v. Batman*, 638 F. App'x 594 (9th Cir. 2016); *In re Vizio, Inc., Consumer Priv. Litig.*, No. 8:16-ml-02693-JLS, 2019 WL 12966638, at *4 (C.D. Cal. July 31, 2019) (VPPA settlement providing \$16.50 per claim). Indeed, many privacy class actions award only *cy pres* relief. See *In re Google Inc. Street View Electronic Commc'ns Litig.*, 21 F.4th 1102, 1113–14 (9th Cir. 2021) (collecting cases).

***935** Along with the monetary relief, class members also receive wide-ranging injunctive relief that prohibits Defendants from collecting and transferring their data without their express consent. The Settlement Agreement also

requires TikTok to delete all pre-uploaded content contained in its servers and refrain from collecting such content in the future without prior user consent. Furthermore, TikTok must implement a privacy compliance and training program for all of its employees, and its compliance with the program will be verified a third-party auditor for the first three years after the settlement is finalized. These injunctive remedies confer substantial benefits to the class. See *In re Equifax*, 2020 WL 256132, at *38 (holding that injunctive relief imposing data privacy compliance and monitoring requirements on defendants was of great value to the class).

With these benefits in mind, the Court must weigh them against “the probabilities and possibilities of victory or defeat” if litigation were to continue. See *Dorvit ex rel. Power Sols. Int'l, Inc. v. Winemaster*, 950 F.3d 984, 988 (7th Cir. 2020) (quoting *United Founders' Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647, 655 (7th Cir. 1971)). Here, the significant litigation risks Plaintiffs would face if the cases were to proceed weigh heavily in favor of approving the settlement.

Foremost of these are the class action waivers and mandatory individual arbitration clauses contained in TikTok's terms of service,²⁵ to which every class member agreed when they signed up for a TikTok account. All parties concur that, if Defendants were able to enforce these clauses, Plaintiffs' claims would be essentially worthless due to the prohibitive time and expense that individual arbitration would impose upon each individual user. For example, a claimant would need to shoulder the cost of retaining an expert to prove that the App illegally expropriated their personal information. See *Kaufman*, 877 F.3d at 285; *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 245, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013) (Kagan, J., dissenting) (“No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.”).

Indeed, if Defendants were to bring a motion to compel arbitration against each Plaintiff, she would face an uphill battle. See, e.g., *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017) (“Courts routinely uphold [such] agreements for the principal reason that the user has affirmatively assented to the terms of agreement by clicking ‘I agree.’”); *Wilcosky v. Amazon.com, Inc.*, 517 F. Supp. 3d 751, 765–66 (N.D. Ill. 2021); *Peter v. DoorDash, Inc.*, 445 F. Supp. 3d 580, 587 (N.D. Cal. 2020); *Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454, 469–70 (S.D.N.Y. 2017); *In re Facebook*, 185 F. Supp. 3d at 1166–67; *Miracle-Pond v. Shutterfly, Inc.*, No.

19-CV-04722, 2020 WL 2513099, at *6–7 (N.D. Ill. May 15, 2020).

Plaintiffs’ assent to the App’s terms of service creates another set of problems for *936 them. Some of Plaintiffs’ claims require them to prove that Defendants accessed their information “without authorization.” 18 U.S.C. § 1030(a) (2) (CFAA); *see also, e.g., CAL. PENAL CODE § 502(c) (2) (CCDAFA)* (imposing liability on one who “[k]nowingly accesses and without permission takes, copies, or makes use of any data”). The FAL and UCL claims require actual reliance on misrepresentations or nondisclosures. *See Williams v. Apple, Inc.*, 449 F. Supp. 3d 892, 912 (N.D. Cal. 2020). The California right-to-privacy claims require an unwelcome “intrusion” into their private lives so serious “as to constitute an egregious breach of ... social norms.” *Hernandez v. Hillsides, Inc.*, 47 Cal.4th 272, 97 Cal.Rptr.3d 274, 211 P.3d 1063, 1072 (2009) (quoting *Hill v. Nat’l Collegiate Athletic Ass’n*, 7 Cal.4th 1, 26 Cal.Rptr.2d 834, 865 P.2d 633, 655 (1994)). And the unjust enrichment claims ask whether Defendants unfairly possess data to which they are not entitled. *See Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1065 (N.D. Cal. 2021). All of these claims could be undermined by the App’s terms of service and privacy policy, which disclose the ways in which Defendants collect, use, and share data and information submitted by App users.²⁶

Defendants also could argue that Plaintiffs lack Article III standing to bring some of their claims, given that a “bare procedural violation” of a federal statute, without more, does not confer standing. *TransUnion LLC v. Ramirez*, — U.S. —, 141 S. Ct. 2190, 2213, 210 L.Ed.2d 568 (2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016)); *see, e.g., Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1248 (7th Cir. 2021) (holding that plaintiffs’ claims that Defendants violated BIPA by selling their data to third parties, without more, did not constitute Article III injury in fact).

Proving damages would present another set of hurdles. For example, courts typically hold that the unauthorized collection and transmission of a plaintiff’s personal information, without more, does not constitute “economic damages” under the CFAA. *See, e.g., Andrews v. Sirius XM Radio Inc.*, 932 F.3d 1253, 1262–63 (9th Cir. 2019) (the CFAA’s “narrow conception of loss,” *id.* at 1262, does not include expropriation of personal information); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1069 (N.D. Cal. 2012) (Koh, J.) (collecting cases). And, although VPPA

provides for statutory damages, in practice, many VPPA cases end up settling, often for a smaller recovery than Plaintiffs will receive here. *See, e.g., In re Vizio*, 2019 WL 12966638, at *4 (VPPA settlement resulting in \$16.50 award per claimant after two motions to dismiss); *In re Netflix Priv. Litig.*, No. 11 C 379, 2013 WL 1120801, at *1–2 (N.D. Cal. Mar. 18, 2013) (*cy pres*-only relief that would have provided \$0.14 per class member). Consumer class action settlements under BIPA also typically provide only relatively modest relief. *See, e.g., Prelipceanu v. Jumio Corp.*, No. 2018 CH 15883 (Cir. Ct. Cook Cnty. July 21, 2020) (\$41.17 per claimant).

In light of the foregoing, the objectors’ contentions that the Settlement Agreement *937 provides inadequate value to class members are unpersuasive. Litteken, in particular, argues that the settlement compares unfavorably to other large data privacy class settlements, contrasting the monetary relief in this case with the \$93.14 per-class-member settlement in *In re Facebook*, 522 F. Supp. 3d 617. There, Facebook agreed to pay \$650 million to settle BIPA claims of Illinois residents whose facial recognition information Facebook had surreptitiously collected. *Id.* at 620–21. But that case featured none of the aforementioned obstacles that Plaintiffs face here, and had other distinguishing factors.

For example, *In re Facebook* settled on the eve of trial, after plaintiffs had survived multiple motions to dismiss and motions for summary judgment and had won a hotly contested motion for class certification in the district court and on appeal. *See id.* at 621; *see also, e.g., 326 F.R.D. 535, 540* (N.D. Cal. 2018), *aff’d sub nom. Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019). Unlike in this case, where Defendants categorically deny that they collected facial recognition data without authorization, *see, e.g., Defs.’ Suppl. Answers* at 7, ECF No. 139, Facebook admitted that it had used “tagging” software to collect facial recognition information from Facebook users in Illinois, while denying that this conduct violated BIPA. *See In re Facebook*, 2018 WL 2197546, at *2. For these reasons, the Court finds that *In re Facebook* is “a poor comparator” to judge the value of the settlement in this case. *In re TikTok*, 565 F. Supp. 3d at 1090.²⁷

For all of these reasons, the Court overrules Mark S.’s and Litteken’s objections to the value of the settlement to the class and finds that the relief the Settlement Agreement provides is substantial when considered against the risks and potential pitfalls of Plaintiffs’ case.

3. Other Settlement Factors

The remaining settlement factors also support a finding that the settlement is fair, reasonable, and adequate.

Given the nature of the claims and number of putative class members, the complexity, length, and expense of future litigation in this case would be enormous. *See Wong*, 773 F.3d at 863. Proceeding to trial would take years of motion practice and extensive fact and expert discovery, assuming Plaintiffs could survive motions to compel arbitration and to dismiss. Moreover, because this is an MDL, once the Court is finished with pretrial proceedings, the individual cases must return to the transferor courts for trial preparation and trial, which would consume inordinate judicial resources. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34–35, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998).

The relative dearth of opposition to the settlement and the reaction of class members weighs in favor of approval as well. *See id.* With over 1.2 million claims filed and a class that includes approximately one in four Americans, only four class members have filed objections to the settlement, and only 4,068 have requested to be excluded. This level of opposition is remarkably low, especially for a widely publicized consumer class action concerning a popular social media platform. *Cf., e.g., Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 495 (N.D. Ill. 2015) (finding that, in case with a class size of 10 million, the fact that only twenty class members filed objections supported reasonableness of settlement, *938 and collecting cases); *In re Equifax*, 2020 WL 256132, at *10 (referring to 388 objectors as a “miniscule number” in an MDL with a class size of 147 million and 15 million claims). Furthermore, two of the objectors are “serial” objectors who “have unsuccessfully asserted the same or similar objections in other class action settlements.” *In re Equifax*, 2020 WL 256132, at *41 (referring to a group of objectors including Helfand); *see also* 1st Cochran Obj. at 3.

Additionally, the opinion of competent class counsel supports approval of the proposed settlement. *See Wong*, 773 F.3d at 863; *see also Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 300 (5th Cir. 2017), *cert. denied*, — U.S. —, 138 S. Ct. 1000, 200 L.Ed.2d 252 (2018). Here, the Court hand-picked a diverse group of highly qualified attorneys to represent the class, including attorneys who were not part of the pre-MDL settlement negotiations and who had voiced concerns regarding various aspects of the original terms. The Court's intent was to force Plaintiffs' counsel who disagreed with one another to work together, and after going back to

the drawing board, all three members of Plaintiffs' Co-Lead Counsel now attest that the settlement is fair, reasonable, and adequate.²⁸ *See* Carroll Decl. ¶ 41; Rhow Decl. ¶ 23; Fegan Decl. ¶ 26, ECF No. 122-7. So too has Judge Phillips, a highly respected mediator. *See* Phillips Decl. ¶ 12, ECF No. 122-9.

The last factor—“the stage of the proceedings and the amount of discovery completed”—asks “how fully the district court and counsel [were] able to evaluate the merits of plaintiffs' claims” before reaching the settlement. *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 350 (N.D. Ill. 2010) (quoting *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 325 (7th Cir. 1980)). Although the settlement was reached at an early stage of litigation, Class Counsel conducted voluminous confirmatory discovery between the initial signing of the Settlement Agreement and Plaintiffs' motion for preliminary approval. Most notably, Plaintiffs retained a programming expert to conduct a two-week-long, in-person inspection of TikTok's source code, which gave Plaintiffs a more comprehensive understanding of the App's technology and served as a launchpad for further discovery. Carroll Decl. ¶¶ 29–39; *see id.* Ex. A, Zeidman Curriculum Vitae. This confirmatory discovery provided the parties with enough information to make an informed decision about settlement. *See Does 1–2 v. Déjà Vu Servs., Inc.*, 925 F.3d 886, 898–99 (6th Cir. 2019) (“[C]ourts have held that settlements are permissible where, ‘notwithstanding the status of discovery, plaintiffs’ negotiators had access to a plethora of information regarding the facts of their case.’”) (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981)); *Cottle v. Plaid Inc.*, 340 F.R.D. 356, 376 (N.D. Cal. 2021).

For the above reasons, the Court finds that the proposed settlement is fair, reasonable, and adequate pursuant to the standards set forth in Rule 23(e). And, with all three prerequisites—class certification, notice, and fairness—now satisfied, the Court grants Plaintiffs' motion for final approval of the class settlement.

D. Attorneys' Fees and Service Awards

1. Legal Standard

One final issue remains—the compensation due to the attorneys, class representatives, *939 and objectors. Rule 23(h) permits a district court to award reasonable attorneys' fees “that are authorized by law or by the parties' agreement.” FED. R. CIV. P. 23(h). But in doing so, courts must be aware of the potential conflict of interest between class counsel and

the class that arises when class counsel asks for fees to be paid out of a common fund, because every dollar the attorneys receive is a dollar that the class does not. *Redman*, 768 F.3d at 629, 633 (courts must “bear[] in mind that the higher the fees the less compensation will be received by the class members”).

When evaluating the reasonableness of a request for attorneys’ fees, the Seventh Circuit has stated that the district court must “compare attorney fees to what is actually recovered by the class,” *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, 867 F.3d 791, 793 (7th Cir. 2017), with a goal “to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.” *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 832–33 (7th Cir. 2018) (quoting *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007)).

Because the market-price estimation is “inherently conjectural,” district courts have discretion to use either the percentage method, which awards fees as a percentage of the common fund, or the “lodestar” method, which awards fees based on the attorneys’ hours and billing rates, to assess the reasonableness of a fee request. *Douglas v. W. Union Co.*, 328 F.R.D. 204, 220 (N.D. Ill. 2018) (quoting *In re Trans Union Corp. Priv. Litig.*, 629 F.3d 741, 744 (7th Cir. 2011)), *aff’d*, 955 F.3d 662 (7th Cir. 2020); see 5 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 15:63 (5th ed. 2011) (updated 2021). Courts frequently use the percentage method in the first instance and cross-check the amount using the lodestar method. See *Williams v. Rohm and Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011); 5 RUBENSTEIN § 15:88 (stating that the lodestar cross-check is “a means of ensuring that the percentage award is not a windfall” to the attorneys). The Court will do so here, first with respect to Class Counsel’s motion for attorney’ fees and then with respect to the other fee petitions.

2. Class Counsel's Motion for Attorneys’ Fees

i. Percentage Method

Class Counsel request \$30,660,539.91 in attorneys’ fees. Assessing the reasonableness of this request under the percentage method is a two-step process. First, the Court determines the value of the fund against which the requested fee percentage will be calculated. This is surprisingly

complex because the gross value of the fund is not the proper denominator. Instead, the Seventh Circuit repeatedly has stated that a percentage fee award should be calculated against “the value received from the settlement by the members of the class”—i.e., the net common fund after deduction of administrative expenses, litigation expenses, and service awards. *Pearson*, 772 F.3d at 781 (citing *Redman*, 768 F.3d at 630).

Here, the gross settlement fund is \$92 million. After deducting \$3,276,268.43 in notice and settlement administration expenses, \$789,944.00 in litigation expenses, and \$90,000 in service awards, the net common fund is \$87,843,787.95. Platt Decl. ¶ 43; Pls.’ Mot. Attys.’ Fees (“Fee Mot.”) at 3, ECF No. 197.

Second, the Court must consider the percentage of the fund that Class *940 Counsel seek and determine whether that percentage—and the dollar amount resulting from it—is “reasonable.” FED. R. CIV. P. 23(h); see 5 RUBENSTEIN § 15:72. In the Seventh Circuit, a percentage fee is reasonable if it roughly approximates the market rate for legal services, in light of the risk undertaken by the attorneys and the benefit conferred to the class. See *Camp Drug Store*, 897 F.3d at 832–33; *In re Sears*, 867 F.3d at 793. In making this inquiry, courts also can “look to actual fee agreements, data from similar cases, and class-counsel auctions” for guidance. *In re Stericycle Sec. Litig.*, 35 F.4th 555, 560 (7th Cir. 2022) (quoting *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005)).

Throughout this litigation, Class Counsel have stated—both to this Court and to the class in the settlement notice—that they intended to seek “ “up to 33.33% of the Settlement Fund” in fees. Settlement Notice ¶ 15. And so here, Class Counsel seek one-third (33.33%) of the gross common fund in fees. But when calculated against the net common fund, the \$30,660,539.91 requested actually constitutes approximately 34.9% of the common fund. Class Counsel argue that they are entitled to the higher number, citing cases where courts have approved percentage awards of 35 percent or higher. But Class Counsel has repeatedly stated that they will seek no more than one-third of the settlement fund in fees, see, e.g., Settlement Notice ¶ 15, and the Court holds them to their promise. One-third of \$87,843,787.95 (the net common fund) amounts to \$29,279,203.44.

The objectors believe that this is still too much and ask the Court to adopt a “sliding scale” approach, which decreases the

attorneys' fee percentage as the size of the overall settlement fund increases. See *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 980 (7th Cir. 2003) ("*Synthroid II*") (applying a formula under which class counsel received 30% of the first \$10 million in the fund, 25% of the next \$10 million, and so on). The objectors contend that the size of the settlement and the early stage of litigation at which the settlement was reached support the use of a similar formula here.

Neither of those considerations compels the use of a sliding-scale approach in this case. Although many sliding-scale cases involve large fund sizes, many courts confronted with settlement funds in the tens of millions do not use a sliding-scale formula. See, e.g., *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2021 WL 5709250, at *5 (N.D. Ill. Dec. 1, 2021) (rejecting sliding-scale approach and awarding 33% of a \$150 million settlement fund in fees). And, as demonstrated by the lodestar cross-check below, a flat percentage fee does not create a windfall to Class Counsel in light of the amount of work performed in this case and the risk involved.

Litteken's reliance on the Seventh Circuit's recent decision in *In re Stericycle Securities Litigation* is unavailing. In *Stericycle*, the Seventh Circuit held that the district court abused its discretion in awarding 25% of a \$45 million securities fraud settlement to class counsel, because the district court did not consider the existence of an actual *ex ante* fee agreement or give sufficient weight to other factors, including prior litigation success (which reduced the risk of nonpayment) and the early stage of the litigation. See *Stericycle*, 35 F.4th at 562–66. But contrary to Litteken's contention, *Stericycle* did not create a general presumption in favor of a sliding-scale approach for large cases. Instead, the *Stericycle* court spoke approvingly of using a sliding-scale approach in cases where an actual *ex ante* fee agreement also has adopted a sliding-scale formula. *Id.* at 563 *941 (district courts should give such agreements "substantial weight" in the reasonableness analysis).²⁹

Indeed, as Class Counsel points out, a flat percentage fee award of one-third of the net common fund is typical in other data privacy settlements, including many BIPA settlements that courts have approved within this district. See, e.g., *Crompton v. Octapharma Plasma, Inc.*, No. 19-cv-08402, slip op. at 5–6 (N.D. Ill. Feb. 16, 2022); *Martinez v. Nando's Rest. Grp., Inc.*, No. 1:19-cv-07012, slip op. at 4 (N.D. Ill. Oct. 27, 2020); *Dixon v. Wash. and Jane Smith Home*, No. 17-cv-8033, slip op. at 1 (N.D. Ill. Aug. 20, 2019).

A one-third flat fee also is routine for class action settlements in similarly complex fields, such as antitrust litigation, see, e.g., *In re Broiler Chicken*, 2021 WL 5709250, at *4 (awarding a flat 33% of a \$150 million common fund and stating "fee awards in antitrust cases in this circuit are almost always one-third"), and consumer protection litigation. See, e.g., *Charvat v. Valente*, No. 12-cv-05746, 2019 WL 5576932, at *11 (N.D. Ill. Oct. 28, 2019) (collecting cases). Furthermore, a one-third fee aligns with the one-third contingency fee routinely charged by class action lawyers across the country. See 5 RUBENSTEIN § 15:73 ("The age-old assumption is that tort lawyers receive a third of their clients' recovery."); *id.* at n.9 (collecting cases); see also *Furman v. At Home Stores, Inc.*, No. 1:16-cv-08190, 2017 WL 1730995, at *4 (N.D. Ill. May 1, 2017) (the fact that "plaintiffs routinely agree to a one-third contingency fee arrangement[] reinforces that Plaintiff's Counsel are requesting the proper market rate").

The significant litigation risks to Plaintiffs described above also increase the market value of Class Counsel's representation. *Camp Drug Store*, 897 F.3d at 833; *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 721 (7th Cir. 2001) ("*Synthroid I*"). Larger contingency fees are generally needed to persuade lawyers to take riskier cases because there is a lower chance that they will receive anything at the end. See John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 481–82 (1981) (endorsing a "probabilistic rationale" for awarding fees under which the size of the fee award correlates with the risk of nonpayment). Admittedly, quantifying risk is a challenging exercise, but in *Florin v. Nationsbank of Georgia, N.A.*, 60 F.3d 1245 (7th Cir. 1995), the Seventh Circuit held that factors supporting the reasonableness of plaintiffs' fee request included (1) the "unsettled and complex" nature of the law of the case; (2) numerous "plausible defenses" available to the defendants; and (3) legitimate doubts about whether the plaintiffs had suffered actual injury. *Id.* at 1247. All three factors support the fee award Class Counsel seek here.

Data privacy law is a relatively undeveloped and technically complex body of law, which creates uncertainty and, therefore, additional risk for Class Counsel. Defendants have a wide array of defenses to Plaintiffs' claims, some of which—the arbitration clause in particular—are more than "plausible." And as in *Florin*, damages may be difficult to recover for many of Plaintiffs' claims, which are untested.

*942 The quality and amount of work that Class Counsel have performed also supports a one-third percentage fee. Class Counsel's timesheets indicate that several of the lead attorneys have devoted essentially their entire professional lives to this case over the last three years. And judged in light of the considerable litigation risks and in comparison with other data privacy settlements, they have secured a substantial benefit to the class. The need to provide financial incentives for zealous and effective representation of consumers in legally and technologically complex data privacy cases such as this—especially in the age of pervasive social media—weighs in favor of granting the request. Cf. *In re Broiler Chicken*, 2021 WL 5709250, at *3 (noting that a substantial fee is necessary to attract high-quality counsel to litigate complex cases).

Finally, the quality of representation Defendants had for their defense supports the fee request as well. See *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 357–58 (S.D.N.Y. 2005) (fact that class counsel “faced formidable opposing counsel from some of the best defense firms in the country” supported reasonableness of fee request, *id.* at 358). Defendants are represented by Wilson Sonsini Goodrich and Rosati, which is one of the leading privacy and data security law firms in the United States according to the legal industry researcher Chambers and Partners. See *Privacy and Data Security: The Elite in USA Legal Rankings*, CHAMBERS AND PARTNERS, <https://chambers.com/legal-rankings/privacy-data-security-usa-2:3220:225:1> (last accessed May 30, 2022). Indeed, Defendants’ counsel has secured victories for major technology companies in several similar consumer privacy cases. See, e.g., *In re Nickelodeon Consumer Priv. Litig.*, 827 F.3d 262, 266, 295 (3d Cir. 2016) (affirming dismissal of VPPA and state law claims); *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1063–64 (9th Cir. 2015) (same). That Class Counsel were able to secure a favorable settlement in the face of this opposition weighs in favor of a one-third fee.

The objectors raise a flurry of additional arguments in opposition to the fee request. They complain that the settlement is simply too large for a one-third percentage fee to be reasonable. The Seventh Circuit, however, has “explicitly rejected” the so-called “megafund rule,” which caps fees at a given percentage (usually ten to fifteen percent) where the size of the fund exceeds a certain amount, “because it [creates] a perverse incentive.” *In re Broiler Chicken*, 2021 WL 5709250, at *3 (citing *Synthroid I*, 264 F.3d at 718 (“Private parties would never contract for such an arrangement, because

it would eliminate counsel's incentive to press for more than [the threshold fund size] from the defendants.”)); see also *In re Equifax*, 2020 WL 256132, at *36 (collecting cases rejecting the megafund rule).

Next, the objectors contend that Class Counsel did not perform enough substantive work on the case to justify their requested percentage. That argument fails to appreciate the nearly three-year history of this case, the considerable resources Class Counsel have expended in confirming the merits of the classes’ claims, and the novelty of many of the issues involved. See, e.g., *In re Equifax*, 2020 WL 256132, at *32–33 (novelty and difficulty of legal issues in data privacy case strongly supported class counsel's fee request).

Litteken also argues that the United States government, and not Class Counsel, should get most of the credit for the settlement because Defendants agreed to settle only after the Trump Administration ordered ByteDance to sell its United States-based operations. Without more, however, the timing of the settlement alone does not *943 permit an inference that the settlement efforts would have failed if not for the Executive Order. Cf. *Sklyarsky v. Means-Knaus Partners, L.P.*, 777 F.3d 892, 898 (7th Cir. 2015) (timing alone is generally insufficient to establish causation). But even assuming, for the sake of argument, that this external pressure played a role in Defendants’ decision to settle this case, the Court declines to discount their fees on that basis. If anything, attorneys should be rewarded, not punished, for leveraging external pressure (of course, within ethical bounds) to zealously promote the interests of their clients.

ii. Lodestar Cross-Check

A lodestar cross-check also confirms the reasonableness of the one-third amount. Under this approach, the Court first calculates the “lodestar” amount, by multiplying the attorneys’ reasonable hourly rates by the number of hours the attorneys reasonably expended on the case. See 5 RUBENSTEIN § 15:87. The proposed fee award then is divided by that amount, yielding a “multiplier,” which is used to assess the reasonableness of the fee amount. *Id.* Here, the undisputed record indicates a collective lodestar of \$14,324,394.90 for Class Counsel. Measuring this figure against the proposed award of \$29,279,203.44 results in a multiplier of 2.04.

In practice, most multipliers fall between one and four. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991); see, e.g., *In re Nat'l Collegiate Athletic Ass'n*, 332 F.R.D. at 225 (1.5); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598 (N.D. Ill. 2011) (2.65); *In re Lawnmower Engine Horsepower Mktg. & Sales Pracs. Litig.*, 733 F. Supp. 2d 997, 1015 (E.D. Wis. 2010) (2.07). And, given the considerable benefit that Class Counsel has obtained for the class in the face of significant litigation risk, the Court finds that a multiplier of 2.04 is reasonable for this case. See *Americana Art China Co. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 245 (7th Cir. 2014) (referring to the multiplier as a “risk multiplier”); *Florin*, 60 F.3d at 1247 (same). Moreover, the Court observes that 2.04 is well below average for a fund of this size, see 5 RUBENSTEIN § 15:89 tbl.2 (for fund sizes over \$44 million, the mean multiplier was 2.39), and less than half the multiplier for the fee awarded to class counsel in *In re Facebook*, 522 F. Supp. 3d at 633 (awarding “a higher-end multiplier of 4.71”).

For the reasons stated above, the Court finds that Class Counsel's request for one-third of the net common fund is reasonable and appropriate in light of the work they performed on behalf of the Nationwide Class and Illinois Subclass.

iii. Allocation of Fees Among Plaintiffs' Firms

Co-Lead Counsel—comprised of Lynch Carpenter LLP; Bird Marella Boxer Wolpert Nessim Drooks Lincenberg & Rhow, P.C. (“Bird Marella”); and Fegan Scott LLC—also request that the Court delegate to them the task of allocating the fee award among the participating plaintiffs' firms. Such delegation is common when all the attorneys agree about how the fees should be distributed. See, e.g., *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 623–24 (8th Cir. 2017) (affirming district court's decision to leave the allocation of the fee award to class counsel “without further judicial oversight or approval”); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 n.15 (3d Cir. 2004) (“[D]istribution of an attorney fee award among counsel is and should be a private matter for the attorneys to resolve amongst themselves.”).

But a blanket delegation to lead counsel is inappropriate where the attorneys *944 for the class disagree among themselves about fees. For example, in *In re High Sulfur Content Gasoline Products Liability Litigation*, the Fifth

Circuit held that a district court abused its discretion by abdicating its duty to supervise the allocation of a fee award when there was a dispute among class counsel over the proper allocation procedures. 517 F.3d 220, 235 (5th Cir. 2008). Instead of resolving the dispute itself, the district court impermissibly “rubber-stamped” the views of the committee it had tasked with allocating the fees. *Id.* at 229; see also 5 RUBENSTEIN § 15:23 (“[I]f multiple counsel in a class suit cannot agree, the court can no longer defer but must itself make the allocation decision.”).

Unfortunately, this case is of the latter variety. Here, Co-Lead Counsel have proposed a fee distribution schedule that sorts the thirty-one plaintiffs' firms into tiers based upon the level of risk they assumed and their involvement in the litigation. See generally Fee Mot. Ex. 16, Lodestar Summary, ECF No. 197-16. Under the proposal, Tier 1 is comprised of Co-Lead Counsel; Tier 2 includes the remaining six firms that make up the Executive Committee and Liaison Counsel; Tier 3 consists of firms that participated in the mediation sessions but were not selected to serve on the Executive Committee; and Tier 4 is comprised of all other firms.

The dissenting view comes from two firms in Tier 3—Glancy Prongay & Murray, LLP (“Glancy Prongay”) and Philips, Erlewine, Given and Carlin LLP (“Philips Erlewine”) (collectively the “objecting firms”). They argue that Co-Lead Counsel's proposal undervalues their respective contribution to the litigation and the risk they undertook as part of the first mediation team and the leadership committee appointed by Judge Koh. Consequently, they demand a multiplier equal to at least 75% of the multiplier that Co-Lead Counsel receive.

Given this disagreement, the Court declines to delegate the distribution of fees to Co-Lead Counsel. Rather, the Court will review the tiered fee schedule that Class Counsel proposes, as well as the underlying billing documents, and exercise its independent judgment based upon the amounts requested and particular circumstances of this case.

First, Co-Lead Counsel request a lodestar multiplier of 3.5 for their own fees. The Court agrees that Co-Lead Counsel have expended enormous time, effort, and resources on this litigation, which does justify a high multiplier. However, granting Co-Lead Counsel a 3.5 multiplier would distribute to Co-Lead Counsel more than two-thirds of the total fee award, when they contributed forty percent of Class Counsel's total lodestar. The Court finds that such a distribution unfairly short-shrifts the rest of the firms—in particular, the

California firms that participated in the pre-MDL proceedings before Judge Koh. Accordingly, the Court awards Co-Lead Counsel the following fees: \$8,117,302.50 to Lynch Carpenter; \$7,073,527.50 to Bird Marella; and \$2,090,244.00 to Fegan Scott. These awards reflect a multiplier of 3.0, which the Court finds adequately compensates Co-Lead Counsel for the additional risk they have absorbed over and above the other firms.

As to the Tier 2 firms,³⁰ whom the Court appointed to the Executive Committee, Co-Lead Counsel propose that Freed *945 Kanner London and Milliken (“Freed Kanner”) receive a multiplier of 1.8, and that the five remaining firms in Tier 2 should receive a multiplier of 1.6. Co-Lead Counsel contend that the Tier 2 firms deserve a modest multiplier for their work researching and drafting the consolidated complaint and contributing to pre-MDL litigation strategy. Co-Lead Counsel further argue that Freed Kanner should receive a slightly higher multiplier than the rest of Tier 2, because it was extensively involved in organizing the second mediation and in the drafting of the Settlement Agreement itself.

The Court agrees that the Executive Committee firms materially benefitted the classes by conducting extensive pre-settlement investigation of Plaintiffs’ claims (particularly the BIPA claim), securing favorable settlement terms during the second mediation, and negotiating amendments to the settlement agreement in the post-consolidation period. What is more, the Executive Committee invested this time and effort at a relatively early stage, before the Court granted preliminary approval of the settlement, which supports awarding a modest risk multiplier. And Freed Kanner’s level of involvement exceeds that of every firm other than Co-Lead Counsel, warranting a slightly higher multiplier than the rest of Tier 2. At the same time, because the Court reduced Class Counsel’s total fee request by nearly \$1.4 million, a slight downward adjustment of Co-Lead Counsel’s suggested multiplier is appropriate. Accordingly, the Court awards the Tier 2 firms the following fees: \$2,046,169.50 to Freed Kanner; \$367,694.54 to Susman Godfrey; \$875,144.30 to Hausfeld; \$644,504.33 to Bottini & Bottini; \$837,802.10 to Burns Charest; and \$29,429.77 to Clifford Law Offices. These awards reflect a lodestar multiplier of 1.5 for Freed Kanner, and a lodestar multiplier of approximately 1.38 for the remaining firms on the Executive Committee.

The objecting firms in Tier 3 do not take issue with these recommendations. They contend, however, that Co-

Lead Counsel’s proposal for their own fees, which suggests awarding Glancy Prongay a multiplier of 1.3 and Philips Erlewine a multiplier of 0.9, fails to adequately compensate them for the risk they took on early in the litigation during the proceedings before Judge Koh. The Court agrees.

A fee award must reflect the level of risk the attorneys bore “at the outset of the case.” *Harman*, 945 F.2d at 976. Here, that standard commands a higher multiplier for these firms than Co-Lead Counsel suggest. Along with Bird Marella, Glancy Prongay was the first to begin investigating the data privacy allegations against TikTok in January 2018, and the two firms were the first to file a complaint against TikTok in November 2019. *See* Fee Mot. Ex. H, Rotter Decl. ¶ 2, ECF No. 197-24 (citing *Hong*, No. 19 C 7792). Philips Erlewine joined the plaintiffs’ team in *Hong* in March 2020 and helped to file an amended complaint in May 2020 that included more detailed factual allegations and a newly-added BIPA claim. *Id.* Ex. I, Given Decl. ¶ 2, ECF No. 197-25. Not only did these two firms join this litigation earlier than any other firm save Bird Marella, but both firms also incurred greater out-of-pocket expenses than any firm save Co-Lead Counsel or Freed Kanner. *See generally* Lodestar Summary.³¹

For these reasons, the Court finds that the objecting firms are entitled to a greater multiplier than Co-Lead Counsel propose. *946 That said, the Court finds that 2.25 (75% of Co-Lead Counsel’s multiplier) is too high when compared to the multiplier awarded to other firms given their relative contributions; therefore, the Court awards \$3,315,381.00 to Glancy Prongay and \$679,018.00 to Philips Erlewine, reflecting a fee multiplier of 2.0.

Co-Lead Counsel also request that the twenty remaining firms in Tiers 3 and 4³² receive “negative multipliers” (that is, less than their lodestar), ranging from 0.9 for several firms in Tier 3, to as low as 0.15 for Bleichmar Fonti, a firm in Tier 4. In support, Co-Lead Counsel contend that the discounts are appropriate, because these firms did not take on substantial pre-consolidation risk and did not participate in the post-MDL proceedings. They further argue that the Tier 4 firms did not confer direct or indirect benefits on the classes, because they merely represented individual class members who filed member cases and did not participate in the mediations or post-MDL litigation.

The Court disagrees that the Tier 3 and Tier 4 firms should receive discounts on their time. These firms all incurred material risks by taking on clients for what would have

been protracted, expensive litigation, had the cases not been consolidated into this MDL. While Co-Lead Counsel are correct that they did not confer substantial benefits to the class in the end, that alone does not justify a negative multiplier in light of these early risks. Accordingly, the Court finds that a 1.0 multiplier is appropriate for the Tier 3 and Tier 4 firms, and awards fees to those firms as follows: \$169,630.00 to Ahdoot & Wolfson; \$286,913.90 to Consumer Protection Legal; \$261,526.00 to Scott+Scott; \$139,495.00 to Foot Mielke; \$228,000.00 to Langeland; \$286,825.00 to Cafferty Clobes; \$163,840.00 to Sauder Schelkopf; \$45,150.00 to Baird Law Firm; \$255,242.50 to Stephan Zouras; \$208,905.00 to Tostrud Law Group; \$39,525.00 to Wood Law Firm; \$72,502.00 to Gordon Law Offices; \$211,130.00 to Cotchett Pitre; \$126,810.00 to DiCello Levitt; \$341,962.50 to Bleichmar Fonti; \$49,322.50 to Chimicles Schwartz; \$235,485.00 to Girard Sharp; \$10,822.50 to Onderlaw; \$29,549.00 to Baer Law; and \$40,350.00 to Lawrence Kamin.

iv. Expenses

Class Counsel are also entitled to reimbursement of reasonable litigation expenses. A request for reimbursement of litigation expenses is judged under the same market-based standard as a fee petition; the Court must ask whether the expenses are in keeping with what “the private market would permit.” *Synthroid I*, 264 F.3d at 722.

Class Counsel report that they have incurred \$789,944.00 in litigation expenses throughout this case.³³ Given the *947 scope and duration of the litigation and the Court's consideration of these costs, and in light of Class Counsel's attestations that they have endeavored to comply fully with the protocols listed in the Court's common benefit fee and expense order, Case Management Order No. 4 ¶¶ 5–7, 10, 13, the Court finds that their request for reimbursement of \$789,944.00 in litigation expenses is reasonable and in line with private market standards and approves the request.³⁴

3. Objector Mark S.'s Petition for Attorneys' Fees

Loevy & Loevy (“Loevy”), counsel for Mark S., also seeks fees. Courts have recognized that objectors “play an essential role in judicial review of proposed settlements of class actions” because their participation helps to ward off the possibility of collusion inherent in class action settlements and to ensure that the settlement terms adequately compensate the class for the value of their claims. *Pearson*, 772 F.3d

at 787; see *In re Sw. Airlines Voucher Litig.*, 898 F.3d 740, 745 (7th Cir. 2018). Such “participation is encouraged by permitting lawyers who contribute materially to the proceeding to obtain a fee.” *Reynolds*, 288 F.3d at 288.

Because the purpose of permitting objectors to participate in the settlement approval process is to benefit the class, in order to be entitled to a fee award an objector must “produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class.” *Id.* In determining whether to award fees to objectors' counsel, then, courts must distinguish objectors who actually add value to the settlement from those who “intervene[] for the purpose of getting paid to go away.” *Vollmer v. Selden*, 350 F.3d 656, 661 (7th Cir. 2003).³⁵

Loevy claims that, were it not for Mark S.'s efforts to carve out the claims of class members under the age of thirteen (“under-13 class members”) in this action from the release in *T.K.*, no under-13 class *948 members would have been able to participate in this settlement. As a result, Loevy contends, Mark S. added at least \$6,256,000—the prorated share of the common fund that is attributable to under-13 class members—in value to the settlement and requests twenty-five percent of that number, or \$1,564,000, in fees.

The proposition that Mark S. is responsible for the ability of under-13 class members to participate in this settlement is without merit. As the *T.K.* court recognized in denying Loevy's fee petition based on nearly identical arguments there, in as early as the fall of 2020, Plaintiffs and Defendants had “‘expressly negotiated the right of class members in the *T.K.* settlement class ... to participate in the MDL settlement class’” in order to “eliminate any potential impact” of the *T.K.* settlement on this case, all without any input from Mark S. Joint Status Report at 3 (N.D. Ill. Oct. 30, 2020), ECF No. 99; see *T.K.*, 2022 WL 888943, at *27. While those negotiations were underway, Mark S.—far from working to preserve the rights of *T.K.* class members to participate in this settlement—in fact was requesting that the *T.K.* court enforce the *T.K.* preliminary injunction against class members in this case in order to get the MDL reassigned to the *T.K.* docket. See Notice of Filing Ex. A, Objector Mark S.'s Mot. Enforcement Prelim. Inj. and Reassignment and Consolidation Related *TikTok* MDL, *T.K.*, No. 19 C 7915 (N.D. Ill. Sept. 9, 2020), ECF No. 59. Given the considerable resources Mark S. expended in trying to unravel the settlement, the Court finds Mark S.'s contention that he was acting in the best interests of the classes in this case without merit.

Mark S. also argues that his counsel should receive a fee award because he was the first to propose the in-App notice. While the Court is confident that the notice program would have satisfied the [Rule 23](#) and due process requirements without the in-App notice, it nonetheless acknowledges that in-App notice conferred a material benefit to the settlement classes. And the Court finds that Loevy does deserve some compensation for this contribution.

That being said, Loevy's fee request of \$1,564,000 far exceeds that contribution. The Court similarly declines to award Loevy their reported lodestar of \$564,938.75, because Loevy's timesheets reveal that much of the work done in connection with this MDL was devoted to undermining the settlement by attempting to enforce the *T.K.* preliminary injunction. See *In re Sw. Airlines*, 898 F.3d at 745 (citing *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687–88 (7th Cir. 2008)) (awarding objectors a small percentage of their requested fees after balancing the “very slight improvement” to the settlement against the objectors’ “lack of constructive activity in the district court,” *id.* at 687, and the “detriment caused by their courtroom antics.” *Id.* at 688)).

Accordingly, the Court awards Loevy \$100,000 in fees. Having reviewed Loevy's timesheets, the Court finds that this award approximates the percentage of Loevy's time that was devoted to improving the notice program. The Court will not award Loevy fees for any other work, because that work did not benefit (and indeed, in many cases attempted to harm) the class.

4. Incentive and Service Awards

Because a named plaintiff “is an essential ingredient of any class action,” *Camp Drug Store*, 897 F.3d at 834 (internal quotation marks omitted), the Court may authorize incentive awards “when necessary to induce individuals to become named representatives.” *Douglas*, 328 F.R.D. at 218 (quoting *Synthroid I*, 264 F.3d at 722). “To determine if an incentive *949 award is warranted, a district court evaluates the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.” *Camp Drug Store*, 897 F.3d at 834 (internal quotation marks and citation omitted).

Class Counsel seek an incentive award of \$2,500 for each of the thirty-five named Plaintiffs.³⁶ At the outset of the cases,

the thirty-five named Plaintiffs provided Class Counsel with extensive details about their use of the App, including when they downloaded it, how frequently they used it, whether they made any videos, whether their videos contain recordings of their faces, and whether they used any of the App's video editing features or facial filters in their videos. See generally Compl. ¶¶ 19–98. These disclosures of Plaintiffs’ personal and private information substantially benefited the classes by validating Class Counsel's legal theories and helping them to understand the App's technology.

The named representatives also expended time and effort on the case after the settlement agreement was reached by approving Class Counsel's pleadings and continuing to assist in confirmatory discovery. And these efforts resulted in substantial benefited the class as well.

Lastly, empirical data indicates that the requested incentive awards are modest. A study of approximately 1,200 class actions showed that the median incentive award per plaintiff was \$5,250, over twice the amount Class Counsel requests here. [5 RUBENSTEIN § 17:8](#) tbl.1. Thus, the Court finds the request of \$2,500 per named Plaintiff to be reasonable and appropriate.

Mark S. and Litteken also seek service awards of \$2,500 and \$1,000, respectively. See *In re Nat'l Collegiate Athletic Ass'n*, 332 F.R.D. at 228–29 (awarding service awards to objectors). For the reasons stated above, the Court concludes that Mark S. benefitted the class to some degree by advocating for in-App notice, but not to the degree of the named Plaintiffs. Accordingly, the Court provides him with a service award of \$1,500.

As for Litteken, the Court is not convinced that he deserves as much credit for the in-App notice, given that Mark S. was the first to raise the issue. Nevertheless, because Litteken's insistence on in-App notice impacted the Court's assessment of the costs and benefits of it, the Court finds that Litteken's request for a \$1,000 service award is appropriate, and it is granted.

III. Conclusion

For the reasons stated above, the Court certifies the Nationwide Class and Illinois Subclass; grants the motion for final approval of the Settlement Agreement [195]; and grants the petitions for fees and service awards [193][197][201] to

the extent stated above. Additionally, the motion to accept opt-outs [207] is granted. Co-Lead Counsel is instructed to provide a proposed final order within the next five days.

IT IS SO ORDERED.

All Citations

617 F.Supp.3d 904, 113 Fed.R.Serv.3d 612

Footnotes

- 1 The Court assumes familiarity with the facts of this case as stated in the Preliminary Approval Order. See *In re TikTok*, 565 F. Supp. 3d at 1079–83.
- 2 For example, if a user “likes” or comments on a video of a dog dancing to a popular song, the App’s algorithm will “learn” about the user’s preference for such videos and will adjust to show the user more videos involving dogs or other animals dancing to music on the user’s video feed. See Compl. ¶ 268.
- 3 Press Release, *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That It Violated Children’s Privacy Law*, FTC (Feb. 27, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc-allegations-it-violated-childrens-privacy> (last accessed May 20, 2022).
- 4 ByteDance initially agreed to sell its United States operations of TikTok to Oracle and Walmart later in September 2020, but a final agreement never materialized, and the Biden Administration ultimately abandoned the Trump Administration’s threat to ban the App. See, e.g., Bobby Allyn, *Biden Administration Pauses Trump’s TikTok Ban, Backs Off Pressure to Sell App*, NAT’L PUB. RADIO (Feb. 10, 2021), <https://www.npr.org/2021/02/10/966584204/> (last accessed May 20, 2022).
- 5 Plaintiffs also assert claims pursuant to several other state consumer protection statutes on behalf of a “Multi-State Consumer Protection Class,” “in the alternative” to a Nationwide Class. *Id.* ¶ 419; see *id.* ¶ 322 n.167 (listing states with consumer fraud laws that may apply to Defendants’ conduct).
- 6 More specifically, the release covers “any and all claims, complaints, actions, proceedings, or remedies of any kind ... arising from or related to the Civil Actions or the collection and use of any user data, including biometric data ... arising from the beginning of time” to the date that the final approval of the settlement is either affirmed on appeal or the date that the time to appeal the final approval order has expired. See Mot. Prelim. Approval Ex. A, Proposed Settlement Agreement and Release § 2.30 (“Settlement Agreement”), ECF No. 122-1; *id.* § 2.12.
- 7 All references to “a user” or “users” in the Settlement Agreement refer to a United States user or users.
- 8 A phone’s “clipboard” is the function that allows the user to store text, images, and videos for the purpose of copying and pasting them within an app or between apps. See Compl. ¶¶ 181–85.
- 9 As required by the Class Action Fairness Act, 28 U.S.C. § 1715, Angeion also served a notice of the settlement, along with a copy of the Settlement Agreement, on the attorneys general of all fifty states, as well as United States territories and the Attorney General of the United States. See Platt Decl. ¶¶ 4–5.
- 10 The 96.78% figure references the “target audience” for Angeion’s media campaign, not the Nationwide Class itself. Platt Decl. ¶¶ 14, 36. That said, because Angeion constructed the “target audience” based on a demographic profile of the class, and because the “target audience” is more than one-third of the

estimated class size, the Court views the reach estimate as probative. *Id.* ¶¶ 13–19; see, e.g., [Schneider v. Chipotle Mexican Grill](#), 336 F.R.D. 588, 596 (N.D. Cal. 2020) (finding a publication notice plan that reached approximately 70% of 30 million-member target audience satisfied [Rule 23](#)).

- 11 App users under the age of thirteen participate in a “limited app experience” that does not have an inbox feature. *TikTok for Younger Users*, TIKTOK (Dec. 13, 2019), <https://newsroom.tiktok.com/en-us/tiktok-for-younger-users> (last visited May 22, 2022); Platt Decl. ¶ 11.
- 12 Palmer Haasch, *TikTok May Owe You Money from its \$92 Million Data Privacy Settlement*, BUS. INSIDER (Nov. 19, 2021, 1:17 PM), <https://www.businessinsider.com/tiktok-data-privacy-settlement-how-to-submit-claim-2021-11> (last visited May 22, 2022); Morgan Sung, *That TikTok Notification About a Settlement Payment Isn't a Scam. Here's What to Know*, NBC NEWS (Nov. 16, 2021, 8:13 PM), <https://www.nbcnews.com/news/us-news/need-know-tiktoks-class-action-lawsuit-rcna5781> (last visited May 22, 2022); Kelly Tyko, *TikTok Class Action: You Might Get Money in the \$92 Million Proposed Settlement. Here's How to File a Claim*, USA TODAY (Nov. 15, 2021, 10:19 PM) <https://www.usatoday.com/story/tech/2021/11/17/you-might-get-money-tiktok-class-action-suit-talking-tech-podcast/8648781002/> (last visited May 22, 2022).
- 13 Angeion received 1,240,080 claim forms. After reviewing the forms, Angeion denied 24,539 for failing to check the box attesting that the claimant had used the App while residing in the United States prior to September 30, 2021, for failing to sign the form, or for being a duplicate of another claim. Platt Decl. ¶ 37.
- 14 The Court does not consider whether the case would be manageable as a class action because that inquiry is unnecessary to certify a settlement-only class. [Amchem Prods., Inc. v. Windsor](#), 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).
- 15 Courts overseeing class action settlements routinely find Helfand's credibility wanting. See, e.g., [In re Equifax Customer Data Sec. Breach Litig.](#), No. 17-md-2800-TWT, 2020 WL 256132, at *42 (N.D. Ga. Mar. 17, 2020) (reciting Helfand's “history of improper conduct in class action litigation”), *rev'd in part on other grounds*, 999 F.3d 1247 (11th Cir. 2021); [Chambers v. Whirlpool Corp.](#), 214 F. Supp. 3d 877, 890 (C.D. Cal. 2016) (identifying Helfand as a ‘serial’ objector[] who [is] well-known for routinely filing meritless objections to class action settlements for the improper purpose of extracting a fee rather than to benefit the Class”), *aff'd in part, vacated in part, and remanded on other grounds*, 980 F.3d 645 (9th Cir. 2020); [Brown v. Hain Celestial Grp., Inc.](#), No. 3:11-cv-03082-LB, 2016 WL 631880, at *9–10 (N.D. Cal. Feb. 17, 2016) (noting that Helfand is a ‘professional’ objector[]” and that “courts across the country ... have repeatedly turned aside [his] efforts to upend settlements”).
- 16 See, e.g., [ARK. CODE ANN. §§ 4-110-101, 4-110-108](#); [COLO. REV. STAT. §§ 6-1-713, 713.5](#); [MD. COM. LAW § 14-3501 et seq.](#); [N.Y. GEN. BUS. LAW § 899-aa\(6\)](#); [N.Y. LAB. LAW § 201-a](#); [TEX. BUS. & COM. CODE ANN. § 503.001](#); [WASH. REV. CODE § 19.375.010 et seq.](#)
- 17 Mark S. also claims that Plaintiffs have failed to adequately represent minor class members under the age of thirteen because the settlement does not include a provision requiring Defendants to comply with COPPA and their consent decree with the FTC that requires them to destroy all personal information collected from all minors under the age of thirteen (including those who falsely indicated that they were over thirteen when they registered for a TikTok account). But Plaintiffs have not brought a COPPA claim here—nor could they, given that COPPA has no private right of action. See [Hubbard v. Google LLC](#), 508 F. Supp. 3d 623, 629 (N.D. Cal. 2020). And, in any event, differences in the relief to which class members are entitled are not, standing alone, the sorts of conflicts of interest that raise adequacy of representation concerns. See [Johnson v. Meriter Health Servs. Emp. Ret. Plan](#), 702 F.3d 364, 372 (7th Cir. 2012).

- 18 Indeed, according to BuzzFeed, China-based engineers have access to everything TikTok collects, which presumably includes any biometric information that TikTok stores. See Baker-White, *Leaked Audio*.
- 19 This does not include TikTok users under the age of thirteen, who participate in the special program “TikTok for Younger Users,” which does not have an inbox feature. See *supra* note 11.
- 20 The objectors also argue that, even if class members were given an opportunity to respond, they were nevertheless “handicapped” in exercising that right because only the objection deadline, and not the deadline for responses to the fee petition, appeared on the settlement notice. But Rule 23 does not require the settlement notice to contain every last bit of information necessary to file an objection. See FED. R. CIV. P. 23(c)(2)(b), 23(e)(1)(B); *Kaufman v. Am. Exp. Travel Related Servs. Inc.*, 283 F.R.D. 404, 406 (N.D. Ill. 2012) (noting that the trial court has “nearly complete discretion to determine the form and content of notice to class members” and collecting cases); 3 RUBENSTEIN § 8:17 (same). And class members had clear notice of the separate response due date both from the 10/1/21 Order and the settlement website. See Platt Decl. ¶ 11; *id.* Ex. B, Settlement Notice, *passim*.
- 21 For example, objector Jennifer Cochran filed a “conditional objection” to the fee petition on January 25, 2022, in which she noted that her counsel advised her that the Plaintiffs’ anticipated request for one-third of the settlement fund in fees may be grounds for an objection. 1st Cochran Obj. at 1, ECF No. 186. Twelve days after Plaintiffs filed their motion for attorneys’ fees, Cochran filed her actual “objection” to the motion, which engaged in some detail with the arguments in Plaintiffs’ motion. See 2d Cochran Obj., ECF No. 207. Plaintiffs accepted that objection and responded to it in their reply brief in support of the motion.
- 22 TikTok also argues that counsel for the Opt-Out Movants improperly “solicited” opt-outs using deceptive advertising. But neither the Settlement Notice nor the Settlement Agreement makes any reference to prohibiting solicitation of opt-outs. And even if the Court were to follow the cases TikTok cites and read a ban on solicitation into the agreement, TikTok has not provided any evidence that these advertisements actually caused confusion among class members. *Cf.*, e.g., Hr’g Tr. at 3:2–6:11, *In re Facebook*, No. 15-cv-3747–JD (N.D. Cal. Sept. 22, 2020), ECF No. 486 (describing evidence of widespread consumer confusion in connection with misleading opt-out communication).
- 23 Congress amended Rule 23 in 2018 to add a list of concerns that courts should consider when deciding whether to approve a class action settlement. FED. R. CIV. P. 23(e)(2), advisory committee note to 2018 amendment; see FED. R. CIV. P. 23(e)(2)(A)–(D). But Congress stated that these factors were not intended to “displace” any of the tests devised by the courts of appeals. FED. R. CIV. P. 23(e)(2), advisory committee note to 2018 amendment. Therefore, the Court applies the factors as stated in *Wong*, with a “focus” on the “core concerns” expressed in the amended Rule. *Id.* Indeed, the enumerated factors in Rule 23(e)(2) are discussed throughout this opinion. That said, to the extent necessary, the Court expressly finds that the settlement is fair, reasonable, and adequate under the factors set forth in Rule 23(e)(2).
- 24 Mark S. again contends that the settlement is the product of a “reverse auction,” alleging that Defendants hand-selected certain attorneys to participate in the first round of mediation. But the Court is satisfied that the subsequent months of renegotiation led by the Court-appointed Class Counsel, which resulted in substantial revisions to the final settlement, sufficiently addressed any such concerns.
- 25 Specifically, the terms of service provide that:
- Any Claim must be brought in the respective party's individual capacity, and not as a plaintiff or class member in any purported class, collective, representative, multiple plaintiff, or similar proceeding (“Class Action”). The parties expressly waive any ability to maintain any Class Action in any forum.... The parties understand that any right to litigate in court, to have a judge or jury decide their case, or to be a party

to a class or representative action, is waived, and that any claims must be decided individually, through arbitration.

Terms of Service, TIKTOK, <https://www.tiktok.com/legal/terms-of-service?lang=en>, (last visited May 24, 2022).

- 26 See, e.g., *Privacy Policy*, TIKTOK (June 2, 2021), <https://www.tiktok.com/legal/privacy-policy-us?lang=en> (stating that TikTok and its affiliates “automatically collect certain information from you when you use the [App], including internet or other network activity information such as your IP address, geolocation-related data ... unique device identifiers, browsing and search history (including content you have viewed in the [App]), and Cookies”); *id.* (explaining how Defendants “share the categories of personal information listed above” with third parties).
- 27 On a related note, objector Mark S. argues that the “net expected value” of the litigation to the class is more than ten times the size of the settlement fund. But for much of the reasons already discussed, the Court finds this unpersuasive.
- 28 It is also worth noting that Defendants’ counsel appears to view the settlement as a boon for the class. See, e.g., Defs.’ Suppl. Answers at 6–7; Final Approval Hr’g Tr. at 43:9–11, *In re TikTok* (N.D. Ill. May 18, 2022), ECF No. 247.
- 29 A number of other factors distinguish *Stericycle* from this case. For example, the risk of nonpayment here was far higher than in *Stericycle*, in which “prior litigation ... and subsequent, very substantial settlements” suggested that class counsel were reasonably sure of payment. *Id.* at 563. Furthermore, prior litigation had laid the groundwork for the *Stericycle* attorneys, who relied on that evidence to negotiate the settlement. *Id.* at 563–65. Here, Class Counsel had to do their own work.
- 30 The firms in Tier 2 include: Freed Kanner London & Millen LLC (“Freed Kanner”); Susman Godfrey LLP; Hausfeld LLP; Bottini & Bottini, Inc.; Burns Charest; and Clifford Law Offices.
- 31 Indeed, Glancy Prongay alone incurred more out-of-pocket expenses than all of Co-Lead Counsel put together. Lodestar Summary at 1–2.
- 32 The firms in Tier 3 (other than Glancy Prongay and Philips Erlewine) include: Ahdoot & Wolfson, PC; Consumer Protection Legal, LLC; Scott+Scott LLP; Foote, Mielke, Chavez, & O’Neil, LLC (“Foot Mielke”); Erik H. Langeland P.C. (“Langeland”); Cafferty Clobes Meriwether & Sprengel LLP (“Cafferty Clobes”); Sauder Schelkopf LLP; Baird Law Firm; Stephan Zouras, LLP; Tostrud Law Group, P.C.; Wood Law Firm, LLC; and Gordon Law Offices, LLC. The firms in Tier 4 include: Cotchett, Pitre & McCarthy (“Cotchett Pitre”); DiCello Levitt; Bleichmar Fonti; Chimicles Schwartz Kriner & Donaldson-Smith LLP (“Chimicles Schwartz”); Girard Sharp LLP; Onderlaw LLC; Baer Law; and Lawrence Kamin.
- 33 This figure reflects \$651,433.09 in expenses independently incurred by the individual firms, and \$138,510.53 in payments made from the TikTok Litigation Fund, to which each member of Co-Lead Counsel and the Executive Committee contributed \$25,000 and \$15,000, respectively. See Decl. Katrina Carroll Supp. Pls.’ Pet. Award Attorneys’ Fees ¶ 9, ECF No. 198; Case Management Order No. 4 ¶¶ 17–23, *In re TikTok* (N.D. Ill. Nov. 18, 2020), ECF No. 105.
- 34 Specifically, the Court approves the reimbursement of litigation expenses to the individual firms as follows: \$27,374.44 to Lynch Carpenter; \$256,057.67 to Bird Marella; \$611.10 to Fegan Scott; \$309,218.63 to Glancy Prongay; \$10,529.00 to Philips Erlewine; \$11,555.07 to Freed Kanner; \$1,871.63 to Susman Godfrey; \$3,315.95 to Hausfeld; \$9,867.45 to Bottini & Bottini; \$1,511.10 to Burns Charest; \$175.30 to Clifford Law Offices; \$1,345.60 to Ahdoot & Wolfson; \$1,076.00 to Consumer Protection Legal; \$624.24 to Scott+Scott;

\$688.30 to Foot Mielke; \$995.05 to Cafferty Clobes; \$1,803.11 to Stephan Zouras; \$1,928.08 to Tostrud Law Group; \$1,767.35 to Wood Law Firm; \$400.00 to Gordon Law Offices; \$681.89 to Cotchett Pitre; \$420.00 to DiCello Levitt; \$4,523.92 to Bleichmar Fonti; \$968.81 to Chimicles Schwartz; \$1,401.44 to Girard Sharp; \$705.06 to Onderlaw; and \$16.90 to Lawrence Kamin.

The Court also approves the reimbursement of \$138,510.53 to Co-Lead Counsel for expert costs paid from the TikTok Litigation Fund and orders Co-Lead Counsel to distribute that sum amongst themselves and the Executive Committee in accordance with each firm's respective contribution to the fund, and pursuant to the procedures set forth in the common benefit fee and expense order. *See generally* Case Management Order No. 4.

- 35 In this vein, Litteken also purported to reserve the right to seek attorneys' fees "should the Court sustain any of [his] objections." Objector Litteken's Provisional Pet. Service Award at 4, ECF No. 193. Because Litteken's objections to final approval of the settlement and to attorneys' fees have been overruled in their entirety, they have not made a material difference to the benefit of class members. Accordingly, the Court will not entertain any such motion.
- 36 The named Plaintiffs are: Katherine Czajka; Misty Hong; Aparna Iyer; Brandy Johnson; Morgan Kukovec; Karina Quinteiro; and Meghan Smith; and minors A.S. *ex rel.* Laurel Slothower; A.S. *ex rel.* A.S.; A.R.; G.R.; C.W.; I.W.; P.S.; M.T.W.; N.T.; L.T.; S.P.; J.P.; K.P.; G.P.; L.M.; A.J.; E.R.; R.S.; J.S.; S.A.; L.B.; L.P.; M.P.; A.O.; H.S.; K.M.; C.H.; and D.M.

2014 WL 2808801

United States District Court, N.D. Illinois, Eastern Division.

Donald D. KAPLAN and [Ian Dolby](#), Plaintiffs,

v.

HOULIHAN SMITH & CO., INC. a/k/a Houlihan
Smith & Company, Inc., [Richard Houlihan](#), Andrew D.
Smith, Charles Botchway, Anthony J. Marsala, David
L. Heald, and Consulting Fiduciaries, Inc., Defendants.

12 C 5134

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Signed June 20, 2014

Attorneys and Law Firms[Nina Wasow](#), [Daniel M. Feinberg](#), [Julie Wilensky](#), [Todd F. Jackson](#), Lewis, Feinberg, Lee, Renaker & Jackson, Oakland, CA, [Paul William Mollica](#), Outten & Golden, Chicago, IL, for Plaintiffs.[James D. Harbert](#), [Clifford E. Yuknis](#), [Leigh Christina Bonsall](#), [Renee O'Neill Kelly](#), Hinshaw & Culbertson, [Daniel C. Meenan, Jr.](#), Kralovec Meenan LLP, [Theodore Michaelson Becker](#), [Julie Ann Govreau](#), Drinker Biddle & Reath LLP, [Daniel J. Polatsek](#), [Brian J. Poronsky](#), [Katherine Shannon Paulson](#), Katten Muchin Rosenman LLP, [Andrea Carin Halverson](#), Stetler, Duffy & Rotert, Ltd., Chicago, IL, [Marc S. Schechter](#), [Corey Francis Schechter](#), Butterfield Schechter & Van Clief LLP, San Diego, CA, for Defendants.**MEMORANDUM OPINION AND ORDER**[George M. Marovich](#), United States District Judge

*1 Lead plaintiffs, Donald D. Kaplan (“Kaplan”) and Ian Dolby (“Dolby”) have moved this Court for final approval of a settlement agreement they entered (on behalf of a class) with defendants Houlihan Smith & Co., Inc. a/k/a Houlihan Smith & Company, Inc. (“Houlihan Smith”), Richard Houlihan (“Houlihan”), Andrew D. Smith (“Smith”), Charles Botchway (“Botchway”), Anthony J. Marsala (“Marsala”), David L. Heald (“Heald”) and Consulting Fiduciaries, Inc. in order to settle the ERISA claims plaintiffs asserted in this case. The Court has held a fairness hearing and, for the reasons set forth below, now grants final approval of the settlement agreement. Also before the Court is class counsel's

motion for attorneys' fees and for reimbursement of expenses from the settlement fund.

I. Background

The two named plaintiffs, Kaplan and Dolby, were participants in the employee stock ownership plan (the “ESOP”) sponsored by their employer, defendant Houlihan Smith, an investment banking firm. The ESOP was established in 2006. As of January 2, 2010, the ESOP owned 278,775 shares of Houlihan Smith.

Plaintiffs allege that in July 2010, Houlihan Smith's Board of Directors decided to split up the company and sell some assets. The individual defendants hired defendant Consulting Fiduciaries, Inc. to represent the interests of the ESOP with respect to the division of the company and the sale of the assets. According to plaintiffs, Consulting Fiduciaries, Inc. failed in their duty, because they allowed asset sales to proceed even though the sales were unfair to ESOP participants. Plaintiffs allege that on November 16, 2010, defendants Botchway and Marsala purchased certain of Houlihan Smith's assets for notes receivable and transferred their equity in Houlihan Smith to the ESOP. On December 14, 2010, an entity owned by Houlihan and Smith purchased certain other Houlihan Smith assets for notes receivable, and Smith transferred his equity to the ESOP. The plaintiffs allege that the individual defendants did not pay enough for those assets, both because the assets were worth more and because the ESOP was left holding 932,875 shares of a now-worthless company.

The parties do not say much about defendants' position(s) on the merits, but they say defendants dispute the allegations. It appears defendants might have argued that Houlihan Smith was headed toward failure in any case (which would mean that the shares of the company would have lost value regardless of the transactions) and that the transactions were designed not to leave the ESOP with worthless shares but rather to salvage a business that could employ some or all of Houlihan Smith's former employees.

With the help of a mediator, the parties reached an agreement to settle this lawsuit. The settlement agreement calls for one insurance carrier to pay \$575,000.00 on behalf of Consulting Fiduciaries, Inc. and Heald and for another insurance carrier to pay \$700,000.00 on behalf of Houlihan Smith, Houlihan, Smith, Botchway and Marsala, for a total settlement fund of \$1,275,000.00. The money, after fees and expenses, is to be divided among the class members based on their pro rata share

of the ESOP on December 31, 2009. Each of the two named plaintiffs is to receive an extra \$1,000.00 for his efforts as a named plaintiff.

*2 As was mentioned above, the settlement agreement allows for certain fees and expenses to be deducted from the settlement amount. For example, the parties agreed that the plaintiffs' attorneys could ask the Court for an award of fees of up to 30% of the settlement amount and of reasonable expenses, all to be taken from the settlement amount. Defendants agreed not to challenge plaintiffs' attorneys' fee petition. The settlement agreement was also made contingent upon the approval of an independent fiduciary, who is to be paid \$15,000.00 from the settlement amount. The class members are to be paid within 45 days after this Court enters final judgment (or after an appeal, should a notice of appeal be filed).

In exchange, the class members are agreeing to release all defendants from any claims arising from the subject matter of this lawsuit that were or could have been brought in this case.

Now-retired District Judge Nordberg certified a class and granted preliminary approval of the settlement agreement. Judge Nordberg certified a class of "all persons who were participants in the Houlihan Smith & Company, Inc. Employee Stock Ownership Plan ("the ESOP") on December 31, 2009 and/or beneficiaries of such ESOP participants." The class definition explicitly excludes the settling defendants (and their spouses, heirs, etc.). Judge Nordberg certified the class pursuant to Rule 23(a) and 23(b)(1) and (2). Judge Nordberg also approved the notice to the class members, which notice the parties then sent to the class members.

Once the class was notified, the Court received objections from two individuals, one (Brian Semitekol ("Semitekol")) of which is a class member and the other (Richard C. Johnston ("Johnston")) is not. Johnston did not commence work at Houlihan Smith until January 2, 2010 and, therefore, was not a participant in the ESOP on December 31, 2009. He believes that date was selected arbitrarily. Semitekol was a participant on December 31, 2009, but he thinks the settlement proceeds should be allocated based on the final allocation of shares on December 31, 2010.

On May 5, 2014, the independent fiduciary (who had been hired by the Plan fiduciaries) issued his report. The independent fiduciary concluded "that the settlement is a

reasonable and attractive settlement for the Plan and Plan participants/beneficiaries."

II. Discussion

A. Final approval of settlement

Once a class is certified, the class claims may not be settled without the approval of the court. [Fed.R.Civ.P. 23\(e\)](#) ("The claims, issues, or defenses of a certified class may be settled ... only with the court's approval"). A court may approve a settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." [Fed.R.Civ.P. 23\(e\)\(2\)](#). In considering whether a class action settlement is fair, adequate and reasonable, a court "must consider 'the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to the settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement.'" *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (quoting *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996)). The most important factor is the strength of the plaintiff's case. *Id.*

Here, the settlement of \$1,275,000.00 is fair, reasonable and adequate. Although the parties have not given the Court sufficient factual information to determine plaintiffs' likelihood of success on the merits, it is clear that the parties dispute the merits of the claims. Notwithstanding the dispute, the settlement amount constitutes about 61 % of the independently-appraised value of the ESOP shares as of December 31, 2008. (The parties have not provided an appraised value for the shares as of December 31, 2009.) A roughly 60% recovery is reasonable in this case. Two of the defendants are dissolved corporations with no apparent assets. (Indeed, one of the chief allegations in this case was that the shares in the ESOP were worthless because Houlihan Smith sold its assets.) The settlement proceeds are coming from two insurance policies—the same two insurance policies that are funding the defense of this suit, such that plaintiffs face the real possibility that the insurance policy maximums would be reached before they win a judgment. Thus, even if plaintiffs could win more than the settlement amount at trial (and that is by no means clear), they might be digging a dry hole. The settlement amount is fair, reasonable and adequate.

*3 The way the settlement proceeds will be divided among the class members also strikes the court as reasonable. The

settlement amount (after fees and expenses) will be divided pro rata, based on the number of shares each class member held in his/her ESOP account on December 31, 2009. The average class member would receive about \$13,000.00 (less attorneys' fees and other expenses). The two named plaintiffs will each receive an extra \$1,000.00 for their efforts as named plaintiffs, which is reasonable.

Two individuals oppose this settlement. One is a class member, and the other is outside of the class. Although the individual who is not a class member lacks standing to object to a settlement agreement to which he is not a party, the two individuals make essentially the same objection. They believe the proceeds of the settlement should not be allocated based on the ESOP share allocations as of December 31, 2009. Class member Semitekol believes December 31, 2010 would be a better date, because by that date, the ESOP had allocated the additional shares it received as a part of the challenged transactions. The defendants and the named plaintiffs, on the other hand, argue that December 31, 2009 is the appropriate date, because that was the date of the last allocation of ESOP shares before the transactions challenged in this case occurred. The Court agrees that December 31, 2009 is a reasonable date to choose for allocating the settlement proceeds. It is those shares that lost value when the challenged transactions occurred. The shares that were added in December 2010 did not lose value, because, as plaintiffs allege in their complaint, those shares were already worthless on account of the fact that Houlihan Smith had already sold its assets. The parties' choice of December 31, 2009 is reasonable. The objections are overruled.

Because the settlement is fair, reasonable and adequate, the Court hereby approves the settlement.

B. Attorneys' fees and expenses

Next, plaintiffs have filed a motion for attorneys' fees and expenses. They seek attorneys' fees of 30% of the settlement amount, i.e., \$382,500.00. They also seek expenses in the amount of \$54,261.75.

1. Attorneys' fees

[Rule 23\(h\) of the Federal Rules of Civil Procedure](#) allows a court to award reasonable attorneys' fees. [Fed.R.Civ.P. 23\(h\)](#). Such a payment from the settlement fund is “ ‘based on the equitable notion that those who have benefited from litigation

should share in its costs.’ ” [Sutton v. Bernard](#), 504 F.3d 688, 691 (7th Cir. 2007) (quoting [Skelton v. General Motors Corp.](#), 860 F.2d 250, 252 (7th Cir. 1988)).

Here, plaintiffs' attorneys seek 30% of the settlement amount. This Court's task is to consider whether this is consistent with a hypothetical *ex ante* bargain for the attorneys' work on this case. [Williams v. Rohm and Haas Pension Plan](#), 658 F.3d 629, 635 (7th Cir. 2011) (When the attorneys' fees are coming from the settlement fund, a court “must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys.”). Plaintiffs' attorneys did not reach an agreement with their clients at the outset, but the Seventh Circuit has recognized that the market rate for ERISA class actions is a contingency fee between 25% and 33% of the settlement (or award). [Williams](#), 658 F.3d at 636. Thus, the 30% plaintiffs' attorneys request is well within the range of market prices. The parties have given the Court no reason to think this case is one that would be priced at a rate other than the usual market rate.

*4 Plaintiffs' attorneys also argue that 30% is reasonable, because it is less than the amount they would receive on a lodestar basis, i.e., if they were paid for their time at their hourly rates. This argument is absurd. Most of the hours were “billed” at a rate of \$725 per hour, but plaintiffs' counsel has provided no evidence any plaintiff has ever or would ever agree to pay that rate (or any of the other hourly rates plaintiffs' lawyers claim as their rates). No rational lead class action plaintiff would agree to pay such an hourly rate in a case where he stood to gain so little, which is precisely why class action lawyers take cases on a contingency basis. Nonetheless, the rate of 30% is reasonable.

The Court approves payment to the plaintiffs' attorneys in the amount of \$382,500.00 for fees.

2. Expenses

Next, the Court considers the expenses for which plaintiffs' attorneys seek reimbursement.

The firm of Lewis, Feinberg, Lee, Renaker & Jackson, P.C. has provided a six-page itemized list (including dates, amounts and descriptions) of the expenses it incurred in connection with this case. The list includes photo-copying costs, Pro Hoc Vice Admission fees, overnight shipping fees, travel and meal expenses, deposition transcript costs and

mediation fees. The Court has carefully reviewed the list of expenses and concludes that they are expenses for which a paying client would reimburse its lawyer. *See In re: Synthroid Mfg Lit'n*, 264 F.3d 712, 722 (7th Cir. 2001) (explaining the appropriateness of considering what the private market would bear in determining whether litigation expenses are reasonable). Accordingly, the Court awards expenses in the amount of \$52,078.70 to Lewis, Feinberg, Lee, Renaker & Jackson, P.C.

Next, the firm of Outten & Golden, LLP seeks reimbursement of expenses in the amount of \$2,183.75. Specifically, Outten & Golden, LLP requests \$350.00 to reimburse it for the filing fee. The Court grants that expense. Outten & Golden, LLP also requests reimbursement for expenses for service of process. The Court awards those expenses as well. Thus, the Court awards Outten & Golden, LLP expenses in the amount of \$2,183.75.

III. Conclusion

For the reasons set forth above, the Court hereby grants final approval of the settlement. The Court approves an incentive award of \$1,000.00 each to named plaintiffs Kaplan and Dolby. The Court approves payment of \$15,000.00 from the settlement fund to the independent fiduciary Nicholas L. Saakvitne.

The Court grants plaintiffs' motion for attorneys' fees. The Court approves an award of attorneys' fees in the amount of \$382,500.00 from the settlement fund. The Court approves an award of \$52,078.70 from the settlement fund to Lewis, Feinberg, Lee, Renaker & Jackson, P.C. as reimbursement for expenses. The Court approves an award of \$2,183.75 from the settlement fund to Outten & Golden, LLP for reimbursement of expenses.

Case dismissed with prejudice.

All Citations

Not Reported in Fed. Supp., 2014 WL 2808801, 59 Employee Benefits Cas. 1613

786 F.2d 320

United States Court of Appeals,
Seventh Circuit.Anita KIRCHOFF and William
Kirchoff, Plaintiffs-Appellants,

v.

Michael FLYNN, et al., Defendants-Appellees.

No. 85-2187.

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Argued Jan. 24, 1986.

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Decided March 17, 1986.

Synopsis

Issue arose over proper attorney fee award in a Civil Rights Act suit charging police officers with assault, battery, false arrest and malicious prosecution. The United States District Court for the Northern District of Illinois, Prentice H. Marshall, J., based award on percentage specified in contingent fee contract, and appeal was taken. The Court of Appeals, Easterbrook, Circuit Judge, held that use of contingent fees is appropriate in cases that enforce old precedents but that court erred in lifting percentage out of the fee contract.

Reversed and remanded.

Eschback, Senior Circuit Judge, filed dissenting opinion.

Attorneys and Law Firms

***320** Edward T. Stein, Singer & Stein, Chicago, Ill., for plaintiffs-appellants.

Maureen Kelly Ivory, Asst. Corp. Counsel, Chicago, Ill., for defendants-appellees.

Before POSNER and EASTERBROOK, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

Opinion

EASTERBROOK, Circuit Judge.

Arrested for feeding the pigeons and walking her dogs in the park, Anita Kirchoff recovered \$25,000 from the police. The defendants gave up, but Kirchoff's lawyers did not. They

wanted some \$50,000 in fees under [42 U.S.C. § 1988](#). The district court gave them \$10,000 on the ground that their contingent fee contract with the Kirchoffs entitled them to 40% of any award. The case requires us to decide whether the contingent fee is the appropriate rate under [§ 1988](#) when the case resembles private tort litigation in which contingent fees are customary. First, however, we pause for the facts.

I

Anita Kirchoff regularly allowed her dogs to roam without leases in Washington Park in Chicago, about a half block from her home. While in the park with the dogs, she would feed the pigeons.¹ Michael ***321** Flynn, a sergeant of the Chicago Police, twice told her that the dogs must be leashed and the pigeons left to their own devices. On May 8, 1982, Flynn saw Kirchoff, her unleashed dogs, and a pigeon enjoying Kirchoff's largesse. As Flynn tells the tale, he and officer Mary Siwak tried to give Kirchoff a citation. To find out who they were citing, they asked Kirchoff her name and address. She balked, and they arrested her, maintaining that when a person being cited will not provide the necessary details, regular procedure requires the arrest. As Kirchoff tells the tale, the police knew who she was, so it was unnecessary for her to provide identification.

Because the police did not have a cell suitable for the two dogs, and the parakeet Kirchoff happened to have in hand, they escorted Kirchoff home, so that she could park her menagerie. At her home they found William Kirchoff, Anita's husband. Anita told her husband that she had been arrested; he responded with some unprintable remarks and punched officer Siwak. (Who started the scuffle will remain a mystery.) Apparently both William and Anita Kirchoff are skilled in karate (the police state that they have black belts), and the officers called for help. By the time help arrived in the person of Lt. Chausse and his paddy wagon, Flynn and Siwak had William Kirchoff in handcuffs. He had been kicked in the groin (self-defense, according to Flynn) and was bleeding about the head. William says that he was clobbered by a pair of handcuffs; Flynn maintains that the Kirchoffs' red macaw drew the blood when it landed on William's head during the fracas and started pecking.²

William was trundled to the squadrol, and the police turned their attention back to Anita. All the police had left the house with William; while they were gone, Anita locked the door and refused to let them back in. The police say (and Anita

denies) that they thrice asked her to open the door. The police ultimately kicked in the door and took Anita into custody. They left a neighbor and an unknown number of dogs, birds, and other animals to guard the Kirchoffs' house. William refused treatment at the hospital to which the police took him. Both Kirchoffs were booked and stayed in jail until the wee hours of the next morning. William spent ten hours in jail, Anita nine.

Anita was prosecuted for littering (dropping bird seed on the ground), feeding a bird, allowing her dogs to run unleashed, and resisting arrest (by locking herself into the house). The state judge convicted Anita of omitting the leash but otherwise acquitted her. The charge of feeding the pigeons had no legal basis. Section 30-7.6 of the park regulations states that “[n]o person shall feed animals in any zoo area except unconfined squirrels, sparrows, pigeons and ducks.” Even if Washington Park is a “zoo area,” Anita was on safe ground unless some robins or perhaps the parakeet hopped in for a meal.³ The charge concerning the dogs was more substantial. Section 30-7 requires dogs and cats in the parks to be “continuously restrained by a leash not exceeding six (6) feet in length....” The penalty for allowing dogs to run unleashed in the park is time in the pound (for the dogs only), see Section 30-7.10. The prosecutor asked for 30 days, but the judge apparently sentenced these dogs to time served.

William Kirchoff was charged with obstructing the police in their arrest of Anita and with battery of officers Flynn and Siwak. He was acquitted on all counts.

***322** This suit under 42 U.S.C. § 1983 turned the tables. The complaint charged the officers with assault, battery, false arrest, and malicious prosecution, all in violation of the fourth, fifth, and fourteenth amendments, and with several pendent state claims. Without stating reasons, the district court granted Anita's motion for summary judgment with respect to liability. About a month before the trial the defendants offered \$42,000 to settle the matter; the Kirchoffs held out for more. The jury fixed Anita's damages at \$25,000 and ruled for the defendants on William's claims. See also *\$25,000 for the Birds*, 71 A.B.A.J. 31 (June 1985). Neither side has appealed on the merits, so we shall not need to inquire why the court granted summary judgment in a case that apparently turns on whose story one believes. We also need not examine the \$25,000 verdict, which is \$2,778 for each hour Anita spent in custody.

The defendants missed a good bet when they neglected to make an offer of judgment under Fed.R.Civ.P. 68. The

Kirchoffs recovered less than \$42,000, so under *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985), an offer would have stopped the running of attorneys' fees. They did not, however, and the Kirchoffs' lawyers asked for fees of \$49,732.50, representing 331.55 hours of work at \$150 per hour. More than 180 of these hours came after the offer of settlement. The defendants argued that the request was excessive. William Kirchoff had lost outright, and Anita had won on liability without a trial. The time spent on William's claims should be excluded, the defendants contended. The case was marginally successful from the plaintiffs' perspective; no plaintiff is happy to take home only 60% of the last settlement offer. The defendants also challenged the hourly rate of \$150 and the need to devote 332 hours (more than eight weeks of full time work) to litigating the events of May 8. One lawyer would have done; the plaintiffs used two for parts of the case. The defendants recomputed the hours and hourly fees, coming up with a proposed award of about \$5,000.

Although the positions with respect to fees differed by an order of magnitude, the district court did not hold a hearing. Instead the judge decided the matter from the bench. After first remarking that he had not seen the agreement between the Kirchoffs and their lawyers concerning fees, he asked whether the agreement provided a contingent fee. One lawyer replied that it did: one-third if settled before the pretrial order, 40% if things went farther. The court then observed that the “beginning point ... should be a determination of the market value for the services” and concluded that the market value in a case such as this is the contingent fee.

Treating the case as a personal injury matter in which the constitutional foundation was window dressing, the court thought the state of the law “well settled ... for a number of years. These cases are today to the jurisprudence of the Federal Courts what FELA cases were forty, fifty years ago. They are personal injury cases with a Federal law underpinning. The marketplace for this type of litigation throughout my career at the bar has been the contingent fee contract.”

The judge went on to explain that \$50,000 was at all events an unsupportable request. William lost, so “[t]he time should be divided in half.” More, “this was an easy case to try, an easy case to try.... [T]here just is no need for the two of you to try this case.... This was a fist-fight case and, indeed, you lost that aspect of it.” The judge summed up:

When I take all of these factors into account, I believe that the contingent fee agreement which you reached with your clients is the fair measure of the fee in this case. You recovered a \$25,000 award for Mrs. Kirchoff. She agreed to pay you forty percent of that. The philosophy of the Civil Rights Attorney's Fee Act is that she should recover her damages without incurring fees. That the defendant should pay her fees, if those fees are reasonable. So she shifts *323 that forty percent of \$25,000, or \$10,000, to the defendants.

II

A court awarding fees under § 1988 is supposed to compute the “market rate” for the attorneys’ work and assess that reasonable fee against the defendants. *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983); *Henry v. Webermeier*, 738 F.2d 188 (7th Cir.1984). In the words of *Henry*, the rate should “simulate the results that would obtain if the lawyer were dealing with a paying client.” 738 F.2d at 195. The district judge thought that 40% of the award is the “market rate” for cases of this type; it was, after all, the rate the Kirchoffs themselves negotiated. What could be a better gauge of the market than an actual transaction in it?

The judge never did read the contingent fee contract, and he got its provisions wrong. True, it entitled the lawyers to 40% of the award if the case went to trial. But this was the lawyers’ entitlement against the Kirchoffs, not against the defendants. The contract also provided that if the court should award more than 40%, the lawyers would keep the excess; if the court should award less than 40%, the Kirchoffs’ net recovery would be reduced. In other words, the 40% in the contract was a floor; there was no contractual ceiling. The district court made the 40% into a ceiling and thereby modified the contract.

There is a more fundamental question: why should we care about this contract? In ordinary tort litigation the contract fixes entitlements. If the plaintiff recovers \$25,000, the lawyer gets \$10,000 and the plaintiff \$15,000. The plaintiff, with money on the line, takes care when negotiating. The Kirchoffs’ contract is not about the disposition of their money. As the district court said, the (or a) policy behind § 1988 is to ensure that the plaintiffs keep the whole recovery. So in negotiating a contract such as this, the Kirchoffs were dickering about the defendants’ money, not their own.⁴ If the contract had said that the fee is to be 60%, would it then be appropriate to award \$15,000 to counsel here? The contingent fee may be the market’s way to price legal services for this sort of claim, but there is nothing magical about the percentage when the plaintiff expects the defendants to pay the freight.

One logical response would be to say that 40% is the customary fee in tort litigation in which plaintiffs *are* looking out for their own wallets, and the bargains these other plaintiffs strike offer vicarious protection to defendants in cases under § 1988. A court need only match these private bargains to arrive at the “market rate.” This would be too facile, however, because the risks plaintiffs face in § 1983 litigation are greater and the rewards smaller. A § 1983 case is not like FELA litigation, in which all but a few defenses have been stripped away. See *Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807, 813 (7th Cir.1985). It is not even like ordinary tort litigation. Although § 1983 creates “a species of tort liability”, *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976), and § 1983 suits are “best characterized as personal injury actions” for purposes of determining the statute of limitations, *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 1949, 85 L.Ed.2d 254 (1985), the plaintiff must show more in a § 1983 case than in a case under the common law of torts. Negligence is not itself actionable. *Daniels v. Williams*, 474 U.S.327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The plaintiff must show intentional wrongdoing or at least recklessness in *324 most § 1983 suits, and every “constitutional tort” will have one or more elements an ordinary negligence suit lacks. See *Gumz v. Morrisette*, 772 F.2d 1395, 1399-1400 (7th Cir.1985). The plaintiff also must overcome any immunity from suit the defendants may possess. See *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

A plaintiff suing the police may encounter juries sympathetic to the defendants-more sympathetic, anyway, than juries are apt to be when the defendant is a deep-pocket corporation

in a products liability or FELA suit. When the plaintiff wins on the merits, the jury may treat the defendant as having shallow pockets. (Defendants share the common perception that the size of the award varies with the depth of the pocket as well as the seriousness of the injury. Courts ensure that juries do not learn that many defendants in § 1983 suits are indemnified. See *Fed.R.Evid.* 411. We have held that informing the jury about indemnity is reversible error. *Joseph v. Brierton*, 739 F.2d 1244 (7th Cir.1984); see also *Joynor v. Berman Leasing Co.*, 398 F.2d 875 (5th Cir.1968).) Litigants under § 1983 therefore have a harder time on the merits, and recover less when they win, than plaintiffs in much other tort litigation. The observation that a contingent fee of $\frac{1}{3}$ or $\frac{2}{5}$ of the recovery fetches adequate counsel in FELA and products liability suits therefore does not demonstrate that the same percentage is the “market rate” in riskier, lower-stakes litigation under § 1983.⁵

This does not mean, however, that contingent fees have no role under § 1988. The “number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate” is the “most useful starting point” in many cases, *Hensley v. Eckerhart*, *supra*, 461 U.S. at 433, 103 S.Ct. at 1939, but it is not the only starting point. A court’s objective is to find the rates “prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum v. Stenson*, *supra*, 465 U.S. at 896 n. 11, 104 S.Ct. at 1547 n. 11. When the “prevailing” method of compensating lawyers for “similar services” is the contingent fee, then the contingent fee *is* the “market rate.”

The market for legal services uses three principal plans of compensation: the hourly fee, the fixed fee, and the contingent fee. The contingent fee serves in part as a financing device, allowing people to hire lawyers without paying them in advance (or at all, if they lose). It also serves as a monitoring device. In any agency relation, the agent may pursue his own goals at the expense of the principal’s. A fixed fee creates the incentive to shirk; a lawyer paid a lump sum, win or lose, may no longer work hard enough to present his client’s case. Fixed fees therefore are used only in cases where the client can monitor the results and the lawyer’s work (did the lawyer secure the divorce or not?) or where the client (or the client’s general counsel) is sufficiently sophisticated to assess what the lawyer has accomplished.

An hourly fee creates an incentive to run up hours, to do too much work in relation to the stakes of the case. An hourly fee may be appropriate where it is hard to define

output (in litigation, for example, the outcome turns on the merits and not simply the lawyer’s skill and dedication), so the hourly method measures and prices the inputs, the attorney’s hours. Again, however, it is necessary to monitor the lawyer’s work. The general counsel of a corporation or a sophisticated client may measure inputs well, but in litigation under § 1988 the plaintiff usually has little ability to monitor and also has little incentive to do so, knowing that the defendant will pay the bill. So the court rather than the plaintiff must do the supervision. This in turn creates complex, secondary litigation about fees.

***325** Judicial monitoring also is necessarily imprecise. The judge cannot readily see what legal work was reasonably necessary at the time; the judge first sees the application for fees after the case is over, and hindsight may obscure the difficult decisions made under uncertainty as much as it illuminates them. The Supreme Court’s oft-repeated wish that litigation about fees not turn into a second major lawsuit (e.g., *Hensley*, *supra*, 461 U.S. at 437, 103 S.Ct. at 1941) is an unattainable dream. The computation of hourly fees depends on the number of hours “reasonably” expended, the hourly rate of each, the calculation of the time value of money (to account for delay in payment), potential increases and decreases to account for risk and the results obtained, and a complex of other considerations under the heading of “billing judgment.” The stakes in this case the request for fees was double the judgment, in others the request for fees may be millions of dollars—ensure that the parties will pursue all available opportunities for litigation. Cf. *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646 (7th Cir.1985); *In re Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir.1984). The fuzziness of the criteria (what is a “reasonable” number of hours?) ensures that people seeking opportunities to contest the fees will not need to search hard.

There is no wholly satisfactory way to employ hourly rates when the plaintiff can not or will not monitor his own attorney and the defendant has both incentive and ability to turn the request for fees into a second major litigation. The “lodestar” method makes of the court a public utilities commission, regulating the fees of counsel after the services have been performed, thereby combining the difficulties of rate regulation with the inequities of retrospective rate-setting.

When the use of hourly rates is the norm in the private market, § 1988 requires courts to follow. This will be so, for example, when the litigation does not have a fixed money

value, as when the plaintiff principally seeks injunctive relief. The same forces that drive private parties to monitor inputs of attorneys' time rather than particular results must drive the legal system in the same direction. But when private litigants have found that it is more useful to give the lawyer a monetary stake in the recovery through the contingent fee than to monitor inputs of time, courts should be willing to learn from that accumulated experience.

The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. This interest-alignment device is not perfect. When the lawyer gains 40 cents to the client's dollar, the lawyer tends to expend too little effort; unless concern for his reputation dominates, he would not put in an extra \$600 worth of time to obtain an extra \$1,000 for his client, because he would receive only \$400 for his effort. Cf. *Chesny v. Marek*, 720 F.2d 474, 477-78 (7th Cir.1984), *rev'd on other grounds*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). But imperfect alignment of interests is better than a conflict of interests, which hourly fees may create. The unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with a payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants. Except in grudge litigation, no client, however wealthy, pays a lawyer more than a dollar to pursue a dollar's worth of recovery. Nothing in the legislative history of § 1988 suggests that Congress meant to give civil rights plaintiffs a sort of representation that wealthy people would not purchase for themselves. See *Jones v. Central Soya Co.*, 748 F.2d 586, 593 (11th Cir.1984); cf. *Bonner v. Coughlin*, 657 F.2d 931, 934 (7th Cir.1981). To the contrary, the legislative history recounted in *Hensley* and *Blum* is full of imprecations against "windfalls" for counsel. Yet it is difficult to avoid excessive recoveries of fees under a system based wholly on the number of hours worked. Cf. *326 *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir.1982), *cert. granted*, 474 U.S. 917, 106 S.Ct. 244, 88 L.Ed.2d 253 (1985) (fees more than seven times recovery). Yet if there should be a cap on the total fee, perhaps as some percentage of the recovery, that would argue strongly for general use of contingent fees, which contain not only a cap but also a floor. Without a floor the introduction of a cap would depress average fees below their expected level in the private market.

At the same time as it automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure, the contingent fee automatically handles compensation for

the uncertainty of litigation. Hourly fees usually are fees that lawyers charge to clients who pay promptly when billed. These fees translate poorly to § 1988 cases, where payment is contingent on success and is delayed until after the end of the litigation. Courts have wrestled with questions concerning multipliers for risk, multipliers for exceptional success, and the treatment of the time value of money. One common concern with compensation for risk is that the multiplier should rise as the probability of success falls, soaking the unlucky defendant who had a good case (more than a 50% chance of prevailing) but lost anyway and therefore faced a huge multiplier. See *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392-93 (7th Cir.1984). We need not rehearse these struggles, one aspect of which is before the Supreme Court this term. *Delaware Valley Citizens Council v. Pennsylvania*, 762 F.2d 272 (3d Cir.), *cert. granted*, 474 U.S. 815, 106 S.Ct. 57, 88 L.Ed.2d 46 (1985). Increasing hourly rates for risk and delay is one way of restoring the hourly rate a lawyer could obtain from a paying client, and a necessary way when the base of the fees must be the hourly rate. Only by offering to pay the lawyer his opportunity wage, the compensation he could obtain by representing paying clients, may a court induce the lawyer to take civil rights cases. Adjustments to produce the anticipated opportunity wage are artificial in the sense that there is no parallel in private markets. The contingent fee contract takes care of this adjustment automatically, yet it never presents defendants with a bill many times the stakes of the underlying litigation. So long as the percentage is set by category of case (as it should be), rather than case by case, defendants with good cases pay no more than defendants with poor ones. The adjustment for risk takes place not in the judge's chambers but in the private market—under a contingent fee system, potential litigants with poor chances simply cannot find counsel. Weak cases stay out of court.

For all of these reasons, we agree with the district court that when the private market for legal services employs the contingent fee for "similar services by lawyers of reasonably comparable skill, experience, and reputation" (*Blum, supra*, 465 U.S. at 895 n. 11, 104 S.Ct. at 1547 n. 11), so may a court making an award under § 1988. The private market uses the contingent fee for personal injury cases, including torts such as battery, false arrest, and malicious prosecution, the subjects of this case. The district court was entitled to employ a contingent fee as a benchmark, even though for reasons we have explained it was wrong to stop the inquiry with the 40% minimum fee in the Kirchoffs' contract. The district judge must ascertain the appropriate rate for cases of

similar difficulty and risk, and of similarly limited potential recovery.

III

All of the § 1988 cases the Supreme Court has considered sought compensation for hours reasonably expended times the appropriate hourly rate. The principal cases, *Hensley* and *Blum*, both involved requests for injunctions as the principal relief. Legal work seeking injunctions is compensated in private markets by the hour, so that the Court's observation that the "lodestar" method is the appropriate one simply reflected the markets in question. The grant of review in *City of Riverside v. Rivera*, where the lodestar method produced an award many times the damages *327 recovered, requires the Court to decide whether a lodestar analysis remains appropriate when the case produces a substantial recovery and the claims are of the sort usually urged in private tort litigation. See Justice Rehnquist's opinion issuing a stay in *Rivera*. 473 U.S. 1315, 106 S.Ct. 5, 87 L.Ed.2d 683 (1985).

