**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

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| JUDY HUNTER, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| BERKSHIRE HATHAWAY INC., | ) | No. 4:14-CV-663Y |
| | ) | |
| Defendant. | ) | |
| | ) | |
| | ) | |
| | ) | |

**MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF FEES, EXPENSES, AND CASE CONTRIBUTION AWARDS**

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Pursuant to Fed. R. Civ. P. 23(h) and ERISA §502(g)(1), 29 U.S.C. § 1132(g)(1), Keller Rohrback L.L.P. ("KR" or "Class Counsel") respectfully requests from this Court an award of $ 2,154,993.30 in attorneys' fees and reimbursement of $54,109.03 in expenses to Class Counsel[1] to be paid by Defendant Berkshire Hathaway Inc. ("Defendant" or "Berkshire"). Class Counsel further requests that the Court approve and authorize the payment of an aggregate of $25,000 in case contribution awards to Plaintiffs Judy Hunter, Anita Gray, and Bobby Lynn Allen from the proceeds of the parties' Settlement.[2] Class Counsel invested over 3,177 professional hours in this litigation, and advanced over $ 54,000 in costs on behalf of the Settlement Classes,[3] all without any guarantee of payment. Class Counsel began their investigation of this case in 2014, and during the ensuing six years they have prevailed in an appeal to the Fifth Circuit, prevailed on a subsequent motion to dismiss, engaged in discovery and motion practice, and participated in a three-month mediation process that led to the Settlement. These efforts resulted in a Settlement with an estimated aggregate value to the Settlement Classes in excess of Ten Million Dollars ($10,000,000). In light of Class Counsel's efforts, the risks posed by the litigation, and results achieved for the Settlement Classes, the requested award is fair, reasonable, and well-supported by the case law.

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[1] This includes fees of $51,052.50 and expenses of $14.00 incurred by local counsel Mark C. Hill, and, following Mr. Hill's retirement, local counsel Matthew Bobo.

[2] A copy of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") is included as Exhibit 1 to the Joint Appendix in Support of Motions for Final Approval of Class Action Settlement and for Approval of Fees, Expenses, and Case Contribution Awards ("Appendix" or "App'x"), filed concurrently herewith.

[3] "Classes" refers to the two classes identified in the Settlement (the "401(k) Settlement Class," Settlement Agreement at § 1.19, and the "Pension Plan Settlement Class," *id.* at § 1.21, App'x 2-3) and preliminarily certified by the Court in its January 28, 2020 Order Granting Motion for Preliminary Approval of Settlement, Dkt. No. 133 (the "Preliminary Approval Order").

## I. BACKGROUND

Although the Court is familiar with the facts, Class Counsel provides here a summary of the work undertaken in the litigation on behalf of the Settlement Classes.[4]

### A. Investigation, Analysis, and the Complaint

Class Counsel began work on the case in early 2014, when they were contacted by plaintiff Judy Hunter, then the Chief Financial Officer of Acme Building Brands, Inc. ("Acme"), a wholly-owned subsidiary of Berkshire, and chair of the Acme committees[5] with responsibility for the Acme Brick Company Pension Plan (the "Pension Plan") and the Acme Brick Company 401(k) Retirement and Savings Plan (the "401(k) Plan") (together the "Plans"). Ms. Hunter contended that Acme, at the insistence of Berkshire, had taken or was contemplating taking action with respect to the Plans in violation of the terms of the Agreement and Plan of Merger dated as of June 19, 2000, under which Berkshire acquired Acme[6] (the "Merger Agreement"). After a thorough investigation and analysis, Class Counsel drafted and filed a complaint (ECF Dkt. 1) against both Acme and Berkshire which alleged violations of the federal Employee Retirement Income Security Act of 1974 ("ERISA") and the terms of the Plans, as modified by the Merger Agreement, including that Berkshire caused its wholly-owned subsidiary Acme to freeze benefit accruals for all Pension Plan participants beginning on October 4, 2014, and caused Acme to cut in half the employer's matching contribution for 401(k) Plan participants for the years 2010 through 2013.

Prior to instigating suit, and throughout the course of the litigation and the parties'

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[4] For additional detail please refer to Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement and Related Relief, ECF Dkt. 130 ("Preliminary Approval Motion").

[5] The Acme Brick Company 401(k) Retirement and Savings Plan Investment/Administrative Committee (the "401(k) Committee") and the Acme Brick Company Pension Plan Retirement/Administrative Committee (the "Pension Committee").

[6] Berkshire acquired Justin Industries, which at the time wholly owned Acme. ECF Dkt. 50 ¶ 20. In a later restructuring Berkshire directly acquired all interests in Acme.

negotiations, Class Counsel worked with the Named Plaintiffs to investigate the facts, circumstances, and legal issues associated with the allegations and defenses in the action. Class Counsel's investigation included, *inter alia*, (a) inspecting, reviewing, and analyzing the Plans, the Merger Agreement, documents publicly available and/or produced by Defendants in litigation and discovery, or otherwise relating to Acme, Berkshire, and the actions of Acme and Berkshire; (b) reviewing, analyzing and researching the applicable law with respect to the claims asserted in this case and the possible defenses thereto; and (c) seeking expert advice on actuarial matters. Declaration of Gary A. Gotto in Support of Motions for Final Approval of Class Action Settlement and Fee Award ("Gotto Decl."), Ex. 10, ¶ 4; App'x at 99

During the course of the litigation and negotiations, the Named Plaintiffs collected and produced documents; reviewed and approved the complaint, the amended complaint, and other major filings; maintained contact with Class Counsel; stayed abreast of settlement negotiations; and advised on settlement of the litigation. Gotto Decl. ¶ 5, App'x 99-100; *see* Declaration of Judy Hunter ("Hunter Decl."), Ex. 3, ¶¶ 2, 15, 23, 24, App'x 49-56; Declaration of Anita Gray ("Gray Decl."), Ex. 4, ¶¶ 2, 13, 17, 20, App'x 57-63; Declaration of Bobby Lynn Allen ("Allen Decl."), Ex. 5, ¶¶ 2, 12, 15, 19, App'x 64-70. Plaintiff Hunter in particular was deeply involved in all phases of the case; provided information and extensive input on all filings before this Court and the Fifth Circuit Court of Appeals; she attended oral argument before both this Court and before the Fifth Circuit in New Orleans; attended the mediation in Los Angeles in person; and sat for a full day deposition. Gotto Decl. ¶ 5, 10, App'x 99-100; Hunter Decl. ¶¶ 10-23, App'x 54-54.

