THE HONORABLE HAYDEE VARGAS
Department 12
Noted for Consideration: Friday, July 24, 2026
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

CHELSEA RUTTER and MAGDALENA CHAVEZ, individually and behalf of all others similarly situated, Plaintiffs, v. BRIGHT HORIZONS FAMILY SOLUTIONS, INC. d/b/a BRIGHT HORIZONS CHILDREN'S CENTERS, INC., Defendant.	NO. 22-2-19810-9 SEA **INDEX OF NON-WASHINGTON AUTHORITIES CITED IN PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS AND SERVICE AWARDS**

EXHIBIT NO.	AUTHORITY
	FEDERAL CASES
1.	*Byles v. Ace Parking Mgmt., Inc.*, No. C16-0834-JCC, 2019 WL 3936663 (W.D. Wash. Aug. 20, 2019)
2.	*Costa v. Comm'r of Soc. Sec. Admin.*, 690 F.3d 1132 (9th Cir. 2012)
3.	*Harris v. Marhoefer*, 24 F.3d 16 (9th Cir. 1994)

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EXHIBIT NO.	AUTHORITY
4.	*Hill v. Continuum Glob. Sols., LLC*, No. 2:12-CV-00717-JCC, 2026 WL 592270 (W.D. Wash. Mar. 3, 2026)
5.	*In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015)
6.	*Liu v. Home Depot USA, Inc.*, No. C23-1217JLR, 2024 WL 4371559 (W.D. Wash. Oct. 2, 2024)
7.	*Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008)
8.	*Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322 (W.D. Wash. 2009)
9.	*Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157 (9th Cir. 2013)
10.	*Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177 (2014)
11.	*Rodriguez v. W. Publ'g*, 563 F.3d 948 (9th Cir. 2009)
12.	*Tuttle v. Audiophile Music Direct*, No. C22-1081JLR, 2023 WL 8891575 (W.D. Wash. Dec. 26, 2023)
13.	*Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002)
14.	*Wilbur v. City of Mount Vernon*, No. C11-1100-RSL, 2014 WL 11961980 (W.D. Wash. Apr. 15, 2014)
OTHER AUTHORITY	
15.	5 Newberg and Rubenstein on Class Actions § 16.10 (6th ed. Dec. 2025 update)
16.	5 Newberg and Rubenstein on Class Actions § 17.1 (6th ed. Dec. 2025 update)

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- Exhibit 1 -

2019 WL 3936663
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Bruce BYLES, individually, and on behalf of all others similarly situated, Plaintiff,
v.
ACE PARKING MANAGEMENT, INC., Defendant.

CASE NO. C16-0834-JCC
|
Signed 08/20/2019

Attorneys and Law Firms

Christopher Eric Love, Darrell L. Cochran, Pfau Cochran Vertetis Amala PLLC, Tacoma, WA, for Plaintiff.

John M. Kreutzer, Bullivant Houser Bailey PC, Portland, OR, for Defendant.

ORDER

Richard A. Jones, UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court on Plaintiff's unopposed motion for attorney fees and costs and for class representative service award (Dkt. No. 36). Having thoroughly considered the parties' briefing and the relevant record, the Court hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

The facts of this case have been discussed in prior orders, and the Court will not repeat them here. (*See* Dkt. Nos. 24, 33, 42.) Most recently, the Court granted Plaintiff's unopposed motion for final approval of class action settlement. (*See* Dkt. No. 42.) Plaintiff now moves for an award of attorney fees.

II. DISCUSSION

A. Attorney Fee Request

Before the Court may award attorney fees to a prevailing party, the Court must determine that the award is "reasonable." *See* *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). District courts employ a two-step process to calculate a reasonable fee award. *Fischer v. SJB–P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000). First, the Court calculates "the presumptive lodestar figure by multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate." *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 622 (9th Cir. 1993). Second, the Court may adjust this figure based on several factors not included in the lodestar calculation. *See* *Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016). There is a "strong presumption" that the lodestar figure represents the reasonable fee. *See* *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

To determine a reasonable billing rate, the Court generally looks to "the forum in which the district court sits." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). The reasonable hourly rate is determined "by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity." *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 946 (9th Cir. 2007). The Court finds that the proposed rates for the attorneys—$550 per hour for Darrell L. Cochran, $300 per hour for Christopher E. Love, $400 per hour for Loren A. Cochran, $450 per hour for Thoams B. Vertetis, and $300 per hour for Kevin M. Hastings—are reasonable compared to similar attorneys in the Seattle area. (*See* Dkt. No. 37.)

"The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). Counsel "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary...." *Hensley*, 461 U.S. at 434. The Court finds that the number of hours expended was reasonable. First, counsel put forward significant effort in ensuring that the majority of the work was performed by junior attorneys who billed at lower rates. (Dkt. No. 37 at 19–23.) Second, the total amount of hours spent on this litigation—288.3—is reasonable considering the age of the case, the procedural history which included an appeal, settlement negotiations, and dispositive motions practice. (*See* Dkt. No. 37.) Therefore, the Court finds that Plaintiff's

calculation of a lodestar figure of $94,660 is accurate and reasonable.

***2** Finally, under a percentage-of-recovery cross check, a requested fee award under fee shifting statutes is reasonable when it does not exceed "half of the total amount of money going to class members and their counsel." *Tait v. BSH Home Appliances Corp.*, 2015 WL 4537463, slip op. at 14 (C.D. Cal. 2015) (quoting *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014)). The amount requested here—$80,000—constitutes half of the total $ 160,000 going to class members and their counsel. Additionally, class counsel is requesting $80,000, instead of the total $94,660 lodestar figure. This further supports the finding that class counsel's requested fee award of $80,000 is reasonable.

B. Plaintiff Byles's Service Award

Service awards given to lead plaintiffs help promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009). Plaintiff Byles participated meaningfully in a contested lawsuit, remained willing to provide assistance to the parties for over three years, and provided class counsel with evidence of the claims and his consent to make strategic decisions about the case. (*See* Dkt. No. 36 at 10.) Therefore, the Court finds that class counsel's request of a $15,000 award for Plaintiff Byles is reasonable.

III. CONCLUSION

For the foregoing reasons, Plaintiff's unopposed motion for attorney fees and costs and for class representative service award (Dkt. No. 36) is GRANTED.

All Citations

Not Reported in Fed. Supp., 2019 WL 3936663

End of Document

- Exhibit 2 -

KeyCite Yellow Flag
Distinguished by Guillen v. Colvin, C.D.Cal., December 15, 2014

690 F.3d 1132
United States Court of Appeals, Ninth Circuit.

Shane A. COSTA, Plaintiff–Appellant,
v.
COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION, Defendant–Appellee.

No. 11–35245
|
Argued and Submitted July 13, 2012.
|
Filed Aug. 24, 2012.

Synopsis

Background: Claimant brought action challenging Commissioner of Social Security's denial of his application for supplemental security income (SSI). The United States District Court for the District of Oregon, Dennis James Hubel, United States Magistrate Judge, reversed and remanded and, 2011 WL 221837, granted in part and denied in part claimant's motion for attorney fees under the Equal Access to Justice Act (EAJA). Claimant appealed.

Holdings: The Court of Appeals held that:

[1] it is improper to apply a de facto cap on the number of hours for which attorneys may be compensated under EAJA, abrogating *Harden v. Commissioner Social Security Admin.*, 497 F.Supp.2d 1214, and

[2] magistrate judge failed to give sufficiently specific reasons for reducing the attorney fees award.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (10)

[1] **United States** Attorney Fees

It is improper for district courts to apply a de facto cap on the number of hours for which attorneys may be compensated under the Equal Access to Justice Act (EAJA) in a "routine" case challenging the denial of social security benefits; rather individualized consideration must be given to each case; abrogating *Harden v. Commissioner Social Security Admin.*, 497 F.Supp.2d 1214. 28 U.S.C.A. § 2412(d).

106 Cases that cite this headnote

[2] **Federal Courts** Costs and attorney fees

Court of Appeals reviews the district court's calculation of the reasonable hours and the hourly rate for attorney fees under the Equal Access to Justice Act (EAJA) for abuse of discretion. 28 U.S.C.A. § 2412(d)(1)(A).

272 Cases that cite this headnote

[3] **United States** Attorney Fees

An error of law in awarding attorney fees under the Equal Access to Justice Act (EAJA) is an abuse of discretion. 28 U.S.C.A. § 2412(d)(1)(A).

11 Cases that cite this headnote

[4] **United States** Reduction

District court must give reasons for reducing attorney fees requested under the Equal Access to Justice Act (EAJA). 28 U.S.C.A. § 2412(d)(1)(A).

22 Cases that cite this headnote

[5] **United States** Enhancement

Where the disparity between the attorney fees requested under the Equal Access to Justice Act (EAJA) and those awarded is relatively large, the district court should provide a specific articulation of its reasons for reducing the award. 28 U.S.C.A. § 2412(d)(1)(A).

22 Cases that cite this headnote

[6] **United States** Lodestar

Courts apply the "lodestar" method to determine what constitutes a reasonable attorney fees under the Equal Access to Justice Act (EAJA) by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. 28 U.S.C.A. § 2412(d)(1)(A).

463 Cases that cite this headnote

[7] **United States** Proof and Documentation of Expenses; Evidence

Counsel for the prevailing party seeking attorney fees under the Equal Access to Justice Act (EAJA) should exercise billing judgment to exclude from a fee request those hours that are excessive, redundant, or otherwise unnecessary, as a lawyer in private practice would do. 28 U.S.C.A. § 2412(d)(1)(A).

135 Cases that cite this headnote

[8] **United States** Attorney Fees

In awarding attorney fees under the Equal Access to Justice Act (EAJA), courts should generally defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case. 28 U.S.C.A. § 2412(d)(1)(A).

280 Cases that cite this headnote

[9] **United States** Reduction

While district courts may consider the fact that many other courts have noted that 20 to 40 hours of attorney fees under the Equal Access to Justice Act (EAJA) is the range most often requested and granted in social security cases, in determining the reasonableness of a specific fee request, courts cannot drastically reduce awards simply because the attorney has requested compensation for more than 40 hours or make reductions with a target number in mind; instead, district courts must explain why the amount of time requested for a particular task is too high. 28 U.S.C.A. § 2412(d)(1)(A) .

255 Cases that cite this headnote

[10] **United States** Reduction

Magistrate judge failed to give sufficiently specific reasons for reducing the attorney fees award that disability benefits claimant requested under the Equal Access to Justice Act (EAJA) from $10,545 to $7,191; in explaining why he cut in half the number of hours requested for preparation of the opening memorandum, the magistrate judge said only that the issues in the case were not novel or complex and that the brief was not very long, the magistrate judge made similar cuts to the hours claimant requested for preparation of the supplemental and reply memoranda, never explaining why the amount of time he allotted to each task was reasonable, and the magistrate judge appeared to apply what he perceived to be an informal district-wide rule that 40 hours was the upper limit for the number of hours a lawyer could reasonably spend on a social security disability appeal. 28 U.S.C.A. § 2412(d).

