

Order. Such notice included individual notice by mail to all members of the *Settlement Class* who could be identified through reasonable efforts and provided valid, due, and sufficient notice of these proceedings and of the matters set forth therein, and included information regarding the procedure for the making of objections. Such notice fully satisfied the requirements of Fed. R. Civ. P. 23 and the requirements of due process.

2. For the reasons set forth in the Fee Motion and declarations presented in support of same, and as further set forth herein, the Fee Motion is granted.

3. The *Court* finds based on the entire record, including the evidence presented in support of the Fee Motion, and specifically including the declarations of Lynn Lincoln Sarko, James M. Sturdivant, and the *Named Plaintiffs*, as well as the *Court's* awareness of the market, that each of the 12 factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), support the requested fee award. Specifically with respect to each *Johnson* factor, the *Court* finds as follows:

(i) The Time and Labor Required.

As set forth in the Declaration of Lynn Lincoln Sarko, *Appointed Counsel* sought and obtained certification of the *Class*, expended thousands of hours on fact discovery, actively prepared for expert discovery, and spent great effort on mediation and settlement. In so doing, *Appointed Counsel* spent over 30,700 hours of attorney and professional time on this case. In addition, *Appointed Counsel* advanced more that \$870,000 in litigation expenses for the benefit of the *Class*. This factor supports the fee award.

(ii) The Novelty and Difficulty of the Questions Presented.

This factor is closely related to factor 10, discussed below, which looks at “the undesirability of the case,” because claims based on novel and difficult theories are, naturally, less desirable than others. As set forth in the Fee Motion, novel and difficult issues of law

were abundant in this case, as were novel and difficult logistical challenges. This factor supports the fee award.

(iii) The Skill Requisite to Perform the Legal Service Properly.

ERISA is a highly-specialized and complex area of the law, and the type of claims brought here – breaches of duty by the *Plan*'s fiduciaries – are based on rapidly evolving legal theories. *Appointed Counsel* demonstrated uncommon skill and diligence in the preparation of this class action. Lead Counsel Keller Rohrback L.L.P. and Associate Counsel Cohen, Milstein, Hausfeld & Toll are national leaders in pursuing this type of litigation, and Liaison Counsel Norman Wohlgenuth Chandler and Dowdell has extensive experience with complex litigation and litigation involving contracts for the delivery of power, generating capacity, oil and gas. This factor supports the fee award.

(iv) The Preclusion of Other Employment by the Attorneys Due to Acceptance of the Case.

As reflected by sheer number of hours devoted by certain of the attorneys and paralegals involved prosecuting this case, many people devoted all, or a majority of, their time to this massive litigation. The amount of time spent and resources expended on this case could have been devoted to other cases, and this factor supports the fee award requested.

(v) The Customary Fee.

Judge Posner, a respected authority on attorney fees, has stated that the normal range of contingent fees is 33% to 40%. *Gaskill v. Gordon*, 160 F.3d 361, 362-63 (7th Cir. 1998) (affirming an award of 38% of the recovery). In recent ERISA *Class* actions, judges from various circuits have awarded percentage fees in excess of those requested here. *E.g., Berger v. Xerox Corp. Ret. Income Guar. Plan*, No. 00-584, 2004 U.S. Dist-LEXIS 1819, at *5 (S.D. Ill. Jan. 22, 2004) (29% of settlement fund awarded); *In re Providian Fin. Corp. ERISA Litig.*, No. 02-1001, 2003 WL 22005019 (N.D. Cal. June 30, 2003) (25% of settlement fund

awarded). The percentage fee requested at this time – 20% – is within the range, and even at the low end of the range, of awards made in risky and work-intensive cases such as this one. In addition, the testimony via declarations of James M. Sturdivant and the *Named Plaintiffs* supports the Fee Motion. This factor supports the fee award.

(vi) Whether the Fee is Fixed or Contingent.

Appointed Counsel accepted this matter on a wholly contingent basis. Courts uniformly hold that when recovery is contingent, a higher fee must be awarded than when counsel undertake no risk of non-payment. *E.g., Blum*, 465 U.S. at 902 (Brennan, J., concurring) (“the risk of not prevailing, and therefore the risk of not recovering any attorney’s fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee”); *Gaskill*, 160 F.3d at 363 (“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”). This factor supports the fee award.

(vii) Time Limitations Imposed by the Client or the Circumstances.

Appointed Counsel committed significant portions of their total firm-wide resources to this single matter, including to review the vast document production in this case—more than 17 million pages of documents. *Appointed Counsel* also coordinated on an almost daily basis with counsel from other firms in the *Securities Action* pursuant to the *Court’s* order to coordinate the discovery in all three cases. This factor supports the fee award.

