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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KRISTOPHER A. SCHWARTZ,

Plaintiff,

v.

ART COOK; ROGER STANGER; RONALD ZIMMERMAN; BUCKLES-SMITH ELECTRIC COMPANY; BANKERS TRUST COMPANY OF SOUTH DAKOTA; AND JOHN DOE DEFENDANTS NUMBERED 1-5,

Defendants,

*and*

BUCKLES-SMITH ELECTRIC COMPANY EMPLOYEE STOCK OWNERSHIP PLAN,

Nominal Defendant.

No. 3:15-cv-03347

**PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS**

Judge: Hon. Beth Labson Freeman

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## I. INTRODUCTION

Plaintiff Kristopher A. Schwartz ("Plaintiff")—individually and on behalf of the Settlement Class—respectfully submit through their counsel Keller Rohrback L.L.P. ("Class Counsel"), this Motion for Award of Attorneys' Fees and Costs. Class Counsel makes this request pursuant to the terms agreed upon by the parties in § 8.1.2 of the Settlement Agreement, the Notice delivered to all Class Members, as well as the common fund doctrine which permits attorneys in class action cases to recover attorneys' fees and costs from the fund created for the benefit of the class. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81 (1980). Class Counsel specifically seek an award of attorneys' fees totaling $115,500, which represents 33% of Settlement Amount, and reimbursement of $25,000 in expenses incurred in prosecuting this action.

Class Counsel submit that this fee and cost application is eminently fair and reasonable in light of the facts of this case. Class Counsel committed considerable time and resources to develop and prosecute this matter without any guarantee of payment. This litigation was hard fought and involved *inter alia*, extensive investigation, consultation with potential experts, substantial discovery, review of documents, and legal research and briefing – all of which were necessary to obtain a settlement on behalf of the Class. Further, the Settlement was reached after arms-length negotiations, both formal and informal, including a mediation conducted by the Honorable Edward A. Infante. In short, Class Counsel obtained an excellent result for the Settlement Class, and Class Counsel's request for reimbursement of fees and expenses should be granted under the standards governing attorney fee and cost requests in this jurisdiction.[1]

[1] Plaintiff has previously provided the Court with the relevant factual and procedural background of this case, and need not repeat them here. Instead, Plaintiff incorporates the factual and procedural background set forth in Plaintiffs' Motion for Preliminary Approval of the Settlement and Plaintiffs' Motion for Final Approval of the Settlement filed simultaneously hereto.

## II. LEGAL ANALYSIS

### A. The Common Fund Doctrine

"The common fund doctrine provides that a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air West, Inc*., 557 F.2d 759, 769 (9th Cir. 1977). The Supreme Court explained:

> The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

*Boeing Co.*, 444 U.S.at 478.

Thus, the Ninth Circuit recognizes that attorneys are clearly entitled to recover fees from the fund recovered. *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig*., 109 F.3d 602, 607 (9th Cir. 1997) (recognizing that "the people who benefit from the money the lawyers' efforts brought in should share the burden of paying the lawyers."). Under regular common fund procedures, "the parties settle for the total amount of the common fund and shift the fund to the court's supervision. The plaintiffs' lawyers then apply to the court for a fee award from the fund." *Staton v. Boeing Co.*, 327 F.3d 938, 969 (9th Cir. 2003).

### B. Class Counsel's Request for an Award of Attorneys' Fees is Well-Supported by Ninth Circuit Jurisprudence Governing Common Fund Cases

There are two basic methods for calculating attorneys' fees: the percentage-of-the-recovery method and the lodestar method. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *see also Wing v. Asarco Inc.*, 114 F.3d 986, 988–90 (9th Cir. 1997). Most courts use a combination of these two approaches by determining whether the percentage sought by an attorney fee application is reasonable, and cross-checking it with the lodestar method. *See, e.g., Theodore Eisenberg*

*and Geoffrey P. Miller, Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Stud. 248, 267 tbl.10 (2010) (showing that between 2003 and 2008, 42.8% of courts used both the percentage and lodestar methods in the same case, suggesting that these courts undertook a lodestar cross-check; 37.8% used only the percentage method, 9.6% used only the lodestar method, and 9.8% used some other method). Under either method, the $115,500 request is reasonable for the reasons set forth below.