50 Cases that cite this headnote

Attorneys and Law Firms

***1133** Linda Ziskin (argued), Ziskin Law Office, Lake Oswego, OR; Drew L. Johnson, Drew L. Johnson, P.C., Eugene, OR, for the appellant.

David Morado, Regional Chief Counsel, Seattle Region X; Kathryn A. Miller (argued), Assistant Regional Counsel, Seattle, WA, for the appellee.

Appeal from the United States District Court for the District of Oregon, Dennis James Hubel, Magistrate Judge, Presiding. D.C. No. 3:09–cv–06048–HU.

Before: BETTY B. FLETCHER and HARRY PREGERSON, Circuit Judges, and CONSUELO B. MARSHALL, District Judge.*

OPINION

PER CURIAM:

[1] The Social Security Administration denied Shane Costa's application for social security disability benefits. Costa sought review of that decision in the Oregon district court.

The federal magistrate judge who presided over Costa's action determined that the agency's decision improperly disregarded the opinions of an examining psychologist and remanded Costa's case to the agency. Costa sought reasonable attorney's fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The magistrate judge granted the request in part but determined that the 60.5 hours Costa's attorneys spent ***1134** working on the case were excessive. Applying what amounts to an informal rule limiting fee awards in social security cases, he reduced the number of hours compensated by nearly one-third, to 41.1 hours. We hold that it is improper for district courts to apply a de facto cap on the number of hours for which attorneys may be compensated under the EAJA in a "routine"[1] case challenging the denial of social security benefits. Rather individualized consideration must be given to each case.

I

Shane Costa applied for disability benefits alleging that he suffered from bi-polar disorder, an eating disorder, spinal pain, agoraphobia, and anxiety. The state disability determination agency denied Costa's application and his request for reconsideration. An administrative law judge heard Costa's appeal and issued a decision finding him not disabled. Costa sought review in the United States District Court for the District of Oregon. The parties consented to entry of final judgment by a United States Magistrate Judge.

The magistrate judge reversed the ALJ's decision finding Costa not disabled and remanded to the agency for further proceedings. The magistrate judge's order includes an exhaustive description of the medical evidence in the record and explains that the agency improperly disregarded the opinions of an examining psychologist. The merits of the magistrate judge's order are not at issue in this appeal.

Costa sought attorney's fees under the EAJA. The magistrate judge reduced the total time awarded for counsel's work on Costa's opening memorandum to the court from 25 hours to 12 hours. In doing so, he explained that "the opening memorandum was only seventeen pages long" and "the issues in the case were not novel or unusually complex." As a result he concluded that "25 hours is unreasonable." He did not explain how he determined that 12 hours was a reasonable amount of time to have spent on the opening memorandum.

Similarly, the magistrate judge reduced the hours requested for preparation of the supplemental and reply memoranda. Costa requested a total of 5.1 hours for preparation of his supplemental memorandum. The magistrate judge said that this memorandum was "just over six pages, with only one-half of one page devoted to argument." The magistrate judge's order indicates that he felt some of the work billed by Costa's attorneys duplicated work previously performed. The magistrate judge also declined to compensate Costa's attorneys for 1.4 hours of work that he deemed clerical.

The magistrate judge's order places substantial weight on a published order by Judge Mosman of the District of Oregon. The magistrate judge quoted Judge Mosman's order, which states that there is "some consensus ... that 20–40 hours is a reasonable amount of time to spend on a social security case that does not present particular difficulty." *Harden v. Comm'r of the Soc. Sec. Admin.,* 497 F.Supp.2d 1214, 1215 (D.Or.2007). Again quoting *Harden,* he wrote, "this range provides an accurate framework for measuring whether the amount of time counsel spent is reasonable." *Id.* at 1216. The magistrate judge later explained that "while the total number of allowed hours is at the high end of the range identified by Judge Mosman, it is not unreasonable in this case."

***1135** Based on his determination of the number of hours reasonably expended on Costa's case, the magistrate judge awarded Costa a total of $7,191.35, which is $3,353.37 less than the $10,544.72 that Costa requested.

We have jurisdiction pursuant to 28 U.S.C. §§ 636(c)(3) and 1291, and we reverse.

II

The EAJA provides for the award of attorney's fees to a party that prevails against the United States in a proceeding for review of an agency action, unless the court finds "that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The Commissioner has never contended that the agency's position was substantially justified but argues that the amount of fees Costa requested was not reasonable. *See id.* at § 2412(d)(2)(A).

[2] [3] [4] [5] We "review the district court's calculation of the reasonable hours and the hourly rate for abuse of discretion." *Moreno v. City of Sacramento,* 534 F.3d 1106, 1111 (9th Cir.2008). An error of law is an abuse of discretion. *Strauss v. Comm'r of the Soc. Sec. Admin.,* 635 F.3d 1135, 1137 (9th Cir.2011). The abuse of discretion standard "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." *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Nonetheless, the district court must give reasons for reducing fees. *See Moreno,* 534 F.3d at 1111. Where the disparity between the fees requested and those awarded is relatively large, the district court should provide a specific articulation of its reasons for reducing the award. *See id.*

[6] [7] The Supreme Court's seminal decision in *Hensley v. Eckerhart* held that courts should apply what is now called the "lodestar" method to determine what constitutes a reasonable attorney's fee under 42 U.S.C. § 1988, the fee shifting statute applicable in civil rights cases. 461 U.S. at 433, 103 S.Ct. 1933. To calculate the lodestar amount, the court multiplies "the number of hours reasonably expended on the litigation ... by a reasonable hourly rate."[2] *Id.* at 433, 103 S.Ct. 1933. The Court further explained that counsel for the prevailing party should exercise "billing judgment" to "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary" as a lawyer in private practice would do. *Id.* at 434, 103 S.Ct. 1933; *see also Moreno,* 534 F.3d at 1111 ("The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client.").

This court applies the principles set forth in *Hensley*—and other cases interpreting 42 U.S.C. § 1988—to determine what constitutes a reasonable fee award under the EAJA. *See Comm'r, INS v. Jean,* 496 U.S. 154, 161, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990) (explaining that once a litigant has established eligibility for fees under the EAJA, "the district court's task of determining what fee is reasonable is essentially the same as that described in *Hensley.*"); *see also Nadarajah v. Holder,* 569 F.3d 906, 916 (9th Cir.2009).

[8] In *Moreno v. City of Sacramento,* we held that a California district court abused its discretion when it awarded fees ***1136** for a significantly lower number of hours than the prevailing plaintiffs had requested and failed to provide adequate explanation for those cuts. 534 F.3d at 1112–13. We said in *Moreno* that "lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees" because "[t]he payoff is too uncertain." *Id.* at 1112. As a result, courts should generally defer to the "winning lawyer's professional judgment as to how much time he was required to spend on the case." *Id.* The court added that a district court can impose a reduction of up to 10 percent—a "haircut"—based purely on the exercise of its discretion and without more specific explanation. *Id.* But where the district court had cut the number of hours by twenty to twenty-five percent it was required to provide more specific explanation than its view that "the amount of time plaintiff's counsel spent was 'excessive.' " *Id.* at 1112–13. Finally, we recognized that sometimes "the vicissitudes of the litigation process" will require lawyers to duplicate tasks. *Id.* at 1113. "Findings of duplicative work should not become a shortcut for reducing an award without identifying just why the requested fee was excessive and by how much." *Id.*

In *Moreno,* we also rejected the district court's method of determining a reasonable hourly rate. We said that the district court "erred by applying what appears to be a de facto policy of awarding a rate of $250 an hour to civil rights cases." *Id.* at 1115. We then explained, "[d]istrict judges can certainly consider the fees awarded by other judges in the same locality in similar cases. But adopting a court-wide policy—even an informal one—of 'holding the line' on fees at a certain level goes well beyond the discretion of the district court." *Id.*

We conclude that it is also an abuse of discretion to apply a de facto policy limiting social security claimants to twenty to forty hours of attorney time in "routine" cases. Indeed, we question the usefulness of reviewing the amount of time spent in other cases to decide how much time an attorney could reasonably spend on the particular case before the court. Surveying the hourly rates awarded to attorneys of comparable experience and skill is a useful tool for assessing the reasonableness of a requested hourly rate because lawyers bill at the same rates in different cases. But it is far less useful for assessing how much time an attorney can reasonably spend on a specific case because that

determination will always depend on case-specific factors including, among others, the complexity of the legal issues, the procedural history, the size of the record, and when counsel was retained.

[9] Many district courts have noted that twenty to forty hours is the range most often requested and granted in social security cases. *See* *Patterson v. Apfel,* 99 F.Supp.2d 1212, 1214 n. 2 (C.D.Cal.2000) (collecting district court cases). While district courts may consider this fact in determining the reasonableness of a specific fee request, courts cannot drastically reduce awards simply because the attorney has requested compensation for more than forty hours or make reductions with a target number in mind. Instead, district courts must explain why the amount of time requested for a particular task is too high. Any other approach fails to give deference to the winning lawyer's professional judgment, as required by *Moreno.* 534 F.3d at 1112.

[10] The magistrate judge reduced the number of hours Costa requested by nearly one-third. Under *Moreno,* the magistrate judge was required to provide relatively specific reasons for making such significant reductions. In explaining why he cut in half the number of hours requested for preparation of the opening ***1137** memorandum, the magistrate judge said only that the issues in the case were not novel or complex and that the brief was not very long. The magistrate judge made similar cuts to the hours Costa requested for preparation of the supplemental and reply memoranda, never explaining why the amount of time he allotted to each task was reasonable. We conclude that the reasons the magistrate gave for reducing the hours as he did were not sufficiently specific given the magnitude of the reductions. *See* *Moreno,* 534 F.3d at 1113 ("Of course, the court might have some specific reason for believing that work is excessive or duplicative, but it must explain why.").

More importantly, it appears that the magistrate judge applied what he perceived to be an informal district-wide rule that forty hours is the upper limit for the number of hours a lawyer can reasonably spend on a social security disability appeal that "does not present particular difficulty." The magistrate judge referenced the range of twenty to forty hours early in his order on fees and quoted *Harden,* 497 F.Supp.2d at 1216, as follows: "[T]his range provides an accurate framework for measuring whether the amount of time counsel spent is reasonable." In addition, toward the end of his order he explained that the 41.1 hours for which he awarded compensation was not unreasonable, despite being "at the high end of the range identified by Judge Mosman." Reading the order in its entirety, we can only conclude that the magistrate judge made his cuts to the requested hours with an eye toward getting the number of hours down to forty rather than based on the number of hours that was reasonable for the legal services provided in Costa's case.

The magistrate judge's approach was not consistent with *Moreno* and was an abuse of discretion. District courts may not apply de facto caps limiting the number of hours attorneys can reasonably expend on "routine" social security cases. For the foregoing reasons, we reverse the magistrate judge's decision on attorney's fees. The magistrate judge shall award fees in the amount of $10,544.72, as requested by Costa, for the proceedings below.