None of the Court's cases bars the use of contingent fees as a benchmark when such fees are the market's method of compensating the sort of legal services in question. Neither do our cases. The Kirchoffs' lawyers contend that we have cleanly rejected the proposition that contingent fees may be the basis for computing awards under § 1988. They cite three cases: *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir.1982); *Lenard v. Argento*, 699 F.2d 874, 899 (7th Cir.), cert. denied, 464 U.S. 815, 104 S.Ct. 69, 78 L.Ed.2d 84 (1983); and *Lynch v. City of Milwaukee*, 747 F.2d 423, 429 (7th Cir.1984). These cases indeed establish limits on the use of contingent fees, but none establishes a bar.

The question in *Sanchez* was whether to adopt the "bright prospects" rule—a doctrine that if a case is likely to involve substantial monetary recovery, so that the prospect of contingent fees will attract counsel, the court should not award fees against the defendants. We rejected the "bright prospects" rule, concluding that although "bright prospects" might attract counsel, the functions of § 1988 include shifting the costs of counsel to those who occasioned the suit, not just ensuring that the plaintiffs could sue. An award of fees enables the plaintiff to keep the whole recovery and brings home to the defendants the full social costs of their unconstitutional conduct, costs that include litigation as well as the original damages. See also Comment, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fee*

Awards Act of 1976, 47 U.Chi.L.Rev. 332 (1980) (discussing the legislative history). A rule that assesses contingent fees against defendants is the opposite of the "bright prospects" rule.

Sanchez also stated: "We ... decline to hold that where a contingent fee contract has been executed, it serves as an automatic ceiling on the amount of a statutory award." 688 F.2d at 505. Two considerations support this conclusion. First, as we explained in Part II, the contingent fee contract between counsel and the plaintiff in a § 1988 case is not an ordinary contract, because the plaintiff expects the defendant to pay. A court should not use this contract or the usual percentage in FELA litigation—as the right or maximum percentage. It is necessary to determine the appropriate percentage for legal work of similar risks and probable recoveries. Second, much civil rights litigation is designed to obtain injunctions or precedents. These may be exceptionally valuable but have no ready monetary equivalent. A wooden application of a contingent fee contract assigns these benefits a value of zero. Section 1988 is designed, in part, to compensate counsel for the cost of producing unquantifiable benefits, and when a case yields such results a fee based on a percentage of the monetary recovery will be too low. See also Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 L. & Contemp.Prob. 233, 237-41 (Win.1984).

Lenard simply recites the holding of *Sanchez*: "The trial court may consider as a factor the contingent fee contract, but it is not to be an automatic limitation on the attorney fee award." 699 F.2d at 899. *Lynch* is in the same spirit: "[W]here the primary relief sought is injunctive or similarly non-monetary, the amount of a § 1988 fee award is not to be reduced merely because money damages may be low or nominal." 747 F.2d at 429. The proposition does not help counsel in a case such as this, in which the plaintiffs sought only money damages, the damages are not nominal and in which the litigation did not create or alter any principle of law. The Kirchoffs sued to redress some of the oldest torts known, not to challenge accepted wisdom or to explore uncharted seas.

*328 Cases in other circuits give a mixed picture at best. Several courts appear to say that contingent fees are irrelevant, impermissible, or both under § 1988. E.g., *Furtado v. Bishop*, 635 F.2d 915, 919 (1st Cir.1980); *Bryant v. TRW, Inc.*, 689 F.2d 72, 79-80 (6th Cir.1982) (Fair Credit Reporting Act); *Hamner v. Rios*, 769 F.2d 1404, 1408 (9th Cir.1985); *Cooper v. Singer*, 719 F.2d 1496 (10th Cir.1983) (en banc);

Sears v. Atchison, Topeka & Santa Fe Ry., 779 F.2d 1450, 1453-54 (10th Cir.1985). These and other cases generally emphasize the non-monetary gains from § 1983 litigation, and to the extent they do so they are at one with our decisions in *Sanchez*, *Lenard*, and *Lynch*. To the extent they hold (as *Furtado* may) that contingent fees may not be the starting point of an award even in mundane litigation without substantial third-party effects, they are at odds with other circuits, such as *Easley v. Empire, Inc.*, 757 F.2d 923, 932 (8th Cir.1985); *Pharr v. Housing Authority of the City of Prichard*, 704 F.2d 1216, 1217 (11th Cir.1983); and *Jones v. Central Soya Co.*, *supra*, 748 F.2d at 593, that give greater sway to contingent fee contracts. There is a conflict among these cases; *Hamner*, for example, explicitly rejects part of the holding in *Pharr*; and *Sears* rejects many other cases. Nothing we can do will bring harmony to them.

But there may be more disharmony than there needs to be. The use of contingent fees can coexist with a recognition that courts must compensate counsel who produce non-monetary benefits, and that compensation for such benefits is presumptively based on the number of hours it took to produce the benefits. *Sanchez*, *Lenard*, and *Lynch* suggest that the lodestar approach is best in cases with substantial injunctive or precedent-creating components. The use of contingent fees is appropriate in cases that enforce old precedents and allow effective compensation as a percentage of the total recovery. Neither approach governs all cases, but there is no necessary conflict. The objective in all cases is the same: to award the plaintiff's counsel the market rate for the services reasonably required to produce the victory. "The market" uses different methods of calculating compensation in different kinds of cases.

To sum up: the district judge was entitled to compute the attorneys' fee in this case as a percentage of the total award. The court was mistaken, however, to lift that percentage out of the contingent fee contract. The 40% was to be a minimum, not a cap. The contract was not bargained between the lawyer and the real parties in interest-the defendants. It also may not provide the percentage that is used in similarly risky tort litigation with moderate stakes. We therefore remand the case to the district court for further consideration of the reasonable attorneys' fee.

REVERSED AND REMANDED.

ESCHBACH, Senior Circuit Judge, dissenting.

I agree with the majority's conclusion that the use of a contingent fee is appropriate in computing a reasonable award of attorney fees under 42 U.S.C. § 1988 "in cases that enforce old precedents and allow effective compensation as a percentage of the total recovery." I, nevertheless, cannot join its opinion. To my mind, the majority fails both to recognize the discretion of the district court in setting an award of fees, and to offer adequate guidance to the district court on remand. Were I Judge Marshall, I would be at a loss to say whether the majority found the actual award of fees in this case excessive, insufficient, or, perhaps, even reasonable. I also would be unable to say at what point I had taken an incorrect turn in setting the award of fees.

I

Section 1988 provides that in federal civil-rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. The *reasonableness* of the fee is the relevant statutory benchmark. *329 *Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984); *see also Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). In enacting § 1988, Congress expressly approved the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974), as guidelines for setting an award of fees, which factors in turn were derived from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106. *See* S.Rep. No. 1011, 94th Cong., 2nd Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913. The legislative history of § 1988 discloses Congress's intent that "a reasonable attorney's fee" is one that is "adequate to attract competent counsel, but ... [does] not produce windfalls to attorneys." S.Rep. No. 1011 at 6; *see also Blum*, 465 U.S. at 893-94, 104 S.Ct. at 1548.

Section 1988 empowers the district court to exercise discretion in determining whether an award is to be made and, if so, its reasonableness.¹ *Blum*, 465 U.S. at 902 n. 19, 104 S.Ct. at 1550 n. 19; *Hensley*, 461 U.S. at 437, 103 S.Ct. at 1941; *see also Lovell v. City of Kankakee*, 783 F.2d 95, 96 (7th Cir.1986); *Linhart v. Glatfelter*, 771 F.2d 1004, 1011 (7th Cir.1985); *Berberena v. Coler*, 753 F.2d 629, 632 (7th Cir.1985); *Muscare v. Quinn*, 614 F.2d 577, 580 (7th Cir.1980). "The amount of the fee, of course, must be determined on the facts of each case." *Hensley*, 461 U.S. at 429, 103 S.Ct. at 1937.² The district court's award may be

set aside on appeal only for a clear abuse of discretion. *See, e.g., Berberena, 753 F.2d at 632; Muscare, 614 F.2d at 580.*

II

As the majority itself acknowledges, this was a simple false-arrest and battery case. It neither established an important constitutional right, nor sought equitable relief for the vindication of such a right. This was an action seeking damages and no more. Anita Kirchoff recovered a judgment for \$25,000.00, from which no appeal was taken.

Anita Kirchoff then petitioned the district court for \$50,000.00 in fees and costs. After evaluating the petition in light of the guidelines approved by Congress, Judge Marshall rejected it as unreasonable. He commented extensively on the nature of her claim, and noted, quite correctly, that it was essentially a personal-injury tort action with federal constitutional underpinnings. He determined that Kirchoff had prevailed only partially on the merits, and that neither novel nor complex legal issues were involved. Judge Marshall also found that there was no need for two attorneys to litigate the claim, and questioned the amount of time and labor set forth in the petition.

Judge Marshall then began his computation of a fee award with a determination of the “market rate” for the legal services rendered by Kirchoff’s counsel.³ He observed that “the marketplace for this type of litigation throughout my career at the bar has been the contingent fee contract.” He noted also that such fee arrangements are useful in attracting competent counsel for civil rights litigants. Judge Marshall concluded that “[t]he market value of this case from a professional standpoint, in my opinion, is the contingent fee which is available *330 in the market for personal injury actions of this kind.” Only then did he apply the 40% fee contained in Kirchoff’s contingent fee contract to the \$25,000.00 recovery to reach the \$10,000.00 fee award.

III

The crux of the majority’s disagreement with Judge Marshall’s computation of a fee award is that the fee percentage contained in Kirchoff’s contract *might* not provide “the percentage that is used in similarly risky tort litigation with moderate stakes.”⁴ The majority, however, does not so much

as hint to Judge Marshall what might constitute “similarly risky tort litigation with moderate stakes.”⁵ Judge Marshall’s conclusion that the market value of the legal services involved was represented fairly by a 40% contingent fee was based upon his considerable number of years experience. In reaching that conclusion, Judge Marshall considered Kirchoff’s petition for attorney’s fees, the defendants’ counter-proposal, and supporting affidavits. It is simply inaccurate to suggest that Judge Marshall thought himself wedded to the fee provision in Kirchoff’s contingent fee contract. Under such circumstances, and considering the facts of this case, I conclude that Judge Marshall’s finding that a 40% fee provision is reasonable in this type of case is sufficient for the purposes of § 1988.⁶

Although the majority does not explicitly state why they fault Judge Marshall’s appraisal of the market value of the legal services involved in this case, it does note that Judge Marshall set the fee award from the bench without a separate hearing. Nevertheless, the Supreme Court has made clear that a petition for attorney’s fees should not precipitate a second major litigation.⁷ *Blum, 465 U.S. at 902 n. 19, 104 S.Ct. at 1550 n. 19; Hensley, 461 U.S. at 437, 103 S.Ct. at 1941.* As the Court has emphasized:

*331 [T]he district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court’s superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award.

Hensley, 461 U.S. at 437, 103 S.Ct. at 1941.

To my mind, Judge Marshall carefully heeded the Supreme Court’s mandate with respect to both the computation of a reasonable fee and as to the conservation of scarce judicial resources. To the extent that my brethren now suggest that Judge Marshall either make more detailed findings or conduct an evidentiary hearing, they compel him to engage in a ritual that exalts form over substance. Section 1988 requires Judge Marshall to set a “reasonable” fee award. It is evident from his remarks that Judge Marshall was well aware of the relevant considerations.⁸ This is not to suggest that some civil-rights cases, involving more complex legal issues or more directly implicating the public interest, might not require more detailed findings. Yet, a decision as to what factors, computations, and evidentiary procedures might then be required should await the presentation of those issues in

the facts of another case. In any event, to require more in the instant case invites procedures whose practical effects are far worse than the ill these procedures are ostensibly designed to remedy. The majority inexplicably encourages losing defendants to appeal from awards of attorney's fees, even when such appeals are not likely to affect the amount of the final fee award. Not only is such litigation unproductive,

but it is inimical to the objectives of § 1988. For the reasons stated above, I would affirm the district court's judgment.

All Citations

786 F.2d 320, 54 USLW 2498

Footnotes

- 1 Anita Kirchoff will never be confused with the 30th Earl of Mar, whose hobby was kicking pigeons. See his entry in *Who Was Who 1971-80*, 520 and his obituary by Auberon Waugh, in *Private Eye* (1975). Hear, e.g., Tom Lehrer, *Poisoning Pigeons in the Park* (1959).
- 2 Predatory birds rarely attack large animals whose eyes they can see, 11 Harv.Med. School Health Letter 8 (Feb.1986), and perhaps William's eyes got distracted, to his macaw's glee.
- 3 Flynn was carrying a booklet of park regulations dated 1973, which included a rule against feeding birds in the park. The police apparently did not have copies of the new book of rules dated 1981.
- 4 If the Kirchoffs had lost, they would have paid nothing. If they had won and the judge had awarded less than \$10,000, they would have owed money to their lawyers. So it is not strictly accurate to say that *none* of their money was at stake. The point, however, is that plaintiffs in § 1983 litigation ordinarily expect the defendants to pay enough that the plaintiffs do not compensate their own lawyers, and the plaintiffs' incentive to drive a hard bargain with their lawyers is correspondingly reduced.
- 5 The Kirchoffs' own contract provided that fees vary with risk: 33% if settled before the pretrial order, 40% if settled thereafter or tried, 50% if the defendants should appeal.
- 1 It is true that the district court's discretion is somewhat circumscribed on the issue of *whether* an award of fees should be made at all. When the prevailing party is the plaintiff, it is entitled to an award of attorney's fees almost as a matter of course. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983); *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir.1984). The *method* of calculating a fee award, however, rests squarely within the sound discretion of the district court. *Linhart v. Glatfelter*, 771 F.2d 1004, 1011 (7th Cir.1985); *Muscare v. Quinn*, 614 F.2d 577, 580 (7th Cir.1980).
- 2 On page 16 of its opinion, the majority indicates that the appropriate fee percentage should be set "by category of case ... rather than case by case."
- 3 The district judge stated that "[a]s I understand the *Hensley* case and its progeny ... the beginning point in applications for attorney's fees under the Civil Rights Act should be a determination of the market value for the services rendered by the prevailing party's counsel, here the prevailing party, Anita Kirchoff."
- 4 The majority also faults Judge Marshall for incorrectly interpreting the contingent fee contract by treating the 40% fee provision as a "cap" and not as a minimum. This point is not well taken. The contingent fee contract was just one of many factors considered by Judge Marshall in rejecting the fee-award recommendations of both parties, and setting the award he did. Judge Marshall did not, and quite rightly so, understand § 1988 to

incorporate a private “fee-shifting” provision contained in a contract negotiated between the prevailing plaintiff and her counsel.

As a logical matter, the fact that the 40% fee provision was designed as a floor, not a ceiling, has little bearing on the reasonableness of the actual fee award. Once Judge Marshall determined that a 40% fee percentage reflected the reasonable market value of the legal services in question, then the relevance, if any, of the fee-shifting aspect of the contract disappeared.

- 5 On page 13 of its opinion, the majority observes that “the private market uses the contingent fee for personal injury cases, including torts such as battery, false arrest, and malicious prosecution, the subjects of this case.” The majority is, of course, well aware that Judge Marshall considered this “a personal injury false arrest case.” Judge Marshall then concluded that a 40% fee accurately reflected the market rate of legal services in such a case. The majority, nonetheless, considers Judge Marshall's findings in this regard insufficient, and his choice of a 40% fee inappropriate. I assume the majority's dissatisfaction stems from its discussion on pages 7-8 of its opinion in which it points out a number of differences between ordinary tort litigation and a personal injury claim brought under § 1983, and cautions against uncritically accepting the customary fee percentages in ordinary tort litigation as benchmarks for § 1983 claims. As I read the majority's opinion, then, the customary fee in traditional false-arrest, battery, and malicious prosecution cases must be adjusted to reflect these differences in the context of § 1983. The majority does not, however, provide Judge Marshall with guidance as to how to make appropriate adjustments.
- 6 Of course, I do not wish to be understood as advocating that a district judge should be restricted to the fee percentage contained in a particular contingent fee contract. As always, the computation of a reasonable fee depends upon the facts of a case, and rests in the first instance within the sound discretion of the district judge.
- 7 The majority itself praises the use of contingent fees for the very reason that, as compared to the “lodestar” approach, such a practice would reduce the motivation of defendants to litigate a fee award. Yet, the majority's dissatisfaction with Judge Marshall's method of computing the fee award cuts back to a large degree on the advantages of the contingent fee in this regard.
- 8 I could understand the majority's misgivings if there had been no contingent fee contract in this case, and Judge Marshall simply had devined what an appropriate fee percentage would have been had the parties entered into a fee contract. Yet, that is not the case before us. Judge Marshall relied upon the actual agreement between Kirchoff and her attorney as an appropriate starting point for computing a fee award. If her counsel felt that the nature of the litigation warranted a higher fee, he could have drafted the fee contract to reflect that. I thus do not believe Judge Marshall abused his discretion by finding that a 40% fee provision reflected a reasonable market rate for this type of litigation.

311 F.R.D. 483

United States District Court, N.D. Illinois, Eastern Division.

Robert KOLINEK, et al., Plaintiff,

v.

WALGREEN CO., Defendant.

Case No. 13 C 4806

|

Signed November 23, 2015

Synopsis

Background: Consumer brought putative class action against pharmacy, alleging pharmacy made unsolicited calls to him and other current and former customers on their cellular telephones in violation of the Telephone Consumer Protection Act (TCPA). After a period of contested litigation, parties agreed to a class-wide settlement. Consumer moved for final approval of proposed class settlement. Several class members submitted objections challenging the settlement, the proposed fee award, and the incentive award. One objector also moved for attorney fees for his counsel.

Holdings: The District Court, [Matthew F. Kennelly](#), J., held that:

proposed settlement class satisfied commonality requirement for certification;

typicality requirement for class certification was satisfied;

adequacy requirement for class certification was satisfied;

predominance requirement for class certification was satisfied;

proposed settlement was fair, reasonable, and adequate;

class counsel was entitled to attorney fees in amount of \$2,824,200, which was 36% of settlement fund;

\$5,000 incentive reward was justified; and

objector was not entitled to award of attorney fees.

Plaintiff's motion granted, and objector's motion denied.

Attorneys and Law Firms

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Todd Spann, pro se.

[Bradley Joseph Andreozzi](#), [Justin O'Neill Kay](#), Drinker Biddle & Reath LLP, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

[MATTHEW F. KENNELLY](#), District Judge:

In July 2013, Robert Kolinek filed suit against Walgreen Co. (Walgreens) on behalf of a class of similarly situated Walgreens customers. Kolinek alleged that Walgreens had made unsolicited calls to him and other current and former customers on their cellular telephones in violation of the Telephone Consumer Protection Act of 1991 (TCPA), [47 U.S.C. § 227\(b\)\(1\)\(A\)\(iii\)](#). After a period of contested litigation, the parties engaged in mediation, conducted by the Honorable Wayne R. Andersen, a highly respected retired judge of this court. The parties agreed to a class-wide settlement of Kolinek's claims that would provide both injunctive and monetary relief to members of Kolinek's putative class. The Court preliminarily approved the settlement in April 2015 and also approved a program of individual notice to potential class members, combined with publication notice.

Kolinek has moved for final approval of the proposed class settlement. Kolinek has also requested an incentive award, and his counsel have petitioned for an award of attorney's fees and costs. A number of class members have submitted objections challenging the settlement, the proposed fee award, and the incentive award. One of those objectors, Todd Spann, has also moved for attorney's fees for his counsel. For the reasons stated below, the Court grants final approval of the settlement agreement and grants Kolinek's petition for fees, costs, and an incentive award. The Court also denies objector Spann's motion for attorney's fees.

Background

A. History of the litigation

As indicated above, Kolinek filed this suit in July 2013. According to his complaint, Kolinek first filled a prescription at a Walgreens store sometime between early 2002 and 2012. At the time, the Walgreens pharmacist told Kolinek that his phone number “was needed for verification purposes (*i.e.*, if another customer named Robert Kolinek attempted to fill a prescription at the same Walgreens, the pharmacist would be able to confirm the correct person using the phone number on record).” Compl. ¶ 18. In early 2012, Kolinek began receiving prerecorded calls from Walgreens on his cellular telephone reminding him to fill his prescriptions at a Walgreens pharmacy. Kolinek alleged that Walgreens made these “refill reminder” calls as a means to increase its share of the pharmacy market, contacting millions of customers who had previously filled prescriptions at Walgreens stores to encourage them to do so again in the future. Kolinek claimed that Walgreens had not obtained those customers' prior express consent to make those calls. Accordingly, Kolinek alleged that Walgreens had violated the TCPA, which provides:

It shall be unlawful for any person within the United States...to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using...an artificial or prerecorded voice...to any telephone number assigned to...a cellular telephone service....

47 U.S.C. § 227(b)(1)(A)(iii). Each violation of the TCPA carries with it \$500 in statutory damages, and willful violations carry \$1500 in statutory damages.

***488** Walgreens moved to dismiss Kolinek's complaint for failure to state a claim. In its motion, Walgreens argued that Kolinek and his putative class of similarly situated individuals consented to receive prescription reminder calls by providing their cellular telephone numbers to Walgreens. Alternatively, Walgreens argued that even without prior express consent, the calls were “made for emergency purposes,” 47 U.S.C. § 227(b)(1)(A), and therefore did not

violate the TCPA. Following full briefing of these issues, the Court granted Walgreens's motion to dismiss. The Court observed that the TCPA does not define “prior express consent” but that pursuant to the Administrative Orders Review Act (more commonly known as the Hobbs Act), the Federal Communications Commission's (FCC) interpretation of the prior express consent defense is binding on federal district courts. Citing the FCC's statement that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary,” *In re Rules & Regs. Implementing Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8769 ¶ 31, 1992 WL 690928 (Oct. 16, 1992) (“1992 Order”), the Court held that Kolinek had given Walgreens “prior express consent” and his claim was therefore barred. The Court dismissed Kolinek's complaint with prejudice. See *Kolinek v. Walgreen Co.*, No. 13 C 4806, 2014 WL 518174 (N.D.Ill. Feb. 10, 2014) (*Kolinek I*).

Kolinek then filed a motion to reconsider, which Walgreens opposed. Kolinek argued that the Court had misunderstood the FCC's 1992 Order and its other orders interpreting the prior express consent defense. In particular, Kolinek directed the Court's attention to FCC orders issued in 2008, 2012, and 2014, the last one issued shortly after the Court dismissed the case. Those orders together indicated to the Court “that the FCC considers the scope of a consumer's consent to receive calls to be dependent on the context in which it is given—contrary to what the Court had seen in the 1992 Order as a general rule that consent for one purpose means consent for all purposes.” *Kolinek v. Walgreen Co.*, No. 13 C 4806, 2014 WL 3056813, at *3 (N.D.Ill. July 7, 2014) (*Kolinek 2*). The Court held that if discovery proved true Kolinek's allegation that he gave his number only when asked to provide it for verification purposes (an allegation that the Court at that juncture was required to take as true, see *Rooni v. Biser*, 742 F.3d 737, 738 (7th Cir.2014)), Walgreens would be unable to prevail on a prior express consent defense. *Kolinek 2*, 2014 WL 3056813, at *4. The Court also noted that further factual development might reveal that Kolinek and other members of the putative class gave their cell phone numbers to Walgreens in a manner that would constitute prior express consent, but that this could not be demonstrated before undertaking discovery. *Id.*

Due to the time that had passed since the initial briefing on Walgreens's motion to dismiss, the Court asked the parties to present their arguments on Walgreens's alternative basis for dismissal—that the prescription reminder calls fell under the TCPA's emergency purposes exception—via oral argument.

Both parties participated in oral argument before the Court in July 2014. In August 2014, the Court issued a written order rejecting Walgreens's emergency purposes argument, explaining:

If the agency charged with interpreting the TCPA—namely, the Federal Communications Commission—had read the exception as covering any call to a customer about prescriptions, prescription refills, or anything of the sort, that interpretation would not only bind the Court but would also dictate the conclusion in this case. *See CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 449–50 (7th Cir.2010). But in fact there is no such interpretation of the TCPA by the FCC. The allegations in the complaint do not say enough about the nature or contents of the call to make it appropriate to dismiss the complaint at this stage of the case based on this particular affirmative defense. As with the express consent defense, further factual development is necessary.

Kolinek v. Walgreen Co., No., dkt. no. 66, at 2 (N.D. Ill. Aug. 11, 2014) (*Kolinek 3*). The Court therefore denied Walgreens's motion to dismiss, whereupon Walgreens answered *489 Kolinek's complaint, denying any and all liability and asserting numerous affirmative defenses. *See* Def.'s Answer, dkt. no. 68.

After Walgreens answered the complaint, the parties began to discuss the possibility of settlement. Informal discovery transpired, and the parties had teleconferences throughout August and September 2014, when they agreed to participate in private mediation. They engaged in a day-long mediation session with retired Judge Wayne Andersen on October 15, 2014, at the close of which Kolinek made a settlement proposal. Walgreens counteroffered a week later, and on October 24, 2014, the parties came to an agreement in principle to resolve the case and avoid protracted litigation, subject to additional confirmatory discovery.

Prior to mediation, the parties informally exchanged information regarding the prescription refill reminder program, including the ways in which Walgreens obtained telephone numbers, how it obtained consent, how the calls were made, and how Walgreens kept its records. Kolinek also served formal written discovery requests, and his counsel took the deposition of Walgreens's Rule 30(b)(6) witness, Christopher Helzerman, in January 2015. Kolinek learned through discovery that Walgreens typically collected customers' phone numbers when they provided personal information in the course of filling or refilling prescriptions. Walgreens would ask customers to identify whether the phone numbers provided were cell phones or landlines. Although Walgreens allegedly determined that it would make prescription refill reminder calls only to landlines, numerous customers ultimately received calls on their cellular phones. Kolinek also learned that Walgreens provided call recipients an easy way to opt out of receiving future calls (by simply pressing "8" on their dial pads), but over the life of the program only 1.5% of all recipients opted out. Meanwhile, many customers appreciated the calls, and customers often used the system to refill their prescriptions at Walgreens.

On March 26, 2015, Kolinek moved for preliminary approval of a class-wide settlement. The Court instructed class counsel to make certain changes to the proposed claim form. Once the claim form was revised to comply with the Court's instructions, the Court granted preliminary approval of the settlement on April 3, 2015.

B. The settlement agreement and proposed fee awards

Walgreens provided Kolinek and Kurtzman Carson Consultants (KCC), a third party administrator, with records that identified the phone numbers to which it had placed prescription refill reminder calls. KCC analyzed the data and determined that roughly 9.2 million of the numbers dialed were cell phones. The proposed settlement defines the settlement class as including all individuals in the United States to whom Walgreens placed a prerecorded prescription refill reminder call to their cellular phone. These individuals, if they did not opt out of the settlement, would agree to release any and all claims against Walgreens based on its making of prerecorded prescription refill reminder calls in exchange for both prospective and retrospective relief from Walgreens.

Prospectively, the settlement requires Walgreens to implement new safeguards to ensure that it knows whether the phone numbers in its database belong to cellular telephones, including expert analysis, third-party data, and improved

customer confirmation practices. Walgreens also agrees to provide customers with the option to elect to receive or stop receiving prescription reminder calls. Walgreens has promised to implement this prospective relief within a year of the effective date of the settlement.

Retrospectively, the settlement requires Walgreens to establish a settlement fund of \$11 million, from which will be drawn all claim awards, administrative costs, and any incentive and attorney's fee awards. Each class member who submitted a valid claim no later than fourteen days before the Court's final approval hearing will be entitled to a *pro rata* share of the money remaining in the settlement fund after those settlement administration expenses, incentive awards, and attorney's fee awards have been deducted. The settlement also provides that uncashed checks issued to claiming class members and other unclaimed money remaining in the settlement *490 fund after payment of all approved claims, expenses, and awards will be distributed to settlement class members with approved claims unless doing so is impracticable, in which case the Court will direct the parties as to what to do with the funds. If so many settlement class members submit approved claims that the *pro rata* share of the fund available to each claimant will be less than fifteen dollars,

each claiming Settlement Class Member will have a second opportunity to exclude himself or herself from the Settlement (the "downstream opt-out"), provided that he or she exercises such option within forty-five (45) days after the Settlement Administrator has posted notice of the amount of the payment per Approved Claim on the settlement website. In such instance, Walgreens may choose in its discretion to pay such Settlement Class Members who have submitted Approved Claims the difference between the amount they received under the Settlement and fifteen dollars (\$15), thereby mooted the downstream opt-out.

Class Action Settlement Agreement, dkt. no. 98-1 ¶ 2.1(f).

As indicated above, the settlement agreement contemplates that the settlement fund will provide reimbursement of expenses, an attorney's fee award for Kolinek's counsel, and an incentive award for Kolinek. In his motion for approval of attorney's fees, expenses, and incentive award, Kolinek seeks roughly \$3.15 million to cover the costs of notice and settlement administration; \$2,824,200 in attorney's fees (representing 36% of the settlement fund after deducting from the total amount the costs of notice and administration pursuant to *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir.2014), and *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir.2014), and the value of an incentive award for Kolinek); and a \$5,000 incentive award for Kolinek.

Discussion

A. The objections

The notice sent to the class set a deadline for submission of objections. Timely objections were submitted jointly by Gleith Cozby, Sharon Hughes, Christinna Oldham, and Rende Bullard, and individually by Melinda Franz, Phyllis Mehl, Betty Morgan, William Mann, Robert Habermann, Rebecca Thomas, Pamela Sweeney, Paige Nash, Lyndy Streight, Gary Sibley, Todd Spann, and Michael Beskine. Hughes, Oldham, and Spann ultimately withdrew their objections to the proposed settlement.

Several other apparent objections were sent to one or more of the attorneys, including those submitted by Isela Gonzales, Lisa Ray, Ashley McClure, and Dr. Kenneth M. Hoffman, but these did not meet the preliminary approval order's requirements for objections. Neither did objections filed by Jimmy Fuzzell and Rita Hartsell, whose objections were received after the deadline for submitting objections, and those filed by Mehl, Habermann, and Thomas, all of whom failed to provide their telephone numbers as required by the preliminary approval order. The Court has nonetheless considered the points made by all who submitted objections.

B. Certification of the proposed settlement class

The proposed settlement class is defined as "all individuals in the United States to whom Walgreens placed a Prerecorded Prescription Call to their cellular telephone." The term Prerecorded Prescription Calls is defined as "any prerecorded voice prescription refill reminder call to a cellular telephone placed by Walgreens and/or any third parties acting on its behalf." Settlement Agreement, dkt. no. 137-1, at 121-22.

The first question the Court must address is whether the class meets the requirements for class certification set forth in [Federal Rule of Civil Procedure 23](#). A court may certify a class if the party seeking certification meets all the requirements of [Rule 23\(a\)](#) and the requirements of [Rule 23\(b\)\(1\), \(2\), or \(3\)](#). *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir.2006).

1. Rule 23(a) requirements

[Rule 23\(a\)](#) requires the party seeking certification to demonstrate that the members of the class are so numerous that *491 joinder is impracticable (numerosity); there are questions of law or fact common to the proposed class (commonality); the class representative's claims are typical of the claims of the class (typicality); and the representative will fairly and adequately represent the interests of the class (adequacy of representation). [Fed. R. Civ. P. 23\(a\)\(1\)–\(4\)](#). Numerosity is typically satisfied where there are at least forty members of a putative class. *See, e.g., Pruitt v. City of Chicago*, 472 F.3d 925, 926–27 (7th Cir.2006). Commonality “requires the plaintiff to demonstrate that the class members ‘have suffered the same injury’....” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). “Their claims must depend on a common contention” that “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*, 131 S.Ct. at 2551. Typicality is satisfied when a plaintiff's claim “arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983). Lastly, the adequacy of representation requirement involves two inquiries: whether the plaintiff's attorney is qualified, experienced, and capable of conducting this type of litigation, and whether the named plaintiff's interests are not antagonistic to those of the class. *See, e.g., Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir.1992).

It is undisputed that the proposed class meets the numerosity requirement. Over nine million individuals allegedly received prerecorded prescription refill reminder calls from Walgreens on their cellular telephones.

A small handful of objectors claim that the settlement class should not be certified because commonality is lacking, Kolinek is not an adequate representative of the class, or his claims are not typical of the class. Citing the Supreme Court's recent grant of certiorari in *Spokeo v. Robins*, — U.S. —, 135 S.Ct. 1892, 191 L.Ed.2d 762 (2015), objector Streight contends that Kolinek is an inadequate representative because he has not sustained an injury-in-fact and thus cannot demonstrate standing to sue in federal court. Objector Sibley argues that Kolinek is an inadequate class representative and his claims are atypical because some class members received numerous prescription refill reminder calls from Walgreens, and those class members' potential damages for Walgreens's violations of the TCPA are therefore much higher than those available to a class representative alleging only one or a few TCPA violations. Objector Nash makes a general claim (without explaining her rationale) that the class lacks commonality and that Kolinek's claim is not typical of the claims of the class, and objector Beskine alleges that Kolinek's counsel is inadequate to represent the interests of the class because class counsel was not sufficiently diligent.

The Court disagrees with all of these contentions and finds that the claims of the proposed class satisfy [Rule 23\(a\)](#)'s commonality, typicality, and adequacy of representation requirements. First, Kolinek's proposed settlement class satisfies commonality. Each class member suffered the same alleged injury, namely, receipt of at least one prerecorded prescription refill reminder call to the class member's cellular telephone without the recipient's prior express consent. The claims of all class members depend on the resolution of a key common question: whether prescription refill reminder calls violate the TCPA when they are prerecorded and recipients receive them before ever affirmatively consenting to them.

Second, Kolinek's claims are typical of even the claims of class members who received multiple prescription refill reminder calls to their cellular phones. Typicality is satisfied when the named plaintiff's claim and those of the class members have a common legal theory, even if there are some factual variations. *Oshana*, 472 F.3d at 514. Kolinek's claim that Walgreens violated the TCPA when it placed a prerecorded prescription reminder call to his cellular phone satisfies [Rule 23\(a\)](#)'s typicality requirement because the class consists of all persons who *492 received such calls. The number of times other class members received prescription reminder calls is immaterial to the question whether those claims arise from the same course of conduct and share a common legal theory.

Finally, Kolinek and his counsel are adequate representatives of the class. As a preliminary matter, the Supreme Court's grant of certiorari in *Spokeo* has no bearing on this case. Kolinek's adequacy as a representative of this class is unaffected by the Supreme Court's decision to address whether an individual who has not alleged any physical or economic harm has standing to sue for statutory damages under the Fair Credit Reporting Act. See *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir.2014). For one thing, the Supreme Court has not issued a decision regarding whether a party seeking purely statutory damages has standing to sue. More important, however, is the fact that Kolinek's complaint does allege actual economic harm: Kolinek claims that Walgreens made calls to his cellular telephone number and that as a result he incurred charges from his cellular phone service provider. Kolinek has standing to sue under Supreme Court precedent, and *Spokeo* is inapposite.

The adequacy of representation requirement is intended to “uncover conflicts of interest between the named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). No objectors have argued, and there is no evidence on the record to suggest, that Kolinek's interests are adverse to those of the settlement class. Furthermore, and as the Court will explain in greater detail below, class counsel have performed satisfactorily on behalf of the class and have demonstrated their competence in representing the class's interests. For these and the reasons stated above, the Court overrules the objectors' arguments and finds that Kolinek has satisfied all of the requirements of Rule 23(a).

2. Rule 23(b) requirements

Rule 23(b) sets forth circumstances under which a class action may be maintained. In this case, Kolinek relies on Rule 23(b)(3), which permits class certification if “questions of law or fact common to class members predominate over any questions affecting only individual members” and class resolution is “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). This inquiry “trains on the legal or factual questions that qualify each class member's case as a genuine controversy,” with the purpose being to determine whether a proposed class is “sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S. at 623, 117 S.Ct. 2231.

Several objectors contend that the settlement class does not meet the predominance requirement because numerous individuals who qualify as members of the settlement class were happy to receive the calls. Importantly, these objectors do not suggest that they or some percentage of the class provided prior express consent to receive prescription reminder calls in any other way than by providing their cellular telephone number in the same or similar way Kolinek did. Rather, they argue that because these individuals wanted to receive prescription refill reminder calls at the time they provided Walgreens their phone numbers, they effectively consented to be called and should not be included in the settlement class. These objectors claim that as a result, the settlement class is overly broad, which dilutes the class and decreases the value of the individual recovery that claiming class members with valid claims will enjoy.

The problem with these objections is that they incorrectly equate appreciating Walgreens's prescription refill reminder calls or declining to opt out of receiving them with the issue of legal significance, namely, whether recipients provided prior express consent to receive prerecorded phone calls. Irrespective of the class members' pleasure or displeasure with receiving prescription refill reminder calls, common questions at the heart of this class's suit against Walgreens include whether, as a matter of law, providing a cellular telephone number for verification purposes constitutes prior express consent to receive prescription refill reminder calls; *493 whether, as a matter of law, prescription reminder calls fall under the TCPA's emergency purpose exception; and if not, whether, as a matter of fact, Walgreens placed prerecorded or automated prescription refill reminder calls to those cellular phones. These common questions are the main questions in this case, and they predominate over individual issues that might also exist.

For these reasons, the Court overrules the objectors' arguments and concludes that the proposed class meets the requirements for certification under Rule 23(b)(3).

C. Approval of proposed settlement

A court may approve a class action settlement only upon a finding that the settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). This requires consideration of a number of factors, including: (1) the strength of the plaintiff's case compared to the defendant's settlement offer; (2) the complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement; (4) the opinion of experienced counsel; and (5) the stage of the proceedings

and the amount of discovery completed. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir.2006). The “most important factor” is the first one—the relative “strength of plaintiffs’ case on the merits balanced against the amount offered in the settlement.” *Id.* (internal citation and quotation marks omitted). A court must also ensure that a proposed settlement is not the product of collusion. See *Eubank v. Pella*, 753 F.3d 718, 721 (7th Cir.2014).

1. Strength of plaintiffs’ case as compared to settlement offer

To determine the strength of a settling class action plaintiff’s case, a court must determine the “net expected value of continued litigation to the class.” *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 284 (7th Cir.2002). Upon determining the net expected value of litigation, the court must “estimate the range of possible outcomes and ascribe a probability to each point on the range.” *Synfuel Techs.*, 463 F.3d at 653. The Seventh Circuit has recognized that valuing hypothetical continued litigation is necessarily speculative and therefore an inexact science. A court is expected only to estimate and come to a “ballpark valuation.” *Reynolds*, 288 F.3d at 285; see also *Eubank*, 753 F.3d at 727 (noting that a district judge must “estimate the likely outcome of a trial” in order to measure the adequacy of a proposed settlement).

The proposed settlement requires Walgreens to pay \$11 million into a settlement fund out of which all fees and awards will be paid, the remainder of which eligible class members who made a timely claim will receive a *pro rata* share (and possibly more, if other claimants do not deposit their checks). As objectors Cozby, Bullard, and Franz point out, this settlement results in miniscule compensation if considered on a per-class-member basis and pales in comparison to the potential recovery plaintiffs could earn if they prevailed at trial. As noted above, the TCPA provides for \$500 per violation and \$1500 per willful violation. If all 9.2 million class members proved they each suffered at least one TCPA violation, they would stand to recover at least \$500 each and \$4.6 billion total; by contrast, if all class members submitted valid claims under this \$11 million settlement, each member would recover a paltry \$1.20.

This argument is not well founded under Seventh Circuit law, for two reasons. First, the recovery for plaintiffs is comparable to the recovery plaintiffs have collected in similar TCPA cases. These objectors are right that this \$11 million settlement equates to roughly \$1.20 per class member, but that number is misleading because it is premised on the

assumption that every class member will submit a valid claim. The reality is that in a class action settlement like this one, there is never a one-hundred percent claim rate or anything close to it. Here, roughly 230,000 class members have submitted valid claim forms, which means the settlement will result in recovery of approximately thirty dollars per claimant. Although thirty dollars per claimant “falls on the lower end of the scale,” it is nonetheless “within the range of recoveries” in TCPA class actions. *494 *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F.Supp.3d 781, 789 (N.D.Ill.2015); *Rose v. Bank of Am. Corp.*, Nos. 11 C 2390 & 12 C 4009, 2014 WL 4273358, at *10–11 (N.D.Cal. Aug. 29, 2014).

Second, the Court’s duty is not simply to measure the settlement value against the possible value of a plaintiff’s total victory following trial. It is true that thirty dollars per claimant is substantially less than the \$500 statutory recovery available for each unlawful phone call Walgreens allegedly made. But Kolinek winning at trial and securing complete recovery for all nine million class members is but one potentiality, and it is a dubious one at that. The “range of possible outcomes” that the Seventh Circuit directs courts to consider, *Synfuel Techs.*, 463 F.3d at 653, also includes total non-recovery, and in light of the facts of this case, the probability of that possible outcome is significant.

For one thing, if Kolinek were to take this case to trial, he would be faced with rebutting Walgreens’s defenses that he and his fellow class members provided prior express consent to receive prescription refill reminder calls and that these calls were made for an emergency purpose and are therefore not unlawful. Although Kolinek withstood Walgreens’s motion to dismiss on both grounds, the Court observed in its written orders as to both issues that further factual development might prove that plaintiffs did indeed consent or that the calls were made for emergency purposes. See *Kolinek 2*, 2014 WL 3056813, at *4; *Kolinek 3*, No. 13 C 4806, dkt. no. 66, at 2.

In addition, manageability concerns would arise if this case went to trial, which might seriously imperil Kolinek’s bid for class certification and ultimately deprive Kolinek of the benefits of the class action device. Pursuant to *Rule 23(b)(3)*’s predominance requirement, courts must consider class members’ interest in prosecuting separate actions; the extent and nature of any other litigation over the controversy; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and any likely difficulties in managing a class action. See *Fed. R. Civ. P.*

23(b)(3)(A)–(D). The last of these factors—manageability—diminishes in importance when the request, as in this case, is for settlement-only class certification. *Amchem Prods.*, 521 U.S. at 620, 117 S.Ct. 2231. Matters would be different were the case to proceed to trial. Identifying consenting class members and determining the timing and nature of such consent would require significant discovery and might require individual determinations, which might undermine manageability enough to destroy predominance. *See, e.g., Balschmiter v. TD Auto Finance LLC*, 303 F.R.D. 508, 527–29 (E.D.Wis.2014); *Jamison v. First Credit Servs.*, 290 F.R.D. 92, 107 (N.D.Ill.2013) (denying certification of class in TCPA litigation where the “parties would need to scour [the defendant’s] records” in order to determine consent). Considering how Walgreens vigorously litigated its defenses in briefing the motion to dismiss and motion to reconsider, it is highly likely that, absent settlement, Walgreens would have equally vigorously opposed class certification, and it might have prevailed.

Finally, without prompt and final resolution through settlement, Kolinek and the plaintiff class would face the realistic probability that the FCC might reinterpret the TCPA in such a way as to extinguish Kolinek’s claims and render any recovery impossible. As now-retired Judge James Holderman observed, the FCC frequently issues orders interpreting or reinterpreting the TCPA. *See In re Capital One*, 80 F.Supp.3d at 791. And as this Court expressed in its earlier orders regarding Walgreens’s motion to dismiss, the FCC’s interpretations are binding on the Court. *Kolinek 2*, 2014 WL 3056813, at *4; *Kolinek 3*, No. 13 C 4806, dkt. no. 66, at 2. If, for example, the FCC were to issue an order in which it determined that prior express consent exists when a consumer, when filling a prescription, volunteers her cellular telephone number for verification purposes, then Kolinek’s claim—and the claims of the other nine million people in the settlement class—would likely vanish. This could happen at any time, and prosecuting this litigation through discovery and a trial would only allow a greater opportunity for the FCC to issue such an interpretation.

As other judges in this district have recognized, “a settlement is a compromise, *495 and courts need not—and indeed should not—reject a settlement solely because it does not provide a complete victory to plaintiffs.” *In re Capital One*, 80 F.Supp.3d at 790 (quoting *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D.Ill.2010) (*AT&T Mobility I*)); *see American Int’l Grp., Inc. v. ACE INA Holdings, Inc.*, Nos. 07 C 2898 & 07 C 2026, 2012

WL 651727 (N.D.Ill. Feb. 28, 2012). Were Kolinek were to proceed to trial, he would have a tough row to hoe in order to overcome Walgreens’s two potentially meritorious defenses and an even tougher one to secure victory. In light of the significant possibility that Kolinek would recover nothing for the class if he proceeded with litigation and the fact that the per-claimant recovery under this settlement is comparable to the per-claimant recoveries in other TCPA cases, the Court finds that this factor weighs in favor of approval.

2. Complexity, length, and expense of future litigation

In *Synfuel Technologies*, the Seventh Circuit instructed courts to consider the likely complexity, length, and expense of continued litigation when determining whether a class action settlement satisfies Rule 23(e)(2). *Synfuel Techs.*, 463 F.3d at 653. These factors weigh heavily in favor of approval of settlement in this case. If the Court approves the proposed settlement agreement, this case will end, and class members will be entitled to the retrospective and prospective relief Walgreens has promised. If, on the other hand, the Court were to deny approval, protracted litigation would ensue. The parties have engaged in limited informal and formal discovery for the purpose of evaluating settlement, but continued litigation likely would necessitate significant additional discovery. It is also likely that further motion practice would ensue, and the benefits inuring to the class would be delayed or denied. The Court finds that the stage of proceedings supports approval of the proposed settlement.

3. Amount of opposition

Significant opposition to a proposed settlement by interested parties should signal to a court that the settlement should not be approved. *Synfuel Techs.*, 463 F.3d at 653. The settlement administrator in this case sent individual notices to 10,207,583 class members. 9,053,718 of whose notices were not returned as undeliverable. Of the 9,053,718 class members whom plaintiff believes its notice plan effectively reached, only twenty individuals¹ (0.0002209%) have objected to the settlement, and only 151 (0.001668%) have opted out. Such a low level of opposition supports the reasonableness of the settlement. *See, e.g., In re Capital One*, 80 F.Supp.3d at 792 (finding opt-out and objection rate of 0.0032% low enough to support settlement); *In re Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, at *7 (N.D.Ill. Aug. 26, 2013) (finding an opt-out and objection rate of less than 0.01% supportive of the reasonableness of settlement); *In re AT&T Mobility Wireless Data Servs. Sales*

Tax Litig., 789 F.Supp.2d 935, 965 (N.D.Ill.2011) (*AT&T Mobility 2*) (same).

4. Opinion of competent counsel

The Seventh Circuit has held that the opinion of competent counsel is relevant to determining the fairness, reasonableness, and adequacy of a class action settlement. *Synfuel Techs.*, 463 F.3d at 653. Class counsel in this case are highly experienced class action litigators who strongly support the proposed settlement. This factor weighs in favor of approval.

5. Stage of proceedings and amount of discovery completed

The final *Synfuel Technologies* factor is the stage of proceedings and the amount of discovery completed. *Id.* Courts are to consider *496 this factor in order to determine “how fully the district court and counsel are able to evaluate the merits of plaintiffs’ claims.” *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 325 (7th Cir.1980). Two objectors, Streight and Beskine, argue that the limited discovery the parties completed was insufficient to place the Court and counsel in a position to evaluate the strength of the settlement agreement.

Kolinek filed this case in July 2014. After filing, the parties litigated Walgreens’s motion to dismiss at three different junctures (initial briefing on both prior express consent and emergency purposes, briefing on reconsideration of the Court’s prior express consent holding, and oral argument on the emergency purposes exception). After Walgreens provided its answer and affirmative defenses, the parties engaged in informal discussions and served and responded to written discovery requests. The plaintiffs also took the deposition of Walgreens’s Rule 30(b)(6) witness, and they engaged in mediation that included the exchange of multiple settlement proposals. The parties and the Court are therefore well positioned to assess the strength of this case and the merits of Kolinek’s claims, and this factor therefore weighs in favor of approval.

6. Absence of collusion

In three recent decisions, the Seventh Circuit has trained its eye on collusion in class action settlements. See *Pearson*, 772 F.3d at 778; *Eubank*, 753 F.3d at 721; *Redman*, 768 F.3d at 622. In class action suits, named plaintiffs typically exercise little control over class counsel, and the class has little or

no ability to hold accountable either the named plaintiffs or class counsel. This can lead them to agree to a settlement that lets the defendant off the hook, rewards class counsel and the named plaintiff with large awards, and leaves the class in the lurch. Courts are thus expected to scrutinize proposed class settlement agreements for signs that the named plaintiff or class counsel settled on a final award that more adequately serves the interests of the defendant, the named plaintiff, or class counsel than it does the interests of absent class members.

Nothing on the record before the Court suggests that this proposed settlement has been tainted by collusion. Before entering into settlement discussions, the parties vigorously litigated this case. When Walgreens moved to dismiss Kolinek’s case, the parties fully briefed the issues of prior express consent and the emergency purposes exception to TCPA liability. After the Court initially granted Walgreens’s motion, Kolinek moved for reconsideration and submitted a detailed memorandum and supplemental authority. Walgreens filed briefs and offered supplemental authority in opposition to Kolinek’s motion. Both parties continued to zealously litigate this case after the Court granted Kolinek’s motion for reconsideration, presenting oral arguments concerning the emergency purposes exception. When Walgreens answered the complaint, it denied all liability and advanced numerous affirmative defenses. The parties were only able to come to an agreement on settlement after engaging in formal mediation with an independent mediator, Judge Andersen. There is no evidence to suggest that the settlement involves any sort of collusion or sells the class short. This factor weighs in favor of approving the settlement.

7. Objections to the settlement

Twenty individuals have submitted objections arguing that the Court should not approve the proposed settlement. The Court has addressed some of the objectors’ arguments in discussing the factors outlined by the Seventh Circuit for approval of a proposed class settlement. The Court addresses here the remaining salient points made by the objectors, except those concerning the awards requested for class counsel’s attorney’s fees and as an incentive for Kolinek, which the Court will discuss in Parts D and E of this decision.

a. General objections to class actions

A majority of the objections submitted to the Court and class counsel express general disapproval of the case and of class action lawsuits in general. As it did in *In re Southwest Airlines*, the Court will borrow the comments of its colleague Judge Amy St. Eve:

***497** [T]he law recognizes class actions as a legitimate part of the U.S. litigation system. The Supreme Court has made this clear on several occasions. *See, e.g., Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (explaining that, in appropriate cases, “the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23”); *Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”). In addition, *Federal Rule of Civil Procedure 23* provides for the use of such a procedure.

AT&T Mobility 2, 789 F.Supp.2d at 982.

The Court respects the opinions of objecting class members who do not think this lawsuit should have been filed, are opposed to class actions generally, or take a dim view of lawyers who file class action suits like this one. But the Court respectfully disagrees with those objectors to the extent that they argue that this suit and other suits like it degrade our legal system and serve no purpose but to fill the coffers of class action lawyers. The TCPA is designed to protect the privacy of American consumers and prevent them from incurring charges for automated telephone calls they receive without first giving consent. When a caller violates the TCPA, the consumer who receives the unlawful call endures some amount of economic harm in the cost of the call and also is subjected to annoyance and the intrusion on privacy that results from an unwanted nuisance call. But even if the cost of such a violation is the \$500 provided under the statute, the reality is that recovering so small a bounty is unlikely to incentivize many individual plaintiffs to hold defendants accountable for their violations of federal law. With the class action device, the TCPA's purpose can be realized. As the Seventh Circuit has explained,

The policy at the very core of the class action mechanism is to

overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir.1997). The Court respectfully suggests that *Rule 23* exists precisely as a means to support suits like this one, a lawsuit designed to hold a party accountable for numerous small violations of federal law.

b. Objections to the agreed-upon prospective relief

Several objectors protest that the settlement agreement's prospective relief is inadequate and should prevent the Court from approving the settlement. Some express disapproval of the agreement's prospective relief because they appreciate receiving prescription refill reminder phone calls and are concerned that Walgreens will cease making these calls if the Court approves the settlement. Others are dissatisfied with the settlement's proposed prospective relief because they contend that Walgreens has merely bound itself to comply with the law in the future.

These objections are not well founded. First, the settlement agreement does more than simply obligate Walgreens to comply with the law. As explained above, the settlement will require Walgreens to implement new safeguards to ensure that when it makes prerecorded prescription refill reminder phone calls, it calls only cellular phone numbers belonging to users who have given prior express consent (or landline phone numbers). These safeguards include the use of expert analysis, third-party data, and improved customer confirmation practices. Walgreens is also promising to ensure that customers will continue to be able to easily and expeditiously opt out of receiving prescription refill reminder calls.

Second, objections based on a desire to continue receiving Walgreens's calls arise out ***498** of a misunderstanding of the proposed prospective relief. Walgreens intends to continue calling to remind customers to refill their prescriptions; it

is promising only to be more careful and to utilize better safeguards to avoid making those calls to cell phone numbers belonging to consumers who have not provided express consent. The claim form provided to class members makes this clear by giving them the option to submit a claim on the settlement and, at the same time, to continue receiving prescription refill reminder calls. At the bottom of each claim form is a checkbox accompanying the following consent:

Voluntary Request to Receive Future Prerecorded Prescription Calls: I now wish to receive Prerecorded Prescription Calls from Walgreens, and I consent to receive such calls. *I understand that providing this consent is not required for me to submit a claim in the settlement, nor is it required for me to purchase any goods or services from Walgreens.*

Dkt. no. 137-1, at 104. Class members who make no claim and thus do not inform Walgreens that they have not given prior express consent will continue to receive prescription refill reminder calls, as will claiming class members who check this box. The Court overrules the objections to the settlement's proposed prospective relief.

c. Purported cy pres provision

The contention by objectors Streight and Spann (who has withdrawn his objection) that the settlement must be rejected because it includes an impermissible “cy pres” provision is similarly predicated on a misunderstanding of the proposed settlement agreement. The portion of the settlement agreement that these objectors view as an impermissibly vague or “hidden” cy pres provision is section 2.1(e), which provides:

Any un-cashed checks issued to Settlement Class Members in accordance with this Agreement, as well as any unclaimed funds remaining in the Settlement Fund after payment of all Approved Claims, all Settlement Administration Expenses,

the Fee Award to Class Counsel, and the incentive award to the Class Representative shall be distributed to Settlement Class Members with Approved Claims if practicable, or in a manner as otherwise directed by the Court upon application made by Class Counsel.

Settlement Agreement, dkt. no. 137-1, at 125. Objector Streight claims that the settlement “contemplates a cy pres beneficiary and distribution, but cy pres in [sic] not mentioned in the Class Notice and a beneficiary was not named, which is unfair to the Class.” Streight Obj., dkt. no. 119, at 4. Streight claims that a cy pres recipient should have been named in the agreement and notice and that “the parties should have outlined how the cy pres recipient will utilize any remaining funds to benefit absent Class Members.” *Id.*

The Seventh Circuit limits the ways in which cy pres provisions may be utilized in class action settlements. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir.2004); *Mace*, 109 F.3d at 345. Cy pres recovery “is a procedural device that distributes money damages either through a market system (e.g., by reducing charges that were previously excessive), or through project funding (the project being designed to benefit the members of the class).” *Mace*, 109 F.3d at 345. The idea of cy pres in the class action context is that if the administrability of a settlement is unreasonably cumbersome and distributing settlement funds becomes infeasible, it may be appropriate to distribute the funds (or the funds remaining after class members' claims are paid) to an alternative beneficiary to ensure that the defendant does not “walk[] away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement....” *Mirfasihi*, 356 F.3d at 784.

Section 2.1(e) of the settlement agreement does not contemplate a cy pres award. Rather, it binds the parties to distribute unclaimed money to class members who do cash their checks unless doing so is not feasible, in which case the parties will look to the Court to instruct them regarding the best course of action. This approach abides by the Seventh Circuit's instruction that “[m]oney not claimed by class members should be used for the class's benefit to the extent that is feasible.” *499 *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 689 (7th Cir.2013). It also permits the parties, should they determine that disbursing leftover funds

is not feasible, to use any unclaimed money for a purpose that benefits the class in some way. See *SEC v. Custable*, 796 F.3d 653, 656 (7th Cir.2015); *Hughes v. Kore of Indiana Enters., Inc.*, 731 F.3d 672, 675–76 (7th Cir.2013). The Court therefore overrules this objection to the settlement.

d. Adequacy of notice plan and claims process

Finally, objectors Ray, Mehl, and Streight urge the Court to reject the settlement because the notice plan was inadequate, and Streight further contends that the claims process is “burdensome, unreasonable and unfair.” Streight Obj., dkt. no. 119, at 4. For classes certified under [Rule 23\(b\)\(3\)](#), [Rule 23](#) requires the “best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#). When members of the class can be identified through reasonable effort, they are entitled to individual notice. *Hughes*, 731 F.3d at 676. Courts also commonly evaluate claims processes to ensure they are fair and reasonable and that they are not so burdensome as to discourage class members from submitting claims. See, e.g., *Schulte v. Fifth Third Bank*, 805 F.Supp.2d 560, 590–91 (N.D.Ill.2011); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. 4:03–MD–015, 2004 WL 3671053, at *14 (W.D.Mo. Apr. 20, 2004). A cumbersome claims process is particularly suspect in the case of a reversionary settlement, that is, a settlement under which the defendant recaptures unclaimed funds. See *Schulte v. Fifth Third Bank*, No. 09 C 6655, 2010 WL 8816289, at *5 (N.D.Ill. Sep. 10, 2010); see also *Pearson*, 772 F.3d at 783 (observing that the imposition of an unduly burdensome claims process typically stands to benefit defendants who can recover leftover funds).

Objector Ray charges that the notice and claim form she received contained personal information that was visible to anyone who happened to come into contact with her mail, and she asserts that the settlement should be rejected due to this invasion of her privacy and the parties' disregard for the risk that she might become a victim of identity theft. Objector Mehl similarly urges the Court to reject the settlement because she was displeased to be contacted via e-mail without giving consent. The concerns these objectors have expressed are not illusory, but they do not provide grounds for the Court to reject the settlement. As for Streight's objection that e-mail notice does not satisfy [Rule 23\(c\)\(2\)\(B\)](#), the Court disagrees, as have other courts in this district. See *AT&T Mobility 1*, 270 F.R.D. at 351.

The Court also disagrees with Streight's contention that the claims process is too burdensome to permit approval of the settlement. First, because the parties seek approval of a nonreversionary settlement fund—Walgreens's total payment to the settlement fund will be \$11 million regardless of the number of claims filed—the contention the parties designed the claims process to discourage class members from making claims is a hard one to sell. Second, the claim form used in this case is short and direct. Postage is prepaid on a form that asks each claimant to provide his or her first and last name, street address (including city, state, and ZIP code), and signature (along with printed name and date of signature). Beyond that, claimants are presented with two checkboxes, one they can check to affirm that they wish to make a claim because they received prerecorded prescription refill reminder calls without their prior express consent, and another they can check if they would like to give Walgreens consent to call them in the future. It is neither unfair nor unreasonable to ask claimants to submit these claim forms in order to recover under the settlement. The Court overrules these objections.

8. Conclusion

After considering all relevant factors, the Court finds that the proposed settlement is fair, reasonable, and adequate. The Court therefore grants the parties' joint motion for final approval of the settlement.

D. Attorney's fees and costs

[Rule 23](#) provides that “[i]n a certified class action, the court may award reasonable *500 attorney's fees...that are authorized by law or by the parties' agreement.” [Fed. R. Civ. P. 23\(h\)](#). This is a “common fund” case, meaning that because the defendant is paying a specific sum in exchange for release of liability to all plaintiffs, equitable principles permit the Court to “determine[] the amount of attorney's fees that plaintiffs' counsel may recover” from the fund “based on the notion that not one plaintiff, but all those who have benefitted from litigation should share its costs.” *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 563 (7th Cir.1994) (internal citation and quotation marks omitted). When determining whether a requested fee award is reasonable, a court “must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of the class members in the fund.” *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 258 (7th Cir.1988). In common fund cases, courts determine reasonableness by “award[ing] counsel the market price for legal services, in light of the risk

of nonpayment and the normal rate of compensation in the market at the time.” *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir.2001) (*Synthroid I*).

Kolinek's counsel request a fee award of \$2,824,200.00, or 25.675% of the \$11 million settlement fund. More importantly for the Court's purposes, the requested award is 36% of the net settlement fund after subtracting administrative costs and a \$5,000 incentive award for Kolinek as named plaintiff. See *Redman*, 768 F.3d at 630 (The “ratio that is relevant to assessing the reasonableness of the attorneys' fee” in a coupon settlement “is the ratio of (1) the fee to (2) the fee plus what the class members received.”); *Pearson*, 772 F.3d at 781 (extending this holding to non-coupon settlements). Class counsel contend that the market rate for the service they have provided is a thirty percent base contingency fee plus a six percent upward adjustment based on the heightened risk of nonrecovery associated with this litigation.

Numerous objectors contend that the proposed attorney's fee award is excessive and propose alternative methods of valuation. Some agree that the Court should apply the percentage-of-the-fund method Kolinek's counsel have proposed but contend that thirty percent is too high a base rate and six percent is too high a risk adjustment. Others argue that the Court should utilize the lodestar approach to determining the appropriate attorney's fee award or that the Court should deem reasonable the percentage requested only if it makes sense in light of a lodestar cross-check.

1. Market rate for legal services

The Seventh Circuit has explained that the “market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case.” *Synthroid I*, 264 F.3d at 721. “The object in awarding a reasonable attorney's fee...is to give the lawyer what he would have gotten in the way of a fee in arm's length negotiation, had one been feasible.” *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir.1992). Like estimating the potential outcomes in a hypothetical class action suit litigated through trial, this process is “inherently conjectural.” *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir.2011).

In the Seventh Circuit, district courts may exercise discretion in choosing either the lodestar or percentage-of-the-fund approach to calculating attorney's fees in common-fund cases.

See *Florin*, 34 F.3d at 566. The Seventh Circuit is agnostic regarding which approach district courts should choose, and no Seventh Circuit case law suggests that a percentage-of-the-fund approach will yield a reasonable result only where it satisfies a lodestar cross-check.

The Court agrees with Kolinek's counsel that the fee award in this case should be calculated based on a percentage-of-the-fund method. Determining the market rate involves securing for the attorney what he would otherwise have bargained for in an arm's length negotiation at the outset of the litigation. See *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 957 (7th Cir.2013). Accordingly, one common method of choosing between the percentage and lodestar approaches *501 is to look to the calculation method most commonly used in the marketplace at the time such a negotiation would have occurred. See *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir.1998). As other courts have observed, the normal practice in consumer class actions is to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery. See, e.g., *In re Capital One*, 80 F.Supp.3d at 795. This is so because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of nine million lightly-injured plaintiffs likely would not be interested in doing.

The Court also agrees with Kolinek's counsel that thirty percent is a reasonable base rate. The Seventh Circuit has elucidated “benchmarks” that can assist courts in estimating the market rate, including the fee contract between the plaintiff and counsel, data from similar cases, and information from class-counsel auctions. *Synthroid I*, 264 F.3d at 719. As Judge Holderman observed in *In re Capital One*, these are not reliable benchmarks in TCPA class actions like this one. For one thing, the only fee agreement available is the retainer agreement between Kolinek and his attorneys, which is “of little value to determining the market rate because named plaintiffs are less often sophisticated buyers of legal services and more often 'the cat's paws of the class lawyers.’” *In re Capital One*, 80 F.Supp.3d at 796 (quoting *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *10–13 (N.D.Ill. Dec. 9, 2009)). Additionally, data from pre-suit negotiations and class-counsel auctions in TCPA class actions are basically non-existent. *Id.*; *Wilkins v. HSBC Bank Nev., N.A.*, No. 14 C 190, 2015 WL 890566, at *10 (N.D.Ill. Feb. 27, 2015).

In re Capital One and *Wilkins*, the two cases upon which Kolinek's counsel most heavily rely, dealt with proposed settlements featuring common funds much larger than the one Walgreens will establish in this case. Based on empirical studies and his analysis of other common fund cases not brought under the TCPA, Judge Holderman determined that in both cases “an *ex ante* negotiation between class counsel and prospective TCPA class members would [have] yield[ed] a downward scaling fee arrangement.” *Wilkins*, 2015 WL 890566, at *10; *In re Capital One*, 80 F.Supp.3d at 803–04. The hypothetical downward scaling fee agreement at which Judge Holderman arrived was based on the fee schedule estimated by the Seventh Circuit in *In re Synthroid Marketing Litigation*, 325 F.3d 974 (7th Cir.2003) (*Synthroid 2*), which held that a district court was within its discretion when it awarded class counsel 30% of the first \$10 million recovered and a lesser percentage of each additional \$10 million recovered. Kolinek suggests that this is evidence that the standard market rate for legal services in TCPA class actions resulting in a sub-\$10 million recovery for plaintiffs is thirty percent.

Relying heavily on a handful of California district court cases, objectors Franz, Cozby, and Bullard argue that courts simply do not grant requests for thirty-percent market rate awards. As the Seventh Circuit has held, attorney's fee awards in analogous class action settlements shed light on the market rate for legal services in similar cases. *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 600 (7th Cir.2005). But as Kolinek rightly points out, the decisions upon which these objectors rely are not analogous to this one because unlike the Seventh Circuit, the Ninth Circuit instructs district courts to calculate 25% of the common fund as the “benchmark” for a reasonable fee award and then provide an explanation of any “special circumstances” that might justify a departure from that benchmark. *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 942 (9th Cir.2011); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990). By contrast, a thirty percent fee award is not unusual in the Seventh Circuit in common fund cases in which recovery is less than \$10 million. *See, e.g., Taubenfeld*, 415 F.3d at 598–600 (holding that district court was within its discretion in awarding lead counsel 30% of a \$7.25 million settlement fund); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 572 (explaining that in class actions, “the usual range for contingent fees is between 33 and 50 percent”); *502 *Bridgeview Health Care Ctr., Ltd. v. Jerryclark*, No. 09 C 5601, 2015 WL 4498741, at *2 (N.D.Ill. July 23, 2015) (awarding one-third of common fund in TCPA class action); *Saf-T-Gard Int'l*,

Inc. v. Seiko Corp. of Am., No. 09 C 0776 (N.D. Ill. Jan. 14, 2011) (awarding one-third of common fund in multimillion dollar TCPA class action). And even though common fund cases in which plaintiffs recover more than \$10 million are not perfectly analogous, the fact that courts in this circuit regularly allow attorneys to recoup one-third of the first \$10 million of the class action settlement fund is, at the very least, instructive. *See, e.g., Synthroid 2*, 325 F.3d at 980 (“We...give consumer class counsel 30% of the first \$10 million...”); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11 C 4462, 2015 WL 1399367, at *4 (N.D.Ill. Mar. 23, 2015) (awarding plaintiffs' counsel a sliding scale contingency fee including thirty percent of the first ten million dollars of the settlement); *In re Capital One*, 80 F.Supp.3d at 804–05 (finding that before considering possible risk adjustments, 30% is the reasonable base market rate for the first \$10 million of recovery); *Wilkins*, 2015 WL 890566, at *10 (same).

Objectors Franz, Cozby, and Bullard argue that a thirty percent base rate is too high because class counsel did not have to do much work to secure a victory for the plaintiffs. The Court disagrees. The mere fact that this case settled before the parties engaged in full-scale formal discovery and summary judgment motion practice does not detract from class counsel's significant participation in this litigation and the effort they put in to secure a victory for the class. Class counsel did not join this case at the eleventh hour; rather, they saw this case through from start (the filing of the suit) to finish (negotiating a valuable settlement), and they did so with the care and skill commensurate with their significant experience as lead counsel in other major class action litigations. Counsel vigorously litigated to withstand Walgreens's motion to dismiss on two separate grounds and to convince the Court to reverse its premature dismissal of the case, and they conducted informal and some formal discovery, analyzing written materials Walgreens provided and taking the deposition of Walgreens's 30(b)(6) witness. More importantly, all of this work would have been foreseeable at the time class counsel participated in arm's length negotiation of their fee.

2. Risk adjustment

The final factor courts must consider when determining the market rate upon which to base a fee award is the risk that class counsel assumed by undertaking class representation. Risk is necessarily a factor in determining the price class counsel would have charged in arm's length *ex ante* negotiations. *Synthroid 1*, 264 F.3d at 721. As the Seventh Circuit has explained, “if the market-determined fee for a

sure winner were \$1 million the market-determined fee for handling a similar suit with only a 50 percent chance of a favorable outcome should be \$2 million.” *Trans Union*, 629 F.3d at 746.

In *In re Capital One*, the court found that class counsel in a TCPA class action suit faced significant risk where it was “quite possible that the discovery may have revealed that many class members acquiesced to receiving calls on their cell phones”; “at the outset of the litigation there was a serious question whether the Plaintiffs’ claims could meet Rule 23’s manageability requirement”; and the FCC was poised to potentially revise its interpretation of the TCPA in such a way as to vanquish plaintiffs’ claims. *In re Capital One*, 80 F.Supp.3d at 805. The court accordingly applied a six-percent risk premium to the thirty-percent fee award tied to the first \$10 million of the settlement fund. *Id.* at 807.

Because the risk factor is intended to help courts estimate the results of a hypothetical *ex ante* negotiation, the fact that this Court dismissed Kolinek’s suit with prejudice before reversing course on his motion to reconsider does not increase or decrease the degree of risk counsel faced. It does, however, demonstrate that the risks imagined by the court in *In re Capital One* were real and significant in the present case. The Court therefore finds that the market rate for legal services in this TCPA consumer class action, based on the degree of effort the attorneys would need to put in, the likelihood of success, *503 and the risks associated with undertaking class representation, was 36 percent. The Court grants Kolinek’s motion for attorney’s fees in the amount of \$2,824,200, or 36% of the settlement fund less administrative costs and the incentive award for Kolinek, which is discussed below.

E. Proposed incentive award

Plaintiffs have also asked the Court to approve an incentive award of \$5,000 to reward Kolinek for his participation as named plaintiff in this suit. Incentive awards “are justified when necessary to induce individuals to become named representatives.” *Synthroid I*, 264 F.3d at 722. If those individuals “would have stepped forward without the lure of an ‘incentive award,’ there is no need for such additional compensation.” *Id.* at 723. When determining whether and how much to award as an incentive for a named plaintiff, courts are instructed to consider “actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount

of time and effort the plaintiff expended in pursuing the litigation.” *Cook*, 142 F.3d at 1016.

This case did not proceed past the earliest phases of formal discovery before it was settled. Still, Kolinek attached his name to this litigation and participated in pre-filing investigation and informal and formal discovery. Although some objectors urge the Court to reject the proposed incentive award because it is dramatically more than the amount claiming class members will recover, a \$5,000 reward is justified based on Kolinek’s role working with class counsel, approving the settlement agreement and fee application, and volunteering to play an active role if the parties continued litigating through trial. It is also worth noting that courts regularly approve \$5,000 incentive awards in common fund cases like this one. *See, e.g., In re Capital One*, 80 F.Supp.3d at 809; *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F.Supp.2d 1028, 1041 (N.D.Ill.2011) (“*AT&T Mobility 3*”) (collecting cases). Because \$5,000 is adequate and comparable to the incentive awards often given in similar cases, the Court overrules Michael Beskine’s objection that the incentive award should be higher than the one Kolinek seeks, as well as the objections of Streight and Franz that the award is too high.

The Court therefore grants class counsel’s motion seeking a \$5,000 incentive award for named plaintiff Robert Kolinek.

F. Spann’s petition for attorney’s fees

Finally, objector Todd Spann has petitioned the Court for an award of \$100,000 in attorney’s fees. Spann filed an objection on July 17, 2015, the deadline for class members to opt out or object to the settlement. In his objection, Spann argued that the settlement should not be approved because Walgreens’s allegedly unlawful prescription refill reminder calls benefitted their recipients more than a settlement would. He was especially worried that this litigation and the proposed settlement would do a disservice to people who appreciated receiving the prescription refill reminder calls or had voiced concerns that the calls would not continue. He also challenged Kolinek’s adequacy as class representative and the “hidden” cy pres provision in the settlement agreement, as discussed above.

Later, in a series of emails and telephone conversations with class counsel, Spann’s attorney expressed concern that the settlement agreement required class members to opt in to receiving prescription refill reminder calls in the future. Class counsel wrote a letter to Spann’s attorney explaining that

the settlement agreement did no such thing. Content in this knowledge, Spann withdrew his objection to the settlement. He then petitioned the Court for attorney's fees, claiming that the service that he performed for the class—namely, getting class counsel to clarify in writing that the settlement agreement does not require individuals to opt in if they would like to continue receiving calls—justified the award of attorney's fees in the amount of \$100,000.

When an objector recovers attorney's fees, the fee award is drawn from the settlement fund, and the total award to the class is diminished. Thus for an objector to a ***504** class action settlement to recover fees, he must show that his objection has secured a benefit for the class that outweighs the fees he is seeking. *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687–88 (7th Cir.2008); see also *Reynolds*, 288 F.3d at 288 (“The principles of restitution that authorize [fee awards to objectors] require...that the objectors produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class.”).

Kolinek cites a decision by the Tenth Circuit and one by a judge of the Eastern District of Wisconsin for the proposition that when objectors secure only modest clarification of or minor procedural changes to a settlement agreement, courts typically refuse to reward them with fee awards. It is worth noting that in both of these cases, the courts denied objectors' fee petitions in part because those objectors were proceeding *pro se*, so granting them incentive awards would “undermine the policy of encouraging the retention of counsel in all cases.” *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F.Supp.2d 806, 818 (E.D.Wis.2009); see also *UFCW Local 88–Retail Food Employers Joint Pension Fund v. Newmont Min. Corp.*, 352 Fed.Appx. 232, 236 (10th Cir.2009).

The Court agrees, however, that whatever conceivable benefit Spann might have secured for the class is marginal at best and that its value is nowhere near the \$100,000 in attorney's fees he now seeks. Spann's objection did not result in any

change to the settlement amount or the procedures by which it will be administered. He claims that the dramatic benefit he secured for the class is the letter he received from class counsel clarifying the settlement's terms, but Kolinek rightly points out that this benefit is overstated in light of Spann's decision to seek clarification at the last possible minute and then withdraw his objection upon simply receiving a letter on the eve of the fairness hearing. More importantly, Spann's objection seems to have arisen not from the settlement agreement's lack of clarity but rather from his or his counsel's misunderstanding of the settlement agreement's clear terms. Rather than creating (or even hinting at) any kind of “opt-in” apparatus, the settlement agreement provides that prerecorded prescription refill reminder calls will cease for those class members who submit valid claim forms attesting that they did not provide prior express consent to receive them *and* do not check the box requesting to continue receiving calls. As the settlement agreement makes abundantly clear, class members who do not affirmatively state that they have not given consent (by submitting a valid claim) will continue to receive calls in the future.

Because Spann's objection resulted in no real benefit for the plaintiff class, the Court denies his petition for attorney's fees.

Conclusion

For the foregoing reasons, the Court grants final approval of the settlement [dkt. no. 135] and plaintiff's motion for attorney's fees, expenses, and incentive award for the named plaintiff [dkt. no. 103]. The Court denies objector Todd Spann's motion for attorney's fees [dkt. no. 169]. By the close of business tomorrow, counsel for the plaintiff class and for Walgreens are to jointly submit a draft judgment order embodying the Court's rulings.

All Citations

311 F.R.D. 483

Footnotes

- 1 The Court has not included in this number the three objectors who withdrew their objections (Franz, Hughes, and Oldham). Additionally, although class counsel spent significant ink on arguments that numerous objectors either did not demonstrate their membership in the class, filed an inadequate objection, or objected improperly

by enlisting the services of professional objectors to “ghostwrite” their objections, the Court has included all objections that were not withdrawn—procedurally proper and not—in this number, because untimely or procedurally defective opt-outs and objections still signal disapproval of the settlement.

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2011 WL 2313604

Only the Westlaw citation is currently available.

United States District Court,
S.D. California.

Lloyd MARTIN, et al., individually and
on behalf of others similarly situated, and,
Grady O'Bryant, et al., individually and on
behalf of others similarly situated, Plaintiffs,

v.

AMERIPRIDE SERVICES, INC., et al., Defendants.

No. 08cv440–MMA (JMA).

|

June 9, 2011.

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ORDER ON FINAL APPROVAL OF CLASS ACTION SETTLEMENT

ORDER ON FINAL APPROVAL OF CLASS ACTION SETTLEMENT, JUDGMENT AND DISMISSAL

[MICHAEL M. ANELLO](#), District Judge.

*1 On June 6, 2011, this matter came before the Court on Plaintiffs' Motion for Final Approval of Class Settlement, Approval of Attorneys Fees and Costs, and Class Representative Service Payment [Doc. No. 57]. At the hearing, the Court advised the parties of its tentative decision to grant Plaintiffs' motion. For the following reasons, the Court **AFFIRMS** its tentative ruling and **GRANTS** Plaintiffs' motion in its entirety.

BACKGROUND

The operative pleading in this case is the First Amended Consolidated Complaint (the “complaint”) [Doc. No. 35], filed on July 1, 2009. Individually named plaintiffs acting as class representatives include: Lloyd Martin, Kirk Sword, Daniel Gore, Grady O'Bryant, Jorge Mejia, Paul Luna, Kye Jacoby, and Rigo Martinez. These individuals were employed by Defendant AmeriPride Services, Inc. as route delivery drivers (holding the official title of customer service representatives or “CSRs”) during the class period commencing on January 15, 2004. AmeriPride is in the business of linen supply, supplying to customers clean laundered towels, linens, uniforms, wearing apparel, and other items. AmeriPride employs CSRs to operate delivery trucks to supply its products and services to its local customers on routes assigned to them by AmeriPride.

Plaintiffs brought this class action against their employer AmeriPride alleging that they and other CSRs are misclassified as “exempt” employees and are thus entitled to unpaid overtime wages and other remedies under California law. Specifically, Plaintiffs' complaint alleges that AmeriPride violated California state law, and alleges five causes of action under the California Labor Code and California Business and Professions Code for (1) overtime pay for introductory employees; (2) overtime pay for regular full-time employees; (3) meal periods; (4) rest periods; and (5) unfair business practices.

PROCEDURAL HISTORY

This matter began as two separate purported class action law suits filed in California state court by Martin, Sword, and Gore in San Diego County, and O'Bryant in Sacramento County. AmeriPride answered the complaint in each case, and simultaneously removed the Martin, et al. action to this Court and the O'Bryant action to the United States District Court for the Eastern District of California. The O'Bryant court transferred that action to this Court. On October 15, 2008, this Court ordered the two actions consolidated. The operative complaint was filed on July 1, 2009.

On September 7, 2010, the parties notified the Court that the action had settled and the Court ordered the parties to file a motion for preliminary approval of class settlement. *See* Doc. No. 46. On December 3, 2010, Plaintiffs filed an unopposed motion for preliminary approval. *See* Doc. No. 51. On January 4, 2011, the Court granted the motion and approved a preliminary settlement, authorized the notice

process, and scheduled a hearing on final approval. *See* Doc. No. 55.

*2 On April 11, 2011, Plaintiffs filed the motion for final approval currently pending before the Court. *See* Doc. Nos. 57–59. On April 15, 2011, AmeriPride filed an opposition to the motion, asserting that Plaintiffs “are now seeking to fundamentally alter the terms of the agreed-upon Settlement Agreement.” *See* Doc. No. 60. According to AmeriPride, disputes developed between the parties with respect to material terms of the Settlement Agreement, including the definition of the class, the effective date of the Settlement Agreement, the timing for deposit of settlement funds, the release of claims, and payment of employment taxes.

In light of the issues raised in AmeriPride's opposition, the Court vacated the Final Approval Hearing which had been previously set for April 25, 2011 and rescheduled the hearing for June 6, 2011, in order to allow counsel for the parties to meet and confer regarding the outstanding disputes related to the Settlement Agreement. *See* Doc. No. 61. On May 27, 2011, in compliance with the Court's order, the parties filed a Joint Statement advising the Court regarding the status of settlement, confirming that all disputes except one have been resolved, and setting forth each party's position on the sole remaining dispute—the effective date of the Settlement Agreement. Because the parties indicated in the Joint Statement that they would seek the Court's determination on the issue, and the dispute did not threaten the integrity of the Settlement Agreement, the Court found the settlement of this class action ready for final approval.

TERMS OF THE SETTLEMENT

1. Settlement Class

This Court provisionally certified the settlement class as follows: “Any individual who was employed as Customer Service Representative (including introductory and/or probationary Customer Service Representatives) in California for AmeriPride during the Class Period (January 15, 2004 through December 31, 2009).” Several class members have claimed compensation for time worked during the class period as relief drivers, wholesale drivers or “route jumpers.” Subsequent to their meet and confer efforts during the month of May, the parties agreed that the settlement class does not include these types of drivers because they are in a different payroll category and are compensated differently than CSRs, except as to those class member CSRs who may

have been relief and/or wholesale drivers at times during the class period. *See Joint Hearing Statement*, Doc. No. 62.

On Friday, May 20, 2011, the Settlement Administrator mailed responses to claimants who filed claims or disputes indicating whether the claim or dispute was accepted or denied and the basis for the denial consistent with the parties' agreed upon definition of the Settlement Class.

Subsequent to their meet and confer efforts during the month of May, the parties also agreed that all named plaintiffs have agreed to a comprehensive release that releases all claims against AmeriPride “arising out of their employment with Defendant or termination thereof and/or any other event, act, occurrence, or omission taking place on or before the Settlement Effective Date ...” *See Joint Hearing Statement*, 4. With respect to the unnamed class members, the parties agree that all class members—as defined above—are releasing any and all wage claims that were brought or could have been brought against AmeriPride during the class period. The parties agree that AmeriPride employees who are not part of the settlement class are not releasing any claims.

2. Settlement Terms

*3 AmeriPride has agreed to pay a gross settlement amount of \$5,250,000 (five million two hundred fifty thousand dollars) (“the common fund”). Upon final approval, the common fund will be allocated among payments to class members, administrative costs, attorneys fees, litigation costs, and class representative service awards. The entire fund is non-reversionary and will be distributed to individual class members on a pro rata basis based on the time and location of where the class member worked as well as the number of weeks worked.

Subsequent to their meet and confer efforts during the month of May, the parties agreed that the Settlement Agreement states that AmeriPride will pay the employer taxes on the portion of each Settlement Payment deemed to be wages, which is fifty percent (50%) of the Settlement Payment. *See Joint Hearing Statement*, 5. This portion will be issued via W–2 form. The other portion is for penalties and interests for which no taxes are due because it will be issued via 1099–MISC form. The employer taxes will be paid by AmeriPride from monies separate and apart from the common fund.

The class representatives will receive an enhancement award of \$18,500. The parties stipulate to award attorneys fees to Class Counsel in the amount of 25% of the common

fund (\$1,312,500), to be split equally between Wagner & Jones LLP and Tosdal Smith Steiner & Wax LLP, plus actual litigation costs of \$16,891.77 to Wagner & Jones and \$14,720.42 to Tosdal Smith Steiner & Wax.

3. Effective Settlement Date

The meaning of the term “Effective Settlement Date” remains in dispute. The parties have requested that the Court determine the issue. The “Effective Settlement Date” is defined in the Settlement Agreement as:

Effective Settlement Date: The Effective Settlement Date is the date on which this Settlement will become final and effective, which shall be upon the occurrence of all of the following events:

- (a) entry of the Preliminary Approval Order;
- (b) the occurrence of the Final Settlement Hearing;
- (c) entry of the Final Judgment; and
- (d) the Final Judgment becomes final, which shall mean,
 - (i) the date the Final Judgment is signed by the Court if there are no objections to the settlement; or
 - (ii) if there are objections to the settlement which are not withdrawn, and if an appeal, review or writ is not sought from the Judgment, the date one day after which the Final Judgment is no longer subject to judicial review or other challenge; or
 - (iii) if a timely notice of appeal is filed, the day after the Final Judgment is affirmed, or the appeal or review is dismissed or denied and the Final Judgment is no longer subject to judicial review or other challenge.

“A settlement agreement is treated as any other contract for purposes of interpretation.” *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir.), cert. denied sub nom., *Paymaster Corp. v. American Bankers Ins. Co. of Fla.*, 506 U.S. 1022, 113 S.Ct. 660, 121 L.Ed.2d 585 (1992); see also *Winet v. Price*, 4 Cal.App.4th 1159, 1164, 6 Cal.Rptr.2d 554 (Cal.Ct.App.1992). Under California law, contract interpretation is a question of law. *SDR Capital Mgmt., Inc. v. Am. Int’l Specialty Ins. Co.*, 320 F.Supp.2d 1043, 1046 (S.D.Cal.2004); see also *Parsons v. Bristol Develop. Co.*, 62 Cal.2d 861, 44 Cal.Rptr. 767, 402 P.2d 839 (Cal.1965). “The fundamental goal of contractual interpretation is to give effect to the mutual intention of

the parties.” *Byrne v. Laura*, 52 Cal.App.4th 1054, 60 Cal.Rptr.2d 908, 916 (Cal.Ct.App.1997). “When a contract is reduced to writing, the parties’ intention is determined from the writing alone, if possible.” *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal.App.4th 944, 135 Cal.Rptr.2d 505, 513 (Cal.Ct.App.1992). “If contractual language is clear and explicit, it governs.” *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 10 Cal.Rptr.2d 538, 833 P.2d 545, 552 (Cal.1992). A court must interpret contractual language in its ordinary sense, unless terms are used by the parties in a technical sense, or a special meaning is given to them by usage. Cal. Civ.Code § 1638.

*4 Plaintiffs argue that “the express terms of subsection (d) (i) above states that the ‘Final Judgment becomes final’ on ‘the date the Final Judgment is signed by the Court [because] there are no objections to the settlement.’ It is undisputed that no objections to the settlement have yet been filed. This means that the Effective Settlement Date is the date of entry of final judgment.” See *Joint Hearing Statement*, 6. AmeriPride counters that the Effective Settlement Date is not only after the Final Judgment is signed by the Court, but *also* after the time for an appeal has expired. *Id.* at 8, 10 Cal.Rptr.2d 538, 833 P.2d 545.

First, the Court finds that the use of the word “or” to transition between subsections (d)(i), (ii), and (iii), does not support AmeriPride’s interpretation of the contract language. Merriam Webster’s Eleventh Collegiate Dictionary (2005) defines “or” as “used as a function word to indicate an alternative.” Here, use of the word “or” indicates that subsections (d)(i), (ii), and (iii), above, are alternatives to one another, and as such, the Final Judgment becomes final as defined by one subsection—not all three, as AmeriPride insists. If the word “and” instead of “or” had been used, the language of the contract would support AmeriPride’s position, but the result would be unworkable because the three conditions in subsections (d)(i), (ii), and (iii) cannot obtain simultaneously.

The parties confirmed during the final approval hearing that there are no objections to the settlement. Subsection (d)(i) expressly contemplates such a situation and provides that the Final Judgment becomes final “the date the Final Judgment is signed by the Court *if there are no objections to the settlement.*” (emphasis added). Unlike subsections (d)(i) (no objections) and (d)(ii) (objections), subsection (d)(iii), which provides the meaning of the word “final” in the event a timely notice of appeal is filed, does not expressly contemplate either

the presence or absence of objections to the settlement, as it does not even contain the word “objections.” Seizing on this, AmeriPride argues that subsection (d)(iii) applies irrespective of whether there are objections to the settlement and therefore applies here.

AmeriPride's interpretation of the contract language is untenable because the Effective Settlement Date cannot at once be the date the Court signs the Final Judgment (subsection (i)) *and* some undetermined date in the future (subsection (iii)), as the two are mutually exclusive.¹ Furthermore, AmeriPride's interpretation of subsection (d) (iii) renders subsection (d)(i) superfluous. The Court will not conclude that the carefully negotiated Settlement Agreement in this case contains unnecessary or extraneous language, particularly when that language bears directly upon the deposit and distribution of millions of dollars. Subsection (d) (iii) must be interpreted as impliedly contemplating objection to the settlement, from which a timely notice of appeal could be filed. Otherwise the word “final” has no clear meaning, when the terms of the Settlement Agreement obviously intended the opposite result.

*5 Accordingly, the Court finds that because there are no objections to the settlement, the Final Judgment in this case becomes final pursuant to subsection (d)(i)—the date the Final Judgment is signed by the Court. The preliminary approval order has been entered and the final settlement hearing occurred on June 6, 2011. Therefore, upon entry of the Final Judgment and on the date the Final Judgment is signed by the Court, the Settlement will become final and effective.

MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

1. Class Certification

A plaintiff seeking a Rule 23(b)(3) class certification must first satisfy the prerequisites of Rule 23(a). Once subsection (a) is satisfied, the purported class must then fulfill the requirements of Rule 23(b)(3). In the present case, the Court had previously preliminarily certified the following California class:

“Any individual who was employed as Customer Service Representative (including introductory and/or probationary Customer Service

Representatives) in California for AmeriPride during the Class Period (January 15, 2004 through December 31, 2009).”

At that time, the Court concluded that the proposed classes satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). *See* Doc. No. 55. The Court also found that the proposed classes satisfied the predominance and superiority requirements of Rule 23(b)(3). Based on its previous findings, the Court certifies the class for the purpose of settlement.

2. The Settlement

a) Legal Standard

Courts require a higher standard of fairness when settlement takes place prior to class certification to ensure class counsel and defendant have not colluded in settling the case. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998). Ultimately, “[t]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir.1982).

A court considers several factors in determining whether a proposed settlement is “fair, adequate and reasonable” under Rule 23(e). Such factors may include: (1) the strength of the case; (2) the risk, expense, complexity and likely duration of further litigation and the risk of maintaining class action status throughout the trial; (3) the stage of the proceedings (investigation, discovery and research completed); (4) the settlement amount; (5) whether the class has been fairly and adequately represented during settlement negotiations; and (6) the reaction of the class to the proposed settlement. *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir.2003). The Court need only consider some of these factors—namely, those designed to protect absentees. *See Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir.2003) (overruled in part on other grounds).

*6 Judicial policy favors settlement in class actions and other complex litigation where substantial resources can be conserved by avoiding the time, cost, and rigors of

formal litigation. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F.Supp. 1379, 1387 (D.Ariz.1989). On November 6, 2009, the parties and their counsel attended one full day mediation, which was conducted by a highly qualified mediator. Subsequent to the mediation, the parties continued negotiations with the assistance of the mediator, which resulted in an oral agreement on the common fund settlement and stipulated Settlement Agreement currently before the Court for final approval. See *Kopfman Decl'n* ¶¶ 35–36.

b) Analysis

(1) The strength of the case, and risk, expense, complexity and likely duration of further litigation

Regarding the strength of Plaintiffs' case, the Court must “determine whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinarily strong case.” *Livingston v. Toyota Motor Sales USA*, 1995 U.S. Dist. LEXIS 21757 (N.D.Cal.1995). Here, Plaintiffs assert that the proposed settlement is both fair and reasonable in light of AmeriPride's available legal and factual grounds for defending against the asserted claims. For example, Plaintiffs contend that, absent settlement, AmeriPride would have asserted a defense that Plaintiffs and the class members are exempt from overtime compensation requirements. See *Kopfman Decl'n* ¶¶ 41–45. Such a defense would present a serious threat to Plaintiffs' claims, as well as create uncertainty as to the appropriateness of class certification. Plaintiffs also asserts that the risk of further litigation is significant, as is the likely duration of further litigation. *Id.* ¶ 47. Given these risks, the actual recovery through settlement confers substantial benefits on the class that outweigh the potential recovery through full adjudication.

(2) The stage of the proceedings (investigation, discovery and research completed)

In the context of class action settlements, as long as the parties have sufficient information to make an informed decision about settlement, “ ‘formal discovery is not a necessary ticket to the bargaining table.’ ” *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir.1998) (quoting *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241 (5th Cir.1982)). Here, the parties engaged in extensive formal and informal discovery, as is reflected by looking at the docket of this case. The parties participated in a number of discovery conferences with the assigned magistrate judge. Depositions were conducted, experts hired and consulted, and so on. See *Kopfman Decl'n* ¶¶ 48–49.

(3) The settlement amount

To assess whether the amount offered is fair, the Court may compare the settlement amount to the parties' estimates of the maximum amount of damages recoverable in a successful litigation. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459. While settlement amounts that are close to the plaintiffs' estimate of damages provide strong support for approval of the settlement, settlement offers that constitute only a fraction of the potential recovery do not preclude a court from finding that the settlement offer is fair. *Id.* (finding settlement amount constituting one-sixth of the potential recovery was fair and adequate). Thus, district courts have found that settlements for substantially less than the plaintiffs' claimed damages were fair and reasonable, especially when taking into account the uncertainties involved with litigation. See, e.g., *Glass v. UBS Fin. Serv., Inc.*, No. C–06–4068 MMC, 2007 U.S. Dist. LEXIS 8476, 2007 WL 2216862, at *4 (N.D. Cal. Jan. 26, 2007) (finding settlement of wage and hour class action for 25 to 35% of the claimed damages to be reasonable); *Williams v. Costco Wholesale Corp.*, No. CV–02–2003 IEG, 2010 U.S. Dist. LEXIS 67731, 2010 WL 2721452, at *4 (S.D.Cal. July 7, 2010) (finding settlement amount constituting approximately 75.6% of the plaintiffs' claimed losses from unpaid overtime pay to be adequate).

*7 Here, the common fund represents approximately 36% of the total potential damages in the case. See *Kopfman Decl'n* ¶ 49. The average class member will receive a settlement payment of \$11,552.31. In addition, AmeriPride has implemented methods of now compensating CSRs in compliance with California's wage and hour laws, such that class members who are still employed by AmeriPride will continue to reap the benefits of settlement by receiving full overtime compensation. The amount offered in settlement is adequate.

(4) Whether the class has been fairly and adequately represented during settlement negotiations

Class Counsel have significant experience in both the substance of wage and hour claims as well as the procedures for class and collective actions. See *Kopfman Decl'n* ¶¶ 4–6. As such, their support of the settlement should be accorded significant consideration. See, e.g., *Nat'l Rural Telcoms Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D.Cal.2004) (“Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation. This is because parties represented

by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation") (internal quotation marks and citations omitted).