(viii) The Amount Involved and the Results Obtained.

The efforts of *Appointed Counsel* have resulted in a \$55 million cash recovery for the *Class*, as well as substantial equitable relief for the *Plan*, bringing the total value of the *Settlement* to over \$112 million.¹ Every penny of the applicable fiduciary insurance policies

¹ The equitable relief is valued at approximately \$57.3 million by Mr. Krishna Ramaswamy, the expert report of whom has been submitted to the *Court*.

(\$50 million) is being paid to fund the *Settlement*, and Williams is paying an additional \$5 million in cash on top of that. This substantial recovery is a good result for the *Class* and is supported by the record. The view of experienced counsel favoring a settlement is accorded “great weight” in appraising the fairness and adequacy of a proposed settlement. *In re Heritage Bond. Litig.*, No. 02-1475, 2005 U.S. Dist. LEXIS 13555, at *32-35 (C.D. Cal. June 10, 2005) (citations omitted). *Appointed Counsel* here have long and extensive experience in handling class action ERISA cases and other complex litigation, are in a strong position to evaluate the strengths and weaknesses of their case, have carefully researched the relevant law, have a very good understanding of the issues involved, as well as the facts, and are in an ideal position to evaluate the merits of their case. Based upon their experience and knowledge, *Appointed Counsel* believe that the *Settlement* achieved here is fair, reasonable, and in the best interests of the *Class*.

The “amount involved” in this litigation is very substantial, and the “results obtained” are very favorable; this factor supports approval of the requested fees.

(ix) The Experience, Reputation and Ability of the Attorneys.

As outlined in the previous section and the prior orders of this *Court*, *Appointed Counsel* are highly experienced in complex ERISA and *Class* action matters. This factor supports the fee award.

(x) The ‘Undesirability’ of the Case.

As set forth above, this factor is similar to factor 2, which concerns the novelty and difficulty of the questions presented. The complexity of this case, combined with the massive investigation required to prosecute it, and the vigorous defense led by several major law firms, reflects that the case had some undesirable characteristics; this factor supports the fee award.

(xi) The Nature and Length of the Professional Relationship With the Client.

Appointed Counsel's professional relationship is that of *Class* counsel to the *Class*, which has over 20,000 members. The sheer number of clients involved meant that management of interactions with the clients was more challenging than in a typical direct action suit. This factor supports the fee award.

(xii) Awards in Similar Cases.

“The ‘customary fee’ factor in a common fund case is the same as the factor suggesting consideration of awards in similar cases.” *Brown*, 838 F.2d at 455. This factor supports the fee award.

4. A 20% fee, plus a reserve of \$150,000 for post-settlement attorneys’ fees and expenses, is at or below the market rate for this and similar litigation, and is fully supported by Tenth Circuit authority. *E.g.*, *Uelton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 853 (10th Cir. 1993) (citations omitted); *Sturdivant Declaration* ¶ 7. For all of the reasons set forth herein, the *Court* hereby awards *Appointed Counsel*, as an attorneys’ fee in this case, 20 % of the cash *Settlement Fund* (\$55 million, plus interest), plus a reserve of \$150,000 for post-*Settlement* attorneys’ fees and expenses incurred by *Appointed Counsel* in assisting in the implementation of the *Settlement*.


5. The *Court* finds based on the evidence presented that *Appointed Counsel* advanced and incurred reasonable and necessary costs in the amount of \$870,807.99. The expenses incurred are the type of expenses commonly incurred by counsel in very large commercial litigation, and the type commonly reimbursed by the common fund in class action

litigation. Accordingly, the *Court* awards *Appointed Counsel* \$ 870,807.99 for reimbursement of their expenses, to be paid out of the cash *Settlement Fund*.

6. An additional reserve of 2% of the cash *Settlement Fund* shall be available to pay attorneys' fees and expenses of plaintiffs' counsel who were not appointed to represent the *Class*; such counsel shall have 30 days from the entry of this order to file their applications for payment of attorneys' fees and reimbursement of expenses. No amounts shall be payable on such applications unless and until approved by the *Court*.

7. For the reasons set forth in the Fee Motion, *Named Plaintiffs* Kristine Zeigler, Karen Raider, and Michael Van Sickle are each hereby awarded \$12,000 as an incentive award for their substantial contribution to the *Class*, and *Named Plaintiffs* Phillip A. Nelson and Harvey K. Jones are each hereby awarded \$2,000 for their substantial contribution to the *Class*, to be paid from the cash *Settlement Fund*.

SO ORDERED this 16 day of November, 2005.



Honorable Terence C. Kern
United States District Judge