**1. The Percentage-of-the-Recovery Method**

The percentage-of-the-recovery method begins with a simple calculation: the size of the fund obtained for the class is multiplied by a commonly accepted percentage to set a benchmark fee for class counsel. *See Newberg on Class Actions*, § 15.65 Lodestar or percentage method – Costs and benefits of each method (5th ed. 2015). This calculation is straightforward, as the court avoids having to evaluate the right number of hours, proper billing rates, and any potential multipliers when utilizing the lodestar method. *Id.* The ease of administration of the percentage method saves valuable judicial and party resources, thus heeding the Supreme Court's insistence that the "request for attorney's fees . . . not result in a second major litigation." *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). The percentage-of-the-recovery method is also advantageous because class counsel have an interest in generating as large a recovery for the class as possible, and because it promotes efficient litigation since there is no incentive for counsel to increase the hours incurred in prosecuting a case. *Newberg on Class Actions*, § 15.65.

Here, Class Counsel seek 33% of the Settlement Amount, or $115,500 of the $350,000 cash consideration paid by Defendants into the common fund. This amount is consistent with what Class Counsel informed the Settlement Class in a Notice approved by the Court. *See* ECF No. 125, ¶ 6; Gotto Decl. ¶ 18. Class Counsel also prosecuted this class action on a contingency fee basis, and bore the risk of non-payment and no recovery. Thus, the financial burden of litigating this case on a contingency fee

basis for nearly two years since the filing of this complaint on July 20, 2015 justifies the fee sought in this petition.

"Attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002). "Contingent fees [are] a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless [of] whether they win or lose." *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (citation omitted). Additionally, Class Counsel's commitment of time and resources to the litigation required counsel to forgo significant other work. *See Vizcaino*, 290 F.3d at 1050 (recognizing that these burdens are relevant in determining appropriate fee award).

Class Counsel undertook this litigation with no assurance of obtaining attorneys' fees or reimbursement of costs. Although there was no guarantee of recovery, and despite the complex and novel issues of law and fact involved, Class Counsel expended considerable time and resources to successfully prosecute the case on behalf of the Settlement Class. Because of Class Counsel's efforts, Defendants have agreed to pay significant monetary relief, resulting in an outstanding result for the Settlement Class.

Further, Class Counsel only submits this fee request for work performed in this case through March 20, 2017, the day the Court preliminary approved the Settlement. As a result, this request does not include the time and work involved in preparing this motion, the final approval motion, and all other related pleadings thereto. Additional attorney time and expense will also be incurred in preparing for and appearing at the Court's Final Fairness Hearing. And even after this petition is submitted, Class Counsel will also be responsible for continuing to administer the Settlement and to disburse the Settlement proceeds if the Court approves the Settlement. Indeed, as Settlement Administrator, significant work remains in distributing payments to the Settlement Class. All of this work is significant and material to effectuate final approval of the Settlement, and will not be compensable.

The amount sought for all work performed and yet to be performed in this case is also well within the range of what is customarily awarded in settlement class actions. For example, one district court conducted a review of fee awards surveyed by other courts and found that a review of 289 class action settlements demonstrated an average attorney's fees of 31.71% and a median value of one-third of the settlement. *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 WL 3008808, at *15 (D.N.J. Nov. 9, 2005) (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306–307 (3d Cir. 2005)). Other courts have similarly conducted illustrative surveys to determine that 33% of the settlement amount is reasonable. *See, e.g.*, *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 150 (E.D. Pa. 2000) ("[T]he award of one-third of the [settlement] fund for attorneys' fees is consistent with fee awards in a number of recent decisions within this district").