(5) *The reaction of the class to the proposed settlement*

The Ninth Circuit has held that the number of class members who object to a proposed settlement is a factor to be considered. *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832, 837 (9th Cir.1976). The absence of any objector strongly supports the fairness, reasonableness, and adequacy of the settlement. See *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 175 (S.D.N.Y.2000) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (citations omitted); *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 624 (N.D.Cal.1979) (finding "persuasive" the fact that 84% of the class has filed no opposition). Here, no class members have objected to the Settlement Agreement and no class member has opted out. See *Kopfman Decl'n* ¶ 52.

3. *Conclusion*

The Court **GRANTS** the motion for final approval, finding that the Settlement Agreement is "fair, adequate and reasonable" under Rule 23(e).

MOTION FOR AWARD OF ATTORNEYS FEES AND COSTS

1. *Relevant Law*

Rule 23(h) of the Federal Rules of Civil Procedure provides that, "[i]n a certified class action, the court may award reasonable attorneys fees and nontaxable costs that are authorized by law or by the parties' agreement." **Fed.R.Civ.P. 23(h)**. California recognizes the common fund doctrine for the award of attorneys fees. Under California and Ninth Circuit precedent, a court has discretion to calculate and award attorneys fees using either the lodestar method or the percentage-of-the-fund method. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 253, 110 Cal.Rptr.2d 145 (2001); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir.2002).

*8 The Ninth Circuit has held that 25% of the gross settlement amount is the benchmark for attorneys fees awarded under the percentage method, with 20 to 30% as the usual range in common fund cases where the recovery is between \$50 and 200 million. *Vizcaino*, 290 F.3d at 1047.

Other case law surveys suggest that 50% is the upper limit, with 30–50% commonly being awarded in cases in which the common fund is relatively small. See Rubenstein, Conte and Newberg, *Newberg on Class Actions* at § 14:6. Indeed, California cases in which the common fund is small tend to award attorneys fees above the 25% benchmark. See *Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1127 (C.D.Ca.2008) (holding attorneys fees for large fund cases are typically under 25% and cases below \$10 million are often more than the 25% benchmark). More particularly, courts may award attorneys fees in the 30–40% range in wage and hour class actions that result in recovery of a common fund under \$10 million. See *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491–92 (E.D.Ca.2010) (citing to five recent wage and hour class actions where federal district courts approved attorney fee awards ranging from 30 to 33%); *Singer v. Becton Dickinson and Co.*, 2010 U.S. Dist. LEXIS 53416, 2010 WL 2196104, * 8 (S.D.Ca. June 1, 2010) (approving attorney fee award of 33.33% of the common fund and holding that award was similar to awards in three other wage and hour class action cases where fees ranged from 30.3% to 40%); *Romero v. Producers Dairy Foods, Inc.*, 2007 U.S. Dist. LEXIS 86270, 2007 WL 3492841 (E.D.Ca. Nov.14, 2007).

2. *Analysis*

Regardless of whether the court uses the percentage approach or the lodestar method, the main inquiry is whether the end result is reasonable. *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir.2000). The Ninth Circuit has identified a number of factors that may be relevant in determining if the award is reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee; (5) the burdens carried by class counsel; and (6) the awards made in similar cases. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir.2002). An explanation is necessary when the district court departs from the "benchmark" of 25% of recovery. *Powers*, 229 F.3d at 1256–57. The award sought in this case equals 25% of the common fund.

Here, the results achieved in this case were favorable. The risks of litigation were real and substantial. The complexity and duration of the case, coupled with the intensity of settlement negotiations, weighs in favor of awarding the 25 percent "benchmark" amount that counsel request here, for a total award of \$1,312,500 plus actual costs and expenses incurred prior to entry of final approval. See *Kopfman Decl'n* ¶ 57. Class Counsel took this case on a contingent fee basis and had to forego other financial opportunities to litigate it

for more than three years. *See Kopfman Decl'n* ¶¶ 60–61. Fifth, the request for attorneys fees in the amount of 25% of the common fund falls within the typical range of 20 to 50% awarded in similar cases, and is lower than many other awards where counsel worked on a contingent basis. *See, e.g., Ingalls v. Hallmark Mktg. Corp.*, 08cv4342 VBF (Ex), Doc. No. 77, P 6 (C.D.Cal. Oct. 16, 2009) (awarding 33.33% fee on a \$ 5.6 million wage and hour class action); *Birch v. Office Depot, Inc.*, Case No. 06cv1690 DMS (WMC), Doc. No. 48, P 13 (S.D.Cal. Sept. 28, 2007) (awarding a 40% fee on a \$ 16 million wage and hour class action); *Rippee v. Boston Mkt. Corp.*, Case No. 05cv1359 BTM (JMA), Doc. No. 70, at 7–8 (S.D.Cal. Oct. 10, 2006) (awarding a 40% fee on a \$ 3.75 million wage and hour class action). Finally, no class members have objected to the attorneys fees.

3. Conclusion

*9 The Court **APPROVES** an award of attorneys fees equal to 25% of the value of the common fund as well as Class Counsel's request for litigation costs and expenses in the requested amount.

CLASS REPRESENTATIVE SERVICE PAYMENTS

1. Relevant Law

In assessing the reasonableness of an incentive award, several district courts in the Ninth Circuit have applied the five-factor test set forth in *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995), which analyzes: (1) the risk to the class representative in commencing a class action, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation. *See, e.g., Carter v. Anderson Merchs., LP*, No. EDCV 08–0025–VAP, 2010 U.S. Dist. LEXIS 55629, 2010 WL 1946757, at *3 (C.D.Cal. May 11, 2010); *Williams v. Costco Wholesale Corp.*, No. 02cv2003 IEG, 2010 U.S. Dist. LEXIS 67731, 2010 WL 2721452, at *7 (S.D.Cal. July 7, 2010).

2. Analysis

No class members have objected to Plaintiffs' intent to seek an enhancement award of \$18,500. The \$18,500 incentive award is also well within the acceptable range awarded in similar cases. *See, e.g., Brotherton v. Cleveland*, 141 F.Supp.2d 907,

913–14 (S.D.Ohio 2001) (approving an award of \$50,000 where the class representative “has been instrumental in bringing [the] lawsuit forward” and “has performed numerous tasks in association with [the] litigation”). Each named plaintiff has provided a declaration to the Court summarizing the time and resources expended in assisting with the preparation for and litigation of this case. For example, Plaintiff O'Bryant responded to written discovery requests and assisted in the preparation of initial disclosures. *See O'Bryant Decl'n* ¶ 15. O'Bryant also traveled to San Diego twice at personal expense to participate in depositions and the full day mediation, *id.* ¶¶ 16–17, as did the other named plaintiffs. *See Jacoby Decl'n* ¶¶ 13–14; *Mejia Decl'n* ¶¶ 12–13; *Martinez Decl'n* ¶¶ 11–12; *Luna Decl'n* ¶¶ 11–12; *Martin Decl'n* ¶ 12; *Sword Decl'n* ¶ 8; *Gore Decl'n* ¶ 12.

3. Conclusion

The Court **APPROVES** the service fee award as reasonable.

CONCLUSION

The Court **GRANTS** Plaintiffs' motion in its entirety, and finds the proposed settlement of this class action appropriate for final approval pursuant to [Federal Rule of Civil Procedure 23\(e\)](#). The Court further finds that the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, and does not improperly grant preferential treatment to any individuals. The Court finds that the settlement was entered into in good faith; that the settlement is fair, reasonable and adequate; and that Plaintiffs have satisfied the standards for final approval of a class action settlement under federal law.

JUDGMENT AND ORDER OF DISMISSAL

*10 This Court **APPROVES** the settlement and directs the Parties to effectuate the Settlement Agreement according to its terms.

The Court **DISMISSES** this case on the merits and with prejudice, pursuant to the terms of the Settlement Agreement.

The Court retains continuing jurisdiction over the interpretation, implementation and enforcement of the Settlement Agreement and all orders and judgments entered in connection therewith.

If this Judgment and the settlement do not become final and effective in accord with the terms of the Settlement Agreement, then this Judgment and all orders entered in connection therewith shall be deemed null and void and shall be vacated.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2313604

Footnotes

- 1 By way of contrast, at least one court has approved a final settlement wherein the settlement agreement included a definition of the effective date of settlement as: "The effective date shall be the date of final approval if no objections are filed to the settlement. If objections are filed and overruled, and no appeal is taken of the final approval order, then the effective date of final approval shall be sixty-five (65) days after the district court enters final approval. If an appeal is taken from the Court's overruling of objections to the settlement, then the effective date of final approval shall be twenty (20) days after the appeal is withdrawn or after an appellate decision affirming the final approval decision becomes final. No money will be distributed unless and until the effective date of final approval occurs." *Chiaramonte v. Pitney Bowes, Inc.* 2008 WL 510765 (S.D.Cal.). The terms of the *Chiaramonte* settlement agreement were clear that an appeal would only effect the finality of the judgment and subsequent distribution of funds in the event objections were filed. Absent any objections, the settlement became effective on the date of final approval, period. The settlement agreement was written such that the three possibilities were plainly mutually exclusive.

962 F.2d 566

United States Court of Appeals, Seventh Circuit.

In the Matter of CONTINENTAL
ILLINOIS SECURITIES LITIGATION:
Fred L. STEINLAUF, on behalf of himself
and all others similarly situated, Plaintiff,

v.

CONTINENTAL ILLINOIS
CORPORATION, et al., Defendants.
Appeals of MUCH, SHELIST, FREED,
DENENBERG, AMENT & EIGER, et
al., counsel for plaintiff class, Appellants.

Nos. 90–3701, 90–3702, 90–3716

|
Argued Dec. 12, 1991.|
Decided April 22, 1992.|
As Amended on Denial of Motions for
Rehearing and Clarification May 22, 1992.**Synopsis**

Following resolution of securities class action arising from defaulted loans, counsel for plaintiff class and counsel who served as cocounsel for class in early stages case submitted fee petitions. [The United States District Court for the Northern District of Illinois, Eastern Division, John F. Grady, J., 750 F.Supp. 868](#), entered order cutting fee request by approximately one-half. On consolidated appeals, the Court of Appeals, [Posner](#), Circuit Judge, held that: (1) ceiling should not have been placed on hourly rates of all lawyers for class, and paralegal services should have been compensated at market rates; (2) risk multiplier should have been awarded, and across-the-board cut should not have been made in research and conferring categories of lawyer time; (3) lawyers should have been allowed to bill expenses associated with use of computerized legal research service, and award of prejudgment interest should not have been refused on basis that “current” billing rates that were two years old were being used as lodestar; and (4) although named plaintiff would under some circumstances be entitled to compensation, subject plaintiff failed to prove his entitlement to fee, and remand was warranted for redetermination of fee due class counsel.

Reversed and remanded.

Attorneys and Law Firms

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[Lowell E. Sachnoff](#) (argued), [Jeffrey A. Schumacher](#), [Gary S. Caplan](#), Sachnoff & Weaver, Chicago, Ill., [Edward A. Grossmann](#), Bernstein, Litowitz, Berger & Grossmann, New York City, for appellants in No. 90–3716.

Before [POSNER](#), [RIPPLE](#), and [MANION](#), Circuit Judges.

Opinion

***568** [POSNER](#), Circuit Judge.

These are consolidated appeals from an order by Judge Grady cutting by roughly one-half the attorneys' fees requested by the plaintiffs' counsel in a class action. [750 F.Supp. 868 \(N.D.Ill.1990\)](#). The principal defendant, the Continental

Bank, had purchased more than a billion dollars in oil and gas loans from the Penn Square Bank, an Oklahoma bank whose collapse in 1982 made the loans that Continental Bank had bought from Penn Square largely uncollectable. Caught thus in the undertow of the Penn Square disaster, Continental itself became insolvent and was taken over by the Federal Deposit Insurance Corporation. Several class actions were brought against Continental and its officers in 1982 under the federal securities laws on behalf of investors who had bought stock in the bank before the crash and who claimed that Continental had made misleading statements about its financial condition. These suits were consolidated before Judge Grady. Extensive discovery and collateral litigation ensued. Between 1986 and 1988 the suits were settled for a total (including interest to the end of 1989) of \$45 million.

Having employed their professional skills to create a cornucopia for the class, the lawyers for the class were entitled under the principles of restitution to suitable compensation for their efforts. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). They had agreed at the outset that they would not seek an award of attorneys' fees in excess of 20 percent of the amount of recovery. That capped their request at \$9 million. But proceeding under the so-called "lodestar" method, by which the fee award is built up from the number of hours spent by the lawyers on the case, *Blanchard v. Bergerson*, 489 U.S. 87, 94, 109 S.Ct. 939, 944, 103 L.Ed.2d 67 (1989), they managed to justify (to their own satisfaction anyway) an award that, but for the ceiling, would have been even higher. So they requested the entire \$9 million, which Judge Grady, in a meticulous 81-page order, reduced as we have said by roughly a half. We respect the care with which he reviewed the lawyers' submissions, despite the absence of an adversary presentation. (The class was notified of the fee request, but no member of the class objected. There is no appellee.) And we review his decision under a deferential standard. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983); *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 698 (7th Cir.1991); *Ustrak v. Fairman*, 851 F.2d 983, 987 (7th Cir.1988). Even so, we are unable to accept most of his rulings.

1. The judge placed a ceiling of \$175 on the hourly rates of all lawyers for the class, including lawyers whose regular billing rates were almost twice as high. He did this on the theory that the most demanding work on the case had been done by a rather junior lawyer whose billing rate is only \$175. The more experienced, higher-paid lawyers simply were not, in the judge's view, needed for this case. This is highly implausible,

when one considers that the defendants hired a crowd of pricey lawyers to defend the case and that the FDIC, in a parallel suit, hired one of the class counsel and paid him the same market rate that the district judge refused to authorize—even though the class action was contingent, and the FDIC suit was not. Nor were the lawyers who defended Continental and its officers against the class, at rates similar to the normal billing rates of the lawyers for the class, at risk of not being paid.

It is apparent what the district judge's mistake was. He thought he knew the value of the class lawyers' legal services better than the market did. What the market valued at \$350 he thought worth only half as much. He may have been right in some ethical or philosophical sense of "value" but it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order. *Missouri v. Jenkins*, 491 U.S. 274, 285, 109 S.Ct. 2463, 2470, 105 L.Ed.2d 229 (1989); *Harsch v. Eisenberg*, 956 F.2d 651, 663 (7th Cir.1992); *Bandura v. Orkin Exterminating Co.*, 865 F.2d 816, 822 (7th Cir.1988); *569 *Tomazzoli v. Sheedy*, 804 F.2d 93, 98 (7th Cir.1986) (per curiam); *Kirchoff v. Flynn*, 786 F.2d 320, 323–26 (7th Cir.1986); *Henry v. Webermeier*, 738 F.2d 188, 195 (1984).

2. The judge committed the same error when he refused to allow paralegal services to be compensated at market rates but instead attempted to compute an hourly *expense* of each paralegal, consisting of the paralegal's weekly salary divided by 40 plus overhead directly attributable to that paralegal, such as health benefits, but excluding general office overhead, such as rent. Paralegals take up space, and they're paid even when they're not working; so the judge plainly underestimated their hourly expense. But his mistake went deeper. He was again trying to determine the value of a service that the market has set its own value on. The Supreme Court has disapproved the approach of basing reimbursement for paralegal expenses on the "cost" of the paralegal, as distinct from the market value of his services, when it is customary to bill separately for the value of those services. *Missouri v. Jenkins*, *supra*, 491 U.S. at 287–89, 109 S.Ct. at 2470–72. The approach is not only unsound; it is futile from the standpoint of economizing on the expense of litigation. It will lead lawyers to substitute their own time, for which they are entitled to be compensated at market rates rather than at some constructed hourly cost, for that of cheaper paralegals.

3. The judge refused to award a risk multiplier—that is, to give the lawyers more than their ordinary billing rates in order to reflect the risky character of their undertaking. This was error in a case in which the lawyers had no sure source of compensation for their services. Suppose a lawyer can get all the work he wants at \$200 an hour regardless of the outcome of the case, and he is asked to handle on a contingent basis a case that he estimates he has only a 50 percent chance of winning. Then if (as under the lodestar method) he is still to be paid on an hourly basis, he will charge (if risk neutral) \$400 an hour for his work on the case in order that his *expected* fee will be \$200, his normal billing rate. If the fee award is to simulate market compensation, therefore, the lawyer in this example is entitled to a risk multiplier of 2 ($2 \times \$200 = \$400$). The need for such an adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent.

The example is oversimplified, because the risk of loss varies over the life of a case. It may be very high at first, but if the plaintiff surmounts the hurdles of the defendant's pretrial motions to dismiss or for summary judgment and proceeds to trial before a jury, it may fall dramatically. That is a refinement a district judge may or may not want to take into account. We are not trying to put him into a straitjacket but are merely emphasizing that the failure to make any provision for risk of loss may result in systematic undercompensation of plaintiffs' counsel in a class action case, where as we have said the only fee that counsel can obtain is, in the nature of the case, a contingent one.

The judge understood all this but said there was no need for any contingency adjustment here because there was no contingency—the risk of the suit's failing was zero. He based this surmise on the fact that most suits, including most class actions, are settled rather than abandoned or decided adversely to the plaintiff—that most plaintiffs therefore get *something* for having sued—and that Continental's shenanigans with respect to its Penn Square loan portfolio had been thoroughly aired in congressional hearings held and widely publicized before these suits were filed. These are not adequate reasons. *Skelton v. General Motors Corp.*, 860 F.2d 250, 258 (7th Cir.1988). Most suits settle for something—have, at the very least, some nuisance value—but the question is, settle for how much? The high-priced lawyers for the class put in thousands of hours before they achieved a settlement, and although the judge found some overstaffing he did not suggest that any of it was due to the lawyers' desire to postpone settling the case.

That after years of stubborn negotiation Continental and the other defendants *570 doubtless would have been willing to pay something to get the case off their backs does not imply that class counsel were certain to obtain a settlement entitling them to a fee commensurate with their efforts. They could have lost everything, because there was considerable doubt whether Continental had actually made any material misrepresentations. A codefendant, Ernst & Whinney, refused to settle and was exonerated of all charges after a long trial.

4. The judge made large across-the-board cuts in two categories of lawyer time—research and conferring. He cut legal research time by 40 percent on the ground that experienced securities counsel don't need to do much research. That clearly is incorrect. No matter how experienced a lawyer is, he has to conduct (or have conducted for him) research to deal with changes in the law, to address new issues, and to refresh his recollection. No one carries the whole of federal securities law—not only the many detailed statutes and regulations but the thousands of decided cases—around in his head, and a lawyer who tries to respond to a motion or brief without conducting fresh research is courting sanctions or a malpractice suit. The judge gave no examples of excessive time spent on legal research—he just had a gestalt reaction that there was too much. That isn't good enough. Likewise with the slashing of hours spent conferring.

Of course we must give weight to the judge's greater familiarity than our own with this suit. But this weight has to be tempered by the fact that most of the lawyers' activity was conducted outside the courtroom (and so the judge's observation), that the case was settled rather than litigated, that it was nonroutine, and that rather than disallowing specific items of unreasonable activity the judge slashed broad categories of activity by arbitrary percentages. That won't do, especially when millions of dollars are at stake. *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 594–95 (3d Cir.1984). The qualification is important: in small cases, the amount at issue in the request for lawyers' fees may be too slight to justify cutting it with laser precision. The meat-axe approach (we called it “trimming fat from a fee application” in *Tomazzoli v. Sheedy*, *supra*, 804 F.2d at 98) may be acceptable in such a case. (The judge awarded only \$6,000 in attorney's fees in *Tomazzoli*.) See also *Ustrak v. Fairman*, *supra*, 851 F.2d at 989 (\$30,000). It is true that in a large case, where the stakes in the attorney's fee determination are greater, so is the burden on the judge because the fee application will be longer and more complex. But in *Evans v. City of Evanston*, 941 F.2d 473, 476–77 (7th Cir.1991), we upheld the district judge's use

of a sampling procedure to determine the reasonableness of a fee request so that he wouldn't have to scrutinize every entry on the lawyers' billing sheets. A judge is not permitted to destroy substantial entitlements to attorneys' fees on the basis of his inarticulate and unsubstantiated dissatisfaction with the lawyers' efforts to economize on their time and expenses.

5. The judge refused to allow the lawyers to bill *any* of their out-of-pocket expenses of using a computerized legal research service (LEXIS). He thought those expenses should be part of the lawyers' overhead. This was another clear error. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir.1991). If computerized research expense were customarily treated in this fashion, lawyers' hourly rates would be even higher than they are, requiring an adjustment in the lodestar. *Missouri v. Jenkins*, *supra*, 491 U.S. at 286–87, 109 S.Ct. at 2470–71. But the more important point is that the market—the paying, arms' length market—reimburses lawyers' LEXIS and WESTLAW expenses, just as it reimburses their paralegal expenses, rather than requiring that these items be folded into overhead. Markets know market values better than judges do. And as with paralegals, so with computerized research: if reimbursement at market rates is disallowed, the effect will be to induce lawyers to substitute their own, more expensive time for that of the paralegal or the computer.

6. The judge refused to award the lawyers prejudgment interest. His reason *571 was that he was using as the lodestar their 1988 billing rates and thus automatically compensating them for the loss of the use of their money. The alternative (described in *Fleming v. County of Kane*, 898 F.2d 553, 562–65 (7th Cir.1990)) would have been to base the award on the rates the lawyers charged when they rendered the services to the class and to add interest on that amount to the present. Both approaches have been deemed acceptable. *Missouri v. Jenkins*, *supra*, 491 U.S. at 282–83, 109 S.Ct. at 2468–69; *Skelton v. General Motors Corp.*, *supra*, 860 F.2d at 255 n. 5. In many, perhaps most, cases the second is more straightforward. The cost of delay in receiving money to which one is entitled is the loss of the time value of money, and interest is the standard form of compensation for that loss. Changes in billing rates from year to year reflect at most only one component of an interest rate—the rate of inflation—and that component may be swamped by factors having nothing to do with the time value of money, such as the demand for and supply of the services of particular lawyers, firms, or specialties, or of the profession as a whole. Suppose that, because of the troubled state of the legal-services market today, the billing rates of the class counsel have actually fallen

since the time when they rendered their services to the class. In that event, to award them a fee on the basis of the current rates would be in effect to award them negative interest. Yet—to recur to the essential touchstone of analysis in these cases—if the lawyers had rendered the services to paying clients, their fees would have been computed and paid at the lawyers' then current billing rates, and the lawyers would have earned interest on those fees to the present. A further consideration is that there may be better information about past than about current billing rates. Past rates are rates that were actually charged to paying clients; current rates may be mere estimates of rates to be charged to those clients.

Again, we don't want to put the judge into a straitjacket. But if he uses current rates, he must be sure to make some provision for the interval between the “current” period and the date the lawyers actually receive their money from the fund for the class. Here the district judge awarded attorneys' fees, on the basis of 1988 billing rates, not in 1988 but late in 1990, leaving a gap of two years.

7. The judge refused to award any money to the named plaintiff for his admittedly modest services; the class lawyers had requested \$10,000 for him. The threshold question is whether a named plaintiff is ever entitled to a fee. The basis for an award of fees in a common-fund case is, as we said, restitutionary, and the law of restitution (excepting salvage in admiralty) generally confines the right to restitution to professionals, such as doctors and lawyers. 2 George E. Palmer, *The Law of Restitution*, ch. 10 (1978). If you dive into a lake and save a drowning person, you are entitled to no fee. The named plaintiff is not a professional; he is, at most, a public-spirited member of the class. Yet the usual formulations of the common-fund doctrine describe the plaintiff rather than his lawyer as the person entitled to be compensated for the expenses he has incurred in conferring a benefit on the (other) beneficiaries of the common fund. See, e.g., *Trustees of the Internal Improvement Fund v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); *Boeing Co. v. Van Gemert*, *supra*, 444 U.S. at 478, 100 S.Ct. at 749. The principal expense is the attorney's fee, but there can be others, provided they are not personal. *Trustees of the Internal Improvement Fund v. Greenough*, *supra*, 105 U.S. at 537–38; *Granada Investments, Inc. v. DWG Corp.*, No. 91–3297, slip op. at 9 (6th Cir. April 30, 1992). Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the

lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable.

The named plaintiff in this case was deposed, which took a few hours, and bore *572 a slight risk of being made liable for sanctions, costs, or other fees should the suit go dangerously awry. *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir.1991). The judge's ground for refusing him a fee was that the risk was negligible because the case was a clear winner and that if the named plaintiff had dropped out because he couldn't hope to be compensated for his modest efforts there were plenty of others to take his place without demanding compensation. The implicit reasoning is that the market would have produced a named plaintiff willing to charge a price of zero, and we think there is enough basis for this conjecture, given the state of the record, to let it stand. The "clear winner" point makes more sense here than in regard to the issue of a risk multiplier, because there the essential question was how large the settlement would be and here the question is whether the named plaintiff was at risk of being made to pay costs or some other sanction if the case went to trial and flopped. That risk was small. Not zero, and not only because the defendants might have won a complete victory at trial as Ernst & Whinney did; an additional point is that if the case had gone to trial and the defendants had made an offer of settlement under Fed.R.Civ.P. 68 and the class had gone on to win a judgment smaller than the offer, the defendants would have been entitled to reimbursement of their costs, and maybe the class counsel would try to stick the named plaintiff with that bill. But that's a huge "maybe," even if we disregard the practical problems of adapting the 10-day deadline for responding to a Rule 68 offer to the requirement that the judge approve any settlement of a class action. Cf. *Rand v. Monsanto Co.*, *supra*. The plaintiff has failed to prove his entitlement to a fee.

The case must be remanded, however, for a redetermination of the fee due class counsel. This is a regrettable outcome in light of the time that the district judge has already devoted to this manner, and we shall therefore suggest (not order) an alternative method of determination that might save time and expense for everyone. The object in awarding a reasonable attorney's fee, as we have been at pains to stress, is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible. It is infeasible in a class action because no member of the class has a sufficient stake to drive a hard—or any—

bargain with the lawyer. So the judge has to step in and play surrogate client. Apparently judges do this with fair success. A recent study finds that "the federal courts appear to have applied, at least implicitly, principles parallel to the market's in determining and awarding attorney fees" in class actions. William J. Lynk, "The Courts and the Market: An Economic Analysis of Contingent Fees in Class-Action Litigation," 19 *J.Legal Stud.* 247, 260 (1990). But efforts to play the role conscientiously can sometimes backfire, entailing the protracted and ultimately futile expenditure of judicial time that we have reviewed in this opinion.

The judicial task might be simplified if the judge and the lawyers bent their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character. This was a contingent fee suit that yielded a recovery for the "clients" (the class members) of \$45 million. The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client. Suppose a large investor had sued Continental for securities fraud, and won \$45 million. What would its lawyers have gotten pursuant to their contingent fee contract? We know that in personal-injury suits the usual range for contingent fees is between 33 and 50 percent but we also know that in large commercial litigation with prospects of multimillion dollar recoveries the percentage frequently is tapered—it might be 33 percent of the first million, 25 percent of the next million, and so on down. The class counsel did not present and the judge did not ask for testimony or statistics concerning the fee arrangements *573 in commercial litigation comparable to the present suit. Yet it might be quicker and easier to generate such evidence than it would be to hassle over every item or category of hours and expense and what multiple to fix and so forth. We also remind bench and bar of our approval in the *Evans* case of Judge Zagel's sampling approach to the auditing of lawyers' hours.

Our emphasis on the contingent factor is not inconsistent with the growing judicial skepticism about the use of risk multipliers in statutory fee-shifting cases in which the plaintiff (not a class) is seeking substantial monetary relief. See, e.g., *Burdett v. Miller*, 957 F.2d 1375, 1384 (7th Cir.1992); *King v. Palmer*, 950 F.2d 771 (D.C.Cir.1991) (en banc). The problem with risk multipliers in such cases is that the lawyer has two sources of fees: the statutory fee award, and the contingent-fee contract that he negotiates with his client. The latter takes care of the risk of loss and thus makes the inclusion of a

risk multiple in the statutory award redundant, assuming as the cases do that the purpose of fee-shifting is to assure competent representation for plaintiffs rather than to make the cost of litigation to the successful plaintiff zero. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 725, 107 S.Ct. 3078, 3086, 97 L.Ed.2d 585 (1987) (plurality opinion); *Lenard v. Argento*, 808 F.2d 1242, 1247 (7th Cir.1987); *Gekas v. Attorney Registration & Disciplinary Commission*, 793 F.2d 846, 853 (7th Cir.1986). In a class action suit, however, there is no contract between lawyer and client—no source other than the judicial award of fees to which the lawyer can look for compensation for risk of loss. The situation is thus parallel to that in an ordinary damages case in which the prevailing plaintiff has no entitlement to a judicial award of fees. The difference of course is that instead of the market's dictating the terms on which the lawyer is retained, the judge must do so. But he must try as best he can to simulate the market, and one way to do this is by obtaining evidence about the terms of retention in similar suits, suits that differ only because, since they are not class actions, the market fixes the terms. It is true that in some of those comparable suits a prevailing plaintiff may be entitled to statutory fees, and that cushion may induce the lawyer to accept retention for a smaller contingent fee than he would demand without the cushion. This is a complication to be weighed against the disadvantages of more conventional, but also more cumbersome, methods of determining a reasonable attorney's fee.

A word finally on the lack of adversary procedure in this case. (On the general issue, see *Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255 (1985).) Since the defendants were out of the case by virtue of their settlement—it being agreed that the lawyers' fees were to come out of the settlement amount—they had no incentive to oppose the request for fees, and they did

not. No class member objected either—but why should he have? His gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule. So the lawyers had no opponent in the district court and they have none here. This put more work on the district judge and on us than in a case where there is an adversary to keep the plaintiff and appellant honest. The lawyers are not to blame. They are entitled to seek fees, and entitled to appeal if the district judge cuts them down. But judges in our system are geared to adversary proceedings. If we are asked to do nonadversary things, we need different procedures. When lawyers request fees from a class settlement fund, they are not like adversaries in litigation; they are like artists requesting a grant from the National Endowment for the Arts. Grant-making organizations establish nonadversarial methods for screening applications; perhaps we need something like that for cases like this. The appointment of a special master to advise the court is an obvious possibility, one frequently used in fee matters and especially appropriate in a case such as this that lacks an adversary setting. Of course the master is limited to assessing objective criteria of cost and performance. The judge may *574 have insights to add by virtue of having observed the lawyers in action. But this would not deprive the special master's recommendation of its value to a prompt and accurate determination of the fee to which the class counsel are entitled.

The judgment is reversed, and the matter is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

All Citations

962 F.2d 566

2022 IL App (1st) 201197-U

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.Appellate Court of Illinois, First District,
THIRD DIVISION.Dave MCCORMICK, Robby Brown, T'Lani
Robinson, Dennis Magana, Scott Swindell, and
Davis Torosyna, Individually and on Behalf of All
Others Similarly Situated, Plaintiffs-Appellees,

v.

ADTALEM GLOBAL EDUCATION, INC.,
Formerly Known as DeVry Education Group, Inc.,
a Delaware corporation, and DeVry University,
Inc., a Delaware corporation, Defendants-Appellees
(Richardo Peart, Objector-Appellant).

No. 1-20-1197

|

May 4, 2022

Appeal from the Circuit Court of Cook County, 2018-
CH-004872, Honorable Michael T. Mullen, Judge Presiding

ORDER

JUSTICE McBRIDE delivered the judgment of the court.

*1 ¶ 1 *Held*: In class action, objector did not show that proposed settlement was unfair or that awarding plaintiffs' attorneys 35% of settlement fund was unreasonable.

¶ 2 Adtalem Global Education, Inc. and DeVry University, Inc., who jointly operated DeVry University and Keller Graduate School of Management (collectively DeVry), were sued by Dave McCormick and five others (collectively McCormick) as class representatives of students who claimed that DeVry was able to recruit students and charge higher tuition between 2008 and 2016 by making misleading and deceptive statements about the income and employment statistics of DeVry graduates. McCormick sought actual damages for the tuition premium that they paid for a DeVry education, as well as equitable relief, statutory damages, and attorney fees. Two years later, McCormick reached a preliminary settlement agreement with DeVry, to which Richardo Peart objected. The trial court denied Peart's

objections, gave final approval to the settlement as fair, reasonable, and adequate, and awarded 35% of the settlement as reasonable attorney fees for the "extraordinary" result that plaintiffs' counsel had negotiated despite DeVry's "thin" liability. Peart appeals the denial of his objections and approval of the settlement.

¶ 3 DeVry University was one of the country's largest for-profit colleges. In 2008, DeVry launched a nationwide advertising campaign in which it boasted of a high rate of job placements for its graduates and highlighted above-average salaries at the jobs which they secured. In 2016, the Federal Trade Commission (FTC) sought an injunction and tuition refunds from DeVry based on advertisements, marketing materials, and other recruitment efforts touting allegedly-deceptive representations about the advantages of holding a DeVry degree. The FTC claimed that DeVry misled consumers when stating that 90% of its graduates who actively sought jobs were able to secure them within their field within six months of graduation and that within one year of graduation, bachelor degree holders were earning an average of 15% more than the graduates of other institutions. That same year, the Department of Education pursued DeVry for its marketing practices. The FTC action resulted in an injunction prohibiting DeVry from misrepresenting how many of its graduates were able to secure jobs within their field of study. In addition, in late in 2016, DeVry settled with the two federal agencies by depositing \$49.4 million toward tuition refunds and providing \$50.6 million for loan and debt relief to its former students. In July 2017, the FTC used DeVry's records to identify former students who were eligible for refunds and mailed 173,000 refund checks worth more than \$49 million to those individuals. Not all of those checks were cashed. When there was money left in the fund in April 2019, the FTC mailed a second round of 128,875 checks totaling more than \$9.4 million to individuals who had cashed their first check. According to appellant Peart's calculations, the average per student payment was \$383.31. The FTC did not publicize how many students accepted their part of the \$50.6 million in debt forgiveness that DeVry was obligated to provide as part of the settlement.

*2 ¶ 4 Other actions were filed around the country. There was a \$27.5 million settlement in a securities lawsuit, and smaller settlements, including \$2.25 million for consumer restitution with the state of New York and \$455,000 with the Commonwealth of Massachusetts. This Illinois case was commenced in 2018.

¶ 5 In this Illinois action, a former DeVry student, Nicole Versetto, alleged that DeVry's false statements persuaded prospective students to enroll at its institutions instead of at similar colleges and to also pay a premium for their tuition. Versetto's claims were based on Illinois consumer protection statutes and the common law theories of fraud, breach of contract, breach of fiduciary duty, conversion, and unjust enrichment. DeVry filed a motion to dismiss which was stayed pending an attempt to mediate in February 2019. The parties' first attempt at mediation was unproductive and the litigation resumed with an amended complaint in March 2019 in which Dave McCormick was substituted as the plaintiff. DeVry's motion to dismiss McCormick's first amended complaint was subsequently granted, with leave to replead. Around this time, however, two similar actions against DeVry which students filed in Illinois federal court were dismissed with prejudice and the second amended complaint that McCormick filed against DeVry was met with a motion to dismiss. See *Robinson v. DeVry Education Group, Inc.*, No. 16-CV-7447, 2018 WL 828050 (N.D. Ill., Feb. 12, 2018); *Polly v. Adtalem Global Education, Inc.*, No. 16-CV-9754, 2019 WL 587409 (N.D. Ill., Feb. 13, 2019). The tide that was seemingly in DeVry's favor shifted while McCormick and DeVry were briefing DeVry's motion, when motions to dismiss three similar suits in other parts of the country were denied. See *Rangel v. Adtalem Global Education, Inc.*, 2019 WL 682 (W.D. Tex., Dec. 13, 2019) (magistrate judge recommending that federal district court deny motion to dismiss); *Brown v. Adtalem Global Education, Inc.*, No. 19-00250-CV-W-ODS, 421 F. Supp. 3d 825 (W.D. Mo., 2019); *Robinson v. Adtalem Global Education, Inc.*, No. 19-CV-1505 (N.D. Ga., Nov. 25, 2019) (granting in part and denying in part motion to dismiss, with leave to replead); *Rangel v. Adtalem Global Education, Inc.*, Mar. 12, 2020 (district court accepting and acting on magistrate judge's report and recommendation filed on December 13, 2019 to deny motion to dismiss). Before DeVry's motion to dismiss McCormick's second amended complaint could be heard on January 13, 2020, the parties agreed to a second mediation.

¶ 6 During the mediation session on December 17, 2019, the parties reached an agreement in principle. Limited discovery ensued. This is the settlement at issue on appeal. For purposes of settlement, McCormick proposed to represent the class of approximately 323,000 individuals nationwide who paid for any part of a DeVry education between 2008 and 2018; and DeVry agreed to create a \$44.95 million fund from which to pay the claims of class members, as well as notice costs and attorney fees. The parties agreed that class

members who submitted valid claims would be entitled to a *pro rata* payment from the \$44.95 million in proportion to their number of paid credit hours. By this they meant that if Claimant A paid for twice as many credit hours as Claimant B, then Claimant A's *pro rata* share would be twice that of Claimant B's *pro rata* share. In addition to the *pro rata* payments, the parties agreed that associate and graduate degree holders who had been unable to find jobs within their fields of study within six months of graduation would be paid an additional \$500; and their bachelor degree counterparts would be paid an additional \$1000. It was also agreed that claims would be subject to an offset for debt forgiveness and money that claimants had already received from any of the federal and state government actions against DeVry, up to one-third of the fund. In addition, DeVry became obligated to provide career counseling services to graduates who were unable to find a job within their field of study within six months, and to request that the credit reporting bureaus delete negative credit events that DeVry had reported about student debt. The former students' release to DeVry preserved their right to seek loan forgiveness through the Department of Education's Borrower Defense to Repayment program.

*3 ¶ 7 On May 28, 2020, the trial court granted preliminary approval to the settlement agreement and ordered that notice be given to settlement class members by paper mail and e-mail. A professional class action claims administrator was retained to communicate with eligible individuals by mail, e-mail, website, and telephone.

¶ 8 Class member Peart, who was represented by counsel in Watkinsville, Georgia, filed an objection on September 22, 2020 to the court's final approval of the settlement, arguing primarily that he was better off pursuing "claims for debt cancellation" rather than participating in a settlement in which his compensation would be reduced or nullified by the payments he took in other settlements. (We note that the settlement preserved class members' right to seek debt forgiveness.) Peart also argued that the requested attorney fees were not reasonable.

¶ 9 In a declaration made on September 16, 2020 under penalty of perjury, the claims administrator stated that of 444,039 known class members, 53,132 individuals submitted claims. This response rate of slightly under 12% of potential claims was considered an "exceptional" response. Only a small number of settlement class members, 866, or about .91% of the settlement class, had opted out of the settlement. Only four settlement class members, including

Peart, filed objections to the settlement. The objectors are .0009% of the settlement class.

¶ 10 After hearing arguments on the motion for final approval and objections, the trial court overruled the objections, noted that it “had given great thought to and *** considered all eight factors identified in the *City of Chicago v. Korshak* case *** and conclud[ed] that the proposed settlement is fair, reasonable, and adequate.” The court gave final approval to the settlement and also reviewed McCormick’s motion for attorney fees and granted the requested amount as reasonable. This appeal followed.

¶ 11 Peart’s first of three arguments is that it was an abuse of discretion to approve a settlement that was not in the best interests of class members whose compensation will be offset, potentially entirely, by their compensation from DeVry’s settlement with the Federal Trade Commission (FTC). Peart claimed and was paid \$772.96 from the FTC settlement and contends that he will be “disadvantaged” when that amount either reduces or eliminates his share of the McCormick settlement. The exact amount of Peart’s offset has not been stated by the settlement administrator, but depends upon the total number of paid credit hours of all former students who participate in the McCormick settlement. Peart contends the trial court should have obtained this data and specifically addressed it before giving approval. However, the payment offsets were “hardly mentioned” in the trial court, were not one of the judge’s considerations, and should not be analyzed for the first time on appeal because “that is not a function of an appellate court (not to mention impossible on this record).” Peart also argues that class members whose compensation is going to be reduced by their earlier compensation are being treated differently from first-time claimants, and that this is an intra-class conflict which entitled his subset of the class to the appointment of separate counsel.

¶ 12 A trial court’s final approval of a class settlement is reviewed for an abuse of discretion. *Steinberg v. System Software Associates, Inc.*, 306 Ill. App. 3d 157, 169, 713 N.E.2d 709, 717 (1999). The abuse-of-discretion standard of review is the most deferential standard that is employed in an appeal. *In re D.T.*, 212 Ill. 2d 347, 356, 818 N.E.2d 1214, 1222 (2004). Under this standard, the question is not whether we would take the same view as the trial court, but only whether no reasonable person would take the same view. *Shaun Fauley, Sabon, Inc. v. Metropolitan Life Insurance Co.*, 2016 IL App (2d) 150236, ¶ 45, 52 N.E.3d 427.

*4 ¶ 13 There is strong public policy in favor of settling and the avoiding costly and time-consuming litigation. *Security Pacific Financial Services v. Jefferson*, 259 Ill. App. 3d 914, 919, 632 N.E.2d 299, 303 (1994); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 784 (3rd Cir. 1995) (“the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation”); *In re School Asbestos Litigation*, 921 F.2d 1330, 1333 (1990) (there is a policy of “encouraging settlement of complex litigation that otherwise could linger for years”).

¶ 14 “Many factors enter into the consideration of the parties to litigation in arriving at a compromise settlement. The result is achieved by each party weighing and assessing the strength and weakness of his position.” *People ex rel. Wilcox v. Equity Funding Life Insurance Co.*, 61 Ill. 2d 303, 316, 335 N.E.2d 448, 456 (1975). “Given that a settlement is a compromise, a trial court is not to judge the legal and factual questions by the criteria employed in a trial on the merits.” *Shaun Fauley*, 2016 IL App (2d) 150236, ¶ 45.

“Approval should be given if the settlement offer is fair, reasonable and adequate. These general terms cannot be precisely defined. The Supreme Court has directed that a judge reach ‘an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated’ and to ‘form an educated estimate of the complexity, expense, and likely duration of such litigation *** and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.’ [Citations.]” *Wilcox*, 61 Ill. 2d at 317, 335 N.E.2d at 456.

See also *Steinberg*, 306 Ill. App. 3d at 169, 713 N.E.2d at 717. When assessing the fairness of a proposed settlement, some of the factors the trial judge should consider include:

- “(1) the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement;
- (2) the defendant’s ability to pay;
- (3) the complexity, length and expense of further litigation;
- (4) the amount of opposition to the settlement;
- (5) the presence of collusion in reaching a settlement;

- (6) the reaction of members of the class to the settlement;
- (7) the opinion of competent counsel; [and]
- (8) the stage of proceedings and the amount of discovery completed.”

City of Chicago v. Korshak, 206 Ill. App. 3d 968, 972, 565 N.E.2d 68, 70 (1990).

¶ 15 The record does not support Peart's contention that the trial court lacked sufficient information about the offset for the payments and debt forgiveness that were claimed in other settlements with DeVry and should have engaged in further analysis of the issue, or the contention that the settlement agreement is unfair to those individuals. The record shows that McCormick's counsel gave a detailed presentation of both the facts and law which provided the trial court with ample support for its discretionary decision to approve the settlement as fair, reasonable, and adequate.

¶ 16 The record shows, for instance, that McCormick submitted lengthy memos with his motions seeking preliminary approval and final approval of the settlement agreement. Length is not indicative of quality, but in this instance, both the preliminary and final motion memos were very informative. The memo regarding preliminary approval was 41 pages; outlined the relevant procedural history of the case; included a summary of settlement agreement; and also cited and applied legal authority regarding certification of the class for settlement purposes, naming the six plaintiffs as settlement class representatives, appointing settlement class counsel, giving preliminary approval to the settlement agreement, and approving the proposed notice and distribution. Attached to this memo was a copy of the settlement agreement. The memo regarding final approval was 51 pages, and was similar in content to the preliminary memo, but also addressed the objections that had been received. Its attachments included the settlement agreement, a declaration from the professional claims administrator, and an affidavit from McCormick's counsel.

*5 ¶ 17 In paragraph 2 of the settlement agreement that was twice submitted for the court's review, the parties specify that class members are entitled to compensation for the credit hours they paid for and that an additional \$500 or \$1000 is owed to the degree holders who did not secure a job within their field of study within six months. Paragraph 2 then states that the compensation will be reduced or precluded by the

debt forgiveness and other forms of compensation that former students have received from other forums, in order to prevent double recovery:

“2. SETTLEMENT RELIEF

2.1 Monetary Payments to Settlement Class Members.

a. Settlement Payments.

- i. Each Settlement Class Member who submits an Approved Claim shall be entitled to a *pro rata* payment based on the number of DeVry and/or Keller credit hours that they have paid for. ***

* * *

- ii. Settlement Class Members submitting an Approved Claim who have graduated from a DeVry associate's or bachelor's degree program or Keller master's degree program, but did not obtain employment in their fields of study within six (6) months of graduation, are entitled to a Graduate Payment in addition to their *pro rata* share described in Section 2.1.a.i. Those Settlement Class Members that graduated from a DeVry associate's degree program, but did not obtain employment in their fields of study within six (6) months of graduation, will be entitled to an additional payment of five hundred dollars (\$500.00). Those Settlement Class Members that graduated from a DeVry bachelor's degree program, but did not obtain employment in their fields of study within six (6) months of graduation, will be entitled to an additional payment of one thousand dollars (\$1,000.00). Those Settlement Class Members that graduated from a Keller master's degree program, but did not obtain employment in their fields of study within six (6) months of graduation, will be entitled to an additional payment of five hundred dollars (\$500.00). Graduate Payments will be paid solely from the Settlement Fund.

b. Settlement Payment Offsets.

- i. In order to prevent double recovery, the total payment to which a Settlement Class Member is otherwise entitled to pursuant to Section 2.1.a shall first be offset by an amount equal to: (i) any debt forgiveness or Borrower Defense to Repayment relief received by that Settlement Class member as of

the Effective Date; and (ii) any cash payment and/or debt forgiveness, including but not limited to loan forgiveness and accounts receivable forgiveness, that the Settlement Class Member received pursuant to Defendants' settlements with the Federal Trade Commission, Department of Education, New York Attorney General and Massachusetts Attorney General ('Government Settlement Payments'). By way of example, if the total amount of debt forgiveness and Government Settlement Payments a Settlement Class Member already received is equal to or exceeds the amount of the cash payment to which the Settlement Class Member would otherwise be entitled to under this Settlement, the Settlement Class Member would not receive a settlement payment under the Settlement. If the total amount of debt forgiveness and Government Settlement Payments associated with a particular Settlement Class Member is less than the amount of the cash payment to which the Settlement Class Member would otherwise be entitled, the Settlement Class Member would receive a payment equal to the difference between the two—*i.e.* total settlement payment less the total amount of debt forgiveness and Government Settlement Payments.”

*6 ¶ 18 Thus, prior to oral argument, the trial court was fully apprised of the relevant facts, including details about the offset. The court also had benefit of Peart's written six-page objection in which his primary argument was, “Since the offset from the FTC settlement creates an intra-class conflict and may leave Mr. Peart and many thousands of other class members with zero recovery, the Court should deny final approval.” Although unnecessary, toward the end of arguments, the trial judge even specified, “I have considered everything that has been submitted to me.”

¶ 19 Neither Peart nor his Georgia-based attorney attended the final approval hearing. Nevertheless, Peart's offset argument was addressed by one of McCormick's attorneys, who stated the following:

“Mr. Peart's objection, from our perspective, primarily raises issues with respect to the offset mechanism in the settlement. He largely contends that it treats [groups of class members] differently, and therefore, unfairly, but really the opposite is true.

I think you have to look at this from DeVry's perspective, which is to say that DeVry has been litigating over these alleged misrepresentations with a number of different folks

prosecuting claims in a number of different forums. Not just us here in this class action, but the FTC, for example, a couple of attorneys general as well.

Through those different pieces of litigation, including this settlement were it to be finally approved, DeVry has been issuing refunds to former students. From DeVry's perspective, it doesn't matter what mechanism those refunds are made through, whether it's through the FTC or this settlement or otherwise. Money is fungible at the end of the day.

What does matter to DeVry, though, is that thus far, absent this settlement, only a limited number of its former students have actually been able to receive refunds. For example, the FTC settlement involved approximately 173,000 former students that were able, under the terms of that deal, to make claims. This case, as your Honor knows, involves several hundred thousand. So the point is that certain folks have already received refunds and others have not.

Here that mechanism would be offset and actually creates more fairness. What it does is it ensures that nobody is getting out ahead of anyone else. Everyone is starting at the same starting line. No one has an advantage in terms of having previously received funds and then getting more funds. So what it allows us to do here is ensure that everybody's refunds are accounted for once, and everybody has the same opportunity to claim under this settlement.

It's also important to note, your Honor, that this was a significant negotiating point for DeVry. I believe throughout our negotiations and I still believe today that DeVry would not have offered the same amount of money in the settlement fund absent this offset.

You know, there's some mention of Mr. Peart wanting additional debt relief that he doesn't get. That's not really tied to the offset at all, your Honor; and as I mentioned previously, this settlement specifically preserves his ability to seek additional debt forgiveness through the Department of Education.”

¶ 20 Accordingly, we find that there is no basis for Peart's argument that payment offsets were “hardly mentioned” in the trial court or that it would be “impossible” from the record for a reviewing court to address the topic. Furthermore, the quoted portion of the oral arguments effectively refutes Peart's contention that the offsets are unfair to him and others like him. The offset language ensures that all former students will be compensated equally and that “double” claimants such as

Peart will not recover double compensation or double debt forgiveness through the McCormick litigation. During oral arguments, McCormick's attorney disclosed that the offset terms were "a significant negotiating point for DeVry," and thus were a key to reaching a settlement at all. There was no apparent reason to appoint separate counsel to represent Peart and others who are receiving the same compensation as their classmates. To the extent that Peart is arguing that the settlement is unfair in general, the trial court made a final determination that the class settlement was fair, reasonable, and adequate. In making this decision, the trial court reviewed the parties' written submissions, the four objections to the settlement, which included the objection filed by Peart, and heard arguments regarding all eight of the *Korshak* factors concerning fairness, reasonableness, and adequacy. *Korshak*, 206 Ill. App. 3d at 972, 565 N.E.2d 68. While Peart is apparently displeased by the settlement, his argument falls far short of meeting his burden to show that the trial court's ruling was an abuse of discretion.

*7 ¶ 21 Peart's second argument is that it was an abuse of discretion to award attorney fees as a percentage of the settlement when some of that money will revert to DeVry as unclaimable by class members who successfully took part in other settlements, primarily the FTC action. Peart estimates that up to 100,000 class members made claims in the FTC action and that this means only \$30 million of the \$44.9 million fund will be paid to claimants in the current action and the remainder of the fund will revert to DeVry. Peart's estimation is that awarding \$15.7 million in attorney fees overcompensates counsel by \$5.24 million. Peart's written objection to final approval of the settlement included this argument and these figures. Peart's solution is that we order the trial court to reconsider the award, based on what Peart considers to be the "actual benefit" to the class.

¶ 22 This is not a persuasive argument. Peart is proposing that McCormick's counsel not be compensated for their advocacy and communication with the entire class for two years and for ultimately negotiating a settlement that benefits all class members. An attorney who recovers a common fund for the benefit of persons other than the attorney or the client is entitled to reasonable attorney fees from the fund as a whole, so as to prevent unjust enrichment to those other individuals. *Scholtens v. Schneider*, 173 Ill. 2d 375, 385, 671 N.E.2d 657, 662 (1996). As discussed below with regard to Peart's next argument about the attorney fees, the trial court based the award on the "extraordinary resolution" that McCormick's counsel achieved in this case despite DeVry's "thin" liability.

McCormick and DeVry negotiated a compromise that gives a mix of financial and nonfinancial benefits to all the class members. Under the negotiated resolution of the case, class members are entitled to financial compensation which will, in some instances, be reduced or eliminated by the compensation those individuals already claimed in the other actions. In addition, class members' nonfinancial entitlements include preservation of the right to obtain loan forgiveness through the Department of Education's Borrower Defense to Repayment program, under which federal direct student loan borrowers who were defrauded by a school may seek forgiveness of their loans. Class members will also benefit from DeVry's obligation to ask the credit reporting bureau to delete negative events that were reported about their DeVry accounts. Class members are also entitled to continue using DeVry's career counseling services past the typical cutoff date for former students. Thus, due to counsel's advocacy, Peart and his fellow class members are receiving a package of financial and nonfinancial compensation in the present without the expense, uncertainty, and time of further litigation. He may have preferred greater financial compensation and is arguing that attorney fees should be based strictly on financial payments. However, he cites no authority for that proposition and, in our opinion, it would be unjust for plaintiffs' counsel to have worked for and obtained "extraordinar[il]y" positive results for the entire class, despite "thin" grounds for negotiating with DeVry, yet be compensated for only a portion of the settlement. The attorneys' efforts created a common fund and the attorneys are equitably entitled to reasonable attorney fees for that work. *Scholtens*, 173 Ill. 2d at 385, 671 N.E.2d at 662.

¶ 23 Peart's final argument is that the attorney fee award of 35% of the settlement was "unreasonably high" and a "windfall" for a case that was actively litigated for less than two years, "never advanced beyond the motion to dismiss stage," and "piggybacked" on the FTC action. He contends the trial court should have required evidence of the legal work in order to perform a "lodestar" cross-check. He also argues that the judge's only stated reason for exceeding a 25% benchmark was being "very familiar with what appropriate fees are."

*8 ¶ 24 When determining a fee award in class action litigation, the trial court has discretion to use either the percentage-of-recovery or lodestar methods. *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235, 243-44, 659 N.E.2d 909, 914 (1995). In McCormick's motion for attorney fees, expenses, and incentive awards to the class

representatives, McCormick contended that the percentage-of-the-recovery method of determining attorney fees was the most suitable in this case. Under the percentage-of-recovery approach, reasonable attorney fees are awarded as a percentage of the amount that counsel recovered on behalf of the class. *Brundidge*, 168 Ill. 2d at 238, 659 N.E.2d at 911. Under the lodestar approach, the reasonable value of services rendered, based upon the number of hours that counsel worked, is increased by a multiplier which accounts for the complexity of the litigation, the contingent risk that counsel took on, and the benefit conferred upon the members of the class. *Brundidge*, 168 Ill. 2d at 239-40, 659 N.E.2d at 912.

¶ 25 In the motion, McCormick's counsel offered to provide the data and caselaw the court needed to perform a lodestar cross-check of the reasonableness of the fee award as determined under the percentage method, and cited *Shaun Fauley*, 2016 IL App (2nd) 150236, ¶ 59, for the proposition that the court was not required to use both methods. The trial judge did not, however, ask counsel to perform a lodestar calculation or submit their underlying records.

¶ 26 Peart cites no authority indicating that the lodestar method was preferable to the percentage-of-recovery method in this instance, *i.e.*, that the trial judge's choice of methods was an abuse of discretion. He also cites no authority for his proposal that fees be calculated under both methods as a cross-check. In fact, numerous criticisms have been lodged against the lodestar method since it originated in the federal Third Circuit and went into wider practice in the early 1970's. *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923, 654 N.E.2d 483, 490 (1995) (“the lodestar approach has been subjected to increased scrutiny as its deficiencies began to offset or exceed its benefits”). A task force appointed by the Third Circuit to compare the respective merits of the percentage-of-recovery and lodestar methods reported that the lodestar method:

“increases the workload of an already overtaxed judicial system, *** creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law, *** has led to abuses such as lawyers billing excessive hours, *** creates a disincentive for the early settlement of cases, *** does not provide the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered, *** [and] is confusing and unpredictable in its administration.” *Ryan*, 274 Ill. App. 3d at 923, 654 N.E.2d at 490 (citing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 246-49 (1985) (*Third Circuit Report*)).

See also *Brundidge*, 168 Ill. 2d at 242-43, 659 N.E.2d at 913 (quoting Macey & Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U.Chi.L.Rev. 1, 54 (1991)) (in which the supreme court criticized the lodestar method in part because “[e]valuating the hours actually expended is a laborious, burdensome, and time-consuming task that may be biased by hindsight,” and “[t]he risk multiplier is little short of a wild card in the already uncertain game of assessing fees under the lodestar calculation”). The task force recommended retaining the lodestar for some statutory fee cases but concluded that the percentage-of-recovery was the best way to calculate reasonable attorney fees in class action cases. *Ryan*, 274 Ill. App. 3d at 923, 654 N.E.2d at 490-91 (citing *Third Circuit Report*, 108 F.R.D. at 255-56). Peart's argument that a method that is disfavored in class actions should have been used at least for a cross-check of the fee award is an argument for inefficiency. He is proposing what the supreme court disapproved of in *Brundidge*: “protracted satellite litigation involving the attorney fees award” as the trial court determines “the reasonable fees to be awarded based upon hourly rates and the reasonable number of hours expended.” *Brundidge*, 168 Ill. 2d at 243, 659 N.E.2d at 913 (acknowledging “valid criticisms” against the lodestar method). Nevertheless, it would have been in the trial judge's discretion to conduct a cross-check. *Brundidge*, 168 Ill. 2d at 244, 659 N.E.2d at 914 (“The decision to award fees based on the lodestar or percentage method is a matter within the sound discretion of the trial court, considering the particular facts and circumstances of each case.”). Peart has not persuasively argued that it was error to proceed solely under the percentage method that is favored in class actions. Furthermore, in addition to being efficient and fair, the percentage approach is likely what the class members and counsel would have negotiated when counsel agreed to take on the case. *In re Capital One Telephone Consumer Protection Act Litigation*, 80 F. Supp. 3d 781, 793 (N.D. Ill. 2015) (indicating that the “normal practice” in consumer class actions is to negotiate compensation based upon a percentage of the recovery). “This is so because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a [large class of] lightly-injured plaintiffs likely would not be interested in doing.” *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 501 (N.D. Ill. 2015). “The class would not have negotiated a compensation scheme that required a level of monitoring the class members were not interested in or capable of providing.” *Capital One*, 80 F. Supp. 3d at 795. Instead, the class would

have chosen the compensation scheme that required the least monitoring to align the incentives of the class and its counsel—the percentage method.” *Capital One*, 80 F. Supp. 3d at 795. We do not find that the trial court used an improper standard or procedure in determining attorney fees.

*9 ¶ 27 Also, the record belies Peart’s statement that the award was based solely on trial court being “very familiar with what appropriate fees are.” The record shows that the court undertook an in-depth analysis of the facts and had ample evidentiary and legal basis for the 35% award. Consistent with the thorough presentation of facts and law that McCormick’s attorney made in seeking the trial court’s preliminary and final approvals of the settlement agreement, McCormick’s attorney gave the trial court a comprehensive, 29-page memo in support of the motion for attorney fees, expenses, and incentive awards for the class representatives. The memo set out the procedural history of the case, discussed relevant authority, and explained why counsel considered \$15,732,500 (35% of the settlement) to be fair compensation for the work and risks that were undertaken and the result that was achieved. The memo also provided the settlement agreement and release, and sample settlement notices and claim forms which the attorneys had distributed to class members. Also attached to the memo were declarations from plaintiffs’ co-counsel Benjamin H. Richman (eight pages) and Robert L. Teel (three pages) regarding their efforts on the case between 2016 and 2020 (see 735 ILCS 5/1-109 (West 2018) (providing for a verified document under penalty of perjury)).

¶ 28 The memo summarized that the settlement was based on allegations that DeVry’s 90% placement claim and higher income claim enabled it to charge a tuition premium (not on allegations that a DeVry degree was valueless, but that a DeVry degree was more expensive than it would have been). Counsel recounted that it was disputed as to whether DeVry’s statements were inaccurate and how much of a tuition premium it had charged; that similar suits against law schools had been dismissed; and that there had been a significant risk that the litigation would not succeed. Counsel’s familiarity with the litigation included two years in motion practice and discovery in federal court before filing in state court, as well as participation in some of the other class actions that were filed in other parts of the country. The state court pleading benefitted from the success and failures of plaintiffs in other jurisdictions. In state court, there was motion practice, settlement negotiations, an unfruitful mediation with Hon. Layn R. Phillips (Ret.), rulings favorable to DeVry which had rekindled its inclination to litigate

rather than use alternative dispute resolution, and then rulings that favored McCormick and restarted the negotiations. After written submissions and telephone conferences with Judge Phillips, there was another all-day mediation session. The attorneys reached an agreement in principle that day, negotiated further, and then agreed to the written terms of settlement and notice that received the court’s preliminary approval. Counsels’ subsequent work included responding to inquiries and opposing objections.

¶ 29 The supporting memo included Illinois state and federal court cases in which attorney fees were awarded in the 30-to-39% or higher range. See *Ryan*, 274 Ill. App. 3d at 922, 654 N.E.2d at 489 (under Illinois law, “an attorney is entitled to an award from the [common] fund for the reasonable value of his or her services.”); *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992) (“The object in awarding a reasonable attorney’s fee *** is to give the lawyer what he would have gotten in the way of a fee in an arm’s length negotiation, had one been feasible.”); *Taubenfeld v. AON Corp.*, 415 F.3d 597, 600 (7th Cir. 2005) (approving of the trial court’s reliance on “a table of thirteen cases in the Northern District of Illinois where counsel was awarded fees amounting to 30-to-39% of the settlement fund”); see also Herbert Newberg & Alba Conte, *Newberg on Class Actions*, § 15.83 (William B. Rubenstein ed., 5th ed.) (50% of a common fund is the upper limit of a reasonable fee award).

¶ 30 During the hearing, the trial judge stated that he was familiar with appropriate awards because he had practiced law for 30 years before becoming a judge and subsequently presided over many class actions. Also, as “the Judge on this case since its inception in Cook County,” he had observed McCormick’s attorneys to be “highly experienced and more than competent.” The judge reviewed precedent and the identified theories of liability and this information confirmed for the court that there had been “significant risk in this case.” Nonetheless, McCormick’s capable counsel had overcome DeVry’s “thin liability” and performed “an extraordinary job” *** to secure the amount of money for the class.” The judge also found that the settlement was “truly an extraordinary resolution to the great benefit of the class” and deemed the 35% fee request to be fair and reasonable compensation.

*10 ¶ 31 This record is contrary to Peart’s contention that the trial judge’s only reason for awarding 35% was being “ ‘very familiar with what appropriate fees are.’ ”

¶ 32 The fact that Peart is able to cite three cases suggesting 25% as a benchmark in common fund cases is of no moment. See *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272-73 (9th Cir. 1989) (“We leave to the district court the task of determining what this reasonable percentage should be. Nevertheless, the district court should take note that 25 percent has been a proper benchmark figure, which it can then adjust upward or downward to fit the individual circumstances of this case”); *In re Home Depot Inc.*, 931 F.3d 1065, 1076 (11th Cir. 2019) (“In this Circuit, courts typically award between 20-30%, known as the benchmark range.”); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 51 (2d Cir. 2000) (quoting, 1 Alba Conte, *Attorney Fee Awards* § 2.02 (2d ed.1993)) (25% is a “ ‘formula born from judicial practice and experience,’ ” however, the court is “disturbed by the essential notion of a benchmark” and cautions that a benchmark is not a “substitute for the searching assessment that should properly be performed in each [common fund] case.”). In our opinion, even if the trial

judge had used 25% as a starting point, he gave reasons for increasing that percentage, including that he was in the best position to assess the circumstances as he was “the Judge on this case since its inception in Cook County,” and that the attorneys were skilled litigators who undertook significant risk in overcoming DeVry's thin liability and achieving an extraordinary settlement for the class. On this record, we do not find that the 35% award was an abuse of discretion.

¶ 33 Affirmed.

Presiding Justice Gordon and Justice [Burke](#) concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2022 IL App (1st) 201197-U, 2022 WL 1417513

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678 F.Supp.2d 806
United States District Court,
E.D. Wisconsin.

Dionne McKINNIE, Plaintiff,

v.

JP MORGAN CHASE BANK, N.A., Defendant.

Case No. 07–CV–774.

|

Dec. 31, 2009.

Synopsis

Background: Plaintiff brought class action against bank alleging that its automated teller machines (ATMs) violated Electronic Fund Transfers Act (EFTA) by failing to properly notify ATM users that fee would be imposed. Parties negotiated settlement and moved for final approval, and plaintiff moved for attorney fees.

Holdings: The District Court, J.P. [Stadtmueller](#), J., held that:

fairness, adequacy and reasonableness of proposed settlement weighed in favor of its approval;

reverter clause and clear sailing provision did not render agreement unfair or unreasonable;

contingency fee arrangement was appropriate method of attorney fees;

class counsel's request for attorney fees was reasonable and appropriate; and

it was not appropriate or warranted to award attorney fees to objector.

So ordered.

Attorneys and Law Firms

***809** [John D. Blythin](#), [Robert K. O'Reilly](#), [Corey Mather](#), Ademi & O'Reilly LLP, Cudahy, WI, [Marvin A. Miller](#), Miller Law LLC, Chicago, IL, for Plaintiff.

[Mark B. Blocker](#), Sidley Austin LLP, Chicago, IL, for Defendant.

ORDER FOR JUDGMENT AND JUDGMENT

J.P. [STADTMUELLER](#), District Judge.

Plaintiff Dionne McKinnie (“McKinnie”) filed this class action lawsuit alleging that the automated teller machines (ATM's) owned by defendant JP Morgan Chase Bank, N.A. (“Chase”) violated the Electronic Fund Transfers Act by failing to properly notify ATM users that a fee would be imposed. The parties negotiated a class action settlement of the claims and this court granted preliminary approval. The action is now before the court for final approval of the settlement and for an award of attorneys' fees to class counsel.

BACKGROUND

McKinnie filed her class action suit on August 28, 2007, asserting that language appearing on the screens of Chase ATM's violated [15 U.S.C. § 1693b\(d\)\(3\)\(C\)](#) of the Electronic Funds Transfer Act (EFTA) by failing to properly disclose ATM fees. The language stated that a fee “may” be assessed and did not explicitly state that a fee “will” be charged for the transaction. Before defendant Chase filed an answer to the complaint, however, the parties requested an interim stay of the proceedings because a nearly identical class action lawsuit was on appeal before the Seventh Circuit Court of Appeals. That case, *Paradise v. JP Morgan Chase Bank, N.A.*, Appeal No. 07–3027, was originally filed in the Northern District of Illinois by the same counsel as the instant case and asserts similar claims arising from allegedly deficient Chase ATM fee notices.

The case filed in the Northern District of Illinois was initially named *Mowry v. JP Morgan Chase Bank*. The district court in *Mowry* dismissed the plaintiffs' claims for unjust enrichment and for actual damages under the EFTA. The court also denied class certification after concluding that the putative class did not meet the requirement for adequacy of the class representatives because of the close relationships between class counsel and two of the plaintiffs, nor did it meet the ***810** requirement that a class action lawsuit be the best method for adjudicating the members' claims. See *Mowry v. JP Morgan Chase Bank, N.A.*, No. 06 C 4312, 2007 U.S. Dist. LEXIS 44222, at *11, 13, 19 (N.D. Ill. June 19, 2007); No.

06 C 4312, 2007 WL 1772142, at *4–6 (N.D.Ill. June 19, 2007). Mowry and another plaintiff accepted Rule 68 offers of judgment following denial of the class certification. The two remaining plaintiffs filed a notice of appeal and the case was re-captioned as *Paradise v. JP Morgan Chase Bank*. The case was then assigned to the Seventh Circuit mediation section.

Meanwhile, McKinnie filed her action in the Eastern District of Wisconsin. The parties in the instant case requested a stay based on the pending appeal in the very similar *Paradise* case. This court granted the stay on February 21, 2008, 2008 WL 466156, and administratively closed the *McKinnie* case. The parties then participated in settlement negotiations with the assistance of a Seventh Circuit mediator and reached a class-wide settlement agreement covering the claims asserted in both *Paradise* and *McKinnie*. Because *Paradise* was before the Seventh Circuit while *McKinnie* remained at the district court level, the parties decided to present their proposed settlement for approval to this court.

The parties filed a motion in the *McKinnie* case requesting that the court lift its stay and reopen the case, which this court did on March 11, 2009. The parties also sought preliminary approval of their class action settlement and the court granted approval on April 8, 2009, 2009 WL 4782736. The court's order provided conditional certification of a nationwide class consisting of:

All persons in the United States who used an ATM card issued by a financial institution other than Chase to withdraw cash from an ATM operated by Chase and were charged a fee by Chase for use of the ATM between August 9, 2005, and September 10, 2006.

The settlement requires that Chase reimburse claiming class members for all ATM fees paid during the relevant period, up to a maximum total sum of \$2.1 million. The costs of class notice, settlement administration and class counsel's fees and expenses are paid out of the settlement amount under the agreement. The agreement terms provide that any undistributed funds remaining after the deduction of class claims, attorneys' fees, and expenses are to be divided as follows: a) 35% to be contributed to a *cy pres* charity; and b) 65% to be returned to Chase. The settlement also states that

Chase will take no position on class counsel's fee petition, provided that they do not seek fees in excess of 33% of the total settlement fund.

The agreement specifies that a settlement administrator will provide both publication notice and internet notice to class members. The parties chose these forms of notice because the class members are non-Chase customers and Chase does not possess names or contact information for these individuals. The settlement administrator published notice of the settlement in two national publications, *Parade* and *USA Weekend*, and posted the notice on an internet website, at a cost of more than \$350,000. The settlement notices resulted in the filing of 1,188 timely claims and 13 claims postmarked after the designated claims expiration date.

The court's order granting preliminary approval specified that class members had until August 10, 2009, to opt out of the class or file written objections. No class members opted out. However, two objections were filed on the deadline date. The objection filed by Chance and Rona White included a notice of intervention and indicated an intent to appear at the Final *811 Settlement Approval Hearing. Chance White ("Objector White") appeared in person at the hearing on September 29, 2009. No other objectors appeared or intervened. Objector White raised objections to the settlement agreement based on the proposed attorneys' fees, the reversion of unclaimed amounts to Chase, and the low response rate of putative class members. The court did not issue a decision on final approval of the settlement at the hearing. Instead, the court advised the parties to revisit the settlement figures, particularly the amounts for attorneys' fees and the *cy pres* contribution, and scheduled a further hearing.

The court held a second Final Settlement Approval Hearing on November 24, 2009. At the hearing, the parties reported that approximately \$187,000 would be paid out to claiming class members. The parties also reported that Chase would pay approximately \$395,000 for class notice and settlement administration, and approximately \$312,000 as a *cy pres* contribution. Class counsel notified the court that it was filing an amended attorneys' fees petition requesting a reduced award of \$625,000. Objector White also appeared at the hearing and expressed continued concerns about the amount of the attorneys' fees and advocated an increase in the amount of the *cy pres* award. The court instructed Objector White to submit his argument regarding the structure of the settlement in writing and instructed the parties to file responses. The

court indicated that it would issue a written decision on both the structure of the settlement and the matter of attorneys' fees.

Objector White did not file any written argument. Instead, he filed a motion to withdraw his objection. Objector White noted in his brief that he had received clarification regarding the amount and distribution of the funds under the proposed settlement and no longer wished to pursue his objection. The court granted Objector White's motion on December 8, 2009, and the objection was withdrawn with prejudice. Objector White then filed a motion for attorneys' fees in the amount of \$25,000 for his involvement in the proceedings.

ANALYSIS

The court will now consider the appropriateness of granting final approval of the settlement agreement and resolve the matter of attorneys' fees.

I. Final Approval of the Settlement Agreement

Federal courts look favorably upon the settlement of class action lawsuits. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir.1996). However, the district court must give “careful scrutiny” to proposed class action settlements and must consider whether a given settlement is “fair, adequate, and reasonable, and not the product of collusion.” *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 748 (7th Cir.2006) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir.2002)). In evaluating the fairness of a proposed settlement, a court considers the strength of the plaintiffs' case compared to the amount of the offer, the complexity and likely length of the litigation, the amount of opposition to the settlement, the opinion of counsel and the stage of the proceedings. *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir.2006).

The court finds that the proposed settlement agreement is fair, adequate, and reasonable. First, the settlement is fair and adequate because claiming class members will be made whole for all ATM fees they paid to Chase during the period in question. Full reimbursement for ATM fees actually paid by the claimants appears *812 eminently reasonable. In contrast, a pro rata distribution of the \$2.1 million settlement amount would result in a windfall to the approximately 1,200 individual claimants of far more than any damages suffered from paying \$2.00 transaction fees after receiving an allegedly inadequate warning.

Second, the fairness of the settlement is apparent when the court considers the strength of the plaintiffs' case. The plaintiffs were unsuccessful at the district court level in the *Paradise* case, and they risk an unfavorable outcome in the Seventh Circuit Court of Appeals or in this court if they choose to pursue further litigation of their claims. Moreover, the Sixth Circuit subsequently issued a decision which calls the validity of the plaintiffs' claims into question. The Sixth Circuit held in *Clemmer v. Key Bank National Association* that an ATM on-screen notice stating that a fee “may” be charged for a transaction provided adequate notice and did not constitute a violation of the EFTA. 539 F.3d 349, 355 (6th Cir.2008). This court may very well reach the same conclusion if asked to rule on the issue. Thus, the settlement is fair, adequate, and reasonable given the *Clemmer* decision and the relative weakening of the plaintiffs' case that followed.

The lack of significant opposition to the settlement also supports approval of the agreement. Approximately 1,200 class members filed claims in response to the settlement notice. However, not a single person opted out of the class and only two objections were filed. Objector White was the only class member to appear at the hearing, and he has since withdrawn his objection. Additionally, counsel endorses the settlement and it was achieved after arms-length negotiations facilitated by a mediator for the Seventh Circuit Court of Appeals. These factors suggest that the settlement is fair and merits final approval.

Lastly, the two objections filed with the court do not raise convincing arguments against the fairness of the proposed settlement. The objections primarily oppose the amount of the requested attorneys' fees, the existence of a “reverter clause” returning 65% of the undistributed award amount to Chase, and the inclusion of a so-called “clear sailing provision” whereby Chase agrees not to oppose counsel's petition for attorneys' fees. None of these challenged terms render the settlement *per se* unreasonable. The amount of fees sought by class counsel equals approximately 30% of the settlement amount, which is common among contingency fee arrangements and is not facially unreasonable. Parties in a class action settlement may negotiate attorneys' fees based on a percentage of the entire common fund, and are not required to base the fees on class members' claims against the fund. See *Williams v. MGM-Pathe Communications, Co.*, 129 F.3d 1026, 1027 (9th Cir.1997). In addition, the reversion of unclaimed funds to the defendant is not objectionable when

class members receive full recovery for their damages and the parties agree to the reversion. *Mangone v. First USA Bank*, 206 F.R.D. 222, 230 (S.D.Ill.2001). Finally, a defendant in a class action settlement has no obligation to oppose the fee petition submitted by class counsel. Thus, the fact that the proposed settlement includes these terms does not render it inherently unfair or unreasonable.

Nevertheless, the combination of a reverter clause and a clear sailing provision may warrant close scrutiny by the court and may, in a given case, lead the court to deny approval of the settlement. See *Sylvester v. CIGNA Corp.*, 369 F.Supp.2d 34, 45–46 (D.Me.2005) (denying *813 approval of proposed class action settlement because the parties failed to overcome the presumption of unfairness presented by the inclusion of both a reverter clause and a clear sailing provision within the settlement agreement). However, the inclusion of both a reverter clause and a clear sailing provision does not compel rejection of the settlement agreement here. The court concludes that there has been no collusion between the parties in the instant case. The claimants will receive full damages and Chase will pay more than \$310,000 to a *cy pres* charity. The sum of these two amounts approximates the \$500,000 statutory penalty under the EFTA for violation of the statute. There remain no objections to approval of the settlement from class members who intervened or appeared at the approval hearings. Further, the settlement was achieved after arms-length negotiation with the assistance of a Seventh Circuit mediator. The reverter clause and clear sailing provision do not render the settlement agreement unfair or unreasonable when viewed against all other relevant considerations.

The two objections (one of which has been withdrawn) also contest the settlement's method of noticing class members, the method of distributing the settlement award, and the allegedly burdensome nature of the claim filing process. However, providing individual notice to each potential claimant was infeasible and publication constituted the “best notice that is practicable under the circumstances,” as required under *Federal Rule of Civil Procedure* 23(c) (2). The class members in this case are non-customers of Chase who used Chase ATM's. Therefore, Chase did not possess identifying information for these individuals. In such circumstances where individual notice is not feasible, publication of notice in a nationally-circulated newspaper and in an online posting constitutes an acceptable substitute. *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 786 (7th Cir.2004).

Further, the method of distributing the settlement fund does not render the agreement unfair or unreasonable. The use of a *cy pres* contribution is proper and acceptable in class action settlements, particularly when locating and ascertaining the status of all individual class members is prohibitively difficult or expensive. See *In re Mexico Money Transfer Litig.*, 164 F.Supp.2d 1002, 1031 (N.D.Ill.2000). One of the objections opposes the reversion of any unclaimed funds to Chase and suggests that all unclaimed funds should instead be awarded to the *cy pres* charity. However, as previously noted, the inclusion of a reverter clause within a class action settlement agreement is not itself problematic. Indeed, a reverter clause can be a useful tool in negotiating a settlement when the total number of eventual claimants is unknown. A defendant may agree to a higher maximum settlement amount—which allows more claimants to be fully compensated for their damages if a large number of claims are filed—in return for possible reversion of a portion of the unclaimed funds. Under the proposed agreement, Chase will contribute more than \$310,000 to the named *cy pres* charity. This amount is significant and, in combination with the damages for the claimants, the costs for publishing the notices and administering the settlement, and the cost of attorneys' fees, provides adequate deterrence and punishment for the alleged wrong-doing. In addition, as the court noted, distributing any unclaimed amounts to claimants on a pro rata basis will result in an unwarranted windfall for those claimants. The court finds no unfairness arising from the settlement's proposed methods of distributing the settlement fund.

Further, the court does not find the objections to the claim filing process to be *814 meritorious. One objector argued that requiring claimants to attest that they withdrew cash from a Chase ATM using a non-Chase card “under penalty of perjury” made the process too onerous and deterred potential class members from filing claims. However, the court does not believe that requiring claimants to verify on the claim forms that they meet class requirements is improper. The settlement is not unfair based on this condition.

The “most important factor” in evaluating the fairness of a class action settlement is “the strength of the plaintiff's case on the merits balanced against the amount offered in the settlement.” *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir.2006) (quoting *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir.1979)). The amount that Chase will ultimately pay out to class members and the *cy pres* charity is significant when balanced against the strength of the

plaintiff's case. The claimants will receive full reimbursement of their ATM fees and Chase is adequately deterred from notifying ATM users that a fee “may” be charged rather than “will” be charged. The court is convinced that the proposed settlement is fair, adequate and reasonable. Therefore, the court will grant final approval of the settlement.

II. Attorneys' Fees

The proposed settlement provides that class counsel will receive an award of attorneys' fees from the common fund. This method of recovering attorneys' fees is known as the “common-fund” doctrine, and holds that class counsel who wins a settlement or judgment creating a commonly-held fund for the benefit of the class is entitled to a reasonable fee drawn from that fund. *See e.g. Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 563 (7th Cir.1994). A district court may award attorneys' fees by either allowing class counsel to recover a percentage of the fund as their fee, the “percentage-of-the-fee method,” or by multiplying the number of hours worked by a reasonable hourly rate, the “lodestar method.” *See Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974–75 (7th Cir.1991). The district court has considerable discretion to determine the reasonableness of attorneys' fees because it has the greatest familiarity with the case and is in the best position to scrutinize the attorneys' work. *Ustrak v. Fairman*, 851 F.2d 983, 987 (7th Cir.1988); *Hyland v. Indicator Lites, Inc.*, 160 F.Supp.2d 981, 984 (N.D.Ill.2001). However, courts must attempt to award the market price for legal services when determining appropriate fees in common-fund cases, “in light of the risk of nonpayment and the normal rate of compensation in the market at the time.” *Taubenfeld v. AON Corp.*, 415 F.3d 597, 598 (7th Cir.2005) (quoting *In re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir.2001)).

A. Fees Sought by Class Counsel

Class counsel seeks an award of fees in the amount of \$625,000, equaling approximately 30% of the \$2.1 million settlement fund. Counsel argues that this amount is appropriate because it simulates the market for small class action claims, which generally involve a contingency fee of one-third of the class fund. Counsel also argues that the total settlement amount offered, \$2.1 million, constitutes the common fund for purposes of calculating attorneys' fees.

An appropriate attorneys' fee award is one that “re-creates” the market for the provided legal services. *Montgomery*

v. Aetna Plywood, Inc., 231 F.3d 399, 408 (7th Cir.2000) (stating that “the measure *815 of what is reasonable is what an attorney would receive from a paying client in a similar case.”). The court accepts counsel's suggestion that the case would be handled on a class action contingency fee basis in the private market. The class members have little motivation to retain counsel on an hourly basis because they are not guaranteed to prevail on their claims and the individual damages suffered were nominal. A contingency fee arrangement is appropriate in such a case because it insulates the plaintiffs from any economic risk if their litigation is ultimately unsuccessful. Therefore, the market rate for the legal services provided by class counsel is a contingency fee. *See Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir.1986) (“When the ‘prevailing’ method of compensating lawyers for ‘similar services’ is the contingent fee, then the contingent fee is the ‘market rate’ ”). The court will award attorneys' fees as a percentage of the common fund because it most closely replicates the market for the legal services provided.

The next determination for the court is whether the percentage should be calculated based on the total settlement fund, or whether it should be calculated based on the actual amount claimed by the class. The answer is important to a determination of class counsel's fees because a relatively small number of class members filed claims and the value of those claims totals approximately \$187,000. Even including the more than \$310,000 to be paid to the *cy pres*, the total amount of the settlement directly benefitting the class is approximately \$500,000. Class counsel's fee award is far lower if based upon the amount claimed against the fund rather than the entire \$2.1 million common fund.

The court finds that an award of attorneys' fees is appropriately based upon the total common fund and not on the amount claimed against it. The \$2.1 million settlement amount was available to the entire class, regardless of the fact that a small number of class members actually filed claims. Therefore, an award of attorneys' fees should be calculated based upon the full benefit. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (stating that the right of absentee class members “to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.”); *See 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions* § 14:6, p. 570 (4th ed. 2002) (stating that *Boeing* settled the issue of whether the benchmark common fund amount for fee award purposes is made up of the

amount claimed by class members or the amount potentially available to class members by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed.). Other courts have upheld attorneys' fee awards based on the entire common fund, even when a portion of that fund was not claimed by class members and reverted to the defendant. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir.2007) (“The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on this basis of the total funds made available, whether claimed or not.”); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295–98 (11th Cir.1999) (upholding an attorney fee award based on the entire settlement fund though a portion reverted to the defendant); *Williams v. MGM–Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir.1997) (holding that the district court abused its discretion by awarding attorneys' fees as one-third of the \$10,000 claimed against the common fund rather

***816** than awarding one-third of the entire \$4.5 million settlement fund in a case where unclaimed funds reverted to the defendant). The court will similarly base its award of attorneys' fees on the entire common fund amount in the instant case.

The remaining determination for the court is whether class counsel's request for attorneys' fees is reasonable and appropriate. Counsel seeks an award of fees and expenses in the amount of \$625,000 equaling approximately 30% of the \$2.1 million common fund amount. An award of 30% falls within the normal percentage range of common fund attorney fee awards approved by courts. *See 4 Newberg on Class Actions* § 14:6, p. 558 (4th ed.2002) (citing a 1996 Federal Judicial Center Study finding that fee awards in common fund class actions were between 20% and 40% of the gross monetary settlement.). This figure may seem high when compared with the approximately \$500,000 to be paid to the class through claim payments and the *cy pres* fund distribution. However, the court concluded above that the appropriate figure for comparison is the total common fund amount of \$2.1 million and not the amount claimed against the fund. The \$625,000 figure also appears high compared with the approximately \$476,000 in attorney hours represented within the billing records submitted by class counsel. (*See O'Reilly Decl.*, Dk. # 44, Exs. AB). However, the total hours that counsel expended on the case is not the determining factor because the court does not apply a “lodestar” method for calculating fees in a class action common fund settlement

such as this one. The “percentage of the fee” method is preferable because it more closely replicates the contingency fee market rate for counsel's legal services. Indeed, “class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.” *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir.1992). Finally, a straight hourly calculation does not properly account for the result achieved by counsel. The settlement agreement guarantees full reimbursement of ATM fees for all claiming class members and guarantees a more than \$300,000 *cy pres* contribution. Counsel negotiated this settlement for claims whose legal merit has been seriously called into question. For these reasons, the court finds that class counsel's fee request is reasonable and will grant an award of \$625,000.¹

B. Fees Sought by Objector White

Objector White is an attorney and requests an award of attorneys' fees in the amount of \$25,000 for his involvement in the settlement proceedings. Objector White argues that he is entitled to an award of fees, despite the fact that he withdrew his objection, because his argument ***817** for a “pro rata” distribution of the common fund resulted in an increased distribution to claimants. He asserts that class members “would have received” payments totaling \$22,416 under the plan of allocation provided in the original settlement, but as a result of his objection, claimants “will receive” \$187,080. This court disagrees.

The settlement agreement provides that all claimants will receive a full refund of all ATM fees paid during the relevant period. Claimants submitted redacted ATM card numbers including the first four digits and last four digits of their 16-digit personal identification number to verify their ATM transactions. (*Ness Decl.*, Dk # 35, Ex. A, at ¶ 3). The settlement administrator then compared these redacted numbers to Chase's database and calculated the highest possible number of transactions for any individual claimant. Using this methodology, the average number of transactions per claimant is twelve and all but two claimants engaged in less than 100 transactions during the period. However, to ensure that no claimant is paid less than their full ATM fees, Chase and class counsel agreed that all claimants will receive a payout based on at least 100 transactions.

Objector White takes credit for the agreement between Chase and class counsel to base all payouts on a minimum of 100 transactions. He asserts that this is the result of his

argument in favor of a pro rata distribution. However, a pro rata distribution would give each claimant a proportionate distribution of the total \$2.1 million common fund based on their number of transactions. It would not simply provide a payout of \$200 to each claimant with less than 100 identifiable transactions. The court does not find that Objector White's involvement resulted in an increased economic benefit to the class based on his pro rata argument. The parties did not heed his suggestion that the common fund be distributed on a pro rata basis. Instead, the parties opposed such a distribution as constituting an unjustified windfall for claimants.

Further, Objector White is not entitled to attorneys' fees because he is a *pro se* litigant. There is considerable authority stating that a court should not award attorneys' fees to a *pro se* litigant who is also an attorney. *In re Texaco Inc. Shareholder Derivative Litig.*, 123 F.Supp.2d 169, 172 (S.D.N.Y.2000) (citations omitted). This is because “a rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf.” *Kay v. Ehrler*, 499 U.S. 432, 438, 111 S.Ct. 1435, 113 L.Ed.2d 486 (1991). This reasoning also applies to a *pro se* attorney objector in a class action settlement. A *pro se* attorney in *In re Texaco Shareholder Derivative Litigation* was denied attorneys' fees after successfully objecting to the attorneys' fees awarded pursuant to a settlement of a shareholders derivative action. 123 F.Supp.2d at 174. The court noted that the *pro se* attorney was not merely representing himself because his objection implicated the interests of other shareholders and that he was not entitled to receive fees for that representation. 123 F.Supp.2d at 172. The court also cited policy concerns supporting its decision, including the policy of encouraging a party to retain counsel in every case, even when the party is himself an attorney. *Id.* at 173. (“If [the *pro se* attorney objector] were permitted to recover fees in this case, a plaintiff who happened also to be a lawyer would be deterred from retaining competent, objective counsel, by the knowledge that he could enrich himself by recovering attorneys' fees if he prevails.”). Objector White is a *pro se* litigant and the *818 court would undermine the policy of encouraging the retention of counsel in all cases if it granted his motion. Thus, an award of attorneys' fees to Objector White is neither appropriate nor warranted.

Accordingly,

IT IS HEREBY ORDERED THAT:

This court finds that the Settlement Agreement has been entered into in good faith following arms-length negotiations and is non-collusive.

This court grants final approval of the Settlement Agreement, including but not limited to the releases therein, and finds that it is in all respects fair, reasonable, and in the best interest of the Settlement Class. Any objections which were filed have been considered and overruled. Therefore, all members of the Settlement Class who have not opted out are bound by this Order for Judgment and Judgment.

Class Certification

The provisionally certified class (the “Settlement Class”) is now finally certified pursuant to Rule 23(b)(3):

All persons in the United States who used an automated teller machine (ATM) card issued by a financial institution other than Chase to withdraw cash from an ATM operated by Chase and were charged a fee by Chase for use of the ATM between August 9, 2005, and September 10, 2006.

Plaintiff Dionne McKinnie and Jason Paradise are designated as class representatives of the Settlement Class.

The law firms of Ademi & O'Reilly LLP and Miller Law LLC are appointed as Settlement Class Counsel.

The certification of the Settlement Class is non-precedential and without prejudice to defendant's rights under the Settlement Agreement if the Settlement Agreement and this Order for Judgment and Judgment do not become effective as provided in the Settlement Agreement.

Class Notice

The Class Notice (as described in the Settlement Agreement) fully complies with the requirements of [Rule 23](#) and due process, constitutes the best notice practicable under the circumstances, and is due and sufficient notice to all persons entitled to notice of the settlement of this lawsuit.

Objections and Opt-Outs

Two objections were filed by Class Members. The Court has considered the objections carefully and has overruled them. None of these objections raise valid concerns about the Settlement Agreement. No person or entity has requested exclusion from the Settlement Class.

CAFA Notice

In compliance with the notice provision of the Class Action Fairness Act, [28 U.S.C. § 1715](#), defendant served timely notice of the settlement to the appropriate officials, and, therefore, the settlement is fully enforceable against all Settlement Class Members (except those who have opted out).

Class Compensation

Defendant shall provide the Class Compensation set forth in paragraph 4 of the Settlement Agreement on the timetable provided in the Settlement Agreement.

Releases

Plaintiff and each Settlement Class Member are determined to have given the releases described in paragraphs 11 and 12 of the Settlement Agreement.

Award of Attorneys' Fees and Costs

The court grants Settlement Class Counsel's application for attorneys' fees and costs in the amount of \$625,000 and awards plaintiff an incentive fee in the amount of \$1,000, finding such fees and costs to be fair and reasonable, and finding that the costs are sufficiently supported.

*819 Other Provisions

The McKinnie lawsuit is dismissed with prejudice as to plaintiff and all members of the Settlement Class without fees or costs except as provided above.

Within seven days of the Effective Date of the settlement agreement (as that term is defined in the settlement agreement), Jason Paradise is directed to file a notice that voluntarily dismisses his appeal, currently pending in the Seventh Circuit, in the case styled as *Paradise v. JP Morgan Chase Bank, N.A.*, No. 07 C 4312.

This court retains jurisdiction over this action, plaintiff, defendant, and all members of the Settlement Class to determine all matters relating in any way to this Order for Judgment and Judgment, the Preliminary Approval Order, or the Settlement Agreement, including but not limited to their administration, implementation, interpretation, or enforcement.

The parties to the Settlement Agreement shall carry out their respective obligations thereunder.

In the event that: 1) the Settlement Agreement is terminated pursuant to its terms; 2) defendant withdraws from the Settlement Agreement; 3) the Settlement Agreement, Preliminary Approval Order, and Order for Judgment and Judgment do not for any reason become effective; or 4) the Settlement Agreement, Preliminary Approval Order, and Order for Judgment and Judgment are reversed, vacated, or modified in any material respect, then: a) any and all orders entered pursuant to the Settlement Agreement shall be deemed vacated, including without limitation the certification of the Settlement Class and all other relevant portions of this Order; (b) the instant action shall proceed as though the Settlement Class had never been certified; and (c) no reference to the prior Settlement Class, or any documents related thereto, shall be made for any purpose; provided, however, that if the parties to the Settlement Agreement agree to jointly appeal a ruling disapproving the Settlement Agreement and the Settlement Agreement is upheld on appeal, then the Settlement Agreement and Final Order and Judgment shall be given full force and effect according to their terms. In the event the settlement does not become final in accordance with the terms of the Settlement Agreement, this Order for Judgment and Judgment shall be void and shall be deemed vacated. Defendant retains the right to oppose class

certification if the settlement is vacated, and the doctrine of res judicata and/or collateral estoppel shall not be applied.

Neither the Settlement Agreement, this Order for Judgment and Judgment, nor any of their provisions, nor any of the documents (including but not limited to drafts of the Settlement Agreement, the Preliminary Approval Order or the Order for Judgment and Judgment), negotiations, or proceedings relating in any way to the settlement, shall be construed as or deemed to be evidence of an admission or concession of any kind by any person, including defendant, and shall not be offered or received in evidence, or subject

to discovery, in this or any other action or proceeding except in an action brought to enforce its terms or except as may be required by law or court order.

IT IS FURTHER ORDERED that the objectors' motion for attorneys' fees (Docket # 46) be and the same is hereby **DENIED**.

All Citations

678 F.Supp.2d 806

Footnotes

- 1 Prior to the withdrawal of his objection, Objector White asserted that res judicata barred class counsel from receiving attorneys' fees for the class action settlement. Counsel received fees in connection with the accepted offers of judgment for the individual plaintiffs in the *Paradise* action. Therefore, Objector White argued, counsel was subsequently barred from receiving any additional award of fees for settlement of this case. However, res judicata does not bar an award of attorneys' fees here. First, the previous attorneys' fee award involved the claims of different parties. The award of fees in *Paradise* was made pursuant to the acceptance of Rule 68 offers of judgment by two individual plaintiffs. In contrast, the instant settlement involves claims on behalf of an entire class. The stipulation for attorneys' fees filed in the *Paradise* case also anticipates a future award of attorneys' fees as a result of appeal of the case. (See O'Reilly Decl., Dk # 35, Ex. M). Therefore, the court cannot find that a stipulated fee award in *Paradise* for offers of judgment precludes an award of attorneys' fees here.