**B. Procedural History**

On August 15, 2014, Plaintiffs filed a putative class action complaint in this Court against Acme and Berkshire, alleging violations of ERISA and the terms of the Plans. ECF Dkt. 1. Plaintiffs alleged that, pursuant to the terms of an Agreement and Plan of Merger dated as of

June 19, 2000, under which Berkshire acquired Acme[7] (the "Merger Agreement"), Defendants had impermissibly frozen benefit accruals under the Pension Plan and reduced the employer's matching contribution under the 401(k) Plan. On August 5, 2015, the Court granted Defendants' motion and dismissed Plaintiffs' claims. ECF Dkt. 36. Plaintiffs timely appealed to the Fifth Circuit Court of Appeals. ECF Dkt. 38. After full briefing and oral argument in New Orleans, the Fifth Circuit held that while Plaintiffs had adequately alleged that the Merger Agreement prohibited Berkshire from causing Acme to institute the freeze or reduce the employer match, the Merger Agreement did not prohibit Acme from taking those actions on its own. *Hunter v. Berkshire Hathaway Inc.*, 829 F.3d 357 (5th Cir. 2016). While the Fifth Circuit affirmed the dismissal of claims against Acme, it reversed the dismissal of most of Plaintiffs' claims against Berkshire, and remanded the case to the District Court to litigate those claims. *Id.*

On October 5, 2016, Plaintiffs amended their complaint to assert claims solely against Berkshire, alleging that Berkshire impermissibly pressured Acme into freezing all accruals of benefits under the Pension Plan, and prevented Acme from restoring to its required level the employer's matching contribution to the 401(k) Plan. ECF Dkt. 50. The Amended Complaint seeks equitable relief, including a declaration that the Merger Agreement amends the Plans, and an injunction unfreezing the Pension Plan, restoring the employer match of the 401(k) Plan, and preventing Berkshire from taking future action contrary to the terms of the Merger Agreement. Berkshire again moved to dismiss, ECF Dkt. 51, and on May 31, 2017, the Court denied Berkshire's motion. ECF Dkt. 58. Berkshire answered the Complaint on July 12, 2017, ECF Dkt. 63.

On October 16, 2017, Plaintiffs filed a motion to certify the class under Fed. R. Civ. P. 23(a) and (b), ECF Dkt. 73. Before the motion could be fully briefed, however, certain

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[7] Berkshire acquired Justin Industries, which at the time wholly owned Acme. ECF Dkt. 50 ¶ 20. In a later restructuring Berkshire directly acquired all interests in Acme.

discovery disputes arose concerning documents retained by Plaintiff Hunter when she separated from Acme, and the Court denied Plaintiffs' motion as moot without prejudice while those issues were being resolved, ECF Dkt. 80. Subsequently, Plaintiffs moved to proceed without class certification, ECF Dkt. 93. On January 23, 2019, the Court granted the motion and dismissed the class allegations in the Amended Complaint, but reserved for later determination the extent of any notice to be given to the Plans' participants prior to any settlement or voluntary dismissal. ECF Dkt. 110. Thereafter, in connection with its preliminary approval of the Settlement, the Court reinstated the class allegations and preliminarily certified the Settlement Classes. Order Granting Motion for Preliminary Approval of Settlement, ECF Dkt. 133 ("Preliminary Approval Order").

**C. Discovery**

Discovery commenced after denial of Berkshire's second motion to dismiss with an exchange of initial disclosures under Fed. R. Civ. P. 26(a) on August 3, 2017. The parties negotiated a protective order and a procedure for the handling of electronically stored information. Gotto Decl. ¶ 6, App'x 100.

Plaintiff Judy Hunter had been the Chief Financial Officer of Acme, was on the committees that administered both Plans, and had direct contact with Berkshire and Acme management over the issues that are the subject of the Complaint. Hunter Decl. ¶¶ 3, 5, 7, App'x 52-52. She had extensive knowledge of the facts underlying the Complaint, and was initially in possession of a large number of supporting documents. However, in light of objections raised by Berkshire, and pursuant to agreement and the Court's order of July 24, 2018, ECF Dkt. 102, all documents in Ms. Hunter's possession that stemmed from her employment with Acme were returned to Acme, subject to discovery in the ordinary course by Plaintiffs.

Plaintiffs responded to Berkshire's discovery requests and served their own. Gotto Decl. ¶ 7, App'x 100. Berkshire has produced over 1,700 documents comprising over 8,200 pages to

date. *Id.* Berkshire deposed Plaintiff Judy Hunter in Phoenix, Arizona on May 21, 2019. *Id.* ¶ 8, App'x 100. Discovery was ongoing, with Berkshire continuing to produce documents and the parties negotiating the scheduling of depositions requested by Plaintiffs, when the parties agreed to settle. *Id.*

**D. Mediation**

On May 7, 2019, pursuant to Court order, the parties jointly designated Robert Meyer of JAMS in Los Angeles, California, as mediator. ECF Dkt. 114. Mr. Meyer is highly experienced in mediating complex cases, in particular ERISA cases, and counsel for both Plaintiffs and Defendant had previously successfully mediated cases with him. Gotto Decl. ¶9, App'x 100.