REVERSED and REMANDED.

All Citations

690 F.3d 1132, 183 Soc.Sec.Rep.Serv. 1, Unempl.Ins.Rep. (CCH) P 15085C, 12 Cal. Daily Op. Serv. 9690, 2012 Daily Journal D.A.R. 11,807

Footnotes

[*] The Honorable Consuelo B. Marshall, Senior District Judge for the U.S. District Court for the Central District of California, sitting by designation.

[1] We note that the term "routine" is a bit of a misnomer as social security disability cases are often highly fact-intensive and require careful review of the administrative record, including complex medical evidence.

[2] Neither party makes any argument regarding the reasonableness of the hourly rate, which the magistrate judge set at the EAJA statutory rate plus a cost-of-living adjustment. 28 U.S.C. § 2412(d)(2)(A)(ii).

- Exhibit 3 -

KeyCite Yellow Flag
Declined to Extend by In re Apollo Group Inc. Securities Litigation, D.Ariz., April 20, 2012

24 F.3d 16
United States Court of Appeals,
Ninth Circuit.

Bryan Keith HARRIS, Plaintiff–Appellant,
v.
John MARHOEFER; County of San Bernardino, Defendants,
and
Brian Alvarez, Individually and as a Deputy Sheriff, Defendant–Appellee.
Bryan Keith HARRIS, Plaintiff–Appellee,
v.
John MARHOEFER; County of San Bernardino, Defendants,
and
Brian Alvarez, Individually and as a Deputy Sheriff, Defendant–Appellant.

Nos. 92–56182, 92–56282.
|
Argued and Submitted March 10, 1994.
|
Decided May 12, 1994.

Synopsis

Civil rights action was brought as result of alleged beating by police following traffic stop. After plaintiff obtained judgment against one defendant, he sought attorney fees. The United States District Court for the Central District of California, Gary L. Taylor, J., awarded attorney fees and costs, and appeals were taken. The Court of Appeals, Bright, Senior Circuit Judge, sitting by designation, held that: (1) reducing lodestar figure for attorney fees by 50% for lack of success was not abuse of discretion, and (2) plaintiff could recover as part of attorney fee award those out-of-pocket expenses that would normally be charged to fee-paying client.

Affirmed.

West Headnotes (7)

[1] **Civil Rights**Amount and computation

In civil rights suit arising from use of excessive force, district court properly exercised its discretion when it reduced lodestar figure for attorney fees by 50% for achieving only partial success based upon results obtained, in light of amount of damages recovered versus amount sought, and number of claims prevailed upon versus number of claims dismissed or decided against plaintiff. 42 U.S.C.A. § 1988.

61 Cases that cite this headnote

[2] **Civil Rights**Time expended; hourly rates

Fee awards pursuant to § 1988 must be reasonable, both as to number of hours spent in advancing successful claims and billing rate per hour. 42 U.S.C.A. § 1988.

17 Cases that cite this headnote

[3] **Civil Rights**Amount and computation

Calculating lodestar figure is starting point for determining reasonable fee under § 1988; only in rare instances should lodestar figure be adjusted on basis of other considerations. 42 U.S.C.A. § 1988.

145 Cases that cite this headnote

[4] **Federal Courts**Costs and attorney fees

Denial of attorney fees for work done in furtherance of prevailing party's § 1988 fee motion was reviewed for abuse of discretion. 42 U.S.C.A. § 1988.

5 Cases that cite this headnote

[5] **Federal Courts**Motion to affirm, procedure, and effect of affirmance

Remand was warranted with respect to claim that district court abused its discretion by failing to award attorney fees for work done in furtherance of prevailing parties' § 1988 fee motion, where it could not be determined from record whether such fees were included in fee award

already made. 42 U.S.C.A. § 1988.

11 Cases that cite this headnote

[6] **Civil Rights** Services or activities for which fees may be awarded

Under § 1988, plaintiff could recover as part of award of attorney fees those out-of-pocket expenses that would normally be charged to fee-paying client, even if such expenses would not qualify as taxable costs. U.S.Dist.Ct.Rules, C.D.Cal., Rule 16.3; 42 U.S.C.A. § 1988.

533 Cases that cite this headnote

[7] **Civil Rights** Services or activities for which fees may be awarded

Expenses related to discovery that plaintiff incurred in deposing defendant's expert were recoverable as part of award of reasonable attorney fees in civil rights suit, and were not subject to statutory limit on expert witness fees. 28 U.S.C.A. § 1821; 42 U.S.C.A. § 1983.

134 Cases that cite this headnote

Attorneys and Law Firms

***17** David E. Frank, Los Angeles, CA, for plaintiff-appellant-cross-appellee.

Carol D. Janssen, Franscell, Strickland, Roberts & Lawrence, Pasadena, CA, for defendant-appellee-cross-appellant.

Appeals from the United States District Court for the Central District of California.
Before: BRIGHT,* WIGGINS, and T.G. NELSON, Circuit Judges.

Opinion

Opinion by Senior Circuit Judge BRIGHT.

BRIGHT, Senior Circuit Judge:

Bryan Keith Harris sought $5 million under 42 U.S.C. § 1983 in damages from six defendants (law enforcement officers and the county employing them) for violation of his constitutional rights arising from an alleged beating Harris sustained following a traffic stop. Harris obtained a $25,000.00 judgment against one defendant, Brian Alvarez, a deputy sheriff. Harris then sought attorney's fees. The district court awarded attorney's fees after reducing the number of hours submitted for duplicative hours and reducing the lodestar figure by 50% for lack of success. The district court awarded costs as requested by Harris.

On appeal, Harris challenges as an abuse of discretion the district court's reduction of the attorney's fees award for lack of success, as well as the court's failure to award attorney's fees for the work done in furtherance of fees under 42 U.S.C. § 1988. Alvarez cross-appeals from the district court's judgment, contending that the court abused its discretion in awarding costs in their entirety. Both Alvarez and Harris seek attorney's fees on appeal as "the prevailing party." We affirm with directions.

I. BACKGROUND

Harris' § 1983 action, brought on November 16, 1989, named as defendants the County of San Bernardino, County Deputy Sheriff John Marhoefer and ten unnamed deputy sheriffs. Ultimately the case went to trial against five individual deputies and the County. Harris sought damages totalling $5 million.

At trial, Harris presented evidence that on March 19, 1989, he had been the victim of excessive force following the stop of a vehicle in which he was a passenger. Harris alleged that after sheriff deputies arrested the driver for driving under the influence, Harris sought permission to take the car to avoid it being impounded. According to Harris, Deputy Marhoefer initiated the beating after Harris asked the deputy for his name and badge number upon repeatedly being denied permission to take the car. Marhoefer claimed that he exerted physical force in effecting Harris' arrest for public drunkenness and interfering with an investigation when Harris resisted being taken into custody.

Harris' claim for damages included evidence of bruises and testimony from his physician, Dr. Gerald S. Friedman, that the failure of Harris' kidney, transplanted on August 17, 1988, resulted from the infliction of excessive force.

According to Dr. Friedman, a bruise to Harris' shoulder sustained during the altercation caused the release of myoglobin resulting in the kidney failure. Dr. Friedman also testified that prior problems with the transplant were overcome by the time Harris sustained the injuries.

The district court dismissed Harris' *Monell*[1] claim against the County on July 11, 1991. Following a bifurcated trial, the jury returned a verdict on July 16 in favor of four of the deputy sheriffs and against Deputy Alvarez on the issue of liability, finding that Alvarez used "more force than was reasonably necessary to effect plaintiff's arrest." Appellant's Excerpts of Record at 66. The jury then returned a partial verdict as to causation, finding that Alvarez caused damage to Harris, but deadlocked as to the ***18** amount of damages. Following a mistrial on that issue, a second jury awarded Harris damages totalling $25,000.00. Judgment on the verdict was entered July 20, 1992.

Harris thereafter sought attorney's fees and costs totalling $120,819.40, based on the following:

367.75 attorney hours @ $275.00/hour	=	$101,131.25
141.25 paralegal hours @ $45.00/hour	=	$6,491.25
out-of-pocket expenses	=	$6,115.65
25.75 attorney hours on fee motion @ $275/hr	=	$7,081.25
total award sought	=	$120,819.40

Harris filed his Bill of Costs with the district court on August 10, 1992. The district court, while awarding Harris attorney's fees pursuant to § 1988, granted a reduced award in its "Order on Attorneys' Fees and Costs," entered September 24, 1992:

325.00 hours @ $200.00/hour = $65,000.00 x .50	=	$32,500.00
115.00 hours @ $45.00/hour	=	$5,175.00
out-of-pocket expenses	=	$6,115.65
time on fee motion	=	$0.00
total award granted	=	$43,790.65[2]

II. DISCUSSION

A. Harris' Appeal

[1] Harris does not challenge the district court's exercise of discretion in reducing the number of attorney hours reasonably spent on the case. Harris, however, contends that the district court erroneously reduced the lodestar figure for attorney's fees by 50% for lack of success on the ground that Harris failed to obtain the specific dollar amount sought or that the jury did not believe that plaintiff's injuries were as serious as alleged. Harris contends that because he prevailed on the merits by establishing every element of a constitutional violation and then proved substantial damages, the district court engaged in improper considerations.

"District court awards of attorney's fees under section 1988 are reviewed for abuse of discretion." *Corder v. Gates,* 947 F.2d 374, 377 (9th Cir.1991) (citing *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983)). We will overturn an award of attorney's fees only "if it is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Corder,* 947 F.2d at 377.

[2] [3] Fee awards pursuant to § 1988 must be reasonable, both as to the number of hours spent in advancing the successful claim(s) and the billing rate per hour. Calculating the lodestar figure is the starting point for determining a reasonable fee. *Gates v. Deukmejian,* 987 F.2d 1392, 1397 (9th Cir.1992). Only in rare instances should the lodestar figure be adjusted on the basis of other considerations. *Cabrales v. County of Los Angeles,* 864 F.2d 1454, 1464 (9th Cir.1988), *judgment vacated on other grounds,* 490 U.S. 1087, 109 S.Ct. 2425, 104 L.Ed.2d 982 (1989), *previous decision reinstated,* 886 F.2d 235 (9th Cir.1989), *cert. denied,* 494 U.S. 1091, 110 S.Ct. 1838, 108 L.Ed.2d 966 (1990).

Here, although the lodestar figure presumptively provides the accurate measure of reasonable fees, *see Cunningham v. County of Los Angeles,* 879 F.2d 481, 484 (9th Cir.1988), *cert. denied,* 493 U.S. 1035, 110 S.Ct. 757, 107 L.Ed.2d 773 (1990), the district court determined that Harris achieved only partial success based upon the "results obtained," i.e., the amount of damages recovered versus the amount sought, and the number of claims prevailed upon versus the number of claims dismissed or decided in defendant's favor. *See* Reporter's Transcript of Proceedings (8/31/92), at 18–19. "[T]he *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the ***19** determination of the size of a reasonable fee, not to eligibility for a fee award at all." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 790, 109 S.Ct. 1486, 1492, 103 L.Ed.2d 866 (1989) (emphasis in original). On review, we conclude that the district court properly exercised its discretion because "the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley,* 461 U.S. at 440, 103 S.Ct. at 1943.