384 Ill.App.3d 401
Appellate Court of Illinois,
Fourth District.

Courtney McNIFF, Plaintiff–
Appellee and Cross–Appellant,
v.

MAZDA MOTOR OF AMERICA, INC.,
Defendant–Appellant and Cross–Appellee.
and
Sam Leman Mazda, Defendant.

No. 4–07–0817.
|
July 18, 2008.

Synopsis

Background: Automobile manufacturer and dealership, which were ordered to pay attorney fees and costs to prevailing consumer in action filed under the Magnuson–Moss Warranty Act, filed motions to reconsider. The Circuit Court, McLean County, [Charles G. Reynard](#), J., denied the motions. Manufacturer and dealership appealed, and consumer cross-appealed.

Holdings: The Appellate Court, [Turner](#), J., held that:

contingency-fee agreement between consumer and attorneys did not limit the amount of fees court could award;

evidence was sufficient to determine reasonable amount of attorney fees;

trial court erred in failing to make attorney fee determination in connection to consumer's response to motion for reconsideration; and

evidence supported attorney fee award based on attorney's standard rate.

Affirmed in part, reversed in part, and remanded with directions.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****600** Matthew D. Jacobson, of Swanson, Martin & Bell, LLP, of Lisle, for appellant.

[William G. Hutul](#), of Law Offices of Norman H. Lehrer, P.C., of Wheaton, and [Daniel G. Deneen](#), of Deneen & Deneen, of Bloomington, for appellee.

Opinion

Justice [TURNER](#) delivered the opinion of the court:

402 ***963** In August 2005, plaintiff, Courtney McNiff, brought suit to recover damages **964 **601** against defendants, Mazda Motor of America, Inc. (Mazda), and Sam Leman Mazda, for breach of written warranty and breach of implied warranty of merchantability. The parties eventually settled. In March 2007, plaintiff filed a petition for an award of costs and attorney fees. In May 2007, the trial court awarded plaintiff's two attorneys a total of \$26,015.50 in fees and costs. Defendant Mazda and plaintiff filed motions to reconsider, both of which the court denied.

On appeal, defendant Mazda argues the trial court (1) erred in awarding attorney fees on an hourly basis when plaintiff entered into ***403** a contingency-fee agreement with her attorneys and (2) abused its discretion in compensating the attorneys. In her cross-appeal, plaintiff argues the trial court erred (1) in refusing to award attorney fees for her response to the motion for reconsideration and (2) by awarding her attorney a lower rate. We affirm in part, reverse in part, and remand with directions.

I. BACKGROUND

In May 2004, plaintiff's grandfather purchased a new 2004 Mazda RX–8 from Sam Leman Mazda for the list price of \$30,854 and immediately gifted the car to plaintiff. The car developed mechanical difficulties rendering it unreliable. Plaintiff asked for a refund but received a second engine instead. Thereafter, the vehicle continued to have difficulties.

In August 2005, plaintiff filed a two-count complaint against defendants, alleging breach of written warranty and breach of implied warranty of merchantability under the Magnuson–Moss Warranty—Federal Trade Commission Improvement Act (Magnuson–Moss Act) ([15 U.S.C. §§ 2301](#) through

2312 (2000)). Plaintiff retained Attorneys Daniel Deneen and William Hutul to represent her in the lawsuit against defendants. In October 2005, defendants filed their answer to the complaint. Ultimately, the parties agreed to a settlement, and defendant Mazda repurchased the vehicle for \$30,000. The settlement did not include attorney fees.

In March 2007, plaintiff filed a petition for an award of costs and attorney fees pursuant to the Magnuson–Moss Act. Deneen attached an invoice for services showing a total of \$13,650 due for 56.25 hours of work. Deneen indicated he charged a premium rate of \$225 per hour for fiduciary-fraud and consumer-fraud litigation through mid-May 2006 and \$250 per hour thereafter. His standard rate was \$175 per hour until May 2006 when it increased to \$200 per hour. The petition also stated Hutul's time records showed 45.4 hours of work from August 11, 2005, through February 6, 2007. At Hutul's rate of \$325 per hour, the fees amounted to \$14,755. In April 2007, Deneen filed a supplemental petition asking for, *inter alia*, \$1,875 in fees for preparing and filing the fee petition.

Defendants filed a response in opposition to plaintiff's fee petition. Defendants argued plaintiff and her attorneys entered into a contingency-fee agreement, whereby counsel agreed attorney fees would be equal to one-third of all amounts collected or recovered in the case. As the parties settled for \$30,000, defendants argued plaintiff's request for fees should be capped at \$10,000. Defendants also contended counsels' time sheets failed to provide sufficient evidence of the reasonableness of the hourly rate and hours expended.

404** In May 2007, the trial court filed its order on the petition for fees. The court found Deneen's reasonable rate of compensation to be \$200 per hour. Based on 65.25 hours of work, the court ordered defendant Mazda to pay Deneen \$13,530.50 **965** ****602** for his fees, which included \$480.50 in costs. The court also found Hutul's reasonable rate of compensation to be \$275 per hour. Based on 45.4 hours of work, the court ordered defendant to pay Hutul \$12,485 for his fees.

In June 2007, defendant Mazda filed a motion to reconsider. Defendant argued the relationship between plaintiff and her counsel was controlled by the contingency-fee agreement and the trial court could not award attorney fees in excess of \$10,000. Defendant also argued the time sheets submitted by plaintiff's counsel lacked specific detail, consisted of block billing, did not correlate with one another, and contained

duplicate time entries. In July 2007, plaintiff filed a response and a motion to reconsider, asking, *inter alia*, the court to award attorney fees for prosecuting the fee petition, including the motion to reconsider.

In August 2007, the trial court entered an order denying the motions to reconsider. As to defendant, the court found a contingency-fee agreement did not impose a cap on a fee award. As to plaintiff, the court found it “considered the reasonableness of the time expended in preparing and prosecuting the fee petition and did not exclude that time from its order of fees.” Defendant Mazda filed an appeal, and plaintiff filed a cross-appeal.

II. ANALYSIS

A. Defendant's Appeal

1. Standard of Review

“Illinois follows the ‘American Rule,’ which provides that absent statutory authority or a contractual agreement, each party must bear its own attorney fees and costs.” *Negro Nest, L.L.C. v. Mid-Northern Management, Inc.*, 362 Ill.App.3d 640, 641–42, 298 Ill.Dec. 436, 839 N.E.2d 1083, 1085 (2005). If a statute or contractual agreement expressly authorizes an award of attorney fees, the court may award fees “so long as they are reasonable.” *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill.App.3d 395, 405, 310 Ill.Dec. 61, 865 N.E.2d 385, 394 (2007). “A trial court's decision whether to award attorney fees is a matter within its discretion and will not be disturbed absent an abuse of that discretion.” *Central Illinois Electrical Services, L.L.C. v. Slepian*, 358 Ill.App.3d 545, 550, 294 Ill.Dec. 844, 831 N.E.2d 1169, 1173 (2005).

2. Magnuson–Moss Act

Consumers often require the assistance of counsel to enforce ***405** their rights under the Magnuson–Moss Act. *Melton v. Frigidaire*, 346 Ill.App.3d 331, 339, 281 Ill.Dec. 954, 805 N.E.2d 322, 327 (2004). Section 2310(d)(2) of the Magnuson–Moss Act provides for the recovery of costs and attorney fees to a prevailing consumer as follows:

“If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by

the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate." 15 U.S.C. § 2310(d)(2) (2000).

This fee-shifting provision was enacted "to vindicate the rights of a consumer who was injured by a party such as defendant and [was] intended to encourage consumers to pursue their legal remedies by providing them with access to legal assistance." *State Farm Fire & Casualty Co. v. Miller* ***966 **603 *Electric Co.*, 231 Ill.App.3d 355, 359, 172 Ill.Dec. 890, 596 N.E.2d 169, 171 (1992). "The plain language of section 2310(d)(2) of the Magnuson–Moss Act provides that an award of attorney fees to a prevailing plaintiff is within the sound discretion of the trial court and will not be disturbed on review absent an abuse of discretion." *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill.App.3d 674, 685, 276 Ill.Dec. 593, 794 N.E.2d 843, 852 (2003).

In the case *sub judice*, defendant concedes plaintiff was a prevailing party under the Magnuson–Moss Act. However, defendant claims plaintiff could not be awarded attorney fees in excess of the amount agreed on by plaintiff and her attorneys in the contingency-fee agreement. The fee agreement stated, in part, as follows:

"Client agrees that the attorneys shall receive a contingent fee equal to one [-]third, or thirty-three and one-third percent (33.33%) of all amounts collected or otherwise recovered, whether by suit, trial, or out[-]of[-]court settlement. * * *

Client understands that this litigation may involve laws and/or statutes which provide for an award of attorneys' fees to the attorneys, as against the [d]efendants, based on the actual time spent on this case by the attorneys. Client understands and agrees that any such fee award by the [c]ourt against [d]efendants shall go to Daniel Deneen and William Hutul. The amount of any such award that is collected by the attorneys shall be credited against the contingent fee, and the contingent fee shall be reduced by the amount of court [-]awarded fees collected by the attorneys."

Because of the \$30,000 settlement, defendant argues plaintiff's award of attorney fees should have been limited

to \$10,000, and the trial court's award over and above that amount was an abuse of discretion.

*406 The Magnuson–Moss Act gives the trial court the discretion to award attorney fees that were reasonably incurred in the prosecution of the action. "[A] contingency[-]fee agreement can be a relevant factor in determining reasonableness." *Rath v. Carbondale Nursing & Rehabilitation Center, Inc.*, 374 Ill.App.3d 536, 544, 312 Ill.Dec. 722, 871 N.E.2d 122, 130 (2007). In *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989), the United States Supreme Court was confronted with a district court's discretionary award of reasonable attorney fees to a prevailing party in a federal civil-rights action. The Supreme Court found "a contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees." *Blanchard*, 489 U.S. at 93, 109 S.Ct. at 944, 103 L.Ed.2d at 75. Instead, "[t]he presence of a pre-existing fee agreement may aid in determining reasonableness." *Blanchard*, 489 U.S. at 93, 109 S.Ct. at 944, 103 L.Ed.2d at 75; see also *Rath*, 374 Ill.App.3d at 544, 312 Ill.Dec. 722, 871 N.E.2d at 130.

Here, defendant Mazda agreed to pay plaintiff \$30,000, not including her attorney fees. The contingency-fee agreement indicated plaintiff's required payment for attorney fees would be reduced by any credits for court-awarded attorney fees. The presence of a fee agreement does not impose a ceiling on the award of fees. See *Keller v. State Farm Insurance Co.*, 180 Ill.App.3d 539, 557, 129 Ill.Dec. 510, 536 N.E.2d 194, 206 (1989) (finding the trial court erred in concluding it was constrained by the contingency-fee agreement in awarding attorney fees when the insurance statute provided for the payment of "reasonable" attorney fees). Further, nothing in the Magnuson–Moss Act requires that any contingency-fee agreements ***967 **604 control over a trial court's award of fees. Thus, the fees awarded must be reasonable, and the trial court found the requested fees to be reasonable in this case.

We note the cases cited by defendant are distinguishable. The facts in *Career Concepts*, 372 Ill.App.3d at 406, 310 Ill.Dec. 61, 865 N.E.2d at 394–95, did not involve a fee-shifting provision. In *Majcher v. Laurel Motors, Inc.*, 287 Ill.App.3d 719, 732, 223 Ill.Dec. 683, 680 N.E.2d 416, 425 (1997), the plaintiff and her counsel entered into a contingency-fee agreement whereby the client would pay one-third of all amounts recovered and attorney fees awarded by the court would be in addition to the fees payable by the client. The Second District did not allow counsel to collect a contingent

fee, as well as an hourly fee, as it would amount to double payment and violate the Rules of Professional Conduct. *Majcher*, 287 Ill.App.3d at 732, 223 Ill.Dec. 683, 680 N.E.2d at 425. Here, however, the fee agreement did not provide for double payment as counsel will not collect the contingent fee. Instead, the amount plaintiff would have been required to pay was reduced by the trial court's award of attorney fees. Accordingly, defendant is not entitled to a reduction in the award of attorney fees based on plaintiff's contingency-fee agreement.

*407 3. Amount of Compensation

In the alternative, defendant argues the trial court abused its discretion in awarding Deneen 65.25 hours of compensation and Hutul 45.4 hours of compensation. Defendant claims (1) Deneen's time records were "glaringly void of any detail" and (2) Hutul's time records were undated, vague and ambiguous, redundant, and excessive.

To help the trial court in assessing whether an attorney's fees are reasonable, "the petitioner must provide sufficient information, including detailed time records that were kept throughout the proceeding." *Richardson v. Haddon*, 375 Ill.App.3d 312, 314, 313 Ill.Dec. 946, 873 N.E.2d 570, 573 (2007).

"When assessing the reasonableness of fees, a trial court may consider a variety of factors, including the nature of the case, the case's novelty and difficulty level, the skill and standing of the attorney, the degree of responsibility required, the usual and customary charges for similar work, and the connection between the litigation and the fees charged." *Richardson*, 375 Ill.App.3d at 314–15, 313 Ill.Dec. 946, 873 N.E.2d at 573.

In this case, we find no abuse of discretion. Deneen's time records are of the type this court routinely sees on appeal in cases concerning the proper amount of attorney fees. The records show the date the services were rendered, a description of the services, the hours, the fee rate, and the total dollar amount. While defendant argues the description of services should have been more detailed, the records provide an adequate list to allow the trial court to determine whether the fees were reasonably incurred in this case.

Hutul's records also provide sufficient information for the trial court to determine the reasonable amount of fees. Hutul's

entries are handwritten, and at times are difficult to read, but they describe the services rendered and the time expended. Although evidence suggested a range of rates for Hutul's services, the trial court found \$275 per hour to be a reasonable rate of compensation "in this specific matter." We find no abuse of discretion.

B. Plaintiff's Cross–Appeal

Plaintiff raises three issues in her cross-appeal. Plaintiff claims the trial court ***968 **605 erred in refusing to award attorney fees for 10.75 hours expended by Deneen in response to defendant's motion for reconsideration. Plaintiff contends the court erred in awarding Deneen his standard hourly rate of \$200, instead of his higher rate of \$225 to \$250 for consumer-law work. Plaintiff also argues this court should remand for further hearing on an award of attorney fees for the time spent on appeal.

*408 1. Time Spent on Motion for Reconsideration

In the trial court, Deneen provided billing statements requesting 7.5 hours for prosecuting the petition for fees and 10.75 hours for time spent on the motion for reconsideration. In denying plaintiff's motion to reconsider, the court indicated "it considered the reasonableness of the time expended in preparing and prosecuting the fee petition and did not exclude that time from its order of fees." Plaintiff argues Deneen is entitled to the additional 10.75 hours for time spent responding to defendant's motion for reconsideration.

We find the trial court should have awarded additional fees for time spent on the motion for reconsideration. See *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill.App.3d 231, 243–44, 219 Ill.Dec. 601, 671 N.E.2d 768, 776 (1996) (finding the trial court erred in refusing to consider the plaintiff's supplemental petition for attorney fees covering the period of posttrial representation). On remand, plaintiff shall submit a supplemental petition detailing reasonable attorney fees incurred in responding to defendant's motion for reconsideration. Because the amount is unclear in the briefs, plaintiff shall set forth the time expended in response to defendant's motion for reconsideration, but that amount shall not exceed 10.75 hours.

2. Hourly Rate

Plaintiff argues the trial court should have awarded Deneen a higher consumer-law rate between \$225 to \$250 per hour, instead of his standard \$200-per-hour rate. Deneen indicated he charged a premium rate of \$225 to \$250 per hour for fiduciary-fraud and consumer-fraud litigation. His standard rate was between \$175 and \$200 per hour.

Here, plaintiff indicated this was “not a complex legal case” but a “simple” breach-of-warranty claim. The trial court's decision to award Deneen his standard rate was not an abuse of discretion.

3. Remand

Plaintiff asks this court to award attorney fees for the appeal or to grant leave to file a supplemental fee petition. “Allowing a plaintiff to petition for appellate attorney fees and costs furthers the [Magnuson–Moss] Act's goal of providing consumers with legal assistance to enable them to pursue a remedy for injury or loss.” *Melton*, 346 Ill.App.3d at 341, 281 Ill.Dec. 954, 805 N.E.2d at 329. Accordingly, we grant

plaintiff's request to file a supplemental petition in the trial court for attorney fees and costs incurred in responding to defendant's direct appeal. See *Berlak*, 284 Ill.App.3d at 244, 219 Ill.Dec. 601, 671 N.E.2d at 776. The trial court may award any and all fees and costs reasonably incurred in defending this “simple” case on appeal.

*409 III. CONCLUSION

For the reasons stated, we reverse the trial court's judgment insofar as it denied plaintiff's request for attorney fees incurred in responding to defendant's motion to reconsider; we otherwise affirm, and we remand the case to the trial court for consideration of attorney fees and costs incurred on appeal and the motion to reconsider.

****606 ***969** Affirmed in part, reversed in part, and remanded with directions.

KNECHT and *STEIGMANN*, JJ., concur.

All Citations

384 Ill.App.3d 401, 892 N.E.2d 598, 322 Ill.Dec. 961

362 Ill.App.3d 640

Appellate Court of Illinois, Fourth District.

NEGRO NEST, LLC., an Illinois Limited
Liability Company, d/b/a Servpro
of Springfield, Plaintiff–Appellee,

v.

MID–NORTHERN MANAGEMENT, INC.,
an Illinois Corporation, Defendant–Appellant.

No. 4–04–0333

|

Dec. 1, 2005.

Synopsis

Background: Cleaning services contractor brought action against apartment management company, seeking payment for services rendered pursuant to contract. Parties settled on amount owed for services, but reserved issues regarding interest, attorney fees and costs for trial court. The Circuit Court, Menard County, [M. Carol Pope](#), J., entered judgment in favor of contractor, awarding \$15,659.87 in attorney fees, costs, and interest. Management company appealed.

The Appellate Court, [Myerscough](#), J., held that provision in contract stating that management company would be responsible for “all collection costs” incurred did not allow recovery for attorney fees.

Reversed.

Procedural Posture(s): On Appeal.**Attorneys and Law Firms**

****1084** [John E. Kerley](#), Kerley & Associates, P.C., Springfield, for Mid–Northern Management, Inc.

[Samuel J. Witsman](#), Jason Anselment, Hart, Southworth & Witsman, Springfield, for Negro Nest, LLC.

Opinion

Justice [MYERSCOUGH](#) delivered the opinion of the court:

*****437 *640** In October 2002, plaintiff, Negro Nest, LLC., doing business as Servpro of Springfield (Servpro), filed suit against defendant, Mid–Northern Management, Inc. (Mid–

Northern), seeking payment for services rendered pursuant to a contract. In November 2003, the parties settled on the amount owed for the services provided but reserved the issues regarding interest, attorney fees, and costs for the trial court's determination. In March 2004, the trial court entered judgment ***641** in Servpro's favor, awarding \$15,659.87 in attorney fees, costs, and interest.

On appeal, Mid–Northern argues the trial court erred in its award because (1) the parties' contract did not specifically provide a basis for awarding attorney fees and (2) the fees awarded were unreasonable. Because we agree with the first point, we reverse.

****1085 ***438 I. BACKGROUND**

In February 2002, Servpro entered into a contract with Mid–Northern by which Servpro was to perform cleaning and restoration services on a multiunit apartment complex managed by Mid–Northern. The contract was prepared by Servpro and included a provision stating, “If the undersigned fails to pay for services rendered and collection efforts become necessary, the undersigned agrees to be responsible for *all collection costs incurred*.” (Emphasis added.) Servpro performed pursuant to the contract and sent Mid–Northern an invoice for \$7,860.66.

Between February and September 2002, Servpro sent six invoices to Mid–Northern. Mid–Northern did not pay the bill. In October 2002, Servpro filed suit seeking \$8,744.50 plus interest, reasonable attorney fees, court costs, and all costs of collection. The parties settled in November 2003 for the full amount of the original invoice, \$7,860.66, and the remaining issues regarding interest, attorney fees, and costs were left to be determined by the trial court.

In March 2004, the trial court heard oral arguments on the issues. The primary point of contention was whether the contract provision providing for “all collection costs” allowed Servpro to collect for its attorney fees. The trial court held attorney fees are encompassed within “all collection costs.” The court entered judgment in Servpro's favor, awarding \$12,668.75 in attorney fees, \$524.27 costs, and \$2,467.85 interest for a total of \$15,659.87. This appeal followed.

II. ANALYSIS

Mid-Northern first contends the trial court erred in awarding attorney fees to Servpro because the court incorrectly found “all collection costs” included attorney fees.

A. Standard of Review

The construction of a contract is a question of law, and the standard of review is *de novo*. *Pennsylvania Life Insurance Co. v. Pavlick*, 265 Ill.App.3d 526, 529, 202 Ill.Dec. 424, 637 N.E.2d 1160, 1162 (1994).

B. Illinois Is an American Rule Jurisdiction

Illinois follows the “American Rule,” which provides that absent statutory authority or a contractual agreement, each party *642 must bear its own attorney fees and costs. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill.2d 560, 572, 251 Ill.Dec. 141, 739 N.E.2d 1263, 1271 (2000). Statutes permitting the recovery of costs are in derogation of the common law and must be strictly construed. *Calcagno v. Personalcare Health Management, Inc.*, 207 Ill.App.3d 493, 502, 152 Ill.Dec. 412, 565 N.E.2d 1330, 1336 (1991). Similarly, contractual provisions providing for attorney fees should also be strictly construed. *Helland v. Helland*, 214 Ill.App.3d 275, 277–78, 157 Ill.Dec. 939, 573 N.E.2d 357, 359 (1991). Successful litigants cannot recover attorney fees as costs unless expressly authorized by a statute or agreement using specific language. See *Estate of Downs v. Webster*, 307 Ill.App.3d 65, 70, 240 Ill.Dec. 309, 716 N.E.2d 1256, 1260 (1999).

A statute or contract must allow for attorney fees by specific language, such that one cannot recover if the provision does not specifically state that “attorney fees” are recoverable. See *Downs*, 307 Ill.App.3d at 70, 240 Ill.Dec. 309, 716 N.E.2d at 1260; *Qazi v. Ismail*, 50 Ill.App.3d 271, 273, 7 Ill.Dec. 434, 364 N.E.2d 595, 596–97 (1977).

C. Seventh Circuit *Boulevard Bank* Opinion

The contract provision at issue calls for recovery of “all collection costs.” The contract **1086 ***439 makes no mention of attorney fees. Plaintiff asks this court to include attorney fees under the umbrella of “collection costs.”

Plaintiff relies exclusively on a Seventh Circuit case, *Boulevard Bank National Ass'n v. Philips Medical Systems International B.V.*, 15 F.3d 1419 (7th Cir.1994), which held “collection costs” included attorney fees under Illinois law. The *Boulevard* court distinguished the general principle that attorney fees are not recoverable unless explicitly authorized by written contract, on the basis that those prior courts had only been construing the term “costs” alone, and not when modified by another term such as “collection.” *Boulevard*, 15 F.3d at 1426. The court reasoned that to give effect to the term “collection costs” it was necessary to include attorney fees, the major cost incurred, and that if the parties wanted to exclude attorney fees they would have used the word “costs” alone. *Boulevard*, 15 F.3d at 1426. The court found the term “collection” modified the term “costs” in such a way as to allow recovery under the contract. *Boulevard*, 15 F.3d at 1426. In coming to this conclusion, the court relied on *Meeker v. Fowler*, 35 Ill.App.3d 313, 341 N.E.2d 412 (1976), which interpreted “collection charge” under section 20 of “An Act in relation to retail installment sales” (Ill.Rev.Stat.1965, ch. 121 1/2, par. 243) (hereinafter 1965 Act) to include attorney fees.

*643 D. *Meeker*: An Anomaly Caused by the Interplay of Contracts and Statutory Penalty Provisions

In *Meeker*, the parties signed numerous instruments, during two transactions in 1965 and in 1968, representing the transfer of three grain bins. The trial court found each transaction constituted an installment sales contract that was governed by the version of the act in effect at the inception of each contract. Ill.Rev.Stat.1965, ch. 121 1/2, pars. 223 through 253; Ill.Rev.Stat.1967, ch. 121 1/2, pars. 501 through 533 (hereinafter 1967 Act). The trial court found the seller noncompliant with the acts and implemented sanctions under two provisions, including denying the seller recovery of his attorney fees because the court believed the fees constituted a “collection charge,” forfeited under one of the statutory penalty provisions. The appellate court reversed the trial court in part, finding the 1968 transaction did not fall within the 1967 Act, but also remanded the cause for a determination of whether the 1965 transaction fell within the 1965 Act. *Meeker*, 35 Ill.App.3d at 320–21, 341 N.E.2d at 417–18. The court, in *dicta*, went on to address whether, if the 1965 transaction did fall within the 1965 Act, the seller could be denied recovery of his attorney fees as a statutory penalty for his noncompliance.

Section 20 of the 1965 Act stated in part, “[a]ny person violating [certain provisions of the Act] * * * is barred from

recovery of any finance charge, delinquency[,] or collection charge * * * on the retail installment contract involved.” Ill.Rev.Stat.1965, ch. 121 1/2, par. 243. The seller contended the trial court erred in denying him recovery for his attorney fees as a “collection charge” under the provision. In support, the seller pointed to section 6 of the Act, which allowed the holder of the contract to include contract provisions allowing for recovery of delinquency and collection charges as well as reasonable attorney fees in the instance of default. Ill.Rev.Stat.1965, ch. 121 1/2, par. 228. The seller argued “collection charge” in section 20 should not be interpreted to encompass attorney fees because the legislature clearly treated collection charges separately from attorney fees in section 6. The *Meeker* court rejected this argument, finding section 6 only applied when holders in compliance with the law were seeking to ****1087 ***440** recover under their contracts. *Meeker*, 35 Ill.App.3d at 321–22, 341 N.E.2d at 418–19.

The *Meeker* court emphasized the buyers were trying to recover under an additional statutory penalty provision, section 17, which allowed a monetary penalty plus recovery of the buyer's attorney fees if the seller failed to comply with the provisions of the act. *Meeker*, 35 Ill.App.3d at 322, 341 N.E.2d at 419. Assuming the contract fell under the 1965 Act, the seller's violations would result in (1) the ***644** seller's forfeiture of any finance, delinquency, and collection charges; (2) a monetary penalty against the seller equal to the contract finance charge or 10% of the purchase price; and (3) the seller's payment of the buyer's attorney fees. *Meeker*, 35 Ill.App.3d at 322, 341 N.E.2d at 419; Ill.Rev.Stat.1965, ch. 121 1/2, pars. 240, 243. Given the penalty provisions and the seller's violation of the law, the court concluded it would be ironic to allow the seller to recover his attorney fees. *Meeker*, 35 Ill.App.3d at 322, 341 N.E.2d at 419.

In support, the *Meeker* court stated, “[t]hough the question seems not to have been considered in Illinois, we find authority from other jurisdictions to the effect that ‘collection charge’ includes attorney's fees.” *Meeker*, 35 Ill.App.3d at 322, 341 N.E.2d at 419, citing *Ben Construction Corp. v. Snushall*, 254 N.Y.S.2d 948, 44 Misc.2d 878 (1964); *General Finance Co. v. Powell*, 114 Mont. 473, 138 P.2d 255 (1943); *McClain v. Continental Supply Co.*, 66 Okla. 225, 168 P. 815 (1917). The *Meeker* court was attempting to give effect to the penalty provision within the context of the entire 1965 Act but in doing so, interpreted statutory language to include attorney fees absent express language. We find *Meeker* unpersuasive in the present case and contrary to prevailing Illinois law.

E. Authorities Underpinning *Meeker*

As already noted, *Meeker* relied on authority from three other American Rule jurisdictions in reaching its conclusion. At issue in *Ben Construction Corp.*, 254 N.Y.S.2d 948, 44 Misc.2d 878, was a penalty provision in an act governing retail installment contracts. The plaintiff was seeking liquidated damages and attorney fees pursuant to a contract provision allowing for such in the event of defendant's breach. *Ben Construction Corp.*, 254 N.Y.S.2d at 950, 44 Misc.2d at 880. The trial court found the plaintiff noncompliant with the governing act and applied the act's penalty provision. *Ben Construction Corp.*, 254 N.Y.S.2d at 951, 44 Misc.2d at 881. The court denied the plaintiff recovery, finding the damages and attorney fees were forfeited as delinquency and collection charges pursuant to the act. *Ben Construction Corp.*, 254 N.Y.S.2d at 952, 44 Misc.2d at 881.

In *General Finance Co.*, 114 Mont. at 475, 138 P.2d at 256, at issue was a guaranty contract providing for “ ‘all collection expenses.’ ” The court held attorney fees were recoverable as a collection expense because the plaintiff was forced to file suit to collect. *General Finance Co.*, 114 Mont. at 481, 138 P.2d at 258. The *General Finance Co.* court relied on *Wood v. Ferguson*, 71 Mont. 540, 230 P. 592 (1924), an earlier Montana case. *General Finance Co.*, 114 Mont. at 481, 138 P.2d at 258. *Wood* held the negotiability of a note providing for “ ‘attorney's fees ***645** and all costs of collection’ ” was not destroyed even though the governing statute only allowed for “ ‘costs of collection or an attorney's fee.’ ” (Emphases in original.) *Wood*, 71 Mont. at 549, 230 P. at 594, quoting Rev.Codes 1921, § 8409. Relying in part on *McClain*, 66 Okla. 225, 168 P. 815, the *Wood* court held “ ‘cost of collection’ ” and “ ‘attorney's fees’ ” were synonymous under the statute ****1088 ***441** and note. *Wood*, 71 Mont. at 549–50, 230 P. at 594, quoting Rev.Codes 1921, § 8409.

In *McClain*, the court considered whether a promissory note allowing for “ ‘collection fees’ ” rendered the note nonnegotiable. *McClain*, 66 Okla. at 226, 168 P. at 816. The court held “ ‘collection fees’ ” was essentially synonymous with “attorney's fees,” “costs of collection,” or “expenses of collection” and did not render a note nonnegotiable. *McClain*, 66 Okla. at 228, 168 P. at 817–18. The court stated as follows:

“In a strict legal sense ‘collection fees’ might be a broader term than ‘attorney's fees,’ for ‘collection fees’ might

embody expenses involved in endeavoring to collect said note by some person other than a licensed attorney and so this might be true of ‘costs of collection’; however, the courts in determining the meaning of these stipulations, so far as we have been able to ascertain, have all treated them as synonymous terms when used in promissory notes and holding that it was a provision or stipulation to reimburse the payee and his assignees for an attorney's fee.” *McClain*, 66 Okla. at 228, 168 P. at 818.

F. Survey: Attorney Fee Recoverability Under Broader Phraseology

1. Negotiable Instruments

In the context of negotiable instruments, particularly promissory notes, there appears to be general acceptance that provisions for “costs of collection” are either synonymous with “attorney fees” or are sufficient to overcome the American Rule. See Black's Law Dictionary 373 (8th ed.2004) (defining “costs of collection” as “[e]xpenses incurred in receiving payment of a note; esp., attorney's fees created in the effort to collect a note”); *Philadelphia National Bank v. Buchman*, 314 Pa. 343, 348–49, 171 A. 589, 591 (1934) (note allowing for recovery of “ ‘all legal costs, and expenses of collection, including an attorney's fee’ ” is still negotiable even though statute allows for “ ‘costs of collection or an attorney's fee’ [(56 Purd. Stat. § 2)]” because “or” in statute is not material and the phrases are synonymous); *Paulman v. Filtercorp, Inc.*, 127 Wash.2d 387, 394, 899 P.2d 1259, 1262 (1995) (“ ‘costs of collection’ ” clause in note presumably includes attorney fees and court costs); *Cox v. Hagan*, 125 Va. 656, 680, 100 S.E. 666, 674 (1919) (provision in note providing for “ ‘costs of collection’ ” *646 “ refers not to the costs of suit, which are allowed by law, but to attorney fees expended in attempting to collect on the note); *McClain*, 66 Okla. at 228, 168 P. at 817–18 (provision in promissory note for “ ‘collection fees’ ” did not render it nonnegotiable because the phrase is synonymous with “attorney's fees,” “costs of collection,” and “expenses of collection”); *Wood*, 71 Mont. at 549, 230 P. at 594 (note is negotiable even though it allows for “ ‘attorney's fees and all costs of collection’ ” because “ ‘costs of collection’ ” and “ ‘attorney's fees’ ” are synonymous under negotiable-instruments statute and note (emphasis in original), quoting Rev.Codes 1921, § 8409); *Pepperell Trust Co. v. Mehlman*, 155 Me. 318, 319–21, 154 A.2d 161, 162–63 (1959) (note providing recovery of “ ‘all cost and other expenses attendant to enforcing payment of this

note’ ” and “ ‘all expenses, if any are incurred, of foreclosure of this mortgage, together with all costs and other expenses attendant to enforcing payment of this note with interest on said sums’ ” allows for the recovery of reasonable attorney fees incurred by the mortgagee in protecting his position); *Haczela v. Krupa*, 219 Mass. 261, 106 N.E. 1004 (1914) (attorney fees and costs recoverable as an “ ‘expense’ ” under a chattel mortgage).

1089 *442 2. Outside Context of Negotiable Instruments

Several American Rule jurisdictions have also considered whether attorney fees are recoverable under imprecise statutory and contractual language outside the context of negotiable instruments. Some of these jurisdictions have concluded “collection costs” or other imprecise statutory language does include attorney fees. See *Leavitt v. Hamelin*, 126 N.H. 670, 495 A.2d 1286 (1985) (court interpreted “ ‘all reasonable costs of collection’ [(N.H.Rev.Stat. Ann. § 544–A:2 (1985))]” under a statute governing bad checks to include attorney fees); *Wenrick v. Crater*, 315 Ark. 361, 364, 868 S.W.2d 60, 61 (1993) (statute giving insurer the right to reimbursement less the “ ‘cost[s] of collection’ [(Ark.Code Ann. § 23–89–207 (1987))]” held the commonsense definition of the phrase includes, among other things, attorney fees); *Davidson v. Munsey*, 29 Utah 181, 188, 80 P. 743, 744 (1905) (attorney fees recoverable as an expense under a contempt statute allowing for “ ‘costs and expenses’ [(Rev. Stat. 1898 § 3368)]”); *In re Loudenslager*, 113 N.J.Eq. 418, 422–23, 167 A. 194, 196 (1933) (phrase “ ‘costs[] and expenses’ [(3 Comp. St.1910, § 196, at 3884)]” in Orphans’ Court Act includes attorney fees).

Some jurisdictions have interpreted similar contract provisions as including attorney fees. See *Wrenfield Homeowners Ass'n v. DeYoung*, 410 Pa.Super. 621, 627–29, 600 A.2d 960, 963–64 (1991) (“ ‘costs of collection’ ” in a homeowners association covenant allows the association *647 to recover its attorney fees upon suit to recover association dues; noting the phrase is synonymous with “attorney fees” in the context of promissory notes and negotiable instruments law); *Top Line Distributors, Inc. v. Spickler*, 525 A.2d 1039, 1041 (Me.1987) (Maine court held the phrase “ ‘cost[s] of collection’ ” in a guaranty contract to indemnify is essentially a promissory note, in which case it is synonymous with “collection fees,” “expenses of collection,” or “attorneys' fees”); *Coast Lumber Co. v. Aetna*

Life Insurance Co., 22 Idaho 264, 272, 125 P. 185, 187 (1912) (provisions in insurance contract that insurance company will “ ‘pay the expense of litigation’ ” and “ ‘will, at its own cost, defend such suit in the name and on behalf of the Assured’ ” were clear and express promises to pay the costs incurred in defending a suit against the assured and attorney fees are part of these costs); *Terry v. Terry*, 70 Idaho 161, 169, 213 P.2d 906, 910 (1950) (attorney fees recoverable under escrow agreement providing for reimbursement for “ ‘all expenses and liabilities incurred in connection with the escrow agreement’ ”); *Brady v. Dilley*, 27 Md. 570, 582 (Md.1867) (attorney fees properly awarded under terms of a deed of trust providing for recovery of “ ‘all just and reasonable expenses, costs, charges [,] and commissions’ ” attending the due execution of the trust).

At the same time, some courts have rejected the notion “collection costs” or “costs of collection” encompasses attorney fees. In *Capital Building Supplies, Inc. v. Miller*, 536 N.E.2d 297 (Ind.App.1989), an Indiana court held the plaintiff could not recover attorney fees expended in defending a judgment on appeal as “collection costs” under an Indiana small claims rule. The rule allowed for the recovery of “ ‘reasonable collection costs’ ” and “ ‘formal collection’ ” fees. *Capital Building Supplies*, 536 N.E.2d at 298, quoting Small Claims R. 11(D). The majority based its holding on its interpretation of the American Rule, including that attorney fees are generally not regarded as “costs,” and its belief as to the plain meaning of the phrase “collection costs.” *Capital Building Supplies*, 536 N.E.2d at 298–99. In ***1090 ***443 addition, a Georgia court found “ ‘costs of collection’ ” in a real estate covenant was insufficient language to overcome the American Rule and refused to award attorney fees. *Arbor Station Homeowners Services, Inc. v. Dorman*, 255 Ga.App. 866, 867–68, 567 S.E.2d 102, 104 (2002).

At least two jurisdictions have determined the word “expense” varies depending on the context. In *Sears v. Inhabitants of Nahant*, 215 Mass. 234, 240, 102 N.E. 491, 493 (1913), after examining several prior decisions, the Supreme Judicial Court of Massachusetts noted “expense” was capable of multiple meanings. In *Sears*, the court *648 concluded the statute at issue did not allow the town to recover attorney fees absent clear legislative intent through unmistakable language. *Sears*, 215 Mass. at 241, 102 N.E. at 494. In *Haczela v. Krupa*, 219 Mass. at 263, 106 N.E. at 1004, the same court held attorney fees and costs incurred in defense of an equity suit were recoverable as “ ‘expenses * * * sustained * * * in

relation’ ” to property as provided for by a chattel mortgage. The court stated, “ ‘[e]xpense’ is a word of somewhat varying significance. But, when used in mortgages, it has been held to be broad enough to include reasonable counsel fees.” *Haczela*, 219 Mass. at 263, 106 N.E. at 1004.

In *Prudential Insurance Co. of America v. Goldsmith*, 239 Mo.App. 188, 197–98, 192 S.W.2d 1, 4 (1945), the Missouri Court of Appeals held attorney fees were not recoverable under a bond provision allowing for “ ‘loss, expense [,] and damage.’ ” The court noted when “costs” or “expenses” is used in a statute it generally does not encompass attorney fees. *Prudential*, 239 Mo.App. at 197, 192 S.W.2d at 4. The court also stated that while attorney fees are generally not recoverable under a contract provision for the payment of “expenses,” they have been held recoverable as an “expense of litigation” under a liability insurance policy. *Prudential*, 239 Mo.App. at 197, 192 S.W.2d at 4. After observing “[t]he decisions of the various states seem to allow or deny * * * attorneys’ fees under various facts and are not at all uniform,” the court held attorney fees were not recoverable as an “expense” under a strict construction of the contract at issue. *Prudential*, 239 Mo.App. at 197–98, 192 S.W.2d at 4.

In *In re Mason*, 203 S.W.2d 750 (1947), a Missouri Court of Appeals cited *Prudential* with approval for the proposition a contract provision for “ ‘collection expense[s]’ ” does not include attorney fees. However, the court did not make a dispositive finding on this issue because the facts did not warrant it. *Mason*, 203 S.W.2d at 759–60.

In *City of Springfield v. Events Publishing Co., L.L.C.*, 951 S.W.2d 366, 374 (Mo.App.1997), the Missouri Court of Appeals held the phrase “ ‘at the expense of the public governmental body’ [(Mo.Rev.Stat. § 610.027.5 (1994))]” in the Missouri Sunshine Law required the public governmental body to pay its opponent’s attorney fees. The court distinguished *Prudential* on the basis that the contract in that case was to be strictly construed while the Sunshine Law was to be liberally construed. *City of Springfield*, 951 S.W.2d at 373–74.

G. Attorney Fee Recoverability Under Illinois Statutes

“[S]tatutes permitting recovery of costs, being in derogation of the common law, must be strictly construed [citation], and litigants should not be permitted to recover as costs items other than those specified *649 in the statute authorizing

such awards.” *Calcagno*, 207 Ill.App.3d at 502, 152 Ill.Dec. 412, 565 N.E.2d at 1336. Illinois courts generally refuse to allow recovery for attorney fees unless the statute specifically states that “attorney fees” are ****1091 ***444** recoverable. *Downs*, 307 Ill.App.3d at 70, 240 Ill.Dec. 309, 716 N.E.2d at 1260; see *Miller v. Pollution Control Board*, 267 Ill.App.3d 160, 171–72, 204 Ill.Dec. 774, 642 N.E.2d 475, 485 (1994) (error to award attorney fees as “ ‘hearing costs’ [(Ill. Rev. Stat 1991, ch. 111 1/ 2, par. 1042(b)(4))]” under Environmental Protection Act absent specific language); *People ex rel. Henderson v. Redfern*, 104 Ill.App.2d 132, 135–36, 243 N.E.2d 252, 254 (1968) (award of attorney fees proper only when specifically provided for in statute; improper for court to enlarge “ ‘cost of the prosecution’ [(Ill.Rev.Stat.1967, ch. 112, par. 14)]” to include attorney fees); *Waller v. Board of Education of Century Community Unit School District*, 28 Ill.App.3d 328, 331–33, 328 N.E.2d 604, 606–08 (1975) (statutory provision providing liability for an amount “ ‘not limited to loss of income and costs incurred therein’ [(Ill.Rev.Stat.1971, ch. 122, par. 24–12)]” for “cost of prosecution” does not include attorney fees); *International Federation of Professional & Technical Engineers v. Chicago Park District*, 349 Ill.App.3d 546, 552, 285 Ill.Dec. 587, 812 N.E.2d 407, 412 (2004) (absent specific language, “ ‘disbursements’ [(710 ILCS 5/14 (West 2000))]” cannot be interpreted to include attorney fees under the Arbitration Act); *City of Chicago v. Illinois Fair Employment Practices Comm’n*, 34 Ill.App.3d 114, 117, 339 N.E.2d 260, 262 (1975) (court held Commission’s order for payment of attorney fees under the Fair Employment Practices Act was void absent specific language and not within limited exceptions to the American Rule).

H. Attorney Fee Recoverability Under Illinois Contracts

In this case, the language at issue is part of a contract and the court must determine the intention of the parties. *J.B. Esker & Sons, Inc. v. Cle-Pa’s Partnership*, 325 Ill.App.3d 276, 285, 259 Ill.Dec. 136, 757 N.E.2d 1271, 1279 (2001). The words used will be given their plain and ordinary meaning. *Qazi*, 50 Ill.App.3d at 272, 7 Ill.Dec. 434, 364 N.E.2d at 596. However, similar to their statutory counterparts, contractual fee-shifting provisions must be strictly construed. *Helland*, 214 Ill.App.3d at 277–78, 157 Ill.Dec. 939, 573 N.E.2d at 359.

When faced with cost or expense-shifting provisions in contracts, Illinois courts have consistently refused to read attorney fees into imprecise language. *Reese v. Chicago*,

Burlington & Quincy R.R. Co., 5 Ill.App.3d 450, 457–58, 283 N.E.2d 517, 522 (1972) (“costs” when used in express indemnity agreements does not include attorney fees and other expenses); ***650** *Singleton v. County of Cook*, 53 Ill.App.3d 994, 995–96, 11 Ill.Dec. 773, 369 N.E.2d 227, 228–29 (1977) (agreement to “ ‘indemnify and save harmless’ * * * ‘against all loss, damage[,] or expense * * * as a result of any suits, actions[,] or claims of any character’ ” is insufficient for recovery of attorney fees or expenses; noting “[t]he agreement did not even refer to attorney’s fees and costs, and those items are not recoverable”); *Nalivaika v. Murphy*, 120 Ill.App.3d 773, 777, 76 Ill.Dec. 341, 458 N.E.2d 995, 997 (1983) (indemnity agreement providing defendants “ ‘further agree to indemnify [plaintiff] * * * from any claim of [third-party plaintiffs]’ ” was not specific enough to support an award of attorney fees because the agreement did not mention attorney fees); *Michaels v. Michaels*, 767 F.2d 1185, 1205 (7th Cir. 1985) (federal court interpreting Illinois law held indemnity agreement releasing defendant “ ‘from any and all obligations, claims, demands, liabilities, actions, and causes of action’ ” that the plaintiff then had, was insufficient to recover attorney fees in the present action because the contract ****1092 ***445** “made no mention of attorney[] fees or costs in the event of a breach”).

Notably, in *Qazi*, 50 Ill.App.3d 271, 7 Ill.Dec. 434, 364 N.E.2d 595, the First District applied principles of statutory construction to interpret imprecise contractual language. In *Qazi*, the issue was whether attorney fees were recoverable under a contract provision stating as follows: “ ‘In case of any legal action arising out of the above default, the party in violation will be responsible for all costs and consequences.’ ” *Qazi*, 50 Ill.App.3d at 272, 7 Ill.Dec. 434, 364 N.E.2d at 596. The plaintiff argued attorney fees should be recoverable because legal action was specifically contemplated by the contract and attorney fees are a natural “consequence” of litigation. *Qazi*, 50 Ill.App.3d at 272, 7 Ill.Dec. 434, 364 N.E.2d at 596. Seeking guidance from statutory fee provisions, the *Qazi* court stated:

“ ‘The legislature has in the past *specifically* provided for attorneys’ fees where it wished to, and the courts have refused to interpret imprecise language as permitting attorneys’ fees.

* * *

The legislature has determined when attorney's fees should be awarded. It has been done by specific language such as listing 'attorney's fees' to overcome the common[-]law rule. Where they have not used such specific language, the courts have consistently refused to give an expanded reading to the legislative language used.' ” (Emphasis in original.) *Qazi*, 50 Ill.App.3d at 273, 7 Ill.Dec. 434, 364 N.E.2d at 596–97, quoting *Waller*, 28 Ill.App.3d at 331, 328 N.E.2d at 606–07.

Applying the rule of statutory construction, the court found it could not award attorney fees as a matter of contractual construction absent specific language. *651 *Qazi*, 50 Ill.App.3d at 273, 7 Ill.Dec. 434, 364 N.E.2d at 597. In *Qazi*, no evidence was presented as to the parties' meaning of the word “consequences,” and the court refused to interpret it to include attorney fees. *Qazi*, 50 Ill.App.3d at 273, 7 Ill.Dec. 434, 364 N.E.2d at 597.

Our survey of American Rule jurisdictions illustrates the uncertainty generated by imprecise cost and fee-shifting provisions. We agree with the Missouri court in its assessment that “the various states seem to allow or deny * * * attorneys' fees under various facts and are not at all uniform.” *Prudential*, 239 Mo.App. at 197, 192 S.W.2d at 4. While the majority of jurisdictions presented with this issue have taken an expanded view of these provisions, we take a narrower reading of statutory and contractual cost and fee-shifting provisions as we deem Illinois law requires strict construction of same.

The American Rule dictates that attorney fees are not recoverable absent express statutory or contractual language. *Downs*, 307 Ill.App.3d at 70, 240 Ill.Dec. 309, 716 N.E.2d at 1260. The contract in this case provided for “all costs of collection,” and no evidence was presented on the parties'

meaning of this phrase. The contract did not specifically provide for attorney fees as required. See *Qazi*, 50 Ill.App.3d at 273, 7 Ill.Dec. 434, 364 N.E.2d at 596–97. Contracting parties must make clear their desire to deviate from the rule so the parties have notice of their potential liability when entering into or disputing contracts. Expressly stating that “attorney fees” are recoverable is the clearest and easiest way to do this. Maintaining a bright-line rule is consistent with American Rule principles and strict construction of these provisions. In addition, it promotes certainty in the law, thereby putting parties on notice of their potential liability and reducing litigation.

****1093 ***446 III. EPILOGUE**

We must therefore reverse the trial court. We find the contract provision allowing for “all collection costs” was not sufficient to allow recovery for attorney fees. As this case illustrates, attorney fees can be a substantial expense and are an important consideration when entering into contracts. As the drafter of the contract and potential seeker of attorney fees, Servpro had the responsibility to clearly apprise Mid–Northern of its potential liability.

Since we find the contract language does not provide for an award of attorney fees, we need not address the question of whether the incurred fees were reasonable.

IV. CONCLUSION

For the reasons stated, we reverse the trial court's judgment.

Reversed.

STEIGMANN and *KNECHT*, JJ., concur.

All Citations

362 Ill.App.3d 640, 839 N.E.2d 1083, 298 Ill.Dec. 436

375 Ill.App.3d 312

Appellate Court of Illinois,
First District, Fifth Division.

Johnny RICHARDSON and Joseph
Russell, Plaintiffs–Appellants,

v.

Alexa HADDON and April Haddon, a/k/a April Jackson,
Defendants–Appellees ([Berton N. Ring, P.C.](#), Appellant.).

No. 1–06–0715.

|

Aug. 10, 2007.

Synopsis

Background: Tenants sued landlords for alleged violations of the Chicago Residential Landlord and Tenant Ordinance. The circuit court awarded damages and reasonable costs and attorney fees to tenants. Before the circuit court ruled on tenants' attorney fee petition, one landlord filed for bankruptcy. The bankruptcy court added \$16,771.44 in attorney fees and costs to landlord's bankruptcy plan. After landlord failed to make payments pursuant to plan, bankruptcy court dismissed case, and issue of attorney fee petition was reinstated in circuit court. The Circuit Court, Cook County, [Wayne D. Rhine](#), J., denied attorney fee petition. Tenants and their attorney appealed.

Holdings: The Appellate Court, [Gallagher](#), J., held that:

trial court based attorney fee award upon careful scrutiny of fee petition,

trial court was required to either award fees requested in fee petition that it decided were reasonable, or clearly state its reasons for particular fee reductions, rather than denying petition in its entirety, and

trial court fulfilled duty to report attorney misconduct.

Reversed and remanded.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****571** Berton N. Ring, P.C., Chicago ([Berton N. Ring](#), Patrick Boyle, of counsel), for Appellants.

No appearance for Appellees.

Opinion

Justice [GALLAGHER](#) delivered the opinion of the court:

*****947 *312** The issue presented in this case is whether the trial court abused its discretion by denying an attorney fee petition in its entirety because it was replete with excessive time spent on numerous items, and where the trial court had repeatedly admonished the attorney concerning prior fee petitions.

BACKGROUND

On November 1, 2001, plaintiffs, Johnny Richardson and Joseph Russell, by their attorney, appellant, Berton N. Ring, P.C. (Ring), filed a complaint against defendants, Alexa Haddon and April Haddon *****948 **572** (also known as April Jackson). The complaint alleged various violations of the Chicago Residential Landlord and Tenant Ordinance, including failure to return plaintiffs' security deposit, failure to provide a summary ***313** of charges deducted from plaintiffs' security deposit, and retaliatory eviction.

Plaintiffs prevailed in their suit on July 25, 2003, after a one-day bench trial. The trial court awarded plaintiffs a judgment of \$3,100, plus costs and reasonable attorney fees. After several continuances, but before the trial court could rule on the plaintiffs' attorney fee petition, defendant Alexa Haddon (Haddon) filed bankruptcy. The bankruptcy court added into Haddon's chapter 13 bankruptcy plan \$19,871.44, including both \$3,100 in damages and \$16,771.44 in attorney fees and costs. However, on June 6, 2005, after Haddon failed to make payments according to the bankruptcy plan, the bankruptcy court dismissed the case. The trial court, here, reinstated the case, where the only matter remaining was a ruling on plaintiffs' attorney fee petition.

The fee petition included a description of activities occurring on 58 separate dates and hourly rate charges for those activities. The fee petition covered time from initial client intake through the preparation of a revised fee petition that

included additional fees for matters arising during and after Haddon's bankruptcy case.

On February 14, 2006, after reviewing the fee petition, the trial judge noted that he had “repeatedly warned Berton Ring about submitting fee petitions that contain items which take a disproportionate amount of time to perform.” The trial court then described some of the charges it found to be excessive both in time and cost, including 1.5 hours to review a police report, 1.5 hours to prepare and file a special process server motion, and 1.5 hours for a hearing on that motion for a special process server. The judge stated that he had been a prosecutor and that it had never taken him that long to review a police report. He further stated, “In light of my previous warnings, I am going to limit Berton N. Ring, P.C.'s award of attorneys fees to the ‘house minimum’ of \$350.” The trial judge then informed the attorney from Ring's office that it would not be necessary for him to prepare an order. Instead, the judge explained that he would be issuing a written ruling, which he would send not only to Berton N. Ring, P.C., but also to the Attorney Registration and Disciplinary Commission (ARDC) along with a copy of the fee petition.

The trial court issued its order on February 20, 2006. The order noted, as a preliminary matter, that “this Court has repeatedly warned Attorney Berton Ring concerning prior fee petitions that contained excessive time spent on numerous items contained in the fee petition.” The order then found that Ring had “again submitted a fee petition that contain[ed] numerous items which [had] taken a disproportionate amount of time to perform, especially in view of the *314 fact that Mr. Ring is one of the leading practitioners in the area of the [Chicago Residential Landlord and Tenant Ordinance].” The order then lists 15 specific dated entries that the trial court characterized as “[s]ome of the offending entries.” These include: (1) 1.5 hours to review a police report; (2) 1.5 hours to prepare and file a special process service motion; (3) 3 hours to prepare a client letter; (4) 2.5 hours to prepare for prove up, when 1.3 hours were spent 14 days prior; and (5) 1.25 hours to review counterclaim answer, when four days prior contained that charge.

The order then concludes with the following two paragraphs:

****573 ***949** “In view of the above and foregoing items, the Court finds this fee petition to be replete with excessive time spent to the extent that the entire fee petition will be denied, and the Law Firm of Berton [N.] Ring, PC will be awarded the minimum fee award of \$350.00, said amount being the established minimum award of attorney

fees for matters pending before the Non-jury Tort and Contract section of the First Municipal District.

Further, that a copy of this Order and the fee petition shall be forwarded to the Attorney Registration and Disciplinary Commission.”

Plaintiffs and Ring filed this timely appeal.

ANALYSIS

As a preliminary matter we note that defendants have not submitted a brief on appeal. Nothing, however, prevents us from deciding this appeal without the appellees' brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill.2d 128, 133, 345 N.E.2d 493 (1976). This appeal raises only the question of whether the trial court abused its discretion in awarding \$350, when the attorney fee petition contained charges and costs totaling \$16,771.44.

A “trial court has broad discretionary powers in awarding the attorney fees sought and its decision will not be reversed unless the court has abused its discretion.” *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill.App.3d 590, 595, 251 Ill.Dec. 420, 740 N.E.2d 501 (2000); see also *Pitts v. Holt*, 304 Ill.App.3d 871, 872, 237 Ill.Dec. 732, 710 N.E.2d 155 (1999); *Kaiser v. MEPC American Properties, Inc.*, 164 Ill.App.3d 978, 984, 115 Ill.Dec. 899, 518 N.E.2d 424 (1987). To facilitate the trial court's reasonableness assessment, the petitioner must provide sufficient information, including detailed time records that were kept throughout the proceeding. *Kaiser*, 164 Ill.App.3d at 984, 115 Ill.Dec. 899, 518 N.E.2d 424. The records submitted to the court should be scrutinized for their reasonableness in the context of the case. *McHugh v. Olsen*, 189 Ill.App.3d 508, 514, 136 Ill.Dec. 855, 545 N.E.2d 379 (1989).

When assessing the reasonableness of fees, a trial court may consider a variety of factors, including the nature of the case, the case's novelty and difficulty level, the skill and standing of the attorney, *315 the degree of responsibility required, the usual and customary charges for similar work, and the connection between the litigation and the fees charged. *Plambeck v. Greystone Management & Columbia National Trust Co.*, 281 Ill.App.3d 260, 273, 217 Ill.Dec. 1, 666 N.E.2d 670 (1996); see also *McHugh*, 189 Ill.App.3d at 514, 136 Ill.Dec. 855, 545 N.E.2d 379. However, these enumerated factors are not exhaustive. See *Plambeck*, 281 Ill.App.3d

at 273, 217 Ill.Dec. 1, 666 N.E.2d 670. For example, a court should also use its own knowledge and experience when making the reasonableness determination. *Plambeck*, 281 Ill.App.3d at 273, 217 Ill.Dec. 1, 666 N.E.2d 670; see also *McHugh*, 189 Ill.App.3d at 514, 136 Ill.Dec. 855, 545 N.E.2d 379. When a trial court reduces the amount requested in a fee petition, the court's ruling should include the reasons justifying a particular reduction. *Shortino v. Illinois Bell Telephone Co.*, 279 Ill.App.3d 769, 773, 216 Ill.Dec. 354, 665 N.E.2d 414 (1996).

In the instant case, plaintiffs argue that the trial court considered its “previous warnings” to attorney Berton N. Ring in reaching its decision to award \$350, instead of conducting an analysis of the \$16,771.44 requested in the fee petition. ***950 **574 Plaintiffs additionally assert that these previous warnings were the sole factor the trial court considered in reaching its decision. Plaintiffs further contend that consideration of attorney Berton N. Ring's previous fee petitions made it all but impossible for the trial court to view the current fee petition in an objective and unbiased manner.

We disagree with plaintiffs' assertions. While it is true that the trial judge commented upon attorney Berton N. Ring's history of filing fee petitions containing excessive time spent (a history that plaintiffs' brief does not deny), there is no indication that attorney Berton N. Ring's history was the sole basis for the trial court's decision here. Although the court noted its prior warnings as a preliminary matter, it nonetheless carefully scrutinized the fee petition in the instant case. *McHugh*, 189 Ill.App.3d at 514, 136 Ill.Dec. 855, 545 N.E.2d 379. Indeed, before doing so, the trial judge commented that he would review Ring's petition with a “fine tooth comb.” The trial court's decision to deny the fee petition was not based solely on attorney Berton N. Ring's history of submitting fee petitions containing excessive amounts of time, it was based on the fact that the fee petition *in the instant case* was “replete with excessive time spent.”

Consistent with *McHugh*, 189 Ill.App.3d 508, 136 Ill.Dec. 855, 545 N.E.2d 379 (1989), the trial court determined the proper amount of time for certain time entries. In addition, the trial judge used his own experience. For example, as the judge noted, he was a prosecutor and it never took him 1.5 hours to review a police report. The order also recognizes attorney Berton N. Ring as a leading practitioner in the Chicago Residential Landlord and Tenant Ordinance area, consistent with *Plambeck* and *McHugh*. Further, the written order includes specific *316 references to duplicative entries. In

view of the trial court's careful analysis of the instant fee petition, it is clear that the trial court's previous admonitions to attorney Berton N. Ring were not the sole basis of its ruling.

Nevertheless, we agree with plaintiffs that the trial court did not provide an objective basis for its drastic reduction of fees. Although the trial court noted that the fee petition was “replete” with excessive time entries and enumerated 15 specific entries that it determined were unreasonable, the trial court did not state that it found each and every entry to be excessive. For example, the fee petition contains an entry for the time spent during the trial, which, if accurate, cannot be said to be excessive. The trial court's decision to disregard the entire fee petition constitutes an abuse of discretion. We are therefore remanding this matter for another fee petition hearing. Our decision here today does not suggest that any particular entry contained within Ring's fee petition is reasonable; only that the trial court should either award those fees that it decides are reasonable or clearly state the reasons for the particular reductions, rather than denying the attorney fee petition in its entirety.

We fully understand the trial court's frustration with attorney Berton N. Ring, who, apparently, has repeatedly submitted fee petitions containing unreasonable fees. A trial court has a duty “to report attorney misconduct to the ARDC” (*Skolnick v. Altheimer & Gray*, 191 Ill.2d 214, 229, 246 Ill.Dec. 324, 730 N.E.2d 4 (2000)), and the trial court fulfilled its duty by forwarding its order and Ring's fee petition to the ARDC. Nevertheless, the Illinois Supreme Court has the sole “‘inherent power to discipline attorneys who have been admitted to practice before it.’ ” **575 ***951 *Skolnick*, 191 Ill.2d at 229, 246 Ill.Dec. 324, 730 N.E.2d 4, quoting *In re Harris*, 93 Ill.2d 285, 291, 66 Ill.Dec. 631, 443 N.E.2d 557 (1982). The Illinois Supreme Court has delegated to the ARDC the “authority to investigate and prosecute claims of attorney misconduct.” *Skolnick*, 191 Ill.2d at 229, 246 Ill.Dec. 324, 730 N.E.2d 4.

For the foregoing reasons, the trial court's decision is reversed and this case is remanded for further proceedings consistent with this opinion. We are forwarding a copy of our opinion to the Attorney Registration and Disciplinary Commission.

Reversed and remanded.

SHEILA M. O'BRIEN, P.J., and FROSSARD, J., concur.

All Citations

375 Ill.App.3d 312, 873 N.E.2d 570, 313 Ill.Dec. 946

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274 Ill.App.3d 913
Appellate Court of Illinois,
First District, Second Division.

Martin RYAN, et al., Plaintiffs–
Appellees, Cross–Appellants,

v.

The CITY OF CHICAGO, a municipal corporation,
Firemen's Annuity and Benefit Fund of Chicago,
Defendants–Appellants, Cross–Appellees.

Nos. 1–92–4435, 1–92–4454, 1–93–
0832, 1–93–0966 and 1–93–0967.

|
Aug. 8, 1995.

Synopsis

Participants in four municipal pension funds brought action based upon city's retention of pension tax levies for its own use. The Circuit Court, Cook County, David J. Shields, J., ordered city to pay interest on monies held more than 30 days. [The Appellate Court, 148 Ill.App.3d 638, 101 Ill.Dec. 929, 499 N.E.2d 517](#), reversed. The Supreme Court, [113 Ill.2d 585, 106 Ill.Dec. 55, 505 N.E.2d 361](#), denied appeal. On remand, after three funds settled with city, the Circuit Court, Cook County, Richard L. Curry, J., awarded fourth fund compound interest, incentive awards to fund's participant-plaintiffs, and fees to participant's attorney. City, fund, and participants appealed. The Appellate Court, [Hartman, J.](#), held that: (1) trial court could award compound interest as part of full equitable restitution; (2) trial court could award attorney fees based on percentage of common fund, rather than by lodestar method; and (3) participants were not entitled to attorney fee award against city.

Affirmed.

Attorneys and Law Firms

****485 *915 ***23** Corp. Counsel of City of Chicago, Chicago ([Susan S. Sher](#), Lawrence Rosenthal, Benna Ruth Solomon, and [Jean Dobrer](#), of counsel), for appellant City of Chicago.

Fagel & Haber, Chicago (Alvin D. Meyers and [Steven J. Teplinsky](#), of counsel), Mayer, Brown & Platt, Chicago ([James D. Holzhauer](#) and [Javier H. Rubinstein](#), of counsel), for appellant The Firemen's Annuity and Benefit Fund.

Krislov & Associates, Ltd., Chicago ([Clinton A. Krislov](#), of counsel), Sachnoff & Weaver, Chicago ([Lowell E. Sachnoff](#), of counsel), for appellees.

[David R. Kugler](#), [Frederic P. Heiss](#), Chicago, and [William A. Marovitz](#), Chicago, for cross-appellees.

Opinion

Justice [HARTMAN](#) delivered the opinion of the court:

These consolidated appeals arise from a lawsuit brought against the City of Chicago (City) by four pension funds: Firemen's Annuity and Benefit Fund (Firemen's Fund); Policemen's Annuity and Benefit Fund; Municipal Employees', Officers', and Officials' Annuity and Benefit Fund; and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund, based upon the City's retention for its own use of certain pension fund monies. In [Ryan v. City of Chicago \(1986\), 148 Ill.App.3d 638, 101 Ill.Dec. 929, 499 N.E.2d 517, appeal denied \(1987\), 113 Ill.2d 585, 106 Ill.Dec. 55, 505 N.E.2d 361 \(Ryan I\)](#), this court held that the City had improperly retained for its own benefit the profits it had made upon tax receipts it collected for the pension funds. We ordered full restitution “of all earnings upon withheld funds, whether retrospective or prospective.” [Ryan I, 148 Ill.App.3d at 646, 101 Ill.Dec. 929, 499 N.E.2d 517.](#)

****486 ***24** On remand, the parties agreed to a judgment in the amount of ***916** \$19,324,131.38, representing simple interest which the City had earned and withheld from the pension funds. The City and three of the funds (Settling Funds) then settled on additional damages representing compound interest. The circuit court awarded the Firemen's Fund \$3,072,943.43 in compound interest and incentive awards of \$10,000 each to two of the fund's participant plaintiffs. The court also awarded the Firemen's Fund's attorneys \$1,993,742.35 in fees calculated as a fixed percentage (33 ⅓%) of that fund's total recovery.

The City appeals the compound interest award to the Firemen's Fund; the Firemen's Fund appeals the award of attorneys' fees as well as the incentive awards; and plaintiffs appeal from the denial of their motion seeking additional fees from the City for fiduciary breach and from the court's refusal to award attorneys' fees for certain work done for the Settling Funds.

In order to comply with recently adopted page limitations set forth in Supreme Court Administrative Rule MR No.

10343, which accompanied amended [Supreme Court Rule 23](#), (134 Ill.2d R.23 (amended eff. July 1, 1994)), the written disposition in this appeal will be bifurcated into this opinion, to be published, and an unpublished [Rule 23](#) order disposing of the remaining, nonprecedential issues, filed contemporaneously with this opinion.

The following issues are raised for our review. Their disposition, whether by this opinion or by [Rule 23](#) order (R.23) are designated in parenthesis. The issues include: (1) whether the circuit court erred in awarding Firemen's Fund compound interest (opinion); (2) assuming the compound interest award was proper, whether the circuit court erred in calculating the award (opinion); (3) on Firemen's Fund's appeal, whether the circuit court erred in awarding attorneys' fees as a fixed percentage of the fund's recovery (opinion); (4) on Firemen's Fund's appeal, whether the circuit court abused its discretion in awarding lodestar-based attorneys' fees and costs without findings in the record as to the reasonable number of hours expended by counsel and counsel's reasonable hourly rate (R.23); (5) on Firemen's Fund's appeal, whether the circuit court erred by utilizing a lodestar risk multiplier in awarding attorneys' fees (R.23); (6) on Firemen's Fund's appeal, whether the circuit court erred in awarding attorneys' fees and expenses incurred in connection with the instant fee litigation (R.23); (7) on Firemen's Fund's appeal, whether the circuit court abused its discretion in granting incentive awards to certain plaintiffs (R.23); (8) on plaintiff's appeal, whether the circuit court erred in refusing to award additional attorneys' fees ***917** for certain work done for the Settling Funds (R.23); and (9) on plaintiffs' appeal, whether the circuit court erred in denying their motion for an additional award of fees against the City for fiduciary breach (opinion).

In *Ryan I*, this court ordered the City to make full restitution to four municipal pension funds after finding that the City improperly withheld tax receipts from the funds, placed those receipts in interest-bearing accounts, and retained the interest generated for its own purposes. (*Ryan I*, 148 Ill.App.3d at 638, 101 Ill.Dec. 929, 499 N.E.2d 517.) On February 15, 1989, the parties agreed to a partial judgment whereby the City would pay the funds \$19,324,131.38 representing the principal amount of simple interest income earned by the City's use of pension tax revenues. The parties could not agree, however, about whether the funds were entitled to additional compensation representing the interest that would have been earned on the \$19.3 million dollar judgment had the City immediately paid it to the funds when it was

generated rather than pursuant to the 1989 judgment. The City eventually settled this question with all the pension funds, except Firemen's Fund, for \$10,383,122.60, representing "compound interest restitution and attorneys' fees."

The issues concerning the additional damages that the City owed Firemen's Fund were extensively briefed by the parties and on May 8, 1991, the circuit court ruled that *Ryan I* required the City to make full restitution to the funds in order to remedy the breach of its fiduciary duty. Accordingly, the court granted plaintiffs' motion for full compound interest fiduciary restitution upon ****487 ***25** the City's earnings from use of the pension tax levies. The court ordered the City to pay Firemen's Fund full compound interest computed at the rates earned by the fund upon its investments generally.

On October 7, 1991, the circuit court entered a \$2,930,875.82 judgment in favor of Firemen's Fund for compound interest upon the fund's recovery under the February 15, 1989 partial judgment and granted incentive awards of \$10,000 each to plaintiffs Walter Rucinski and Bernard McKay out of the fund's recovery. The judgment was later amended and increased to \$3,072,943.43. The court placed this judgment money into escrow pending final resolution of the attorneys' fees issues.

Following this ruling, the circuit court considered further a fee dispute between Firemen's Fund and attorney Clinton Krislov, who acted as lead counsel for plaintiffs throughout this litigation. On May 28, 1992, Krislov filed a petition for attorneys' fees and costs, requesting \$2.2 million from Firemen's Fund, arguing the amount was justified under either a "percentage of recovery" approach or a "lodestar ***918** basis."¹ Krislov's petition further requested \$350,000 from the Settling Funds for work done after May 21, 1990², an additional award against the City to reimburse Firemen's Fund for its fees and a fee based upon an appropriate percentage of any additional award against the City.

On September 25, 1992, the circuit court granted Firemen's Fund's motion to strike the portion of Krislov's fee petition related to the instant fee litigation as well as its motion to strike the fee request of one attorney. The court denied, however, Firemen's Fund's motion to strike: the request for a percentage of recovery as attorneys' fees, improper time entries, current rates for historic work, and consideration of projected income or recovery. On November 17, 1992, Krislov revised his lodestar analysis by eliminating 570 hours connected with fee litigation. According to the revision, the

overall lodestar was reduced to \$1,136,629.62 with Firemen's Fund's 35% share being \$397,820.

On December 14, 1992, the circuit court issued an opinion and order vacating its September 25 ruling striking Krislov's request for attorneys' fees and expenses incurred in connection with the fee dispute. Finding a meaningful lodestar analysis of Krislov's fees to be "nigh impossible," "unworkable in this case," and stating that "the findings could never be based on anything other than conjecture, surmise, intuition or gut feelings," the court adopted a percentage-of-the-fund method and awarded Krislov \$1,993,742.35 as a 33 ⅓ % fee from the \$5,981,227.05 benefit conferred upon Firemen's Fund. For comparative purposes only, the court also found the fee supported by an approximate lodestar analysis based on 5000 hours, a \$175/hour rate and a 2.1 multiplier. The court also denied Krislov's requests: for consideration of the present value of the future benefits, for a penalty award against the City for breach of fiduciary duty, for any fees for post-May 21, 1990 services rendered to the Settling Funds, and for interest on fees or incentive awards.

***919** On February 16, 1993, the circuit court granted Krislov's motion for modification of costs, thus increasing his recovery by \$45,713.86. The court also granted Krislov's request to correct the court's comparative lodestar analysis by allocating 35% of the lodestar work to Firemen's Fund's claim and using a multiplier of 4. These consolidated appeals were then timely filed.

I

The City contends that the circuit court's compound interest award to Firemen's Fund constitutes "prejudgment interest" which ****488 ***26** cannot be awarded against a municipality except in limited circumstances.

Plaintiffs and Firemen's Fund counter that they are entitled to full compound interest due to *Ryan I*'s mandate that the City "repay to the pension funds any profits it has made or will make upon receipts it has withheld from the pension funds and full restitution must be made of all earnings upon withheld funds, whether retrospective or prospective." (*Ryan I*, 148 Ill.App.3d at 646, 101 Ill.Dec. 929, 499 N.E.2d 517.) They argue that they received full equitable restitution for the City's breach of its fiduciary duty rather than "prejudgment interest."

Restitution may be recovered as interest when warranted by equitable considerations. (*In re Estate of Wernick* (1989), 127 Ill.2d 61, 87, 129 Ill.Dec. 111, 535 N.E.2d 876 (*Wernick*). See also *Martin v. Heinold Commodities, Inc.* (1992), 240 Ill.App.3d 536, 181 Ill.Dec. 376, 608 N.E.2d 449, *affirmed in part, reversed in part* (1994), 163 Ill.2d 33, 205 Ill.Dec. 443, 643 N.E.2d 734.) Equity allows or withholds interest in accordance with what is equitable and just in view of all the circumstances in the case (*The People ex rel. Barrett v. The Farmer's State Bank of Irvington* (1938), 371 Ill. 222, 224, 20 N.E.2d 502), and the amount of interest allowed need not fall within any precise terms. (*Wernick*, 127 Ill.2d at 87, 129 Ill.Dec. 111, 535 N.E.2d 876.) Whether equitable circumstances support an award of interest is a matter lying within the sound discretion of the circuit court and will not be reversed absent an abuse of that discretion. (*Wernick*, 127 Ill.2d at 87, 129 Ill.Dec. 111, 535 N.E.2d 876.) The supreme court held that in an action for breach of fiduciary duty, a court could award equitable interest to make an injured party whole since statutory prejudgment interest "does not provide an accurate measure of compensation for money wrongfully withheld." *Wernick*, 127 Ill.2d at 87–89, 129 Ill.Dec. 111, 535 N.E.2d 876.

In *Ryan I*, this court ordered the City to repay to the pension funds any profits it had made upon withheld tax receipts and to make "full restitution * * * of all earnings upon withheld funds." (*Ryan I*, 148 Ill.App.3d at 646, 101 Ill.Dec. 929, 499 N.E.2d 517.) In accordance with *Ryan I*'s mandate, the circuit court expressly awarded Firemen's Fund compound interest as part of its judgment of full restitution and not as a separate ***920** award of statutory or common law prejudgment interest. The record discloses that in granting compound interest, the circuit judge stated:

" * * * I am satisfied that this thing has to be resolved on the basis of the concept of *full equitable restitution* rather than as interest or prejudgment interest * * * .

* * *

The entitlement to *full restitution*, compound interest does not implicate the prejudgment interest statute or an analysis of prejudgment interest cases [but] implicate[s] * * * an analysis of righting a wrong * * * done by a trustee to its beneficiaries." (Emphasis added.)

We agree. The City's characterization of the compound interest award as "prejudgment interest" is unpersuasive. Firemen's Fund did not seek separate interest on a final

judgment, but compound interest as part of its effort to obtain full reimbursement from the City for wrongful use of fund money. Significantly, the February 15, 1989 agreed order on the amount of simple interest owed by the City was designated as a *partial* judgment, indicating that compound interest was part of Firemen's Fund's original claim. Compound interest was awarded here as part of the court's overall judgment of equitable restitution and not as a separate award of prejudgment interest.

Plaintiffs and Firemen's Fund also posit that the circuit court had statutory authorization to award compound interest under the Illinois Pension Code (40 ILCS 5/1–101 *et seq.* (West 1992)) in that the Code subjects a wrongdoing fiduciary “to such equitable or remedial relief as the court may deem appropriate, including the removal of such fiduciary.” (Emphasis added.) 40 ILCS 5/1–114 (West 1992).

In the present case, the court specifically found that compound interest was required in order to make full equitable restitution under the Pension Code. (Cf. ****489 ***27** *Loeffler v. Frank* (1988), 486 U.S. 549, 564, 108 S.Ct. 1965, 1974, 100 L.Ed.2d 549, 563 (holding that the phrase “any other equitable relief as the court deems appropriate” provides for prejudgment interest against a private or governmental party).) The circuit court correctly found that the Pension Code provides statutory authorization for an equitable compound interest award.

In summary, we conclude that the circuit court's award of compound interest was not an abuse of discretion but provided Firemen's Fund full equitable restitution. Further, the circuit court's restitution award finds statutory support in the Illinois Pension Code.

***921 II**

The City next maintains that, assuming *arguendo*, the compound interest award is proper, the amount awarded was excessive because it exceeded the statutory post-judgment interest rate of 6%.

In equity, the amount of interest allowed need not fall within any precise terms. (*Wernick*, 127 Ill.2d at 87, 129 Ill.Dec. 111, 535 N.E.2d 876.) Moreover, the statutory rate for an award of prejudgment interest does not provide an accurate measure of compensation for money wrongfully withheld. (*Wernick*, 127 Ill.2d at 88, 129 Ill.Dec. 111, 535 N.E.2d 876.) An equitable

award of interest is a matter within the circuit court's sound discretion and will not be reversed absent an abuse of that discretion. *Wernick*, 127 Ill.2d at 87, 129 Ill.Dec. 111, 535 N.E.2d 876.

Here, the court awarded interest based upon equitable and not statutory interest considerations. Statutory interest rates are inapplicable. The City's attempt to characterize the compound interest award as post-judgment interest on the parties February 15, 1989 partial judgment order is without merit. Instead, the February 15, 1989 *partial* judgment governing simple interest was not complete because the issue of compound interest had not been settled. The compound interest award was part of the court's judgment granting Firemen's Fund full restitution and not “post-judgment” interest on the February 15, 1989 partial judgment order.

The circuit court did not abuse its discretion in awarding Firemen's Fund interest compounded at the fund's investment rate since no other rate would have provided full equitable restitution.

III

Firemen's Fund charges that the circuit court abused its discretion in awarding attorneys' fees as a fixed percentage of the fund's recovery rather than following Illinois precedent which requires use of the lodestar method for calculating fees in common fund and derivative cases.

In the absence of statutory authority or a contractual agreement between the parties, a successful litigant may not recover attorneys' fees or costs of the litigation from his or her adversary. (*Saltiel v. Olsen* (1981), 85 Ill.2d 484, 488, 55 Ill.Dec. 830, 426 N.E.2d 1204.) The general rule requiring litigants to bear their own costs and attorneys' fees does not interfere, however, with the power of courts of equity to permit a litigant or lawyer who recovers a common fund for the benefit of others to recover costs and reasonable fees from the fund as a whole. (*Boeing Co. v. Van Gemert* (1980), 444 U.S. 472, 478, 100 S.Ct. 745, 749, 62 L.Ed.2d 676, 681; *Baksinski v. Northwestern University* (1992), 231 Ill.App.3d 7, 12, 172 Ill.Dec. 436, 595 N.E.2d 1106, *appeal denied* (1992), 146 Ill.2d 622, 176 Ill.Dec. 792, 602 N.E.2d 446 (*Baksinski*).) The award of fees under the common fund doctrine ***922** rests upon equitable considerations of *quantum meruit* and the prevention of unjust enrichment; an attorney is entitled to an award from the fund

for the reasonable value of his or her services. (*Baksinski*, 231 Ill.App.3d at 13, 172 Ill.Dec. 436, 595 N.E.2d 1106.) Such an award operates to spread the cost of the litigation proportionately among those who share in the benefit of his or her efforts. *Baksinski*, 231 Ill.App.3d at 13, 172 Ill.Dec. 436, 595 N.E.2d 1106.

Historically courts, in their exercise of discretion, have applied a reasonableness standard in determining the amount of a common ****490 ***28** fund fee award, with the percentage-of-the-fund approach (percentage analysis) emerging as the dominant method of calculating attorneys' fees. (*Court Awarded Attorney Fees, Report of the Third Circuit Task Force* (1985), 108 F.R.D. 237, 242 (*Third Circuit Report*); *Swedish Hospital Corp. v. Shalala* (D.C.Cir.1993), 1 F.3d 1261, 1265.) Percentage analysis sometimes resulted in exorbitant fees, however, which sparked criticism of the courts and of the legal profession, and thus, generated pressure to find alternative methods of calculating fees. (*Leader v. Cullerton* (1976), 62 Ill.2d 483, 488, 343 N.E.2d 897; *Third Circuit Report*, 108 F.R.D. at 242.) As a result, in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.* (3rd Cir.1973), 487 F.2d 161, the Third Circuit developed the "lodestar" approach which shifted the emphasis from a fair percentage of recovery to the value of the time expended by counsel. The lodestar approach quickly gained acceptance in other federal courts because it was viewed as more reasonable than the percentage analysis for making fee awards in modern complex litigation. *Third Circuit Report*, 108 F.R.D. at 244.

In the 1970's, our supreme court followed the then majority of federal courts by accepting the lodestar computation method. (*Fiorito v. Jones* (1978), 72 Ill.2d 73, 377 N.E.2d 1019; *Leader v. Cullerton* (1976), 62 Ill.2d 483, 343 N.E.2d 897; *Flynn v. Kucharski* (1974), 59 Ill.2d 61, 319 N.E.2d 1. See also *Baksinski*, 231 Ill.App.3d at 13, 172 Ill.Dec. 436, 595 N.E.2d 1106.) Under the lodestar method, where a common fund has been created, attorneys for the successful plaintiff may directly petition the court for the reasonable value of their services which benefitted the class. (*Baksinski*, 231 Ill.App.3d at 13–14, 172 Ill.Dec. 436, 595 N.E.2d 1106.) In determining compensation, the court calculates the number of hours which benefitted the class and then fixes an hourly rate for each attorney, taking into account the nature of the services performed, the complexity of the undertaking and the hourly fee charged for similar services by attorneys with similar skills and qualifications. (*Fiorito*, 72 Ill.2d at 90, 377 N.E.2d 1019; *Leader*, 62 Ill.2d at 491–92, 343 N.E.2d

897.) The hourly rates are multiplied by the hours expended, producing the "lodestar" computation which may be adjusted by a weighted multiplier to account for the contingent ***923** nature of the undertaking and the benefits conferred upon the class. (*Fiorito*, 72 Ill.2d at 90–91, 377 N.E.2d 1019.) The amount of the attorneys' fees award is within the circuit court's sound discretion. *Leader*, 62 Ill.2d at 488, 343 N.E.2d 897; *Baksinski*, 231 Ill.App.3d at 14, 172 Ill.Dec. 436, 595 N.E.2d 1106.

In approving the lodestar approach, our supreme court reasoned that although class action fees are contingent upon success, a class action is not a typical contingent-fee case because the amount of the fee has not been fixed by voluntary agreement between the client and his or her attorney. (*Fiorito*, 72 Ill.2d at 87–88, 377 N.E.2d 1019; *Flynn*, 59 Ill.2d at 66, 319 N.E.2d 1.) Rather, the fee is taken, by order of the court, from money that belongs to others, *i.e.*, the fund. (*Fiorito*, 72 Ill.2d at 88, 377 N.E.2d 1019; *Flynn*, 59 Ill.2d at 67, 319 N.E.2d 1.) Consequently, the court concluded that the rights of the class must be carefully considered and that the time expended becomes a significant factor in determining the fee. *Flynn*, 59 Ill.2d at 67, 319 N.E.2d 1.

In the past decade, however, the lodestar approach has been subjected to increased scrutiny as its deficiencies began to offset or exceed its benefits. (*Third Circuit Report*, 108 F.R.D. at 246.) The Third Circuit, which developed the lodestar method, appointed a task force to compare the respective merits of lodestar and percentage analysis. The task force enumerated nine deficiencies identifiable in the lodestar method: (1) it increases the workload of an already overtaxed judicial system, (2) it is insufficiently objective and produces results that are far from homogenous, (3) it creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law, (4) it is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount, (5) it has led to abuses such as lawyers billing excessive hours, (6) it creates a disincentive for the early settlement ****491 ***29** of cases, (7) it does not provide the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered, (8) it works to the particular disadvantage of the public interest bar because the lodestar is lower in civil rights cases than in securities or anti-trust cases, and (9) it is confusing and unpredictable in its administration. (*Third Circuit Report*, 108 F.R.D. at 246–49.) The task force recommended retention of the lodestar in some

statutory fee cases but concluded that a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases. *Third Circuit Report*, 108 F.R.D. at 255–56.

Accordingly, most federal circuits that have revisited the issue recently either have abandoned the lodestar in favor of a percentage fee in common fund cases (*924 *Swedish Hospital Corp. v. Shalala* (D.C.Cir.1993), 1 F.3d 1261; *Camden I Condominium Association, Inc. v. Dunkle* (11th Cir.1991), 946 F.2d 768) or have granted the district court discretion to determine which method is more suitable in a particular case. *Florin v. Nationsbank of Georgia, N.A.* (7th Cir.1994), 34 F.3d 560. Accord *In re Washington Public Power Supply System Securities Litigation* (9th Cir.1994), 19 F.3d 1291; *Useton v. Commercial Lovelace Motor Freight, Inc.* (10th Cir.1993), 9 F.3d 849; *Rawlings v. Prudential–Bache Properties, Inc.* (6th Cir.1993), 9 F.3d 513. See also *Boeing Co. v. Van Gemert* (1980), 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (approving a fee award based upon the percentage analysis in a common fund case). But see *Longden v. Sunderman* (5th Cir.1992), 979 F.2d 1095; *Walitalo v. Iacocca* (8th Cir.1992), 968 F.2d 741.

The growing weight of authority, then, indicates that although the lodestar is still alive, particularly with regard to statutory fee-shifting cases, a percentage fee also may be appropriate in common fund cases.

The case *sub judice* illustrates the advantages in granting the circuit court discretion to choose either the lodestar or percentage method. The circuit court found a lodestar analysis impossible because the case involved not only “9 years of legal efforts and more than 5700 billable hours” but “[n]either the lawyers challenging the bona fides of Krislov’s time entries nor the court charged with valuing his efforts were involved during the first six years of the relevant nine-year period.” The court found additional obstacles to a credible lodestar analysis including the fact that Krislov represented four city pension funds, so that allocation of the myriad time entries to that time spent solely for Firemen’s Fund was impossible. The court also questioned the rate it should use in computing the lodestar since Krislov’s hourly rates had changed over the course of the nine year litigation.

Percentage analysis approach eliminates the need for additional major litigation and further taxing of scarce judicial resources which occurred here as a result of plaintiffs’ request for attorneys’ fees. Significantly, according to plaintiffs,

nearly half of the 11,000 page record in this case is devoted to the fee litigation. Consequently, the court ordered a 33 ⅓ % fee due to the extreme contingency risk, plaintiffs’ financing and prosecuting the claim without assistance from the funds, winning a \$33 million hard cash benefit from a tenacious adversary, and engaging in satellite litigation to protect the money benefit from a collateral attack.

Firemen’s Fund alleges that controlling Illinois precedent requires use of the lodestar method in common fund cases and that *925 only the supreme court can overrule or modify its previous opinions. Although our supreme court has approved the lodestar method in this state, it has never unequivocally and definitively ruled that percentage analysis may never be utilized in common fund cases.

The circuit court did not abuse its discretion in determining attorneys’ fees based upon percentage rather than lodestar analysis.

IV

Plaintiffs maintain the circuit court abused its discretion in denying their request that a substantial portion of Firemen’s Fund’s attorneys’ fees be surcharged as an additional award against the City due to its breach of fiduciary duty.

492 *30 Plaintiffs first contend, in this regard, that common law routinely surcharges self-dealing fiduciaries for legal costs. The law regarding common fund cases does not authorize the circuit court to shift fees to an adversary but attempts to spread the fees among those who benefitted from the litigation. Under the common fund doctrine, courts of equity may permit an attorney to recover costs and reasonable fees from the fund itself or from its other beneficiaries. (*Baksinski*, 231 Ill.App.3d at 12, 172 Ill.Dec. 436, 595 N.E.2d 1106.) Therefore, in common fund cases, the award of fees and expenses is not charged against the adversary, as is disallowed by the “American Rule,” but rather, against the persons or entities benefitted by the successful creation or preservation of the fund. (*Baksinski*, 231 Ill.App.3d at 13, 172 Ill.Dec. 436, 595 N.E.2d 1106.) Although plaintiffs rely upon a number of cases from foreign jurisdictions, they cite no Illinois case authorizing an award of attorneys’ fees against a breaching fiduciary in a common fund situation.

The Illinois Pension Code (40 ILCS 5/1–101 *et seq.* (West 1992)) is claimed to be authority for awarding fees against the

City, plaintiffs submitting that [sections 5/1–114](#) and [5/1–115](#) of the Code could be so construed; however, neither provision expressly authorizes an award of attorneys' fees. The circuit court may not award statutory attorneys' fees in the absence of specific language. See [Qazi v. Ismail](#) (1977), 50 Ill.App.3d 271, 273, 7 Ill.Dec. 434, 364 N.E.2d 595; [City of Chicago v. Illinois Fair Employment Practices Commission](#) (1975), 34 Ill.App.3d 114, 116–17, 339 N.E.2d 260.

Although attorneys' fees are not explicitly mentioned in section 5/1–114 of the Illinois Pension Code, plaintiffs contend that this statutory provision generally tracks the enforcement provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132 (1988) which authorizes attorneys' fees. ERISA expressly authorizes a fee award, however; the Illinois Pension Code neither expressly authorizes fees nor incorporates ERISA.

***926** Plaintiffs argue that the circuit court erred in concluding that an additional fee award for fiduciary breach would be punitive and barred by the Local Governmental and Governmental Employees Tort Immunity Act (Act). ([745 ILCS 10/1–101 et seq.](#) (West 1992).) The Act immunizes the City from paying “punitive or exemplary damages in any action brought directly or indirectly against it by the injured party or a third party.” ([745 ILCS 10/2–102](#) (West 1992).) Attorneys' fees cannot be awarded as a separate entity distinct from punitive damages, absent a statutory provision specifically authorizing an award of such fees. ([E.J. McKernan Co. v. Gregory](#) (1993), 252 Ill.App.3d 514, 546, 191 Ill.Dec. 391, 623 N.E.2d 981.) Indeed, plaintiffs acknowledge the punitive nature of such an award in their brief when they state that a “fee award here would *deter* others from similar actions, since it makes the *punishment* worse than merely returning the money.” (Emphasis added.) Plaintiffs' attempt to obtain a punitive award of attorneys' fees from the City is prohibited by the Act.

Plaintiffs assert that the Act does not apply to this case because it involves a contractual dispute. The City declares that its use of the pension funds' monies constitutes the tort of conversion which is covered by the Act. ([Martel Enterprises v. City of Chicago](#) (1991), 223 Ill.App.3d 1028, 1032–33, 164 Ill.Dec. 945, 584 N.E.2d 157.) Assuming, *arguendo*, that plaintiffs' claim sounds in contract, however, the City points out that such a claim does not entitle a plaintiff to punitive damages. Generally, punitive damages are not recoverable for breach of contract; the sole purpose of contract damages is to compensate the nonbreaching party, and punitive damages are not available even for a “wilful” breach of contract. [Morrow v. L.A. Goldschmidt Associates, Inc.](#) (1986), 112 Ill.2d 87, 94, 96 Ill.Dec. 939, 492 N.E.2d 181.

Plaintiffs submit that even if the Act applies, a fee award need not be characterized as punitive. As discussed above, the circuit court specifically found that such an award would be punitive and plaintiffs conceded its punitive nature in their brief.

The circuit court did not abuse its discretion in denying plaintiffs' request that a portion ****493 ***31** of the attorneys' fees be surcharged as an additional award against the City.

For the reasons set forth, we find no reversible error in the circuit court's disposition of the issues articulated above and, accordingly, affirm.

Affirmed.

SCARIANO, P.J., and DiVITO, J., concur.

All Citations

274 Ill.App.3d 913, 654 N.E.2d 483, 211 Ill.Dec. 21

Footnotes

- 1 Under a “percentage of recovery” approach, Krislov argued the requested fee of \$2.2 million represented only 24% of the fund's total recovery since the fund recovered approximately \$9 million in overall benefits as a result of the litigation. The petition also claimed that a \$2.2 million fee was justified under the lodestar approach since the attorneys billed 5700 hours of time at hourly rates ranging from \$125 to \$350, producing a

lodestar value of \$1.3 million. The petition approximated Firemen's Fund's share of the lodestar at \$450,000 (35%) which, with a multiplier of 5, produced a fee of \$2.25 million.

- 2 On November 30, 1990, Krislov and the Settling Funds settled their fee dispute for \$2.2 million for work done through May 21, 1990.

274 Ill.App.3d 913
Appellate Court of Illinois,
First District, Second Division.

Martin RYAN, et al., Plaintiffs–
Appellees, Cross–Appellants,

v.

The CITY OF CHICAGO, a municipal corporation,
Firemen's Annuity and Benefit Fund of Chicago,
Defendants–Appellants, Cross–Appellees.

Nos. 1–92–4435, 1–92–4454, 1–93–
0832, 1–93–0966 and 1–93–0967.

|
Aug. 8, 1995.

Synopsis

Participants in four municipal pension funds brought action based upon city's retention of pension tax levies for its own use. The Circuit Court, Cook County, David J. Shields, J., ordered city to pay interest on monies held more than 30 days. [The Appellate Court, 148 Ill.App.3d 638, 101 Ill.Dec. 929, 499 N.E.2d 517](#), reversed. The Supreme Court, [113 Ill.2d 585, 106 Ill.Dec. 55, 505 N.E.2d 361](#), denied appeal. On remand, after three funds settled with city, the Circuit Court, Cook County, Richard L. Curry, J., awarded fourth fund compound interest, incentive awards to fund's participant-plaintiffs, and fees to participant's attorney. City, fund, and participants appealed. The Appellate Court, [Hartman, J.](#), held that: (1) trial court could award compound interest as part of full equitable restitution; (2) trial court could award attorney fees based on percentage of common fund, rather than by lodestar method; and (3) participants were not entitled to attorney fee award against city.

Affirmed.

Attorneys and Law Firms

****485 *915 ***23** Corp. Counsel of City of Chicago, Chicago ([Susan S. Sher](#), Lawrence Rosenthal, Benna Ruth Solomon, and [Jean Dobrer](#), of counsel), for appellant City of Chicago.

Fagel & Haber, Chicago (Alvin D. Meyers and [Steven J. Teplinsky](#), of counsel), Mayer, Brown & Platt, Chicago ([James D. Holzhauer](#) and [Javier H. Rubinstein](#), of counsel), for appellant The Firemen's Annuity and Benefit Fund.

Krislov & Associates, Ltd., Chicago ([Clinton A. Krislov](#), of counsel), Sachnoff & Weaver, Chicago ([Lowell E. Sachnoff](#), of counsel), for appellees.

[David R. Kugler](#), [Frederic P. Heiss](#), Chicago, and [William A. Marovitz](#), Chicago, for cross-appellees.