The settlement negotiations took place over the course of three months. The parties exchanged confidential mediation memoranda on July 2, 2019, and Plaintiff Judy Hunter and her counsel attended a day-long in-person mediation session in Los Angeles on July 9, 2019. While the parties, through the mediator, exchanged proposals, they were unable to immediately reach a settlement. However, they agreed to continue to work towards settlement, and in August 2019, at the mediator's request, Berkshire provided additional information to further inform the parties' negotiations and to assist the mediator in crafting a mediator's proposal. The parties exchanged drafts of a proposed term sheet in August and September. Gotto Decl. ¶ 10, App'x 100.

On October 10, 2019, after review and analysis of the additional information provided by Berkshire (with the assistance of Plaintiffs' actuarial expert); after extensive communications with and through the mediator; and after considering all relevant factors, the parties accepted a mediator's proposal and reached an agreement in principle to settle the case. Gotto Decl. ¶ 11, App'x 101. Thereafter, the Parties entered into a formal Settlement Agreement, *Id.* ¶ 12, App'x 101. Class Counsel drafted and filed a Motion for Preliminary Approval, which this Court granted on January 28, 2020. ECF Dkt. 133.

## II. THE SETTLEMENT ESTABLISHES BENEFITS AGGREGATING OVER TEN MILLION DOLLARS

Under the terms of the Settlement, Defendant will cause to be made a cash payment of $750,000 to resolve the claims of the 401(k) Settlement Class (Settlement ¶ 1.33, 6.1.3, Appx. 4, 9-10), and will cause Acme to amend the Pension Plan to provide for the Pension Plan Settlement Class to receive up to an additional two years and nine months' worth of benefit accruals (*id.* ¶ 6.1.2, App'x 9) at an estimated value of $9,402,000.[8] Neither the cash payment nor the additional accruals require members of the Settlement Classes to submit any claims (*id.* ¶¶ 6.1.2, 6.1.3, App'x 9-10), and Defendant is bearing the costs of notice. *Id.* ¶ 2.2.3, App'x 5-6. The fees and expenses of Class Counsel will not be paid from either of these recoveries, and Defendant will separately cause amounts awarded by the Court to be paid *in addition to* those recoveries. *Id.* ¶ 6.1.4, App'x 10.

Case contribution awards for Named Plaintiffs, with Court approval, will be paid out of the $750,000 cash payment to the 401(k) Settlement Class. Class Notice, Ex. 2, App'x 39. Class Counsel seek awards of $15,000 to Judy Hunter and $5,000 each to Anita Gray and Bobby Lynn Allen, to compensate them for the time, effort, and risks they assumed in connection with this action. *Id.*

## III. ARGUMENT

### A. The Court Should Approve, and Order Berkshire to Pay, the Requested Attorneys' Fees.

"In a certified class action, the court may award reasonable attorney's fees … that are authorized by law." Fed. R. Civ. P. 23(h). After conducting its mandatory careful review of the proposed fee award for reasonableness, *In re Heartland Payment Sys., Inc. v. Customer Data*

[8] Acme's actuary (using assumptions stated in the estimate) has estimated the value of these additional accruals to be approximately $9,402,000. An actuarial expert retained by Plaintiffs has confirmed the reasonableness of this estimate.

*Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1069 (S.D. Tex. 2012), the Court should award the requested fees here under ERISA §502(g)(1), 29 U.S.C. § 1132(g)(1).

> [Courts in the Fifth Circuit] typically use one of two methods for calculating attorneys' fees: (1) the percentage method, in which the court awards fees as a reasonable percentage of the common fund; or (2) the lodestar method, in which the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or a downward multiplier.

*Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642-43 (5th Cir. 2012). The Fifth Circuit endorses both approaches and allows "district courts the flexibility to choose between the percentage and lodestar methods in common fund cases, with their analyses under either approach" (informed by" the 12-factor test outlined in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974)). *Evans v. TIN, Inc.*, CIV.A. 11-2067, 2013 WL 4501061 (E.D. La. Aug. 21, 2013) at *6. The district court must show that it "has utilized the *Johnson* framework as the basis of its analysis, has not proceeded in a summary fashion, and has arrived at an amount that can be said to be just compensation." *Dell*, 669 F.3d at 642 (quoting *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 823 (5th Cir. 1996)).

In this case, the bulk of the value of the settlement is contained in accrual of benefits whose value to participants will not be realized until retirement, and may therefore not be reduced to cash for many years. Class Counsel do not seek an actual percentage of the amount recovered as their fee; instead, they seek an award under the fee-shifting provisions of ERISA §502(g)(1), 29 U.S.C. § 1132(g)(1). "If the court determines under the five-factor *Bowen* test that a party is entitled to attorneys' fees, the lodestar method is then used to determine the amount to be awarded." *Johnson v. Prudential Insurance Co. of America*, No. H-06-130, 2008 WL 901526 at *6 (S.D. Tex. Mar. 31, 2008), citing *Todd v. AIG Life Ins. Co*., 47 F.3d 1448, 1459 (5th Cir. 1995). Class Counsel demonstrate below that they are entitled to a fee award, and that their

requested fees, calculated on the lodestar basis and supported by the *Johnson* analysis, are in line with an award on a percentage basis of the value recovered.

### 1. Class Counsel is Entitled to Attorneys' Fees Under ERISA §502(g)(1).

ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), provides that in an action such as this one "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." The substantial benefit provided by the Settlement, particularly after obtaining a reversal in the Fifth Circuit and defeating a subsequent motion to dismiss, easily meets the threshold standard that Plaintiffs must show only "some degree of success on the merits" in order to warrant a fee award. *Hardt v. Reliance Standard Life Ins. Co.* 560 U.S. 242, 256 (2010) (rejecting "prevailing party" standard).