Harris next argues that the district court abused its discretion by failing to award any fees for the legal work done in preparation of the motion for an award of fees sought pursuant to § 1988. Accordingly, Harris seeks $5,150.00 for time spent preparing the fee application (25.75 hours @ $200.00/hour).

[4] We also review for abuse of discretion the denial of attorney's fees for work done in furtherance of a prevailing party's § 1988 motion. *Accord Lund v. Affleck,* 587 F.2d 75, 77 (1st Cir.1978).

[5] Harris sought an award of attorney's fees based on a total of 393.50 hours, including 367.75 hours incurred on the merits of the § 1983 action and 25.75 hours on the § 1988 motion for fees. From the record before us, we cannot tell whether the district judge included or did not include these 25.75 hours in the fee award. Consequently, we remand this issue to the district court. If the district court included the questioned hours in the fee award, that ruling stands affirmed. Otherwise, the district court should make an additional award for preparing the fee application.

B. Alvarez's Cross–Appeal

[6] [7] In his cross-appeal, Alvarez claims that the district court abused its discretion in awarding plaintiff the entire amount sought for costs. Alvarez first argues that Harris' failure to comply with Central District Local Rule 16.3[3] precludes the award of costs, as the rule is mandatory and any award for costs pursuant to an untimely Bill of Costs, i.e., filed more than fifteen days from entry of judgment, constitutes an abuse of discretion. In addition, Alvarez contends Harris recovered costs on items that are not allowed under law, specifically 28 U.S.C. § 1920, including costs for

the following: service of summons and complaint, service of trial subpoenas, fee for defense expert at deposition, postage, investigator, copying costs, hotel bills, meals, messenger service and employment record reproduction. Lastly, Alvarez asserts that the district court's award included unnecessary costs, as Harris failed to address the necessity of many of the above listed costs as required by Local Rule 16.3.3.

Rule 16.3 does not bar the expenses in question. Under § 1988, Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that "would normally be charged to a fee paying client." *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1216 n. 7 (9th Cir.1986), *reh'g denied and opinion amended,* 808 F.2d 1373 (9th Cir.1987); *Laffey v. Northwest Airlines, Inc.,* 746 F.2d 4, 30 (D.C.Cir.1984), *cert. denied,* 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985), *overruled on other grounds, Save Our Cumberland Mountains, Inc. v. Hodel,* 857 F.2d 1516 (D.C.Cir.1988) (en banc); *see also* ***20** *West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 87–88 n. 3, 111 S.Ct. 1138, 1141 n. 3, 113 L.Ed.2d 68 (1991). Thus reasonable expenses, though greater than taxable costs, may be proper. Harris' response indicated the questioned items were necessary and reasonable in this case.

In addition, the "expert witness fees" awarded by the district court are not witness fees as contemplated under 28 U.S.C. § 1821, limiting expert witness fees to $40.00 per day. Rather, these are expenses related to discovery that Harris incurred in deposing Alvarez's expert and thus are recoverable expenses as part of the reasonable "attorney's fees" award.[4]

III. CONCLUSION

Based upon the foregoing, we affirm the district court's award of attorney's fees and costs, except that we remand for further consideration the plaintiff's fee request for the time reasonably spent on the motion for fees.

Additionally, plaintiff-appellant is entitled to fees for defending the cross-appeal. We award him $2,000 in fees but neither party is entitled to tax any costs for this appeal or cross-appeal.

All Citations

24 F.3d 16

Footnotes

[*] Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

[1] *Monell v. Department of Social Servs. of City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

2 At the hearing on the Motion for Award of Attorney's Fees and Expenses, held August 31, 1992, the district court's comments reflect the following breakdown as to the award of fees and costs:

costs	=	$6,115.65
attorneys fees:		
325 attorney hours @ $200.00	=	$65,000.00
115 paralegal hours @ $45.00	=	$5,175.00
	=	$70,175.00
(reduction for lack of success)		x .50
	=	$35,087.50
total award	=	$41,203.15

Reporter's Transcript of Proceedings (8/31/92), at 15–16, 23.
Alvarez, who drafted the "Order on Attorneys' Fees and Costs," does not contest the grant of fees based on the discrepancy of $2,587.50 ($43,790.65–$41,203.15) between the oral award and the court's written order.

[3] Central District of California Local Rule 16.3 provides as follows:

> **Bill of Costs—Filing and Form—Notice.** The prevailing party who is awarded costs shall have fifteen (15) days after entry of judgment to file and serve a Bill of Costs. The Bill of Costs shall be attached to a Notice of Application to the Clerk to Tax Costs.
> **16.3.1. Form of Notice.** The Notice of Application to the Clerk to Tax Costs shall state the hour and date when such application will be made.
> **16.3.2. Time of Application.** The date and time for taxation of costs by the Clerk shall be not less than fourteen (14) nor more than twenty-one (21) days from the date notice is given to the other parties.
> **16.3.3. Form of Bill of Costs.** Each item claimed shall be set forth separately in the Bill of Costs. The prevailing party, his attorney or his agent having knowledge of the facts shall file a declaration with the Bill of Costs. The declaration shall verify that:
> (a) The items claimed as costs are correct;
> (b) The costs have been necessarily incurred in the case;
> (c) The services for which fees have been charged were actually and necessarily performed; and
> (d) The costs have been paid or the obligation for payment has been incurred.

[4] We also reject Alvarez's contention that Harris' untimely filing of his Bill of Costs precludes recovery of those costs, for two reasons: (1) the rule may not apply as most of the disputed items constitute expenses charged as part of the award of attorney's fees and (2) even if Rule 16.3 as to time applies, that requirement does not oust the district court's jurisdiction to consider the allegedly late motion for costs.

End of Document

- Exhibit 4 -

2026 WL 592270
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington.

Tiffany HILL and Michelle Anderson, individually and on behalf of all others similarly situated, Plaintiffs,
v.
CONTINUUM GLOBAL SOLUTIONS, LLC, a Delaware Limited Liability Company, Xerox Business Services, LLC, a Delaware Limited Liability Company, Livebridge, Inc., an Oregon Corporation, Affiliated Computer Services, Inc., a Delaware Corporation, Affiliated Computer Services, LLC, a Delaware Limited Liability Company, Defendants.

NO. 2:12-cv-00717-JCC
|
Signed March 3, 2026

Attorneys and Law Firms

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Daniel P. Hurley, K&L Gates LLP, Seattle, WA, Patrick M. Madden, Todd L. Nunn, Arnold & Porter Kaye Scholer LLP, Seattle, WA, for Defendant Xerox Business Services, LLC.

Patrick M. Madden, Todd L. Nunn, Arnold & Porter Kaye Scholer LLP, Seattle, WA, Ryan Drew Redekopp, K&L Gates LLP, Seattle, WA, for Defendants LiveBridge, Inc., Affiliated Computer Services, Inc., Affiliated Computer Services LLC.

ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

JOHN C. COUGHENOUR

***1** This matter came before the Court on Plaintiffs' Motion for Final Approval of the proposed class action settlement with Defendants and Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards (Dkt. Nos. 277, 282). The Court, having considered all papers filed and arguments made with respect to the motions and being fully advised, finds that:

1. On January 20, 2026, the Court held a Final Approval Hearing, at which time the Parties and Members of the Settlement Classes were afforded the opportunity to be heard in support of or in opposition to the settlement. The Court received no objections to the settlement.

2. Adequate and sufficient notice was provided to the Settlement Classes in accordance with the Court's Preliminary Approval Order, Rule 23(e) of the Federal Rules of Civil Procedure, and due process. This was the best notice practicable under the circumstances, and it included the dissemination of individual notice to all Members of the Settlement Class who could be identified through reasonable effort.

3. Defendants also served notice of the settlement as required by the Class Action Fairness Act of 2005, 28 U.S.C. § 1715(b).

4. The terms of the Settlement Agreement are incorporated fully into this Order by reference.

5. The Court has considered the Rule 23(e)(2) factors and factors enunciated by the Ninth Circuit in Churchill Village, L.L.C. v. General Electric, 361 F.3d 566, 575 (9th Cir. 2004), and those factors favor final approval of the settlement.

6. The terms of Settlement Agreement, which was negotiated at arm's length, are fair, reasonable, and adequate given the complexity, expense, and duration of further litigation and the risks involved in establishing damages and maintaining class action status through trial and appeal.

7. The relief provided under the Settlement Agreement constitutes fair value given in exchange for the release of claims.

8. The extent of discovery completed, the stage of the proceedings, and the experience and views of Class Counsel support approval of the Settlement Agreement.

9. The lack of objections from any members of the Classes or governmental actors further supports approval of the Settlement Agreement.

10. Plaintiffs and Class Counsel have adequately represented the Settlement Classes.

11. In determining that the Settlement Agreement is fair, reasonable, and adequate, the Court has also considered that payments will be issued directly to Members of the Settlement Classes based on individualized damages and interest calculations and the strengths and weaknesses of the claims of the respective Classes. The Settlement Agreement treats the Members of each Class equitably relative to each other

12. The Parties and each Member of the Settlement Classes have irrevocably submitted to the jurisdiction of this Court for any suit, action, proceeding, or dispute arising out of the Settlement Agreement.

***2** 13. It is in the best interests of the Parties and the Settlement Classes and consistent with principles of judicial economy that any dispute between any Member of the Settlement Classes (including any dispute as to whether any person is a Member of the Settlement Classes) and any Released Party which, in any way, relates to the applicability or scope of the Settlement Agreement or the Final Judgment and Order should be presented exclusively to this Court for resolution by this Court. IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

14. Settlement Classes. This action is a class action against Defendants on behalf of the Settlement Classes defined as follows:

> First Settlement Class. All persons who worked at Defendants' Washington call centers under an "Activity Based Compensation" or "ABC" plan that paid "per minute" rates for certain work activities between June 5, 2010, and January 16, 2015, but excluding any employees (1) who were hired after September 27, 2012, and who signed arbitration agreements as part of Defendants' revised 2012 Dispute Resolution Program; (2) who previously stipulated to arbitration in Amedee v. Xerox Business Services, et al., Case No. 2:15-cv-880-BJR; and/or (3) who are Members of the Second Settlement Class.
>
> Second Settlement Class. All persons who have worked at Defendants' Washington Call centers under an "Activity Based Compensation" or "ABC" plan that paid "per minute" rates for certain work activities between June 5, 2010, and January 16, 2015, and who previously consented to join the matter of Douglas v. Xerox Bus. Servs., Case No. C12-1798-JCC (W.D. Wash. 2012), but excluding (1) Tysheka Richard; (2) any employees who were hired after September 27, 2012, and who signed arbitration agreements as part of Defendants' revised 2012 Dispute Resolution Program; and/or (3) any employees who previously stipulated to arbitration in Amedee v. Xerox Business Services, et al., Case No. 2:15-cv-880-BJR.