Opinion

Justice [HARTMAN](#) delivered the opinion of the court:

These consolidated appeals arise from a lawsuit brought against the City of Chicago (City) by four pension funds: Firemen's Annuity and Benefit Fund (Firemen's Fund); Policemen's Annuity and Benefit Fund; Municipal Employees', Officers', and Officials' Annuity and Benefit Fund; and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund, based upon the City's retention for its own use of certain pension fund monies. In [Ryan v. City of Chicago](#) (1986), [148 Ill.App.3d 638, 101 Ill.Dec. 929, 499 N.E.2d 517](#), *appeal denied* (1987), [113 Ill.2d 585, 106 Ill.Dec. 55, 505 N.E.2d 361](#) (*Ryan I*), this court held that the City had improperly retained for its own benefit the profits it had made upon tax receipts it collected for the pension funds. We ordered full restitution “of all earnings upon withheld funds, whether retrospective or prospective.” [Ryan I](#), [148 Ill.App.3d at 646, 101 Ill.Dec. 929, 499 N.E.2d 517](#).

****486 ***24** On remand, the parties agreed to a judgment in the amount of ***916** \$19,324,131.38, representing simple interest which the City had earned and withheld from the pension funds. The City and three of the funds (Settling Funds) then settled on additional damages representing compound interest. The circuit court awarded the Firemen's Fund \$3,072,943.43 in compound interest and incentive awards of \$10,000 each to two of the fund's participant plaintiffs. The court also awarded the Firemen's Fund's attorneys \$1,993,742.35 in fees calculated as a fixed percentage (33 ⅓%) of that fund's total recovery.

The City appeals the compound interest award to the Firemen's Fund; the Firemen's Fund appeals the award of attorneys' fees as well as the incentive awards; and plaintiffs appeal from the denial of their motion seeking additional fees from the City for fiduciary breach and from the court's refusal to award attorneys' fees for certain work done for the Settling Funds.

In order to comply with recently adopted page limitations set forth in Supreme Court Administrative Rule MR No.

10343, which accompanied amended [Supreme Court Rule 23](#), (134 Ill.2d R.23 (amended eff. July 1, 1994)), the written disposition in this appeal will be bifurcated into this opinion, to be published, and an unpublished [Rule 23](#) order disposing of the remaining, nonprecedential issues, filed contemporaneously with this opinion.

The following issues are raised for our review. Their disposition, whether by this opinion or by [Rule 23](#) order (R.23) are designated in parenthesis. The issues include: (1) whether the circuit court erred in awarding Firemen's Fund compound interest (opinion); (2) assuming the compound interest award was proper, whether the circuit court erred in calculating the award (opinion); (3) on Firemen's Fund's appeal, whether the circuit court erred in awarding attorneys' fees as a fixed percentage of the fund's recovery (opinion); (4) on Firemen's Fund's appeal, whether the circuit court abused its discretion in awarding lodestar-based attorneys' fees and costs without findings in the record as to the reasonable number of hours expended by counsel and counsel's reasonable hourly rate (R.23); (5) on Firemen's Fund's appeal, whether the circuit court erred by utilizing a lodestar risk multiplier in awarding attorneys' fees (R.23); (6) on Firemen's Fund's appeal, whether the circuit court erred in awarding attorneys' fees and expenses incurred in connection with the instant fee litigation (R.23); (7) on Firemen's Fund's appeal, whether the circuit court abused its discretion in granting incentive awards to certain plaintiffs (R.23); (8) on plaintiff's appeal, whether the circuit court erred in refusing to award additional attorneys' fees ***917** for certain work done for the Settling Funds (R.23); and (9) on plaintiffs' appeal, whether the circuit court erred in denying their motion for an additional award of fees against the City for fiduciary breach (opinion).

In *Ryan I*, this court ordered the City to make full restitution to four municipal pension funds after finding that the City improperly withheld tax receipts from the funds, placed those receipts in interest-bearing accounts, and retained the interest generated for its own purposes. (*Ryan I*, 148 Ill.App.3d at 638, 101 Ill.Dec. 929, 499 N.E.2d 517.) On February 15, 1989, the parties agreed to a partial judgment whereby the City would pay the funds \$19,324,131.38 representing the principal amount of simple interest income earned by the City's use of pension tax revenues. The parties could not agree, however, about whether the funds were entitled to additional compensation representing the interest that would have been earned on the \$19.3 million dollar judgment had the City immediately paid it to the funds when it was

generated rather than pursuant to the 1989 judgment. The City eventually settled this question with all the pension funds, except Firemen's Fund, for \$10,383,122.60, representing "compound interest restitution and attorneys' fees."

The issues concerning the additional damages that the City owed Firemen's Fund were extensively briefed by the parties and on May 8, 1991, the circuit court ruled that *Ryan I* required the City to make full restitution to the funds in order to remedy the breach of its fiduciary duty. Accordingly, the court granted plaintiffs' motion for full compound interest fiduciary restitution upon ****487 ***25** the City's earnings from use of the pension tax levies. The court ordered the City to pay Firemen's Fund full compound interest computed at the rates earned by the fund upon its investments generally.

On October 7, 1991, the circuit court entered a \$2,930,875.82 judgment in favor of Firemen's Fund for compound interest upon the fund's recovery under the February 15, 1989 partial judgment and granted incentive awards of \$10,000 each to plaintiffs Walter Rucinski and Bernard McKay out of the fund's recovery. The judgment was later amended and increased to \$3,072,943.43. The court placed this judgment money into escrow pending final resolution of the attorneys' fees issues.

Following this ruling, the circuit court considered further a fee dispute between Firemen's Fund and attorney Clinton Krislov, who acted as lead counsel for plaintiffs throughout this litigation. On May 28, 1992, Krislov filed a petition for attorneys' fees and costs, requesting \$2.2 million from Firemen's Fund, arguing the amount was justified under either a "percentage of recovery" approach or a "lodestar ***918** basis."¹ Krislov's petition further requested \$350,000 from the Settling Funds for work done after May 21, 1990², an additional award against the City to reimburse Firemen's Fund for its fees and a fee based upon an appropriate percentage of any additional award against the City.

On September 25, 1992, the circuit court granted Firemen's Fund's motion to strike the portion of Krislov's fee petition related to the instant fee litigation as well as its motion to strike the fee request of one attorney. The court denied, however, Firemen's Fund's motion to strike: the request for a percentage of recovery as attorneys' fees, improper time entries, current rates for historic work, and consideration of projected income or recovery. On November 17, 1992, Krislov revised his lodestar analysis by eliminating 570 hours connected with fee litigation. According to the revision, the

overall lodestar was reduced to \$1,136,629.62 with Firemen's Fund's 35% share being \$397,820.

On December 14, 1992, the circuit court issued an opinion and order vacating its September 25 ruling striking Krislov's request for attorneys' fees and expenses incurred in connection with the fee dispute. Finding a meaningful lodestar analysis of Krislov's fees to be "nigh impossible," "unworkable in this case," and stating that "the findings could never be based on anything other than conjecture, surmise, intuition or gut feelings," the court adopted a percentage-of-the-fund method and awarded Krislov \$1,993,742.35 as a 33 ⅓ % fee from the \$5,981,227.05 benefit conferred upon Firemen's Fund. For comparative purposes only, the court also found the fee supported by an approximate lodestar analysis based on 5000 hours, a \$175/hour rate and a 2.1 multiplier. The court also denied Krislov's requests: for consideration of the present value of the future benefits, for a penalty award against the City for breach of fiduciary duty, for any fees for post-May 21, 1990 services rendered to the Settling Funds, and for interest on fees or incentive awards.

***919** On February 16, 1993, the circuit court granted Krislov's motion for modification of costs, thus increasing his recovery by \$45,713.86. The court also granted Krislov's request to correct the court's comparative lodestar analysis by allocating 35% of the lodestar work to Firemen's Fund's claim and using a multiplier of 4. These consolidated appeals were then timely filed.

I

The City contends that the circuit court's compound interest award to Firemen's Fund constitutes "prejudgment interest" which ****488 ***26** cannot be awarded against a municipality except in limited circumstances.

Plaintiffs and Firemen's Fund counter that they are entitled to full compound interest due to *Ryan I*'s mandate that the City "repay to the pension funds any profits it has made or will make upon receipts it has withheld from the pension funds and full restitution must be made of all earnings upon withheld funds, whether retrospective or prospective." (*Ryan I*, 148 Ill.App.3d at 646, 101 Ill.Dec. 929, 499 N.E.2d 517.) They argue that they received full equitable restitution for the City's breach of its fiduciary duty rather than "prejudgment interest."

Restitution may be recovered as interest when warranted by equitable considerations. (*In re Estate of Wernick* (1989), 127 Ill.2d 61, 87, 129 Ill.Dec. 111, 535 N.E.2d 876 (*Wernick*)). See also *Martin v. Heinold Commodities, Inc.* (1992), 240 Ill.App.3d 536, 181 Ill.Dec. 376, 608 N.E.2d 449, *affirmed in part, reversed in part* (1994), 163 Ill.2d 33, 205 Ill.Dec. 443, 643 N.E.2d 734.) Equity allows or withholds interest in accordance with what is equitable and just in view of all the circumstances in the case (*The People ex rel. Barrett v. The Farmer's State Bank of Irvington* (1938), 371 Ill. 222, 224, 20 N.E.2d 502), and the amount of interest allowed need not fall within any precise terms. (*Wernick*, 127 Ill.2d at 87, 129 Ill.Dec. 111, 535 N.E.2d 876.) Whether equitable circumstances support an award of interest is a matter lying within the sound discretion of the circuit court and will not be reversed absent an abuse of that discretion. (*Wernick*, 127 Ill.2d at 87, 129 Ill.Dec. 111, 535 N.E.2d 876.) The supreme court held that in an action for breach of fiduciary duty, a court could award equitable interest to make an injured party whole since statutory prejudgment interest "does not provide an accurate measure of compensation for money wrongfully withheld." *Wernick*, 127 Ill.2d at 87–89, 129 Ill.Dec. 111, 535 N.E.2d 876.

In *Ryan I*, this court ordered the City to repay to the pension funds any profits it had made upon withheld tax receipts and to make "full restitution * * * of all earnings upon withheld funds." (*Ryan I*, 148 Ill.App.3d at 646, 101 Ill.Dec. 929, 499 N.E.2d 517.) In accordance with *Ryan I*'s mandate, the circuit court expressly awarded Firemen's Fund compound interest as part of its judgment of full restitution and not as a separate ***920** award of statutory or common law prejudgment interest. The record discloses that in granting compound interest, the circuit judge stated:

"* * * I am satisfied that this thing has to be resolved on the basis of the concept of *full equitable restitution* rather than as interest or prejudgment interest * * *."

* * *

The entitlement to *full restitution*, compound interest does not implicate the prejudgment interest statute or an analysis of prejudgment interest cases [but] implicate[s] * * * an analysis of righting a wrong * * * done by a trustee to its beneficiaries." (Emphasis added.)

We agree. The City's characterization of the compound interest award as "prejudgment interest" is unpersuasive. Firemen's Fund did not seek separate interest on a final

judgment, but compound interest as part of its effort to obtain full reimbursement from the City for wrongful use of fund money. Significantly, the February 15, 1989 agreed order on the amount of simple interest owed by the City was designated as a *partial* judgment, indicating that compound interest was part of Firemen's Fund's original claim. Compound interest was awarded here as part of the court's overall judgment of equitable restitution and not as a separate award of prejudgment interest.

Plaintiffs and Firemen's Fund also posit that the circuit court had statutory authorization to award compound interest under the Illinois Pension Code (40 ILCS 5/1–101 *et seq.* (West 1992)) in that the Code subjects a wrongdoing fiduciary “to such equitable or remedial relief as the court may deem appropriate, including the removal of such fiduciary.” (Emphasis added.) 40 ILCS 5/1–114 (West 1992).

In the present case, the court specifically found that compound interest was required in order to make full equitable restitution under the Pension Code. (Cf. ****489** *****27** *Loeffler v. Frank* (1988), 486 U.S. 549, 564, 108 S.Ct. 1965, 1974, 100 L.Ed.2d 549, 563 (holding that the phrase “any other equitable relief as the court deems appropriate” provides for prejudgment interest against a private or governmental party).) The circuit court correctly found that the Pension Code provides statutory authorization for an equitable compound interest award.

In summary, we conclude that the circuit court's award of compound interest was not an abuse of discretion but provided Firemen's Fund full equitable restitution. Further, the circuit court's restitution award finds statutory support in the Illinois Pension Code.

***921 II**

The City next maintains that, assuming *arguendo*, the compound interest award is proper, the amount awarded was excessive because it exceeded the statutory post-judgment interest rate of 6%.

In equity, the amount of interest allowed need not fall within any precise terms. (*Wernick*, 127 Ill.2d at 87, 129 Ill.Dec. 111, 535 N.E.2d 876.) Moreover, the statutory rate for an award of prejudgment interest does not provide an accurate measure of compensation for money wrongfully withheld. (*Wernick*, 127 Ill.2d at 88, 129 Ill.Dec. 111, 535 N.E.2d 876.) An equitable

award of interest is a matter within the circuit court's sound discretion and will not be reversed absent an abuse of that discretion. *Wernick*, 127 Ill.2d at 87, 129 Ill.Dec. 111, 535 N.E.2d 876.

Here, the court awarded interest based upon equitable and not statutory interest considerations. Statutory interest rates are inapplicable. The City's attempt to characterize the compound interest award as post-judgment interest on the parties February 15, 1989 partial judgment order is without merit. Instead, the February 15, 1989 *partial* judgment governing simple interest was not complete because the issue of compound interest had not been settled. The compound interest award was part of the court's judgment granting Firemen's Fund full restitution and not “post-judgment” interest on the February 15, 1989 partial judgment order.

The circuit court did not abuse its discretion in awarding Firemen's Fund interest compounded at the fund's investment rate since no other rate would have provided full equitable restitution.

III

Firemen's Fund charges that the circuit court abused its discretion in awarding attorneys' fees as a fixed percentage of the fund's recovery rather than following Illinois precedent which requires use of the lodestar method for calculating fees in common fund and derivative cases.

In the absence of statutory authority or a contractual agreement between the parties, a successful litigant may not recover attorneys' fees or costs of the litigation from his or her adversary. (*Saltiel v. Olsen* (1981), 85 Ill.2d 484, 488, 55 Ill.Dec. 830, 426 N.E.2d 1204.) The general rule requiring litigants to bear their own costs and attorneys' fees does not interfere, however, with the power of courts of equity to permit a litigant or lawyer who recovers a common fund for the benefit of others to recover costs and reasonable fees from the fund as a whole. (*Boeing Co. v. Van Gemert* (1980), 444 U.S. 472, 478, 100 S.Ct. 745, 749, 62 L.Ed.2d 676, 681; *Baksinski v. Northwestern University* (1992), 231 Ill.App.3d 7, 12, 172 Ill.Dec. 436, 595 N.E.2d 1106, *appeal denied* (1992), 146 Ill.2d 622, 176 Ill.Dec. 792, 602 N.E.2d 446 (*Baksinski*).) The award of fees under the common fund doctrine ***922** rests upon equitable considerations of *quantum meruit* and the prevention of unjust enrichment; an attorney is entitled to an award from the fund

for the reasonable value of his or her services. (*Baksinski*, 231 Ill.App.3d at 13, 172 Ill.Dec. 436, 595 N.E.2d 1106.) Such an award operates to spread the cost of the litigation proportionately among those who share in the benefit of his or her efforts. *Baksinski*, 231 Ill.App.3d at 13, 172 Ill.Dec. 436, 595 N.E.2d 1106.

Historically courts, in their exercise of discretion, have applied a reasonableness standard in determining the amount of a common ****490 ***28** fund fee award, with the percentage-of-the-fund approach (percentage analysis) emerging as the dominant method of calculating attorneys' fees. (*Court Awarded Attorney Fees, Report of the Third Circuit Task Force* (1985), 108 F.R.D. 237, 242 (*Third Circuit Report*); *Swedish Hospital Corp. v. Shalala* (D.C.Cir.1993), 1 F.3d 1261, 1265.) Percentage analysis sometimes resulted in exorbitant fees, however, which sparked criticism of the courts and of the legal profession, and thus, generated pressure to find alternative methods of calculating fees. (*Leader v. Cullerton* (1976), 62 Ill.2d 483, 488, 343 N.E.2d 897; *Third Circuit Report*, 108 F.R.D. at 242.) As a result, in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.* (3rd Cir.1973), 487 F.2d 161, the Third Circuit developed the "lodestar" approach which shifted the emphasis from a fair percentage of recovery to the value of the time expended by counsel. The lodestar approach quickly gained acceptance in other federal courts because it was viewed as more reasonable than the percentage analysis for making fee awards in modern complex litigation. *Third Circuit Report*, 108 F.R.D. at 244.

In the 1970's, our supreme court followed the then majority of federal courts by accepting the lodestar computation method. (*Fiorito v. Jones* (1978), 72 Ill.2d 73, 377 N.E.2d 1019; *Leader v. Cullerton* (1976), 62 Ill.2d 483, 343 N.E.2d 897; *Flynn v. Kucharski* (1974), 59 Ill.2d 61, 319 N.E.2d 1. See also *Baksinski*, 231 Ill.App.3d at 13, 172 Ill.Dec. 436, 595 N.E.2d 1106.) Under the lodestar method, where a common fund has been created, attorneys for the successful plaintiff may directly petition the court for the reasonable value of their services which benefitted the class. (*Baksinski*, 231 Ill.App.3d at 13–14, 172 Ill.Dec. 436, 595 N.E.2d 1106.) In determining compensation, the court calculates the number of hours which benefitted the class and then fixes an hourly rate for each attorney, taking into account the nature of the services performed, the complexity of the undertaking and the hourly fee charged for similar services by attorneys with similar skills and qualifications. (*Fiorito*, 72 Ill.2d at 90, 377 N.E.2d 1019; *Leader*, 62 Ill.2d at 491–92, 343 N.E.2d

897.) The hourly rates are multiplied by the hours expended, producing the "lodestar" computation which may be adjusted by a weighted multiplier to account for the contingent ***923** nature of the undertaking and the benefits conferred upon the class. (*Fiorito*, 72 Ill.2d at 90–91, 377 N.E.2d 1019.) The amount of the attorneys' fees award is within the circuit court's sound discretion. *Leader*, 62 Ill.2d at 488, 343 N.E.2d 897; *Baksinski*, 231 Ill.App.3d at 14, 172 Ill.Dec. 436, 595 N.E.2d 1106.

In approving the lodestar approach, our supreme court reasoned that although class action fees are contingent upon success, a class action is not a typical contingent-fee case because the amount of the fee has not been fixed by voluntary agreement between the client and his or her attorney. (*Fiorito*, 72 Ill.2d at 87–88, 377 N.E.2d 1019; *Flynn*, 59 Ill.2d at 66, 319 N.E.2d 1.) Rather, the fee is taken, by order of the court, from money that belongs to others, *i.e.*, the fund. (*Fiorito*, 72 Ill.2d at 88, 377 N.E.2d 1019; *Flynn*, 59 Ill.2d at 67, 319 N.E.2d 1.) Consequently, the court concluded that the rights of the class must be carefully considered and that the time expended becomes a significant factor in determining the fee. *Flynn*, 59 Ill.2d at 67, 319 N.E.2d 1.

In the past decade, however, the lodestar approach has been subjected to increased scrutiny as its deficiencies began to offset or exceed its benefits. (*Third Circuit Report*, 108 F.R.D. at 246.) The Third Circuit, which developed the lodestar method, appointed a task force to compare the respective merits of lodestar and percentage analysis. The task force enumerated nine deficiencies identifiable in the lodestar method: (1) it increases the workload of an already overtaxed judicial system, (2) it is insufficiently objective and produces results that are far from homogenous, (3) it creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law, (4) it is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount, (5) it has led to abuses such as lawyers billing excessive hours, (6) it creates a disincentive for the early settlement ****491 ***29** of cases, (7) it does not provide the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered, (8) it works to the particular disadvantage of the public interest bar because the lodestar is lower in civil rights cases than in securities or anti-trust cases, and (9) it is confusing and unpredictable in its administration. (*Third Circuit Report*, 108 F.R.D. at 246–49.) The task force recommended retention of the lodestar in some

statutory fee cases but concluded that a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases. *Third Circuit Report*, 108 F.R.D. at 255–56.

Accordingly, most federal circuits that have revisited the issue recently either have abandoned the lodestar in favor of a percentage fee in common fund cases (*924 *Swedish Hospital Corp. v. Shalala* (D.C.Cir.1993), 1 F.3d 1261; *Camden I Condominium Association, Inc. v. Dunkle* (11th Cir.1991), 946 F.2d 768) or have granted the district court discretion to determine which method is more suitable in a particular case. *Florin v. Nationsbank of Georgia, N.A.* (7th Cir.1994), 34 F.3d 560. Accord *In re Washington Public Power Supply System Securities Litigation* (9th Cir.1994), 19 F.3d 1291; *Useton v. Commercial Lovelace Motor Freight, Inc.* (10th Cir.1993), 9 F.3d 849; *Rawlings v. Prudential–Bache Properties, Inc.* (6th Cir.1993), 9 F.3d 513. See also *Boeing Co. v. Van Gemert* (1980), 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (approving a fee award based upon the percentage analysis in a common fund case). But see *Longden v. Sunderman* (5th Cir.1992), 979 F.2d 1095; *Walitalo v. Iacocca* (8th Cir.1992), 968 F.2d 741.

The growing weight of authority, then, indicates that although the lodestar is still alive, particularly with regard to statutory fee-shifting cases, a percentage fee also may be appropriate in common fund cases.

The case *sub judice* illustrates the advantages in granting the circuit court discretion to choose either the lodestar or percentage method. The circuit court found a lodestar analysis impossible because the case involved not only “9 years of legal efforts and more than 5700 billable hours” but “[n]either the lawyers challenging the bona fides of Krislov’s time entries nor the court charged with valuing his efforts were involved during the first six years of the relevant nine-year period.” The court found additional obstacles to a credible lodestar analysis including the fact that Krislov represented four city pension funds, so that allocation of the myriad time entries to that time spent solely for Firemen’s Fund was impossible. The court also questioned the rate it should use in computing the lodestar since Krislov’s hourly rates had changed over the course of the nine year litigation.

Percentage analysis approach eliminates the need for additional major litigation and further taxing of scarce judicial resources which occurred here as a result of plaintiffs’ request for attorneys’ fees. Significantly, according to plaintiffs,

nearly half of the 11,000 page record in this case is devoted to the fee litigation. Consequently, the court ordered a 33 ⅓ % fee due to the extreme contingency risk, plaintiffs’ financing and prosecuting the claim without assistance from the funds, winning a \$33 million hard cash benefit from a tenacious adversary, and engaging in satellite litigation to protect the money benefit from a collateral attack.

Firemen’s Fund alleges that controlling Illinois precedent requires use of the lodestar method in common fund cases and that *925 only the supreme court can overrule or modify its previous opinions. Although our supreme court has approved the lodestar method in this state, it has never unequivocally and definitively ruled that percentage analysis may never be utilized in common fund cases.

The circuit court did not abuse its discretion in determining attorneys’ fees based upon percentage rather than lodestar analysis.

IV

Plaintiffs maintain the circuit court abused its discretion in denying their request that a substantial portion of Firemen’s Fund’s attorneys’ fees be surcharged as an additional award against the City due to its breach of fiduciary duty.

492 *30 Plaintiffs first contend, in this regard, that common law routinely surcharges self-dealing fiduciaries for legal costs. The law regarding common fund cases does not authorize the circuit court to shift fees to an adversary but attempts to spread the fees among those who benefitted from the litigation. Under the common fund doctrine, courts of equity may permit an attorney to recover costs and reasonable fees from the fund itself or from its other beneficiaries. (*Baksinski*, 231 Ill.App.3d at 12, 172 Ill.Dec. 436, 595 N.E.2d 1106.) Therefore, in common fund cases, the award of fees and expenses is not charged against the adversary, as is disallowed by the “American Rule,” but rather, against the persons or entities benefitted by the successful creation or preservation of the fund. (*Baksinski*, 231 Ill.App.3d at 13, 172 Ill.Dec. 436, 595 N.E.2d 1106.) Although plaintiffs rely upon a number of cases from foreign jurisdictions, they cite no Illinois case authorizing an award of attorneys’ fees against a breaching fiduciary in a common fund situation.

The Illinois Pension Code (40 ILCS 5/1–101 *et seq.* (West 1992)) is claimed to be authority for awarding fees against the

City, plaintiffs submitting that [sections 5/1–114](#) and [5/1–115](#) of the Code could be so construed; however, neither provision expressly authorizes an award of attorneys' fees. The circuit court may not award statutory attorneys' fees in the absence of specific language. See [Qazi v. Ismail](#) (1977), 50 Ill.App.3d 271, 273, 7 Ill.Dec. 434, 364 N.E.2d 595; [City of Chicago v. Illinois Fair Employment Practices Commission](#) (1975), 34 Ill.App.3d 114, 116–17, 339 N.E.2d 260.

Although attorneys' fees are not explicitly mentioned in section 5/1–114 of the Illinois Pension Code, plaintiffs contend that this statutory provision generally tracks the enforcement provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132 (1988) which authorizes attorneys' fees. ERISA expressly authorizes a fee award, however; the Illinois Pension Code neither expressly authorizes fees nor incorporates ERISA.

***926** Plaintiffs argue that the circuit court erred in concluding that an additional fee award for fiduciary breach would be punitive and barred by the Local Governmental and Governmental Employees Tort Immunity Act (Act). ([745 ILCS 10/1–101 et seq.](#) (West 1992).) The Act immunizes the City from paying “punitive or exemplary damages in any action brought directly or indirectly against it by the injured party or a third party.” ([745 ILCS 10/2–102](#) (West 1992).) Attorneys' fees cannot be awarded as a separate entity distinct from punitive damages, absent a statutory provision specifically authorizing an award of such fees. ([E.J. McKernan Co. v. Gregory](#) (1993), 252 Ill.App.3d 514, 546, 191 Ill.Dec. 391, 623 N.E.2d 981.) Indeed, plaintiffs acknowledge the punitive nature of such an award in their brief when they state that a “fee award here would *deter* others from similar actions, since it makes the *punishment* worse than merely returning the money.” (Emphasis added.) Plaintiffs' attempt to obtain a punitive award of attorneys' fees from the City is prohibited by the Act.

Plaintiffs assert that the Act does not apply to this case because it involves a contractual dispute. The City declares that its use of the pension funds' monies constitutes the tort of conversion which is covered by the Act. ([Martel Enterprises v. City of Chicago](#) (1991), 223 Ill.App.3d 1028, 1032–33, 164 Ill.Dec. 945, 584 N.E.2d 157.) Assuming, *arguendo*, that plaintiffs' claim sounds in contract, however, the City points out that such a claim does not entitle a plaintiff to punitive damages. Generally, punitive damages are not recoverable for breach of contract; the sole purpose of contract damages is to compensate the nonbreaching party, and punitive damages are not available even for a “wilful” breach of contract. [Morrow v. L.A. Goldschmidt Associates, Inc.](#) (1986), 112 Ill.2d 87, 94, 96 Ill.Dec. 939, 492 N.E.2d 181.

Plaintiffs submit that even if the Act applies, a fee award need not be characterized as punitive. As discussed above, the circuit court specifically found that such an award would be punitive and plaintiffs conceded its punitive nature in their brief.

The circuit court did not abuse its discretion in denying plaintiffs' request that a portion ****493 ***31** of the attorneys' fees be surcharged as an additional award against the City.

For the reasons set forth, we find no reversible error in the circuit court's disposition of the issues articulated above and, accordingly, affirm.

Affirmed.

SCARIANO, P.J., and DiVITO, J., concur.

All Citations

274 Ill.App.3d 913, 654 N.E.2d 483, 211 Ill.Dec. 21

Footnotes

- 1 Under a “percentage of recovery” approach, Krislov argued the requested fee of \$2.2 million represented only 24% of the fund's total recovery since the fund recovered approximately \$9 million in overall benefits as a result of the litigation. The petition also claimed that a \$2.2 million fee was justified under the lodestar approach since the attorneys billed 5700 hours of time at hourly rates ranging from \$125 to \$350, producing a

lodestar value of \$1.3 million. The petition approximated Firemen's Fund's share of the lodestar at \$450,000 (35%) which, with a multiplier of 5, produced a fee of \$2.25 million.

- 2 On November 30, 1990, Krislov and the Settling Funds settled their fee dispute for \$2.2 million for work done through May 21, 1990.

2024 WL 1676754

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

[Andrea SCHMITT](#); Elizabeth Mohundro;
and O.L. by and through her parents, J.L. and
K.L., each on their own behalf, and on behalf
of all similarly situated individuals, Plaintiffs,

v.

[KAISER FOUNDATION HEALTH PLAN OF
WASHINGTON](#); [Kaiser Foundation Health
Plan of Washington Options, Inc.](#); Kaiser
Foundation Health Plan of the Northwest; and
Kaiser Foundation Health Plan, Inc., Defendants.

NO. 2:17-cv-1611-RSL

|

Signed April 18, 2024

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ORDER:

(1) FINALLY APPROVING
SETTLEMENT AGREEMENT;

(2) APPROVING DISBURSEMENTS PURSUANT
TO THE SETTLEMENT AGREEMENT;

(3) APPROVING PAYMENT OF ATTORNEY
FEES, LITIGATION COSTS AND
CASE CONTRIBUTION AWARDS;

(4) ESTABLISHING A LATE CLAIM DEADLINE; AND

(5) ORDERING FINAL REPORT

[Robert S. Lasnik](#), United States District Judge

*1 This matter comes before the Court on class counsel's
unopposed "Motion for Attorney Fees, Costs and Case
Contribution Awards" (Dkt. # 175) and the class's unopposed
"Motion for Final Approval of Settlement Agreement" (Dkt.
178).

I. BACKGROUND AND PROCEDURAL POSTURE OF THE CASE

On December 11, 2023, this Court certified a settlement
class and preliminarily approved an agreement for a class-
wide settlement of claims ("Settlement Agreement") against
Defendants Kaiser Foundation Health Plan of Washington,
Kaiser Foundation Health Plan of Washington Options, Inc.,
Kaiser Foundation Health Plan of the Northwest; and Kaiser
Foundation Health Plan, Inc. (collectively, "Kaiser"). Dkt
Nos. 170 and 171. This Court issued an Amended Order
Approving Settlement Agreement on December 13, 2023.
Dkt. No. 173.

The Settlement Agreement resolves all claims against Kaiser
on behalf of a class of present or former Kaiser members
with disabling hearing loss who paid for hearing aids and
associated care during the class period. The Settlement
Agreement creates a common settlement fund of \$3,000,000
out of which class members' valid claims submitted in
compliance with the settlement procedures will be paid. Dkt.
No. 167-1, at § 6. The Settlement Agreement also allowed the
Plaintiffs to seek an attorney fee award of up to 35% of the
settlement amount, reimbursement of actual litigation costs,
and a case contribution award of up to \$15,000 for each of the
named Plaintiffs, subject to the Court's review and approval
and paid from the Settlement Fund. *Id.*, at § 10. Settlement-
related costs of class notice, claims administration, and taxes
will be paid out of the Settlement Fund as well. *Id.*, at § 6.3.

With the Court's Order preliminarily approving the settlement
agreement, the Court directed the Claims Processor to
issue notice to the Settlement Class. Dkt. No. 173,
¶¶3-8. Both the Claims Processor and class counsel
established settlement webpages consistent with the Court's
Order. *Id.*, ¶9. Class counsel's website directed class
members to the website maintained by the Claims

Processor, which included class counsel's Motion for Attorney Fees, Litigation Costs and Case Contribution Award. See <https://www.kphearingaidsettlement.com/Content/Documents/Motion%20for%20Attorney%20Fees.pdf>. Defendant Kaiser provided the required notice under the Class Action Fairness Act ("CAFA"). Spoonemore Decl., ¶3, *Exh. 2*.

The Order also provided that class members who wished to comment on or object to the proposed Agreement were required to do so by April 4, 2024. Dkt. No. 173, ¶13. Class members were informed of their rights and of this deadline in the notices that were mailed to them, and on the websites of both the Claims Processor and class counsel. Spoonemore Decl., ¶4.

*2 The Order further scheduled a final settlement hearing, to be held on April 18, 2024, at 11:00 a.m. PT, to consider objections and comments by class members and to determine whether the proposed Agreement is fair, reasonable, adequate, and should be approved by the Court. Dkt. No. 173, ¶15.

Consistent with the Court's Order, class counsel filed a motion for an award of attorney fees, litigation costs, and case contribution payments on March 7, 2024. Dkt. No. 173, ¶17; Dkt. No. 175.

Having reviewed the papers submitted and having heard from counsel, the Court finds as follows:

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Settlement Agreement Should Be Finally Approved.

1. The parties reached a Settlement Agreement resolving claims brought in this lawsuit after approximately seven years of litigation.

2. The Settlement Agreement provides for a \$3,000,000 fund from which payments will be made for class members' valid and approved claims for uncovered hearing aids and associated services during the class period. Dkt. No. 167-1, ¶¶1.20, 6.2.1. The Settlement Fund will also pay for class notice, the cost of claims administration, attorney fees and litigation costs, case contribution awards, and if there are any remaining funds, a *cy pres* distribution agreed upon by the parties. *Id.*, ¶6.

3. If there are insufficient funds for payment of all valid and approved claims in full, after attorney fees, costs, case contribution awards and specified expenses are paid, then class members will receive a *pro rata* distribution of the approved claim amount. *Id.*

4. In return for the benefits under the Settlement Agreement, the Settlement provides for releases by Plaintiffs O.L. and Mohundro and unnamed class members of any and all claims brought or that could have been brought in this litigation against Defendants relating to coverage of or benefits for hearing aids and related services through December 31, 2023. Claims after that date are not released. *Id.*, ¶¶1.4, 1.15, 1.16, 3.1-3.4. The same requirements apply to Plaintiff Schmitt, except that her release extends through December 31, 2024. *Id.*

5. The Court preliminarily approved the proposed settlement on December 13, 2023. Dkt. No. 173.

6. The Court's Preliminary Approval Order appointed Epiq Class Action & Claims Solutions, Inc. ("Epiq") as Claims Processor and directed the parties to work with Epiq to email and mail the approved Notice(s) to Settlement Class Members. *Id.*, ¶3.

7. Starting on or about February 21, 2024, Epiq emailed and mailed the court-approved Notice(s) as described in the Settlement Agreement and the Court's Amended Order. See Dkt. No. 174. Ultimately, Epiq believes that it reached approximately 78% of the email addresses provided for Notice. *Id.*, ¶15. For other Notice Recipients, Epiq mailed short-form postcard Notices (237,748) or long-form, prepopulated Notices (586). *Id.*, ¶¶17-22. In addition, twelve class notice recipients asked to be mailed a Claims Package, which Epiq provided. *Id.*

8. On or about December 14, 2023, Defendants timely provided notices and materials required under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715(b). Spoonemore Decl., ¶3, *Exh. 2*.

*3 9. No class members objected to the Settlement Agreement. *Id.*, ¶2. Only five individuals opted out of the Settlement Agreement, and it is not clear that these individuals were class members, since there is no indication that they had purchased hearing aids and associated services during the class period. *Id.*, ¶2. No comments or concerns

were received from any of the state attorney general offices. *Id.*

10. Class counsel received numerous calls and emails inquiring about the settlement and the claims process. *Id.*, ¶5. Class counsel reports that none of the comments were negative. *Id.*

11. A total of 913 unique claims were received by the Claims Processor by April 4, 2024. The total value of these claims, after Epiq's initial review, is \$2,695,629.29.

12. Some additional claims were received by the Claims Processor after April 4, 2024, through April 10, 2024 ("Late Claims"). The total value of these Late Claims, after removing duplicates and plainly ineligible claims, is \$29,767.94. Based upon the timely and Late Claims received through April 10, 2024, class counsel estimates that claimants will recover at least 44%-45% of their submitted claims, if not more. Spoonemore Decl., ¶7.

13. Rule 23(e) provides that "a class action shall not be dismissed or compromised without the approval of the court...." Compromise and arbitration of complex litigation is encouraged and favored by public policy. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999).

14. A presumption of fairness and adequacy attaches to a class action settlement reached in arm's-length negotiations by experienced class counsel after meaningful discovery. *See, e.g., Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th Cir. 1982); *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 209, 35 P.3d 351 (2001).

15. The following factors are generally considered when determining whether a settlement is fair, adequate, and reasonable: the likelihood of success by plaintiff; the amount of discovery or evidence; the settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and absence of collusion. *Officers for Justice*, 688 F.2d at 625.

16. Based upon these factors, the Court finds that the Agreement is fair, reasonable, and in the best interests of the class. The requirements of Fed. R. Civ. P. 23 have been satisfied. Under the Settlement Agreement, Claimants whose claims are not approved, in full or in part, will have the

opportunity to (a) submit a timely appeal to the Claims Processor and (b) participate in arbitration, such that due process is also satisfied.

17. Specifically, the Court concludes that the Agreement was the result of arm's-length bargaining. It was reached after sufficient discovery and other litigation activity, and after a day-long mediation with Judge Charles Burdell (King Cty. Sup. Ct., Ret.). Although the Plaintiffs believed that their claims had a strong likelihood of success, the litigation likely involved complex questions of federal and state anti-discrimination law and insurance regulation, damages calculations, and class certification issues. Given that many of these issues are of first impression, there was a significant risk that even if Plaintiffs were successful before the trial court, they would face significant delay as these novel issues were decided on appeal. The Court finds that there is no evidence of collusion between the parties, and the Settlement Agreement was reached in good faith.

*4 18. The Class was provided with adequate notice, and due process has been satisfied in connection with the distribution of the Class Notice. No objections to the proposed Agreement were received by the Court or any of the parties.

B. Class Counsel's Requested Fees Are Reasonable.

Where a class action settlement creates a common fund, as has been done here, the Court has discretion to choose either the percentage-of-the-fund or lodestar method in calculating the fee award. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Typically, however, courts apply the percentage-of-the-fund method where the settlement involves a common fund. *Kinney v. Nat'l Express Transit Servs. Corp.*, Case No. 2:14-cv-01615-TLN-DB, 2018 U.S. Dist. LEXIS 10808, *11 (E.D. Cal. Jan. 22, 2018); *Gerstein v. Micron Tech., Inc.* 1993 U.S. Dist. LEXIS 21215, *14 (D. Idaho Sept. 10, 1993). *Accord*, MANUAL FOR COMPLEX LITIGATION (4th), § 14.121 ("[T]he factor given the greatest emphasis is the size of the fund created, because 'a common fund is itself the measure of success ... [and] represents the benchmark from which a reasonable fee will be awarded.'"). The Court adopts the percentage-of-the-fund method here, and finds that allocating 33⅓% of the common fund towards attorney fees is reasonable. *See In Re: Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, *60 (C.D. Cal. June 10, 2005) (awarding 33⅓% because of "exceptional result" in obtaining a settlement for just 23% of class members' losses and citing cases awarding 33⅓% or more for recoveries ranging from 10% to 17% of class members' losses). In finding 33⅓%

to be a reasonable percentage, the Court has considered the following facts:

1. An Award of Attorney Fees Amounting to 33⅓% of the Settlement Fund is Reasonable.

(a) The Settlement's Highly Beneficial Results. Class counsel obtained an excellent result. The Settlement provides a substantial monetary benefit for the Class by creating a \$3 million fund for the reimbursement of class members' claims for their out-of-pocket expenditures on hearing aids and related services over an approximately 9-year period. Dkt. No. 167-1, § 6. The Settlement offers such reimbursement regardless of whether an otherwise eligible class member previously made a claim to Kaiser for coverage of services related to hearing loss. *Id.* Significantly, the Settlement provides a streamlined process for filing a claim, sending prior claimants pre-populated claim forms they can verify online. *Id.*, at § 6.5.1.2.

(b) Risk in Taking on the Litigation. Class counsel undertook a significant risk in bringing this class action lawsuit on a contingent basis. The case was novel and unique and was heavily litigated by both parties for over six years, during which class counsel paid substantial expenses out of pocket and devoted similarly substantial work on the Class's behalf, for which counsel would not be entitled to reimbursement absent a recovery.

*5 (c) Complexity of the case. This case is complex, turning on issues of first impression regarding the extent to which Sec. 1557 of the Affordable Care Act and Washington State anti-discrimination law provide claims and rights of action to remediate potentially discriminatory health insurance benefit designs. *See, e.g., Schmitt, et al. v. Kaiser Found. Health Plan of Wash.*, 965 F.2d 945, 954-55 (9th Cir. 2020). The case required a concomitant great deal of skill in achieving the settlement.

Based on these factors, the Court finds that a 33⅓% allocation of funds from the common fund towards class counsel's attorney fees is reasonable. *See Vizcaino*, 290 F.3d at 1048-1049 (listing factors for consideration in making a reasonableness determination).

2. The Lodestar Cross-Check Supports a Fee Award of 33⅓% of the Common Fund.

The Court also finds that 33⅓% of the common fund constitutes reasonable attorney fees even after performing and

considering a lodestar cross-check. A lodestar cross-check is not required by governing law or the Settlement Agreement. *See Benson v. Doubledown Interactive, LLC*, 2023 U.S. Dist. LEXIS 97758, *8 (W.D. Wash. June 1, 2023) (citing *Farrell v. Bank of Am. Corp., N.A.*, 827 F. Appx. 628, 631 (9th Cir. 2020)); *see generally* Dkt. No. 167, App. 1. However, it can provide a useful perspective on the reasonableness of fees otherwise resulting from a percentage of the common fund calculation. *Vizcaino*, 290 F.3d at 1050.

The lodestar is determined by “multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate.” *McCown v. City of Fontano Fire Dept.*, 565 F.3d 1097, 1102 (9th Cir. 2009). Based on class counsel's declaration and fee ledgers, the lodestar amount is \$1,185,268.75. That lodestar rate is then compared to the percentage fee award amount, in this case, \$1,000,000. The percentage award sought by class counsel represents a 15% reduction from their lodestar, further endorsing the reasonableness of the percentage-based calculation of class counsel's fees.

C. Payment of Litigation Costs.

Litigation costs are recoverable in a class action settlement. *Staton v. Boeing Co.*, 327 F.3d 938, 974-75 (9th Cir. 2003); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). The Settlement in this matter specifically authorizes the award of litigation costs, subject to court review and approval. Dkt. No. 167-1, § 10.2. Class counsel has provided a ledger of the costs they paid out of pocket on this litigation, amounting to \$374,137.63. The Court has reviewed the costs and finds them to constitute reasonable expenditures for the items and services on which they were incurred, as well as reasonable overall.

D. The Requested Case Contribution Awards Are Reasonable.

Case contribution awards are typical in class action cases, *Rodriguez v. West Publ'g Corp.*, 563 F. 3d 948, 958-959 (9th Cir. 2009), and are in the court's discretion to award. *In re Mego Fin. Corp. Sec. Litig.*, 213 F. 3d 454, 463 (9th Cir. 2000). The Settlement agreement authorizes an award of \$15,000 to each of the named Plaintiffs, for a total of \$45,000. Dkt. No. 167, App. 1, § 10.3. Plaintiffs and the class seek an award of \$15,000 for each class representative.

*6 In determining whether to approve a case contribution award, courts may consider the following factors: (1) the risk

to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

The Plaintiffs' proposed incentive awards satisfies these criteria. Each of the class representatives made a significant contribution in time (and intrusion into their lives) toward the prosecution of this case for years, and its eventual settlement. Dkt. No. 176, ¶9. The class representatives have been actively involved in every aspect of the case, throughout its years-long lifespan. *Id.*; Dkt. No. 168, ¶5. They each agreed to pursue the defendants here on behalf of a class, even though they might have reached a better result for themselves had they pursued their claims individually. They each understood and signed agreements recognizing that they owed a fiduciary duty to all other class members, and were responsible for monitoring the litigation, communicating with class counsel, and acting in the best interests of the class. Dkt. Nos. 93–96 (Declarations of Plaintiffs Schmitt, Mohundro, J.L. and K.L. in support of Motion for Class Certification). Indeed, Plaintiff Schmitt agreed to a special release related to her future claims in order to get the settlement finalized. *See* Dkt. No. 167-1, § 1.16.

Additionally, courts often consider the relative size of a case contribution award compared with the common fund from which it is drawn to determine the incentive award's reasonableness. *See Sandoval v. Tharaldson Employee Management*, No. EDCV 08-482-VAP, 2010 U.S. Dist. LEXIS 69799 (C.D. Cal. June 15, 2010) (noting that incentive award not exceeding 1% of total settlement was fair and reasonable); *Acosta v. Evergreen MoneySource Mortg. Co.*, No. 2:17-cv-00466-KJM-DB, 2019 U.S. Dist. LEXIS 198728 *53 (E.D. Cal. Nov. 14, 2019) (awarding named plaintiff \$10,000 incentive award that represented 2.85% of gross settlement amount). Class counsel's proposed total award of \$45,000 between all three class representatives would amount to 1.5% of the Settlement Fund, supporting a finding of its reasonableness.

Based on the caselaw governing such awards, the sizable efforts the named Plaintiffs reasonably expended in this manner on behalf of themselves and the Class, and the relatively modest amount requested as incentive awards compared with the total Settlement Fund, the Court finds that

the requested \$15,000 case contribution payment for each of the named Plaintiffs is reasonable and should be awarded to them.

III. APPROVAL OF DISBURSEMENTS AND PAYMENTS TO CLASS MEMBERS

*7 27. To facilitate payments from the Settlement Fund, class counsel is authorized to delegate authority to the Claims Processor to make all necessary distributions from the Settlement Fund required pursuant to this Order and/or the Settlement Agreement.

28. Upon the occurrence of the conditions set forth in Section 2 of the Settlement Agreement, the Court authorizes the payment of valid and approved class member claims. The Court authorizes the disbursement of these funds from the Settlement Fund and authorizes the Claims Processor, in consultation with class counsel, to make disbursements until all of the funds are distributed, consistent with the terms of the Settlement Agreement.

29. Claimants must negotiate their checks within 90 days of issuance. The Claims Processor may extend this deadline on request from a class member and issue replacement checks for lost checks without further approval of the Court or additional cost to the claimant, provided the cost of replacing the check does not exceed the value of the lost check.

IV. CLASS NOTICE AND CLAIMS ADMINISTRATION COSTS

30. The Claims Processor is authorized to reimburse itself from the Settlement Fund for the cost of Class Notice and claims administration through April 11, 2024.

31. The Claims Processor may reimburse itself for the cost of claims administration, taxes, etc. incurred after April 11, 2024, after notifying class counsel regarding such payments at least 14 days in advance.

V. AUTHORIZATION OF LATE-FILED CLAIMS

32. The Claims Processor reports that, through April 10, 2024, claims were filed after the April 4, 2024, deadline for submitting claims ("Late Claims"). The estimated amount

of these Late Claims is \$29,767.94. Class counsel and Epiq anticipate that additional late claims may be received. Adjudication and payment of Late Claims may result in a very slight reduction of the *pro rata* payments to other class members. The Court concludes that this reduction does not unduly prejudice the class members who timely filed their claims. Courts have equitable authority to permit the inclusion of Late Filed claims. *Cf. Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1993).

33. The Court orders the Claims Processor to accept Late Claims filed through May 4, 2024. The Claims Processor is ordered to adjudicate and pay those claims as if they were timely filed.

VI. CLASS COUNSEL'S FINAL REPORT AND DISMISSAL

*8 34. Class counsel shall submit a final report to the Court regarding claims processing and disbursement of funds from the Settlement Fund by no later than 30 days after the Settlement Fund is fully funded and the Claims Processor has processed and paid all valid and approved claims, including any Late Claims authorized for payment by the Court, and any claims allowed as a result of the arbitration process. The report shall detail the payment of court-awarded attorney fees and litigation costs, case contribution awards, and payment of claims, as well as any other activities necessary to close the Settlement Fund. At the same time, class counsel shall file a proposed Order of Dismissal.

VII. ORDER

It is, therefore, ORDERED ADJUDGED AND DECREED that:

1. The Settlement Agreement is approved as fair, reasonable, and adequate under Fed. R. Civ. P. 23, and its terms shall bind all class members, with the exception of the five class members who timely opted out;

2. Class counsel is awarded 33⅓% of the gross amount of the Settlement Fund (\$3,000,000) created in this matter as attorney fees. Such fees (\$1,000,000) shall be paid from the common Settlement Fund.

3. Class counsel be reimbursed \$374,137.63 in costs to be paid from the common Settlement Fund.

4. The Claims Processor is ordered to accept, adjudicate, and pay all late-filed claims and emailed claims received by May 4, 2024, as if the claims were timely received.

5. The Claims Processor is ordered to make payments and distribute checks to class members and the named plaintiffs in accordance with the Agreement and this Order, as approved by the Claims Processor or on appeal by the Arbitrator, in whole or in part based upon the distributions to be made. These amounts are authorized to be paid from the Settlement Fund.

6. Class Representatives Andrea Schmitt, Elizabeth Mohundro, and O.L., by and through their parents J.L. and K.L., are awarded \$15,000 each, or \$45,000 total, as case contribution awards, to be paid from the common Settlement Fund.

7. Class counsel is ordered to submit a Final Report in accordance with the Agreement and this Order.

All Citations

Not Reported in Fed. Supp., 2024 WL 1676754

805 F.Supp.2d 560

United States District Court, N.D. Illinois, Eastern Division.

Shannon SCHULTE, on behalf of herself
and all others similarly situated, Plaintiff,

v.

FIFTH THIRD BANK, Defendant.

Case No. 09-cv-6655

|

July 29, 2011.

Synopsis

Background: Accountholders brought putative class actions against bank, alleging that bank engaged in unlawful practice by processing debit card purchases and ATM (automated teller machine) withdrawals in high-to-low order, which resulted in higher overdraft fees than if transactions had been processed chronologically. Settlement between accountholders and bank was preliminarily approved and settlement class was certified. Several class members submitted objections. Settling parties moved for final approval of settlement, and class counsel requested approval of attorney's fees, costs, and expenses, and approval of incentive awards for class representatives.

Holdings: The District Court, [Robert M. Dow, Jr., J.](#), held that:

strength of accountholders' claims against bank, balanced against proposed settlement, weighed in favor of approval of settlement;

complexity, length, and expense of continued litigation weighed in favor of approval of settlement;

small amount of opposition to settlement weighed in favor of approval;

opinion of competent counsel weighed in favor of approval of settlement;

stage of proceedings and amount of discovery completed did not weigh against approval of settlement;

notice to class members of settlement agreement was best notice practicable, met the requirements of due process, and

provided court with jurisdiction over absent class members; and

award of \$3,166,666 in attorney's fees for class counsel was reasonable.

Final approval of settlement granted; request for attorney's fees approved; request for costs and expenses denied; incentive award approved.

Attorneys and Law Firms

***565** [Ben Barnow](#), [Sharon Harris](#), Barnow and Associates, P.C., Chicago, IL, [Burton H. Finkelstein](#), Finkelstein Thompson LLP, Washington, DC, for Plaintiff.

[Drew M. Hicks](#), [James E. Burke](#), Keating Muething & Klekamp PLL, Cincinnati, OH, [Roger Andrew Lewis](#), [Steven A. Levy](#), Goldberg Kohn Ltd., Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

[ROBERT M. DOW, JR.](#), District Judge.

Before the Court is the settling parties' motion for final approval of the settlement and Class Counsel's motion for approval of attorneys' fees, costs, and expenses, and for approval of incentive awards for the Class Representatives [103]. For the reasons explained below, the motion is granted in part and denied in part. Specifically, the Court (1) grants final approval of the settlement, finding that the settlement is fair, reasonable, and adequate; (2) approves Class Counsel's request for attorneys' fees of \$3,166,666; (3) denies Class Counsel's request for cost and expense reimbursement without prejudice; and (4) approves an incentive award of \$1,000 each for the Class Representatives, Shannon Schulte and Marlene Willard.

I. Factual Background

A. History of the Litigation

Plaintiff filed her class action complaint in this case [1]¹ on November 21, 2009. In their complaints, Plaintiffs allege that they were Fifth Third² accountholders and had used a debit card in connection with their accounts. Plaintiffs further allege that Fifth Third improperly assessed them (and other Fifth Third customers) overdraft fees for insufficient

funds on debit card purchases and ATM withdrawals by “re-sequencing” transactions in order to maximize the number of overdraft fees. To explain, Fifth Third did not process debit card and ATM transactions in strict chronological order; rather, within a given posting period, the bank processed the transactions in high-to-low order. If a customer overdrew his account, posting transactions in a high-to-low order sometimes resulted in Fifth Third charging the customer a higher number of overdraft fees than it would have charged had it posted the transactions chronologically. Plaintiffs allege that Fifth Third's practice was unlawful and caused them and others similarly situated to suffer financial injury.

On February 16, 2010, Defendant filed a motion to dismiss the *Schulte* case [17].

On March 2, 2010, the United States Judicial Panel on Multidistrict Litigation (“JPML”), entered a Conditional Transfer Order (“CTO 13”) conditionally transferring the Actions to the Southern District of Florida, where the Multidistrict Litigation, *In re Checking Account Overdraft* *566 *Litigation*, MDL No. 2036 (the “Overdraft MDL”), was and remains pending. Shortly thereafter, Plaintiffs and Defendant filed oppositions to CTO 13 and, on April 2, 2010, Fifth Third filed a motion with the JPML requesting that the Actions be transferred to this Court for coordinated or consolidated pretrial proceedings.

That same day, Objector Michelle Keyes, who is represented, *inter alia*, by various counsel from the Overdraft MDL, filed a complaint against Fifth Third in the United States District Court for the Southern District of Florida. See *Keyes v. Fifth Third Bank*, Case No. 10–cv–21283 (S.D.Fla.). Less than a week later, on April 7, 2010, Objector Keyes requested that her case be consolidated into the Overdraft MDL; that request was granted on April 19, 2010. On April 19, 2010, an attorney representing Objector Keyes sent a letter to the JPML arguing that Defendant's motion to transfer the Actions was inappropriate, because it would create a new MDL and Objector Keyes' case had already been consolidated into the Overdraft MDL.

On May 27, 2010, the parties entered into the Settlement Agreement, the terms of which are discussed below. That day, the parties filed a motion for preliminary approval of the settlement [35].³

Later that day, counsel for the settling parties notified the JPML that the parties had entered into the Settlement

Agreement and, on June 3, 2010, the JPML vacated CTO 13. The JPML reasoned that in light of the settlement reached between Plaintiffs and Defendant, the *Schulte* and *Willard* cases should not be transferred into the Overdraft MDL. The Panel further ruled that the *Schulte* and *Willard* cases should not be centralized as a separate and new MDL in this district. The Panel noted that its ruling does not bar either the creation of a new MDL, or the transfer of the Actions to the Overdraft MDL, in the event that the settlement here was not approved or did not fully resolve those actions.

On June 9, 2010, Objectors Michelle Keyes, Amanda Ratliff and Verdel Ratliff appeared and filed objections to the motion for preliminary approval of the proposed settlement [39]. The Court postponed ruling on the motion for preliminary approval to allow the parties time to respond in writing to the objections. See [45, 46]. Objectors Keyes and the Ratliffs subsequently filed a copy of the Findings of Fact and Conclusions of Law After Bench Trial issued in *Gutierrez v. Wells Fargo Bank*, 730 F.Supp.2d 1080 (N.D.Cal.2010)[53], another case involving overdraft fees resulting from debit reordering, which the Objectors argued supported their position that the settlement here should not be preliminarily approved. The parties each responded to that filing [54, 57].

After considering the arguments from the parties and from the Keyes and Ratliff Objectors, on September 10, 2010, the Court entered an order addressing the various objections and (1) preliminarily approving the settlement; (2) approving the notice plan; (3) appointing a notice specialist and claims administrator; (4) certifying the Settlement Class for settlement purposes only; (5) appointing Class Counsel; and (6) scheduling a final fairness hearing to consider final approval of the settlement [59]. The Court subsequently reset the final fairness hearing to March 3, 2011[70].⁴

*567 Beginning in January, 2010, a number of Class Members submitted objections to the settlement.⁵ On March 7, the parties each filed their memoranda in support of final approval [102, 103], which, *inter alia*, responded to the various objections. After denying a request by the parties to conduct discovery on some of the objectors (see [111]), the Court held a fairness hearing on March 16, 2011[112], at which time the Court heard argument from counsel for the parties and from a number of objectors. Subsequently, the Court requested additional briefing on one issue raised at the fairness hearing [117], and the parties provided that briefing shortly thereafter [118]. Finally, on June 3, 2011, the Keyes and Ratliff Objectors filed a Notice of Recent Developments

in Support of Objections, in which they notified the Court of an order preliminarily approving a settlement in MDL 2036.

B. Terms of the Settlement⁶

The Court here briefly summarizes the more important provisions of the Settlement Agreement. The Agreement and Preliminary Approval Order define the relevant class as follows:

All persons in the United States who hold or held a Fifth Third Account who at any time during the Class Period incurred at least one Overdraft Fee (as defined in the Settlement Agreement) associated with at least one Fifth Third Debit Card Transaction.

Excluded from the Settlement Class are Fifth Third Bank, any parent, subsidiary, affiliate or sister company of Fifth Third Bank, and all officers or directors of Fifth Third Bank, or any parent, subsidiary, affiliate or sister company at any time during the Class Period, and the legal representatives, heirs, successors, and assigns of any of the foregoing. The Court presiding over any motion to approve the Settlement Agreement is excluded from the Settlement Class. Also excluded from the Settlement Class is any person who timely submits a valid request to be excluded from this Settlement.

¶ 7; Preliminary Approval Order [59] at 10. The class period is from October 21, 2004 through July 1, 2010. ¶ 1(d). The term “Overdraft Fee” means an “insufficient funds fee, overdraft fee, or other similar fee, incurred as a result of the ‘re-sequencing’ of a Fifth Third Debit Card Transaction in non-chronological order that was not previously reversed, refunded, or returned to the Settlement Class Member by Defendant.” ¶ 1(s). The term “re-sequencing” is not defined in the Agreement or elsewhere. A “Fifth Third Debit Card Transaction” is a transaction *568 that is “effectuated with or relating to such Fifth Third Debit Card(s), including but not limited to automatic teller machine (“ATM”) transactions and point of sale (“POS”) transactions.” ¶ 1(l). Accordingly, the settlement covers overdraft fees that result from debit card purchases and ATM transactions, but not fees that are the result of the payment of checks or other transfers.

The settlement provides for the creation of a \$9,500,000 settlement fund from which Class Members may receive reimbursement for overdraft charges incurred during any one continuous forty-five day period within the Class Period. ¶¶ 9, 23–24. There is no cap on the amount that an individual

Class Member may recover. If, after fees, costs, expenses, and incentive awards are paid, the amount claimed by Class Members is less than the remaining amount, the remainder will be distributed to claimants on a *pro rata* basis, with each such Class Member receiving up to (but not exceeding) three times the amount claimed on his or her claim form. After that, any remaining amounts will be distributed under the *cy pres* doctrine to one nonprofit credit counseling organization in each of the twelve states in which Fifth Third has branches. See ¶¶ 30, 31.

In order to obtain these benefits, Class Members are required to fill out a claim form. Dissatisfaction with the claim form (in fact, with the entire claims process) has been the subject of many of the objections submitted to the Court. Following the preliminary approval order, in which the Court expressed some skepticism regarding the claims process ([59] at 8–9), the parties submitted a revised claim form [62], which the Court approved [64]. On the revised form, Class Members must provide their name, address, social security or tax identification number, and account number(s) with Fifth Third. Class Members can then choose one of two options for submitting a claim. “Option 1” is the option for customers who “do not have all of [their] records,” and allows the Class Member to make a claim “to the best of [his or her] knowledge or belief.” Class Members are asked to identify a year, and then estimate the number of Overdraft Fees incurred during *any* 45–day period within that year, along with the aggregate amount of fees charged during that 45–day period. Class Members are not asked to identify the specific 45–day period for which they are making a claim, only the year. “Option 2” is for customers who “used [their] bank statements and/or other records to determine the information” that they were providing. Under that option, the Class Member was to identify the number and amount of “Overdraft Fees” incurred in a particular 45–day period. Under both options, the Class Member was asked to “declare under penalty of perjury that I believe that the information I am providing is true and correct to the *best of my knowledge and belief*.” (emphasis in original).

The settlement also provides for non-monetary consideration. By entering into the settlement, Fifth Third agrees to modify its business practices to no longer re-sequence debits from highest to lowest amount; instead, it will process all charges in the order that they are presented to Defendant for payment.

¶ 10(a).⁷ Fifth Third further agrees to train its call center telephone operators on issues related to overdraft charges and to authorize those *569 operators to waive any overdraft

fee for good cause (including an automatic waiver of one overdraft fee per year, plus those resulting from errors in account reporting and other hardship situations such as hospitalization or illness causing an inability to examine account balances). ¶ 10(b).

In addition to paying Class Members, the \$9.5 million settlement fund was also intended to be used to pay all attorneys' fees, costs and expenses, incentive payments, and the costs of claims administration and notice. ¶ 9; see also ¶¶ 14; 20.⁸ To date, \$1,000,984.18 had been paid from the fund to cover such costs. Further, in a letter to the Court, the parties indicated that as of May 18, 2011, they "have agreed that the Settlement Fund will not be required to pay any more of the notice and claims administration costs * * *" [119]. It appears that Defendant has paid at least an additional \$668,580.52 out of pocket to cover notice and claims administration costs. See [113]. The Agreement provides that Class Counsel will "seek approval of the Court for payment of not more than one-third of the Settlement Fund for attorneys' fees." ¶ 11. The Agreement also provides for an incentive award not to exceed \$1,000 for Plaintiffs Schulte and Willard. ¶ 12. In their motion [103], Class Counsel requests \$3,166,666 (which is 33.3% of the settlement fund) in attorneys' fees, and \$54,281.32 as reimbursement for costs and expenses. Counsel also requests an incentive award of \$1,000 for Plaintiffs Schulte and Willard.

Once the settlement becomes final (see ¶ 32), Class Members will be bound to a broad release. ¶ 34. The Agreement provides that Defendant "expressly denies any and all liability" in the lawsuits. ¶ 33.

As of May 13, 2011, the claims administrator had received "over 100,000 claims." Parties Supplemental Mem. [118] at 1. In contrast to this high participation rate, 342 Class Members excluded themselves from the settlement, and 15 Class Members submitted 13 separate objections to the settlement.

C. Plaintiffs' Expert Report

As explained in detail below, before the Court can finally approve the settlement, it must first quantify the "net expected value of continued litigation to the class." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir.2006). For that reason, in its order preliminarily approving the settlement, the Court called for the parties to provide at the final approval stage "evidence that would enable the Court to

determine the potential value of Class Members' claims." [59] at 5.

In response to that directive, Plaintiffs have attached to their memorandum in support of final approval an expert report prepared by Mr. Thomas A. Tarter, an expert in banking and financial institutions.⁹ Class Counsel retained Mr. Tarter *570 to estimate: (1) the amount of excess overdraft fees caused by Defendant's practice of re-sequencing debit card and ATM transactions from the highest to lowest amount during the class period; and (2) the present value of Defendant's change in business practices, required under the settlement, to no longer re-sequence debit card and ATM transactions. Tarter Expert Report at 6. Mr. Tarter estimates that during the class period, Defendant collected approximately \$97.7 million as a result of its re-sequencing policy. *Id.* at 15. Mr. Tarter also estimates that the present value of Fifth Third's agreement to end its practice of re-sequencing is \$58.8 million over the next five years, or \$108.8 million over the next ten years (computed at a 3.5% discount rate). *Id.* at 15–16.

In order to reach his opinions, Mr. Tarter reviewed various documents including the complaint, settlement-related documents, Defendant's public filings and web site, and information provided by Defendant including non-public and confidential documents and data. *Id.* at 5.

To estimate total "Excess OD Fees" (Mr. Tarter's term for earnings from overdraft fees resulting from re-sequencing), Mr. Tarter multiplied the net overdraft fees attributable to debit card and ATM transactions by the probability that the fees collected by FTB were the result of re-sequencing. First, using data provided by Defendant, Mr. Tarter took the total amount of overdraft fees received from customers for each month during the class period (adjusted for waivers, reversals and charge offs).¹⁰ He then multiplied these monthly charge amounts by .57, to reflect that approximately 57% of overdraft fees were generated by debit card and ATM transactions. *See id.* at 8. These monthly totals gave Mr. Tarter an estimation of the total monthly amounts of overdraft fees collected by Defendant that resulted from debit card or ATM transactions. Mr. Tarter then attempted to estimate how much of these totals were "Excess OD Fees."

Defendant provided Mr. Tarter with the average number of overdraft fees charged to customers who incurred one or more overdraft fee for each month during the class period. *Id.* at 9. (Over the class period, the average number of overdraft fees

for this customer population ranged between 3.12 and 4.24 fees per month). Mr. Tarter recognized that there was a direct relationship between the number of overdraft fees charged to a customer in any given day¹¹ and the likelihood that one or more of the fees was the result of re-sequencing. When a fee was the result of re-sequencing, Mr. Tarter called it a “mismatch.” Using a set of matrices, Mr. Tarter calculated that the probability of mismatch was 0% where there was only one overdraft transaction,¹² 10% for two, 17.65% for three, and 20.21% for four. *Id.* at 11. These probabilities were plotted on a graph, and a “best-fit” curve was created, *571 which enabled Mr. Tarter to calculate the probability of “mismatch” for average numbers of overdraft transactions that were not whole numbers.¹³

Mr. Tarter calculated the total amount of Excess OD Fees for three different scenarios, assessing the likely total Excess OD Fees depending on whether the average number of fees assessed per month all occur on one day, or are spread over two or three days. Mr. Tarter reasoned that if overdrafts were spread over two or three days, the percentage of OD fees that were “mismatched” would be lower. To calculate Excess OD Fees, assuming the average number of fees assessed per month all occur on one day, Mr. Tarter multiplied 57% of the total amount of overdraft fees collected for a given month by the mismatch probability for that month. Each month's totals were then summed, giving Fifth Third's total Excess OD Fee earnings for the entire class period, assuming the average number of fees assessed per month all occurred on one day. The calculation assuming the average number of fees assessed per month occurred on two or three days was identical, except that Mr. Tarter divided the probability of a “mismatch” by two or three, respectively, to reflect the chance that overdrafts within a particular month were spread over two or three days.

Ultimately, Mr. Tarter concluded, based on his experience in banking, that the average number of overdraft fees assessed per month would likely be spread over two or three days. This assumption was based on the fact that most people are paid by their employers either twice or three times per month, and individuals are most likely to overdraft their accounts the day before they are paid. *Id.* at 9. Thus, to calculate Excess OD Fees for the class period, Mr. Tarter averaged the total Excess OD Fees collected, where the average number of overdraft fees assessed per month would likely be spread over two or three days. This resulted in a figure of \$97.7 million.¹⁴

Mr. Tarter then estimated the present value of Defendant's change in business practices, required under the settlement, to no longer re-sequence debit card and ATM transactions. In determining this figure, Mr. Tarter had to account for Regulation E, which became effective in July and August of 2010. This regulation provided that accountholders can only be assessed overdraft fees for debit and ATM transactions if they have affirmatively authorized a bank to allow them to overdraft their account—otherwise, the transaction is simply declined. *Id.* at 13. Analysis of data provided by Defendant indicated that Regulation E is associated with a 36% decrease in overdraft fee revenue.

Thus, to estimate the present value of the settlement's requirement that Defendant no longer re-sequence, Mr. Tarter used the most recent completed calendar year for which data was available, 2009, to calculate Defendant's likely theoretical future earnings from re-sequencing. In this calculation, the estimated Excess OD Fees for 2009 were reduced by 36% to take into *572 account Regulation E. *Id.* at 14. The resulting figure was discounted at a rate of 3.50% (to correlate with the 10-year U.S. Treasury Bond) for five and ten years, resulting in a net present value of \$58.8 million over five years or \$108.3 million over ten years in losses to Defendant resulting from the settlement's requirement that it no longer engage in re-sequencing.

D. Defendant's Damage Calculation

Attached to their memorandum in support of final approval of the settlement (Ex. 1 to [102]), Defendant includes its own damage calculation that estimates that “the impact of high-to-low posting on debit and ATM transactions during the Class Period was \$16,752,710 annually.” See Affidavit of Kevin Sullivan, Senior Vice President, CFO–Retail, Banking (“Sullivan Aff.”), ¶ 9. Extrapolated out over the entire class period, that figure amounts to approximately \$95,281,038.

Mr. Sullivan explains that over the class period, Fifth Third realized an average total of approximately \$244,922,667 per year in overdraft fees.¹⁵ This figure represents all overdraft fees, not just those that resulted from debit card or ATM transactions. Fifth Third determined that “approximately 57% of the yearly realized overdraft fees were the result of a debit card or ATM transaction.” *Id.* ¶ 8. Thus, multiplying the above figure by .57 resulted in average yearly overdraft fees of \$139,605,920 that were the result of debit card and ATM transactions. Using financial models that Fifth Third prepared for its periodic regulatory filings, Fifth Third estimated that

approximately 12% of the overdraft fees relating to debit card and ATM transactions were attributable to its use of a high-to-low posting order. *Id.* ¶ 9. Thus, the “estimated impact of high-to-low posting on debit and ATM transactions during the Class Period was \$16,752,710 annually,” *id.*, which is \$1,396,059 per month, or \$95,281,038 over a 68.25-month class period.

Fifth Third's data further showed that approximately 72% of the overdraft fee revenue was generated by the approximately 7% of Fifth Third's customers who overdrafted six or more times a month. *Id.* ¶ 10. Adjusting for these “chronic overdrafters,” the “total estimated impact of high-to-low posting on debit card and ATM transactions for the 93% 'non-frequent overdrafters' was * * * \$26,711,266” over the entire class period. *Id.* ¶ 11.

E. Objections to the Settlement

As noted above, construing the term “objection” broadly, 15 Class Members filed 13 separate objections to the settlement. The Court summarizes each of the objections below.

1. Keyes and Ratliff, and Kannapel Objections

Objectors Michelle Keyes, Amanda Ratliff, Verdel Ratliff, and Laura Kannapel are each represented by members of the Plaintiffs' Executive Committee (“PEC”) in the Overdraft MDL. Objectors Keyes, Amanda Ratliff, and Verdel Ratliff filed an objection [90] that challenges the settlement on numerous grounds. Objector Kannapel filed a separate objection [91]. In further support of their objection, the Keyes/Ratliff Objectors filed the preliminary approval order of a settlement agreement reached between the plaintiffs and defendant Bank of America in the Overdraft MDL [121]. The Court will discuss these objections together and will refer to the two groups of objectors collectively as the “PEC Objectors.”

*573 a. Amount of Settlement Fund and Criticism of Expert Report

The PEC Objectors argue that given the potentially high value of Class Members' claims, the amount that the settlement fund provides to reimburse Class Members is inadequate.

Before discussing this objection, the Court should note that pursuant to the schedule set by the Court, the PEC Objectors' filed their objections before the parties filed their briefs in support of the settlement. As discussed in detail above, Plaintiffs' brief attached and discussed the Tarter Expert Report and Defendant provided its own damages calculation. In their opening objections, the PEC Objectors argued that the Court could not grant final approval because the settling parties had, at the time those objections were filed, failed to provide evidence that would enable the Court to determine the value of Class Members' claims. *See, e.g.* Keyes/Ratliff Objection at 3–4; Kannapel Objection at 4–5. The filing of the Tarter Report and Sullivan Affidavit corrected this deficiency, and so, the Court need not discuss these arguments further.

After receiving the parties' memoranda in support of final approval, the PEC Objectors did not seek leave to file a reply brief to attack the Tarter Report or Sullivan Affidavit (or to address any other issues with the parties' memoranda).¹⁶ However, at the fairness hearing, counsel for Objectors Keyes and Ratliff did offer two specific criticisms of the way in which Mr. Tarter calculated the value of the class's claims. See Fairness Hearing Tr. at 96–100. First, the Keyes/Ratliff Objectors note that while Mr. Tarter recognized that those individuals who incurred only one overdraft fee in a month could not be Class Members, the population from which he obtained his average number of fees charged per month was customers who incurred *one or more* overdraft fees for each month during the class period. Tarter Report at 9. Counsel argues that there is no way to know how much this “mistake” skewed Mr. Tarter's results. Second, Mr. Tarter assumed that because 57 percent of all transactions were debit card or ATM transactions, 57 percent of overdraft fees were attributable to debit card or ATM transactions. Counsel argues that this is a *non sequitur*. In fact, according to counsel, a customer would probably be more likely to overdraft when making a debit card transaction than when writing a check. Fairness Hearing Tr. at 98–99 (“Debit cards probably account for 95 percent of the overdraft fees.”).

Because the PEC Objectors could not challenge the Tarter Report or Sullivan Affidavit in their opening objections, the PEC Objectors instead pointed to settlements and verdicts in other cases involving claims similar to those at issue in this lawsuit as proof that the settlement amount here is inadequate. Specifically, the objectors argue that the decision in *Gutierrez v. Wells Fargo Bank*, 730 F.Supp.2d 1080 (N.D.Cal.2010), where a judge excoriated Wells Fargo for its debit reordering practices and ordered it to pay \$203 million in restitution to

its California customers and cease its reordering practices, is evidence of the inadequacy of this settlement. Keyes/Ratliff Obj. at 5–6. The Court discussed the *Gutierrez* decision in its preliminary approval order ([59] at 6 n. 4) and will do so again below. Further, the objectors point to a settlement reached in the Overdraft MDL between the plaintiffs there and Bank of America, in which Bank of America agreed to pay class members *574 \$410 million to resolve the claims pending against it in that litigation. See Ex. A to [121]. The Court will address the objection about the size of the \$9.5 million fund in detail below, along with each of the other objections raised.

b. Benefits Allocation

The PEC Objectors argue that the distribution of the settlement proceeds is arbitrary and capricious, resulting in unwarranted inequitable treatment of Class Members. Keyes/Ratliff Obj. at 7–9; Kannapel Obj. at 7–10. Objectors argue that by forcing Class Members to choose a single 45–day period in which to claim a refund of overdraft charges, the settlement will unfairly “benefit [] a Class Member who incurred the brunt of his or her overdraft fees over a short period of time at the expense of another Class Member who accumulated a larger amount of impermissible fees over a greater period of time.” Kannapel Obj. at 8. For instance, a customer who incurred a total amount of overdraft fees of \$100, but incurred them all in one month, may be entitled to a full refund. However, a customer who incurred \$1,000 in total fees, spread out evenly over a two-year period, could only recover approximately \$63. Further, the Objectors take issue with the fact that funds left over after the initial distribution are to be used to pay up to treble damages to Class Members who have already been compensated, instead of being used to refund Class Members for charges from outside the 45–day period.

c. Claims Process

The PEC Objectors argue that the claims process is unnecessary and that it is unduly burdensome on Class Members and deters claims.

First, the Objectors have a fundamental disagreement with the need for a claims process. The Objectors argue that because the identity of Class Members and the amount that each has been overcharged can be determined from Fifth Third's records, there is no need for customers to submit

a claim form. Instead, argue the Objectors, Fifth Third should simply send payments directly to Class Members. The Keyes/Ratliff Objectors argue that “[t]he Bank of America settlement demonstrates the feasibility of a direct distribution of settlement benefits to class members without the requirement of self identification.” [121] at 1. “There, the settlement administrator will identify class members and the harm they incurred for the [class period] and then class members will have a credit posted to their account, or in the case of former customers, have a check sent to their most recent address.” *Id.*

Next, the Objectors identify problems with the claims process as it is employed in this case. First, as the Court explained in its order calling for additional briefing [117], the Objectors argued that it would be impossible for any Class Member to submit a claim in good faith on the basis of the settlement documents as they currently are written. *Id.*; see also Kannapel Obj. at 12; Fairness Hearing Tr. at 73–78. As the Court also explained in its prior order, under both options in the claim form, a Class Member must identify an amount of “Overdraft Fees” that he or she incurred during a particular time period. Again, the term “Overdraft Fee” means “an insufficient funds fee, overdraft fee, returned item fee, daily overdraft fee, overlimit fee, or other similar fee, incurred as a result of the ‘re-sequencing’ of a Fifth Third Debit Card Transaction in non-chronological order that was not previously reversed or refunded.” According to the Objectors, a major problem with the settlement is that Class Members have no way of knowing which fees were the “result of [* * *] ‘re-sequencing’ ” such that they could accurately fill out the form and make a claim. The Objectors argue that *575 Defendant has not disclosed how it determines the order in which charges are posted to customers' accounts. Counsel further submitted that a Class Member viewing his or her statement would not be able to determine which fees were “Overdraft Fees” in part because the statements do not indicate the date on which charges were posted within a posting period—they only indicate the date on which a purchase was made.

Next, the Objectors vociferously object to Fifth Third's refusal to make Class Members' statements over the 69–month class period available for free so that Class Members can accurately fill out claim forms. The Settlement Agreement only provides free statements for a period going back 16 months from the date of request by the Class Member. A customer must pay \$5 per month for additional statements. The 16–month period of “free statements” does not appear to be a concession to

Class Members as part of the settlement; rather, it appears to be Fifth Third's standard practice with regard to making past statements available to customers. The Objectors argue that the requirement that Class Members pay Fifth Third for the records that they need to determine the value of their claims is unfair and intended to deter claims.

d. Amount of Discovery Conducted at Time of Settlement

Finally, the PEC Objectors argue that the absence of pre-settlement discovery demonstrates that Class Counsel failed to properly evaluate the merits of the claims at issue in this litigation. Keyes/Ratliff Obj. at 3; 10–11; Kannapel Obj. at 6. The Objectors point out that the “docket reflects that no formal or informal discovery was conducted, and the settlement reached at the early stage of the proceedings suggests that none was conducted.” Keyes/Ratliff Obj. at 10. Further, the Objectors argue that the 30–day period of “confirmatory discovery” provided for in the Settlement Agreement is “an inadequate substitute for adversary discovery.” *Id.* at 11.

2. Vitali Objection

Aaron Vitali raises a number of objections to the settlement. See Vitali Obj. [88]. First, Mr. Vitali takes issue with the fact that Defendant “[has] not admitted guilt.” To Mr. Vitali, this “is much more important than any nominal fee or recovery.” Next, Mr. Vitali argues that the class period ends on July 1, 2010, and Defendant will have no “repercussions” and Class Members will have no recovery “for the months post July 2010.” In recognition of lost interest and “emotional and financial hardship” suffered by customers as a result of Defendant's conduct, Mr. Vitali proposes that interest “be taken into account when repaying the fees incurred.” Next, Mr. Vitali objects that “Fifth Third is only willing to refund a 45 day window of fees”—Mr. Vitali feels that Fifth Third should refund all fees wrongfully obtained. Furthermore, Mr. Vitali argues that the “online data provided only goes back 16 months” and “the only ones who can bring up past data about closed accounts or older accounts is Fifth Third.” Mr. Vitali asserts that Fifth Third (or rather, an independent agency working with Fifth Third) should determine the amount of refund owed to each Class Member. Mr. Vitali appeared at the fairness hearing and reiterated these objections.

3. Katz Objection

Joshua K. Katz raises three objections to the settlement. See Katz Obj. [93]. First, Mr. Katz argues that the proposed settlement fund is too small. Second, Mr. Katz argues that the court in the Overdraft MDL has already “considered and rejected” some of the arguments that Defendant makes in its motion to dismiss. Mr. Katz argues that this shows that the *576 “plaintiff's case rests on very solid ground [* * * and therefore] there is no justification for accepting such a small amount in comparison to the amount of money wrongfully realized by the defendant.” Katz Obj. at 1. Mr. Katz's third objection is “that the settlement contains a provision whereby the defendants will actually make money from the class members if they need to obtain their banking records in order to submit a claim.” *Id.* In this settlement, because a Class Member “may not be aware of what specific 45–day period should be used in submitting his or her claim,” there is a “legitimate need to examine 5 years' worth of records to make this decision.” Mr. Katz argues that Defendant should provide customer records for the entire class period to those who request them at no charge.

4. Scyoc Objection

David R. Scyoc identifies three problems with the proposed settlement and makes three proposals as to how Defendant's business practices should be changed going forward. See Scyoc Obj. [96]. First, Mr. Scyoc argues that the class period should extend through December 31, 2010. Scyoc also objects that a “45 continuous days claim period is too restrictive,” instead, a Class Member should choose “any 45 [presumably non-contiguous] days during [the] claim period.” Finally, like Objector Katz, Mr. Scyoc argues that “16 months [of] free statements is too restrictive.” With regard to the change in Defendant's business practices, Mr. Scyoc believes that instead of agreeing to process charges chronologically, Defendant should “process all charges from lowest to highest unless requested otherwise by [the] customer in writing.” Further, the bank should “reject/deny all prospective charges if [there are] insufficient funds in [the] customer's account unless [the] customer has requested otherwise in writing.” Finally, Mr. Scyoc argues that Defendant should “credit deposits first, before processing debits.” Mr. Scyoc appeared at the fairness hearing and reiterated these objections.

5. Ackerson Objection

Objector Roger Ackerson did not file his objection; instead it was mailed directly to the Court and to Class Counsel. Class Counsel attached Mr. Ackerson's objections to Exhibit I to Plaintiffs' memorandum in support of final approval [103]. Mr. Ackerson objects that the settlement only covers customers who utilized debit cards or ATMs. Further, Mr. Ackerson argues that "[i]f indeed wrongdoing was done, then a single period of 45 days seems to be of little value." Ackerson Obj. at ¶ 5. Mr. Ackerson argues that claims period should be "expanded to the amount of time that I held accounts with Fifth Third Bank." Portions of Mr. Ackerson's objection relate to a dispute that he had with Fifth Third about his particular account, and not to the settlement generally. In addition to his objection, Mr. Ackerson has included some correspondence with the Better Business Bureau and Fifth Third executives that relates to this dispute. The Court has not considered this material.

6. Cannata Objection

Objector Sam P. Cannata also did not file his objection; instead it was mailed directly to Class Counsel. Class Counsel also included Mr. Cannata's objection in Exhibit I to Plaintiffs' memorandum [103]. First, Mr. Cannata argues that the fees sought by Class Counsel (1/3 of the entire settlement fund) are excessive. Mr. Cannata notes that much of this fund will not be paid out to Class Members; some may be distributed in a *cy pres* and other amounts will go towards covering administrative costs. Mr. Cannata argues that the issue of attorney's fees should be "deferred until such time as the Court has received reports indicating the amount of *\$577 monetary relief that has actually been delivered to the Class." Cannata Obj. at 2.

Second, Mr. Cannata takes issue with the *cy pres* distribution itself. Mr. Cannata argues that distributions to Class Members should be "large enough so as to exhaust the fund," such that no *cy pres* is needed. Further, Mr. Cannata questions how the charity that will be the recipient of the distribution will be chosen. Cannata Obj. at 3–4.

7. Albright Objection

The Court received a letter dated March 9, 2011 from Patrick Albright. In it, Mr. Albright includes receipts and account statements and argues that these materials show that he was improperly assessed overdraft charges. With respect to the instant settlement, Mr. Albright argues that it "astounds [him] that [* * * the settlement] [l]imits the period of questionable transactions to 45 days." Further, Mr. Albright questions the need for a claims process—instead the amounts owed to customers "should be determined by Fifth Third's own records [because] * * * [t]hey know exactly how much they took." Third, Mr. Albright objects that the settlement "[a]llows for no admission of guilt or punitive damages, and has no deterrent value." Mr. Albright argues that "\$9.5M is an insulting sum from a bank that may have profited ten times that amount by their fraudulent practices."

8. Other Objections and Submissions

The Court has received the following additional communications from Class Members. Some of these are not "objections" in the formal sense; however in the interest of completeness, the Court will summarize them below.

On February 14, 2011, Elizebeth Stackel filed a packet of material with the Court [89]. The Court has closely read Ms. Stackel's filing and concludes that it does not identify any specific objection to the settlement.

In a handwritten letter to Class Counsel dated February 23, 2011, Andrew Kelly states only that he is "an objector to this settlement [and is] hiring my own lawyer!" Mr. Kelly's letter was included in Exhibit I to Plaintiffs' memorandum. Mr. Kelly identifies no specific grounds for his objection.

In a handwritten letter to the Court dated December 27, 2010 and filed with the Court [84], Christopher Basie states that he "object[s] to the settlement" and gives the Court permission to use "[t]he history of my checking account and phone calls [to the Goodlettsville, TN Branch]" in support of his objection. Mr. Basie identifies no specific grounds for his objection.

On February 24, 2011, Teresa and Timothy Drew filed a "declaratory affidavit" with the Court [95]. The Drews report that on February 15, 2011, they attempted to obtain records that they needed in order to prepare their claim form, and were told that they could not obtain the records free of charge. The Drews argue that the "requirement to pay for the records necessary to establish [their] claim create[s] a hardship and

[is] divisive to just and equitable discovery of the facts to settle damages and is directly contrary to the findings & Settlement Order of Judge Robert M. Dow, Jr.” Further, the Drews attach various of their bank account records and identify instances where transactions “were posted out of sequence with obvious results.” The Drews state that “[i]f it is found that mine or my sons credit record was in some way impugned, and or I do not receive at least the amount of recovery per my claim herein, I may seek additional damages and hereby give Notice that I reserve the right to do so and to be conditionally excluded* * *.” Because the Drews’ affidavit attempts to reserve certain claims that would otherwise be released in the settlement and purports to *578 seek “conditional” exclusion, the Court interprets the Drews’ affidavit as a request for exclusion.

The Court received two letters from R. McKinley Elliot, Esq. The first, dated March 2, 2011, informs the Court that Defendant “continues to reorder the posting of checks to customer accounts.” The second letter, dated March 11, 2011, complains that the implementation date for Fifth Third’s change in business practices was twice pushed back, finally to March 25, 2011.

II. Legal Standard

A court may approve a settlement that would bind class members only if it determines after a hearing that the proposed settlement is “fair, reasonable, and adequate.” [Fed.R.Civ.P. 23\(e\)\(2\)](#). To evaluate the fairness of a settlement, a court must consider “the strength of plaintiffs’ case compared to the amount of defendants’ settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement.” [Synfuel Techs., Inc. v. DHL Express \(USA\), Inc.](#), 463 F.3d 646, 653 (7th Cir.2006) (quoting [Isby v. Bayh](#), 75 F.3d 1191, 1199 (7th Cir.1996)).

“The ‘most important factor relevant to the fairness of a class action settlement’ is the first one listed: ‘the strength of plaintiff’s case on the merits balanced against the amount offered in the settlement.’” [Synfuel](#), 463 F.3d at 653 (quoting [In re Gen. Motors Corp. Engine Interchange Litig.](#), 594 F.2d 1106, 1132 (7th Cir.1979)). Furthermore, “[i]n conducting this analysis, the district court should begin by ‘quantifying the net expected value of continued litigation to the class.’ To do so, the court should ‘estimate the range of possible

outcomes and ascribe a probability to each point on the range.’” *Id.* (quoting [Reynolds v. Beneficial Nat’l Bank](#), 288 F.3d 277, 284–85 (7th Cir.2002)). Although the Seventh Circuit has recognized that “a high degree of precision cannot be expected in valuing a litigation,” the court should nevertheless “insist that the parties present evidence that would enable possible outcomes to be estimated,” so that the court can at least come up with a “ballpark valuation.” *Id.* (quoting [Reynolds v. Beneficial Nat. Bank](#), 288 F.3d 277, 285 (7th Cir.2002)). In essence, a court must weigh the value of the proposed settlement against the total amount that the class could recover, discounted by the weaknesses and risks inherent in the class’ claims.

“Federal courts naturally favor the settlement of class action litigation.” [Isby](#), 75 F.3d at 1196. Nevertheless, the Seventh Circuit has warned that “the structure of class actions under [Rule 23](#) * * * gives class action lawyers an incentive to negotiate settlements that enrich themselves but give scant reward to class members, while at the same time the burden of responding to class plaintiffs’ discovery demands gives defendants an incentive to agree to early settlement that may treat the class action lawyers better than the class.” [Thorogood v. Sears, Roebuck & Co.](#), 627 F.3d 289, 293 (7th Cir.2010) (emphasis omitted). District courts must therefore “exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions.” [Synfuel](#), 463 F.3d at 652; see also [Reynolds](#), 288 F.3d at 280.

III. The Settlement Satisfies [Rule 23](#) Because It Is Fair, Reasonable, and Adequate

Applying the five factors identified in [Synfuel](#), 463 F.3d at 653, the Court concludes that the settlement is “fair, reasonable, *579 and adequate” and thus meets the requirements of [Rule 23](#).

A. Strength of Plaintiffs’ Case Balanced Against Amount of Settlement

As noted above, the “most important factor” in determining whether a proposed settlement satisfies [Rule 23](#) is the “strength of plaintiff’s case on the merits balanced against the amount offered in the settlement.” [Synfuel](#), 463 F.3d at 653. Because the Settlement promises to yield benefits to the class that are significant in light of Defendant’s potentially strong defenses should the case proceed to trial, the first factor under [Synfuel](#) counsels approval.

1. Potential Value of the Class's Claims

The Court begins its task by “‘quantify[ing] the net expected value of continued litigation to the class.’” *Synfuel*, 463 F.3d at 653 (quoting *Reynolds*, 288 F.3d at 284–85). Setting aside the specter of punitive damages, the evidence introduced by the settling parties established that the top of “the range of possible outcomes,” *id.*, is a recovery by the class of between \$95.2 million (Defendant's number) and \$97.7 million (Plaintiffs' expert's number). The potential exposure calculations put forward by the parties went essentially unchallenged,¹⁷ and no objector sought to introduce his own analysis of the class's potential recovery in this case. The evidence before the Court therefore conclusively establishes that around \$96.5 million (the average of parties' top-end damage calculations) is the most that the class could hope to recover.

The next step in determining the fairness of the settlement is to discount the value of the class's claims based on the various defenses available to the defendant. See *Synfuel*, 463 F.3d at 653. The record in this case establishes that Plaintiffs would face considerable hurdles if they proceeded toward trial. Were this litigation to proceed absent settlement, Fifth Third's memorandum in support of its motion to dismiss [23] shows that it would argue that Fifth Third was contractually authorized to re-sequence Class Members' debit card transactions from the *580 highest to lowest amount, and that the terms of the Deposit Agreement preclude a finding that Fifth Third engaged in any deception or unfair conduct. *Id.* at 2–3. All customers signed a signature card when opening a personal deposit account, which provides that the terms and conditions contained in the card, “together with resolutions or authorizations which accompany this signature card, if applicable, and the Rules, Regulations, Agreements and Disclosures of Bank constitute the Deposit Agreement (“Agreement”) between individual(s) or entity(ies) named hereon (“Depositor”) and the Bank.” *Id.* at 2. Fifth Third's Rules and Regulations state, *inter alia*:

In the case of overdraft or overpayment of any account, whether such by error, mistake, inadvertence, or otherwise, the amount of such overdraft shall immediately be paid to [Fifth Third]. An overdraft fee may be assessed by [Fifth Third] whether

[Fifth Third] pays the item or not. If multiple items are presented to [Fifth Third] and there are not sufficient collected funds to pay all of those items, [Fifth Third] (not customer) has the right to decide the order of the items that will be paid and which items will be returned, if any. [Fifth Third] may select any payment order at any time, which may include paying the largest items first such as your mortgage, rent or car payment.

Id. at 2.

While Plaintiffs would oppose a contract-based defense, a number of courts have accepted similar arguments when made by bank defendants in cases where the plaintiff was alleging that the defendant bank's re-sequencing practices were unlawful. Most notably, in *Hassler v. Sovereign Bank*, 374 Fed.Appx. 341 (3d Cir.2010), where a New Jersey plaintiff alleged that the defendant bank's practice of re-sequencing debit card transactions from highest-to-lowest amount was unlawful, the Third Circuit affirmed the dismissal of the plaintiff's breach of contract for violation of the duty of good faith and fair dealing, consumer fraud, and unjust enrichment claims based on its determination that the account agreement at issue (which Fifth Third has argued is similar to the language of the Deposit Agreement) allowed the defendant bank to reorder overdraft fees and “explicitly provided for the reordering of charges.” *Id.* at 344; see also *Fetter v. Wells Fargo Bank, N.A.*, 110 S.W.3d 683, 691 (Tex.App.Ct.2003) (affirming summary judgment against breach of implied duty of good faith and fair dealing claim because the deposit agreement “specifically permit[ted] high to low posting in addition to the authorization provided in UCC section 4–303(b)”; *Daniels v. PNC Bank, N.A.*, 137 Ohio App.3d 247, 738 N.E.2d 447, 449 (2000) (dismissing breach of implied duty of good faith and fair dealing claim because the deposit agreement that authorized the defendant bank to post items “in any order convenient to [the bank]” authorized the bank to post items from highest-to-lowest); *Smith v. First Union Nat'l Bank*, 958 S.W.2d 113, 114 (Tenn.Ct.App.1997).