It is similarly evident that the award of fees here is consistent with the applicable factors in the non-exclusive list laid out in the venerable case of *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980), "[n]o one of [which] is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a court should address in applying section 502(g)." *Bowen* and the cases it relied on[9] did not arise in a settlement context, but there is ample reason to award fees here and we address these nuclei of concerns *seriatim.*

(1) *Degree of the opposing parties' culpability or bad faith.* In light of the parties' settlement without admission of fault, this factor is not in play here.

(2) *The ability of the opposing parties to satisfy an award of attorneys' fees.* This factor does not inhibit the award of fees here. Berkshire's recent public statements demonstrate that it has the ability to satisfy the requested fee award.[10]

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[9] *Bowen* draws its factors in part from *Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978), where a fiduciary breach was proved at trial.

[10] *E.g.*, CNN Business, *Berkshire Hathaway's cash pile soars to $128 billion with Warren Buffett yet to make big acquisition*, https://www.cnn.com/2019/11/02/business/berkshire-hathaway-q3-earnings/index.html (updated 11/2/2019) (last accessed 3/2/2020).

(3) *Whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances.* Although the parties have expressly not admitted fault, the award of fees in a hard-fought case that ends in settlement will undoubtedly have a deterrent effect on similar cases, particularly those where a defendant knows it is culpable.

(4) *Whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself.* This factor cuts strongly in favor of an award of fees. The Action from the outset has sought relief that benefits all Class members, not just the three Named Plaintiffs. *See, e.g.*, Am. Complt. (ECF Dkt. 50) at 30-33 (requesting equitable relief that benefits all Class members); Hunter Decl. ¶¶ 6, 9, 12, 14, App'x. 51-53; Gray Decl. ¶¶ 7, 12, App'x 59-60; Allen Decl. ¶¶ 7, 11, App'x 66-67. Plaintiff Hunter in particular brought this case because she was a fiduciary of both Plans and was fulfilling her obligation as a fiduciary; the benefit of this ten million dollar settlement is necessarily spread among thousands of Plan participants, while only the Named Plaintiffs took any risk in order to receive it.

(5) *The relative merits of the parties' positions.* The merits of the parties' positions remain finally undetermined due to the Settlement. Nevertheless, this factor favors the award of fees in that Class Counsel was required, after an initial setback on a motion to dismiss, to file an appeal and fight back to reinvigorate the litigation, and after remand prevailed in full on Defendant's second motion to dismiss.

*Bowen* went on to describe another fact that would weigh in favor of an award of attorneys' fees: "Where plaintiffs are fiduciaries, for example, … a court should consider whether those parties would have violated their fiduciary duties by not bringing suit. " *Id.*, 624 F.2d at 1Gotto 6-1267. It was precisely to vindicate her fiduciary duties that Plaintiff Hunter brought this suit, *see, e.g.,* Am. Compl. ¶¶ 2, 31, 56.

In sum, this case is well-positioned for an award of fees. Plaintiffs and Class Counsel

took significant risks for six years to reach this Settlement, and Class Counsel should receive a reasonable fee.

**2. The Lodestar Analysis Supports Class Counsel's Reasonable Fee Request.**

Having established entitlement to a fee award under *Bowen*, Class Counsel now proceed to demonstrate that their requested lodestar is reasonable. *Todd,* 47 F.3d at 1459. Under the lodestar method, a court must "determine the reasonable number of hours expended on the litigation and the reasonable billing rates for the participating attorneys, multiplying the figures to arrive at the 'lodestar.'" *Prudential Ins.*, 2008 WL 901526, at *6. In this case, Class Counsel calculates the lodestar for this litigation, including local counsel's fees of $51,153,[11] to be approximately $2,381,995, as set out in the following table[12]:

[11] Local counsel's fees are included in total lodestar but are not included in the calculation of Class Counsel's effective blended rate.

[12] A more detailed summary is included as Gotto Decl. Exhibit B, App'x 150-151. Because hours and fees are shown in whole numbers on this table, there are minor rounding differences with Exhibit B.

| Timekeeper Type | Hours | Fees | Blended Rate | Billing Judgment Adjustments | Adjusted Fees | Adjusted Blended Rate[13] |
|---|---|---|---|---|---|---|
| Partner | 2,339 | $ 1,920,865 | $ 821.23 | ($ 165,000) | $ 1,755,865 | $ 750.66 |
| Associate | 432 | $ 252,822 | $ 585.24 | ($ 40,000) | $ 212,822 | $ 492.13 |
| Paraprofessional | 406 | $ 107,155 | $263.93 | ($ 22,000) | $ 85,155 | $ 209.92 |
| Estimated future fees | | $ 50,000 | | | $ 50,000 | |
| Subtotals | | $ 2,330,842 | | | $ 2,103,842 | |
| Local Counsel fees | | $ 51,153 | | | $ 51,153 | |
| **Totals** | **3,177** | **$ 2,381,995** | | | **$ 2,154,995** | |

Gotto Decl. ¶ 22, App'x 103. The $2,381,995 lodestar number includes Class Counsel's actual time recorded through February 12, 2020, plus an estimate of an additional $50,000 for fees to be incurred by Class Counsel in connection with drafting pleadings, communicating with class members, attending the final hearing, and performing other tasks required to obtain final approval and implementation of the settlement. *Id.* ¶ 23, App'x 103. The lodestar is adjusted downwards by $227,000 in discretionary adjustments reflecting Class Counsel's billing judgment. The adjusted fees are divided by number of hours billed, by partner, associate, and paraprofessional timekeeper groups, to establish the adjusted blended billing rates of $750.66 for partners, $492.13 for associates, and $209.25 for paraprofessionals. *Id.* ¶ 24, App'x 103-104.