15. The Settlement Classes satisfy the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) as set forth in the order granting preliminary approval of the settlement (Dkt. 273).

16. Settlement agreement. The Settlement Agreement is finally approved under Rule 23(e) of the Federal Rules of Civil Procedure as fair, reasonable, and adequate and in the best interests of the Settlement Classes. The Settlement Agreement shall be deemed incorporated herein and shall be consummated in accordance with the terms and provisions thereof, except as amended or clarified by any subsequent order issued by this Court.

17. As agreed by the Parties in the Settlement Agreement, upon Final Approval, Plaintiffs and Members of the Settlement Classes release, settle, compromise, relinquish, and discharge each of the Released Parties from each of the Released Claims as set forth in the Settlement Agreement.

18. Settlement Administration expenses. The Court approves CPT Group's administrative expenses of $34,500 if there is no second distribution of settlement payments and $46,000 if there is a second distribution. The settlement administration expenses are to be paid from the settlement fund in accordance with the Settlement Agreement.

19. Attorneys' Fees. Class Counsel are entitled to an award of reasonable attorneys' fees from the $9,100,000 Settlement Fund they recovered on behalf of the Settlement Classes. See Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) ("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.").

***3** 20. Where Class Counsel's efforts have created a common fund, courts in the Ninth Circuit have discretion to use either the percentage-of-the-fund method or the lodestar

method to award attorneys' fees. In re Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 570 (9th Cir. 2019). The method a district court chooses to use, and its application of that method, must achieve a reasonable result. See In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 942 (9th Cir. 2011). The percentage-of-the-fund method is an appropriate method for calculating a reasonable attorney's fee where, as here, the benefit to the Settlement Classes is easily quantifiable. Id.

21. The Ninth Circuit instructs that "[t]he 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases." Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1048 (9th Cir. 2002). The "benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990). The relevant factors include the results achieved, the risk of continued litigation, the skill required and quality of work, the contingent nature of the fee and financial burden carried by the plaintiff, and awards in similar cases. Vizcaino, 290 F.3d at 1048–50. Courts may also consider a lodestar cross-check. Id. at 1050.

22. Class Counsel's request for an award of 35% of the Settlement Fund is reasonable given the excellent and quantifiable settlement achieved for the classes—a $9,100,000 Settlement Fund, providing 202% of the total potential damages for both Settlement Classes—as well as the contingent nature of the fee, the skill and experience demonstrated by Class Counsel, the length of the litigation, the risk of no recovery, and awards in similar cases.

23. A lodestar crosscheck supports the reasonableness of Class Counsel's fee. In re Bluetooth, 654 F.3d at 944–45. The court calculates the "lodestar figure" by multiplying the number of hours reasonably expended by a reasonable rate. In re Hyundai, 926 F.3d at 570. Class Counsel reasonably invested more than 3,770 hours in the litigation. Class Counsel's lodestar—calculated at reasonable hourly rates ranging from $500 to $700 for partners, $450 to $500 for associates, $250 for paralegals, and $150 to $200 for legal assistants—is $2,217,812.50. Their fee request represents a modest multiplier of 1.44, which is within the range of multipliers approved by this Circuit. See Vizcaino, 290 F.3d at 1051 n.6. This multiplier is appropriate given the risk Class Counsel assumed and consistent with multipliers approved by other courts as part of a lodestar cross-check on a percentage-of-the-fund fee award.

24. Class Counsel are awarded $3,185,000 in attorneys' fees to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

25. Costs. Class Counsel's litigation costs are reasonable, necessary and directly related to the work performed on behalf of the Settlement Classes. See In re Apple Inc. Device Performance Litig., 50 F.4th 769, 785 (9th Cir. 2022). Class Counsel are awarded $81,759.41 in costs to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

***4** 26. Service Award. The Court approves a service award of $15,000 for Class Representative Tiffany Hill and $3,000 for Class Representative Michelle Anderson, to be paid from the settlement fund, in recognition of their respective efforts on behalf of the Settlement Classes.

27. Neither this Final Judgment and Order, nor the Settlement Agreement, shall be construed or used as an admission or concession by or against Defendants or any of the Released Parties of any fault, omission, liability, or wrongdoing, or the validity of any of the Released Claims. This Final Judgment and Order is not a finding of the validity or invalidity of any claims in this lawsuit or a determination of any wrongdoing by Defendant or any of the Released Parties. The final approval of the Settlement Agreement does not constitute any opinion, position, or determination of this Court, one way or the other, as to the merits of the claims and defenses of the Class Representatives, Members of the Settlement Classes, or Defendants.

28. Without affecting the finality of this judgment, the Court hereby reserves and retains jurisdiction over this settlement, including the administration and consummation of the settlement. In addition, without affecting the finality of this judgment, the Court retains exclusive jurisdiction over Defendants and each Member of the Settlement Classes for any suit, action, proceeding, or dispute arising out of or relating to this Order, the Settlement Agreement, or the applicability of the Settlement Agreement. Without limiting

the generality of the foregoing, any dispute concerning the Settlement Agreement, including, but not limited to, any suit, action, arbitration, or other proceeding by a Member of the Settlement Classes in which the provisions of the Settlement Agreement are asserted as a defense in whole or in part to any claim or cause of action or otherwise raised as an objection, shall constitute a suit, action, or proceeding arising out of or relating to this Order. Solely for purposes of such suit, action, or proceeding, to the fullest extent possible under applicable law, the parties hereto and all Members of the Settlement Classes are hereby deemed to have irrevocably waived and agreed not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of this Court, or that this Court is, in any way, an improper venue or an inconvenient forum.

29. This action is hereby dismissed on the merits, in its entirety, with prejudice and without costs.

30. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, there is no just reason for delay, and the Court directs the Clerk to enter final judgment.

Based on the foregoing, it is HEREBY ORDERED that Plaintiffs' Motion for Final Approval of Class Action Settlement (Dkt. Nos. 277, 282) is GRANTED.

IT IS SO ORDERED.

All Citations

Slip Copy, 2026 WL 592270

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- Exhibit 5 -

KeyCite Yellow Flag
Declined to Follow by Tyler v. Michaels Stores, Inc., D.Mass., December 9, 2015

779 F.3d 934
United States Court of Appeals, Ninth Circuit.

In re ONLINE DVD–RENTAL ANTITRUST LITIGATION.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
Theodore H. Frank, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.
In re Online DVD–Rental Antitrust Litigation.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
Jon M. Zimmerman, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.
In re Online DVD–Rental Antitrust Litigation.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
Edmund F. Bandas, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.
In re Online DVD–Rental Antitrust Litigation.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
Maria Cope, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.
In re Online DVD–Rental Antitrust Litigation.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
John Sullivan, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.
In re Online DVD–Rental Antitrust Litigation.
Andrea Resnick; Bryan Eastman; Amy Latham; Melanie Miscioscia; Stan Magee; Michael Orozco; Lisa Sivek; Michael Wiener, Plaintiffs–Appellees,
v.
Tracey Klinge Cox, Objector–Appellant,
v.
Netflix, Inc.; Wal–Mart Stores, Inc.; Walmart.Com USA LLC, Defendants–Appellees.

Nos. 12–15705, 12–15889, 12–15957, 12–15996, 12–16010, 12–16038
|
Argued and Submitted Feb. 13, 2014.
|
Filed Feb. 27, 2015.

Synopsis

Background: Individuals representing putative class of subscribers to internet-based DVD rental service filed antitrust action against internet-based DVD-rental service and large discount retailer, challenging as anticompetitive promotion agreement that divided up DVD-related businesses between the two companies. Plaintiffs moved for certification of litigation class of subscribers to internet-based DVD-rental service. The United States District Court for the Northern District of California, Phyllis J. Hamilton, J., 2010 WL 5396064, granted motion, then later denied approval of initial settlement agreement between retailer and global class of those subscribers and subscribers to another competing online DVD rental service, but conditionally approved settlement agreement between retailer and class of subscribers to internet-based DVD-rental service, gave preliminary approval of settlement and form and plan of notice, and denied renewed motion to decertify litigation class. Class members appealed.

Holdings: The Court of Appeals, Sidney R. Thomas, Chief Judge, held that:

[1] district court did not abuse its discretion in certifying the settlement class, despite objector's contention that class representatives were inadequate because their incentive awards were much larger than average settlement payout;

[2] district court did not abuse its discretion in approving claimant-fund-sharing mechanism;

[3] district court's notice of settlement did not violate either class action rule or due process;

[4] district court did not err in approving settlement as fair, reasonable, and adequate, based on consideration of *Churchill* factors;

[5] portion of settlement that would be paid in gift cards to discount retailer was not a "coupon settlement" within meaning of Class Action Fairness Act (CAFA);

[6] district court did not err in calculating attorney fee award as percentage of total settlement fund, including notice and administrative costs;

[7] district court provided adequate notice to class of attorney fee provision; and

[8] district court provided an adequate explanation of its rationale for fee award.

Affirmed.

See, also, 779 F.3d 914, 2015 WL 845842.

Procedural Posture(s): On Appeal.

West Headnotes (25)

[1] **Federal Courts** Class actions

Court of Appeals reviews district court's decision to approve class action settlement for clear abuse of discretion. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

4 Cases that cite this headnote

[2] **Federal Courts** Costs and attorney fees

Court of Appeals reviews district court's award of fees and costs to class counsel, as well as its method of calculation, for abuse of discretion. Fed.Rules Civ.Proc.Rule 23(h), 28 U.S.C.A.

11 Cases that cite this headnote

[3] **Federal Courts** Class actions

Court of Appeals reviews court's order on class certification for abuse of discretion. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

2 Cases that cite this headnote

[4] **Federal Civil Procedure** Representation of class; typicality; standing in general

While examination of potential conflicts of interest has long been an important prerequisite to class certification and is especially critical when class settlement is tendered along with motion for class certification, court does not favor denial of class certification on basis of speculative conflicts, nor does district court abuse its discretion when conflicts are trivial; only conflicts that are fundamental to suit and that go to heart of litigation prevent plaintiff from meeting adequacy requirement for certification. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

53 Cases that cite this headnote

[5] **Costs, Fees, and Sanctions** Class actions; incentive awards

District court did not abuse its discretion in approving settlement class in antitrust class action, despite objector's contention that the nine class representatives were inadequate because their representatives' awards, at $5,000 each, were significantly larger than the $12 each unnamed class member would receive; there were no structural differences in claims of class representatives and other class members, nor did settlement explicitly condition incentive awards on class representatives' support for settlement, and agreement provided no guarantee that class representatives would receive incentive

payments, leaving that decision to later discretion of district court. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

286 Cases that cite this headnote

[6] **Costs, Fees, and Sanctions** Class actions; incentive awards
Federal Civil Procedure Representation of class; typicality; standing in general

Incentive awards that are intended to compensate class representatives for work undertaken on behalf of class are fairly typical in class action cases, and incentive payments to class representatives do not, by themselves, create impermissible conflict between class members and their representatives; rather, resolution of two questions determines legal adequacy, (1) whether the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) whether the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

296 Cases that cite this headnote

[7] **Compromise, Settlement, and Release** Class actions, claims, and settlements in general

To assess fairness of class action settlement, court looks to eight "*Churchill* factors" including (1) strength of plaintiff's case, (2) risk, expense, complexity, and likely duration of further litigation, (3) risk of maintaining class action status throughout trial, (4) amount offered in settlement, (5) extent of discovery completed and stage of proceedings, (6) experience and view of counsel, (7) presence of governmental participant, and (8) reaction of class members to proposed settlement. Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

98 Cases that cite this headnote

[8] **Federal Courts** Class actions

Review of district court's decision to approve a class action settlement is extremely limited; it is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

7 Cases that cite this headnote

[9] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

District court did not abuse its discretion in approving "claimant-fund-sharing" mechanism as part of antitrust class settlement, despite objector's contention that because so few class members actually filed claims, settlement should not have used approach whereby each class member who submitted claim received equal share of settlement fund, regardless of harm he or she suffered.