Fifth Third has also argued that federal and Illinois law authorized it to re-sequence debit card transactions from highest to lowest amount, and accordingly, Plaintiffs could

not establish a violation of the Illinois Consumer Fraud Act (Count I) or other similar state consumer fraud statutes. See, e.g. [815 ILCS 505/10b\(1\)](#) (“Nothing in this Act shall apply to * * * [a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States.”). In its memorandum in support of its motion to dismiss, Fifth Third relied on an Illinois decision affirming the dismissal of claims alleging that a bank's practice of reordering checking transactions ^{*581} was unlawful. See *Hill v. St. Paul Fed. Bank for Savings*, 329 Ill.App.3d 705, 263 Ill.Dec. 562, 768 N.E.2d 322, 328 (Ill.App.Ct. 1st Dist.2002). Citing to [815 ILCS 505/10b\(1\)](#), the *Hill* Court held that “a bank's failure to disclose the posting order of checks in its schedule of fees comes under the Act's exemption for conduct authorized by law.” *Id.*, 263 Ill.Dec. 562, 768 N.E.2d at 328. The court explained that the portion of the federal Truth in Savings Act addressing bank fees specifies that a bank “need not include” in its disclosures “any information not specified” in applicable regulations. *Id.*, 263 Ill.Dec. 562, 768 N.E.2d at 327–328 (quoting 12 U.S.C. § 4303(a)). That regulation, 12 C.F.R. Pt. 230, Supp. I, § 230.4(b)(4), requires only that the bank state the fee amount and the conditions under which a fee may be imposed, such as by stating a “\$4.00 monthly service fee.” *Id.*, 263 Ill.Dec. 562, 768 N.E.2d at 328. Because the order in which overdrawn checks are posted “is not a ‘condition’ under which overdraft fees are assessed within the meaning of [section 4303\(b\)\(1\)](#),” the court concluded that “federal law does not require banks to disclose in their schedules of fees the posting order of checks and other items.” *Id.*

Furthermore, under the Illinois Uniform Commercial Code, banks are expressly authorized to post “items” to a customer's account “in any order.” [810 ILCS 5/4–303\(b\)](#) (UCC § 4–303(b)). An “item” is defined in the UCC as “an instrument or a promise or order to pay money handled by a bank for collection or payment.” [810 ILCS 5/4–104\(9\)](#) (UCC § 4–104(9)). Paragraph 7 of the Official Comments to [810 ILCS 5/4–303](#) (UCC § 4–303) provides the rationale for allowing banks to pay “items” in any order:

As between one item and another no priority rule is stated. This is justified because of the impossibility of stating a rule that would be fair in all cases, having in mind the almost infinite number of combinations of

large and small checks in relation to the available balance on hand in the drawer's account; the possible methods of receipt; and other variables. *Further, the drawer has drawn all of the checks, the drawer should have funds available to meet all of them and has no basis for urging one should be paid before another;* and the holders have no direct right against the payor or bank in any event, unless of course, the bank has accepted, certified or finally paid a particular item, or has become liable for it under Section 4–302. Under subsection (b) the bank has the right to pay items for which it is itself liable ahead of those for which it is not.

Id., Official Comment ¶ 7 (emphasis added); see also *Hill*, 263 Ill.Dec. 562, 768 N.E.2d at 325 (discussing [810 ILCS 5/4–303\(b\)](#)). While *Hill* concerned the re-sequencing of checks, Defendant would argue that the same rationale would apply to re-sequencing of debit card and ATM transactions. In their memorandum, Plaintiffs acknowledged that Defendant's contract-based defenses and arguments that its conduct was authorized by law would be difficult to overcome.

With regard to Plaintiffs' unjust enrichment claims, in addition to the foregoing arguments, Fifth Third would argue that such claims are barred because Fifth Third's relationship with each Class Member was governed by the express terms of the Deposit Agreement. Although some exceptions exist, Plaintiffs acknowledge that each of twelve states in which Fifth Third has offices recognizes that a cause of action for unjust enrichment does not lie when an express contract governs the relationship between parties. See Unjust Enrichment Chart, Exhibit D to Pl. Mem. [103]. Plaintiffs concede that “this issue would necessitate briefing and review, further complicating this matter absent settlement.” Pl. Mem. at 15.

^{*582} Plaintiffs would also be required to face arguments relating to the voluntary payment doctrine. As a general matter, the voluntary payment doctrine provides that “[a]bsent fraud, coercion or mistake of fact, monies paid under a claim of right to payment but under a mistake of law are not recoverable.” *Spivey v. Adaptive Mktg. LLC*, 622 F.3d

816, 822 (7th Cir.2010) (discussing Illinois' interpretation of the voluntary payment doctrine). According to Plaintiffs, each of the states where Fifth Third has offices recognizes a similar form of the voluntary payment doctrine. See Voluntary Payment Doctrine Chart, Exhibit E to Pl. Mem. As attested to in the Affidavit of Kevin Sullivan, Fifth Third estimates that approximately 72% of its overdraft fee revenue was generated from the approximately 7% of Fifth Third customers who overdrafted six or more times a month. Sullivan Aff. ¶ 10. Fifth Third would likely argue that, at some point, such persons had actual or constructive notice of Fifth Third's practice of re-sequencing debit card and ATM transactions, potentially rendering such Class Members' claims barred (or greatly reduced) by the voluntary payment doctrine.

In addition to these defenses on the merits, absent settlement, Plaintiffs would be required to overcome a contested class certification proceeding. There is no guarantee that Plaintiffs would prevail at this stage. See *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir.2010) (“Class treatment of consumer fraud cases can certainly present difficulties, and courts should consider these concerns before deciding to grant class certification”). At such a proceeding, Plaintiffs would have to demonstrate the manageability of the case; a requirement absent in a class certified for settlement purposes only. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial.”) (citations omitted). Additionally, any ruling on class certification would likely be appealed pursuant to Rule 23(f), further lengthening and complicating the matter.¹⁸

While Plaintiffs maintain that their claims would ultimately succeed, the above discussion establishes that Fifth Third has a number of potentially meritorious defenses. Absent settlement, Class Members would face the real risk that they would win little or no recovery. What is assured is that any victory would come only after many months (or years) of hard-fought litigation. For these reasons, the use of a significant discount percentage is appropriate. In fact, Mr. Sullivan's calculations show that if the Court accepted just one of Defendant's defenses—the “chronic overdrafter”/voluntary payment argument—the value of the Class's claims would fall approximately 72% (from \$95.3 million to \$26.7 million). Sullivan Aff. ¶ 11.

2. Value of the Settlement to Class Members

On the other side of the ledger, the evidence presented to the Court establishes that Class Members will realize significant benefits from the settlement. In addition to paying \$9.5 million to the settlement fund, Fifth Third has also expended over \$416,000 in fulfilling its notice *583 obligations under the agreement. Also, Fifth Third has paid at least an additional \$668,580.52 out of pocket to cover other notice and claims administration costs. See [113]. This amounts to a total expenditure of at least \$10.58 million. It must also be remembered that “a dollar today is worth a great deal more than a dollar ten years from now,” *Reynolds*, 288 F.3d at 284, and a major benefit of the settlement is that Class Members may obtain these benefits much more quickly than had the parties not settled. If the Class Members were “required to await the outcome of a trial and inevitable appeal, [* * *] they would not receive benefits for many years, if indeed they received any at all.” *In re AT & T Mobility Wireless Data Services Sales Tax Litig.*, 789 F.Supp.2d 935, 961, 2011 WL 2204584, at *24 (N.D.Ill. June 2, 2011).

Further, the prospective relief agreed to by Defendant, including its agreement to cease its practice of re-sequencing transactions from the highest to lowest amount, is an important and valuable benefit for the numerous Class Members who inevitably will continue to bank with Fifth Third. For those customers, the prospective relief will reduce the number of overdraft fees that they will pay in the future. Plaintiff's expert has estimated the value of this relief to be \$58.8 million over the next five years, and \$108.3 million over the next ten years. Tarter Rep. at 16. Class Counsel represents that it is his belief that “this relief is groundbreaking, in that no other bank defendant has agreed to that concession in a case settlement related to the re-sequencing of debit card transactions.” Pl. Mem. at 5.

3. The Amount of the Benefits Offered in the Settlement is Fair

“The uncertain nature of the legal issues implicated by proceeding to trial makes it difficult to calculate a precise probability of success.” *In re AT & T Mobility Wireless Data Services Sales Tax Litig.*, 789 F.Supp.2d at 963, 2011 WL 2204584, at *25 (citing *Synfuel*, 463 F.3d at 653). Nevertheless, the information before the Court conclusively establishes that the amount of settlement benefits offered to

the class is “fair, reasonable, and adequate.” [Fed.R.Civ.P. 23\(e\)\(2\)](#).

As an initial matter, without taking into account the \$1.08 million that Defendant has paid to effectuate the settlement, and without taking into account the real value of the prospective change in Defendant's business practices, the \$9.5 million settlement fund still represents approximately 10% of the \$96.5 million that is the class's maximum potential recovery. Numerous courts have approved settlements with recoveries around (or below) this percentage. See, e.g. [Lazy Oil Co. v. Witco](#), 95 F.Supp.2d 290, 339 (W.D.Pa.1997) (approving settlement amounting to 5.35% of damages for the entire class period, and 25.5% of damages within the limitations period); [Erie Forge and Steel, Inc. v. Cyprus Minerals Co.](#), Civil No. 94-404 (W.D.Pa. Dec. 23, 1996) (approving settlement of \$3.6 million where plaintiffs' expert estimated damages at \$33 million); [In re Domestic Air Transp. Antitrust Litig.](#), 148 F.R.D. 297, 325 (N.D.Ga.1993) (12.7% to 15.3%); [In re Newbridge Networks Sec. Litig.](#), 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) (approving settlement and concluding that while “[c]ourts have not identified a precise numerical range within which a settlement must fall in order to be deemed reasonable; [] an agreement that secures roughly six to twelve percent of a *potential* trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the targeted range of reasonableness”); [In re Ravisent Techs., Inc. Sec. Litig.](#), 2005 WL 906361, at *9 (E.D.Pa. Apr. 18, 2005) (approving settlement, *584 which amounted to 12.2% of damages, and citing study by Columbia University Law School, which determined that “since 1995, class action settlements have typically recovered between 5.5% and 6.2% of the class members' estimated losses.”) (internal citations omitted).

In *Domestic Air Transp. Antitrust Litigation*, the court reasoned that simply because “the proposed settlement amounts to a fraction of potential recovery does not render the proposed settlement inadequate and unfair.” 148 F.R.D. at 325. “In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery. * * * The proposed settlement cannot be judged without reference to the strength of plaintiffs' claims and other factors relating to a potential recovery for plaintiffs.” *Id.* (citing [Detroit v. Grinnell Corp.](#), 495 F.2d 448, 455 n. 2 (2d Cir.1974)). When the Court takes Fifth Third's strong defenses into account, and considers the real value of the

prospective relief (at least to those who continue to bank with Fifth Third), the Court must conclude that the “most important factor” in determining whether a proposed settlement satisfies Rule 23—namely the “strength of plaintiff's case on the merits balanced against the amount offered in the settlement,” [Synfuel](#), 463 F.3d at 653—supports approving the Settlement Agreement in the present case. In short, the settlement provides immediate value to the Class Members that is well within the range of—and may in fact significantly exceed—their expected recovery from proceeding to trial.

In their objections, the PEC Objectors argue that this is a low-ball settlement. Support for this argument relies on the Objectors' comparison of the settlement fund in this case with the amounts awarded (\$203 million in *Gutierrez*) and the amounts agreed to (\$410 million against Bank of America in the Overdraft MDL) in cases involving similar claims. The Court concludes that comparison of this settlement with the recoveries in similar cases does not upset the Court's conclusion that this settlement merits approval.

As an initial matter, the Court recognized in its order preliminarily approving the settlement that “comparison of settlements in similar cases is relevant to whether a settlement is fair, adequate and reasonable.” [59] at 5. That is undoubtedly true. See [Trombley v. National City Bank](#), 759 F.Supp.2d 20, 24–25 (D.D.C.2011) (“The Court recognizes that the comparison of settlements in similar cases can be relevant when evaluating the fairness, adequacy, and reasonableness of a proposed settlement.”). However, when it granted preliminary approval to the settlement, the Court agreed with the PEC Objectors' criticisms of the parties' “adequacy by analogy” argument, and warned that such an argument was no substitute for evidence concerning *this case* that would enable the Court to determine the potential value of Class Members' claims. [59] at 5. It appears that the PEC Objectors did not take their own criticism to heart: While the parties presented expert and other evidence regarding the value of the class's claims in *this lawsuit*, the PEC Objectors' main challenge to the settlement is an “*inadequacy by analogy*” argument. Indeed, it bears repeating that the PEC Objectors did not seek to conduct discovery on the basis for the settling parties' damages calculations or offer an expert report of their own. Each case is different and must be evaluated on its own merits. E.g. [Liebman v. J.W. Petersen Coal & Oil Co.](#), 73 F.R.D. 531, 536 (C.D.Ill.1973). And due to the inevitable variations among different cases, solid evidence involving the value of the class's claims in *this case* is inherently more persuasive *585 than comparisons

to other settlements or verdicts. See *Goldberg v. Touche Ross & Co.*, Fed. Sec. L. Rep. (CCH) ¶ 96,892 (S.D.N.Y.1979) (in approving the settlement, the court did not consider plaintiffs' comparative table of settlements in other actions of claimed comparative value as having any impact because the variables between cases were too many to justify such a comparison) (cited in William B. Rubenstein, Alba Conte and Herbert B. Newberg, 4 NEWBERG ON CLASS ACTIONS § 11:47 (4th ed. 2011)).

Regardless, neither the *Gutierrez* case nor the Bank of America settlement in the Overdraft MDL shows that the amount of this settlement is insufficient. In a 90–page opinion following a bench trial, the Court in *Gutierrez v. Wells Fargo Bank*, 730 F.Supp.2d 1080 (N.D.Cal.2010), ordered Wells Fargo to and cease its reordering practices and pay \$203 million in restitution to its California customers. Most importantly, this award is not an appropriate basis for comparison because it is the result of a judgment after a bench trial; not a settlement. Further, Plaintiffs have explained that there are significant differences between *Gutierrez* and this case that make comparison difficult. The law at issue in *Gutierrez* was different than the law at issue in this case. There, the plaintiffs prevailed on claims brought under California's Unfair Competition Law, Cal. Bus. & Prof.Code §§ 17200 *et seq.* Under that statute, relief is available *without* individualized proof of deception, reliance, and injury. *Gutierrez*, 730 F.Supp.2d at 1138. Further, the court in *Gutierrez* relied heavily on the California version of U.C.C. § 4–303 and its California-specific comments, which expressly prohibit establishing a practice solely to maximize overdraft fees. *Id.* at 1121. As explained above, Illinois's version of U.C.C. § 4–303 contains no such prohibition. Fifth Third Bank has no branches in California. And finally, as the Court explained in its previous order, once the differences between the relative sizes of Wells Fargo and Fifth Third are taken into account, it is possible that the result in *Gutierrez* actually supports the fairness of the size of the recovery here. See [59] at 6 n. 4; [54] at 4.¹⁹

The PEC Objectors have also filed an order preliminarily approving a settlement agreement between Bank of America and a group of plaintiffs in the Overdraft MDL. Ex. A to [121]. Tellingly, neither of the PEC Objections nor the “Notice of Recent Developments” [121] to which the PEC Objectors attached the Bank of America settlement agreement contains a discussion of the similarities between this case and the lawsuit against Bank of America, a discussion of the relative sizes of the banks or the settlement classes, or other information

that would permit the Court to compare the two settlements. Accordingly, it is of little value to the Court in assessing the sufficiency of the benefits of this settlement.

B. Likely Complexity, Length, and Expense of the Litigation

The Seventh Circuit has held that the likely complexity, length, and expense of continued litigation are relevant factors *586 in determining whether a class-action settlement is fair, reasonable, and adequate. *Synfuel*, 463 F.3d at 653. Those factors support approval of the Settlement Agreement in this case.

If the Court approves the Agreement, the present lawsuit will come to an end and Class Members will realize both immediate and future benefits as a result. If the Court denies approval, however, protracted litigation would likely ensue (either in this Court or before the court presiding over the Overdraft MDL). If the Court denied approval, Defendant would likely re-file its motion to dismiss. If Plaintiffs' claims survive that hurdle, the parties would engage in discovery related both to the merits of the Class' claims and to the propriety of class certification. “The costs associated with discovery in complex class actions can be significant.” *In re AT & T Mobility Wireless Data Services Sales Tax Litig.*, 789 F.Supp.2d at 964, 2011 WL 2204584, at *26 (citing Nicola Faith Sharpe, *Corporate Cooperation Through Cost-Sharing*, 16 MICH. TELECOMM. & TECH. L.REV. 109, 110 (2009) (“Discovery accounts for about 50% of all litigation costs and up to 90% of the costs in the top 5% of the most expensive case.”) (citation omitted)). As explained above, a class certification proceeding would likely be hotly-contested and followed by an inevitable appeal. If the Class was certified, and if Plaintiffs survive through summary judgment proceedings, they would still be required to establish their entitlement to damages at trial. Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation. See *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir.1982) (“There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.”).

C. Amount of Opposition to the Settlement

The Seventh Circuit has instructed district courts to evaluate the amount of opposition to a settlement among affected parties in deciding whether to approve a class-action settlement. *Synfuel*, 463 F.3d at 653. A very small percentage of affected parties have opposed the settlement. As of May

13, 2011, the claims administrator had received “over 100,000 claims.” Parties Supplemental Mem. [118] at 1. In contrast to this high participation rate, only 342 Class Members excluded themselves from the settlement and only 15 Class Members submitted documents that could be considered objections. See *In re Mexico Money Transfer Litig.*, 164 F.Supp.2d 1002, 1021 (N.D.Ill.2000) (holding that the fact that more than “99.9% of class members have neither opted out nor filed objections * * * is strong circumstantial evidence in favor of the settlement”), *aff’d*, 267 F.3d 743 (7th Cir.2001); *cf. The Authors Guild, et al. v. Google, Inc.*, 770 F.Supp.2d 666, 676 (S.D.N.Y.2011) (denying approval of Google’s class action, in part because “an extremely high number of class members—some 6,800—opted out” and because “the objections [were] great in number”).

D. Opinion of Competent Counsel

The opinion of competent counsel is relevant to the question whether a settlement is fair, reasonable, and adequate under Rule 23. *Synfuel*, 463 F.3d at 653. Class Counsel has extensive experience in consumer class actions and complex litigation and there is no indication that the Settlement Agreement is the victim of collusion. Class Counsel believes that the Settlement is beneficial to the Class and meets the class-certification requirements of Rule 23. See Pl. Mem. at 20. The Court thus concludes that the opinion of *587 competent counsel in this case supports its approval of the Settlement. Accord *Retsky Fam. Ltd. v. Price Waterhouse L.L.P.*, 2001 WL 1568856, at *3 (N.D.Ill. Dec. 10, 2001) (“[T]heir opinion that the settlement is fair, reasonable and adequate also favors approval of the settlement.”).

E. Stage of the Proceedings and the Amount of Discovery Completed at the Time of Settlement

The last factor that the Seventh Circuit deems relevant to the question whether a class-action settlement is fair, reasonable, and adequate concerns the stage of the proceedings and the amount of discovery completed. *Synfuel*, 463 F.3d at 653. This factor is relevant because it determines “how fully the district court and counsel are able to evaluate the merits of plaintiffs’ claims.” *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 325 (7th Cir.1980), overruled on other grounds by *Felzen v. Andreas*, 134 F.3d 873 (7th Cir.1998).

The PEC Objectors argue that the absence of formal pre-settlement discovery demonstrates that Class Counsel failed to properly evaluate the merits of the claims at issue in this litigation. *Keyes/Ratliff* Obj. at 3; 10–11; Kannapel

Obj. at 6. The Objectors point out that the “docket reflects that no formal or informal discovery was conducted, and the settlement was reached at the early stage of the proceedings suggests that none was conducted.” *Keyes/Ratliff* Obj. at 10. Further, the Objectors argue that the 30-day period of “confirmatory discovery” provided for in the Settlement Agreement is “an inadequate substitute for adversary discovery.” *Id.* at 11.

Apart from exchanging initial disclosures pursuant to Rule 26(a), Class Counsel concedes that no formal discovery was conducted, but states that “[d]uring months of arms-length negotiations occurring prior to settlement, Settlement Class Counsel engaged in substantial informal discovery.” Pl. Mem. at 21. That discovery apparently consisted of “multiple meetings and conversations with Fifth Third’s counsel, during which information was appropriately shared.” *Id.* In addition, prior to settling, Class Counsel conducted a “great deal of independent research” to evaluate his claim, including “examining hundreds of pages of bank statements to study the manner in which Fifth Third’s practices affected Settlement Class Members.” *Id.*

The Court concludes that this factor does not weigh against approval of the settlement. As the Court noted in its preliminary approval order, that counsel conducted no formal discovery prior to settlement does not necessarily preclude final approval. See *In re Prudential Ins. Co. of America Sales Practice Litigation*, 148 F.3d 283, 319 (3rd Cir.1998); *Cotton v. Hinton*, 559 F.2d 1326, 1332 (5th Cir.1977) (“It is true that very little formal discovery was conducted and that there is no voluminous record in the case. However, the lack of such does not compel the conclusion that insufficient discovery was conducted.”). Indeed, the “label of ‘discovery’ [either formal or informal] is not what matters.” *In re AT & T Mobility Wireless Data Services Sales Tax Litig.*, 789 F.Supp.2d at 967, 2011 WL 2204584, at *29. Instead, “[t]he pertinent inquiry is what facts and information have been provided.” *Id.* As the Southern District of New York has noted:

[T]he question that this Court must answer is not how much or how little discovery was completed by the parties before they agreed to the settlement, but rather whether the discovery that was completed was sufficient for “effective representation.” * * * Intervenor * *

* have not explained how additional discovery would have been in the interest *588 of the class. Discovery has costs, and further discovery would have taken additional time and resulted in the expenditure of additional funds on both sides, neither of which is in plaintiffs' interests.* * * [C]lass counsel's decision to forgo additional discovery in the hopes of minimizing costs and achieving a quick recovery for their clients appears to be both fair and reasonable[.]

McBean v. City of New York, 233 F.R.D. 377, 384–85 (S.D.N.Y.2006); see also *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 211 (5th Cir.1981) (finding settlement appropriate, despite absence of formal discovery, when “plaintiffs did have access to information”).

Here, Class Counsel asserts that they had access to sufficient information such that they could effectively represent the Class. The Objectors have not explained “how additional discovery would have been in the interest of the class” or would have resulted in a better settlement. *McBean*, 233 F.R.D. at 384–85. Indeed, as the Seventh Circuit has suggested, the fact that Class Counsel negotiated a fair settlement is evidence that he had enough information to effectively represent the class. *Mars Steel Corp. v. Continental Illinois Nat. Bank and Trust Co. of Chicago*, 834 F.2d 677, 684 (7th Cir.1987) (“Rather than attempt to prescribe the modalities of negotiation, the district judge permissibly focused on the end result of the negotiation, which was more favorable to the class than any class member could reasonably have expected. The proof of the pudding was indeed in the eating.”). Further, pursuant to the Settlement Agreement, settlement Class Counsel was entitled to reasonable confirmatory discovery. This discovery confirmed the fairness of the settlement.²⁰ This is not the sort of case where the absence of formal discovery suggests collusion or that the class counsel otherwise failed to get the best agreement possible for their class. Cf. *Olden v. Gardner*, 294 Fed.Appx. 210, 218 (6th Cir.2008); *Reynolds v. Beneficial Nat. Bank*, 260 F.Supp.2d 680, 687–88 (N.D.Ill.2003) (declining to approve settlement on remand and disqualifying class counsel because evidence established that they attempted to settle case without first undertaking sufficient discovery to estimate class damages).

The stage of proceedings at which this case settled does not weigh against approval. In *In re Asbestos Litigation*, 90 F.3d 963, 988 (5th Cir.1996), rev'd on other grounds *sub nom. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), the court held that that the fact that the parties “filed their proposed settlement agreement on the same day as the plaintiff class filed its complaint [and] clearly did not intend to litigate the complaint” did not “change the adversarial nature of the disputes which the settlement resolves and does not contradict the district court's finding that settlement negotiations were heated, difficult and conducted at arm's length.” That a case is settled early does not establish that the class was ill-represented or that the settlement was the product of collusion. *589 *Id.* In any event, the stage of proceedings here was further along than in *Asbestos Litigation*—the parties did not come to this Court holding hands. Rather, the filing of Defendant's motion to dismiss suggests that the parties began the litigation in an adversarial posture. See also *In re AT & T Mobility Wireless Data Services Sales Tax Litig.*, 789 F.Supp.2d at 967, 2011 WL 2204584, at *29 (quoting *Molski v. Gleich*, 318 F.3d 937, 959 (9th Cir.2003)) (“Early dispute resolution is salutary, and we should not encourage the unnecessary expense, delay, and uncertainty caused by lengthy litigation when the parties are prepared to compromise. Nor should we hold * * * that a prompt settlement necessarily suggests a failure to prosecute or defend the action with due diligence and reasonable prudence. To the contrary, an early resolution may demonstrate that the parties and their counsel are well prepared and well aware of the strength and weaknesses of their positions and of the interests to be served by an amicable end to the case.”) (Graber, J., concurring), overruled on other grounds by *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir.2010), and judgment reversed by — U.S. —, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)).

IV. Objections to the Settlement

For the preceding reasons, the five factors outlined by the Seventh Circuit support approving the Settlement Agreement. Nevertheless, 15 Class Members have filed 13 separate objections, which collectively articulate a number of specific arguments why the Court should not approve the settlement. The Court has addressed some of these objections in the discussion above and will consider the balance here. The objections filed by Class Members do not establish that the Court should deny final approval of the settlement.

A. Benefits Allocation

As discussed above, the settlement does not distribute benefits on a strictly *pro rata* basis depending on the amount of fees incurred. Instead, customers must choose a 45-day period within the Class Period for the reimbursement of fees. The Court concludes that this allocation of benefits is appropriately tailored to the facts and law at issue in this case, and is fair, reasonable, and adequate. As the Court recognized in its order preliminarily approving the settlement, “when real and cognizable differences exist between the likelihood of ultimate success for different plaintiffs, it is appropriate to weigh distribution of the settlement in favor of plaintiffs whose claims comprise the set that was more likely to succeed.” *In re PaineWebber Ltd. Partnerships Litigation*, 171 F.R.D. 104, 133 (S.D.N.Y.1997) (internal quotations and citations omitted); see also *id.* (collecting cases); see also *In re Lucent Techs., Inc., Secs. Litig.*, 307 F.Supp.2d 633, 649 (D.N.J.2004) (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 248–49 (3d Cir.2001) (“Courts have routinely approved plans of allocation that provide different payments to class members.”)).

By reimbursing customers for damages incurred in a 45-day period, the settlement recognizes that customers who incurred “surprise” charges have stronger claims than the “chronic overdrafters” who paid many fees over a long period of time. This allocation method ensures that the benefits of the settlement are made available to all Class Members, while protecting the interests of Class Members with the strongest claims—those who incurred “surprise” overdraft charges—from erosion of the settlement fund by Class Members who were chronic overdrafters, and therefore those with arguably the weakest claims. Approximately 72% of all overdraft fee revenue was generated from the *590 approximately 7% of Fifth Third's customers who overdrafted six or more times a month. Sullivan Affidavit ¶ 10. As the Court has explained, these frequent overdrafters arguably have weaker claims than the other Members of the Settlement Class because they can be said to have had actual or constructive notice of Fifth Third's reordering policies and are more susceptible to defenses such as the voluntary payment doctrine. The way in which the settlement allocates benefits is fair because it recognizes these important differences among Class Members. What would be “arbitrary, unreasonable, and unfair[]” (Objector Kannapel's words) would be to distribute 72% of the settlement fund to the 7% of Class Members who have the weakest claims.

In *Trombley v. National City Bank*, a class action where a plaintiff alleged that a bank's re-sequencing of debit/check card and ATM transactions was unlawful, the court reached a similar conclusion when granting preliminary approval of a settlement that allowed class members to file claims for reimbursement of overdraft fees incurred during any two months of the class period at issue there, in stating that:

Reimbursing for the highest amount of overdraft fees incurred in any two calendar months—the two months do not have to be consecutive—enables Class Members to receive compensation, even though they may have had reasonable notice of the manner in which overdraft fee charges are imposed. There is also no cap on the number of overdraft fees that Class Members may recover for the two calendar months that they select for reimbursement. Limiting the recovery period to two months also prevents chronic overdrafters, who had notice of National City Bank's overdraft policies yet continued incurring overdraft fees anyway, from being unfairly rewarded for their behavior. It appears to be, therefore, a reasonable allocation methodology for the settlement funds, with the remaining funds then distributed among Class Members on a *pro rata* basis.

759 F.Supp.2d at 27 (D.D.C.2011). Thus, the allocation method provided for under the Settlement takes is tailored to the facts of this case and is fair, reasonable, and adequate. The Court overrules the objections of the PEC Objectors, and Objectors Vitali, Scyoc, Ackerson, and Albright, all of whom complain that recovery should not be limited to a 45-day period.²¹

B. Claims Process

As discussed above, a number of Objectors have argued that various aspects of the claims process are unfair, unduly burdensome on Class Members, and designed to deter claims.

While some of the Objectors' concerns about the claims process are indeed concerning, they are not serious enough to warrant rejection of the settlement in its entirety.

A few initial points about the claims process: First, many of the concerns about the claims process were voiced before data about the Class's response to the settlement was available. Again, Class Members have filed more than 100,000 claims. This excellent response strongly suggests that many of the concerns about the allegedly burdensome or confusing character of *591 the claims process were unwarranted. Next, the Court has reviewed the claim form and concludes that it is not unduly burdensome, long, or complex. All information called for on the form is required of the claims administrator in order for it to process claims. See *In re WorldCom, Inc. Sec. Litig.*, 2004 WL 2591402, at *12 (S.D.N.Y. Nov. 12, 2004) (holding that “[t]he [one] objection to the length and complexity of the proof of claim form is * * * meritless,” as “the information that claimants are required to submit is necessary in order for a fair distribution of the settlement proceeds”); *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 2004 WL 3671053, at *14 (W.D.Mo. April 20, 2004) (“The objectors also complain that the claim form for former subscribers is ‘burdensome.’ The one-page form merely requires a claimant to provide enough information to enable Defendants to search their records to confirm that the claimant falls within the definition of the relevant subclass. This requirement is reasonable.”). The parties' use of a settlement website and toll free number suggests that the claims process was designed to encourage—not discourage—the filing of claims. For example, the ability to submit a claim online through the settlement website allowed Class Members to submit a claim without the need to pay for a stamp. See, e.g. *In re Nasdaq Market-Makers Antitrust Litigation*, 2000 WL 37992, *4–5 (S.D.N.Y. Jan. 18, 2000) (recognizing that the “innovative use” of “electronic claim forms is likely to contribute to a far larger number of claims”); see also 3 NEWBERG ON CLASS ACTIONS § 8:40 (4th ed.) (“the inclusion of toll-free numbers in notices serves to facilitate, and thereby encourage, the filing of claims”) (collecting cases). And as the Court observed in its order preliminarily approving the settlement, because Defendant's total monetary payment to the settlement fund will be \$9.5 million regardless of the number of claims filed, it seems unlikely that the claims process is designed to limit the “take rate” of the Class Members.

That said, a number of Objectors raised three specific concerns about the claims process. First, the PEC Objectors,

and Objectors Vitali, Katz, and Scyoc argue that the provision of only 16 months of free statements from the date of a Class Member's request is unfair, when Class Members could use statements going back to the start of the Class Period to determine which 45-day period would be the best for making their claim. Assuming that these records are indeed kept, the Court imagines that there are costs associated with the retrieval and transmission of years-worth of old account statements. Plaintiffs explain that the number of account statements that would be provided was a negotiated term, and the Objectors' arguments that more free statements should have been provided are “tantamount to complaining that the settlement should be ‘better,’ which is not a valid objection.” *Browning v. Yahoo! Inc.*, 2007 WL 4105971, at *5 (N.D.Cal. Nov. 16, 2007) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir.1998)). Further, Class Members did not need all of their account statements in order to file a claim—the claim form provided that if Class Members were unable to locate their statements, they could submit a form based on the best of their knowledge and belief, identifying only a year in which they incurred overdraft charges.

Perhaps the claims process would have functioned better if Class Members had all of their account statements for the months during the Class Period that they were customers. However, “the courts have held that their function is not to modify the terms of a proposed settlement; but rather to approve or disapprove of the *592 proposed settlement ‘as a whole.’ ” 8 NEWBERG ON CLASS ACTIONS § 24:126 (4th ed.) (citing *Evans v. Jeff D.*, 475 U.S. 717, 727, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986)) (“the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed.”); see also *Turner v. Murphy Oil, USA, Inc.*, 472 F.Supp.2d 830, 843 (E.D.La.2007) (“the Court is also limited in that it may not make unilateral modifications or alterations to the proposed settlement, but rather may only accept or reject the agreement as a whole.”); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1797.5 & n. 9 (3d ed. 2005); MANUAL FOR COMPLEX LITIGATION § 21.61. For all of the reasons explained above, the settlement as a whole is worthy of approval; that the Court believes that one or a few terms could have been improved—such as the number of free statements made available—is an insufficient grounds for rejection.

Next, as explained above, the PEC Objectors argue that it would be impossible for any Class Member to submit a claim

in good faith on the basis of the settlement documents as they currently are written. Again, the claim form asks customers to identify an amount of “Overdraft Fees” that he or she incurred during a particular time period, where “Overdraft Fees” are fees “incurred as a result of the ‘re-sequencing’ of a Fifth Third Debit Card Transaction in non-chronological order.” The Objectors argue that Class Members cannot know which overdraft fees are “the result of ‘re-sequencing.’”

The settling parties conclusively rebutted this objection in the joint supplemental brief called for by the Court [118]. The parties explain that there are a number of ways that a Class Member could know that a specific overdraft fee was caused by re-sequencing. First, a Class Member's personal knowledge of his account activity, transactional history, and prior overdraft charges could support a claim made in “the best of [their] knowledge and belief.” Claim Form at 1. The parties explain that based on their knowledge of their daily schedules and purchasing habits, customers often knew when fees were the result re-ordering. See [118] at 3–4. Other customers—such as Plaintiff Willard—kept contemporaneous personal financial records from which they could deduce that they were the victims of high-to-low re-sequencing. See Declaration of Marlene Willard, Ex. 4 to [118] (explaining that she ascertained that she had incurred fees as a result of re-sequencing by examining her actual receipts and notebook ledger).

Second, the parties explain that Fifth Third mailed customers an “Overdraft Letter” each time that a customer incurred an overdraft charge. See Ex. 2 to [118], Affidavit of Thomas K. Kappes, Jr., at ¶ 7. Each Overdraft Letter, *inter alia*: detailed the date of overdraft(s), amount the account was overdrawn by, and amount of overdraft charges incurred; included a summary of relevant account activity detailing the beginning balance, the amount of any deposits/credits, whether there were any unavailable funds from deposits, the pending amounts and withdrawals/debits deducted from any balance, and the ending balance; and stated “[i]f you have questions or need additional information, please call us at 1–800–972–3030.” *Id.* ¶¶ 8, 9. The Overdraft Letters also included the date an item was charged or credited to a customer's account, the date each debit card transaction occurred (in the description for each charge), and detailed the order in which debit card transactions were charged to the customer's account—from highest to lowest amount. *Id.* The parties provided examples of such letters. A Settlement Class Member could *593 use an Overdraft Letter to determine that a particular overdraft fee was the result of resequencing. [118] at 4–5. If a Class

Member did not have his or her relevant Overdraft Letters, the Class Member could use his or her monthly account statements to determine that multiple overdraft fees were charged on one day and that the amount of money in the account at the beginning of the day was sufficient to pay at least one debit card charge. The Class Member could then use the description of the debit card charges and overdraft fees on the statement and knowledge of his transactional history and daily activity to come to an informed belief that he incurred an overdraft fee as the result of Fifth Third's re-sequencing of debit card transactions. Finally, Class Members could submit a claim in good faith if they had a conversation with a Fifth Third customer service representative, during which they were informed that fees has been charged as a result of the bank's re-sequencing policy. According to Defendant, Fifth Third's customer service representatives were trained to explain to customers the basis of any overdraft fees charged, including those resulting from the bank's re-sequencing of debit card transactions in non-chronological order. *Id.* (citing Affidavit of Anna Gise, at ¶ 4, Ex. 3 to [118]).

All of the above conclusively rebuts the assertion that Class Members could not in good faith fill out and submit a claim form, and the “proof of the pudding” (*Mars Steel Corp.*, 834 F.2d at 684) is the fact that Class Members have submitted more than 100,000 claims, and none has submitted an objection or other document complaining that it was impossible for them to file a claim in good faith.

Finally, the PEC Objectors and Objector Albright question the very need for a claims process. The Keyes/Ratliff Objectors note that in the Bank of America settlement, class members will be paid directly; they will not be required to submit a claim form. There, the settlement administrator will identify class members and the harm they incurred and then class members will have a credit posted to their account, or in the case of former customers, have a check sent to their most recent address. The Court rejects this objection.

First, as the Court noted in its prior opinion, there is nothing inherently suspect about requiring class members to submit claim forms in order to receive payment, see, e.g. *Milliron v. T-Mobile*, 2009 WL 3345762, *6 (D.N.J.2009) (“the Court finds it perfectly appropriate to require Class members to submit certain information proving they are entitled to collect the relief awarded in this case”); 3 NEWBERG ON CLASS ACTIONS § 8:45 (4th ed.) (settlements employing proof of claim requirement are “commonly employed” in consumer fraud cases), especially in a common fund case like this,

where the defendant's payout is capped regardless of the take rate.

Second, and perhaps most importantly, the claims process is a negotiated facet of this settlement, which, as the Court explained above, is fair as a whole. The Court may not “make unilateral modifications or alterations to the proposed settlement,” *Turner*, 472 F.Supp.2d at 843, such as the substitution of a claims process for a direct payout.

Third, despite the fact that Defendant presumably knows (or could ascertain) which Class Members incurred overdraft fees as the result of re-sequencing, there is evidence before the Court to support the argument that a claims process is not completely superfluous. For one, there would presumably be costs associated with investigating how much is owed to each Class Member under the settlement and distributing payments. Had the onus of that process been placed on Defendant, there *594 may have been less money available to pay claims. Second, there has been some suggestion that certain customers intentionally overdrafted their accounts, using the overdraft as an “easy loan program.” Fairness Hearing Tr. at 27:24. The option to file (or to not file) a claim gives customers who were aware of and assented to Defendant's re-sequencing policies the ability to opt out of receiving a payment that they feel they do not deserve. See *Lonardo v. Travelers Indem. Co.*, 706 F.Supp.2d 766 (N.D. Ohio 2010) (rejecting objection that “the [claim] form is unnecessary because it does not provide [defendant] with any information they do not already have” in part because “the claim form and opt-in procedure are negotiated components of the settlement that [defendant] insisted upon in order to force Settlement Class Members to affirm that they would have purchased a lower-priced policy had it been offered to them.”).

And finally, it must be noted that a direct-distribution of settlement benefits (at least to former customers who would be mailed checks) is not a panacea. See, e.g. *In re: Educational Testing Service Praxis Principles of Learning and Teaching, Grades 7–12*, MDL No. 1643, 2006 WL 3332829, at *2 (E.D. La. Nov. 15, 2006) (overruling objection that a “claims process for the expedited payments was unnecessary * * * because the names and addresses of [class members] are known” and checks could therefore be mailed directly to class members; finding that claims process prevents checks from being mailed to unverified and old addresses and thereby reduces undeliverable mail and fraudulently cashed checks).²²

C. Miscellaneous Objections

Objectors Albright and Vitali take issue with the fact that Defendant has not admitted guilt. But Defendant is not required to admit that it did anything wrong when settling a case. In fact, it “is common to most settlement agreements” that the defendant “does not admit liability.” *Hernandez v. Talman Home Mortg. Corp.*, 1986 WL 5205, at *3 (N.D. Ill. April 29, 1986); see also *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 2008 WL 2566867, at *12 (S.D. Tex. June 24, 2008) (“A settlement is not tantamount to an admission of liability. Defendants settle for many reasons, such as the avoidance of bad publicity and litigation costs, the possibility of an adverse verdict, and the maintenance of favorable commercial relationships.”).

Objector Scyoc argues that the Class Period should extend through December 31, 2010. Similarly, Objector Vitali argues that the Class Period ends on July 1, 2010, and Defendant will have no “repercussions” and Class Members will have no recovery “for the months post July 2010.” Plaintiffs explain that the length of the Class Period was tailored to the facts of this case, specifically, the effectuation of Regulation E, which provides:

(1) Existing account holders. For accounts opened prior to July 1, 2010, the financial institution must not assess any fees or charges on a consumer's account on or after August 15, 2010 for paying an ATM or one-time debit card transaction pursuant to the overdraft service, unless the institution has complied with *595 § 205.17(b)(1) and obtained the consumer's affirmative consent.

(2) New account holders. For accounts opened on or after July 1, 2010, the financial institution must comply with § 205.17(b)(1) and obtain the consumer's affirmative consent before the institution assesses any fee or charge on the consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service.

12 C.F.R. § 205.17(c). With the effect of this regulation in mind, the Court concludes that the length of the Class Period is not a reason that approval of the settlement should be withheld.

Next, Objector Vitali argues that [i]n recognition of lost interest and “emotional and financial hardship” suffered by customers as a result of Defendant's conduct, interest “be

taken into account when repaying the fees incurred.” As this objection simply argues that the amount awarded to Class Members should be increased, it is “tantamount to complaining that the settlement should be ‘better,’ which is not a valid objection.” *Browning v. Yahoo! Inc.*, 2007 WL 4105971, at *5. Similarly, Objector Scyoc's proposals about how the prospective relief could be improved are not proper grounds upon which to deny final approval. *Id.*

Finally, Objector Ackerson objects that the settlement only covers customers who utilized debit cards or ATMs, and does not provide reimbursement for fees incurred as a result of overdrawn checks. The Settlement Agreement provides that Class Members only release claims that relate to “the use of a Fifth Third Debit Card.” Settlement Agreement at ¶ 34. While the settlement provides no compensation for overdraft fees that were the result of overdrawn checks, it does not purport to release such claims either. That the settlement does not cover checks is not a reason why the approval should be withheld.

V. Class Notice

Constitutional due process and [Federal Rule of Civil Procedure 23\(c\)\(2\)\(B\)](#) require that absent class members receive “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” What comprises the best notice possible depends on various elements, including the size of the class, whether the class members can be easily identified, and the probability notice will reach the intended audience. See, e.g. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 166–67, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (considering the size, ease of identifying the class, and probability of receiving notice); *Phillips Petroleum v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Where lists of class members and their addresses are readily ascertainable, the court generally demands individual notice. *Id.* at 173, 94 S.Ct. 2140. Here, no one objects to the sufficiency of Notice, and the Court concludes that it is indeed unobjectionable.²³

The Notice Program was developed and implemented by Hilsoft Notifications, a professional class action notification company. Cameron R. Azari, Esq., a Hilsoft executive, filed an affidavit with the Court attesting to the implementation and adequacy of the Notice Program. See Azari Aff., Ex. C to Pl. Mem. Azari attests that Fifth Third was able to identify names and contact information for virtually all potential Class Members, and individual *596 Notice

reached approximately 89.7% of potential Settlement Class Members. *Id.* ¶¶ 7, 13.²⁴ In addition to individual notice, the parties disseminated notice by publication on the internet, in a number of daily newspapers, and via press release.²⁵ The parties also established a toll-free number, maintained by the Claims Administrator, with which Class Members could listen to answers to frequently asked questions and/or request that a copy of the Claim Form or Detailed Notice be mailed to them. *Id.* ¶ 36. As of March 7, 2011, the toll-free number had handled 66,906 calls representing 181,206 minutes of use. *Id.*

The Court has reviewed the content of all of the various notices, as well as the manner in which Notice was disseminated, and concludes that the Notice given to the Class fully complied with [Federal Rule of Civil Procedure 23](#), as it was the best notice practicable, satisfied all constitutional due process concerns, and provided the Court with jurisdiction over the absent Class Members. [Fed.R.Civ.P. 23\(c\)\(2\)\(B\)](#); *Eisen*, 417 U.S. at 177–78, 94 S.Ct. 2140; *Phillips Petroleum*, 472 U.S. at 797, 105 S.Ct. 2965. Indeed, the high number of claims filed is further proof of the adequacy of the Notice program. See *In re Agent Orange Product Liability Litigation MDL No. 381*, 818 F.2d 145, 169 (2d Cir.1987) (fact that large number of claims were filed by class members “suggest[ed] *597 that no practical problem exist[ed] as to the adequacy of the notice”).

VI. Motion for Fees, Costs, Expenses, and Incentive Awards

Class Counsel requests approval of attorneys' fees, costs and expenses, and for approval of incentive awards for the Class Representatives (see [103]). For the reasons explained below, the Court approves attorneys' fees of \$3,166,666. The request for cost and expense reimbursement of \$54,281.32 is denied without prejudice. The Court approves an incentive award of \$1,000 each for Plaintiffs Schulte and Willard.

A. Attorneys' Fees

“In a certified class action, the court may award reasonable attorney's fees * * * that are authorized by law or by the parties' agreement.” [Fed.R.Civ.P. 23\(h\)](#). The Settlement Agreement provides that Class Counsel would “seek approval of the Court for payment of not more than one-third of the Settlement Fund for attorneys' fees,” Settlement Agreement at ¶ 11, and Class Counsel have indeed sought \$3,166,666, which is precisely one-third of the \$9.5 million fund. In determining whether this sought-after amount is reasonable,

the Court “must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of the class members in the fund.” *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 258 (7th Cir.1988).

To determine the reasonableness of the sought-after fee in this, a common-fund case, “courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.” *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir.2001) (“*Synthroid I*”); see also *In re Conti'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir.1992) (“[t]he object in awarding a reasonable attorney's fee * * * is to give the lawyer what he would have gotten in the way of a fee in arm's length negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible.”). The Seventh Circuit has recognized, however, that “[s]uch estimation is inherently conjectural[.]” *Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir.2011). In *Synthroid I*, the Seventh Circuit held that the “market rate for legal fees depends in part on (1) the risk of nonpayment a firm agrees to bear, in part (2) the quality of its performance, in part on (3) the amount of work necessary to resolve the litigation, and in part on (4) the stakes of the case.” *Synthroid I*, 264 F.3d at 721; see also *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir.2005).²⁶ The probability of success at the outset of the litigation is relevant to this inquiry. See *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565 (7th Cir.1994).

Consideration of all of the relevant factors reveals that an award of \$3,166,666 is reasonable. First, Class Counsel incurred a significant risk of nonpayment by accepting this case. *Trans Union*, 629 F.3d at 746 (“within the set of colorable legal claims, a higher risk of loss does argue for a higher fee.”). As discussed in detail above, Fifth Third possesses a number of potentially meritorious defenses to the Actions. At the inception of this lawsuit, there was no certainty that *598 Plaintiffs would win, or that the case would settle; and if Plaintiffs had lost, Class Counsel “would receive no fees at all.” *Id.* All contingent fee class action cases involve some degree of risk for plaintiffs' counsel. See *Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir.2007) (“there is generally some degree of risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit”). Further, the Seventh Circuit recognizes that “the higher the risk of failure the higher the contingent fee that a

client would have to pay in an arm's length negotiation with the lawyer in advance of the suit.” *Trans Union*, 629 F.3d at 746. That at the inception of this lawsuit, Plaintiff Shannon Schulte authorized her attorney (Mr. Burton H. Finkelstein) to seek a fee of up to 33.3% of her potential recovery is further evidence that the risk that Counsel was undertaking at the beginning of the suit was relatively high. *Id.*; see also *Synthroid I*, 264 F.3d at 718–19.

Second, the quality of Class Counsel's performance in this litigation favors approval of the fees requested. Class Counsel have navigated a complicated case and have negotiated a Settlement Agreement that provides significant benefits to the Class Members.

Third, the amount of work necessary to resolve this lawsuit was substantial. *Synthroid I*, 264 F.3d at 721. As of March 3, 2011, Class Counsel and other attorneys from their firms reported having spent 2,815.50 hours advancing this matter, which represents a lodestar of \$1,258,385.20. See Summary of Attorney Time, Ex. H to Pl. Mem. Class Counsel undoubtedly spent additional time since March 3, 2011 attending the fairness hearing and responding to the Court's request for additional briefing. While many courts in this circuit have criticized the use of a lodestar cross-check in common fund cases,²⁷ the fee request here would nevertheless survive such an analysis. The requested award here would represent a multiplier of less than 2.5, which is not an unreasonable risk multiplier. See *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974 (7th Cir.1991) (noting that “[a risk] multiplier is, within the court's discretion, appropriate when counsel assume a risk of non-payment in taking a suit” and “[m]ultipliers anywhere between one and four * * * have been approved”).

The Court also observes that the stakes in the case are high given the size of the Class, the scale of the challenged activity, the complexity and costs of the legal proceedings, and the amount of money involved. Accord *In re AT & T Mobility Wireless Data Services Sales Tax Litig.*, 792 F.Supp.2d 1028, 1037–38, 2011 WL 2173746, at *9 (N.D.Ill. June 2, 2011).

Lastly, the Court should consider attorneys' fee awards in other class actions when assessing a fee request. See *Taubenfeld*, 415 F.3d at 600–601. A number of fee awards in common-fund cases from within the Seventh Circuit show that an award of 33.3% of the settlement fund is within the reasonable range. See *Taubenfeld v. AON Corp.*, 415 F.3d 597, 598–600 (7th Cir.2005) (finding that the district *599 court

was within its discretion in awarding lead counsel 30% of a \$7.25 million settlement fund); *In re Synthroid Mktg. Litig. (Synthroid II)*, 325 F.3d 974, 980 (7th Cir.2003) (“We * * * give consumer class counsel 30% of the first \$10 million and 25% of the next \$10 million * * * from \$20 million to \$46 million, consumer class counsel is entitled to 22% of that portion of the recovery. And we think that 15% of all amounts over that is a decent estimate of the fee that would have been established in ex ante arms'-length negotiations. Because the consumer class recovered a total of \$88 million, the fee comes to \$17.52 million, or 19.9% of the fund.”); *Meyenburg v. Exxon Mobil Corp.*, 2006 WL 2191422, at *2 (S.D.Ill. July 31, 2006) (“The Court is independently aware that 33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation.”); *Abrams v. Van Kampen Funds, Inc.*, 2006 WL 163023, at *7 (N.D.Ill. Jan. 18, 2006) (“This bench has previously found that 25% is the median fee award in cases involving recoveries of \$5–\$15 million. The present case is in a somewhat higher category, with the gross recovery being \$31,500,000. However, * * * 25% of the net recovery will be considered the median fee award in the present type of case. The court will award fees based on that percentage unless the specific circumstances of this case call for a higher or lower award.”); *Gaskill v. Gordon*, 942 F.Supp. 382, 388 (N.D.Ill.1996) (“[T]he Court concludes that the professionals should recover 38% of the total fund available for distribution. This award reflects an increase of five percent over the court's original award of 33% and exceeds the range of most common fund fee awards.”) (citing *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C.Cir.1993) for the proposition that “common fund awards typically fall between twenty and thirty percent”); *Goldsmith v. Tech. Solutions Co.*, 1995 WL 17009594, at *8 (N.D.Ill. Oct. 10, 1995) (“Thirty-three percent appears to be in line with what attorneys are able to command on the open market in arms-length negotiations with their clients.”).

In addition, it must be remembered that Class Counsel's fee award is much less than one-third of the Class's total recovery once the value of the prospective relief is taken into account. Where a settlement includes substantial affirmative relief, such relief must be considered in evaluating the overall benefit to the class. *Will*, 2010 WL 4818174, at *1 (citing MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.71, at 337 (2004); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, § 3.13 (2010); cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) (cautioning against an “undesirable emphasis”

on monetary “damages” that might “shortchange efforts to seek effective injunctive or declaratory relief.”)). Taking the value of this relief into account is further proof of the reasonableness of Class Counsel's sought-after fees.²⁸

*600 B. Costs and Expenses

The Federal Rules of Civil Procedure allow the Court, in a certified class action, to “award reasonable * * * nontaxable costs that are authorized by law or by the parties' agreement.” *Fed.R.Civ.P.* 23(h). Here, the agreement states that “Class Counsel shall seek approval of the Court for reimbursement of reasonable costs and expenses incurred by [Class Counsel] in litigating, handling, and resolving the Actions.” Settlement Agreement at ¶ 11. Exhibit 2 to the Affidavit of Sharon Harris (one of Plaintiff's attorneys) is a list of expenses incurred through March 4, 2011. The exhibit is a one-page document that shows the amount of expenses incurred in broad categories only; for example, it shows \$12,908.41 in “Hotels, Transportation, (airfare & taxi service), and Meals.” The other expenses sought by Class Counsel are for court reporter fees, filing fees, transcript fees, copying, travel, expert fees, and so forth.

Although no one has objected to Class Counsel's request for reimbursement of costs and expenses—and thus any such objections are waived—the Seventh Circuit has explained that district courts must exercise their discretion to “disallow particular expenses that are unreasonable whether because excessive in amount or because they should not have been incurred at all.” *Zabkowitz v. W. Bend Co., Div. of Dart Indus., Inc.*, 789 F.2d 540, 553 (7th Cir.1986) (quoting *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir.1984)). The requested expenses do not seem excessive on their face. However, Class Counsel has provided insufficient itemization and back-up documentation of the expenses so to allow the Court to make a meaningful assessment. The Seventh Circuit has explained that “the amount of itemization and detail required is a question for the market.” *Synthroid I*, 264 F.3d at 722. “If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more.” *Id.* Paying clients (especially in today's marketplace) typically would require more detail than Class Counsel has provided regarding how its attorneys are spending the Class's money. To be sure, the Court is not requesting an encyclopedic accounting of the expenditures; a summary document containing the amount of detail that generally accompanies a bill of costs submitted under *Fed.R.Civ.P.* 54(d) and 28 U.S.C. § 1920 will suffice to enable the Court

to perform its oversight function. Cf. *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble*, 924 F.2d 633, 643 (7th Cir.1991) (explaining that a prevailing party submitting a bill of costs is “not required to submit a bill of costs containing a description so detailed as to make it impossible to economically recover photocopying costs”). But the single page submitted thus far is simply not enough. Class Counsel's request for reimbursement of costs and expenses is denied without prejudice; counsel may re-submit its request along with additional supporting materials, within 30 days of the date of this order.

C. Incentive Payments

With respect to incentive payments, the Seventh Circuit has explained that such “awards are justified when necessary to induce individuals to become named representatives.” *Synthroid I*, 264 F.3d at 722. In deciding whether an incentive award is proper, and, if so, in what amount, “relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.” *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.1998) (approving incentive award of \$25,000). Class Counsel represents that the Class Representatives *601 participated in this

litigation and willingly undertook “the responsibilities and risks attendant with bringing this class action.” Pl. Mem. at 41. Further, notice of this lawsuit was sent to millions of customers and it and similar suits have garnered attention in the press. Class Representative's willingness to publically place their names on this suit and open themselves up to scrutiny and attention is certainly worth some remuneration. The Court grants the requested incentive award of \$1,000 each.

VII. Conclusion

For the reasons set forth above, the Court (1) grants final approval of the settlement, finding that the settlement is fair, reasonable, and adequate; (2) approves Class Counsel's request for attorneys' fees of \$3,166,666; (3) denies Class Counsel's request for cost and expense reimbursement without prejudice to re-filing within 30 days of the date of this order; and (4) approves an incentive award of \$1,000 each for the Class Representatives, Shannon Schulte and Marlene Willard.

All Citations

805 F.Supp.2d 560

Footnotes

- 1 On February 1, 2010, Marlene Willard filed a similar action in the Northern District of Georgia against Fifth Third. *Willard v. Fifth Third Bank, N.D. Ga.*, Case No. 1:10-CV-0271-JOF. While Willard is not a party to this action, she is a party to the Settlement Agreement, which provides that upon entry of final approval, the *Willard* action will be dismissed with prejudice. Willard and Schulte together are referred to as “Plaintiffs” or the “Class Representatives.” The Settlement Agreement refers to the *Schulte* and *Willard* cases as the “Actions.”
- 2 The Court will refer to Defendant Fifth Third Bank as “Fifth Third” or “Defendant.”
- 3 The Settlement Agreement is attached as Ex. A to Plaintiffs' motion for final approval of the settlement [103].
- 4 On November 8, 2010, [2010 WL 4483975](#), the Court denied a motion by the Keyes and Ratliff Objectors to amend the schedule that the Court had set for considering final approval of the settlement. [68]. The Objectors had asked the Court to (1) amend the schedule *ex ante* to provide objectors an opportunity to file a reply brief in support of their objections, and (2) delay the final approval hearing until after the close of the claims period.
- 5 The Settlement Agreement, at § 19, provided a procedure for the filing of objections. To be considered valid, an objection had to be filed with the Clerk of the Court at least 21 days before the final approval hearing and sent to Class Counsel and Defendant's counsel. The Settlement Agreement also imposed a number of requirements on the objection itself; for example, objectors were required to include “a list of all other

objections filed by the objector during the five years prior to the date the objection was filed.” *Id.* With the agreement of counsel for the parties, the Court has considered *all* of the objections that it received, regardless of whether the objections were properly and timely filed with the Court, or complied with the other formal requirements. However, Plaintiffs preserve their right to challenge improperly-submitted objections on the basis of their invalidity. See Pl. Mem. at 19 n. 11.

6 Unless otherwise indicated, all citations in this section are to the Settlement Agreement.

7 At the fairness hearing, counsel for Defendant informed the Court that the injunctive relief provided for in the Settlement Agreement “will be fully implemented by the first quarter of 2011.” Transcript of Final Fairness Hearing [120] at 46:25–47–1. As the Court has had no indication that that schedule has been delayed, the Court assumes that the prospective relief is now in place.

8 However, Defendant agreed to directly pay for the portion of the notice costs that involved notices on Defendant’s website or in the monthly statements that Defendant sends to its customers (i.e., these costs were not paid out of the fund). ¶ 15. Defendant has paid at least \$416,000 out of pocket to cover such costs. Pl. Mem. [103] at 6.

9 No one has challenged Mr. Tarter’s experience and qualifications, so the Court need not discuss them in detail. Briefly, Mr. Tarter holds a B.S. in business from the University of California at Los Angeles and an M.B.A. from Santa Clara University. Mr. Tarter is currently the managing director of the Andela Consulting Group, a consulting firm whose services include research, management consulting (especially for troubled companies), litigation consulting, and expert witness services. Mr. Tarter’s experience in the banking industry spans more than 40 years. Mr. Tarter has worked as a financial and management consultant, business advisor, and board member for public and private companies engaged in deposit transactions. Mr. Tarter has also been a senior bank officer at four banks, has served on the boards of directors for two banks, and has served as an independent outside director and chair of the audit committee for a large mortgage company.

10 For example, Defendant received \$15,546,166 in February 2006 from overdraft fees paid by its customers (after waiving, reversing, or charging off \$1,647,754). Ex. E–1 to Tarter Report.

11 The Court uses the word “day” here, but technically, Defendant processes debits for the purpose of assessing overdraft fees at the end of each “business cycle.” A “business cycle” is the end of the business day Tuesday through Friday. *Id.* at 9. Processing at the end of the day on Monday incorporates transactions made since the end of the banking day on the previous Friday. *Id.*

12 Of course, if a customer was assessed only one overdraft fee within a given posting period, the order in which the debits were posted would not have had any effect on the number of fees assessed.

13 For an example, the Court returns to February 2006. Since the average number of fees assessed on customers who incurred at least one fee during that month was 3.19, if all of the fees were assessed on one day (explained below), Tarter estimates that 18.3% of the fees collected during that month were the result of re-sequencing. Ex. E–1 to Tarter Report.

14 As a side note, Mr. Tarter cites a report from the American Bankers Association for the proposition that 77% of U.S. deposit accountholders polled said that they had not paid any debit card overdraft fees during the 12–month period preceding mid-August 2010. Tarter Report at 7. Accordingly, Mr. Tarter concluded that “the great majority of [Defendant’s] customers would not be affected by the Settlement Agreement.” *Id.* at 8.

15 This figure is adjusted for waivers, reversals, and charge-offs.

- 16 In a previous order (see [68] at 2), the Court indicated that it would entertain a motion by the PEC Objectors for leave to file a reply brief in support of their objections. The PEC Objectors decided not to take the Court up on this offer.
- 17 The Court will here address the PEC Objectors' criticisms of the Tarter Report. Both are unwarranted. Objectors argue that Mr. Tarter erred because the population from which Mr. Tarter drew his average number of fees incurred per month included customers who incurred just one overdraft fee per month, and these individuals could not be Class Members. Tarter Report at 9. But Mr. Tarter accounted for the inclusion of these individuals in the way in which he calculated and applied the mismatch probabilities—those calculations recognized that the probability of mismatch was 0% where there was only one overdraft transaction in particular day. *Id.* at 11. The PEC Objectors' second criticism of the Tarter Report is equally unfounded. Again, the PEC Objectors criticize Mr. Tarter's assumption that because 57 percent of all transactions were debit card or ATM transactions, 57 percent of overdraft fees were attributable to debit card or ATM transactions. First of all, Mr. Sullivan's affidavit establishes that 57 percent was the appropriate discount factor. See Sullivan Aff. at ¶ 8 (“Based on modeling done by Fifth Third in connection with the preparation of its periodic regulatory filings, it has been determined by approximately 57% of the yearly realized overdraft fees were the result of a debit card or ATM transaction.”). And in any event, assuming *arguendo* that Mr. Tarter's assumption was not validated by Mr. Sullivan's affidavit, the Objectors offer no concrete evidence to substantiate their concern that Mr. Tarter's choice to equate percentage of transactions performed with percentage of fees generated may have materially affected his ultimate damages calculation. The PEC Objectors did not seek to depose Mr. Tarter, nor did they seek to discover the information upon which Mr. Tarter based his analysis in order to test it or to offer an expert report of their own.
- 18 The Court makes clear that in enumerating Defendant's potential defenses, it does not purport to determine whether or not they would ultimately be successful. See [Williams v. General Elec. Capital Auto Lease](#), 1995 WL 765266, at *4 (N.D.Ill. Dec. 26, 1995) (“It is neither appropriate nor necessary to resolve the merits of the conflicting positions in the case in order to evaluate the fairness of the settlement.”).
- 19 In briefing at the preliminary approval stage, Plaintiffs argued that “adjusting [the award in *Gutierrez*] for the relative size between the class certified in *Gutierrez* and the proposed Settlement Class here, that judgment is reduced, on a comparative basis, to \$29 million.” [54] at 4. In her objection, Kannapel argues that in Plaintiffs' reduced the *Gutierrez* settlement too much, because they failed to account for the fact that the settlement only applied to Wells Fargo's *California* customers. Kannapel Obj. at 4–5. However, this objection seems misplaced, as Plaintiffs' did compare the number of Wells Fargo's *California* customers to the number of Fifth Third's customers nationwide. [54] at 4.
- 20 Plaintiffs report that they engaged in “wide-rang[ing]” and “detailed” confirmatory discovery following preliminary approval. See Pl. Mem. [103] at 7–8. Class Counsel examined financial information including “data and information pertaining to monthly summaries of consumer overdraft item fees, daily fee dollars, waivers, reversals and charge offs; net consumer fees; principal losses; realized fees; the number of monthly overdraft occurrences; the number of accounts with occurrences (that is, the posting of an overdraft fee); and the average number of overdraft occurrences.” *Id.* Class Counsel (and their expert) also participated in several in-person and telephone conferences with Fifth Third's attorneys and management wherein Fifth Third responded to various questions. *Id.*
- 21 Objector Cannata takes issue with the *cy pres* aspect of the settlement, and argues that distributions to Class Members should be “large enough so as to exhaust the fund,” such that no *cy pres* is needed. In their papers and at the fairness hearing, Class Counsel confirmed that because of the large number of claims filed by the Class, there will be no *cy pres* distribution. Fairness Hearing Tr. at 16–17; see also *id.* at 88; Pl. Mem. at 34. For this reason, the Court need not discuss the *cy pres* aspects of the settlement further.

- 22 The Keyes/Ratliff Objectors renew their request that the Court postpone any decision on final approval until after completion of the claims process. This would allow the Court to learn the actual number of claims filed by class members before granting or denying approval of the settlement. Because the large number of claims filed suggests no problems with notice to the class or with the claims process, and for the reasons explained in its previous order on this subject [68], the Court need not delay ruling.
- 23 In its order preliminary approving the settlement [59], the Court preliminarily approved the form and content of the Notice Plan and approved and appointed Hilsoft Notifications as Notice Specialist. *Id.* at ¶¶ 10; 11; 14.
- 24 Individual Notice was comprised of the following: A summary notice of the settlement (“Summary Statement Notice”) was included in the monthly statements of all potential Class Members who were current Fifth Third customers as of December 1, 2010, and who received monthly paper statements by mail. *Id.* ¶ 14. The Summary Statement Notices were inserted in the envelopes containing the monthly paper statements so that the headline of the Summary Statement Notices faced the flap of the envelopes and the Summary Statement Notices would be the first thing seen when the envelopes were opened. *Id.* The outside of the envelopes containing the monthly paper statements mailed to potential Class Members included a printed “call out” to alert Class Members that important legal information was included. *Id.* Additionally, the enclosed statements included text directing Class Members to the enclosed Summary Statement Notices. *Id.* ¶ 14. Fifth Third has reported that 1,425,631 account statements including the Summary Statement Notice were mailed to potential Class Members. *Id.* ¶ 15. In addition, a Summary Postcard Notice was mailed to potential Class Members who were Fifth Third customers who did not receive monthly statements by mail, and to all potential Class Members who were former Fifth Third customers. *Id.* ¶ 16. Prior to mailing, the addresses of potential Class Members who were former Fifth Third account holders were verified and, where appropriate, updated. *Id.* ¶¶ 16–18. Altogether, 2,711,981 Summary Postcard Notices were mailed to potential Class Members. *Id.* ¶ 23.
- 25 Publication notice of the settlement appeared in a weekday edition of 19 daily newspapers, having a combined daily circulation of over 3.6 million, in markets where Fifth Third has a significant number of branch offices. *Id.* ¶¶ 26–29. Additionally, a Court-approved informational release was issued to approximately 5,600 press outlets throughout the United States. *Id.* ¶ 31. Notice was also posted on the settlement website, www.OverdraftSettlement.com, in English and Spanish. *Id.* ¶ 33. The settlement website allows Class Members to view information about the settlement, including copies of the Detailed Notice, Settlement Agreement, and the Court's orders regarding the settlement. The settlement website also contains answers to frequently asked questions and includes contact information for the Claims Administrator. *Id.* By visiting the settlement website, Class Members can view and file a Claim Form, and can download and print a paper Claim Form. *Id.* As of March 7, 2011, there had been 243,574 website visitor sessions in which 1,291,650 website pages were viewed, which equates to just over 5.3 pages per visitor session. *Id.* ¶ 34. Additionally, a banner displaying the notice headline was also posted on Fifth Third's website, www.53.com, throughout the notice period, which included the address of the settlement website. *Id.* ¶ 30.
- 26 Of course, district courts must exercise caution in focusing on the first factor, for a dogmatic application of the principle would justify large attorneys' fees for frivolous class-actions suits that defendants agreed to settle. *In re Trans Union Corp. Privacy Litig.*, 629 F.3d at 746.
- 27 “The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive.” *Will v. General Dynamics Corp.*, 2010 WL 4818174, at *3 (S.D.Ill. Nov. 22, 2010) (citing *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979–980 (7th Cir.2003) (“The client cares about the outcome alone” and class counsel's efficiency should not be used “to reduce class counsel's percentage of the fund that their work produced.”); *In re Comdisco Sec. Litig.*, 150 F.Supp.2d 943, 948 n. 10 (N.D.Ill.2001) (“To view the matter through the lens of free market principles, [lodestar analysis] (with or without a multiplier) is truly unjustified as a matter of logical analysis.”)).

- 28 Because the Court has approved the amount of attorneys' fees sought by Class Counsel, it overrules Mr. Cannata's objection that the amount of attorneys' fees sought are excessive. See Cannata Obj. Further, Mr. Cannata argues that the issue of attorney's fees should be "deferred until such time as the Court has received reports indicating the amount of monetary relief that has actually been delivered to the Class." *Id.* at 2. Because there is no *cy pres* distribution and because the fund's exposure for the costs of notice and administration has been capped by agreement of the parties as discussed above, the Court is aware now of how much of the fund will actually be distributed to Class Members.

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2016 IL App (2d) 150236

Appellate Court of Illinois, Second District.

SHAUN FAULEY, SABON, INC.; [Sandy Rothschild and Associates, Inc.](#); Debaun Development, Inc.; and Christopher Lowe Hicklin DC PLC, Individually and as the Representatives of a Class of Similarly Situated Persons, Plaintiffs–Appellees,

v.

METROPOLITAN LIFE INSURANCE CO., Storick Group Co., The Storick Group, Scott R. Storick, and John Does 1–10, Defendants–Appellees (Judd Clayton, Jr., Objector–Appellant). Shaun Fauley, Sabon, Inc.; [Sandy Rothschild and Associates, Inc.](#); Debaun Development, Inc.; and Christopher Lowe Hicklin DC PLC, Individually and as the Representatives of a Class of Similarly Situated Persons, Plaintiffs–Appellees and Cross–Appellants,

v.

Metropolitan Life Insurance Co., Storick Group Co., The Storick Group, Scott R. Storick, and John Does 1–10, Defendants–Appellees (Austin Distributing, Objector–Appellant and Cross–Appellee).

Nos. 2–15–0236, 2–15–0326

|

March 23, 2016.

Synopsis

Background: Class action was brought against insurance company and others for violations of Telephone Consumer Protection Act, arising out of defendants sending of unsolicited facsimile advertisements. The Circuit Court, Lake County, [Luis A. Berrones](#), J., approved settlement agreement following hearing, and objectors to settlement agreement appealed. Class representatives cross-appealed.

Holdings: The Appellate Court, [McLaren](#), J., held that:

character attacks on class counsel and objectors' counsel in appellate briefs violated rules governing briefs;

direct notice to class members, by facsimile, of proposed settlement agreement comported with due process;

provision of proposed settlement agreement that objectors appear in person at hearing on final approval in order to present their objections did not violate due process;

appellate review of trial court's determination that proposed settlement agreement was fair, reasonable, and adequate was for abuse of discretion, and not de novo review;

trial court did not abuse its discretion in finding that class counsel adequately represented interests of all class members, as factor in determining whether proposed settlement agreement was fair, reasonable, and adequate;

trial court did not abuse its discretion in refusing to allow lodestar cross-check of award of approximately \$7.6 million in attorney fees under settlement agreement.

Affirmed; cross-appeal dismissed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***430** [C. Jeffrey Thut](#), of Roach, Johnston & Thut, Libertyville, for appellant.

[Michael Resis](#), of SmithAmundsen LLC, Chicago, and [Frank A. Zacherl](#), of Shutts & Bowen LLP, Miami, FL, for appellee Metropolitan Life Insurance Company.

[Brian J. Wanca](#) and [David M. Oppenheim](#), both of Anderson & Wanca, Rolling Meadows, for appellees Shaun Fauley, Sabon, Inc. et al.

OPINION

Justice [McLAREN](#) delivered the judgment of the court, with opinion.

****509 ¶ 1** Objectors, Judd Clayton, Jr., and Austin Distributing, appeal the trial court's final approval of a settlement in a class-action fax-blasting lawsuit. Plaintiffs, Shaun Fauley, Sabon, Inc., [Sandy Rothschild & Associates, Inc.](#), Debaun Development, Inc., and Christopher Lowe Hicklin DC PLC (class representatives), individually and as the representatives of a class of ****510 *431** similarly situated persons, filed the lawsuit against defendants, Metropolitan Life Insurance Company, Storick Group Company, The Storick Group, Scott R. Storick, and John

Does 1 through 10 (collectively MetLife). Objectors objected to the settlement reached by the class-action parties. The trial court considered the objections and approved the settlement, which included a common fund of \$23 million and attorney fees of over \$7.6 million. On appeal, objectors argue that the trial court erred by approving the settlement, because: (1) the due-process rights of the class were violated; (2) class counsel was inadequate; (3) the class representatives were inadequate; and (4) the attorney-fee award was excessive. The class representatives cross-appeal, arguing that the trial court erred by denying their motion to strike Austin's objection. We affirm the trial court's final approval of the settlement. We dismiss the class representatives' cross-appeal appeal as moot.

¶ 2 I. BACKGROUND

¶ 3 On July 28, 2014, class representatives filed a class action complaint against MetLife, alleging that MetLife sent facsimile advertisements in violation of the Telephone Consumer Protection Act of 1991 (TCPA) (47 U.S.C. § 227 (2012)) and seeking \$500 in statutory damages for each violation.

¶ 4 On July 30, 2014, two days after filing their complaint, the class representatives filed a motion for “Preliminary Approval of Class Action Settlement.” The attached settlement agreement created a common fund of \$23 million to be paid by MetLife, from which the class representatives' counsel, Anderson & Wanca (class counsel), would receive approximately \$7.6 million and each class representative would receive \$15,000. In addition, the settlement agreement provided that C-Mart and Richard Cadenasso would each receive \$15,000 from the common fund.

¶ 5 C-Mart and Cadenasso were class representatives in three fax-blast class action lawsuits against MetLife that were filed before this case in other jurisdictions. C-Mart and Cadenasso, like the class representatives here, were represented by Anderson & Wanca. These three prior lawsuits were dismissed after discovery and mediation.

¶ 6 The settlement agreement in this case also provided that, from the remainder of the \$23 million common fund, all class members could submit claims and receive: (1) \$150 to \$250 per fax, for up to 10 faxes; (2) a *pro rata* share, up to \$100 per fax, for a maximum of 10 faxes (where indicated by the record of transmission); or (3) a *pro rata* share up to \$50 (if

the claimant submitted a sworn statement). Any checks issued to claimants that were not cashed would be paid to certain named charities (the *cy pres* provision).

¶ 7 On August 7, 2014, the trial court granted preliminary approval of the proposed settlement agreement, certified the class, and found that the proposed forms of notice satisfied the requirements of due process under the Illinois and United States Constitutions (Ill. Const. 1970, art. I, § 2; U.S. Const., amends. V, XIV) and section 2–803 of the Code of Civil Procedure (Code) (735 ILCS 5/2–803 (West 2014)). The trial court's written order provided:

“The Settlement Agreement proposes notice to the Settlement Class by: (i) facsimile [direct notice], (ii) publication in USA Today on three (3) occasions, and (iii) by maintaining a settlement website. The Court finds that such proposed notice satisfies the requirements of due process under the Illinois and United States Constitutions and **511 *432 735 ILCS 5/2–803. The Court approves the form of the [direct] Notice.”

¶ 8 The direct notice was sent to those who received faxes during the relevant time period as determined by MetLife's electronic records. The direct notice explained that class members were those who received unsolicited facsimile advertisements or faxes that did not contain opt-out language as required by the TCPA. The direct notice briefly described the lawsuit as alleging that MetLife violated the TCPA by sending “unsolicited advertisements by fax.” The direct notice explained that, although MetLife denied the allegations and raised defenses, MetLife had created the \$23 million settlement fund. The direct notice described the three types of relief available to class members and explained who represented the class; it further relayed that class counsel would request a \$15,000 incentive award for each of the class representatives and an award of attorney fees equal to “one-third of the settlement fund.” The direct notice provided the following four options: (1) “Submit a Proof of claim (attached) to receive a check”; (2) “Do nothing” and be bound by the settlement, but “you will not receive any money”; (3) “Opt out of the settlement”; or (4) “Object to the settlement.” Regarding instructions on how to object to the settlement, the direct notice provided:

“**Object to the Settlement:** If you wish to object to the settlement rather than excluding yourself, you must file a written objection with the Clerk of the Circuit Court of Lake County, 18 N. County St., Waukegan, Illinois 60085. Your objection must be filed by [October 14], 2014, and

must contain the name and number of this case (as indicated at the top of this notice). You must also serve copies of your objection on Class Counsel and Defendants' attorneys (identified above), postmarked by the same date. Your objection must include your name, fax number, and street address, along with a statement of the reasons why you believe the Court should find that the proposed settlement is not in the best interests of the Settlement Class. It is not sufficient to simply state that you object; you must state your reasons. Additionally, if you want the Court to consider your objection, then *you must also appear* at the final approval hearing in Room C-301, on [November 14], 2014 at [9:00 a.m.] *You are not required to attend this hearing unless you object to the settlement.*" (Emphases in original.)

The direct notice also provided:

"WHERE CAN YOU GET MORE INFORMATION?"

This Notice only summarizes the litigation and the settlement. To see the complete file, including a copy of the settlement agreement, you may visit the office of the Clerk of the Circuit Court of Lake County, 18 N. County St., Waukegan, Illinois 60085. The clerk will make the files relating to the lawsuit available to you for inspection and copying at your own expense. If you have specific questions, you can write to Class Counsel at the address listed above. Include the case number, your name, your fax number, and your current street address on any correspondence. You may also call attorney Brian J. Wanca, Class Counsel, at * * *.

* * *

TO FILE YOUR CLAIM, GO TO: <http://www.class-settlement.com>

Enter your unique USER ID & PASSWORD and follow the easy online instructions." (Emphases in original.)

¶ 9 The publication notice defined the class and indicated that class members could be entitled to a portion of the \$23 ****512 *433** million fund for unsolicited faxes. The publication notice provided in part:

"Claim forms are available from the claims administrator or the website listed below. Claim forms are due by *November 26, 2014*. If you wish to object to the settlement, you must identify yourself as a class member and state the reason for and file and serve your objection by *October 14, 2014*,

and you must appear at the Court hearing on *November 14, 2014*." (Emphases in original.)

The publication notice referred class members to www.termllifeinsurancetcpa_settlement.com. The record indicates that this website contained a link to the proposed settlement and the preliminary approval order, which provided, "Settlement Class members who wish to opt out of the settlement * * * are required to serve a written request for exclusions * * * on the parties or their designated agent * * * on or before Oct. 14, 2014."

¶ 10 Austin filed an objection to the proposed settlement, arguing that the settlement amount was too low in relation to the amount of potential damages, the award of attorney fees was too high, the *cy pres* award was a breach of class counsel's fiduciary duty to the class, and the *cy pres* award established that class counsel was inadequate.

¶ 11 Clayton received direct notice of the settlement and submitted a claim. Thereafter, Clayton filed an objection to the settlement, arguing that the settlement amount was unfair relative to the TCPA penalties, the award of attorney fees was excessive, and the direct notice to the class was not the "best notice practicable," because it did not provide access to relevant court documents on a public website. In addition, Clayton joined and incorporated Austin's objection. The class representatives filed a brief in support of final approval of the settlement.

¶ 12 The class representatives also filed a motion to strike Austin's objection, alleging that Austin failed to provide information required by the trial court's preliminary approval order, such as a fax number and address. The class representatives also alleged that Austin failed to show class membership and that the settlement administrator could not locate Austin in MetLife's database listing the recipients of the faxes. The trial court denied the class representatives' motion to strike.

¶ 13 Austin issued a subpoena requesting a settlement agreement relating to the case *Old National Bank v. Anderson, Cook Co. Cir. Ct., No. 2014 CH 06229*. In that case, Old National Bank sought relief against Wanca and Anderson & Wanca, alleging that Wanca fraudulently transferred funds to avoid a \$3.35 million debt. After the instant class-action lawsuit was filed, Wanca and Anderson & Wanca entered into a settlement agreement with Old National Bank, and the case was voluntarily dismissed. The class representatives, Wanca, and Anderson & Wanca filed a motion to quash Austin's

subpoena for the Old National Bank settlement agreement, and the trial court granted their motion.

¶ 14 Austin also issued a subpoena requesting “[a]ny and all records of [class counsel’s] time and costs advanced in [this case].” The class representatives and class counsel filed a motion to quash the subpoena and for a protective order pursuant to [Illinois Supreme Court Rule 201\(c\)](#) (eff. July 1, 2014). The trial court granted the request for class counsel’s time records, to be submitted for *in camera* inspection pursuant to a protective order.

¶ 15 After a fairness hearing held on January 16, 2015, the trial court issued a written order on February 27, 2015, in which it overruled in part and sustained in ****513 *434** part objectors’ objections. The trial court summarized the facts and the proposed settlement as follows. The class representatives filed their class-action lawsuit alleging violations of the TCPA. Section 227(b)(3)(B) of the TCPA provides that a person may recover \$500 in damages for each violation. [47 U.S.C. § 227\(b\)\(3\)\(B\) \(2012\)](#). The class representatives and MetLife agreed to settle the lawsuit for \$23 million. This settlement occurred during the pendency of several similar cases in other jurisdictions with different class representatives, which ultimately were dismissed. Each class representative here will receive an incentive award of \$15,000. C-Mart and Cadenasso, who served class representatives in lawsuits that were dismissed, will each receive an incentive award of \$15,000. Class counsel will receive attorney fees of approximately \$7.6 million and be reimbursed for costs and expenses in the amount of \$592,094. Class members will be paid \$250, \$85, or \$42.50, depending on whether they submit level-one, level-two, or level-three claims. The checks issued to class members but not cashed will be paid as a *cy pres* award: 50% to the Lake County Bar Association and 50% to various charities.

¶ 16 The trial court identified the following objections: (1) the amount of information provided relating to the proposed settlement; (2) the amount of the settlement; (3) Anderson & Wanca being class counsel; (4) the *cy pres* award; (5) the amount of the attorney fees; and (6) the named plaintiffs being class representatives. The trial court analyzed the proposed settlement and the objections under the eight-factor test set forth in [City of Chicago v. Korshak](#), 206 Ill.App.3d 968, 972, 151 Ill.Dec. 797, 565 N.E.2d 68 (1990), to determine whether the proposed settlement was fair, reasonable, and in the best interests of the class members. The trial court discussed each factor in turn: (1) the strength of the class representatives’

case balanced against the amount of the proposed settlement; (2) MetLife’s ability to pay; (3) the complexity, length, and expense of further litigation; (4) the amount of opposition to the proposed settlement and the reaction of the class members to it; (5) the presence of collusion in reaching the settlement agreement; (6) the opinion of competent counsel; (7) the stage of the proceedings and the amount of discovery completed; and (8) the amount of attorney fees. See *id.*

¶ 17 Regarding the first factor, the strength of the case balanced against the amount of the proposed settlement, the trial court determined that the application of this factor addressed two of the objections: the insufficiency of information relating to the proposed settlement and the inadequacy of the settlement amount. The trial court was provided with “a substantial amount of information regarding the litigation * * * and each side’s perceived strengths and weakness[es] [including] confidential mediation submissions that ultimately led to settling this case and later with class counsel’s time records.” Based on this information, the trial court found that MetLife had “some strong defenses that would result in substantial additional litigation and pose a real risk to a successful outcome for [class] plaintiffs.” The trial court found that “the potential damages for a class of 2,792,213 members, or even the 1,892,792 [\$500 each = over \$946 million] class members contacted, are substantially more than the settlement amount; balanced against the strength of defendant’s possible defenses this factor weighs in favor of settlement.”

¶ 18 The trial court found that the second factor, MetLife’s ability to pay, favored approval of the settlement.

***435 **514** ¶ 19 Regarding the third factor, the complexity, length, and expense of further litigation, the trial court found that MetLife asserted several defenses, raising complex issues, that would “require additional litigation to resolve” and require the parties to incur additional expense, substantial time, effort, and resources. The trial court therefore found that this factor weighed in favor of the settlement.

¶ 20 Regarding the fourth factor, the amount of opposition and the reaction of class members to the settlement, the trial court found that 1,892,782 direct notices were sent to class members and 50,000 claims were made, but only two objections were filed. The trial court found that the opposition was “*de minimis*” and that this factor weighed in favor of approving the settlement.

¶ 21 Regarding the fifth factor, the presence of collusion in reaching the settlement agreement, the trial court stated that this factor addressed objectors' objection regarding Anderson & Wanca's adequacy as class counsel. The trial court stated that the proposed settlement was the product of "extensive negotiations that included multiple third-party mediation sessions." Further, the amount of the proposed settlement was the "second highest" for a TCPA case. Objectors had provided no evidence that the proposed settlement was not the product of "good-faith, arm's-length negotiations." Objectors had provided no evidence that class counsel breached its fiduciary duty to any class member. The trial court wrote the following in a footnote:

"The objectors attempt to create a conflict between the Anderson & Wanca firm and the class members by submitting evidence of an unrelated lawsuit against Anderson & Wanca and the multi-million dollar payment obligation that Anderson & Wanca has in that case. The objectors then ask the Court to conclude that because the payment obligation and the amount of attorney's fees requested in this case are comparable amounts that Anderson & Wanca breached its fiduciary duty to the class members by entering into the proposed settlement. The objectors, however, fail to provide any evidence that this multi-million dollar payment obligation influenced any action taken by Anderson & Wanca in this case. Absent additional evidence from the objectors the Court has no basis upon which it can reach this conclusion."

The trial court also found that the *cy pres* award was proper and that overall the fifth factor weighed in favor of approving the settlement.

¶ 22 Regarding the sixth factor, the opinion of competent counsel, the trial court found, "[c]lass counsel has extensive experience in the prosecution of TCPA cases and it is class counsel's opinion that the proposed settlement is fair, reasonable, and in the best interest of all class members." The trial court found this opinion supported by retired Judge Terrance J. Brady, who set forth class counsel's experience and competency in support of its request for attorney fees. The trial court found that the sixth factor weighed in favor of approving the settlement.

¶ 23 Regarding the seventh factor, the stage of the proceedings and the amount of discovery, the trial court found that, although the case was in the early stages of litigation, substantial discovery and motion practice had been

completed, as had the litigation in the dismissed cases in other forums. The parties had sufficient information to evaluate the merits of their respective positions and, therefore, this factor weighed in favor of approving the settlement.

*436 **515 ¶ 24 Regarding the eighth factor, the amount of attorney fees, the trial court, citing *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235, 238, 213 Ill.Dec. 563, 659 N.E.2d 909 (1995), stated that "[a]n award of fees under the common fund doctrine may be determined by the percentage-of-the-award method or by the [lodestar] method at the court's discretion. *Id.* at 244, 213 Ill.Dec. 563, 659 N.E.2d 909." The trial court found that class counsel's time records showed "the substantial amount of time, expense and effort expended in litigating this case [and that] class counsel accepted a substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case." The trial court found that there was no reason to award attorney fees under the lodestar method instead of the one-third percentage-of-the-award method.

¶ 25 The trial court overruled all of the objections it had identified to the final approval of the settlement agreement except for the objection relating to the adequacy of the settlement as it related to the payment of the incentive awards to C-Mart and Cadenasso. The trial court withheld for 14 days the entry of an order approving the settlement, to provide the class representatives and MetLife an opportunity to revise the settlement to conform to the court's findings and ruling and to adjust the payment amounts to account for an additional \$30,000 available for distribution to the class members. The trial court also ruled that, if the parties failed to revise the settlement to conform to the court's findings and ruling, the court would enter an order denying the class representatives' motion for final approval of the settlement.

¶ 26 On March 2, 2015, Clayton renewed his objection to any revised settlement.

¶ 27 On March 3, 2015, the settling parties revised the settlement, eliminating the incentive awards to C-Mart and Cadenasso, and provided a proposed final approval order to the trial court. On March 6, 2015, the trial court entered the final approval order and overruled the objections, based on its findings from the January 16, 2015, final fairness hearing and the February 27, 2015, written order.

¶ 28 Clayton filed a notice of appeal on March 6, 2015, and an amended notice of appeal on March 16, 2015. Austin filed

its notice of appeal on April 2, 2015. On April 13, 2015, the class representatives filed their notice of cross-appeal, appealing the trial court's denial of their motion to strike Austin's objection. This court consolidated the appeals.

¶ 29 II. ANALYSIS

¶ 30 Initially, we address Clayton's motion to strike the class representatives' brief because its statement of facts is a “[p]etulant attack on the character of Objectors and their counsel” in violation of [Illinois Supreme Court Rule 341\(h\)\(6\)](#) (eff. Feb. 6, 2013) (requiring an appellant's brief to contain a statement of facts with “facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal”). We note that the argument section of Austin's brief contains similar attacks on the character of class counsel, in violation of [Illinois Supreme Court Rule 341\(h\)\(7\)](#) (eff. Feb. 6, 2013) (requiring that the argument section contain “the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on”). We do not condone this conduct. Although attorneys in high-stakes civil cases often find their veracity and reputations under attack, they must remember that ****516 *437** they are members of an honorable profession and that personal and hyperbolic attacks of the type made by the attorneys here do not serve our system of justice. Further, such attacks do not take the place of factual or legal analysis. We also note that the parties' use of string citations to federal court decisions and Illinois trial court decisions is neither helpful nor persuasive. However, the parties' flagrant improprieties are not so egregious as to hinder our review of the facts or the issues. See [John Crane Inc. v. Admiral Insurance Co.](#), 391 Ill.App.3d 693, 698, 331 Ill.Dec. 412, 910 N.E.2d 1168, (2009). Therefore, we deny Clayton's motion to strike the class representatives' brief, but we will disregard any unsupported or inappropriate statements contained in the briefs of both the class representatives and Austin. *Id.*

¶ 31 A. Due-Process Rights

¶ 32 1. Notice

¶ 33 Clayton argues that the notices violated the class members' constitutional due-process rights because they were defective and not the best notice practicable. Specifically, and

for the first time on appeal, Clayton argues that the publication notice was defective because it failed to inform potential class members of their opt-out rights and the procedures to opt out. It is well settled that issues not raised in the trial court cannot be raised for the first time on appeal. [People ex rel. Wilcox v. Equity Funding Life Insurance Co.](#), 61 Ill.2d 303, 313, 335 N.E.2d 448 (1975) (class-action objectors could not raise an argument on appeal regarding the adequacy of notice where they failed to raise it in the trial court). Because Clayton failed to challenge the sufficiency of the publication notice in the trial court, he cannot raise this issue here for the first time. See *id.*

¶ 34 Clayton also argues that the direct notice was not the “best practicable” notice, because it failed to direct potential class members to a settlement website with court documents, such as the settlement documents. Clayton argues more precisely that, although the direct notice directed potential class members to a website containing the notice, proposed settlement, and preliminary approval order, the notice was misleading because it led members to believe that the website was solely for submitting claims. Clayton asserts that the website should have provided access to court documents without confusion as to whether a claim must first be submitted.

¶ 35 According to [section 2–803 of the Code \(735 ILCS 5/2–803 \(West 2014\)\)](#), “[u]pon a determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties.” However, the exercise of the court's discretion is limited by the dictates of due process. [Carrao v. Health Care Service Corp.](#), 118 Ill.App.3d 417, 429, 73 Ill.Dec. 684, 454 N.E.2d 781 (1983). Our supreme court has indicated that “[t]he question of what notice must be given to absent class members to satisfy due process necessarily depends upon the circumstances of the individual action.” [Miner v. Gillette Co.](#), 87 Ill.2d 7, 15, 56 Ill.Dec. 886, 428 N.E.2d 478 (1981) (citing [Frank v. Teachers Insurance & Annuity Ass'n of America](#), 71 Ill.2d 583, 593, 17 Ill.Dec. 796, 376 N.E.2d 1377 (1978)).

¶ 36 The United States Supreme Court has explained that due process requires notice to be the “best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties ****517 *438** of the pendency of the action and afford them an opportunity to present their objections.’ ” [Phillips Petroleum Co. v. Shutts](#), 472 U.S. 797, 812, 105 S.Ct. 2965,

86 L.Ed.2d 628 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). In addition, the “notice should describe the action and the plaintiffs' rights in it.” *Id.* We review *de novo* a trial court's finding, upon approval of a class-action settlement, that notice to the class satisfied due process. See *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 759 (6th Cir.2013).

¶ 37 The record indicates that the direct notice informed potential class members of the class action's pendency and the opportunity to object to the proposed settlement, and it provided a website containing the notice, preliminary approval order, and proposed settlement. The trial court found that the “Notice and the process by which it was sent fully complied with the requirements of 735 ILCS 5/2–803 and due process under the Illinois and United States Constitutions, constituted the best practicable notice under the circumstances, and provided due and sufficient notice to all persons entitled to notice of settlement of this lawsuit.” The record indicates that the notice was adequate and satisfied the requirements of due process. Thus, the trial court properly so found.

¶ 38 Clayton cites *Gooch v. Life Investors Insurance Co. of America*, 672 F.3d 402 (6th Cir.2012), and *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir.2004), to support his argument. In *Gooch*, the court of appeals held that a notice that included a website where potential class members could obtain additional information “met the due-process baseline.” *Gooch*, 672 F.3d at 424. In *Mirfasihi*, the court of appeals held that, where individual notice is impossible, notice by publication in a national newspaper and a settlement website maintained by the settlement administrator are “acceptable.” *Mirfasihi*, 356 F.3d at 786. Nothing in *Gooch* or *Mirfasihi* indicates that a website containing access to court documents is necessary to satisfy due process. Therefore, neither *Gooch* nor *Mirfasihi* is controlling.

¶ 39 2. Requirement to Appear

¶ 40 Next, Clayton argues that requiring class members to appear at the fairness hearing to object to the proposed settlement violated their due-process rights under the United States Constitution, because it unreasonably deprived absent class members the opportunity to be heard. Due process requires that all class members “receive notice plus an opportunity to be heard and participate in the litigation,

whether in person or through counsel.” *Phillips Petroleum Co.*, 472 U.S. at 812, 105 S.Ct. 2965.

¶ 41 While our research has revealed no Illinois case on point, MetLife cites an unreported federal court of appeals case, *Spark v. MBNA Corp.*, 48 Fed.Appx. 385 (3d Cir.2002), which held, “we are confident that a court, consistent with due process, may require an objector to be present, in person or by counsel, to present his objections and respond to inquiries.” *Id.* at 391. Although *Spark* is not binding on this court, we find it persuasive.

¶ 42 In contrast, Clayton cites no persuasive authority to support his argument. Clayton cites only *Litwin v. iRenew Bio Energy Solutions, LLC*, 226 Cal.App.4th 877, 172 Cal.Rptr.3d 328 (2014), wherein the court determined that requiring an objector to appear at the final approval hearing violated the California Rules of Court. Clayton cites no similar Illinois rule. Therefore, *Litwin* is not persuasive. The other cases cited by Clayton are not on point or Clayton misstates their holdings. In this case, we determine that requiring **518 *439 class members to be present in court to object did not violate their due-process rights. See *Spark*, 48 Fed.Appx. at 391.