[13]It is not unusual, where there has been a long delay before a plaintiff's counsel receives payment, for fees to be calculated at current rates in order to factor in the time value of money. *See, e.g.*, *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 763 (S.D. Tex. 2008). In this case, however, Class Counsel have elected to bill time at the billing rate of the timekeeper at the time it was billed. The "blended rate" over the course of the representation for Class Counsel's principal timekeepers (*i.e.*, the total dollar value of the billed time divided by the total hours worked) is set forth on Gotto Decl. Exhibit C. Gotto Decl. ¶ 25, App'x 104. The Adjusted Blended Rate set forth above for each group of timekeepers is the rate derived by dividing their adjusted fees by total hours.

As explained *infra* note 13, Class Counsel's fees are calculated based on Class Counsel's rates when the time was recorded. Gotto Decl. ¶ 25, App'x 104. Exhibit C to the Gotto Declaration, App'x 152-153, sets forth, for each attorney timekeeper and paraprofessionals as a group (excluding any timekeepers who recorded less than ten hours over the course of the entire representation), the total hours billed over the course of the representation, the aggregate lodestar at the rates in effect when billed, and the blended rate over the entire representation (equal to the lodestar divided by hours); it does not reflect the billing judgment adjustments set forth in the foregoing table. Over the course of the representation, rates for partners ranged from $500 to $975; for associates, from $445 to $650; and for paraprofessionals, from $231 to $350. *Id.* ¶ 27.

**a. Class Counsel's Hours Were Reasonably Spent**

The 3,177 professional hours Class Counsel spent litigating this case were reasonable. This litigation has gone on for well over five years. It has required the investigation and preparation of two complaints, the litigation of two motions to dismiss, and in the interim it required a trip to the Fifth Circuit Court of Appeals. It has required substantial discovery and additional motion practice, including a motion to certify a class, a motion to proceed without a class, a motion to compel, and a motion for preliminary approval of settlement – as well as preparation of a mediation memorandum and participation in mediation proceedings. Investigation, development, and litigation of Plaintiffs' claims reasonably required the amount of work Plaintiffs put into it. *Cf. Slipchenko v. Brunel Energy, Inc.*, No. H-11-1465, 2015 WL 338358 (S.D. Tex. Jan. 23, 2015) (approving lodestar based on 3,645.60 hours of work over three years in an ERISA wrongful denial of benefits matter).[14]

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[14] In *Slipchenko* Plaintiffs and Defendants had agreed to a discount in excess of 50%, from $1.7 million to $624,999, where the value of the recovery ($375,000) was far less than the lodestar amount. *Slipchenko,* 2015 WL 338358 at *18. In this case, the requested fees constitute approximately 22% of the value of the settlement, and to the extent approved they will be paid *in addition to* the settlement.

Class Counsel has generally categorized the time spent by its partners, associates and paraprofessionals by area of endeavor, and has included a table identifying hours spent on those tasks. Gotto Decl. ¶ 28, App'x 104, and Exhibit B, App'x 150-151. The largest number of gross hours – 843 – were spent on motion practice (which, as described above, encompassed two labor-intensive motions to dismiss, an unusual motion to proceed not as a class, a discovery motion, and other procedural and administrative motions); of these, 476 were partner hours, 298 were associate hours, and 69 were paraprofessional hours. The next-largest category, discovery, accounted for 730 hours, including 472 partner hours, 82 associate hours, and 175 paraprofessional hours.

Class Counsel litigated the novel issues in this case efficiently. To the extent practicable they assigned work to lower-billing associates and paraprofessionals, for a total of about 838 hours. Gotto Decl. ¶ 29, App'x 104. However, to some extent – for example, in briefing the appeal to the Fifth Circuit, where 563 partner hours were expended, extensive partner attention was particularly warranted. *Id.* As explained above, Class Counsel has reviewed its bills and exercised billing judgment by discounting its total lodestar by $227,000, and has calculated all time entries based on the billing rate in effect at the time the entry was made. *Id.* ¶¶ 24, 25, App'x 103-104.

**b. Class Counsel's Billing Rates are Reasonable**

"An attorney's requested hourly rate is prima facie reasonable when he requests that the lodestar be computed at his or her customary billing rate, the rate is within the range of prevailing market rates, and the rate is not contested." *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1087 (internal citation omitted) (finding reasonable rates ranging from $825/hour for a co-lead class counsel to $90/hour for paralegal work).

Here, Class Counsel seeks attorneys' fees at Keller Rohrback's rates in effect when the time was recorded. Keller Rohrback's blended billing rates over the past almost six years in this

matter – $ 821.23 for partners, $ 585.24 for associates, and $ 263.93 for paraprofessionals working on the case – are in line with or lower than fee awards to Keller Rohrback in other cases. [15] Further, they compare very favorably to the current rates charged by professionals at Munger Tolles & Olson, defense counsel in this Action. *See, e.g.*, Exhibit B to Munger, Tolles & Olson's First Interim Fee Application in the PG&E Corporation bankruptcy,[16] budgeting partners at $1,173/hr, associates at $722/hr, and paralegals at $357/hr.,[17] included as Exhibit 8, App'x 85-87.