10 Cases that cite this headnote

[10] **Deposits in Court** Disposition under judgment or order of court

Concepts of claimant fund approach and fluid recovery should not be conflated; "fluid recovery" can be used interchangeably with "cy pres" distributions to describe distribution that confers indirect benefit on class members, whereas "claimant fund" approach provides direct compensation to class members.

[11] **Federal Courts** Class actions

Court of Appeals reviews de novo whether notice of proposed settlement in class action satisfies due process. U.S.C.A. Const.Amend. 5.

14 Cases that cite this headnote

[12] **Compromise, Settlement, and Release** Form, requisites, and sufficiency
Constitutional Law Compromise and settlement
Federal Civil Procedure Sufficiency

District court's notice of settlement of antitrust class action against large discount retailer did not violate either federal civil rule governing class actions or due process; notice provided was not deficient despite two objectors' argument that it failed to provide estimate as to how much of an award each claimant would receive, did not disclose what cost average claimant had incurred

due to anticompetitive conduct at issue, neglected to state fact that administration costs would be deducted from settlement fund, and did not reveal that state class attorneys could claim fees from settlement fund that would further reduce amount available to class members and drive attorney fees request over 25%. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 23(e)(1), 28 U.S.C.A.

7 Cases that cite this headnote

[13] **Compromise, Settlement, and Release** Form, requisites, and sufficiency
Federal Civil Procedure Sufficiency

Notice of proposed class-action settlement provided pursuant to rule must generally describe the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

30 Cases that cite this headnote

[14] **Compromise, Settlement, and Release** Form, requisites, and sufficiency
Constitutional Law Compromise and settlement
Federal Civil Procedure Sufficiency

District court's notice of settlement of antitrust class action against large discount retailer did not violate either federal civil rule governing class actions or due process despite objector's contention that "dual notice" was misleading and constitutionally and statutorily deficient because class members received information about subject case and another case against internet-based DVD rental service in one notice and e-mail did not include information about district court's decision to grant summary judgment for defendant in the other case. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 23(e)(1), 28 U.S.C.A.

1 Case that cites this headnote

[15] **Costs, Fees, and Sanctions** Class actions; incentive awards

Settlement agreement in antitrust class action was not unfair despite objector's argument that incentive awards for nine class representatives were unreasonably large, even though the $5,000 incentive award each representative received was roughly 417 times larger than $12 individual award; the $45,000 in incentive awards made up mere .17% of total settlement fund of $27.25 million. Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

150 Cases that cite this headnote

[16] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection
Federal Civil Procedure Options; withdrawal

A "reverter" provision that allowed large discount retailer to keep excess settlement funds in antitrust class action and confidential "opt-out" provision that allowed it to leave settlement agreement at any time did not make that agreement unfair; one clause of reverter provision applied only if settlement was not approved so any argument regarding it was moot, the other relevant clause allowed return of funds only if retailer had transferred monies in excess of amount needed to pay all costs and claims under settlement, and, under the opt-out-provision, which allowed retailer to opt out if a certain percentage of class members opted out of the settlement, only the exact threshold was kept confidential, for practical reasons. Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

10 Cases that cite this headnote

[17] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection
Compromise, Settlement, and Release Findings, Conclusions, and Determination

District court provided sufficient explanation for, and did not abuse its considerable discretion in, approving settlement agreement in antitrust class action against large discount retailer as fair, reasonable and adequate despite objector's contention that court failed to fully explain its decision under *Churchill* factors; record reflected that district judge considered those factors, most

importantly class's chance of success if it continued to pursue litigation, and given her decision in corresponding case against internet-based DVD rental service and length and complexity of case thus far, she reasoned that settlement was fair in large part because it would provide class members with their only chance at relief. Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

[18] **Compromise, Settlement, and Release** Class settlements

Compromise, Settlement, and Release Costs and Fees of Litigation

In awarding attorney fees in settled class action, courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable. Fed.Rules Civ.Proc.Rule 23(h), 28 U.S.C.A.

17 Cases that cite this headnote

[19] **Attorneys and Legal Services** Lodestar and percentage methods compared or combined

In the Ninth Circuit, there are two primary methods to calculate attorneys fees in class action where a settlement produces a common fund for the benefit of an entire class; under the "percentage-of-recovery" method, attorney fees equal some percentage of common settlement fund, with benchmark percentage in Ninth Circuit being 25%, whereas "lodestar" method requires multiplying the number of hours prevailing party reasonably expended on litigation, as supported by adequate documentation, by reasonable hourly rate for region and for lawyer's experience. Fed.Rules Civ.Proc.Rule 23(h), 28 U.S.C.A.

209 Cases that cite this headnote

[20] **Costs, Fees, and Sanctions** Class actions

While district court has discretion in calculating fees or approving fee request in class actions, it abuses that discretion when it uses mechanical or formulaic approach that results in an unreasonable reward.

2 Cases that cite this headnote

[21] **Antitrust and Trade Regulation** Costs and Attorney Fees

Portion of settlement of antitrust class action that would be paid in gift cards from discount retailer was not a "coupon settlement" and attorney fee award was not attributable to award of coupons within meaning of Class Action Fairness Act (CAFA); gift cards were sufficiently different from coupons, especially given fact that claimants could choose between gift cards and cash, gift cards were freely transferable, and they had no expiration date. 28 U.S.C.A. § 1712(a).

26 Cases that cite this headnote

[22] **Attorneys and Legal Services** Antitrust

District court did not err in calculating attorney fee award in settled antitrust class action as percentage of total settlement fund, including notice and administrative costs, and litigation expenses.

41 Cases that cite this headnote

[23] **Compromise, Settlement, and Release** Form, requisites, and sufficiency

Federal Civil Procedure Sufficiency

District court provided adequate notice of attorney fee petition to class members; notice e-mailed and mailed to class members informed them that class counsel would be seeking fees in amount of 25% of total settlement fund and also gave class members clear deadline for filing objection, and district court set deadline for filing fee motion fifteen days before deadline for filing objection. Fed.Rules Civ.Proc.Rule 23(h)(1), 28 U.S.C.A.

37 Cases that cite this headnote

[24] **Attorneys and Legal Services** Lodestar and percentage methods compared or combined

Factors courts may consider in assessing request for attorney fees in common fund case that was calculated using percentage-of-recovery method include extent to which class counsel achieved exceptional results for the class, whether the case was risky for class counsel, whether counsel's performance generated benefits beyond the cash

settlement fund, the market rate for the particular field of law in some circumstances, the burdens class counsel experienced while litigating the case, e.g., cost, duration, and foregoing other work, and whether the case was handled on a contingency basis; in addition, a court may cross-check its percentage-of-recovery figure against a lodestar calculation.

331 Cases that cite this headnote

[25] **Attorneys and Legal Services** Antitrust

District court did not abuse its discretion in its analysis, explanation, and approval of class counsel's request for attorney fees in settled antitrust class action; class counsel requested, and court awarded, the 25% benchmark award only, while it was not per se valid benchmark was helpful starting point, counsel compared benchmark to summary lodestar numbers provided by class counsel and concluded those lodestar estimates were three times benchmark, and district judge provided reasoned explanation for her decision to approve fee request, both in her order and in oral ruling.

141 Cases that cite this headnote

Attorneys and Law Firms

***939**Theodore H. Frank (argued), Center for Class Action Fairness, WA, D.C.; Gary Sibley, Dallas, TX; Joseph Darrell Palmer, Law Offices of Darrell Palmer PC, Solana Beach, CA; Christopher A. Bandas, Bandas Law Firm, P.C., Corpus Christi, TX; Christopher V. Langone and Grenville Pridham, Law Office of Christopher Langone, Ithaca, NY; Joshua R. Furman (argued), Joshua R. Furman Law Corp., Los Angeles, CA, for Objector–Appellants Frank, Cope, Cox, Bandas, Sullivan, and Zimmerman.

Todd A. Seaver, (argued), Joseph J. Tabacco, Jr., and Christopher T. Heffelfinger, Berman DeValerio, San Francisco, CA, for Plaintiffs–Appellees.

Appeal from the United States District Court for the Northern District of California, Phyllis J. Hamilton, District Judge, Presiding. D.C. No. 4:09–md–02029–PJH.

Before: SIDNEY R. THOMAS, Chief Judge, STEPHEN REINHARDT, Circuit Judge, and LLOYD D. GEORGE, Senior District Judge.*

***940OPINION**

THOMAS, Chief Judge:

In this appeal, class members challenge the district court's approval of a settlement between Walmart[1] and a class of Netflix DVD subscribers arguing, among other matters, that the gift card portion of the settlement constituted a coupon settlement within the meaning of the Class Action Fairness Act ("CAFA"), Pub.L. No. 109–2, 119 Stat. 4 (2005). We hold that the settlement was fair and that the fee award was proper, and we affirm the district court.

I

Before its focus changed to streaming video, Netflix's primary business was renting DVDs to subscribers online and shipping them out by mail. Other companies, including retail giant Walmart, tried to compete. Netflix reached an agreement with Walmart that divided up DVD-related business between the two companies. Under the agreement, Netflix stopped selling DVDs, and focused solely on its DVD rental business. In return, Walmart wound down its own burgeoning online rental service, but continued to act as a major DVD seller.

In 2009, Andrea Resnick and seven other class representatives ("plaintiffs") filed a consolidated amended class action complaint against Netflix and Walmart, challenging the agreement as anti-competitive. Plaintiffs assert that as a result of the agreement and Walmart's subsequent departure from the rental business, Netflix charged its customers unfairly high monthly subscription prices.