¶ 43 B. Approval of Class Settlement

¶ 44 1. Standard of Review

¶ 45 Objectors attack the trial court's final approval of the class settlement. Objectors contend that our review is *de novo*. We disagree. To support their argument, objectors cite federal cases that are not binding on this court (see *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 78, 372 Ill.Dec. 255, 991 N.E.2d 745) and decisions that are factually distinguishable. In Illinois, a trial court's final approval of a class-action settlement will not be disturbed unless the trial court abused its discretion. *People ex rel. Wilcox v. Equity Funding Life Insurance Co.*, 61 Ill.2d 303, 316, 335 N.E.2d 448 (1975); *Quick v. Shell Oil Co.*, 404 Ill.App.3d 277, 281, 344 Ill.Dec. 549, 937 N.E.2d 255 (2010). In such a case, the question is not whether the reviewing court agrees with the action taken by the trial court, but whether “no reasonable person would take the view adopted by the trial court.” *In re Marriage of Schneider*, 214 Ill.2d 152, 173, 291 Ill.Dec. 601, 824 N.E.2d 177 (2005). Given that a settlement is a compromise, a trial court is not to judge the legal and factual questions by the criteria employed in a trial on the merits.

See *GMAC Mortgage Corp. of Pennsylvania v. Stapleton*, 236 Ill.App.3d 486, 493, 177 Ill.Dec. 697, 603 N.E.2d 767 (1992). Rather, the standard used to evaluate the settlement of a class action is whether the agreement is fair, reasonable, and adequate. *Steinberg v. System Software Associates, Inc.*, 306 Ill.App.3d 157, 169, 239 Ill.Dec. 178, 713 N.E.2d 709 (1999).

¶ 46 2. Adequate Representation of Class

¶ 47 a. Class Counsel

¶ 48 i. Fraudulent–Transfer Lawsuit

¶ 49 Objectors argue that class counsel breached its fiduciary duty to the class by failing to disclose that, just after the trial court granted preliminary approval of the settlement, class counsel settled a separate case. In this separate case, *Old National Bank v. Anderson*, Cook Co. Cir. Ct., No. 2014 CH 06229, Old National Bank sought \$3.6 million, alleging that class counsel was liable for fraudulent transfer. Old National Bank alleged that in 2011 Wanca was liable for a \$3.6 million judgment and that, in 2012, Wanca engaged in a fraudulent transfer to avoid payment. Old National Bank filed its complaint in April 2014, and the class representatives here filed their complaint in July 2014. Thereafter, the trial court granted preliminary approval of the settlement and class counsel settled its lawsuit with Old National Bank. Objectors contend that class counsel's failure to disclose the details of the settlement in the fraudulent-transfer case, coupled with its efforts to prevent disclosure, leads to the conclusion that class counsel did not adequately represent the class.

¶ 50 The trial court conducted a lengthy fairness hearing and considered objectors' argument regarding class counsel's concurrent litigation and settlement with Old National Bank. The trial court found that objectors failed to present any evidence that the settlement here was not the product of good-faith, arm's-length negotiation, that the Old National Bank settlement influenced any action taken by class counsel in this case, or that class counsel breached its fiduciary duty to any class member. Nothing in the record indicates otherwise. Therefore, the trial court did not abuse its ****519 *440** discretion by overruling objectors' objection.

¶ 51 Objectors cite *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir.2014) to support their argument. In *Eubank*, the court of appeals held that the district court's approval of

the settlement was error for numerous reasons, including class counsel's legal problems, namely, the fact that class counsel was a defendant in two lawsuits involving his former law firm's accusation that he misappropriated assets and a recommendation from the Illinois Attorney Registration and Disciplinary Commission that he be suspended from the practice of law. *Id.* at 722. In holding that the settlement should have been disapproved, the court of appeals also reasoned that class counsel replaced three named class plaintiffs because they opposed the settlement. *Id.* In this case, objectors provided no evidence that class counsel here was under the kind of financial duress as class counsel in *Eubank* or that class counsel in this case engaged in the type of self-dealing that class counsel engaged in *Eubank* (replacing named class plaintiffs who opposed the proposed settlement). Therefore, *Eubank* is distinguishable from this case.

¶ 52 ii. Class Counsel's Relationship with Sabon and C–Mart

¶ 53 Next, objectors argue that class counsel's less-than-arm's-length relationships with Sabon and C–Mart show that class counsel is inadequate and, therefore, cannot serve as class counsel. Objectors argue that Sabon and class counsel have collaborated on at least five TCPA class actions and that class counsel has paid Sabon more than \$10,000. Objectors also contend that class counsel had a similar relationship with C–Mart, class counsel solicited C–Mart, and C–Mart did not know what a class action was. Because objectors failed to raise these arguments in the trial court, these issues are forfeited on appeal. See *Haudrich v. Howmedica, Inc.*, 169 Ill.2d 525, 536, 215 Ill.Dec. 108, 662 N.E.2d 1248 (1996).

¶ 54 3. Class Representatives

¶ 55 Objectors argue that Fauley and Sabon are inadequate class representatives. Objectors contend that Fauley is an inadequate class representative because “no information is available about [him] because he refused to appear for a deposition.” Objectors argue that Sabon is an inadequate class representative because Sabon is closely associated with class counsel in that “[they] work together on TCPA cases.” MetLife argues that objectors have forfeited these arguments because they raise them for the first time on appeal. We agree with MetLife. Austin's objection to the final approval of the settlement (adopted and joined by Clayton) did not raise the issues it now raises on appeal regarding Fauley and Sabon.

Austin made only a vague allegation that “[g]iven the obvious defects in the Proposed Class Settlement one must seriously question whether class counsel and the named representatives can fairly and adequately represent the class.” It is well settled that “issues not raised in the trial court are deemed [forfeited] and may not be raised for the first time on appeal.” *Id.* Because objectors failed to raise these issues in the trial court, these arguments are forfeited.

¶ 56 4. Attorney Fees

¶ 57 Objectors argue that the trial court erred by refusing to allow a lodestar cross-check on class counsel's more than \$7.6 million in attorney fees. Objectors also argue that the amount was excessive. The class representatives argue that the trial court did not abuse its discretion by approving the award based on the percentage **520 *441 method. We agree with the class representatives.

¶ 58 In *Brundidge*, our supreme court held that a trial judge has discretionary authority to choose a percentage or a lodestar method when determining the amount of fees to be granted to plaintiff's counsel in common-fund class-action litigation. *Brundidge*, 168 Ill.2d at 243–44, 213 Ill.Dec. 563, 659 N.E.2d 909. The lodestar method is a computation that increases the reasonable value of services rendered by a weighted multiplier; this multiplier represents certain considerations, for example, “the contingency nature of the proceeding, the complexity of the litigation, and the benefits [to] * * * the class.” *Id.* at 239–40, 213 Ill.Dec. 563, 659 N.E.2d 909 (citing *Fiorito v. Jones*, 72 Ill.2d 73, 91, 18 Ill.Dec. 383, 377 N.E.2d 1019 (1978)).

¶ 59 In this case, class counsel submitted time records to the trial court, as ordered, and the trial court examined them *in camera*. In a brief filed in support of the final approval of the settlement, class counsel summarized its time records, representing that “the time records submitted *in camera* show that [class] counsel's lodestar value was \$2,577,811.” Therefore, had the trial court used the lodestar method, the effective multiplier would have been approximately 2.97, well within the range of multipliers used in other common-fund cases. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n. 6 (9th Cir.2002) (a survey of multipliers showed a range from 0.6 to 19.6, with most ranging from 1 to 4, and a “bare majority” ranging from 1.5 to 3.0). We note that the multiplier here was also justified in light of the trial court's finding that class counsel accepted “substantial risk

in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [MetLife].” See *Brundidge*, 168 Ill.2d at 239–40, 213 Ill.Dec. 563, 659 N.E.2d 909 (to determine the proper multiplier, a court may consider “the contingency nature of the proceeding” and the complexity of the litigation). Accordingly, under the lodestar method, the amount of attorney fees would not necessarily have been lower. Thus, objectors' argument that the trial court should have used a lodestar cross-check on class counsel's fees is unpersuasive. We cannot say that the trial court abused its discretion by granting the attorney fees based on a percentage of the common fund.

¶ 60 In a related argument, objectors argue that the trial court erred by denying them access to class counsel's time records, “making it impossible to determine whether the amount of hourly fees logged were reasonable and necessary.” It is the appellant's burden to provide a complete record on appeal in order to support a claim of error. *Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 156, 298 Ill.Dec. 201, 839 N.E.2d 524 (2005). Since class counsel's time records are not part of the record on appeal, we are unable to determine if error, let alone prejudicial error, arose. Class counsel's hours and fees were listed in a pleading, and we will presume that the trial court would have noted any discrepancies between the pleading and the actual time records after its *in camera* review. Accordingly, we must presume that the trial court's ruling regarding class counsel's fees had a sufficient factual basis and was in conformity with the law. See *Foutch v. O'Bryant*, 99 Ill.2d 389, 391–92, 76 Ill.Dec. 823, 459 N.E.2d 958 (1984) (in the absence of a complete record on appeal, a reviewing court presumes that the trial court's order had a sufficient factual basis and was in conformity with the law).

¶ 61 Next, objectors argue that the trial court erred by awarding class counsel over **521 *442 \$7.6 million in attorney fees, because class counsel breached its fiduciary duty to the class. Objectors again contend that class counsel breached its fiduciary duty by failing to disclose the Old National Bank lawsuit. Objectors also contend, again, that class counsel was inadequate because it included Sabon as a class representative and Sabon had “extensive prior dealings with class counsel in [other] TCPA cases.” We have already determined that these arguments have no merit. Objectors point to nothing in the record indicating that the settlement was not fair, reasonable, and adequate. See *Steinberg*, 306 Ill.App.3d at 169, 239 Ill.Dec. 178, 713 N.E.2d 709. Therefore, the trial court did not abuse its discretion by

approving the fee award. See [Quick](#), 404 Ill.App.3d at 281, 344 Ill.Dec. 549, 937 N.E.2d 255.

¶ 62 C. Cross–Appeal

¶ 63 The class representatives appeal the trial court's order denying their motion to strike Austin's objection. We will not address this issue, because it is moot. Our affirmance of the approval of the settlement renders the failure to strike Austin's objection at worst *de minimis*, and harmless, error. Therefore, the class representatives' cross-appeal is dismissed.

¶ 64 III. CONCLUSION

¶ 65 For the reasons stated, we affirm the trial court's judgment approving the settlement and dismiss the class representatives' cross-appeal.

¶ 66 No. 2–15–0236, Affirmed.

¶ 67 No. 2–15–0326, Affirmed; cross-appeal dismissed.

Justices [HUDSON](#) and [BIRKETT](#) concurred in the judgment and opinion.

All Citations

2016 IL App (2d) 150236, 52 N.E.3d 427, 402 Ill.Dec. 506

844 F.Supp. 1226

United States District Court, N.D. Illinois, Eastern Division.

Myles M. SPICER, et al., Plaintiffs,

v.

CHICAGO BOARD OPTIONS
EXCHANGE, INC., et al., Defendants.

No. 88 C 2139.

|

Aug. 10, 1993.

Synopsis

Law firms who represented members in class action arising from losses sustained on floor of stock exchange after “Black Monday” stock market upheaval sought attorney fees and expenses from settlement fund. The District Court, Will, J., held that: (1) attorney fee award in amount of \$2,900,000, representing 29% of \$10 million settlement fund, was maximum recovery allowable, and (2) incentive award of \$10,000 would be granted to each of the three class representatives.

So ordered.

Attorneys and Law Firms

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MEMORANDUM OPINION

WILL, District Judge.

Before us now in this case are all remaining matters: the distribution to the class of the settlement fund, the fee petitions ***1233** from class counsel, class counsel's requests for reimbursement of expenses, and the incentive awards requested for the representative plaintiffs. When a common

fund is created for the settlement of a class action lawsuit, as in this litigation, the distribution of the fund is controlled by the court, acting as fiduciary for the class members. *Skelton v. General Motors Corp.*, 860 F.2d 250, 252–53 (7th Cir.1988), cert. denied, 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989). The voluminous fee and costs requests submitted by class counsel—from six law firms and representing the work of approximately 40 lawyers, 17 law clerks, 25 paralegals, and others, over the course of more than four years—will be considered first, under the common fund doctrine, which allows us to award fair and reasonable attorneys' fees and reimbursement for expenses reasonably incurred in creating the settlement fund.

We have already granted to class counsel two interim awards of attorneys' fees and expenses in the amounts of \$750,000.00 and \$1,000,000.00, totalling \$1,750,000.00. Class counsel have filed a fee petition requesting \$4,396,324.00, which represents 81.7% of their calculated lodestar figure of \$5,379,089.00. In addition, class counsel have requested reimbursement for case expenses totalling \$1,197,553.77. The initial requests for fees and expenses together total almost 56% of the \$10,000,000 settlement. Class counsel have also filed a petition for administrative expenses and fees. Finally, class counsel have filed a supplemental petition for administrative fees and expenses. In the original petition, they requested \$232,135.50 in legal fees already incurred, plus an estimated \$5,000.00 for remaining legal fees to complete the administration, and \$44,746.79 in costs already incurred in administering the claim fund, plus an estimated \$1,550.00 for remaining out-of-pocket costs to complete the administration. In their supplemental petition for administrative expenses and fees, however, class counsel request additional costs of \$3,499.00, future projected administrative costs of \$1,573.00, and additional legal fees of \$28,800.00. We assume that the supplemental petition for fees replaces the original request of an estimated additional \$5,000.00, to complete the administration of the fund. We further assume that the supplemental petition for costs replaces the original request for an estimated additional \$1,550.00, to complete the fund administration.

In sum, the total amount of fees requested by class counsel is \$4,657,259.50, including the fees requested in the original and supplemental petitions for administrative fees to complete the administration of the claim fund. The total amount of costs requested by class counsel is \$1,253,848.14, including the projected costs to complete the administration of the claim fund. The combined requested fees and expenses total

\$5,911,107.64, or more than 59% of the settlement. We are also asked to consider at this time the plaintiffs' petition for an incentive award to the representative plaintiffs.

As discussed below, we will grant the plaintiffs' petition for an incentive award to representative plaintiffs Myles M. Spicer, John A. Brittain, and David W. Schut, in the amount of \$10,000.00 each, for a total of \$30,000.00. Having reviewed and considered carefully the pending petitions, and the accompanying time records, affidavits, supporting memoranda, and other supporting materials, we are now prepared to approve a total fee award in the amount of \$2,900,000.00, which represents 29% of the settlement. In addition, we are prepared to approve costs in the amount of \$1,002,252.50. These figures include the amounts previously allowed as interim fees and costs awards. Thus, further funds for both fees and costs will be disbursed to class counsel in the total amount of \$2,152,252.50. It should be noted that the total award to class counsel, for both fees and costs, is \$3,902,252.50, which represents approximately 39% of the settlement. A reserve fund in the amount of \$40,000.00, plus all interest earned after July 1, 1993, (which we anticipate to be approximately \$30,792.00) shall be established for future contingencies. The remaining settlement fund, including all interest earned through July 1, 1993, shall be distributed to the class as specified below and in our Final Judgment Order, entered June 18, 1993. Any distributed funds unclaimed by class members by December 1, 1993, shall be added to the reserve fund. A separate order is attached.

***1234 I.**

BACKGROUND

This action was brought in the aftermath of the October 19, 1987 "Black Monday" stock market upheaval—a day in which the stock and other equity markets across the United States experienced gross declines without comparison since the stock market crash of 1929. The Dow Jones Industrial Average fell by 508 points—a decline of 22.6 percent from the close of trading on Friday, October 16, to the close of trading on Monday, October 19, 1987. The index for Standard & Poors 500 dropped 57.68 points, or 20.74 percent of its value. The volume of trading on all exchanges soared.

This suit was based specifically on the events which occurred on the floor of the Chicago Board Options Exchange ("CBOE") on October 20, 1987, the day after the vast declines

had taken place in the equity markets. The prices for these options on October 19 & 20, 1987, were unusually high at times and unstable throughout the day, at least in part, because of the declines and instability in the equity markets.

The first complaint in this case was filed in March 1988. Two other complaints were filed in the next three months. The plaintiffs' principal theory of liability was premised upon the defendants' failure to disclose certain risks. Defendants included CBOE, the Options Clearing Corporation ("OCC"), and a number of market makers. In June 1988, the first complaint was consolidated with the two other similar complaints. The remainder of 1988 was devoted to sorting out the various claims, including the filing of a consolidated complaint, followed by the first motion to certify the class, class discovery, and the first motions to dismiss. The case accelerated when the second consolidated complaint was filed in March 1989. The balance of 1989 was devoted to class discovery, briefing on certification of the class and the several motions to dismiss, and frequent hearings before the court to clarify the substance and parameters of the claims. The defendants filed surreply memoranda opposing class certification and supporting the motions to dismiss. CBOE also sought a hearing to present testimony on the issue of class certification.

In January 1990, we granted the class certification motion. The class was defined as:

All persons, other than market makers, who purchased OEX or OEZ series [Standards & Poors 100] index options through market orders during a rotation on October 20, 1987, at the Chicago Board Options Exchange, and who [allegedly] suffered damages from such purchases because of paying excessive prices for those options as a result of defendants' alleged misconduct.

Class Certification Order, entered January 30, 1990. On October 24, 1990, we granted in part and denied in part the defendants' motions to dismiss, dismissing the defendant market makers from the case. Most of 1991 was devoted to discovery. Defendants CBOE's and OCC's motion for summary judgment was filed in early 1992, and expert

discovery continued for several months. On December 3, 1992, we granted in part and denied in part the defendants' motion for summary judgment. The defendants' motion for summary judgment was granted with respect to the Securities Act of 1933 § 12(2) claim and denied with respect to the Securities and Exchange Act of 1934 § 10b (and Rule 10b-5) claim generally. Partial summary judgment was also granted on one issue under 10b-5—the risk from the way the rotations were conducted. Preparation for trial continued. On December 22, 1992, the case was resolved by settlement, in the amount of \$10,000,000.00.

II.

FEE PETITION

A. Legal Work Performed In This Case

During the more than four years that this case was pending, class counsel allegedly devoted more than 32,000 hours to create a \$10,000,000.00 fund for the benefit of the class members. Two firms—Beeler, Schad & Diamond and Joyce & Kubasiak—assumed lead counsel status in this case in the spring of 1989, when the second consolidated complaint was filed. More than 85% of the time *1235 devoted to this case was spent by these two firms. Beeler, Schad & Diamond devoted 19,700 hours to this case, which comprised approximately 60% of the total time spent by class counsel. Joyce & Kubasiak devoted 8,400 hours to this case, which comprised approximately 26% of the total time spent by class counsel.

1. The Work Performed By Class Counsel

We will briefly review the general work performed by class counsel on behalf of the plaintiffs in this case.

The first complaints in this case were filed in early 1988. Motions to dismiss and to certify the class were briefed in the fall of 1988. Recognizing the force of certain of the defendants' arguments, class counsel decided in late 1988 to reconstitute the case fundamentally. This decision resulted in the filing of the second amended complaint in March 1989. Class counsel argue that they were at a significant disadvantage regarding the prosecution of this case because of their lack of familiarity with the pricing and trading of index options. They note that defendants' counsel had the assistance

of CBOE's technical staff, sophisticated computer systems, and a surveillance department experienced in monitoring for rules violations and trading irregularities. Moreover, defendants' counsel had ready access to the individuals who operated the exchange and the OCC.

To compensate for this disadvantage, class counsel employed outside experts, purchased computers, and took extensive discovery through both document examination and depositions in order to formulate their case. Together with the experts, class counsel developed the options pricing models necessary to determine damages in this case. Class counsel not only hired three experts to advise them during the case, but also frequently attended seminars conducted by experts to prepare them for trial. The subjects of these seminars included: options pricing; trading procedures at CBOE; the CBOE constitution, rules, and rule interpretations; interrelationships of markets and hedging; price and volume reporting to the public; other information reported to the public; the audit trail of October 20 OEX options transactions (regarding price, participants, clearing firms, volume, and time of transactions); net capital requirements of market makers and clearing firms; and the role of the OCC.

From the onset, class counsel attempted to divide the legal work in a way which enabled them to pursue the litigation as efficiently as possible. According to class counsel, they met periodically to generate ideas and assignments, and review work already done, so that no person would duplicate the work of any other person. We note and appreciate the efforts of class counsel to minimize such duplication. However, in a case of this size, with so many lawyers involved, it is virtually impossible to eliminate altogether the duplication of effort. The frequent meetings themselves inevitably represented duplication. Because we feel that significant duplication of effort has occurred in this case, we have taken that fact into account in making our determination of fair and reasonable fees.

As described below in greater detail, Futterman & Howard, in conjunction with Beigel & Sandler, responded to the motions to dismiss the complaint, assisted by Beeler, Schad & Diamond and Joyce & Kubasiak. Beeler, Schad & Diamond and Joyce & Kubasiak handled the class certification issues, class discovery, and briefing. Once the class was certified and the motion to dismiss was denied, class counsel divided the defendants and other parties among the class counsel firms so that discovery would not be extensively duplicated. Upon completion of merits discovery, Beeler, Schad & Diamond

took the lead in responding to the motions for summary judgment. It also assumed responsibility for all damage analysis and expert discovery, with the assistance of Joyce & Kubasiak.

Class certification was fought by the defendants for over a year, with detailed discovery and extensive briefing. The defendants filed affidavits supported by exhibits summarizing trading data on October 20, in an attempt to establish that: (1) market makers were buyers as much as sellers and thus public customers did not constitute a class distinct from market makers; and (2) trading in the first and second rotations extended over six hours, with hundreds of series trading at different prices under varying market conditions *1236 and interrupted by a trading halt, so that an individual investigation of the price of each series in each rotation would be required, thus destroying commonality.

We held several hearings focusing on whether common issues would predominate. Finally, we certified the class described above. We declined, however, to certify a defendant class until the motions to dismiss were decided. Substantial briefing on the defendant class certification issue occurred during the spring and summer of 1990. Numerous hearings on this issue were held, at which class counsel were questioned regarding the definition of a defendant class of market makers who failed to appear and trade on October 20. This issue was never resolved because we granted the market makers' motions to dismiss.

We held several hearings to define the class. We eventually determined that damages would be calculated based solely on the allegedly excessive prices paid on October 20, without regard to any subsequent or preceding sales or purchases. We then required class members to "net" losses so that any who had benefitted from excessive prices or other recoveries would be required to offset their profits and other recoveries against their losses. We drafted the final draft of the class notice, accepting most of class counsel's proposals. We then required class counsel to send notice to all potential class members. Class counsel found this to be a difficult and time-consuming endeavor, requiring them to construct a class list from scratch since CBOE had no list of individual traders or brokerage firms involved. Unfortunately, fewer than five persons responded to the notice in the *Wall Street Journal*. Class counsel subpoenaed 147 brokerage firms for trading records, and filed motions to compel against several. Class counsel spent several hundred hours enforcing the subpoenas.

A protective order was entered in June 1990, requiring that all of the records of the brokerage firms be kept confidential.

Class counsel spent several months preparing a database of all class members, including all relevant trade data. The hard copy data had to be evaluated by class counsel and then put into the database created for this case by the plaintiffs' computer experts. Class notice was sent in July 1990 to approximately 2,800 potential class members. In August and September 1990, notice was sent to an additional 300 potential class members. Beginning in April 1991, class counsel provided us with written status reports concerning efforts to identify class members.

The complaint evolved as the case developed. In response to the defendants' motions to dismiss, class counsel recast the entire complaint. It was their fifth amended complaint, filed in January 1990, that we sustained in significant part in our ruling on the motions to dismiss. We found that a failure to enforce rules would not sustain an implied right of action under the Securities and Exchange Act of 1934, but sustained plaintiffs' principle claims under both [section 12\(2\)](#) and rule 10b-5, essentially leaving the plaintiffs with an omissions and a scheme to defraud case.

Our decision to dismiss the market makers led class counsel to request that we reconsider our ruling. We declined to do so. Class counsel, concerned that there would be a statute of limitations problem against the market makers unless an appeal was undertaken immediately, appealed unsuccessfully to the Seventh Circuit on that issue and whether there should be an implied private right of action for the failure of CBOE to enforce its rules. Class counsel point out that the Seventh Circuit opinion recognizes that a private right of action for violation of an exchange rule might be allowed in certain circumstances. *See Spicer v. Chicago Bd. of Options Exchange, Inc.*, 977 F.2d 255, 256 (7th Cir.1992) ("We decline to announce a categorical rule regarding all potential private actions under this provision [Section 6(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78f(1988)].").

In February 1991, defendants CBOE and OCC filed their answer to the fifth amended complaint, which admitted none of the central allegations. Discovery began again. Joyce & Kubasiak handled discovery related to the market makers. Beeler, Schad & Diamond was responsible for discovery of CBOE's officers, employees, and investigating committees. Futterman & Howard and *1237 Beigel & Sandler handled

discovery from the OCC. Beeler, Schad & Diamond was generally responsible for preparing document requests. It also prepared and served three sets of interrogatories. Beeler, Schad & Diamond maintained a computer-based document depository with an analysis of each document according to predetermined categories. A database was then constructed from which documents could be properly selected for depositions.

In total, class counsel took 76 depositions; interviewed additional witnesses; subpoenaed documents from approximately 40 market makers, 147 introducing brokers, and clearing firms; examined 30,000 pages of documents and millions of trading records. According to class counsel, discovery was particularly time-consuming because of the arcane record-keeping practices of the business. They spent an enormous amount of time preparing for each deposition, with Beeler, Schad & Diamond conducting a computer run of its litigation support database to find deposition references and documents relevant to each witness. It also prepared a package of material as a predicate to each deposition. Class counsel also filed in April 1991, a motion to compel production of documents asserted to be protected by various privileges. In June 1991, we entered an order directing that most of these documents be produced to the plaintiffs. These voluminous documents were produced during the following eight weeks. As a result of the delay in document production, class counsel had to retake many depositions. In November 1991, class counsel served extensive responses to contention interrogatories, including references to deposition testimony and exhibits. Subject to limited exceptions (i.e., expert discovery), discovery closed in November 1991.

Plaintiffs' testifying expert—John Blin—was deposed by the defendants in the spring and summer of 1992. During the course of his deposition, the defendants attempted to disqualify him or drive him from the case by insisting on taking discovery of all of the clients for whom he had served as investment advisor. We prohibited such discovery, granting an appropriate protective order. Beeler, Schad & Diamond deposed three of the defendants' four trial experts and Joyce & Kubasiak deposed the defendant's remaining expert.

Robert Whaley, the defendants' lead expert, had researched extensively and written widely on index options, options pricing theory, and arbitrage-based pricing models. Whaley attempted to counter Blin's damages opinions by applying different techniques and vantage points to his analysis of OEX trade data. He disputed Blin's linkage and arbitrage theories

as they applied to OEX options. He developed his own forecast model—the “naive model”—which formed the basis for his conclusion that plaintiffs' damages were, at most, \$2.9 million. Working with their experts, class counsel attempted to chart the complete matrix of possible information needed in order to reproduce Whaley's results and effectively rebut his contentions. This required much time and effort on the part of class counsel.

Another of the defendants' experts—Merton H. Miller—offered opinions designed to frame Whaley's quantitative analysis. Drawing from his extensive experience in this field and his work on the Miller Report, he challenged Blin's parameters regarding the linkage between cash and futures markets, disputed the extent to which the formal arbitrage impacts the fairness and orderliness of derivative markets, and cautioned against application of any hard-and-fast rules to high volatility markets.

Another of the defendants' experts—Mark Rubenstein—also provided additional framework for Whaley's quantitative analysis opinions. He challenged Blin's delinkage opinions and suggested that the OEX options market could still be fair and orderly notwithstanding the absence of arbitrage links between and among CBOE (OEX), Chicago Mercantile Exchange (SPZ), and New York Stock Exchange (S & P 100 cash). He also challenged Blin's damage approach, including the propriety of applying one implied volatility value throughout October 20.

Another of the defendants' experts—Sheldon Natenberg—offered opinions designed to link Whaley's quantitative analysis and apply both Rubenstein's and Miller's theoretical *1238 analysis in practical terms to the actual events which occurred on October 20, as viewed from the exchange floor. He offered opinions regarding the propriety of operational decisions made by CBOE on the exchange floor on October 20, including CBOE's decisions to open, to waive the bid-ask spread, and to conduct rotations. According to class counsel, these experts made it imperative that class counsel devote hundreds of hours to the preparation of depositions.

Although both the Brady Commission Report and the SEC Staff Report were helpful to class counsel in the prosecution of this case, neither provided the level of detail necessary to establish liability and damages at trial. Through their discovery in this case, class counsel discovered alleged price and volume reporting inadequacies at the CBOE, none of which was mentioned in any of the reports.

They also discovered the details regarding the reports by CBOE's Market Review Panel and Special Business Conduct Committee, none of which was made public. Class counsel determined that many of the conclusions in the SEC Staff Report and the Brady Commission Report were too simplistic for proper use at trial and found it necessary to develop their own theories and analyses.

Upon receipt in July 1989 of CBOE's various computer trade files for October 20 OEX trades, class counsel began an intensive examination of all OEX trades at CBOE on October 20. Because this occurred prior to certification of the plaintiff class, class counsel could not depose CBOE's computer personnel to answer their questions concerning this data. Plaintiffs' experts struggled to develop a series of computer analyses to determine when each trade occurred. After class counsel exposed the alleged deficiencies in CBOE's audit trail, they still had to fix the times of all trades with reasonable accuracy in order to analyze the fairness of the prices of each series. In order to analyze the fairness of any series, it was crucial for class counsel to determine the time that each series traded at a given price. The price of each series had to be measured against the bid-ask of that series, the level of the underlying instrument, and the level of the hedge. With this information, class counsel were able to analyze the fairness of any OEX option price using an arbitrage-based pricing model, such as Black-Scholes or Cox-Ross-Rubinstein. They could also analyze the relationships of prices between series and pricing patterns among series.

The task of analyzing October 20 trading was enormously complex. In fact, although various attempts had been reported in academic literature to analyze phenomena for other days during the October 12-23, 1987 crash period, no published author attempted analysis of October 20. Class counsel essentially reconstructed a sense of order that public customers could reasonably have expected to occur on an admittedly volatile October 20. To accomplish this feat, they analyzed the trades for many other trading days over the preceding 16 months. By July 1991, class counsel had upgraded their computer system to enable them to receive straight main frame dumps—that is, data transfers eliminating the need for CBOE to engage in programming or other alterations of its main frame computer data files. Plaintiffs received this requested data in October 1991. In analyzing the trading data for the preceding 16 months, class counsel searched for other trading days experiencing high volatility, examined the data for reporting accuracy and pricing patterns, and measured hedging and arbitrage activity

in other markets. Class counsel identified non-volatile trading days and compared findings on volatile days with comparable analysis for non-volatile trading days' results.

Class counsel were able to apply the principles of econometrics to sample and structure the performance of this market in a way to measure the volatility of the OEX market, reasonably restore order to October 20, and account for the alleged unfairness built into many series that were traded on that day. Class counsel's efforts and results were contained in Blin's [Fed.R.Civ.Proc. 26](#) Summary prepared in February 1992, and in his implied voluntary report forwarded in May 1991.

The defendants filed a summary judgment motion in February 1992. Class counsel responded ***1239** with a lengthy memorandum, including the affidavit of Blin, 36 supporting exhibits, and several appendices. After the defendants' reply, a surreply was filed by class counsel in September 1992. We issued our opinion on the summary judgment motions in early December 1992. Shortly before the summary judgment motions were decided, the defendants filed five motions *in limine*, which remained unresolved at the time the case finally settled. The defendants also filed a motion to decertify or narrow the plaintiff class. The defendants also filed a motion for bifurcation, which we granted. In late November 1992, the defendants filed a motion to postpone the trial until at least March 1993, which we denied. An absolute trial date of January 4, 1993 was set.

In their petition, class counsel point out that the defendants have not yet made any changes in the Options Disclosure Document (“ODD”). However, they argue that the summary judgment opinion is itself prophylactic relief in that it acknowledges at least the possibility of a number of deficiencies in the ODD. Class counsel further argue that there is prophylactic relief resulting from this case in the sense that CBOE and OCC must either amend their operations or await the next lawsuit against them on the groundwork that has been laid by class counsel.

2. Work Performed By Each Firm

We will briefly review the role of each firm and its most active attorneys in the litigation of this case.

a. Beeler, Schad & Diamond, P.C.

Beeler, Schad & Diamond acted as the resource center for all firms involved in this case. It obtained documents from the defendants, analyzed, catalogued, and made available these documents to co-counsel. Beeler, Schad & Diamond maintained the deposition exhibits, providing copies and lists to all firms. Partner Stephen B. Diamond performed three principal functions on behalf of the class. First, along with partner Edward Joyce of Joyce & Kubasiak, he acted as principal spokesperson on behalf of the class. Second, he prepared the agenda for and presided at every meeting of class counsel, assigned work, and followed up to ensure that all work was completed. After the motions to dismiss were briefed, Diamond wrote most memoranda and motions that were filed with the court. Third, he took the depositions of the senior officers of the CBOE, every exchange officer or employee involved in trading on October 20, including floor officials, order book official's price and quote reporters, communications vice presidents, and others. In addition, Diamond assumed the lead role for trial preparation. The pretrial order was prepared under his supervision.

Partner Eugene W. Beeler, Jr. performed four principal functions on behalf of the class. First, he analyzed CBOE's computerized trade data systems, analyzed the features and deficiencies of CBOE's trade audit trail, and deposed CBOE's computer systems personnel involved in CBOE's internal post-October 20 investigations. Second, he coordinated work and provided resources needed for plaintiffs' consulting and trial experts. He helped them design programs to analyze the effects of exchange actions and system irregularities on those prices. He also headed plaintiffs' efforts to assign times for all October 20 trades, and analyzed CBOE's computer trade data for rules violations. Third, he designed class counsel's document and deposition litigation support databases and instructed both staff and class counsel in its use. He also designed the computer system and selected equipment to incorporate and analyze 16 months of CBOE OEX options trade data. Fourth, he had overall responsibility for expert discovery. He prepared the plaintiffs' [Fed.R.Civ.Proc. 26](#) Summary, analyzed [Fed.R.Civ.Proc. 26](#) summaries of and deposed CBOE's three trial damages experts. He defended against the defendants' motion to bar plaintiffs' expert, and prepared for trial direct examination of the plaintiffs' expert, and cross-examination of the defendants' trial damages experts. He also identified and developed the plaintiffs' "comparable market" rebuttal analysis.

Beeler also analyzed the market maker liability issues, helped identify potential defendant class members, and provided much of the research and many of the arguments supporting the duty of market makers to appear and trade. He prepared merits document requests and interrogatory sets, participated *1240 in numerous Rule 12(k) conferences, and helped depose CBOE's floor procedures expert. He supervised the subpoenaing of clearing firm trading records and prepared sections of plaintiffs' responses to various motions.

Beginning in 1990, associate Mary E. Phillips bore principal responsibility for the identification and notification of the plaintiff class, including conducting third party discovery from 147 brokerage firms, negotiating with those firms for the production of customer trading data, and supervising the process of putting class member identity and trading data into a database, and mailing class notices to all potential class members. She was primarily responsible for implementing the document litigation support database designed by Beeler. She prepared pretrial order materials, and designed demonstrative exhibits and a case law research database for use during trial. Phillips also conducted extensive legal and factual research and drafted responses and motions, including analyzing documents produced by CBOE and government reports, researching and drafting a motion to compel CBOE and OCC to produce privileged documents, researching factual issues in documents produced by CBOE and various government reports in order to produce a comprehensive response to defendants' interrogatories, researching and drafting legal arguments related to plaintiffs' responses to the summary judgment motions, analyzing documents produced by CBOE and deposition testimony for support of factual assertions made in the responses, and conducting research in academic and securities industry periodicals regarding pre-crash descriptions of market delinkage phenomena to support the testimony of plaintiffs' expert.

Associate Vincent J. Buzek conducted an extensive interview poll of class members to determine individual data on plaintiff class trading strategies and the events that occurred on October 20, 1987. Additionally, he conducted legal and factual research in support of plaintiffs' claims and assisted Phillips in analyzing documents produced by CBOE for entry into a litigation support database. Among other things, he subpoenaed clearing firms for the production of documents related to their capital situations and conducted depositions of many clearing firm representatives.

The paralegals at Beeler, Schad & Diamond implemented and utilized the document and litigation support databases maintained by the firm for the benefit of all class counsel. They completed all computations and prepared the graphs attached to expert Blin's [Rule 26](#) Interrogatory response and also the subsequent revisions of those and other graphs. They also assisted in the third party discovery of brokerage firms to ascertain identities of individual class members and maintained the database containing customer trading data. They handled questions from class members, located missing class members, abstracted depositions, and prepared demonstrative exhibits.

Beeler, Schad & Diamond has also requested fees for clerical time spent on this case. The firm's clerical time is divided into two parts. First, substantial clerical time was devoted by assistants to paralegals which was billed at a rate less than 50% of the paralegal rate. The assistants to the paralegals input database information, organized documents, and performed various other tasks. Also, whenever paralegal work could have been accomplished by clerical staff, class counsel have reduced the rates of those paralegals to the clerical rate. Second, the firm did not charge secretarial overtime rates, but instead charged at the standard hourly clerical rate, despite the fact that the firm's clerical staff spent considerable overtime during the life of this suit.

We now summarize the fee request presented by Beeler, Schad & Diamond. Beeler, who is billed at an hourly rate of \$275.00, spent 4,592.60 hours on this case, for a lodestar of \$1,262,965.00. Diamond, who is billed at an hourly rate of \$275.00, spent 2,667.10 hours on this case, for a lodestar of \$733,452.50. Partner Lawrence W. Schad, who is billed at an hourly rate of \$240.00, spent 197.30 hours on this case, for a lodestar of \$47,352.00. Philipps, who is billed at an hourly rate of \$120.00, spent 3,875.60 hours on this case, for a lodestar of \$465,072.00. Buzek, who is billed at an hourly rate of \$120.00, spent 1,407.50 hours on this case, for a lodestar of \$168,900.00. Other associates, billed at hourly rates ranging from \$140.00 to \$150.00, spent 540.15 hours on this case for a lodestar of \$78,417.00. Paralegals, billed at hourly rates ranging from \$65.00 to \$70.00, spent 4,340.53 hours on this case, for a lodestar of \$284,743.45. Paralegals, billed at the clerical hourly rate of \$30.00, spent 229.20 hours on this case, for a lodestar of \$6,876.00. Clericals, billed at an hourly rate of \$30.00, spent 1,686.10 hours on this case, for a lodestar of \$50,583.00. The firm lodestar totals \$3,098,360.95, for 19,536.08 hours spent on this case.

b. *Joyce & Kubasiak, P.C.*

Joyce & Kubasiak conducted factual and legal research relating to the various causes of actions alleged against CBOE, OCC, and several participating and non-participating market makers. It also assisted in the drafting of each complaint. It participated in the briefing of all significant motions in the case, including responses to the motions to dismiss and briefs regarding the motions to certify both the defendant and plaintiff classes. Prior to the certification of the plaintiff class, the firm also participated in class discovery, including written discovery and depositions of class representatives. In support of the plaintiffs' motion to compel, the firm assisted in briefing the issue whether the self-evaluative privilege applied to investigations undertaken by CBOE and OCC after October 20. During the market maker depositions, it briefed the issue whether the attorney-client privilege limited the scope of discovery pertaining to the submissions of several market makers to the Special Business Conduct Committee ("SBCC") of the CBOE. The firm participated in preparing responses to the defendants' motions for summary judgment. Also, the firm researched a number of issues relating to the admissibility at trial of certain documents, including the Brady Report and the 1987 SEC Report. Joyce & Kubasiak also prepared motions in limine with respect to evidence which the defendants planned to introduce at trial.

The firm conducted nearly all of the discovery relating to market maker conduct in the days prior to and on October 20. It subpoenaed and deposed approximately 40 market makers and floor brokers, including both participants and non-participants on October 20. The firm also participated in the preparation of discovery to the defendants. It also hired and prepared a former market maker—James Harrigan—to offer expert testimony regarding the general operation of the OEX pit and the role of the market makers. The firm spent considerable time assisting in the preparation of the plaintiffs' primary liability and damage expert—John Blin. It also assisted in the preparation of the plaintiffs' appellate brief on the issue whether an implied private cause of action could be brought for violations of CBOE's rules and conferred with co-counsel throughout the litigation to determine pre-trial and trial strategy. The firm took the deposition of at least one of the defendants' experts and assisted substantially in the defense of the defendants' deposition of Blin.

Together with Beeler, partner Edward T. Joyce developed in conjunction with expert Blin the “linkage” argument which was the linchpin of Blin's opinion. Joyce was responsible for developing the argument that the defendants misrepresented the market makers' duty, or at least failed to disclose to the public that the market makers had no duty to appear and make a market on any given day. In conjunction with Diamond, Joyce developed many of the [Section 12\(2\)](#) and 10b-5 omissions arguments. Also, Joyce was responsible for convincing Blin not to withdraw from the case, following the defendants' attack on his opinion. Joyce was responsible for most of the market maker depositions. From his deposition of First Options, he developed the argument that CBOE and OCC were motivated to permit the wholesale violation of their rules by the market makers because of a concern relating to the ability of the clearing firms to meet their financial obligations to the defendants if October 20 proved to be as disastrous as the previous day.

Together with Joyce, associates Paul A. Castiglione and James X. Bormes had four primary areas of involvement. First, they conducted factual and legal research, drafting the complaints and briefing the numerous motions in this matter, including plaintiffs' *1242 motions to certify and plaintiffs' response to the defendants' motion for summary judgment. Second, they were involved in all stages of discovery, including expert discovery, related to market maker activity. Third, they assisted in preparing the final pre-trial order and other trial preparation. Fourth, they were responsible for other miscellaneous matters, including preparation of the appellate brief with respect to interlocutory appeal of dismissal of claims for CBOE rules violations and coordination with co-counsel on general litigation strategy.

We now summarize the fee request presented by Joyce & Kubasiak. Joyce, who is billed at an hourly rate of \$275.00, spent 2,723.50 hours on this case, for a lodestar of \$748,962.50. Partner John T. Doyle, who is billed at an hourly rate of \$200.00, spent 48.60 hours on this case, for a lodestar of \$9,720.00. Partner Raymond A. Flystra, who is billed at an hourly rate of \$200.00, spent 9.30 hours on this case, for a lodestar of \$1,860.00. Partner Steven J. Rotunno, who is billed at an hourly rate of \$200.00, spent 10 hours on this case, for a lodestar of \$2,000.00. Associate Paul A. Castiglione, who is billed at an hourly rate of \$150.00, spent 2,756.80 hours on this case, for a lodestar of \$413,520.00. Associate James X. Bormes, who is billed at an hourly rate of \$140.00, spent 1,933.10 hours on this case, for a lodestar of \$270,634.00. Law clerks, billed at hourly rates ranging

from \$50.00 to \$85.00, spent 682.50 hours on this case, for a lodestar of 43,921.50. Paralegals, billed at an hourly rate of \$65.00, spent 198.10 hours on this case, for a lodestar of \$12,876.50. The firm lodestar totals \$1,503,494.50, for 8,361.90 hours spent on this case.

c. Futterman & Howard, Chtd.

After drafting the initial complaint on behalf of Brittain, Futterman & Howard had primary responsibility for portions of the brief in opposition to the motions to dismiss. It also had significant involvement in discovery. It took the lead in examining the in-house counsel for CBOE and for OCC and had primary responsibility for the discovery taken from the OCC. The firm also sought out and interviewed prospective expert witnesses in the case and participated in the development of the plaintiffs' damage theory. The firm shared responsibility for the preparation of legal and factual arguments in plaintiffs' submissions in opposition to the defendants' motion for summary judgment.

Partner Ronald L. Futterman was involved in all phases of the litigation. After drafting the complaint for plaintiff Brittain, he was involved in the initial preparation of discovery requests and conferences with defendants' counsel to resolve objections. He also supervised the work of junior partner James G. Bradtke, who during 1988 and 1989 was extensively involved in the case. Futterman participated in the preparation of the various amendments to the complaint and supervised the research efforts raised by the defendants' motions to dismiss. Following preparation of sections of the brief in opposition to the motions to dismiss for which the firm was responsible, Futterman reviewed and edited those drafts. He was also involved in the effort to locate an expert witness for the plaintiffs, which was particularly time-consuming because of the reluctance of many academics, who valued their relationship with the CBOE or other securities exchanges, to become involved as a testifying expert for the plaintiffs. Futterman was also responsible for developing the arguments advanced in support of class certification concerning the absence of material fact disclosures in the Options Disclosure Document. He had the responsibility for taking the depositions of in-house counsel at both CBOE and OCC. He also developed the factual case against OCC, which required his examination of thousands of pages of documents. He was responsible for taking the depositions of the executive vice president of OCC, and the president and chairman of OCC. He provided input into the development

of the responses to the contention interrogatories, and also with respect to the development of the damage theory. Futterman also assembled the factual information in the record to rebut OCC's claim that it was entitled to summary judgment. He was assigned the task of preparing for and taking the deposition of at least one of the defendants' experts. He spent considerable time reviewing articles and SEC materials, including testimony of the defendants' experts before congressional committees.

***1243** During 1988 and 1989, partner James G. Bradtke had primary responsibility for the work performed by Futterman & Howard on this case. He was initially involved in researching and writing the arguments advanced by the plaintiffs in support of their claim that a private right of action existed under Section 6 of the Securities and Exchange Act of 1934 for violation of CBOE rules. He was also involved in the early review of documents and participated in the research and writing of sections of the class action brief. In mid-1990, Bradtke was required to reduce his active work schedule for health reasons. Upon his return to work on a part-time basis in 1992, the case was too well developed for him to become involved again without significant duplication of effort. Accordingly, from January 1991 through the present, Bradtke was essentially uninvolved in the case, and Futterman took on primary responsibility for the case at the firm.

Two senior paralegals devoted approximately 30% of the total hours invested by this firm in the case. Their work involved primarily extensive library research. Working under the close supervision of class counsel and the consulting experts, the paralegals located articles in business periodicals and academic journals which concerned options pricing models and recent theoretical developments that modified the traditional approach to options pricing models. Their work required them to identify these articles and to contact university libraries around the country to obtain monographs prepared by the authors or works in progress.

We now summarize the fee request presented by Futterman & Howard. Futterman, who is billed at an hourly rate of \$275.00, spent 1,019.30 hours on this case, for a lodestar of \$280,307.50. Bradtke, who is billed at an hourly rate of \$200.00, spent 315.80 hours on this case, for a lodestar of \$63,160.00. Partner Aram Harturian, who is billed at an hourly rate of \$240.00, spent 1.60 hours on this case, for a lodestar of \$384.00. Associates, billed at hourly rates of \$150.00 and \$160.00, spent 23.10 hours on this case, for a lodestar of \$3,498.00. Law clerks, billed at an hourly rate

of \$50.00, spent 111.55 hours on this case, for a lodestar of \$5,577.50. Paralegals, billed at an hourly rate of \$70.00, spent 388.30 hours on this case, for a lodestar of \$27,181.00. Paralegals, billed at the clerical hourly rate of \$30.00, spent 16.00 hours on this case, for a lodestar of \$480.00. The firm lodestar totals \$380,588.00, for 1,875.65 hours spent on this case.

d. Beigel & Sandler, Ltd.

Partners Herbert Beigel, Leigh Lasky, and Philip Fertik of Beigel & Sandler had principal responsibility for the firm's involvement in this case. The four primary areas of involvement for Beigel & Sandler were: (1) conducting factual and legal research in connection with the original complaint filed against CBOE and OCC; (2) drafting the original motion for class certification and participation in the joint responses to motions to dismiss filed by the defendants; (3) handling the appeal to the Seventh Circuit from our memorandum opinion of October 24, 1990, including both briefs and oral argument; and (4) assisting co-counsel in connection with certain discovery matters including discovery related to the OCC.

In response to the various complaints, the defendants filed motions to dismiss. Beigel & Sandler participated in the coordinated opposition to the various motions to dismiss the plaintiffs' complaints. The firm also participated in the research on the issues raised by the defendants' motion to dismiss. It drafted certain sections of the plaintiffs' responses to the motions for summary judgment and generally provided input in connection with these responses. The firm had the principal responsibility for the appeal, which focused on whether an implied right of action exists under Section 6 of the Securities and Exchange Act of 1934 for violations of the rules of a national securities exchange by the exchange or its members. Beigel & Sandler participated in class discovery, including defending depositions of class representatives, as well as participating in the other discovery related to class certification. Additionally, the firm coordinated with co-counsel on general discovery and, specifically, discovery related to the OCC.

We now summarize the fee request presented by Beigel & Sandler. Beigel, who is ***1244** billed at an hourly rate of \$275.00, spent 128.00 hours on this case, for a lodestar of \$35,200.00. Lasky, who is billed at an hourly rate of \$200.00, spent 747.25 hours on this case, for a lodestar of \$149,450.00.

Fertik, who is billed at an hourly rate of \$200.00, spent 116.75 hours on this case, for a lodestar of \$23,350.00. Partner Robert McCoy, who is billed at an hourly rate of \$200.00, spent 75.75 hours on this case, for a lodestar of \$15,150.00. Partner Stephen D. Sharp, who is billed at an hourly rate of \$200.00, spent 4.25 hours on this case, for a lodestar of \$850.00. Partner Bruce Rose, who is billed at an hourly rate of \$200.00, spent 46.00 hours on this case, for a lodestar of \$9,200.00. Counsel Allan Lasky, who is billed at an hourly rate of \$240.00, spent 4.00 hours on this case, for a lodestar of \$960.00. Associates, billed at hourly rates of \$150.00 and \$110.00, spent 228.60 hours on this case, for a lodestar of \$29,346.00. A law clerk, billed at an hourly rate of \$70.00, spent 9.25 hours on this case, for a lodestar of \$647.50. Paralegals, billed at hourly rates of \$50.00 and \$70.00, spent 50.75 hours on this case, for a lodestar of \$2,782.50. The firm lodestar totals \$266,936.00, for 1,410.60 hours spent on this case.

e. Cohen, Milstein, Hausfeld & Toll

Cohen, Milstein, Hausfeld & Toll ("Cohen, Milstein") participated primarily in the drafting of the various complaints. It also conducted legal research at the SEC library in Washington, D.C., and engaged in other Washington-area research to obtain information concerning the October 1987 crash from various government sources. It also assisted in the drafting of certain sections of the briefs in opposition to the defendants' motions to dismiss, and defended the first deposition of Brittain. Cohen, Milstein also developed some of the legal arguments in the brief in opposition to the defendants' motion for summary judgment, and assisted Futterman & Howard in the preparation of jury instructions.

We now summarize the fee request presented by Cohen, Milstein. Partner Herbert E. Milstein, who is billed at an hourly rate of \$240.00, spent 4.00 hours on this case, for a lodestar of \$960.00. Partner Michael D. Hausfeld, who is billed at an hourly rate of \$240.00, spent 73.00 hours on this case, for a lodestar of \$17,520.00. Partner Steven J. Toll, who is billed at an hourly rate of \$240.00, spent 72.50 hours on this case, for a lodestar of \$17,400.00. Partner Daniel S. Sommers, who is billed at an hourly rate of \$160.00, spent 243.00 hours on this case, for a lodestar of \$38,960.00. An associate, billed at an hourly rate of \$100.00, spent 42.00 hours on this case, for a lodestar of \$4,200.00. Law clerks, billed at an hourly rate of \$50.00, spent 79.00 hours on this case, for a lodestar of \$3,950.00. A paralegal, billed at an hourly rate of \$65.00,

spent 7.50 hours on this case, for a lodestar of \$487.50. The firm lodestar totals \$83,477.50, for 521.50 hours spent on this case.

f. Fishman & Merrick

Counsel at Fishman & Merrick were the initial counsel of Buys-MacGregor, one of the class representatives. Having extensive securities and commodities trading experience, the firm prepared the initial complaint filed on behalf of Buys-MacGregor and participated in the initial discovery related to that case. In September 1989, the firm withdrew from further representation when they decided with co-counsel that Fishman & Merrick's representation in arbitration proceedings of market makers, who were neither individual defendants nor members of the potential defendant class, could create the appearance of a conflict of interest. The firm's withdrawal in no way reduces the significance of their early contribution to this case and they remain entitled to compensation.

We now summarize the fee request presented by Fishman & Merrick. Partner David A. Gennelly, who is billed at an hourly rate of \$200.00, spent 106.25 hours on this case, for a lodestar of \$21,250.00. Partner Kenneth F. Berg, who is billed at an hourly rate of \$170.00, spent 77.00 hours on this case, for a lodestar of \$13,090.00. Partner Paul Carrier, who is billed at an hourly rate of \$200.00, spent 28.70 hours on this case, for a lodestar of \$5,740.00. Partner Gerald L. Fishman, who is billed at an hourly rate of \$240.00, spent 5.75 hours on this case, for a lodestar of \$1,380.00. Associates, billed at hourly rates of \$160.00 and \$170.00, spent ***1245** 26.00 hours on this case, for a lodestar of \$4,367.50. A paralegal, billed at an hourly rate of \$60.00, spent 6.75 hours on this case, for a lodestar of \$405.00. The firm lodestar totals \$46,232.50, for 250.45 hours spent on this case.

B. Administrative Work Performed

As noted above, class counsel have also submitted two petitions for administrative expenses and fees, to be decided at the same time that we resolve all remaining matters in this case. All of the administrative work was performed by Beeler, Schad & Diamond. They request that they be granted a significant percentage of their attorney time devoted to this administration.

In their original petition for administrative fees and expenses, class counsel requested \$232,135.50, plus an estimated \$5,000.00 in additional future fees to cover the cost of completing the administration of the fund. However, in their supplemental petition for administrative expenses and fees, filed in mid-July 1993, class counsel inform the court that they have actually incurred additional legal fees of \$28,800.00. Accordingly, in their original and supplemental petitions for administrative fees, Beeler, Schad & Diamond requests additional fees totalling \$260,935.50.

We will briefly review the administrative efforts performed by class counsel. We preliminarily approved the settlement agreement on December 22, 1992. Notice of the proposed settlement was mailed by December 28, 1992, and a proof of mailing was filed with the court on January 4, 1993. In administering the fund, class counsel engaged in discussions with the court regarding the transfer and investment of the settlement fund. With our approval, the \$10,000,000.00 settlement fund was invested at the maximum rate of interest in United States government securities.

As claim forms were received from potential class members, class counsel cross-checked the claimants' data against the supporting documentation in order to verify that the claim forms were properly executed. Where appropriate, class counsel contacted class members to request additional supporting documentation. The fairness hearing was held on January 28, 1993. Following discussion among class counsel, defendants' counsel, and the court, we entered a Final Judgment and Order of Dismissal with Prejudice on February 4, 1993. Because many brokerage firms had failed to provide the necessary supporting trade documentation, including the names of persons who traded on October 20, 1987, we entered an order on February 1, 1993, directing each brokerage firm to respond to class counsel. Class counsel received and processed these responses.

Class counsel's initial report on March 22, 1993, reflected that 887 claim forms had been received and were being processed. On April 15, 1993, we approved the claim determination procedure proposed by class counsel and entered an order which was sent to all claimants, giving them until May 31, 1993, to appeal their claim determination. On May 10, 1993, class counsel filed a claim determination status report, including a four-volume appendix of claim determination calculations. Class counsel provided verification to all claimants who disagreed with their claim determinations. We held a hearing on June 10, 1993, at which we considered

the objections of 36 claimants and class counsel's response to each objection, which was contained in a three-volume appendix filed with the court on June 7, 1993. Class counsel have complied promptly with our recent orders regarding the clarification and revision of claim determinations for class members who filed written objections with the court.

We now summarize Beeler, Schad & Diamond's original request for administrative fees. Beeler, who is billed at an hourly rate of \$275.00, spent 498.70 hours on administrative matters, for a lodestar of \$137,142.50. Diamond, who is billed at an hourly rate of \$275.00, spent 88.80 hours on administrative matters, for a lodestar of \$24,420.00. Partner James Shedden, who is billed at an hourly rate of \$180.00, spent .70 hours on administrative matters, for a lodestar of \$126.00. Associates, billed at hourly rates of \$120.00 and \$150.00, spent 188.00 hours on administrative matters, for a lodestar of \$22,569.00. Paralegals, billed at an hourly rate of \$65.00, spent 693.80 hours on administrative matters, for a lodestar of \$45,097.00. Clericals, billed *1246 at an hourly rate of \$30.00, spent 92.70 hours on administrative matters, for a lodestar of \$2,781.00. The firm lodestar totals \$232,135.50, for 1,562.70 hours spent on administrative matters. As is apparent, the bulk of the administrative work was performed by partners who seek compensation at their full hourly rates.

In the supplemental petition for administrative fees and expenses, Beeler, Schad & Diamond requests additional fees in the amount of \$28,800.00. These fees were incurred in the claims administration principally by performing additional computer database analyses, preparing attorney responses to objecting claimants, and carrying out our further instructions regarding claim administration. We now summarize Beeler, Schad & Diamond's supplemental petition for attorneys' fees. Partner Beeler, who is billed at an hourly rate of \$275.00, spent 71.30 additional hours, for a lodestar of \$19,607.50. Partner Diamond, who is billed at an hourly rate of \$275.00, spent 4.9 additional hours, for a lodestar of \$1,347.50. Associate Philipps, who is billed at an hourly rate of \$120.00, spent 22.5 additional hours, for a lodestar of \$2,700.00. Paralegal Krejci, who is billed at an hourly rate of \$65.00, spent 78 additional hours, for a lodestar of \$5,070.00. Clericals Finlon and Murphy, who are billed at an hourly rate of \$30.00, spent 2.5 additional hours, for a lodestar of \$75.00. The firm lodestar for additional hours spent on administrative matters thus totals \$28,800.00, representing 179.20 additional hours of legal work. Again, the bulk (\$21,000 of \$28,000) is administrative work performed

by partners. Adding the \$28,800.00 additional legal fees requested in the supplemental petition, the total request for administrative fees is \$260,935.50.

The costs of the administration of the settlement fund may be paid from the settlement fund, within the discretion of the court. 2 *Newberg on Class Actions* § 11.39, at p. 448, n. 180 (3d ed. 1992). Accordingly, we will consider these fees as part of the Beeler, Schad & Diamond fee request.

c. Summary of the Fees Requested

1. Standard Reductions

Guided by our opinion in *In the Matter of Superior Beverage/Glass Container*, 133 F.R.D. 119, 130 (N.D.Ill.1990), we are pleased to note that lead counsel (Beeler and Diamond) personally reviewed every time entry of every lawyer, paralegal, and law clerk of every firm, in an effort to make appropriate reductions in the lodestar for each firm. We have also reviewed the time records for the legal and administrative work performed in this case.

A review of the time records indicates that there were frequent conferences held among the counsel in this case. Class counsel suggest that due to the size and complexity of the legal and factual issues in this litigation, and the large number of counsel and experts involved, it was often necessary for class counsel to meet as a group to analyze outstanding problems, resolve those problems, make work assignments, and develop litigation strategy. Some conferences were obviously necessary in order to minimize the duplication of effort—especially where the plaintiffs' experts could quickly bring class counsel up to speed on various substantive issues. Nonetheless, after reviewing the records, we feel that the number of conferences is excessive. We have taken this fact into consideration in making our final determination of what constitutes a fair and reasonable fee.

In *Superior Beverage/Glass Container*, we reviewed time entries to correct them where partners did work that could have been done by associates, and where associates did work that could have been done by paralegals, etc. Unlike most other fee petitions we have considered, in this case, the number of partner hours is significantly greater than that of associates. Partner hours expended in this case total 13,317.80. Associate hours expended total 10,832.85. Indeed, as class counsel note, this is extraordinary. Class counsel

argue that it is explained by the fact that this case was simply too complicated to have a large part of the case delegated to associates. While we recognize that this case was complex, we disagree with the proposition that the legal issues involved were so complex that further delegation of work to associates, or even *1247 paralegals, was not possible. This is particularly true of the administrative work. We have great confidence in the ability of young lawyers to assimilate complicated factual scenarios, educate themselves regarding the applicable law, and then apply the law to the relevant facts. While we understand that much work must necessarily be done by partners, in large part supervising and reviewing the work of associates and paralegals, we expect delegation of work to associates and paralegals wherever possible. Accordingly, we find the hours expended by partners in this case to be excessive. We also have taken this fact into consideration in making our final fee determination.

Lead counsel, in preparing the fee petition, struck all associate time appearing at status calls or arguments before the court. We approve of this practice, as we recall very little significant involvement of any associates at the numerous status hearings in this case.

Where more than eight hours were recorded on any day by any one person, lead counsel examined the entries with extreme care to ensure that no excess hours were billed. We also approve of this practice. In *Superior Beverage/Glass Container*, we struck paralegal time which we believed should have been clerical, and thus part of firm overhead. Class counsel contend that this is an extreme remedy and have instead reviewed paralegal work, and where appropriate, reduced the time and rate from paralegal to clerical for paralegal time spent on what could be considered clerical assignments. Finally, class counsel have excluded from the fee petition all hours billed for time spent preparing the petition. Class counsel have also excluded from the administrative fee petition all hours billed for time spent preparing the petition. We agree. As we have noted in our past opinions determining fee awards, we do not feel that it is appropriate to compensate attorneys for the time spent preparing the fee petition and supporting documentation.

2. Calculation of the Requested Fee

In calculating the lodestar for each firm, the five lawyers who performed the lead counsel role were assigned the maximum hourly rate of \$275.00. Class counsel claim that

this rate is somewhat below the hourly rate normally charged by attorneys for work such as that performed in this case. Senior partners, attorneys with at least 15 years of experience practicing law, who did not serve as lead counsel were billed at an hourly rate of \$240.00. All other partners were assigned an hourly rate of \$200.00. All associates were assigned hourly rates ranging from \$170.00 (for senior associates) to \$100.00 (for attorneys admitted to practice in 1991 or 1992). Law clerks who had already graduated from law school were billed at an hourly rate of \$85.00. Law student clerks were billed at an hourly rate of \$50.00. Senior paralegals were billed at an hourly rate of \$70.00. Junior paralegals were billed at an hourly rate of \$65.00. Class counsel contend that these rates are conservative. We have received in confidence and reviewed defense counsel's hourly rates in this case. Based on that review, while we do not agree with class counsel that the

hourly rates used to calculate the lodestar are conservative, we acknowledge that they are reasonable.

The hours billed in this case (including the hours billed for administrative work) are enormous, totalling approximately 32,625.31. As we have noted above, the prosecution of this case involved significant duplication of effort. Where so many lawyers are involved, such duplication is nearly impossible to eliminate altogether. Nonetheless, it is our obligation to ensure that such duplication is not compensated through our award of attorneys' fees. Accordingly, we have taken this fact into consideration in making our fee determination.

Class counsel have requested the following fees for work performed through the settlement date of December 22, 1992:

<u>Firm</u>	<u>Lodestar</u>	<u>Amount Requested</u>
Beeler, Schad & Diamond	\$3,098,360	\$2,532,289
Joyce & Kubasiak	1,503,494	1,228,805
Beigel & Sandler	266,936	218,166
Futterman & Howard	380,588	311,054
Cohen, Milstein	83,477	68,225
Fishman & Merrick	46,232	37,785
TOTAL	\$5,379,089	\$4,396,324

***1248** The amount requested by each firm represents 81.7% of their lodestar. Although they contend that a multiplier of between 2 and 3 would be appropriate for the risk involved in this case, class counsel have not requested a multiplier. Even had they requested a multiplier, we would not allow one in this case.

Class counsel's method for calculating the fees requested is straightforward: From the \$10,000,000.00 settlement fund, class counsel subtracted the disbursements and divided the remaining amount equally between class members and class counsel. In addition, Beeler, Schad & Diamond has requested \$260,935.50 for administrative fees; this additional amount increases Beeler, Schad & Diamond's total fee request to \$2,793,224.50. The total class counsel request for fees,

including administrative fees, thus amounts to \$4,657,259.50, or 46.5% of the settlement.

3. Reaction of Class Members to the Fee Petition

We have received much commentary on the fees and costs requested by class counsel from the class members themselves. We did not solicit these commentaries. Class counsel sent a copy of the fee petition to all claimants who class counsel believed had valid claims, soliciting their support for the fee petition. Class counsel also provided the potential claimants with a form letter addressed to this court, in which the author supports the full award of the fee and costs petition. Most of the letters received were based on this

form letter. Some claimants sent their letters directly to us; others sent their letters to class counsel, who then filed copies of the letters with us. While we emphasize that we did not request the comments of class members on this issue, we will briefly summarize some of their reactions to the fee petition as we feel that their reactions are important and should be considered in determining the fee award.

In total, we received directly 96 letters concerning the petition for fees and costs. Class counsel has submitted for our review 81 additional letters, which apparently were sent to class counsel rather than to us directly. It should be noted preliminarily that nearly all of the letters received expressed sincere appreciation for the efforts of class counsel in creating the settlement fund. Of the letters received directly by the court, 18 letters were sent by claimants whose final claim determinations revealed that they were not actually class members. Accordingly, we have not considered these letters in connection with our evaluation of the fee and costs petition.

Of the letters written by class members and received directly by the court, 53 stated that, after reviewing the petition for attorneys' fees and reimbursement of litigation expenses filed by class counsel, class counsel made an excellent recovery and should therefore be granted in full the fees and expenses requested. The 81 additional letters filed by class counsel also favor a full award to class counsel of the fees and expenses requested in the petition.

Of the letters written by class members and received by the court, 25 letters object in some way to the fee and costs petition. Among these objections, 11 letters noted that while the authors felt that the petition request was too high, they felt unqualified to advise the court regarding what amount would constitute a fair and reasonable fee for the attorneys involved in this case. These objectors left this issue to our determination, asking us to keep in mind that the class members (and not class counsel) are those who really suffered the losses in this case. Some of these letters further noted the fact that the \$10,000,000.00 settlement fund is insufficient to compensate the class members for more than a mere fraction of their actual October 20, 1987 OEX losses. We acknowledge this fact and consider it in our determination of the fee petition.

One objection letter stated that while class counsel's request for fees and costs in excess of 50% of the settlement fund is excessive, in light of their risks of time and expenses, they should be awarded a minimum of 40% for fees and

expenses combined. Seven objection letters stated that class counsel should be awarded no more than one-third of the settlement fund to cover their fees and expenses. One objection letter stated that an award to class counsel of 30% of the settlement fund would be the most fair and equitable *1249 distribution. One letter stated that while an award of one-third is standard in cases of this type, the award here should be less than 30% because of the limited size of the settlement fund. One letter suggested that our grant of fees and costs not exceed 25% of the settlement fund. Another letter suggested that our grant of fees and costs not exceed 20% of the settlement fund. One letter suggested that we reduce our award to half of the amounts requested by class counsel for fees and costs. Finally, one letter suggested an award of attorneys' fees in the amount of \$2,930,000.00, plus all costs.

We appreciate the efforts of the class members who took the time to review carefully the rather lengthy fee and costs petitions filed in this case, and who wrote to us with their comments. We assure them that we have put forth our best efforts to determine a fair and reasonable fee for class counsel in light of all of the facts as well as class members' comments.

D. Analysis of the Fee Petition

1. The Common Fund Doctrine

Under the United States' no-fee rule, a court generally may not award attorneys' fees to a prevailing party unless it is expressly authorized by statute. *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). However, the Supreme Court has long recognized an exception to this rule: Where a representative plaintiff successfully establishes or protects a fund in which other class members have a beneficial interest, the costs of litigation may be spread among the fund's beneficiaries. See *Trustees v. Greenough*, 105 U.S. 527, 532, 26 L.Ed. 1157 (1882); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389–97, 90 S.Ct. 616, —, 24 L.Ed.2d 593 (1970); *Alyeska Pipeline Service*, *supra*. Under the common fund doctrine, attorneys for the successful party may petition the court for a portion of the fund as compensation for their efforts in creating or protecting that fund. The Supreme Court has noted that, “a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fees from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, —, 62 L.Ed.2d 676 (1980).

2. Determining A Reasonable Fee: The Hybrid Approach

Determination of what constitutes a fair and reasonable fee award from a common fund is a delicate undertaking, calling for the informed exercise of judicial discretion under all the circumstances of the case. We have elsewhere discussed the history of attorneys' fee awards and the different approaches that various courts have adopted for determining fair and reasonable attorneys' fees. See *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 255–63 (N.D.Ill.1979) (summarizing history of fee awards and approaches to calculating a fair and reasonable fee). In short, most courts utilize either a lodestar time/rate analysis or a percentage of the common fund analysis to determine an appropriate fee award. The Seventh Circuit has indicated that the decision whether to award attorneys' fees according to the lodestar method or the percentage of the fund approach rests in the sound discretion of the trial court. *Harmen v. Lyphomed, Inc.*, 945 F.2d 969, 974 (7th Cir.1991) (“The decision of the whether to use a percentage method remains in the discretion of the district court.”). See also *Kirchoff v. Flynn*, 786 F.2d 320, 329 n. 1 (7th Cir.1986) (“The method of calculating a fee award ... rests squarely within the discretion of the district court.”).

We have previously discussed at great length the choice between lodestars and percentages, noting both the problems with a straight percentage-of-the-pot approach and the objections to lodestars. See *In the Matter of Superior Beverage/Glass Container*, 133 F.R.D. 119, 123–29 (N.D.Ill.1990) (discussing advantages and disadvantages of both approaches). We will not repeat that discussion here. At that time, we reiterated our prior conviction that a hybrid approach should be utilized in determining fee awards, noting that “[w]e remain convinced ... that rigid application of any method, whether lodestar or percentage, is a mistake but that some form of time/rate multiplier analysis *1250 modified, if necessary, to reflect a reasonable percentage of the recovery, is the best way to calculate reasonable and fair fees.” *Id.* at 124. Our hybrid approach utilizes certain aspects of both the lodestar and percentage of the fund methodologies. We continue to advocate this hybrid approach in determining fee awards under the common fund doctrine. In describing the hybrid approach, we emphasized the individual nature of fee determinations. Because every case is different, any method utilized by the court in determining fees must be flexible, so

that it can account for the individual considerations of each case.

Under our hybrid approach, no final fee determination can reasonably be made without considering the size of the settlement. *Id.* at 128. In *Superior Beverage/Glass Container*, we stated:

[I]n no case, even under a time/rate analysis, should a fee award consume an untoward portion of the class recovery. And in this sense, even judges who use time/rate analyses always blend lodestars and percentages. No judge reasonably awards fees by looking *only* at hours. What is left for the class, after fees have been awarded, is always a paramount consideration. *The size of the settlement necessarily suggests upper (and lower) limits on permissible fees, in a common fund case, no matter how many hours were logged.* That is axiomatic. Hours are not rewarded simply because they were toiled. They are rewarded, consistent with the common fund theory, because they brought benefit to the class.

Id. at 126 (emphasis in original). In essence, we believe that the size of the fund recovered on behalf of the class should act to impose a cap on the amount of attorneys' fees that may be recovered by class counsel where straight lodestar compensation would consume an inordinate share of the common fund. This principle is a central factor in determining what constitutes a fair and reasonable fee award in this case.

3. Discussion of Fees Requested

In our Final Judgment Order of June 17, 1993, we approved the claims of approximately 521 class members who sustained an aggregate total loss in the amount of approximately \$24,691,297.63. Final Judgment Order, entered June 17, 1993. As discussed above, the settlement fund is \$10,000,000.00. By July 1, 1993, approximately

\$141,136.00 in interest was earned on the settlement fund. From these figures, it is clear that the plaintiffs in this case will be obtaining only a minimal recovery of their losses sustained on October 20, 1987. Including administrative fees and costs, class counsel have requested \$4,657,259.50 for attorneys' fees and \$1,255,398.14 for costs. These figures include the projected fees and costs for the remaining administration of the settlement fund. The total request by class counsel for both fees and costs equals \$5,911,107.64, or approximately 59% of the settlement fund. The requested fees alone constitute approximately 46.6% of the settlement fund. This court could not in good conscience grant such an award to class counsel; an award of this size would be unfair to the class members and would constitute a windfall to class counsel. The suit would be primarily for the benefit of class counsel rather than their clients.

In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the Supreme Court confirmed in a statutory fee case that a reasonable fee is based on a number of factors, including reasonable hours expended multiplied by the prevailing hourly rate for one of comparable background, reputation, experience. However, the Court emphasized that the central factor to be considered was the result obtained. *Id.* at 433–37, 103 S.Ct. at 1939–41. The principle that the result obtained must be considered in determining the fee award is particularly applicable to the common fund case. The fee award may not infringe too substantially upon the recovery of the class members. Under our hybrid approach, the percentage-of-the-fund methodology should be applied in such situations to limit the award of attorneys' fees.

While the Supreme Court has not directly addressed this issue, it seems at least to have acknowledged the usefulness of the percentage-of-the-fund approach for this *1251 purpose. In *Blum v. Stenson*, 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, — n. 16, 79 L.Ed.2d 891 (1984), the Supreme Court noted with approval the use of a percentage of the common fund to determine attorneys' fees in common fund cases. In distinguishing attorneys' fee awards under fee shifting statutes, the Court stated, "Unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation." *Id.* While we still do not advocate use of the pure percentage analysis to determine attorneys' fee awards in every case, our hybrid approach requires consideration of the results achieved and

the damages of the class members in determining the fees recoverable by class counsel.

There can be no general rule specifying what percentage of a common fund may reasonably be awarded as attorneys' fees in every case because the amount of any fee must be determined according to the individual facts of each case—most particularly, the size of the common fund. As the Supreme Court noted, "[i]ndividualization in the exercise of a discretionary power [for the award of attorneys' fees] will alone retain equity as a living system and save it from sterility." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 167, 59 S.Ct. 777, 780, 83 L.Ed. 1184 (1939). See also *Mashburn v. National Healthcare, Inc.*, 684 F.Supp. 679, 692 (M.D.Ala.1988). Commentators have noted that "the common fund itself is the measure of success ... and represents the benchmark on which a reasonable fee will be awarded." Herbert Newberg, *Attorney Fee Awards* § 2.07, at 417 (1986). For example, where—as here—the fund is comparatively modest in reference to the hours expended by class counsel on the case, the size of the fund is necessarily a limiting factor on the amount of attorneys' fees that can be awarded by the court from that fund. See also *Howes v. Atkins*, 668 F.Supp. 1021, 1025 (E.D.Ky.1987) (quoting Herbert Newberg, *Attorney Fee Awards*, *supra*, at 54) ("When the fund is modest in comparison to the hours expended, the small size of the fund is necessarily a limiting factor in the amount of any fee that will be awarded from that fund."). We do not mean to suggest by this discussion that the results obtained for the class members in this case were not significant. In fact, we believe that class counsel performed well and obtained a fine recovery for the class. Ten million dollars is indeed a substantial sum. However, we must consider the size of that recovery in light of the hours expended, the rates charged, the total class damages, and the total fees requested. In this case, the total fees requested are highly disproportionate to the recovery obtained, notwithstanding the fact that it represents only 81.7% of the suggested lodestar amount for each firm.

In our above discussion of the fee petition, we noted several additional factors that we have considered in making our fee determination. First, the hours billed by partners in this case were excessive. We feel that more work could and should have been delegated to associates and paralegals. Second, the total number of hours billed in this case—by both partners and associates—was excessive. While we acknowledge the sincere efforts of class counsel to minimize the duplication of efforts, we believe that there was in fact significant duplication that should not be compensated. Also, the

number of conferences held among class counsel in this case was excessive. Although many conferences were necessary and reasonable, the number identified in the time logs is excessive, especially in light of the large number of partners attending many of these conferences. Most importantly, as explained above, we have considered the size of the settlement fund—\$10,000,000.00—and compared it to both the losses sustained by the class—almost \$25,000,000.00—and the attorneys' fees requested by class counsel.

It is important to note at this point that counsel are to be commended for bringing this action to resolution short of trial, and for conducting themselves with professionalism throughout the case. We also appreciate the great efforts of all counsel involved to accommodate our various requests for detailed information concerning both the legal work performed and the disbursements made in ***1252** connection with this case. We recognize that our award of attorneys' fees must be adequate to encourage competent counsel to continue to pursue this type of complicated commercial securities litigation on behalf of a class. On the other hand, we must ensure that the class recovery is optimized. Having considered carefully the request for attorneys' fees, including the supporting memoranda and the appendices of affidavits and time logs, we are prepared to award attorneys' fees in the total amount of \$2,900,000.00, which represents 29% of the settlement. We regard this amount as the maximum fee recovery allowable under the circumstances of this case. We are convinced, after our careful examination of the fee request and supporting information, that this amount constitutes a fair and reasonable fee. Also, having received and reviewed in confidence a summary of the attorneys' fees billed and charged by the counsel for the defense in this case, we are convinced that our award is both fair and reasonable in the context of the legal services performed in the prosecution of this case.

Our award of fees in the amount of 29% of the settlement is within the “normal” range of attorneys' fees allowed in class actions of this type. We do not wish to over-emphasize this point as we believe that each case must be considered carefully in the context of its individual circumstances. Moreover, as stated above, we believe that our hybrid approach is preferable to the straightforward application of the percentage-of-the-fund method of fee determination. Cf. *In re Activision Securities Litigation*, 723 F.Supp. 1373, 1378 (N.D.Cal.1989) (court concludes that “in class action common fund cases the better practice is to set a percentage fee and that, absent extraordinary circumstances that suggest

reasons to lower or increase the percentage, the rate should be set at 30%”).

However, commentators who have surveyed attorneys' fee awards in similar cases suggest that in common fund cases such as the one before us at this time, attorneys' fees are typically awarded in the range of 20% to 30%. See, e.g., Herbert Newberg, *Attorney Fee Awards*, *supra*, at 51–52 (“In common fund cases attorney's fees should not usually exceed 50% of the fund recovered and are typically in the 20% to 30% range.”); *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, October 8, 1985 (Arthur R. Miller, Reporter), 108 F.R.D. 237, 247 n. 32 (1985) (“Judges systematically awarded fees in the range of twenty to twenty-five percent of the fund....”).

Our research of case law supports the conclusion that fee awards typically range from 20% to 50% of the fund, and most often constitute 20% to 30% of the fund. See, e.g., *In re Telephere International Securities Litigation*, 753 F.Supp. 716 (N.D.Ill.1990) (in securities class action, fees awarded constitute 21.7% of settlement fund of \$1,519,500.00); *In re Security America Corporation Securities Litigation*, 750 F.Supp. 352 (N.D.Ill.1990) (in securities class action, fees awarded constitute 11.4% of the \$15,184,951.00 common fund); *Rudolph v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1990 WL 7168 (N.D.Ill. Jan. 18, 1990) (in securities class action, fees awarded constitute 15% of settlement fund of \$10,000,000.00); *In re Gould Securities Litigation*, 727 F.Supp. 1201 (N.D.Ill.1989) (in securities class action, fees awarded constitute at least 20.4% of settlement fund of \$10,000,000.00); *Mashburn v. National Healthcare, Inc.*, 684 F.Supp. at 697 (in securities fraud class action, fees and costs awarded constitute 30.29% of \$9,925,000.00 cash portion of \$17,425,000.00 common settlement fund); *Howes v. Atkins*, 668 F.Supp. at 1027 (in shareholders' derivative action, fees and costs awarded constitute 40% of cash settlement fund of \$1,000,000.00); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250 (S.D. Ohio 1991) (in class action, fees and costs awarded constitute 15.6% of \$32 million cash portion of settlement of \$56.6 million); *In re Cincinatti Gas & Electric Co. Securities Litigation*, 643 F.Supp. 148 (S.D. Ohio 1986) (in securities class action, fees awarded constitute 15% of common fund of approximately \$14 million); *In re Dun & Bradstreet Credit Services Customer Litigation*, 130 F.R.D. 366, 375 (S.D. Ohio 1990) (fees awarded constitute 15% of settlement fund of \$18 million); *In re Warner Communications Securities Litigation*, 618 F.Supp. 735, 754 (S.D.N.Y.1985), ***1253** *aff'd*, 798 F.2d

35 (2d Cir.1986) (in securities fraud class action, fees awarded constitute approximately 25% of cash settlement fund of \$18.4 million); *In re TSO Financial Litigation*, 1989 WL 80316 (E.D.Pa. July 17, 1989) (fees awarded constitute 23% of settlement fund of \$2,850,000.00); *Harman v. Lyphomed, Inc.*, 787 F.Supp. 772, 778 (N.D.Ill.1992) (in securities fraud class action, fees awarded constitute 20% of settlement fund of \$9,900,000.00); *Edmonds v. United States*, 658 F.Supp. 1126, 1128–30 (D.S.C.1987) (in class action, fees awarded constitute 5% of common fund of approximately \$27–30 million); *In re Activision Securities Litigation*, 723 F.Supp. 1373, 1378 (N.D.Cal.1989) (in securities class action, fees awarded constitute 30% of the common fund).

Several other courts have also surveyed recent cases and reached similar conclusions regarding the amounts typically awarded as attorneys' fees in common fund cases. *See, e.g., Warner Communications Securities Litigation*, 618 F.Supp. at 749–50 (survey of cases suggests that fees are typically awarded in the range of 20% to 50% of common fund); *Enterprise Energy*, 137 F.R.D. at 250 (survey of cases reveals fee awards ranging from 18% to 33% of common fund); *Harman*, 787 F.Supp. at 774 (survey of recently reported class action securities fraud cases from Northern District of Illinois reveals fee awards ranging from 10.3% to 21.7% of common fund); *TSO Financial Litigation*, 1989 WL at App. A. (appendix of fee awards in class actions, concluding that fee awards are typically 19% to 45% of the common fund). *See also In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297 (N.D.Ga.1993) (fees awarded in common fund cases typically constitute 20% to 30% of fund).

4. An Alternative: The Market Approach to Attorneys' Fees

While we continue to advocate application of the hybrid approach articulated above, we note that several alternative approaches to fee determinations have recently been proposed. In their petition, class counsel have directed our attention to one new method in particular. In *Matter of Continental Illinois Securities Litigation*, 962 F.2d 566 (7th Cir.1992) (Posner, J.), the Seventh Circuit articulated an alternative method of attorneys' fee determination based on an analysis of the relevant legal market.

The court first noted that the object in awarding a reasonable fee is to give the lawyer what he would have gotten in an arm's length negotiation, had one been feasible. In a class action suit, the court suggested that much time and expense might be

saved by abandoning the lodestar computation and, instead, basing the reasonable attorneys' fee on fee arrangements for similar services within the relevant market. The court stated:

The judicial task might be simplified if the judge and the lawyers bent their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character.... The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.

Id. at 572. The court further suggested that in making such a determination, the trial court should obtain “evidence about the terms of retention in similar suits, suits that differ only because, since they are not class actions, the market fixes the terms.” *Id.* at 573.

In its supplemental petition, class counsel have attempted to provide us with such evidence. They have submitted for our consideration the affidavits of several prominent Chicago attorneys who regularly engage in commercial contingent fee litigation. We will briefly review these affidavits.

Myron M. Cherry, of Cherry & Flynn, states in his affidavit that he would not undertake a representation such as the plaintiffs in this case unless he would be able “to charge a minimum of 33%, and more likely 40% to 50%, of the recovery.” Aff. of Myron M. Cherry, at 2. In setting the fee, he normally considers the difficulty in stating and maintaining a cause of action against an exchange and the estimated cost in attorney-time required to prosecute such a suit against the vigorous defense mounted by a well-financed national exchange. *Id.* at 1. In addition, Cherry would expect the client *1254 to pay the costs of pursuing the case. He also notes that his firm often requires a negotiated, non-refundable retainer in addition to the contingent fee. William J. Harte states that he ordinarily charges a contingent fee from 33.33% to as high as 50%, depending on the following factors: (1) the difficulty in establishing liability; (2) the extent to which the defendant will be represented by competent, well-financed counsel; (3) the extent to which expert testimony will be required; (4) the extent to which such expert testimony is

readily available; (5) the extent to which the defendants have a reputation for willingness to settle claims; (6) the extent to which a successful verdict or judgment can be collected; and (7) the extent to which they will be successful in convincing other contingent fee plaintiffs' lawyers to join with them in the litigation in order to spread the risk. Aff. of William J. Harte, at 2. He also notes that he had never heard of anyone who has successfully sued and obtained a money judgment or negotiated a settlement where a national exchange has agreed to pay money damages. *Id.* at 1.

Michael B. Hyman, of Much, Shelist, Denenberg, & Ament, P.C., states that experienced, competent counsel would normally not be attracted to cases such as this litigation unless they could reasonably anticipate recovering attorneys' fees "amounting to 33% to 40% of the total amount recovered for the class or fees based on an enhancement or multiplier up to three or more times over customary hourly (lodestar) rates." Aff. of Michael B. Hyman, at 2. In deciding whether to undertake the representation, his firm conducts a financial analysis, apart from any legal or factual analysis of the plaintiff's claim, to ensure that the case would be profitable. He also notes that his firm considered and rejected filing a case similar to this litigation at the time that this litigation began. *Id.* at 1. Peter M. King, of Canel, Davis & King, states that in determining an appropriate contingent fee to charge a client in a suit against a national securities or commodities exchange, he would consider "the extreme difficulty in stating a cause of action against an exchange coupled with the very rigorous defense that can be expected not only from the exchange's well-financed and competent counsel, but also from other exchanges who might be affected by the outcome of the case in question." Aff. of Peter M. King, at 1–2. He would not undertake representation such as this case unless he would be able to charge a contingent fee of 40%, plus the costs of the litigation. *Id.* at 2.

Clinton A. Krislov, of Krislov & Associates, Ltd., states that, if he would have undertaken the case, he would require a very high percentage fee of 50% plus costs of litigation, due to the complexity of the case and the low likelihood of success. Aff. of Clinton A. Krislov, at 2. He notes that the normal fee of 33.33% would be unacceptable here in light of the lack of a strong cause of action. He further notes that it is "generally viewed that the lawyers' gross share should not exceed the clients' gross recovery." *Id.* David A. Novoselsky states in his affidavit that he would not undertake a representation such as the plaintiffs in this case unless he was able to charge a minimum of 40% (and more likely 50%) of the recovery. Aff.

of David A. Novoselsky, at 2. In determining an appropriate contingent fee to charge a client in a suit against a national securities or commodities exchange, he would "consider the extreme difficulty in stating a cause of action against an exchange coupled with the very vigorous defense that can be expected not only from the exchange's well-financed and competent counsel but also from other exchanges who might be affected by the case in question." *Id.* at 1–2.

Lowell E. Sachnoff, of Sachnoff & Weaver, Ltd., states that if the plaintiffs in this litigation were a private client, his firm would not have agreed to take on the litigation without a firm contingent fee agreement in the range of "35% to 45% of the recovery with the client paying the costs of the litigation on a regular basis." Aff. of Lowell E. Sachnoff, at 4. He states without qualification that his firm "would not accept a plaintiff class action such as *Spicer* without some assurance based on applicable law that if we prevailed and conferred a substantial benefit, monetarily or otherwise, we would be paid an appropriate premium over our regular hourly rates." *Id.* at 3. He notes that the litigation in this case carried with it a very substantial degree of ***1255** risk at the outset because the claims were novel and the legal basis uncertain. Terry Rose Saunders states in her affidavit that in determining an appropriate contingent fee to charge a client in a suit against a national securities or commodities exchange, she would "consider the extreme difficulty in stating a cause of action against an exchange coupled with the very vigorous defense that can be expected not only from the exchange's well-financed and competent counsel but also from other exchanges who might be affected by the outcome of the case in question." Aff. of Terry Rose Saunders, at 1–2. Accordingly, she explains that she would not undertake an engagement such as this litigation unless she would be able to charge a minimum of 33% and up to 40% of the recovery under circumstances where she would also be assured of receiving from any settlement or verdict at least the value of her time. *Id.* at 2. She further notes that she would expect the client to pay the litigation costs.

In addition to these affidavits, two of the attorneys who served as lead counsel in this case have also filed affidavits. Edward T. Joyce, of Joyce & Kubasiak, P.C., notes that representing plaintiffs in commercial litigation is difficult because the theories of liability are very complex and are often difficult to explain to a jury, both the fact and amount of damages are difficult to quantify and explain to juries, and the defendants are usually represented by experienced and well-qualified attorneys who raise every conceivable defense,

making prosecution of the case very expensive. Due to these factors, his firm does not customarily accept commercial contingent litigation unless the client is willing to pay a contingent fee of between 40% and 50%, and then only if the client is prepared to advance a substantial portion of the costs of pursuing the claim. Aff. of Edward T. Joyce, at 3. In support, Joyce has also submitted for our information a sample of sixteen contingent fee contracts that his firm has entered into with its clients for the prosecution of commercial litigation. Eleven of these contracts require the client to pay 50% of the gross recovery before reimbursement of costs and five require the client to pay 40% of the gross recovery before reimbursement of costs. It should be noted that one of these contracts specifies that the attorneys' fee shall be 33.33% of any settlement or 40% of any sum recovered through trial. Another specifies that attorneys' fees shall be 25% of any settlement if no complaint is filed in court. Two others specify that attorneys' fees shall be 33.33% if recovery is achieved before responsive pleadings are filed by the defendants.

Stephen B. Diamond, of Beeler, Schad & Diamond, describes in his affidavit the challenging nature of this case. He states that when he undertakes on a contingent fee basis cases (which are normally less difficult than the litigation at issue here), he requires both that the client pay costs on a regular basis and that they pay a 40% contingent fee. Aff. of Stephen B. Diamond, at 3. According to Diamond, the 40% is applied to the total recovery and does not permit any subtraction of costs before calculating the percentage.

In addition to the above-mentioned affidavits and contingent fee contracts, we received from one class member a copy of a letter sent to him by another of the class attorneys in this case—Herbert Beigel. This letter is particularly instructive on what fees attorneys comparable to those involved here normally charge for litigation such as that involved in this case. In the January 21, 1989 letter, Beigel offers, in the event that no class is certified by the court, to represent the class member individually for a contingent fee of 33.33% of any amount recovered, plus costs. We find this letter—an actual offer of representation by an attorney *in this case* to a plaintiff *in this case* regarding the specific facts of *this case*—to constitute much better evidence of what the market normally would pay for the services rendered in this case than the affidavits and contracts submitted by class counsel, most of which make no distinction between a settlement in which the risk of receiving no compensation is obviated and a trial.

In its discussion of the market approach, the Seventh Circuit was careful to note that in applying the market approach to fees, the court must also consider the nature of the recovery obtained for the class. In discussing the possible application of the ***1256** market approach to the case before it, the court specifically referred to the size of the recovery—\$45,000,000.00. *Continental Illinois Securities*, 962 F.2d at 572 (“This was a contingent fee suit that yielded a recovery for the ‘clients’ (the class members) of \$45 million.”). As noted above, we feel that this point cannot be over-emphasized: The results achieved for the class necessarily play an important role in determining what is a fair and reasonable fee for the attorneys who facilitated those results. We believe, given the size of the settlement fund obtained for the class in this case, that our award of \$2,900,000.00 in attorneys' fees is both fair and reasonable.

5. Conclusion

In accordance with the above discussion, we award attorneys' fees in the total amount of \$2,900,000.00. This award includes the fee award for legal work performed in this case as well as the hours spent administering the settlement fund. The award also covers any future fees expended in the remaining administration of the fund. As noted above, we have already made two interim awards of attorneys' fees and expenses. Our first award was for attorneys' fees in the amount of \$500,000.00 and for reimbursement of litigation expenses in the amount of \$250,000.00. Order, entered February 12, 1993. Our second interim award was for a total amount of \$1,000,000.00, with no specific designation made regarding what portion constituted fees and what portion constituted expenses. Order, entered June 17, 1993. We now clarify that the entire amount of the second interim award constituted an award of attorneys' fees, bringing the total interim award of fees to \$1,500,000.00. Accordingly, this amount already paid to class counsel must be deducted from the total award of fees, and we now award class counsel additional fees in the amount of \$1,400,000.00.

Ideally, allocation of the fee award is a private matter to be handled among class counsel. Herbert Newberg, *Attorney Fee Awards* § 2.16 (1986). Although class counsel have not submitted with their petition a negotiated allocation agreement, they have informed us that they have agreed among themselves upon a methodology to be used to distribute our award among the six firms involved in this case. Accordingly, we will not order a specific allocation of

our award among the firms. Should the firms require such an order, they have ten days in which to petition this court to make such an allocation.

III.

EXPENSES

Class counsel originally requested \$1,207,397.24 for expenses associated with this case (petitions of 1/15/93 and 5/10/93); upon revision, that total was reduced to \$1,197,553.77 (petition of 7/9/93). They then submitted a supplemental petition with an additional \$8,025.58 in case expenses and \$44,746.79 in administrative expenses, and a second administrative expense petition for \$5,072.00 (replacing part of their first administrative petition), for a grand total of \$1,253,848.14. The majority of this amount is requested to pay the fees of various experts which total \$817,264.88. We discuss each category in turn below, as the request was presented to us. In general, however, we have considered whether the category of expense should be part of general overhead, or is chargeable to the class in this case, and also whether the specific expenditures were reasonably necessary in this case.

A. Individual Firm Expenses

1. Long Distance Calls

Each firm submitted individual requests for payment of their phone bills. The total requested was \$5,734.74. We have allowed for long distance calls, but not for cellular calls. Cellular phones may be a convenience but they are not a necessity, and most of the cellular phone calls were local.

Beeler, Schad & Diamond: They have requested \$3,683.74, of which we have found valid receipts for \$2,690.03. We do not allow the 20% mark up that Beeler, Schad & Diamond apparently makes routinely.

Futterman & Howard: They requested \$194.03 and gave a general explanation of what long distance calls were made, *1257 but did not provide any documentation to support this request. No costs are allowed.

Beigel & Sandler: They requested \$1,331.07 and gave a general explanation of what long distance calls were made,

but did not provide any documentation to support this request. No costs are allowed.

Cohen, Milstein, Hausfeld & Toll: They requested \$206.02, but did not provide any documentation to support this request. No costs are allowed.

Fishman & Merrick: They requested \$50.28 and gave a general explanation of what long distance calls were made, but did not provide any documentation to support this request. No costs are allowed.

Joyce & Kubasiak: They requested \$269.60, and we found \$106.86 in valid bills.