In assessing the reasonableness of Class Counsel's rates, there are several reasons why the Court should not limit its consideration to the rates charged in the immediate Fort Worth community. First, this matter involved a direct claim against Acme, a major employer in Fort Worth, raising concerns about actual and potential conflicts of interest in the Fort Worth legal community. Second, the claims in this matter are highly novel and complex, requiring the attention of sophisticated ERISA litigation counsel. As a practical matter, these two factors required Plaintiffs to seek appropriate ERISA litigation counsel outside the immediate community. Furthermore, Berkshire, with in excess of $800 billion in assets, would also be a direct defendant, and indeed it commenced defense of this case by hiring both local Fort Worth counsel and the Washington, D.C. law firm of Miller & Chevalier, Chartered. Any agreement to accept the representation on a contingency fee involved a large degree of risk.

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[15] Local counsel's billing rates – Mark Hill, $400 to $450/hour; Matthew Bobo, $500/hour – are well within the range of fees for similar service in the community. Hill Decl. ¶ 4, App'x 72; Bobo Decl. ¶ 4, App'x 74.

[16] *In re PG&E Corporation, et al.*, U.S. Bankr. Ct., N.D. Cal., No. 19-30088 (DM), First Interim Application of Munger, Tolles & Olson LLP for Compensation for Services and Reimbursement of Expenses as Attorneys to the Debtors and Debtors in Possession for Certain Matters from January 29, 2019 through May 31, 2019, DE No. 2996 (Filed 7/15/19).

[17] *McClain v. Lufkin Indus., Inc.*, 649 F.3d 374 (5th Cir. 2011), which approved plaintiffs' counsel's out-of-district rates but criticized comparisons of plaintiffs' and defendants' counsel's total *fees*, *id.* at 384, does not affect Class Counsel's comparison of Plaintiffs' and Defendant's counsel's *rates* in the national marketplace.

Keller Rohrback's billing rates, which were used for purposes of calculating the lodestar here, have been submitted to courts throughout the country. These rates are set after a thorough review of prevailing rates of competitor firms and other market indicia. Gotto Decl. ¶ 30, App'x 105. These rates are the same as rates used by Keller Rohrback in comparable types of class actions and other complex litigation. *Id.* In addition, Keller Rohrback has submitted fee petitions in other class cases that have reported billing rates at amounts comparable to those sought herein, and courts have approved an award of attorney's fees in such cases. *Id. E.g.*, Order Awarding Attorneys' Fees, Service Awards, & Reimbursement of Litigation Expenses ¶ 5, *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, MDL No. 2335 (S.D.N.Y. Sept. 24, 2015), ECF No. 637 (awarding then-current attorneys' rates between $475 and $895); Order Approving Attorney's Fees, Expenses & Incentive Awards ¶ 5, *Diebold v. N. Tr. Invs., N.A.*, No. 09-1934 (N.D. Ill. Aug. 10, 2015), ECF No. 285 (awarding then-current attorneys' rates between $395 and $895); Order & Final Judgment ¶ 8, *In re Bear Stearns Cos. ERISA Litig.*, No. 08-2804 (S.D.N.Y. Sept. 20, 2012), ECF No. 163 (awarding then-current attorneys' rates between $295 and $785); Order Granting Plaintiffs' Motion for Final Approval ¶ 10, *In re Ford Motor Co. ERISA Litig.,* No. 06-11718 (E.D. Mich. Feb. 15, 2011), ECF No. 291 (awarding then-current attorneys' rates between $331 and $740); Order Granting Lead ERISA Counsel's Motion for Award of Attorneys' Fees & Expenses at 2, *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, No. 05-1725 (E.D. Mich. May 12, 2010), ECF No. 493 (awarding then-current attorneys' rates between $300 and $675); Order Granting Lead Counsel's Application for Attorney's Fees & Reimbursement of Litigation Expenses ¶ 6, *In re State St. Bank & Tr. Co. ERISA Litig.*, No. 07-8488 (S.D.N.Y. Feb. 19, 2010), ECF No. 191 (awarding then-current attorneys' rates between $300 and $740); Order & Final Judgment ¶ 9, *In re CMS Energy ERISA Litig.*, No. 02-72834 (E.D. Mich. June 27, 2006), ECF No. 226 (awarding then-current rates between $300 and $640).

Class Counsel's rates are reasonable; the time it spent on the case is reasonable; and the Court should approve the requested lodestar fees.

**3. The Percentage Method Supports Class Counsel's Reasonable Fee Request.**

Class Counsel's requested fees under the lodestar approach are strongly validated by a calculation of attorneys' fees as a percentage of the value of the settlement. The typical class action fee award in the Fifth Circuit ranges between 25% and 33% of a common fund. *See Jones v. JGC Dallas LLC*, 2014 WL 7332551 at *6, No. 3:11–CV–2743–O (N.D. Tex. Nov. 12, 2014) (citing authorities and approving 30% fee award on $2.3 million recovery). Class Counsel's fee agreement with Plaintiffs expressly caps fees at one-third (Gotto Decl. ¶ 3, App'x 99), but the requested fees here do not come anywhere close to that percentage. With the value of the settlement at over $10 million, and the fees requested by Class Counsel at $2.15 million, the fees requested under the lodestar calculation amount to no more than 21% of the settlement's value.[18]

**4. The *Johnson* Factors Support the Reasonableness of the Requested Fee Award.**

An analysis of the familiar twelve *Johnson* factors confirms the reasonableness of the requested award. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974).

***a. The Time and Labor Required.***

This factor is similar to the analysis of reasonableness of the hours expended on the litigation under the lodestar method. *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1082. The amount of time and labor that Class Counsel spent to prosecute this action on behalf of Plaintiffs and Class Members weighs in favor of the requested fee award, for the reasons articulated in Section III.A.2.a, above.

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[18] Under these circumstances, although Class Counsel has not requested a multiplier, the percentage calculation method would easily support an enhancement to Class Counsel's lodestar. If fees were calculated at just 25% of the settlement value, the award would be about $2.5 million, or a lodestar multiplier of 1.2.