The district court granted plaintiffs' motion for certification of a litigation class of Netflix subscribers. The court denied approval of an initial settlement agreement between Walmart and a global class of both Netflix subscribers and subscribers to Blockbuster's online DVD rental service. However, a class of just Netflix subscribers then reached a settlement agreement with Walmart. The court conditionally approved

the Netflix settlement class and also gave preliminary approval of the settlement, and the form and plan of notice. The court denied a renewed motion by Netflix to decertify the Netflix litigation class.[2]

In the settlement agreement, Walmart agreed to pay a total amount of $27,250,000, comprising both a "Cash Component" and a "Gift Card Component," in exchange for dismissal with prejudice of all claims asserted in the complaint. The class consists of:

> any person or entity residing in the United States or Puerto Rico that paid a subscription fee to rent DVDs online from Netflix on or after May 19, 2005, up to and including the date the Court grants Preliminary Approval of the Settlement, or some other date to be agreed to by the parties to this Agreement.[3]

The Cash Component funded attorneys' fees and expenses, costs of notice and administration, and incentive payments to class representatives. The amount remaining constituted the Gift Card Component and was used to provide class members ***941** with either gift cards or, if they so chose, the cash equivalent of a gift card. The gift card could only be used at the Walmart website and was freely transferrable, although it could not be resold. To receive payment, a class member was required to submit a claim form. A claimant could submit a claim for a gift card via e-mail, the class action website, or regular mail. A claimant could submit a claim for cash by regular mail only, and had to include the last four digits of his or her Social Security Number. Each claimant received an equal share of the Gift Card Component. In other words, the Gift Card Component (the amount remaining after subtracting attorneys' fees and expenses, notice and administration costs, and incentive payments) was split evenly among all valid claimants, regardless of the specific damages each individual claimant incurred.

Initial e-mail notice of the settlement was provided to some 35 million class members. Notice was mailed to more than 9 million class members whose email addresses were invalid such that the email notice "bounced back." The notice informed class members about the settlement and claims-submission process; stated that class counsel would seek $1.7 million in reimbursement of litigation expenses and fees of 25% of the total settlement fund of $27,250,000 and that Class Representatives would receive $5,000 each in incentive payments; it also set a deadline for filing a claim, leaving the class, or objecting to the settlement of February 14, 2012. The notice encouraged class members to visit the class website for more details. In response to the notice, 1,183,444 claims were submitted. 744,202 requests were for gift cards and 434,253 were for the equivalent value in cash. 722 class members opted out of the class and 30 lodged objections.

The appellants in this consolidated appeal, members of the proposed class, all objected to the settlement. At a March 14, 2012 fairness hearing and in the accompanying March 29, 2012 orders, the court gave final approval to the settlement and settlement class and awarded attorneys' fees. The judge rejected all objections, concluding that not "one objection was sufficient [ ]—singular or in the aggregate—to preclude [her] from approving this settlement." The court determined that CAFA's coupon—settlement provisions should not apply because the Walmart gift cards were sufficiently different from coupons—especially given the fact that claimants could choose between gift cards and cash, the gift cards were freely transferrable, and they had no expiration date.

The court concluded the attorneys' fees were properly calculated as 25% of the settlement fund, including administration and notice costs. It decided the percentage amount was fair, especially given that the alternative lodestar calculation would have resulted in attorneys' fees three times larger than the amount class counsel requested. The court approved attorneys' fees of $6,812,500 (25% of the total fund of $27,250,000), reimbursement of some litigation expenses totaling $1,700,000, incentive awards of $5,000 each for nine class representatives (totaling $45,000), and payment of notice and administration costs out of the fund. Administration and notice costs totaled roughly $4.5 million, leaving roughly $14.1 million in the settlement fund for the Gift Card Component. Divided among almost 1.2 million claims, the Gift Card Component will provide claimants with roughly $12 each.[4]

***942** Following the court's approval of the settlement, six objectors, Theodore Frank, Tracey Klinge Cox, Maria Cope, Edmund F. Bandas, John Sullivan, and Jon M. Zimmerman ("Objectors"), timely appealed and their cases were consolidated.

[1][2][3] We have jurisdiction under 28 U.S.C. § 1291. We review a district court's decision to approve a class action

settlement "for clear abuse of discretion." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir.2011) (citing *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir.2009)). Similarly, we review a court's "award of fees and costs to class counsel, as well as its method of calculation" for abuse of discretion. *Id.* (citing *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148–49 (9th Cir.2000)). We review a court's "order on class certification for an abuse of discretion," as well. *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir.2008).

II

The district court did not abuse its discretion in certifying the settlement class. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620–21, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), the Supreme Court clarified the difference between certifying a litigation class under Federal Rule of Civil Procedure 23(a) and (b) and certifying a settlement class under Rule 23(e). The Court noted that Rule 23(e) "was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)." *Id.* Thus, just because a settlement appears to be fair, reasonable, and adequate under Rule 23(e) does not mean a class has met the certification requirements of Rule 23(a) and (b). *Id.* at 621, 117 S.Ct. 2231 ("[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rules 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed."). Here, the district court certified the settlement class of Netflix subscribers pursuant to Rules 23(a) and (b)(3).

[4] We have observed that "[e]xamination of potential conflicts of interest has long been an important prerequisite to class certification" and "is especially critical when the a[sic] class settlement is tendered along with a motion for class certification." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.1998). However, we do not "favor denial of class certification on the basis of speculative conflicts." *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir.2003). Nor does a district court abuse its discretion when conflicts are trivial. *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 813 (7th Cir.2013). "Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement." 1 William B. Rubenstein et al., *Newberg on Class Actions* § 3.58 (5th ed.2011). A conflict is fundamental when it goes to the specific issues in controversy. *Id.*

[5] Cox argues the district court certified a class in violation of Rule 23(a), because the class representatives are not able to adequately represent the class. Relying on *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 187–89 (3d Cir.2012), Cox argues the representatives are not capable of adequately representing the class because the nine class representatives' awards under the settlement, at $5,000 each, are significantly larger than the $12 each unnamed class member will receive. Cox argues that, like in *Dewey*, there is an arbitrary line drawn in this ***943** case between class representatives and all other class members.

[6] However, incentive awards that are intended to compensate class representatives for work undertaken on behalf of a class "are fairly typical in class action cases." *Rodriguez*, 563 F.3d at 958. Incentive payments to class representatives do not, by themselves, create an impermissible conflict between class members and their representatives. *Cobell v. Salazar*, 679 F.3d 909, 922 (D.C.Cir.2012); *White v. Nat'l Football League*, 41 F.3d 402, 408 (8th Cir.1994), *abrogated on other grounds by Amchem Prods. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Rather, "[r]esolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. As to the latter question, "[t]he relevant inquiry is whether the plaintiffs maintain a sufficient interest in, and nexus with, the class so as to ensure vigorous representation." *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1112 (5th Cir.1978).

Here, as in *Hanlon*, there were no structural differences in the claims of the class representatives and the other class members. *Hanlon*, 150 F.3d at 1021. This case does not involve an *ex ante* incentive agreement between the class representatives and class counsel, which we criticized in *Rodriguez*, 563 F.3d at 958–60. Nor does it involve a settlement which explicitly conditioned the incentive awards on the class representatives' support for the settlement, as was the case in *Radcliffe v. Experian Information*

Solutions Inc., 715 F.3d 1157, 1164 (9th Cir.2013). In this case, as in *Cobell,* the class settlement agreement provided no guarantee that the class representatives would receive incentive payments, leaving that decision to later discretion of the district court. *Cobell,* 679 F.3d at 922. The amount sought and awarded was relatively small, well within the usual norms of "modest compensation" paid to class representatives for services performed in the class action. *Phillips v. Asset Acceptance, LLC,* 736 F.3d 1076, 1080 (7th Cir.2013). Indeed, we approved an identical incentive fee in *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 463 (9th Cir.2000). Thus, the district court did not abuse its discretion in certifying the settlement class.

Dewey is not to the contrary. The settlement in that case was structured far differently than in this case. *Id.* at 187. The class in Dewey was split up into two groups: a reimbursement group and a residual group. *Id.* All of the class representatives were in the reimbursement group. As a result, the class representatives were apt to favor the reimbursement group's interests over the residual group's, which the court held was an impermissible conflict under Rule 23(a). *Id.* This case involved only one settlement class, with no subclasses. Each class member was entitled to the same distribution, so the class representatives had no incentive to favor one subclass over another. In short, this case does not involve the intra-class structural conflict that concerned the court in *Dewey.* Indeed, read properly, in its extensive discussion of what conflicts are "fundamental," Dewey supports our conclusion that there was no fundamental conflict between the class representatives and class members that would prevent settlement class certification. Therefore, the district court did not abuse its discretion in certifying the settlement class.[5]

***944** III

The district court did not err in approving the settlement. We have previously recognized that settlements in class actions "present unique due process concerns for absent class members," including the risk that class counsel "may collude with the defendants." *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 946 (internal quotation marks omitted).

[7][8] To guard against these dangers, Federal Rule of Civil Procedure 23(e) "requires court approval of all class action settlements, which may be granted only after a fairness hearing and a determination that the settlement taken as a whole is fair, reasonable, and adequate." *Id.* at 946. To assess the fairness of a settlement, we look to the eight *Churchill* factors, including:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and view of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

Id. (quoting *Churchill Vill., L.L.C. v. Gen. Elec.,* 361 F.3d 566, 575 (9th Cir.2004)); *see also Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1375 (9th Cir.1993).[6] "Our review of the district court's decision to approve a class action settlement is extremely limited. It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon,* 150 F.3d at 1026 (internal citation omitted). Keeping this standard in mind, we review Objectors' various challenges to the district court's decision to approve the settlement agreement.

A

[9] The district court did not err in using the claimant fund mechanism. Zimmerman argues that because so few class members actually filed claims, the settlement should not have used the claimant fund sharing approach—whereby each class member who submits a claim receives ***945** an equal share of the settlement fund, regardless of the harm he or she suffered. Labeling claimant fund sharing a type of fluid recovery, Zimmerman argues that both state and federal courts disfavor fluid recovery distribution methods, especially when only a small proportion of class members participate. *See Democratic Cent. Comm. of the Dist. of Columbia v. Washington Metro. Area Transit Comm'n,* 84 F.3d 451, 455 n. 2 (D.C.Cir.1996) ("Implementing fluid recovery ... in federal class actions is controversial."); *see also State v. Levi Strauss & Co.,* 41 Cal.3d 460, 476, 224 Cal.Rptr. 605, 715 P.2d 564 (Cal.1986) ("Hence, the advantages of claimant fund sharing can only be realized

where a large proportion of class members participate and submit accurate claims.").

[10] The district court did not abuse its discretion in approving this claimant-fund-sharing settlement. First, we are careful not to conflate the concepts of "claimant fund approach" and "fluid recovery." Indeed, we have previously used "fluid recovery" interchangeably with "cy pres" distributions to describe a distribution that confers an indirect benefit on class members. *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir.2012) ("A *cy pres* remedy, sometimes called 'fluid recovery,' is a settlement structure wherein class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment." (internal citation omitted)). The claimant fund approach in this case, however, provides direct compensation to class members.