2. Facsimile

Law firms are responsible for assuming some expenses as part of overhead, and we find this to be one of them.¹ This is not even a close question to the extent that firms charge not only for sending a fax (which could include long distance phone charges) but also for receiving a fax. Overall, however, we consider the fax to be a modern day messenger, part of common office expenditures, and assignable to overhead. The firms requested a total of \$9,611.54 which is denied.

3. Messenger

As with some other requested costs, or things like secretarial services, we find that the payment of messengers to deliver documents is part of general overhead. While the details are unimportant since this category will not be included, we note in passing that several firms submitted “charges” based on sending their own messengers on deliveries, and that these charges often exceeded that of the commercial firm's receipts that we examined. Law firms have no right to make a profit off of incidental activities such as delivering documents. This request for a total of \$2,585.98 is denied.

4. Air Express

While ordinary postage can be expected to be included in overhead, we do find it reasonable to reimburse the firms for their express mail costs, particularly given the volume of materials that needed to be exchanged with their expert in

New York City and the material that was subpoenaed from trading firms nationwide.

Beeler, Schad & Diamond requested \$1,414.76, however we found valid receipts for only \$1,334.26 which is allowed.

Beigel & Sandler requested \$514.57, however their documentation does not indicate which of many Fed Ex charges were incurred in this case as opposed to others. Nothing is allowed.

Joyce & Kubasiak requested \$257.87, and we found valid receipts for \$189.52.

5. Court Fees/Costs

Beeler, Schad & Diamond has (upon revision) requested \$57.00 for filing an appearance. However, having checked the fee schedule adopted by the Judicial Conference and confirmed with the office of the clerk for the Northern District of Illinois, we find that while a fee is charged for filing a complaint, no such fee is charged for filing an appearance in a case. The receipt provided is a petty cash receipt, with no evidence that the funds requested were paid to the U.S. District Court. This request is not allowed.

***1258** *Futterman & Howard* has requested \$120.00 for filing a complaint which is allowed.

Beigel & Sandler has requested \$222.50; however, only \$120.00 is documented and allowed.

Cohen, Milstein, Hausfeld & Toll has requested \$20.00, but there is no documentation and no costs are allowed.

Fishman & Merrick has requested \$240.00; however, only \$120.00 is documented and allowed.

Joyce & Kubasiak has requested \$198.50. We have found \$31.50 in valid expenses. Their request to charge the class \$3.00 per month as an “internal docketing fee” is not allowed. The expense of keeping track of filings and deadlines and other activities of the docketing department of the firm are part of overhead, not an out-of-pocket expense that can be charged to the class.

6. Court Hearing Transcripts

While local court rule 45B explicitly applies only to costs awarded the prevailing party under [Fed.R.Civ.Pro. 54\(d\)](#), we believe it is a good guide of what constitutes reasonable costs. Although class counsel suggest that Rule 45B applies only to court hearings, and not to deposition transcripts, the text of the rule specifically mentions depositions. See also [EEOC v. Sears, 1987 WL 11642 \(N.D.Ill. May 27, 1987\)](#). Accordingly, we have reduced the amount requested to pay court reporter fees to comply with the maximum rates established by the Judicial Conference both here and with deposition transcripts below. The Judicial Conference rate does not allow charges for attendance fees, and those have been cut. Finally, while the Judicial Conference instructs reporters that may charge *their* actual cost for a computer diskette copy (i.e., a few dollars at most), that does not mean, as class counsel argue, that class counsel is entitled to be reimbursed for what they actually paid (\$30–35).

Beeler, Schad & Diamond: The request is for \$2,189.84, and under the maximum allowable rates, \$1,705.50 is permissible. However, local rule 45B allows for costs of transcripts to be taxed only if the transcript was “necessarily obtained” for use in the case. The transcripts requested here include 36 different status hearings and motion calls over more than four years—almost every one that was held. Several status conferences involved no discussion of substance for which a transcript was necessary (although it may have been convenient). A search of notes from September 1991 through settlement of this case in December 1992 revealed at least three court dates for which transcripts were not necessary. Extrapolating this over the course of the litigation, we believe that at least nine of the 36 transcripts were unnecessary, or 25%. However, because the transcripts from those days would also be shorter, we have actually only reduced the award by 20%. Thus, the total amount awarded for court hearing transcripts is \$1,364.40.

Joyce & Kubasiak: For the reasons discussed above, their request for \$88.00 is reduced to \$66.00.

7. Service of Process

Beeler, Schad & Diamond: This request for \$665.00 to serve deposition subpoenas on 17 people and make attempts on three is reasonable, and is allowed in full.

Joyce & Kubasiak: This request is for \$5,933.00 that was paid to Special Process Service Company. This cost is reasonably necessary, and is allowed in full.

8. Deposition Transcripts

The same rules were applied to the rates allowed to court reporters for depositions as for court hearings, and the corresponding reductions were made.

Beeler, Schad & Diamond: \$3,562.50 is requested; \$2,273.75 is allowed.

Futterman & Howard: \$442.00 is requested; \$150.75 is allowed.

Cohen, Milstein, Hausfeld & Toll: \$171.25 is requested; \$81.00 is allowed.

Joyce & Kubasiak: \$2,807.85 is requested; \$785.25 is allowed.

9. Witness Address Search Fees

Beeler, Schad & Diamond: The total revised request of \$357.98 is allowed.

***1259** *Joyce & Kubasiak*: The request is for \$4,469.50 owed to Checkmate Consulting, Financial and Investigation Specialists. This amount is reasonable and allowable.

10. Class Notice Publication and Mailing

Beeler, Schad & Diamond: This request for \$2,026.09 is allowed in full.

11. Subpoena Fees/Witness Fees

Cohen, Milstein, Hausfeld & Toll: Their request for \$45.00 is allowed.

Joyce & Kubasiak: This request is for payment of witness fees under 28 U.S.C. § 1821. Their revised request for \$2,430.51 is approved.

12. Expert Witness—Office Expenses

Beeler, Schad & Diamond is requesting \$36,000.00 for space within their offices that was occupied by experts for this case. They argue that they could have earned that much in rents from other tenants if the experts were not there, and that it was essential for the experts to be there. We find this expense no more entitled to reimbursement than the rent on the offices occupied by the lawyers involved in this case.

13. Expert Witnesses—Other Consultants

Beeler, Schad & Diamond: They have requested a revised total of \$638.74 for payments made to a market analyst who reviewed a report and to an anonymous market maker who gave them a great deal of background information. This request is approved.

Futterman & Howard requests \$1,425.85 for their share of the payment to the market maker mentioned above. This is approved.

Beigel & Sandler has withdrawn their undocumented request.

Cohen, Milstein, Hausfeld & Toll requested \$541.41, their share of payments made to the market maker. This is allowed.

14. Expert Witnesses—Harrigan

Joyce & Kubasiak: This request is for \$13,929.00, representing 184 hours at an hourly rate of \$75.00, and \$129.00 in expenses. His rate was reasonable. His hours, however, were not reasonable. His second invoice shows several two-hour trips to pick up documents, lots of meetings, and extensive reviewing of documents. While his expertise may have been useful, most of his hours seem wasteful (the time spent picking up documents—messenger services are much cheaper) or excessive (the number of hours reviewing CBOE rules and prospectus—this court did not begin with Harrigan's professed expertise and was able to read and understand the documents in less time than he spent). Thus, the number of allowable, reasonably necessary hours we find out of 132 is 48. Out of the first 52 hours, we allow 29.5. The total number of hours allowed is 77.5, for a total of \$5,812.50, plus expenses, giving a grand total of \$5,941.50.

15. Demonstrative Evidence

Joyce & Kubasiak: They have requested \$7,920.00 for 24 trial exhibits that were completed before settlement (although not enlarged and mounted, saving \$170.00 per) at \$330.00 each. These exhibits used graphics to explain how the options trading pit functioned. This expense is allowable.

16. Computer Support

Beeler, Schad & Diamond: They have requested \$33,763.10 for hardware and software (excluding items that they are now using for other projects). As with desks and chairs, legal pads and typewriters used by the firm and its employees, we believe that these costs are part of the overhead for running a firm. Even if they required more computers to work on this case than they will be using in the future to work on others, the computers are perfectly usable office equipment. Even if the equipment provides more computer power than is necessary for word processing and other common tasks, the firms may very well take on other cases involving large amounts of data—other securities cases, anti-trust cases, many types of cases would require such computing power. If they truly believe that they will not be using some of this equipment in the future, they can sell it in the used computer market. While they argue that computer equipment has a very short life span, this opinion is being drafted on a computer that is four years old and will undoubtedly be serviceable *1260 for a few years more. It may not be the cutting edge, but the cutting edge is not always, or often, “reasonably necessary.” We find no basis to allow any of these requested costs.

17. Conference Expenses

Beeler, Schad & Diamond: This request is for \$1,529.08. While it is called “conference expenses,” this really consists of petty cash receipts for meals. While the lawyers may have discussed the case while eating these meals, they are not reasonably necessary expenses that are so connected with the case that the class should pay for them out of the settlement fund. The meals would have been eaten regardless of whether there was a pending case or not.

18. Photocopy Costs

The firms' requests for photocopy costs consist primarily of copies that they have made themselves, and they ask to be reimbursed at \$.20 to \$.25 per page for these copies. We do not believe that firms are entitled to run their photocopy operations as profit centers, and we do not believe that the charged rates reflect the actual costs to the firms.² In fact, in their supporting memorandum of May 10, 1993, they indicated that they set their charges based on what other firms were charging—the market as they saw it, not just the actual cost of the copying. If their actual costs are that high, they should not be doing the copies themselves, they should bring the work to a copy shop that can charge a more reasonable rate. After checking rates at local copy shops, we have decided that it will be generous enough to allow the firms \$.10 per page for in-house copies.³ Furthermore, while we have not examined all of the documents that were copied to determine if making each copy was “reasonably necessary,” we are well aware that many copies are made out of convenience and not necessity. Based on our experience with complex litigation and bills of costs, we have cut the number of copies requested by half, and allowed that number at \$.10/page.

Beeler, Schad & Diamond: Their request totalled \$62,245.21. This included 299,909 in-house copies and \$2,243.79 in outside copies. From the receipts for outside copies we allow \$1,942.56.⁴ The claimed in house copies were documented and then some—we found 300,209 copies, and we will work from that figure since we made cuts elsewhere when we did not find acceptable documentation. As described above we will therefore allow 150,105 copies, for \$15,010.50 in-house. The total allowed is thus \$16,953.06.

Futerman & Howard: Their request is for \$2,112.64. This includes 8,491 copies, some billed at \$.20 and some at \$.22. We will allow 4,246 copies at \$.10, for a total of \$424.60. Their outside copy costs of \$368.50 are allowed. Thus, the total allowed is \$793.10.

Beigel & Sandler has requested \$6,825.92, including \$11.00 in outside copying, and has documented 20,661 internal copies. We will allow 10,331 copies, for a total of \$1,033.10 internal and a grand total of \$1,044.10.

Cohen, Milstein, Hausfeld & Toll has requested \$1,687.74, but no supporting documents were submitted, and no costs are awarded to them.

Fishman & Merrick: They have requested \$1,019.05. Their outside copy receipts of \$32.35 are allowed. They have

reported 4,654 copies in-house, from which we will allow 2,327 copies, or \$232.70. The total for photocopies is thus \$265.05.

***1261** *Joyce & Kubasiak*: They have requested \$16,353.95. Their outside copying of \$456.10 is allowed. Their request also includes 66,090 in house copies. We will allow 33,045 copies or \$3,304.50 in house. The total allowed is \$3,760.60.

19. Printing & Binding

Beeler, Schad & Diamond: They have requested \$779.92. While ordinarily printing documents is part of overhead, Beeler, Schad & Diamond has requested reimbursement for special paper and ink cartridges which they purchased in order to do color graphs. The cost of outside production of these graphs would have exceeded the amount of their request. To the extent that the receipts show that they were for such special supplies, we will allow the request; however petty cash receipts which simply state "supplies" are insufficient. We will allow \$272.51.

Joyce & Kubasiak: This request is for \$996.00 from internal charges. When the firm binds large documents, they charge \$3.00 per 50 pages. However, Kinko's Copy Shop will do the same at \$3.95 for any document up to 300 pages. Thus, they could have fulfilled the binding needs noted on the submitted documents for only \$213.30.

20. Staff Overtime Expenses

Beeler, Schad & Diamond: They have requested \$365.72 for petty cash disbursements to their employees for meals eaten when working on overtime. While Beeler, Schad & Diamond may choose to compensate their employees in this fashion, this is not an expense that the class need reimburse them for.

Joyce & Kubasiak: They have requested \$2,501.14 for overtime pay, but their documentation shows only the number of hours worked, not the amounts paid to the people who reported overtime. This does not matter, however, because, as with all clerical salaries, this is part of overhead.

21. Books & Publications

Beeler, Schad & Diamond: They have asked for \$1,163.83. From the documentation provided, we find \$427.49 to be allowable. We do not allow for the purchase of books that are of more general use, including for instance instructional manuals for their computer software.

Fishman & Merrick: They have requested \$43.15, which is approved.

Joyce & Kubasiak: This request for \$892.79 is not completely documented, but we do find \$243.90 in allowable purchases. We will not require the class to pay for a copy of *The Chicago Manual of Style* or other books that were not targeted very specifically towards the needs of this case.

22. Computerized Legal Research

Although in years past we have been more skeptical of Lexis and Westlaw charges, computerized legal research has become an integral and necessary part of a good law practice. Furthermore, their speed of searching makes their use efficient because they save hours of attorney time that would otherwise be charged to the class. Finally, the Seventh Circuit has held that it is error to exclude this category of costs. *In Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, 570 (7th Cir.1992). However, because there is virtually inescapable waste from an occasional mis-worded search or repeated request, we have discounted the requested amounts by 25%.

Beeler, Schad & Diamond: They have requested \$15,202.99, the documentation supports charges of \$11,621.01, and as explained above, we will allow \$8,715.76. We consider the \$20.00 subscriber fee to be part of overhead, and the random allocation of the entire month's tax bill to this case on some months and no tax charges on other months is not allowable.⁵

Futerman & Howard requests \$1,550.66; we allow \$1,163.00.

***1262** *Beigel & Sandler* requests \$780.42, and we find documentation for \$286.86. Therefore, we allow \$215.15.

Cohen, Milstein, Hausfeld & Toll requests \$1,239.69, with documentation showing \$1,062.37. We will allow a total of \$796.78.

Fishman & Merrick 's request was undocumented and withdrawn.

Joyce & Kubasiak: Their revised request is for \$8,320.47. We find some of their documentation unacceptable: they submitted Westlaw printouts showing the time used with handwritten notes indicating the dollar amount they would like to be reimbursed for, they also submitted actual Westlaw bills showing searches billed for, and, where there was a match between the bills and the individual receipts, the individual receipts were often marked up significantly from the cost shown on the Westlaw bill. Thus, we will only consider crediting the searches shown on the actual Westlaw bills. These total \$6,320.01, and we will therefore allow \$4,740.01.

23. Letter of Credit Fees

Beeler, Schad & Diamond: They have requested \$2,299.32. However, we believe that their cash flow problems, which made Blin fearful that he would not be paid, are their responsibility, and resulting additional expenses may not thereby be charged to the class.

Joyce & Kubasiak: The same reason requires that we deny this request for \$2,468.75.

24. Travel

Beeler, Schad & Diamond: Their total request is for \$4,582.72. A good portion of this request is supported by petty cash receipts for cab fare, tolls or parking for trips to the library, to make deliveries, to home after working late, or into the office on a Saturday. We will not award any of these expenses; the travel requested is part of the daily life of a law firm, not an unusual out-of-pocket expense. We have particular problems with a few receipts which claim trips to the Daley Center for status hearings or for motions.⁶ None of the status hearings in this case were held at the Daley Center. We recognize that with the number of receipts included and the size of this request, perfection is impossible, and there were several other receipts for trips to the Daley Center to do research for this case, which counsel understandably requested reimbursement for. However, the inclusion of charges that so clearly are not the responsibility of the class in this case (even after this specific problem was

mentioned) calms any concern we might have that we are erring on the side of underinclusion.

There are allowable travel expenses due to depositions, however. We will allow \$1,442.39.

Futterman & Howard: They have requested \$1,225.18. A sizable percentage is for cab fare and other expenses disallowed above. They do, however, have reimbursable travel expenses for a deposition, totalling \$810.68.

Beigel & Sandler: They have requested \$3,633.33; again much of it is disallowed. The \$838.28 which covered Myles Spicer's travel expenses due to his deposition is allowed, however.

Cohen, Milstein, Hausfeld & Toll: They have requested \$1,330.81. As above, most of this is not allowed; however \$562.00 for airfare is allowable.

Fishman & Merrick: They have requested \$705.50. Again the routine use of cabs is not an allowable expense. The main charge was \$669.00 for three to travel between Chicago and Grand Rapids by plane, to meet with one of the class representatives. We do not mean to pick nits, but the same trip by train would only cost \$154.00 for three people, and only take a couple of hours more. As with copy costs and other expenses, counsel have a duty to the class to do things in an economical, cost-efficient fashion. We will allow \$154.00 in travel costs.

Joyce & Kubasiak: They have requested \$6,563.34. Again much is disallowed; however, there were legitimate travel expenses relating *1263 to depositions or meetings with their expert. We find \$3,334.31 allowable.

25. Miscellaneous

While some of the ledger entries submitted in support of these requests are not particularly legible, we are informed that most of the requests (totalling \$5,329.52 for all firms) are for "working lunches" or other meals. As discussed above, such expenses will not be allowed.

Beeler, Schad & Diamond also requests reimbursement for \$576.00 they spent for special ventilation in their offices so that they could work in the days after the Great Chicago Flood. While we recognize that they faced difficulties in

using their offices at the time of the flood, and appreciate their perseverance in working through it, this expense was not made necessary by this case. It is part of general overhead. Beeler, Schad also deleted a request accidentally included in photocopying and asked that it be considered under miscellaneous. While a bottle of wine from Marshall Fields is indeed miscellaneous, it is not chargeable to the class. Apparently the wine was a gift for Mr. Blin. We believe that the nearly \$400,000.00 paid to Blin was sufficient compensation for his efforts in this case.

Joyce & Kubasiak requests reimbursement for the cost of transferring and copying promotional videotapes used by the CBOE. One set of these films was submitted to the court, and other copies were to be shown to the jury. This expenditure, totalling \$403.00, is allowed.

26. Postage

Requests for postage costs total \$2,525.83. However, where postage was necessary for a large and non-routine item, such as mailing notice to the class, it has already been included. In addition, none of the requests were completely substantiated. No costs are allowed in this category.

B. Shared Expenses

1. Court hearing transcripts

This request was reduced in accordance with local rule 45B, as discussed with individual expenses above. The revised request is for \$90.00, we allow \$54.00.

2. Deposition transcripts

They have submitted a revised request of \$51,352.59; however, only \$46,335.31 actually appears from the receipts to be for deposition transcripts. The costs for transcripts have been reduced as above, to a total of \$34,079.25. The remaining receipts are for other deposition expenses. Fed ex bills, totalling \$1,286.75, are allowed as air express was above. Class counsel also requests reimbursement of photocopying performed in connection with depositions, but for convenience we will consider that request, together with all of the other shared photocopy costs, below. Thus, the total allowed in this category is \$35,366.00.

3. Witness address search

This request for \$247.80 is allowed.

4. Class notice mailing

This request is for \$11,748.98. Postage of \$837.10 and a newspaper ad of \$5,209.68 are allowed for a total of \$6,046.78. The cost of envelopes for the mailing are not allowed. Class counsel also requests reimbursement of photocopying performed in connection with the notice, but for convenience we will consider that request, together with all of the other shared photocopy costs, below.

5. Subpoena fees

They have requested \$8,342.76. The fees charged by the U.S. District Court for serving subpoenas are allowed. The charges by various trading firms for costs of responding to subpoenas must also be allowed (although we do note that it was rather outrageous of firms to charge up to \$1 per page for documents copied). The travel expenses relating to the Whaley deposition are also allowed. The total allowed is \$4,474.60. Class counsel also requests reimbursement of photocopying performed in connection with this category, but for convenience we will consider that request, together with all of the other shared photocopy costs, below.

*1264 6. Expert fees: Goldberg

Mr. Goldberg was the computer expert in this case. He did a great deal of programming and data manipulation. He made accessible the voluminous trade data that was central to this case. His charge was \$65.00 per hour, which is reasonable, and his hours, while high, are not out of bounds. The total requested—\$221,679.25—is approved.

7. Expert fees: Grief

Mr. Grief was the plaintiffs' expert on the market and its operations. He worked closely with Mr. Goldberg in sorting out the trade data and with the attorneys in explaining what

happened. The contract with Grief provided for \$225.00 per day regardless of the number of hours worked. This resulted in a bargain on some days when many hours were worked, and a windfall to Mr. Grief on short days. Class counsel assure us that he worked many hours and that this rate in fact was a bargain. The total requested is \$189,621.46, which is approved.

8. Expert witness fees: Blin

John Blin was plaintiffs' expert witness for trial. It was his theory and testimony that would have been the linchpin of plaintiffs' proof of liability. Without Blin there would have been no case. Although his rate, \$400.00 per hour, is high, class counsel have detailed their extensive and nearly fruitless efforts in attempting to get someone expert in this field to testify against an exchange. The total revised request is for \$389,429.17. This includes 926 hours of work, for \$370,400, \$7,336.14 for expenses paid by Blin, and \$11,693.03 in expenses paid by class counsel for Blin's travel between Chicago and New York. This expense, \$389,429.17, is approved.

9. Demonstrative evidence

Upon revision, the items here were relocated elsewhere and there is currently no request in this category.

10. Computer support

They have requested \$9,306.40. We will allow \$4,805 for getting data in computer format, use of some rented software and conversion of data formats, but we deny the expenditures for computer equipment and software, as we did with individual expenses above.

11. Photocopy

They have requested \$11,532.72. This revised request includes \$918.80 for external copying. The external receipts include several duplicates, and we find only \$176.80 in allowable costs. The in-house copying, including amounts originally split between depositions, subpoenas, class notice, and this category is based on logs of copies made in June–

August 1990 and March–April 1992.⁷ The total recorded in those receipts is \$18,576.27, or 92,881 copies. As we did with individual copy costs, we will allow 46,441 copies for \$4,644.10. The total allowed in this category is therefore \$4,820.90.

12. Printing & binding

This revised request for \$1,239.25 is allowed (although it seems to be for copying and binding).

13. Books & publications

They have requested a revised total of \$911.01, of which \$68.80 is allowable. As with individual costs above, we have not allowed for the cost of computer manuals or software or books that are more generally usable to be included in costs chargeable to this case.

14. Computerized legal research

They have requested \$6,284.02, of which \$5,866.14 is documented. As noted above, we would therefore allow \$4,399.61. As with the individual cost, we are not allowing for subscription fees, or taxes that are not individually allocated to this case.

***1265** *C. Additional Case Expenses* (petition of 6/9/93)
Beeler, Schad & Diamond have requested an additional \$8,025.58 in expenses incurred preceding settlement of this case, which they were not billed for until after they filed their initial petition for fees and costs.

1. Computer research

They have requested \$1,326.35 for Lexis and \$207.48 for Dow Jones News Retrieval. Following the same procedures as above, a total of \$941.12 is approved.

2. Data tapes

The request for \$333.00 is approved.

3. Expert fees: computer

They have requested an additional \$6,158.75 for fees paid to Mr. Goldberg for additional computer work. This request is approved for \$5,866.25. We have disallowed reimbursement for 4.5 hours on December 2, 1992 because the work described is for general operation of the firm, and is not specific to this case. We quote: "Install WordPerfect and WordPerfect Office programs on IDS computer for use with CBOE case. Demo system for Gene Beeler. Test fax capabilities. Configure IDS computer." Regardless of what case this particular computer was used to work on, law firms are expected to install WordPerfect or their other word processing programs at their own expense, not at clients.

D. Administrative Expenses (petition of 6/9/93)

Beeler, Schad & Diamond also made expenditures in administering the settlement. They have requested an additional reimbursement of \$44,746.79, plus advance payment on anticipated expenditures of \$1,550 for a total of \$46,296.79.

1. Address Searches

This request for \$10,461.00 is approved. This includes \$1,659.00 for obtaining forwarding address information from the US Postmaster, and \$8,802.00 for a search firm to track down class members.

2. Postage

They have requested \$1,175.68 for postage, of which \$1,173.34 is granted. (The petty cash receipt for routine postage was excluded and a transcription error was corrected, leaving the allowed total.)

3. Computer programming: Goldberg

They have requested \$28,892.50 for 444.5 hours of computer programming. We allow all of this cost except for \$32.50 for work relating to a press release (12/23/92). A total of \$28,860 is approved.

4. Photocopying

We approve the \$100.50 requested for outside photocopying. The in-house request totalled \$2,457.60, which we reduced, as above, to \$614.60. The total allowed is thus \$715.10.

5. Long distance phone calls

The total requested was \$909.50, and we were able to verify and allow \$431.65 (excluding mobile phone costs and markups, as discussed above).

6. Federal Express

The request for \$68.00 is allowed.

7. Court hearing transcripts

The \$66.00 for a paper transcript is approved, the \$35.00 for the disk is denied.

8. Lexis

This request for \$325.18 (we believe it is really for \$352.18) is not allowed. The administration of the settlement should not have entailed any further legal research—at least nothing so complex that use of Lexis was required.

9. Miscellaneous

The requests for fax costs, parking, messenger services, and envelopes are denied for the reasons discussed above.

E. Additional Administrative Expenses (petition of 7/19/93)

In their petition of June 9, 1993 class counsel requested \$1,550.00 for costs projected through June 30, 1993. They have now replaced that request with one for \$3,499.00 for costs documented through July 15, 1993 *1266 and an additional \$1,573.00 for costs projected through July 30, 1993.

1. Search fees

They have requested \$23.00 for tracking down a class member who moved without a forwarding address. This is allowed.

2. Messenger and Federal Express

As above, we will not allow for local messenger deliveries; however, we will reimburse for \$121.00 of Federal Express charges.

3. Telephone

As above, we will not allow mobile phone calls to be billed to the class; however, we will allow \$89.20 in documented long distance costs.

4. Computer programming

They have requested an additional \$1,088.75 for work done by their computer expert which is allowed.

5. Court hearing transcripts

They have requested \$620.00, including expedited rates. They did not request permission in advance, as the rules require; thus we will allow only the regular rates, for a total of \$393.00.

Firm

Beeler, Schad & Diamond

Futterman & Howard

Beigel & Sandler

Cohen, Milstein, Hausfeld & Toll

Fishman & Merrick

Joyce & Kubasiak

Shared Costs

6. Photocopying

They have requested \$1,387.00 for in house copying of 6,935 copies. As above we will allow half the copies at \$.10/page, or \$346.70. They have also requested reimbursement for two petty cash copy jobs. The \$3.25 for copying docket sheets is allowed. The \$3.15 charge for copying the Judicial Conference chapter on court reporter transcript fees is not allowed. First, it does not relate to case administration but to preparation of the fee petition, which is not chargeable to the class. Second, this court, when requested, gave a free copy of the relevant pages to class counsel. They have no business asking to be paid for making another one. The total allowed in this category is \$349.95.

7. Fax

As above, these costs will not be allowed.

8. Anticipated future costs

As noted above, class counsel have requested \$1,573.00 for anticipated future expenses. We will not award any future costs without seeing specific documentation. However, we recognize that there may be legitimate expenses in the future. When documentation of specific expenses can be provided, we will allow up to \$1,573.00 from the reserve fund discussed below.

F. Summary

Costs

\$39,161.46

\$ 4,463.38

\$ 2,217.53

\$ 2,026.19

\$ 582.20

\$40,568.76

\$862,252.62

Additional Costs	\$ 7,140.37
Administrative Costs	\$ 41,775.09
Additional Administrative	\$ 2,064.90
TOTAL	\$1,002,252.50

IV.

INCENTIVE AWARDS

Plaintiffs have submitted a petition in support of an incentive award of \$10,000.00 to each of the three class representatives—Myles M. Spicer, John A. Brittain, and David W. Schut. In considering this petition, we have reviewed the following factors: (1) the actions taken by the class representatives to protect the interests of class members and others; (2) whether those actions resulted in substantial benefit to the class members; and (3) the amount of time and effort spent by the class representatives in pursuing the litigation. We grant these awards for the services provided by these representative plaintiffs in pursuing the claims on behalf of the class. Each representative suffered substantial losses, ranging from \$57,000.00 to \$102,000.00. These representatives were the only members among 3,000 investors who stepped forward to press this case, and each invested much time and energy to achieve the results obtained.

Each of the three representative plaintiffs provided substantial service for the benefit of the class. They each believed that something very wrong occurred in the OEX pit at CBOE on October 20, 1987. Each complained *1267 immediately to CBOE about the prices they had received on their trades and began their own investigations concerning the events of the day. Upon receiving no meaningful response from CBOE, each sought out counsel to pursue the claims that they felt they had against CBOE and the OEX market-makers.

Each representative plaintiff monitored the case by analyzing key pleadings, legal memoranda and our opinions, and providing their reactions to class counsel. As discovery progressed, class counsel discussed with them the information and solicited ideas about additional information to pursue based on inconsistencies and other defects in the information obtained. Each sat for two depositions. Each reviewed voluminous material in preparation for the December 1992

settlement conference. Each was preparing his testimony for trial when the case finally settled.

Each of the class representatives devoted time and effort over the last four and a half years to the development of this case. Spicer assisted in bringing the first suit by providing extensive materials that he had prepared for a related arbitration case, including charts based on historical pricing data to illustrate appropriate prices for his October 20 trades. *See* Aff. of Myles M. Spicer, at 2–3. Brittain obtained CBOE's October 20 Times and Sales Reports and analyzed them for inaccuracies in CBOE's reported trade volumes and prices. He also analyzed these reports to illustrate the impact October 20 trades had upon investors who used traditional options investment strategies. *See* Aff. of John A. Brittain, at 2–4. Schut explained normal options pricing patterns and relationships, provided an introduction to traditional options investment strategies, and explained in a general way CBOE's floor operations. According to class counsel, he provided a common sense explanation of the prices on October 20, which buttressed Brittain's work. He helped class counsel to identify members of the class by explaining the workings and interrelationships of clearing firms and introducing brokerage firms, and by identifying the different types of records ordinarily prepared and retained by each which would help to locate class members. *See* Aff. of David W. Schut, at 2–3.

The Seventh Circuit has recently recognized that, in appropriate cases, class representatives may be entitled to incentive awards. While affirming the district court's denial of an incentive award to the class representative for his “admittedly modest services” in *In Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, 571 (7th Cir.1992), the court nonetheless observed that “[s]ince without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses....” Courts have recognized the importance of incentive awards for class representatives in many cases. *See, e.g., Hammond v. Hendrickson*, No. 85 C 9829 (Aspen, J.) (N.D.Ill. Nov. 20, 1992) (court granted representative plaintiff in a securities

class action an incentive award in the amount of \$5,000.00); *In re Petro–Lewis Broker–Dealer Litigation*, C.A. No. 1–85–cv–172–RLV (N.D.Ga.1990) (court approved award of one half of out-of-pocket losses totalling \$150,122.80 in lieu of pro rata share to fifteen class plaintiffs); *Squitieri v. Gould, et al.*, Civ. 89–6832 (E.D.Pa.1991) (order entered Mar. 31, 1991, awarding \$17,500.00 to representative plaintiff); *In re Windmere Securities Litigation*, Civ. 90–0185 (S.D.Fla. April 8, 1992) (court approved incentive awards of \$2,500.00 to each representative plaintiff in securities litigation); *In re Dun & Bradstreet Credit Services Customer Litigation*, 130 F.R.D. 366 (S.D.Ohio 1990) (court approved two incentive awards of \$55,000.00 and three of \$35,000.00 to five representative plaintiffs); *In re SmithKline Beckman Corp. Securities Litigation*, 751 F.Supp. 525 (E.D.Pa.1990) (court approved award of \$5,000.00 to each of several representative plaintiffs); *In re First Jersey Securities, Inc. Litigation*, MDL No. 681, 1989 WL 69901 (E.D.Pa. June 23, 1989) (court approved award of \$24,000.00 to representative plaintiff); *Golden v. Shulman*, [1988–89 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 94,060, 1988 WL 144718 (E.D.N.Y.1988) (court approved award of \$5,000.00 to representative *1268 plaintiff in securities class action); *CBS, Inc. v. Paley*, No. 86 Civ 9140 (JMC) (S.D.N.Y.1990) (court approved payment of \$15,000.00 to derivative plaintiff who initiated litigation on behalf of company); *Franklin Container Corp. v. International Paper Co.*, No. 77–3204 (E.D.Pa.1987) (court awarded \$100,000.00 to each of two named plaintiffs in an antitrust case); *Bogosian v. Gulf Oil Corp.*, 621 F.Supp. 27 (E.D.Pa.1985) (court approved an award of \$20,000.00 to each of two representative plaintiffs in antitrust case); *In re Ashland Oil Spill Litigation*, Master File No. M–14670 (W. D.Pa.1990) (court approved 45 awards of \$2,500.00 each to plaintiffs in class action); *In re Broadview Savings Bank Securities Litigation*, No. C86–3522 (N.D.Ohio 1988) (court approved an award of \$10,000.00 to representative plaintiff); *McGuinness v. Parnes*, No. 87–2728–LFO, 1989 WL 29814 (D.D.C.1989) (court approved an award of \$1,500.00 to each of representative plaintiffs in securities class action); *Daniel v. Local 705*, No. 74 C 2865 (Moran, J.) (N.D.Ill. Oct. 7, 1987) (court approved an award of \$25,000.00 to survivor of lead plaintiff for significant reforms accomplished for pension participants); *Basile v. Merrill Lynch, P.F. & S.*, 640 F.Supp. 697, 702 (S.D.Ohio 1986) (court awarded \$948,000.00 separate cash award for representative plaintiffs and intervening plaintiffs from a \$12.6 million settlement fund); *Cruden v. Bank of New York*, [1992 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,471

(S.D.N.Y.1991) (court approved an award of \$7,500.00 to representative plaintiffs).

As noted above, the class representatives in this case made substantial contributions to the development of the case. Because each of the three representative plaintiffs provided valuable services which benefitted the class as a whole, the plaintiffs' petition for an incentive award of \$10,000.00 each for named plaintiffs Spicer, Brittain, and Schut is granted.

V.

DISTRIBUTION OF THE SETTLEMENT FUND

In response to information received from potential claimants in this case, class counsel attempted to verify all claimants' trades in order to identify precisely the class and the exact amount of each class member's claim. On April 30, 1993, they issued a Notice of Claim Determination to all claimants whose claims they disputed in whole or in part. On May 13, 1993, class counsel issued a Revised Claim Determination Notice to claimants who provided additional information sufficient to justify modifying their original claim determination notice, and to claimants affected by resolving the "limit order" trades. Class counsel additionally modified claim determinations for those claimants who had lagged in providing information that we had directed concerning arbitration awards or settlements attributable to October 20, 1987 OEX rotation trades.

In total, 36 claimants formally objected to their claim determinations, as calculated by class counsel. Written objections and class counsel's responses to those objections were filed with this court in early June 1993. On June 10, 1993, we held a hearing at which we considered all objections. The objections fell into six main categories: (1) late claims; (2) non-October 20, 1987 trades; (3) non-CBOE Matched Trades computer file trades; (4) free trading trades; (5) arbitration offsets; and (6) miscellaneous objections.

In the first category, one claimant objected who failed to submit a claim before the extended bar date. In the second category, five claimants objected, arguing that class counsel disallowed one or more of their trades which occurred on days other than October 20, 1987. In the third category, nine claimants objected that class counsel disallowed one or more of their trades which did not appear in the CBOE Matched Trades computer file of October 20, 1987 OEX trades. In the fourth category, seven claimants objected

that class counsel disallowed one or more of their October 20, 1987 trades which occurred during free trading. In the fifth category, eight claimants who earlier recouped through arbitration or settlement part of their losses objected to class counsel's allocation of their arbitration awards or settlements attributable to October 20, 1987 OEX rotation trades. In the last category, ***1269** five claimants with six claims objected for miscellaneous reasons. Two claimants objected that class counsel classified trades as "inconclusive". One claimant with two claims expressed confusion and asked for an explanation of the damage calculation. Another claimant objected, arguing that class counsel disallowed limit order trades. Finally, another claimant whose trades were allowed objected because he felt that a greater recovery was in order.

We ruled on all the objections shortly after the hearing. Order, entered June 15, 1993. In our June 15, 1993 order, we ruled on most of the objections and directed class counsel to examine further the complaints of eight objectors. On June 18, 1993, we ruled on these eight objections in our Final Judgment Order. Final Judgment Order, entered June 18, 1993. In our final order, we identified all 521 class members and the amounts of their respective claims. We also calculated the total damage claim for all 521 class members, which amounts to \$24,691,297.63. In our final judgment order, we directed that "[t]o determine the amount each Class Member receives, Class Counsel shall calculate the percent each Class Member's claim amount bears to the total damage claim amount, then apply that percentage to the amount of the settlement fund the Court awards the Class." Final Judgment Order, at 3.

At this time, we order that class counsel distribute (after appropriate payments or deductions are made for (1) our total award of attorneys' fees in the amount of \$2,900,000.00; (2) our award of costs in the amount of \$1,002,252.50; (3) our reserved funds in the amount of \$40,000.00 plus all interest earned after July 1, 1993, (which we anticipate to be approximately \$30,792.00) for future contingencies; and (4) our grant of an incentive award to the representative plaintiffs in the total amount of \$30,000.00) the remaining settlement fund plus interest earned through July 1, 1993, to the 521 class members in the manner described above. We note that this award to the class members of approximately \$6,027,747.50 from the original \$10,000,000.00 settlement, plus \$141,136.00 in interest earned through July 1, 1993, for a total of \$6,168,883.50, represents approximately 61.68% of the original settlement fund and will compensate class members for approximately 25% of their total losses of

\$24,691,297.63. This distribution shall be made through class counsel no later than August 30, 1993. Any distributed funds which remain unclaimed by class members by December 1, 1993, shall be added to the reserve fund.

Class counsel shall furnish the court by August 16, 1993, a schedule of the proposed distribution, including the name of each class member and the amount proposed to be distributed to each class member, in accordance with our Final Judgment Order. This proposed schedule of distribution shall also reflect the three incentive awards which we have granted above. An initial report summarizing this distribution shall be filed by class counsel with this court no later than September 13, 1993. A final report summarizing this distribution, including proof of distribution, shall be filed by class counsel with this court as soon as possible and no later than December 17, 1993. Specifically, that final report shall contain, at a minimum, the following: (1) a certification that the settlement fund has been distributed pursuant to the instructions in this opinion and in our Final Judgment Order; (2) proof of distribution of the appropriate amount to each class member (e.g., cancelled checks); (3) identification of the bank account which represents the common fund; and (4) bank account statements for that account covering the time period from the transfer of the settlement fund to the date of the report; (5) identification of the bank account which represents the reserve fund; and (6) bank account statements for that account covering the time period from the creation of the reserve fund to the date of the report.

VI.

CONCLUSION

In accordance with the above discussion, we award class counsel additional attorneys' fees in the amount of \$1,400,000.00 and additional expenses in the amount of \$752,252.50. We also award named plaintiffs Spicer, Brittain, and Schut an incentive award of \$10,000.00 each, for a total incentive award of ***1270** \$30,000.00. We direct class counsel to establish a reserve fund in the amount of \$40,000.00 plus all interest earned after July 1, 1993, for future contingencies. The remaining settlement fund, including all interest earned through July 1, 1993, shall be distributed to the class members in accordance with the procedure articulated in this opinion and in our Final Judgment Order, entered June 18, 1993, no later than August 30, 1993. Class counsel shall furnish the court by August

16, 1993, a schedule of the proposed distribution. An initial report summarizing the distribution of the common fund shall be filed with the court no later than September 13, 1993. A final report summarizing the distribution, including proof of distribution, shall be filed with the court no later than December 17, 1993. The court reserves jurisdiction over all matters relating to the distribution of the common fund.

ORDER

As described in our Memorandum Opinion of this same date, IT IS HEREBY ORDERED THAT:

(1) Class counsel shall receive an additional award of attorneys' fees in the amount of \$1,400,000.00, to be paid out of the common fund created under the settlement agreement approved by this court (the "common fund"), for an aggregate attorneys' fee award of \$2,900,000.00, which represents 29% of the settlement of \$10,000,000.00;

(2) Class counsel shall receive an additional reimbursement of expenses in the amount of \$752,252.50, to be paid out of the common fund, for an aggregate expenses award of \$1,002,252.50, which represents approximately 10% of the settlement;

(3) Class representatives Spicer, Brittain, and Schut shall each receive incentive awards of \$10,000.00, to be paid out of the common fund;

(4) Class counsel shall establish a reserve fund for future contingencies out of the common fund, in the amount of \$40,000.00, plus all interest earned after July 1, 1993; as directed below in paragraph (9), any distributed funds which remain unclaimed by members of the plaintiff class by December 1, 1993, shall be added to the reserve fund;

(5) Class counsel shall furnish the court no later than August 16, 1993, a schedule with the proposed distribution to individual members of the plaintiff class pursuant to our Memorandum Opinion of this date and our Final Judgment Order;

(6) The balance of the common fund, including all interest earned through July 1, 1993, in the amount of approximately \$6,168,883.50, shall be distributed no later than August 30, 1993, to authorized members of the plaintiff class, as set forth in the proposed distribution list prepared provided for in paragraph 5; we note that this distribution will compensate the members of the plaintiff class for approximately 25% of their aggregate losses totalling approximately \$24,691,297.63;

(7) Class counsel shall file an initial report on the distribution of the common fund no later than September 13, 1993;

(8) Class counsel shall file a final report on the distribution of the common fund no later than December 17, 1993;

(9) Any distributed funds which remain unclaimed by members of the plaintiff class by December 1, 1993, shall be added to the reserve fund; and

(10) LaSalle Northwest and American National Bank are directed to distribute the common fund in accordance with the schedule of distribution to be filed with the court by class counsel as provided in paragraph (5) of this order, plus the additional disbursements to class counsel as provided in paragraphs (1) and (2) of this order.

(11) The court reserves jurisdiction over all matters relating to the distribution of the common fund.

All Citations

844 F.Supp. 1226

Footnotes

- 1 Class counsel have cited to this court's opinion in *Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Co. v. National Basketball Association*, 1992 U.S.Dist. Lexis 19473 (N.D.Ill. 12/18/92) in which we allowed facsimile and messenger charges. However, in that case the party that was to pay the costs had made no objection to the amount or nature of the costs requested. In this case there is no adversary party to dispute the amount of costs, but some class members have expressed concern about

the amount of costs in this case, and we feel it is our duty to look after the interests of the class. *Skelton v. General Motors Corp.*, 860 F.2d at 253 (“The court becomes the fiduciary for the fund’s beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing the fee applications.”) Thus, we allowed the photocopy costs requested by WGN uncut, although in all of our other opinions on costs we have cut the amount of photocopying, as we do in this case (see below).

- 2 We also note that one of Beeler, Schad & Diamond’s tenant bills submitted in support of another expense request shows that Beeler, Schad & Diamond bills its tenants \$0.15 per page for photocopying.
- 3 This rate has been used by other judges as well, see e.g. *BASF Corporation v. The Old World Trading Company, Inc.*, 1992 WL 229473, 1992 U.S.Dist. LEXIS 13691 (N.D.Ill. Sept. 11, 1992).
- 4 This excludes from the request one cab ride, one undocumented charge, and the 20% markup on 3 charges. We also found that 10 copies of the SEC report on the October 1987 market break were bought for \$273.15 in addition to 4 copies purchased for \$114. While we understand the importance of this report and the convenience of having more than one copy, we find that 14 copies is excessive, and will allow only for the cost of 4.
- 5 It should not be too difficult to either ascertain the percentage of the tax, and apply it to the amount billed for this case, or to figure out what percentage of the total bill is allocable to this case and take a corresponding percentage of the total tax. If roommates splitting a phone bill can do this, a law firm ought to be able to. They have not done so, and we do not have sufficient information to do their job for them.
- 6 Receipts of 9–18–90, 2–12–91, 2–13–91, and 4–16–91.
- 7 Excluding the portion of March 1992 that was requested and paid under the individual photocopy requests.

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557 F.Supp.2d 1
United States District Court,
District of Columbia.

Eunice WELLS, et al., Plaintiffs,

v.

ALLSTATE INSURANCE CO., et al., Defendants.

Civil Action No. 00–0760–LFO.

|

May 28, 2008.

Synopsis

Background: Insured filed action in District of Columbia, alleging that automobile insurer failed to disclose material facts about its claims handling processes. After removal, class certification was granted. Parties moved for court approval of settlement agreement, and class counsel moved for approval of attorney fees, costs, and incentive awards to named plaintiffs.

Holdings: The District Court, [Louis F. Oberdorfer](#), J., held that:

approval of proposed settlement of class claims for \$800,000 was warranted;

attorney fee award of \$700,000 was reasonable; and

\$10,000 incentive awards for named plaintiffs were reasonable.

Motions granted.

Attorneys and Law Firms

*2 [David Errol Tompkins](#), [Peter A. Chapin](#), Sacks & Chapin, P.C., Sonnenschein Nath & Rosenthal, Washington, DC, [Thomas Joseph Minton](#), Goldman & Minton, P.C., Baltimore, MD, [George W. Croner](#), Kohn, Swift & Graft, P.C., Philadelphia, PA, for Plaintiffs.

[Margo Weinstein](#), Sonnenschein Nath & Rosenthal, Chicago, IL, for Defendants.

[John J. Calkins](#), Sonnenschein Nath & Rosenthal, Washington, DC.

MEMORANDUM OPINION

[LOUIS F. OBERDORFER](#), District Judge.

The parties have settled this class-action suit and now move for court approval of the settlement agreement, as required under [Federal Rule of Civil Procedure 23](#). See Motion for Final Approval of Class Action Settlement [dkt # 242]. Class counsel also move for approval of attorneys' fees, costs, and incentive awards to the named plaintiffs. See Joint Petition of Class Counsel for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Awards to Class Plaintiffs ("Joint Pet.") [dkt # 241]. For the reasons discussed below, both motions will be granted.

I. BACKGROUND

In 1998, Plaintiff Eunice Wells, a policyholder of Defendant Allstate Insurance *3 Company, was hit by a car while crossing the street. She sought to recover for her injuries under her Allstate uninsured-motorist coverage. After Allstate refused to settle, Wells sued Allstate in the District of Columbia Superior Court for benefits. She also moved for certification as representative of a class claiming injuries from Allstate's alleged violations of the District of Columbia Consumer Protection Procedures Act, [D.C.Code Ann. § 28–3901](#) ("Consumer Protection Act" or "Act"). Among other things, the Act creates liability for "failure to state a material fact if such failure tends to mislead." *Id.* § 28–3904. Wells alleged that Allstate's violations included failing to disclose that it resisted paying on uninsured-motorist claims, and that it adopted a "scorched-earth litigation tactic" against policyholders who litigated after refusing to settle.

Allstate removed the case to this court. Wells settled her personal-uninsured-benefits claim, but her class claim under the Consumer Protection Act proceeded. Plaintiffs' amended complaint alleged that, if uninsured-motorist claimants were represented by counsel, Allstate referred their claims to a special unit, which, as a tactic, deliberately and regularly took far more time to pay than Allstate took to pay claimants who did not have counsel. On May 17, 2002, this court denied Allstate's Motion for Summary Judgment.

On August 12, 2002, [210 F.R.D. 1](#), this court certified a class of Allstate policyholders to include those who “(1) between March 20, 1997 and October 19, 2000, (2) made a claim for uninsured motorist benefits which Allstate paid in part or in full, (3) for, *inter alia*, bodily injury, and (4) at some or all points during the claims process were represented by counsel.” This class was limited to policyholders who made claims before October 19, 2000, the effective date of an amendment to the D.C. Consumer Protection Act. This amendment made it easier for consumers to sue by eliminating certain requirements of injury-in-fact and causation. The Court of Appeals for the District of Columbia dismissed Allstate's appeal from the certification.

In April 2003, Plaintiffs moved to join Charles Rawlings as a party plaintiff and to expand the class to include policyholders who, like Rawlings, had filed uninsured-motorist claims after the Act's October 2000 amendment. In October 2004, Plaintiffs moved to qualify Rawlings as a class representative. In November 2004, Allstate moved for summary judgment on Rawlings's claims, arguing that he waived those claims

by signing a general release. On January 24, 2006, [2006 WL 176100](#), this court denied Allstate's motion, concluding that Rawlings did not waive his claims. On July 6, 2006, the court issued an order qualifying Rawlings as a class representative and amending the class definition to extend the time period for which claims were filed: the class now includes Allstate policyholders or beneficiaries who made an uninsured-motorist claim between March 20, 1997, and July 6, 2006, and otherwise meet the original class definition. In March 2007, the parties began mediation before Jonathan Marks, a mediator with extensive experience in complex litigation.

The mediation culminated in a settlement agreement stating that the approximately 1,200 class members would receive a total of \$800,000. Settlement Agreement [dkt # 234–2]. Each class member would receive one of three cash amounts—\$150, \$600, or \$1,200—depending on the length of time it took to receive payment on his or her claim:

Days Between Loss Report and Claim Payment	Amount of Settlement Payment
0–180 days	\$ 150
181–635 days	\$ 600
635 + days	\$1,200

*4 *Id.* ¶ 6(A). Additionally, Allstate agreed not to oppose class counsel's request for \$700,000 in fees and \$25,000 in costs, to be awarded at the court's “sole discretion.” *Id.* ¶ 5(A). Finally, under the agreement, the two named class plaintiffs receive an additional “incentive award” of \$10,000 each. *Id.* ¶ 6(B).

On December 18, 2008, counsel for both parties presented their Settlement Agreement to the court for preliminary approval. On January 7, 2008, the court issued an order granting such approval. The parties then issued notice to the class members of the proposed settlement and of the final settlement hearing. In addition to stating the terms of the \$800,000 class settlement noted above, the notice stated that class counsel would request court approval of awards of \$700,000 for attorneys' fees, \$25,000 for costs, and \$10,000 for the two named plaintiffs. No objections were filed. Only

one member of the class, Ms. Donna Ridley, also known as Donna Ridley Ramrattan, has requested exclusion from the class and the settlement (and is therefore not a member of the class). On May 13, 2008, Judge Thomas F. Hogan presided over the final settlement hearing. At the conclusion of the hearing, Judge Hogan stated his recommendation that this court approve the settlement award to the class members, the incentive awards to the named plaintiffs, and—subject to further consideration—the award for attorneys' fees and costs. On May 16, 2008, at Judge Hogan's request, class counsel filed documents detailing the time and expense costs previously summarized in support of their motion for approval of fees and costs.

II. DISCUSSION

This court must address three items: (1) the award to class members (\$800,000 total); (2) the attorneys' fees and costs (\$725,000 total); and (3) the incentive awards to the two named plaintiffs (\$10,000 each). As discussed below, each of these amounts are reasonable in the context of this unique case and will be approved.

A. The \$800,000 Award to Class Members

Under [Federal Rule of Civil Procedure 23](#), “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval.” [Fed.R.Civ.P. 23\(e\)](#). “Approval of the proposed class action settlement lies within the discretion of this Court.” *Livengood Feeds, Inc. v. Merck KGaA (In re Vitamins Antitrust Litig.)*, 305 F.Supp.2d 100, 103 (D.D.C.2004). “The [Rule 23](#) requirements are fully consistent with the long-standing judicial attitude favoring class action settlements.” *Id.* “The Court must eschew any rubber stamp approval ... yet, at the same time, must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.” *Id.* (citation omitted). “The exercise of this discretion, however, is constrained by the ‘principle of preference’ favoring and encouraging settlements in appropriate cases.” *Id.*

“There is no single test in this Circuit for determining whether a proposed class action settlement should be approved under [Rule 23\(e\)](#).” *Id.* “Generally, in determining whether settlement should be approved, courts consider whether the proposed settlement is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are being served if the litigation is resolved by settlement rather than pursued.” *Id.* “In making this determination, courts in this Circuit have examined the following factors: (a) whether the settlement is the result of arm's length negotiations; *5 (b) the terms of the settlement in relation to the strength of plaintiffs' case; (c) the status of the litigation at the time of settlement; (d) the reaction of the class; and, (e) the opinion of experienced counsel.” *Id.* As noted below, these factors weigh in favor of approving the settlement award to the class here.

Arms' length negotiations. Experienced class counsel litigated this case for nearly eight years before settlement was reached through mediator Jonathan Marks. Marks is an experienced mediator, and he has provided a declaration that the settlement was reached through arms' length negotiation. Marks Decl. ¶¶ 17, 20 [dkt # 241–7] (concluding that the settlement is “fair and reasonable” and stating that “[c]ounsel

for each Party were effective advocates for their clients and effective participants in the effort to reach a settlement that fairly valued the risks and opportunities of each Party in the litigation”). “Because there is nothing in the course of the negotiations or the face of the Settlement that ‘discloses grounds to doubt its fairness,’ the Court finds that the Settlement at issue was the result of arms' length negotiations and is thus presumptively fair, adequate and reasonable.” *Vitamins Antitrust Litig.*, 305 F.Supp.2d at 104 (citing [Manual for Complex Litigation \(Third\)](#), § 30.41 (1995)).

Terms of the settlement. Allstate is alleged to have a nefarious policy that is a grave insult to the legal profession. As noted, each of the approximately 1,200 class members will receive, from a total fund of \$800,000, cash payments of either \$150, \$600, or \$1,200.

Additionally, trial would have been costly, and the case “would have undoubtedly continued” through the appeals process after a trial. Joint Pet. at 8. Counsel further state that bringing this suit under the D.C. Consumer Protection Act was a novel approach: “It is also indisputably true that no other reported case reflects an attempt to use the protections of the [Act], on either an individual or class-wide basis, to pursue a recovery for injured policyholders who were penalized simply because they had decided that they needed assistance of counsel in pursuing their insurance claims.” *Id.* at 13. Moreover, the payment is *in addition to* any payment that class members might have obtained under the terms of their individual policies. *See* Joint Pet. at 9. In sum, in light of the uncertainties of litigation, these cash payments are fair and reasonable.

Status of litigation at settlement. The settlement agreement is the result of years of litigation, but neither party has yet to face the time and expense of trial (or the inevitable appeal). Accordingly, the settlement has “not come too early to be suspicious nor too late to be a waste of resources.” *Vitamins Antitrust Litig.*, 305 F.Supp.2d at 105.

Reaction of class to settlement. No objections have been filed to the proposed settlement, and only one person has chosen to opt out.

Opinion of experienced counsel. “Although the Court will not defer blindly to the views of counsel with regard to the adequacy of a settlement, it must consider that the [settlement was] reached after several months of arms' length negotiation by experienced counsel and that both counsel and all parties

involved view the settlements as reasonable.” *Id.* at 106. Further, the case went through extensive mediation, and the experienced mediator believes that the settlement is fair and reasonable.

* * *

Accordingly, the court will approve the settlement for the class members.

***6 B. Attorneys' Fees and Costs**

“In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.” Fed.R.Civ.P. 23(h). Class counsel request approval of \$700,000 in fees, \$25,000 in costs, and \$10,000 for each of the named plaintiffs. The Settlement Agreement provides that Allstate does not object to such approval.

1. The \$700,000 For Attorneys' Fees

“In general, each party to litigation in the United States bears its own attorneys' fees absent a specific fee-shifting statute.” *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C.Cir.1993). “Over time, courts have fashioned several equitable exceptions to this ‘American rule.’ ” *Id.* “One of the earliest, and still most common, exceptions is the ‘common fund’ doctrine typically applied in class actions like the present one.” *Id.* “That doctrine allows a party who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees.” *Id.* “It is by now well established that ‘a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.’ ” *Id.* (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980)). “The underlying justification for attorney reimbursement from a common fund ... is that unless the costs of litigation are spread to the beneficiaries of the fund they will be unjustly enriched by the attorney's efforts.” *Id.*

“Courts have a duty to ensure that claims for attorneys' fees are reasonable.” *In re Lorazepam & Clorazepate Antitrust Litig.*, No. MDL 1290, 2003 WL 22037741, at *7 (D.D.C. June 16, 2003) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Swedish Hosp.*, 1 F.3d at 1265). “Proponents find the percentage-of-recovery

method attractive ‘because it directly aligns the interests of the Class and its counsel and it provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system.’ ” *Id.* (quoting *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F.Supp.2d 418, 431–32 (S.D.N.Y.2001)). Yet “special problems exist in assessing the reasonableness of fees in a class action suit since class members with low individual stakes in the outcome often do not file objections, and the defendant who contributed to the fund will usually have no interest in how the fund is divided between the plaintiffs and class counsel.” *Id.* at *7 n. 9. Fee awards in common-fund cases may range from fifteen to forty-five percent. *Id.* at *7. By way of comparison, “the normal range of fee recovery in antitrust suits is twenty to thirty percent of the common fund.” *Id.*

Courts look to several factors when evaluating fee requests under the percentage-of-recovery method, including the following:

- (1) the size of the fund created and the number of persons benefitted;
- (2) the presence or absence of substantial objections by members of the class to the settlement terms or fees requested by counsel;
- (3) the skill and efficiency of the attorneys involved;
- (4) the complexity and duration of the litigation;
- (5) the risk of nonpayment;
- (6) the amount of time devoted to the case by plaintiffs' counsel; and
- *7 (7) the awards in similar cases.

Id. at *8; see also *Cohen v. Warner Chilcott Pub. Ltd. Co.*, 522 F.Supp.2d 105, 122 (D.D.C.2007) (relying on these factors).

Here, counsel concede that the \$700,000 fee requested—45% of the total recovery—“is toward the high end of the range of percentages generally awarded by courts.” Joint Pet. at 8. Applying the applicable factors, as shown below, reveals that the requested fee is nonetheless reasonable in this unique case.

Size of the fund and class. As noted, the settlement provides that \$800,000 will be shared among 1,191 class members. Each class member will receive \$150, \$600, or \$1,200.

These payments are in addition to any recovery that class members may have obtained under their individual policies. Moreover, cash payments further enhance the value of the settlement. *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, at *17 (E.D. Pa. June 2, 2004). Additionally, the fund from which attorneys' fees and costs reimbursements will be paid has been negotiated separately by class counsel only after the creation of the settlement fund for the class. Joint Pet. at 9. Thus, class counsel's " 'requested fee does not diminish recovery by the Settlement Class.' " *Id.* at 9–10 (quoting *Cohen*, 522 F.Supp.2d at 122) (alterations omitted). In short, each class member will receive significant value from this settlement. *Cf. Cohen*, 522 F.Supp.2d at 122 (class of two million consumers and common fund of \$8.3 million).

Objections. As noted, no class member has objected to the settlement, including the provision for attorneys' fees. And, of course, Allstate—who will pay the fees—also has no objection.

Attorney skill and efficiency. This litigation involved experienced class counsel who successfully navigated this case to this stage. Counsel brought the unique D.C. Consumer Protection Act claim, obtained class certification, broadened the class through discovery and litigation, and negotiated the case to this successful resolution. Allstate vigorously contested each of these developments.

Complexity and duration of litigation. In addition to the points noted above, class counsel emphasize that bringing this sort of suit was not only complex, but also novel. As they note, no other reported case reflects this type of attempt to bring suit under the Act for allegations related to a defendant's mistreatment of policyholders based on the way they pursued their insurance claims. Joint Pet. at 13.

Risk of nonpayment. Class counsel "undertook this case on a purely contingent basis." *Id.* "The risk of nonpayment through either an award of summary judgment or loss at trial was significant and real in this case." *Lorazepam*, 2003 WL 22037741, at *8. Counsel accurately note that "[t]here were many factors that could have eliminated any chance of recovery in this case[,] including the rejection of Class Counsel's novel theory of liability, the risks associated with establishing damages on behalf of the Class members, or the denial of class certification." Joint Pet. at 13. Indeed, counsel have yet to be paid any fees for this litigation.

Time devoted. Class counsel state that they have expended approximately 3,100 hours since the initial hearing on class certification in May 2002. The collective lodestar for class counsel, calculated at their customary hourly rates, totals \$1,278,432. This is further evidence that their request for approval of \$700,000 in fees is reasonable. *See Lorazepam*, 2003 WL 22037741, at *9 (noting that a fee award that is 1.15 or 1.36 times *greater* than the lodestar "falls near the low end of normal multipliers" and that "multiples *8 ranging up to four are frequently awarded in common fund cases when the lodestar method is applied") (internal quotation marks omitted); *Cohen*, 522 F.Supp.2d at 123 n. 4.

Similar cases. As noted, class counsel concede that their fee request "falls at the high end" of the fee percentages recognized for common-fund cases. Joint Pet. at 14. The court agrees, however, "that the factors identified in [their] Joint Petition support the requested fee and demonstrate that Class Counsel have obtained an admirable recovery for the Class in an extremely difficult and challenging litigation against an opponent represented by first-rate counsel with virtually unlimited litigation resources." *Id.*

Public interest. Though the public interest is not always named as a separate factor in the fee-award determination, it is also worth serious consideration. *Cf. Burka v. U.S. Dep't of Health and Human Servs.*, 142 F.3d 1286, 1292 (D.C.Cir.1998) (Wald, J., concurring) (noting that courts evaluate the public benefit under fee-shifting statutes "all the time"). Here, the settlement serves the public interest not only by conserving the resources required of further litigation, but also by sounding a cautionary note to the insurance industry: policyholders must be treated fairly.

* * *

In sum, class counsel achieved class certification and ably prosecuted a unique theory of liability for this consumer class; assumed a substantial risk of nonpayment over years of contested litigation; achieved a settlement amounting to significant cash recoveries of \$150 to \$1,200 for each class member; demonstrated that their requested fee award is significantly less than the lodestar; received Allstate's agreement to the requested fee award; negotiated the fee award separately from the class fund; and received no objections from the class to the requested fee award. Under these unique circumstances, class counsel are entitled to their requested fee award of \$700,000.

2. The \$25,000 in Litigation Costs

“In addition to being entitled to reasonable attorneys fees, class counsel in common fund cases are also entitled to reasonable litigation expenses from that fund.” *Lorazepam*, 2003 WL 22037741, at *10. Counsel have filed affidavits and supporting documents showing that they incurred \$28,629.61 in litigation costs and expenses since the class-certification hearing in May 2002. *See* Affidavits of Class Counsel [dkt # 241–3 to 241–6]; Summary Sheets of Time and Expenses [dkt # 243–2 to 243–4]. Counsel request approval of \$25,000 in costs, to be paid by Allstate. Allstate has no objection to this request. The court concludes that this request—a small piece of the overall settlement—is reasonable.

C. The \$10,000 Incentive Awards For the Named Plaintiffs

“This Court has ... determined that incentive awards to named plaintiffs are not uncommon in class action litigation, particularly where a common fund has been created for the benefit of the entire class.” *Lorazepam*, 2003 WL 22037741, at *10. Indeed, “courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” *Id.* (internal quotation marks omitted). “The propriety of allowing modest compensation to class representatives seems obvious.” *Id.* (internal quotation marks omitted). “In deciding whether to grant incentive awards and the amounts of such awards, courts consider factors such as ‘the actions the plaintiff has taken to protect the interests *9 of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff

expended in pursuing the litigation.’ ” *Id.* (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.1998)).

Here, class counsel request that this court grant \$10,000 each to Eunice Wells and Charles Rawlings as incentive awards to compensate them for their contribution to the settlement achieved in this case. Class counsel state that “plaintiffs Wells and Rawlings have devoted their time and effort to assist in the prosecution of the Action that has produced this recovery for the benefit of the Class.” Joint Pet. at 17. They both were deposed (Wells was deposed twice). Wells also attended the two-day class-certification hearing. Additionally, both produced documents and assisted in responding to interrogatories. No objection to their incentive awards has been filed. In short, “[t]he additional payments to the named Plaintiffs are reasonable in light of their investments of time, money, and effort on the part of the class.” *Lorazepam*, 2003 WL 22037741, at * 11 (approving \$20,000 incentive awards to named plaintiffs).

III. CONCLUSION

For the foregoing reasons, the court shall grant (1) Motion for Final Approval of Class Action Settlement [dkt # 242] and (2) Joint Petition of Class Counsel for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Awards to Class Plaintiffs [dkt # 241]. Orders granting those motions accompany this Memorandum Opinion.

All Citations

557 F.Supp.2d 1

1995 WL 765266

Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

Stacey E. WILLIAMS, et al., Plaintiffs,
v.
GENERAL ELECTRIC CAPITAL
AUTO LEASE, et al., Defendants.

No. 94 C 7410.
|
Dec. 26, 1995.

MEMORANDUM DECISION

JOAN H. LEFKOW, Executive Magistrate Judge:

*1 This class action is before the court on the parties' joint motion for final approval of a class action settlement agreement. Because it is a class action, the court must determine whether the settlement is fair, reasonable and adequate for the members of the class. The following memorandum decision addresses these issues.

The complaint was filed December 13, 1994, by Stacey A. Williams, individually and on behalf of a class of consumers who had entered into automobile leases with defendant General Electric Capital Auto Lease, Inc ("GE Capital" or "GECAL"). In addition to GE Capital, automobile dealer Jacobs Twin Honda, Inc., was sued as an alleged agent of GE Capital. The complaint alleges that GE Capital and its agents imposed substantial charges for early termination and default under GE Capital's leases without disclosing those charges in comprehensible terms as required by the federal Consumer Leasing Act, [15 U.S.C. §§ 1667 et seq.](#), and the Act's implementing Federal Reserve Board Regulation M, 12 C.F.R. part 213. The complaint alleges additional Consumer Leasing Act violations, (1) that the lease form fails to identify express warranties and guarantees made by the manufacturer as required by [12 C.F.R. § 213.4\(g\)\(7\)](#), (2) that the termination charges were unreasonable, and (3) that the lessee's disclosed right to demand that realized value be determined by appraisal was as a practical matter unavailable. The complaint further alleges that the same omissions and commissions constituted violations of Illinois statutes prohibiting unfair and deceptive practices, and also that the failure to disclose the "capitalized cost" of its leased vehicles -- the price of the vehicle used to

derive all of the numbers in the lease -- violated the Illinois Consumer Fraud Act, [815 ILCS 505/2](#).

Plaintiffs' counsel also represented certain plaintiffs in an action originally filed in 1991 in the Circuit Court of Cook County, Illinois, which alleged similar disclosure violations on behalf of a different group of lessees. *Carone, et al. v. Sun Hyundai, et al.*, No. 91 L 11124. Defendants moved in this court to dismiss or stay this action in favor of the state court litigation, a motion which was never ruled on because this settlement intervened. The parties propose to settle both the federal and state court litigation in this court. They represent that the Honorable John N. Hourihane, the judge presiding in *Carone*, has assented to the parties' proposal that the settlement proceed in this court and has dismissed the state court case. The parties have consented to proceed before a magistrate judge under the provisions of [28 U. S. C. § 636\(c\)](#).

The key terms of the settlement are as follows:

The settlement is entered into on behalf of a class consisting of all persons in the United States other than residents of Connecticut, who, on or after January 1, 1987, and prior to July 21, 1995, entered into an automobile lease assigned to GE Capital and written on a lease form prepared by GE Capital which bears one of the identification numbers listed on Schedule A to the Settlement Agreement.

*2 Class members whose GE Capital leases either (i) were outstanding on July 21, 1995 or (ii) were early terminated on or before July 21, 1995 (*i.e.*, were terminated prior to the scheduled expiration date) and who submit a proof of claim will receive, at their option, either (a) a certificate which may be applied in the maximum amount of \$50 to charges due on early termination under such leases when all other such charges are paid in full ("Early Termination Certificate") or (b) a certificate which maybe applied in the maximum amount of \$100 ("New Lease Certificate") to payments on a new GE Capital automobile lease (other than security deposits).¹ Class members whose GE Capital leases were terminated on or before July 21, 1995 on or after the scheduled termination date and who submit a proof of claim receive a New Lease Certificate.

The Early Termination Certificates will be in the amount of \$50 or \$2.5 million divided by the number of proofs of claim requesting such certificates, whichever is less. The New Lease Certificates will be in the amount of \$100 or \$10 million

divided by the number of proofs of claim requesting such certificates.

The \$10 million in New Lease Certificates are intended as a substitute for \$500,000 or \$1 million statutory damages.² Class members who did *not* terminate their leases early did not suffer any actual damages from the early termination provisions of the leases, and are only entitled to recover statutory damages. Because there are 600,000 class members, distributing \$500,000 or \$1 million to the class would not provide meaningful relief. Instead, the parties agreed that \$10 million in discounts on new leases would be substituted.

The class members who either terminated their leases early or have outstanding leases which they intend to terminate early (as evidenced by their election to obtain an Early Termination Certificate) are (i) entitled to their share of statutory damages and (ii) any actual damages which could be proved. The \$2.5 million in Early Termination Certificates are intended in compromise of these claims. Because early termination of a lease always results in some monetary liability on the part of the lessee, the \$2.5 million is the equivalent of cash.

The named plaintiffs in this and the *Carone* case are to receive \$1,000 and release from the early termination charges on their respective leases.

Upon final judgment, and conditioned on GE Capital's performance of the settlement, each class member will release GE Capital and its current and former officers, directors, successors, predecessors, executors, administrators, assigns, shareholders, affiliated companies, employees, attorneys and agents from all claims arising out of the matters complained of, namely, (i) the disclosures made on or in connection with the GE Capital leases, (ii) the reasonableness or validity of the charges and other terms contained in the leases, and (iii) the collection or attempted collection of charges imposed under such lease forms.

***3** In addition, the settlement agreement expressly provides that several common types of lease-related claims are *not* released: (i) claims against assignors of GE Capital (car dealers and local leasing companies) based upon representations other than the written terms of the form lease and (ii) claims based upon vehicle defects, property damage, personal injury or death, repossession or recovery of the leased vehicle, application of security deposits, and collection practices other than collection or attempted collection of the amounts specified in the lease. In addition, the rights and

obligations of the defendants and the class members under the leases are not affected except as specifically provided.

On July 26, 1995, the court provisionally certified the class and preliminarily approved the proposed settlement and ordered that notice of the proposed settlement be sent to all known class members on or before September 30, 1995. An affidavit of mailing filed by GECAL represents that all known 607,000 class members have been timely notified in accordance with the order. (Approximately 29,000 mailings were undeliverable.³)

The notice, which had been approved by the court, described the terms of the litigation, the proposed settlement, and the rights of class members. The notice further informed class members of a hearing on the settlement to be held November 29, 1995, at 10:00 a.m., stating that anyone wishing to object to the settlement could do so by submitting an objection in writing by November 1, 1995 and that they could appear at the hearing.

In response to the notice, counsel represent that approximately 1,300 class members opted out. The parties agree that class members who indicated their decision to opt out after the deadline of November 1, 1995, should nonetheless be excluded from the class and that class members may continue to exercise their right to opt out through January 31, 1996. A Supplemental Opt-Out List and Late Opt-Out List (those received after November 1, 1995) have been filed, which list identifies the individuals who have elected to be excluded from the class through the date of the hearing. (*Counsel are directed to file a final opt-out list by February 15, 1996.*)

On November 29, the court having considered the submission of plaintiffs' counsel, GE Capital's counsel, and the objections received, entertained oral argument on the parties' motion for final approval of the class action settlement and for entry of judgment.

In deciding whether to approve a proposed settlement, the court must determine whether it is fair, reasonable, and in the best interests of the class that will be affected by it. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982); *In re Domestic Air Transportation Antitrust Litig.*, 148 F.R.D. 297, 312 (N.D. Ga. 1993); *GMAC Mortg. Corp. v. Stapleton*, 236 Ill. App. 3d 486, 493, 603 N.E.2d 767, 773 (1st Dist. 1992). Relevant factors to this determination are (1) the strength

of the case for plaintiff on the merits, balanced against the extent of the settlement offer, (2) the complexity, length and expense of further litigation, (3) the substance and extent of opposition to the settlement by the class members, (4) the reaction of members of the class to the settlement, (5) the opinion of competent counsel, and (6) the progress of the proceedings. *Bennett*, 737 F.2d at 986; *Gautreaux*, 690 F.2d at 631; *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980); *In re Domestic Air Transportation*, 148 F.R.D. at 312. These factors are addressed in sequence below.

A. The Strength of the Case on the Merits Balanced Against Settlement Offer.

*4 Based on the presentations of the parties and in the added light of the objections raised, the court is satisfied that plaintiffs' claims had substantial likelihood of success. Plaintiffs note that the Illinois court denied a motion to dismiss the *Carone* litigation⁴ and have cited *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11 (2d Cir. 1993), in which the court held that the disclosures in the termination provisions of an automobile lease form were not reasonably understandable. In the lease form at issue here, the lessor was permitted to veil the extent to which the termination penalty exceeded the depreciation component (the return to GE Capital of part of its capital investment in the car) and the equivalent of interest (compensation to GE Capital for the fact that the lessee is paying in monthly installments instead of at once). Although there is no precedent that the capitalized cost must be disclosed under the Consumer Leasing Act, a complaint alleging that a dealer's use of a capitalized cost above "sticker price" was a material fact which must be disclosed survived a motion to dismiss in *Maryland National Bank v. Goodman*, 91 M1 157394 (Cir. Ct. Cook Co. Ill.) (App. B to Plaintiffs' submission). Nevertheless, defendant has not conceded liability and maintains that the disclosures in the lease form comply with federal and state law.

It is neither appropriate nor necessary to resolve the merits of the conflicting positions in the case in order to evaluate the fairness of the settlement. See *In re Domestic Air Transportation*, 148 F.R.D. at 312-13; *Armstrong*, 616 F.2d at 313. This is particularly so here because the proposed settlement fund vastly exceeds the amount that could be awarded were the plaintiff class to obtain judgment in their favor. If this class action were to go to judgment in favor of plaintiffs, the damages available under 15 U.S.C. § 1640(b) for the entire class would be capped at \$500,000 (or

possibly \$1,000,000 if two separate classes with independent claims were found and compensated).⁵ Thus, the award to individual class members at best would likely be less than \$2.00 each. Because this amount is nominal, the parties believe the proposed settlement fairly compensates the plaintiff class. Even the nominal amount may not be recoverable, however, because the law is unsettled whether plaintiffs would be required to establish reliance on the disclosure statement in order to prove damages. See *McCoy v. Salem Mortgage Co.*, 74 F.R.D. 8 (E.D. Mich. 1976) (statute and legislative history of federal Truth In Lending Act appear to contemplate actual damages based on reliance on the nondisclosures); *Vickers v. Home Federal Savings and Loan Ass'n*, 62 A.D.2d 1171, 404 N.Y.S.2d 201 (1978) (class certified for liability only because individual reliance was required to establish damages under Truth In Lending Act); *Guilfooy v. Suncoast Savings and Loan Ass'n*, No. 94-1500-CIV (S.D. Fla. Oct. 13, 1995) (App. I to Plaintiffs' submission) (plaintiff must show reliance to establish actual damages under Truth In Lending Act). Plaintiffs' counsel represent that their doubts about their ability to establish reliance was a significant factor in their decision to enter into settlement. Whatever the resolution of that issue, this is clearly not a case in which the settlement forecloses the potential of significantly greater awards of damages to class members.⁶ The court finds that, on balance, the award to class members is fair in light of their potential recovery on the merits.

B. The Complexity, Length and Expense of Further Litigation.

*5 The parties have not commented extensively on this point and it has not been addressed by the objectors. The court observes that the case would likely be resolved on summary judgment, a procedure which would be quicker and less expensive than any case that went to trial on disputed facts. Nevertheless, the continuation of the litigation in the face of the limited potential recovery speaks most forcefully in favor of resolution of this case by settlement.

C. The Substance, Extent, and Reaction of Class Members to the Proposed Settlement.

The response to the notice indicates that this litigation has not generated significant interest. A relatively small number, about .2 percent of those receiving notice, have elected to opt out and only an estimated five percent of those receiving notice, about 27,000, have elected to file claims as of December 7, 1995.⁷

The court now turns to the objections to the settlement. Only 15 class members have filed objections. Several have been proffered by persons who have indicated their desire to opt out or who wish their objections to be ruled on before they decide whether to opt out. These objections are considered herein, and as indicated above, class members will be given until January 31, 1996, to make a final opt out decision.

1. *John V., Jr., and Cynthia A. O'Connor* object to the added award to the class representatives entailing release from early termination charges under their leases plus \$1,000 if all class members do not receive the same. The provision of additional awards to class representatives, however, has been approved to encourage individuals to take on the responsibility of litigation. See, e.g., *GMAC Mortg.*, 236 Ill. App. 3d at 497, 603 N.E.2d at 776; *Spicer v. Chicago Board Options Exchange*, 844 F. Supp. 1226, 1266-67 (N.D. Ill. 1993).

The O'Connors also believe that \$50 is essentially a "joke" where the early termination charges were more than \$1,000. Similarly, *Thomas A. Toppen* states that he entered into a 60-month lease which he terminated after about 24 months. This resulted in approximately \$1,700 termination charges. He believes the nominal settlement is therefore unreasonable. Plaintiffs' counsel respond that the O'Connors and Mr. Toppen likely believe that the entire early termination charge was wrongful but it is not. Rather, most of the charge is unamortized depreciation, a normal assessment. Plaintiffs' counsel point out that the measure of damages is highly uncertain and could range from the statutory minimum of \$100 if the court (in an individual action) found all charges reasonable in spite of nondisclosures, to the determination that none of the charges could be collected. (Plaintiffs' counsel admit, however, that the latter has yet to be endorsed by a court. Plaintiffs' brief at 9.) The court is satisfied, in any event, that for class members who do not opt out of the class, the likely recovery is considerably less than \$50. This objection, then, may motivate the objectors to opt out but it does not defeat the fairness of the settlement.

*6 2. *Susan A. Reilly* states that she has learned through hard experience that a lease is inflexible where a lessee's circumstances make continuing the lease impracticable. She would like to terminate her lease but the charges are excessive. She thinks she should receive more than \$50 although she cannot file her own law suit. Unless Ms. Reilly files her own law suit, however, her damages if the plaintiff

class were to prevail would be less than \$50. Her objection does not defeat the fairness of the settlement.

3. *Kathy Reith* states her intention to object to the settlement on the basis that "the true victims of GE Capital's irresponsibility stand to gain nothing from this suit, while the attorneys gain up to \$600,000." The issue of attorneys' fees is addressed below. Plaintiffs' counsel point out that Ms. Reith's concerns expressed in her letter related to misrepresentations made by the car dealer, which claims are not released in this settlement. This portion of Ms. Reith's objection does not defeat the fairness of the settlement.

4. *Mark A. Ticer* complains that the asserted claims lack merit and the litigation "does nothing more than generate fees and expenses in the attorney's pocket." He complains that the return on this matter is so little that the litigation is frivolous. In spite of the small monetary return to the class, the court does not find the case frivolous or merely a fee generating tool for class counsel. Through the accumulation of small claims, class actions can effect reform of improper practices and thereby benefit consumers. Because the cost of litigation would far outstrip the recovery of small individual claims, and because the litigation of small claims would be ineffective to effect broad reforms, the class action motivates corporations to respond to legitimate consumer complaints.

5. The objection of *Michael R. Drogin* has been resolved by agreement.

6. *Seymour R. Harris* expresses a concern that the settlement will allow GE Capital to obtain unwarranted general releases for itself and its agent car dealers. Mr. Harris also believes the notice fails sufficiently to inform class members about the provisions of the settlement in that it does not state explicitly that opt outs' claims against auto dealers (as well as GE Capital) would not be affected or that opt outs might become members of another class in another law suit against another dealer (as well as file individual suits). Mr. Harris also believes that the settlement grossly understates the value of the claim.

In response to the court's concern expressed on December 13 about the scope of the release, the parties have submitted the following statement with respect to the release:

This release ... is intended to release GECAL from any claims of the type which the named plaintiffs have made or could have made relating to lease disclosures or lease charges based on the facts alleged in the

amended complaint. The parties understand that the specific applicability of this release to any particular claim must be determined by the court in which such claim is made in light of all the facts and circumstances. It is the intent of the parties that variations in legal theories do not give rise to further actions based upon the same facts.

*7 The settlement is also intended to release GECAL's assignors (i.e., the car dealers who initiate the leases) from any claims made against them based upon the language of GECAL's form lease, which it supplies to the dealers. Such a release is necessary in order to provide GECAL itself complete relief from such claims. The settlement expressly excludes from the release, however, claims that might be made against assignor-dealers based upon representations they make to customers that differ from the terms set forth in the lease. Thus a claim that a dealer mis-stated the nature of early termination charges under the lease is not released. A claim that a dealer failed to disclose capitalized cost would be released to the extent it is based solely on the absence of such disclosure in the lease form, but not to the extent that it is based upon other conduct of the dealer creating an alleged duty to disclose the capitalized cost (such as negotiating the purchase of the car at a lower price and then switching the customer to a lease).

The court is satisfied that the release is confined to resolution of issues presented in this lawsuit and does not amount to a general release. A narrower release would not be of interest to the defendants, who wish to dispose of this litigation.

Mr. Harris' objection concerning notice does not concern the court. The fundamental message of the opt out notice is that a class member can be excluded from all the consequences of the litigation. This embraces the implicit assumptions about which Mr. Harris is concerned.

The objection that the settlement undervalues the claims rests on (a) an assumption that other violations of the Consumer Leasing Act arising from the lease form which might have been established would each give rise to an award of up to \$500,000 against both GE Capital and the offending dealer; and (b) that the limitations of § 1640(d) and (g) do not apply to class actions. Although it is possible to read the provisions as Mr. Harris does, the court is satisfied that plaintiffs have interpreted it properly -- that the total award to the entire class is capped at \$500,000 (or at most \$1 million). To read the statute otherwise would render the damages cap void, a result which Congress would likely have made explicit if that had been its intention.

7. *Steven Lawson* objects on the basis that the settlement is worthless to the class. He believes the \$100 new lease certificate is worthless because GE Capital can simply raise its price to absorb the \$100 loss. This is, of course, possible but fails to take into account market competition which would auger against it. He derides the notion that a class member would have to enter into a new lease with GE Capital in order to use the \$100 certificate and suggests it only provides additional business to the malefactor in the situation. This objection is not persuasive where, as here, the recipients of the certificates are class members who did not terminate their leases; thus they were neither affected by the nondisclosures or subjected to the allegedly excessive termination charges. Although it is true that in an individual case a plaintiff could recover up to \$1,000 without actual damages, the appropriate comparison here is the amount the person would have recovered in a class action that went to judgment. Here, that amount would have been nominal. The unfairness, if any, is not in the settlement but in the damages cap imposed by Congress.⁸

*8 Mr. Lawson, like several other objectors, also suggests that the \$50 early termination certificate is nearly worthless to early terminators because they are not to be released from the early termination charges. He also complains that the notice did not provide information on what early termination charges customarily amount to or how they are determined so as to assist a provisional class member in deciding whether to terminate early (or to opt out). GECAL maintains that the charges under the leases were not inflated. Class counsel respond that Mr. Lawson does not recognize that early termination charges are an accepted part of leasing or that the bulk of the money allocated for early termination certificates will go to persons who have already terminated. Those individuals will receive either cash or a reduction in the amount owed to GE Capital. A person who is not sure whether to terminate should normally request a new lease certificate which would have a higher value. The court observes also that it is unlikely that the small amount involved would influence a decision to terminate. Rather, those confronted with circumstances favoring termination will simply have available this small deduction from the inevitable charges.

Mr. Lawson is also disturbed that the settlement does not entail reformation of the lease form. Counsel for both parties represent, however, that the American Financial Services Association, in response to litigation such as this, has adopted a voluntary standard of conduct calling for disclosure of

“capitalized cost” in all leases. They also represent that the Federal Reserve Board has published for comment new regulations which govern the disclosures required for early termination charges. Obviously, GE Capital expects to comply with those regulations and is unwilling to enter into any agreement that would impose different obligations. The court believes this is a reasonable position.

Mr. Lawson also makes a variety of procedural objections concerning the absence of an evidentiary hearing on the motion for preliminary approval of the settlement, which included provisional certification of the class, approval of class counsel and the terms of settlement. The fact that the case was in a settlement posture before defendant was required to answer no doubt contributed to the comprehensiveness of that event. Under the circumstances, the court believes the order was appropriate and sees no prejudice to class members because they had been given sufficient time to opt out and to raise objections. *See Mars Steel Corp. v. Continental Illinois National Bank & Trust Co.*, 834 F.2d 677, 683-84 (7th Cir. 1987) (district court's certification of the class along with preliminary approval of settlement and its refusal to hold evidentiary hearing before giving preliminary approval to settlement were within its discretion).

8. *Pamela Cade* points out that class members such as herself who will neither make an early termination of a lease or make future lease payments to Capital will not benefit at all from the settlement. *Joel Judd, Elliot Silverman and Randy Scheer* echo this objection, stating that after one lease with GE Capital they do not intend to enter into another one; thus, the settlement makes them no better off than if defendants were to prevail.⁹ Ms. Cade suggests that the settlement be modified either to create a minimum cash value for the certificates or to make them transferable in order to increase the number of class members who will take advantage of the settlement.

*9 Several other objectors are also suspicious of the certificate form of payment because it tends to reward GE Capital with more business and to give the class members very little. Class counsel respond that in fact the early termination certificates are money in the pocket of those members of the class who have any claim to actual damages. They point out that the other class members have no out-of-pocket losses, so this is unlike situations where coupons have been used (or disapproved) to compensate a class whose members have in fact suffered actual damages. GE Capital adds that because the claims of non-terminating class

members have only infinitesimal value, the cash value would at best be less than \$1.00, an amount so low that it would not justify the transaction costs. Similarly, making the certificates transferable would significantly affect the value that could be assigned to them. Capital is unwilling to settle on this basis.

The court believes that although persons such as Cade, Judd, Silverman and Scheer will obtain no monetary recovery, this is not unjust in view of their lack of damages. They do enjoy the benefit of improved disclosures which have resulted or will soon result from the litigation.

In light of the nominal potential recovery, the court accepts the parties' agreement that payment be made in certificates and that those certificates be non-transferable. Transferability at the same value would vastly increase the cost of the settlement and reducing the value to make transferability practicable would result in too little gain to individuals to make it worthwhile.

9. *Thomas J. Little*, similarly to Ms. Cade, states that he terminated his lease with GE Capital and, after unsatisfactory negotiations regarding the termination charges, ultimately purchased the car. He is unhappy about his experience and would not enter into a new lease under any circumstances; thus, he feels the settlement is worthless to him. Class counsel state that Dr. Little would appear to be entitled to \$50 and, if so, he would receive a check in that amount.

The court is concerned that persons such as Dr. Little who have paid their early termination charges be fully informed that they can file a claim and receive payment in lieu of a new lease certificate. This may entail identifying those individuals and sending them notice to that effect. *Counsel are directed to report to the court by January 4, 1996 either that this has been done or to provide an alternative proposal addressing this concern.*

10. Most of the objectors take umbrage with class counsel's request for attorney's fees. The approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred on the class. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *In re Continental Illinois Sec. Litigation*, 962 F.2d 566 (7th Cir. 1992), *later proceeding*, 985 F.2d 867 (7th Cir. 1993); *see also In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Lit.*, 56 F.3d 295, 307 (1st Cir. 1995); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I Condominium Assn v. Dunkle*, 946 F.2d 768, 773-74

(11th Cir. 1991); *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237 (1985); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988); *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Bebchick v. Washington Metropolitan Area Transit Comm'n*, 805 F.2d 396, 406-7 (D.C. Cir. 1986).

***10** This permits the attorneys to benefit in relation to the value conferred on their clients, a time-honored practice in the tort field. Fees in the range of 25 percent of the recovery have been approved in other common fund cases. See *Paul, Johnson, Alston & Hunt*, 886 F.2d at 272-73 (“Ordinarily, ... fee awards range from 20 percent to 30 percent of the fund created.”); *Bebchick*, 805 F.2d at 407 (25% of the recovery was a reasonable percentage fee for otherwise uncompensated attorneys); *Camden I*, 946 F.2d at 775 (courts are beginning to view the median of this 20% to 30% range as a benchmark).

Class counsel are requesting \$600,000 which GE Capital will pay in addition to the money allocated for certificates. Although the notice stated that counsel would also request seven percent of the early termination coupons actually used and 10 percent of the new lease certificates actually used, class counsel have agreed to waive their request to be paid fees from the certificates.¹⁰

Class counsel represented on December 13 that as of December 7, claims had been approved for approximately 14,500 new lease certificates and 9,900 early termination certificates. Assuming that all of these certificates are redeemed, the outlay would be \$1.945 million. This number is expected to increase through the approval of additional claims, although counsel concede that the total of 27,000 claims received as of December 7 represent the bulk of those expected. If one assumes an additional 20 percent to be added to the \$1.945 million for additional claims allowed, and approximately \$18,000 (\$1,000 plus release of all charges which the court estimates at \$2,000 each) for the named plaintiffs, the total expenditure by GE Capital would be in the range of \$2.35 million. Based on this estimate, a fee award of \$600,000 would be but slightly more than 20 percent of the total recovery likely to be paid under the settlement.¹¹

The feeling that class counsel are getting rich while accomplishing little for class members is acknowledged. Nevertheless, it must also be recognized that the intended benefit of this type of litigation is not to be found in individual class member's awards. The availability of the class action device together with the legislation imposing a

damages cap strongly point to a public policy which seeks to induce compliance and deter violations by granting incentives to counsel rather than to individual consumers. Without significant counsel fees to encourage the pursuit of these claims, the public policy to induce compliance with the law would be disserved. In light of all these factors, the court concludes that \$600,000 is a reasonable fee award.¹²

11. Finally, the objectors raise a variety of other issues which are either not borne out by the record or are, in the court's view, not significant enough to discuss in this decision. The court has, however, read all the objections and finds that they are not material to the determination that this settlement is fair, reasonable and adequate for the class. Because several of the objectors expressed need for resolution of their objections before they made a decision whether to opt out, *plaintiffs' counsel are directed by December 31, 1995 to mail a copy of this decision to all objectors.*¹³

D. The Opinion of Competent Counsel and the Progress of the Proceedings.

***11** The court finds that counsel on both sides of this case are very competent and have represented their clients with the allegiance required of them by the code of conduct of their profession. Counsel have brought the case to resolution efficiently by joining the state and federal litigation into one settlement. There is no indication that counsel have pursued inappropriate theories or engaged in wasteful or needless litigation, nor on the other hand that they have settled the case for less than the potential recovery without reasonable basis. Indeed, the settlement likely has gained more than the potential recovery could have.

CONCLUSION

For these reasons, the court grants the motion for final approval of the proposed settlement as set forth in the Settlement Agreement, and approves the award of attorney fees in the amount of \$600,000. Draft order to enter. This case will be called for status on January 4, 1996 at 10:00, concerning the remaining directions to counsel identified above, at which time (assuming satisfactory resolution) final judgment will be entered.

All Citations

Not Reported in F.Supp., 1995 WL 765266

Footnotes

- 1 Although the Settlement Agreement is not explicit, the parties represent that class members whose early termination charges have already been paid in full may receive a check for \$50 from GE Capital in lieu of a new lease certificate.
- 2 Plaintiffs contended that an addendum to the lease which GE Capital added during the time frame at issue, although making a provision entirely favorable to consumers, was nevertheless a technical violation because it added a second page.
- 3 After the November 29, 1995 hearing on the fairness of the proposed settlement (discussed below), the court convened court on December 13, 1995 to ask counsel to respond to particular questions that arose from the hearing. One question concerned the number of undeliverable notices. Counsel for GE Capital reported that 29,000 class members, approximately five percent, could not be located through forwarding addresses.
- 4 The court denied the motion to dismiss plaintiffs' claims that the early termination charges were unreasonable, that the disclosure of default charges in the lease form was confusing, and that the warranty disclosure was inadequate under the Consumer Leasing Act and/or state law. App. G to plaintiff's submission.
- 5 See footnote 2 *supra*. Section 1640 reads, in pertinent part, as follows:
 - (a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person, is liable to such person in an amount equal to the sum of --

 - (1) any actual damage sustained by such person as a result of the failure;
 - (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000; or
 - (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of \$500,000 or 1 per centum of the net worth of the creditor.
 - (3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by this court;
- 6 Potentially at least, the class members who terminated their leases were in a position to file individual lawsuits and recover damages authorized at 15 U.S.C. § 1640. If an individual prevailed in such an action, statutory damages alone would be between \$100 and \$1,000, and thus would certainly exceed the value that such an

individual will recover in the proposed settlement. In addition a prevailing plaintiff would be entitled to actual damages that could be proven. Clearly, a class member who wishes to undertake an individual action would have a greater recovery if he or she prevailed, but the cost of litigation would likely deter such an individual from assuming the risk of losing such a lawsuit.

- 7 Counsel made this estimate on December 13, cautioning that the figures were estimates and the final figures would likely be greater.
- 8 Mr. Lawson calculates that 90% of the class will receive nothing. This estimate assumes that 50,000 early termination certificates will be issued, and that \$500,000 will go to the remainder of the class in the form of new lease certificates of \$100, or 5,000 beneficiaries. He apparently overlooks that the cap on the new lease certificates under the Settlement Agreement is \$10 million rather than \$500,000. Settlement Agreement at 4, ¶ 2(c).
- 9 Randy Scheer also objects to the class representatives receiving more than other class members and *Herman Fagan* believes the nominal relief is simply inadequate. All of these objections are similar to those treated above and will not be discussed.
- 10 Counsel had estimated that GE Capital would expend \$2.5 million in early termination coupons alone and that the \$600,000 fee request would be approximately 20 percent of that total recovery (including the fees). These numbers, as counsel appears to concede, are high in that the rate of claims has been lower than expected. This has undoubtedly persuaded counsel to reduce its request for fees to \$600,000.
- 11 If 20 percent is allocated to attorney fees, the total recovery would be \$2,937,500, of which 20 percent would be \$587,500.
- 12 The objection that too many attorneys are involved carries no weight where the award is fixed based on a percentage of recovery. The size of the shares for individual attorneys will presumably be inversely proportional to the number of attorneys involved.
- 13 This includes Bruce I. Griffey, who states that he received the notice on November 13, 1995.