Further, the market rate for a contingent fee is a highly relevant measure in determining whether the percentage requested by Class Counsel here is reasonable. A one-third fee award from the common fund in this case is consistent with, if not below, what is routinely privately negotiated in contingency fee litigation. Indeed, in non-class contingency fee litigation, a 30% to 40% contingency fee is typical. One court relied on surveys and reports to conclude that "a one-third fee is a common benchmark in private contingency fee cases. That benchmark is then often adjusted upward to 40% or higher in the event of an appeal." *Allapattah Serv. Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1212 (S.D. Fla. 2006) (citations to studies and reports omitted); *see also In re Orthopedic Bone Screws Prods. Liab. Litig.*, No. 97–381, 2000 WL 1622741, at *7 (E.D. Pa. Oct. 23, 2000) ("[P]laintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery."); *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987) (holding 33% contingency fee reasonable).

In light of the foregoing, Class Counsel submits that the $115,500 sought in attorneys' fees in this case, which represents 33% of the common fund, is reasonable and should be granted here.

**2. The Lodestar Method**

Though the percentage-of-the-recovery method establishes on its own that the fee award sought by Class Counsel is warranted, courts often conduct a "lodestar crosscheck" to ensure that the percentage applied does not create an unjustifiable windfall for counsel. *See Vizcaino*, 290 F.3d at1050. A lodestar figure is "the product of reasonable hours times a reasonable rate." *City of Burlington v. Dague*, 505 U.S. 557, 559 (1992).

Here, the net lodestar expended in this litigation as of March 21, 2017 is $514,626.90. Gotto Decl. ¶ 12. This work is the sum of 1,131.95 hours expended in this litigation by all attorneys and professional staff at Keller Rohrback. *Id.* These hours were incurred by, among other things, investigating the claims against Defendants, engaging in extensive factual and legal research, reviewing and analyzing relevant documents from Plaintiff, preparing and drafting the complaint and all amendments thereto, propounding discovery requests to Defendants, responding to discovery requests from Defendants, consulting with ERISA experts, and reviewing and analyzing financial documents. In additional, substantial attorney time was spent meeting and conferring and ultimately negotiating a settlement with Defense counsel.

Given these activities by Class Counsel, coupled with the complexity of the ERISA issues involved in this case, the hours incurred are reasonable. In addition, as stated previously, Class Counsel anticipate spending substantial additional hours on this litigation to bring it to conclusion, including administering the Settlement and distributing payments to the Settlement Class. These yet-to-be-incurred hours are not accounted for in the net lodestar amount.

Class Counsel's rates for attorneys and their staff—which range from $210 to $940 per hour—are based on each individual's position, experience level, and location. Gotto Decl. ¶ 9. These rates are reasonable because they are based on "prevailing market rates" for similar services by lawyers of "reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 & n.11 (1984); *see also Bouman v. Block*, 940 F.2d 1211, 1235 (9th Cir. 1991) (finding that declarations

submitted by counsel of the "prevailing market rate in the relevant community . . . [are] sufficient to establish the appropriate [billing] rate for lodestar purposes"). These rates are also reasonable because they have previously been approved by courts across the country. Gotto Decl. ¶ 14. Taking into account the results achieved in this case, the complexity and risk of the litigation, and the skill and experience of counsel, Class Counsel's rates are reasonable and appropriate in this litigation.

The total lodestar amount also outweighs the amount sought by Class Counsel. In particular, the fee award requested is approximately 22.4% of the lodestar amount, resulting in a negative multiplier. This calculation confirms that the compensation proposed for Class Counsel is fair and reasonable. *See Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) ("This resulting multiplier of less than one, (sometimes called a negative multiplier) suggests that the negotiated fee award is a reasonable and fair valuation of the services rendered to the class by class counsel."). The lodestar check also alleviates any concern that the attorney fee recovery in this case would provide a windfall to Class Counsel. No part of the favorable outcome to the Settlement Class, and no dollars of the recovery, were easily obtainable here. Success required both meritorious claims and persistent settlement efforts.