**b. *Novelty and Difficulty of the Issues, and Skill Required.***

*Johnson* factors two (novelty and difficulty of the case), three (skill required to properly provide the legal services), and nine (experience, reputation and ability of counsel) are related. This case presented a highly unusual fact pattern – enforcement against Berkshire Hathaway, a company of enormous resources, of a negative promise for the benefit of third parties contained in a separate merger document that Plaintiffs contend amended the Plans. In accepting the representation of Plaintiffs Class Counsel was taking on significant risk; and, indeed, it proceeded to litigate heavily, without compensation, in more than one court for more than five years before this resolution was reached.

Keller Rohrback is well known for its success in complex ERISA class action litigation, and has many years of experience in litigating ERISA cases. See firm resume attached to Gotto Decl. as Ex. A, App'x 108-149. Local counsel also have extensive experience, and provided valuable guidance in navigating the Northern District of Texas. Gotto Decl. ¶ 35, App'x 106. Working in concert, Class Counsel and local counsel provided excellent legal services in an uncertain area of the law. The fact that Class Counsel had the experience and skill necessary to prosecute this case is borne out by the successful result.

**c. *Preclusion of Employment.***

The fourth Johnson factor, preclusion of employment in other matters due to accepting this case, also supports Class Counsel's request. Keller Rohrback agreed to represent Plaintiffs in this case on a contingency basis, committing to expend potentially thousands of hours of work and advance significant litigation expenses without any guarantee of payment. Gotto Decl. ¶ 3, App'x 99. Class Counsel's acceptance of this case meant that it was limited in accepting other cases if it did not have additional resources to staff them. Class Counsel's commitment to this litigation precluded other employment, and this factor supports the reasonableness of Class Counsel's fee request.

**d. *Customary Fee, and Whether Fixed or Contingent.***

The fifth and sixth Johnson factors – the customary fee and whether the fee is fixed or contingent – also support Class Counsel's request. Class Counsel agreed to accept this representation with the understanding that it would need to advance all expenses, with payment of fees in an amount not to exceed one-third of the sums recovered in the litigation, and reimbursement of expenses, all contingent on a favorable outcome and subject to Court approval. Gotto Decl. ¶ 3, App'x 99. Class Counsel entered into separate agreements with local counsel under which local counsel's fees would be paid out of the fee approved by the Court in proportion to hours expended at Class Counsel's and local counsel's lodestar. *Id.* ¶31, 33, App'x 105-106. Both Plaintiffs and Class Counsel understood and agreed that Class Counsel would be entitled to obtain a fee through a common fund recovery, statutory fee-shifting, or some combination thereof. *Id. ¶3,* App'x 99. The arrangement here is typical and customary of ERISA class action contingent fee practice.

As discussed in Section III.A.2.b, above, the rates at which Class Counsel's lodestar is calculated are Class Counsel's usual rates for services in class action and other complex litigation cases when the time was recorded, Gotto Decl. ¶ 30, App'x 104-105, and are reasonable particularly in light of the availability of the legal services required, the nature and resources of the parties to the litigation, and counsel retained to defend Defendants. These factors also support the reasonableness of the requested fee.

**e. *Time Limitations.***

This case did not present unusual time limitations imposed either by the client or the circumstances. As a result, the seventh *Johnson* factor is neutral in this analysis.

**f. *The Amount Involved and the Results Obtained.***

The Supreme Court and the Fifth Circuit have instructed that "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *In re*

*Heartland Payment Sys.*, 851 F. Supp. 2d at 1085 (citing *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) and *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998)). Through Class Counsel's efforts, members of the Pension Plan Settlement Class will share in the benefit of two years and nine months of additional pension benefit accruals worth $9.4 million, and members of the 401(k) Plan Settlement Class will share proportionally in three-quarters of a million dollars. Because Plaintiffs sought equitable relief, and because as of early 2017 none of Plaintiffs were any longer an employee of Acme or an active participant in either Plan, Plaintiffs faced significant obstacles in obtaining prospective relief for both Plans, and in addition faced a potentially difficult argument for obtaining retroactive equitable relief for the 401(k) Plan Settlement Class. Consequently, Plaintiffs faced a very real risk that their recovery if they prevailed at trial could have been less than their recovery from the Settlement – and, if Berkshire Hathaway chose to appeal, Plaintiffs could have waited even longer to realize any benefit from the litigation. The Settlement is an excellent result for Plaintiffs, and this factor weighs heavily in favor of the requested fee award.

**g. *The Undesirability of the Case***

The tenth Johnson factor looks at the "undesirability" of the case. A number of things made this case undesirable to prospective counsel. First, it is a contingency fee case against a locally popular employer and a well-known co-defendant with bottomless pockets, which made expensive and lengthy litigation almost certain. Second, Plaintiffs would have to prove up a transaction that was fourteen years old, one of the primary signatories of which had passed away. And third, the claim that a pair of clauses in an old merger agreement amended the two Plans posed significant challenges under existing law. Class Counsel in fact had to litigate in two different courts for going on six years in order to reach this result. This factor supports Class Counsel's request.

**h. *The Nature and Length of the Professional Relationship with the Clients***

Class Counsel had no pre-existing relationship with the clients. Once Class Counsel had been retained, Plaintiffs – particularly Plaintiff Hunter - communicated frequently on matters of concern, evidence, and strategy, and all Plaintiffs were involved in major decisions. Gotto Decl. ¶ 5, App'x 99-100. Because of the length and nature of the relationship that developed, however, as a practical matter it would have been extremely difficult to turn the case over to substitute counsel.

**i. *Awards in Similar Cases.***

The facts of this case are unique. Class Counsel discuss above other awards to Keller Rohrback in ERISA cases (§ III.A.2.b), and percentage recoveries in class actions in the Fifth Circuit (§ III.A.3), from which the Court may conclude that the amount requested by Class Counsel is solidly within the range of approved fee awards.