The Settlement also provides a substantial recovery within the range that courts have traditionally found to be fair and adequate under the law. There is a broad range of potential recovery if the case were to be litigated to its conclusion. At one end of the spectrum is the possibility that Plaintiff would prevail on his claims on behalf of the Class and recover the full amounts requested. At the other end of the spectrum is the possibility that Defendants would defeat liability entirely, thereby resulting in no recovery. As set forth in Plaintiff's Motion for Final Approval filed concurrently with this motion, Class Counsel believes that it is unlikely that damages in excess of $18.33 per share could have been established at trial, and that Defendants would have contested any liability whatsoever and would have offered evidence of much lower damages. Thus, a settlement of $350,000, equal to approximately $6 per share held by Class Members, is an excellent compromise when considering the total amount sought by

Plaintiff and the attendant risks of trial. The settlement will provide a meaningful recovery to Class Members in the form of direct monetary benefits. If the Court grants this motion, $209,500 will be distributed to the Settlement Class on a pro rata basis to each Class Member based on the amount of shares he or she owns under the Plan (or approximately $3.61 per share). *See* Gotto Decl. ¶ 18.[2]

Ultimately, when Class Counsel undertook representation of this ERISA action, there was no guarantee of any recovery or compensation. This complex action entailed significant risks for Class Counsel and created substantial demands on their time and resources. However, Class Counsel litigated this case aggressively, fronting all costs and working on a contingency basis. Accordingly, Class Counsel submit that their fee application is fair and reasonable and should be granted.

**C. Class Counsel's Request for Reimbursement of Costs is Fair and Reasonable.**

Courts allow recovery of "out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (internal quotations and citations omitted); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177-78 (S.D. Cal. 2007) (costs such as filing fees, photocopy costs, travel expenses, postage, and telephone and fax costs are relevant and necessary expenses in class action litigation). Lawyers whose efforts succeed in creating a common fund for the benefit of a class are not only entitled to reasonable fees, but also to reasonable out-of-pocket expenses and costs in the prosecution of the claims and in obtaining a settlement. *Vincent*, 557 F.2d at 769. Here, a total of $27,077.98 in costs have been incurred by Class Counsel. Gotto Decl. ¶ 15. But consistent with the parties' Settlement Agreement and the Notice sent to the Settlement Class, Class Counsel represented they would seek no more than $25,000 in expenses. In addition, the expense categories for which Class Counsel seek reimbursement are of the type routinely charged to hourly clients and include, for example, filing fees, legal research, court costs, mediation services, and travel.

[2] These calculations are based on plan account statements provided by Defendants to Class Counsel to date. Class Counsel is in the process of verifying this information with Defendants, and the parties will be able to determine the specific allocation amount for each Settlement Class Member by the Final Fairness Hearing date. *See* Gotto Decl. ¶ 19.

*Id.* These are reasonable and standard expenses of litigation, and the expenses should be reimbursed here.

## III. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests, through their Class Counsel, that the Court grant their Motion for Attorneys' Fees and Costs. For the Court's convenience, a Proposed Order governing both this motion and Plaintiffs' Motion for Final Approval of the Settlement is attached hereto.

DATED this 1st day of May, 2017.

KELLER ROHRBACK L.L.P.

By: */s/ Gary A. Gotto*

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***Attorneys for Plaintiff Kristopher A. Schwartz***

**CERTIFICATE OF SERVICE**

I, Gary A. Gotto, hereby certify that on May 1, 2017, a true copy of the above document was served on the Defendants, through their counsel of record, via ECF.

By: */s/ Gary A. Gotto*
Gary A. Gotto