The applicable *Johnson* factors all support the reasonableness of the requested fee award, and it should be approved.

## IV. REIMBURSEMENT OF EXPENSES

The Court may award reasonable litigation expenses authorized by the parties' agreement, Fed. R. Civ. P. 23(h). Trial courts may determine what is reasonable based on an objective standard of reasonableness, *i.e.*, the prevailing market value of services rendered. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Consistent with their representation agreement with Plaintiffs, Gotto Decl. ¶ 3, App'x. 99, Class Counsel seek reimbursement of reasonable and necessary expenses of $54,109.03, as summarized on Gotto Decl. Ex.D, App'x 154-155. These expenses include filing fees; travel expenses for court appearances, deposition, and mediation; expert fees; copying, delivery and telecommunications charges; computer-based research and database charges; and similar litigation expenses. *Id.* Expenses of this type are typically billed

by attorneys, and are calculated, without markup, from the actual expenses of these services in the markets in which they were provided. *Id*. ¶ 36, App'x 106.

## V. CASE CONTRIBUTION AWARDS

Class Counsel respectfully request that the Court approve case contribution awards to compensate Plaintiffs for their active and vital role in this litigation, for the settlement they helped achieve for other Class Members, and for the risks they incurred in bringing this class action lawsuit. Case contribution awards are an appropriate means of recognizing when a named plaintiff's efforts and sacrifices exceeded that of other class members. *McClain v. Lufkin Indus. Inc.*, No. CIV.A. 9:9763, 2010 WL 455351, at *24 (E.D. Tex. Jan. 15, 2010), *aff'd.* 649 F.3d 374 (5th Cir. 2011). To weigh those efforts and sacrifices, the courts generally consider three factors: (1) "actions the plaintiff has taken to protect the interests of the class, [(2)] "the degree to which the class has benefitted from those actions, and [(3)] the amount of time and effort plaintiff expended in pursuing the litigation." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *Heartland*, 1051 F. Supp. 2d at 1089 (relying on *Niedert*'s statement of relevant factors). Case contribution awards are especially appropriate in cases where a named plaintiff incurred a risk of retaliation by their employer. *McClain,* 2010 WL 455351 at *25. Here there are three Plaintiffs without whom there could be no case, each of whom has contributed to the litigation; has collected documents and provided information to Class Counsel in connection with investigation and responding to discovery; has maintained regular contact with Class Counsel; has reviewed and approved the Complaints and other major filings; has stayed abreast of the pleadings, motions, and settlement negotiations; and analyzed and approved the Settlement. Allen Decl. ¶ 2, 7-16, App'x 65-68; Hunter Decl. ¶ 2, 9-23, App'x 50, 52-54; Gray Decl. ¶ 2, 7-17, App'x 58-61. Two of the plaintiffs, Ms. Hunter and Ms. Gray, took the substantial risk of bringing the lawsuit

while still employed at Acme. Hunter Decl. ¶ 3, 12-13, App'x 51-53; Gray Decl. ¶ 3, 10-11, App'x. 59-60.

Though the contributions of all three Named Plaintiffs were essential to the resolution of this litigation, Ms. Hunter did the lion's share of the work. She brought the case because she believed, as a fiduciary of both Plans, that the duty she owed to the Plan Members demanded nothing less. Hunter Decl. ¶ 5, 9, App'x 51-52. She assisted with the preparation of the appellate briefing and attended the appellate argument before the Fifth Circuit in New Orleans. Hunter Decl. ¶ 18, App'x 53. She traveled to Phoenix to deal with discovery issues, and again to give her deposition. Hunter Decl. 16-17, App'x 53. She was intimately involved in the discovery process, and attended a hearing on a motion to compel in Fort Worth. And she traveled to Los Angeles to attend the mediation that ultimately led to the Settlement. Hunter Decl. ¶ 19, App'x 53. She brought the case in fulfillment of her duty to protect the best interests of the Plan Members, and she faithfully maintained the same dedication to serving the best interests of those very same people in her capacity as Named Plaintiff through all five years of litigation. Hunter Decl. ¶ 23, App'x 54.

Because of the relative contributions of the three Plaintiffs, Class Counsel request that the Court approve a case contribution award of Fifteen Thousand Dollars ($15,000) to Judy Hunter, and Five Thousand Dollars ($5,000) each to Anita Gray and Bobby Lynn Allen. These Case Contribution Awards, to the extent approved, would be paid out of the 401(k) Class award of $750,000. While this does, of course, reduce by 3% the amount to be received by the 401(k) Class, in the absence of the contributions of the Plaintiffs there would have been no case, no settlement, and no 401(k) Class award at all.

## VI. CONCLUSION

Class Counsel respectfully request that the Court approve their requested fees of $2,154,993.30, and reimbursement of expenses of $ 54,109.03, and order Berkshire Hathaway to pay the approved amounts forthwith. Class Counsel further respectfully request that the Court approve Case Contribution Awards of $15,000 to Plaintiff Judy Hunter, $5,000 to Plaintiff Anita Gray, and $5,000 to Plaintiff Bobby Lynn Allen; order that Berkshire Hathaway cause them to be paid from the 401(k) Settlement Class fund prior to distribution to any Class member; and grant such other and further relief as the Court may deem appropriate. A proposed form of order granting this motion is submitted herewith.

RESPECTFULLY SUBMITTED this 24th day of March, 2020.

*/s Gary A. Gotto*
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**CERTIFICATE OF SERVICE**

I certify that on March 24, 2020, all counsel of record were served with a copy of the foregoing via the Court's ECF system pursuant to Local Rule 5.1(d).

*/s Christopher Graver*