Zimmerman cites the California Supreme Court, which has called claimant fund sharing one "method[ ] of fluid recovery" and has noted that claimant fund sharing is unique among fluid recovery methods because it provides actual compensatory benefits to class members. *Levi Strauss & Co.*, 41 Cal.3d at 476, 224 Cal.Rptr. 605, 715 P.2d 564 (explaining that claimant fund sharing "uses the entire class recovery to provide monetary compensation to individual class members"). Nevertheless, Zimmerman does not cite any binding or persuasive federal authority for the proposition that claimant fund sharing is prohibited when only a small number of class members file settlement claims. In *Six (6) Mexican Workers v. Arizona Citrus Growers,* we noted that settlements have been approved where less than five percent of class members file claims. 904 F.2d 1301, 1306 (9th Cir.1990).

Moreover, we have employed similar methodology in other cases. *See, e.g., Dennis v. Kellogg Co.*, 697 F.3d 858, 862–63, 868 (9th Cir.2012) (rejecting a settlement because the cy pres portion of the award lacked specificity; another part of the settlement fund was distributed to claimants who submitted claims and not to silent class members). Finally, because this case involves a settlement agreement with a class of plaintiffs who were allegedly harmed by paying excessively high Netflix subscription prices, the concerns we have raised before regarding fluid recovery are not implicated here. *See Six (6) Mexican Workers,* 904 F.2d at 1306 (noting, following a class action antitrust case tried to a judge, that the Second and Ninth Circuit's concerns over fluid recovery involve "the impermissible circumvention of individual proof requirements" rather than the allocation of unclaimed damages). The district court did not abuse its discretion in employing the claimant fund mechanism.

B

The district court's notice of the settlement did not violate either Federal Rule of Civil Procedure 23 or due process. Federal Rule of Civil Procedure 23(e)(1) requires a court to "direct notice [of a proposed ***946** settlement] in a reasonable manner to all [settlement] class members who would be bound by the proposal." Rule 23(e) requires notice that describes "the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Lane,* 696 F.3d at 826 (internal quotation marks omitted). However, Rule 23(e) "does not require detailed analysis of the statutes or causes of action forming the basis for the plaintiff class's claims, and it does not require an estimate of the potential value of those claims." *Id.*

[11] Objectors argue that the notice provided in this settlement to class members violated Rule 23 and class members' due process rights. *See Mendoza v. Tucson School Dist. No. 1,* 623 F.2d 1338, 1350–51 (9th Cir.1980) ("Although [Rule 23(e)] accords a wide discretion to the District Court as to the form and content of the notice, due process requires its presence and constitutional adequacy."). We review "de novo whether notice of a proposed settlement satisfies due process." *Torrisi,* 8 F.3d at 1374.

[12] Cope and Bandas argue that the notice was deficient for failing to provide an estimate as to how much of an award each claimant would receive, not disclosing what cost an average claimant had incurred due to the anti-competitive conduct at issue, neglecting to state the fact that administration costs would be deducted from the settlement fund, and not revealing that, according to Cope and Bandas, state class attorneys could claim fees from the settlement fund that would further reduce the amount available to class members and drive the attorneys' fees request over 25%. Sullivan contends that the dual notice provided to class members—including both information regarding the ongoing Netflix litigation and the settlement with Walmart—was misleading and constitutionally and statutorily deficient.

[13] The notice provided in this settlement, in both mail and email form, was sufficient under the Constitution and Rule 23(e). First, none of the cases Objectors cite require the level of specificity they claim is needed. Indeed, as we made clear in *Lane,* Rule 23(e) requires sufficient detail simply "to alert those with adverse viewpoints to investigate and to come forward and be heard." *Lane,* 696 F.3d at 826 (internal quotation marks omitted); *see also* *Rodriguez,* 563 F.3d at 962 (holding that a notice contained "adequate information" when it did not exaggerate class representative support for the settlement and described "the aggregate amount of the settlement fund and the plan for allocation"). Here, the notice meets the requirements articulated in *Lane* and *Rodriguez.* The email notice provides simple and straightforward information about the class action, about the status of the cases against both Netflix and Walmart, about what action class members may take in either case, and about the uncertain nature of the Netflix litigation and the need to check the website for more detail. Most importantly, the notice states the amount of the settlement fund with Walmart, the amount class counsel will seek in fees, litigation expenses, and incentive awards, the fact that class counsel will seek payment for other costs from the fund, the fact that class members will need to submit a claim to obtain relief, an internet link and phone number to obtain a claim form, and the deadline for objecting or submitting a claim. The mail form is substantially the same. The e-mail and mail notices, which did not need to and could not provide an exact forecast of how much each class member would receive, gave class members enough information so that those with "adverse viewpoints" could investigate and "come forward and be heard." *Lane,* 696 F.3d at 826.

***947** To the extent Cope and Bandas argue the notice fails to inform class members of the possibility that state class counsel will request attorneys' fees, in addition to the 25% in the fee request in this case, the district court was within its discretion to reject that argument. Paragraph 13.2 of the Settlement Agreement clarifies that state attorneys' fees and other costs will come from the fees requested pursuant to Paragraph 6.1.1.1. And, pursuant to Paragraph 6.1.1.1, class counsel requested attorneys' fees totaling 25% of the settlement fund. Class counsel made clear at the fairness hearing that any fee request from state class counsel would come from the fee award granted in this case. The court did not abuse its discretion in interpreting Paragraph 13.2 as class counsel recommended.

[14] Finally, we disagree with Sullivan that notice was deficient because class members received information about both the Netflix and Walmart cases in one notice and because the e-mail did not include information about the district court's decision to grant summary judgment for the defendant in the Netflix case. While it is true that the initial e-mail notice came out shortly before the summary judgment decision but did not forecast it, the notice sent by regular mail was promptly updated, and the website was too. The notice in this case was not perfect, but the court did not abuse its discretion in approving the notice plan and ultimately approving the settlement.

C

The district court did not err in approving the settlement as fair, reasonable, and adequate. As noted above, we consider the eight *Churchill* factors when assessing whether a settlement is fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e). *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 946. Cox points to specific provisions in the agreement to argue that the settlement was not fair, reasonable, and adequate, and she contends that the district court failed to adequately explain its decision. We consider each argument in turn.

1

[15] Cox argues the incentive awards in this case—$5,000 for each of nine class representatives—were unreasonably large and thus unfair. Cox cites to *Staton v. Boeing, Co.,* 327 F.3d 938 (9th Cir.2003), with the $12 each claimant will receive. But *Staton* does not support her argument. In *Staton,* we reversed in part due to incentive awards that averaged $30,000 for 29 class representatives, totaling $890,000. *Staton,* 327 F.3d at 976–77. Thus, the average incentive award was 30 times the $1000 that unnamed class members received. *Id.* at 948–49, 976–77. More importantly, the incentive payments as a whole made up roughly 6% of the total settlement (estimated, on the large end, to be $14.8 million). *Id.* In contrasting the *Staton* facts with other cases and reversing because the *Staton* incentive awards were too large, we looked to "the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." *Id.* at 977. In this case, nine class

representatives receive $5,000, totaling $45,000, while unnamed class members receive $12. While it is true that a $5,000 incentive award is roughly 417 times larger than the $12 individual award, we focused less on that fact in *Staton* and more on the number of class representatives, the average incentive award amount, and the proportion of the total settlement that is spent on incentive awards. *Id.* at 977. Here, incentive awards are $5,000, an amount we said was reasonable in *Staton.* *Id.* at 976–77. $5,000 is considerably less than the average ***948** of $30,000 in *Staton.* There are nine class representatives, compared with the 29 in *Staton. Id.* Finally, the $45,000 in incentive awards makes up a mere .17% of the total settlement fund of $27,250,000, which is far less than the 6% of the settlement fund in *Staton* that went to incentive awards. *Id.* at 948–49, 976–77. Thus, under *Staton,* the district court did not abuse its discretion in approving the settlement awards, especially considering its conclusion that the litigation was "complicated" and took up quite a bit of the class representatives' time. Further, as we noted previously, we approved an identical incentive fee in *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d at 463.

2

[16] Cox also argues that two provisions in the settlement agreement, a reverter provision that she alleges allows Walmart to keep excess settlement funds and a confidential opt-out provision that allows Walmart to leave the settlement agreement at any time, make the agreement unfair. We disagree. One clause of the reverter provision, Paragraph 11.1.1, applies only if the settlement is not approved, so any argument regarding that clause is moot. The other relevant clause, Paragraph 11.1.4, allows a return of funds to Walmart only if "Wal–Mart has transferred monies in excess of the amount needed to pay" all costs and claims under the settlement. The district court did not abuse its discretion in deciding that these provisions do not allow for any improper reversion of allocated settlement funds to Walmart. The opt-out provision, Paragraph 9.4, allows Walmart to opt out if a certain percentage of class members opt out of the settlement.[7] Only the exact threshold, for practical reasons, was kept confidential. And because the court has granted final approval of the settlement, that threshold necessarily has not been met and the court therefore did not abuse its discretion in holding this issue was moot.

3

[17] Finally, Cox argues the court abused its discretion by failing to fully explain its decision under the *Churchill* factors. Cox cites *Linney v. Cellular Alaska Partnership,* 151 F.3d 1234, 1242–43 (9th Cir.1998) for the proposition that the district court needed to provide a detailed explanation of its decision to approve the settlement, along with a response to objections, in a written order. Cox misreads *Linney.* In that case, we stated instead that a court needs to provide a reasoned explanation, along with a response to objections, either in an order or somewhere else in the record. *Linney,* 151 F.3d at 1242–43. Moreover, it is important to remember that our review of a fairness determination is " 'extremely limited,' and we will set aside that determination only upon a 'strong showing that the district court's decision was a clear abuse of discretion.' " *Lane,* 696 F.3d at 818 (quoting *Hanlon,* 150 F.3d at 1026–27).

Here, the district court did not abuse its discretion. At the March 14, 2012 hearing, the judge considered many of the objections to the settlement and explained her decision to reject each of them. The record reflects that she considered the *Churchill* factors, most importantly the class's chance of success if it continued to pursue litigation. Given her decision in the corresponding Netflix case and the length and complexity of the case thus far, she reasoned that the settlement was fair ***949** in large part because it would provide class members with their only chance at relief. In her March 29, 2012 written order, she provided additional reasoning, explaining that the settlement was in the public interest and followed vigorous arm's length negotiation between both sides of the litigation. She also listed the *Churchill* factors, noting briefly that she had considered each, as is reflected in the record. Between the order and the fairness hearing, the court provided sufficient explanation for its decision and did not abuse its considerable discretion in approving a settlement. *See* *Lane,* 696 F.3d at 818.

IV

[18][19] The district court did not err in approving the fee award. Plaintiffs' class counsel asked for attorneys' fees in the amount of 25% of the overall settlement fund of $27,250,000 and the district court granted class counsels' request. In awarding attorneys' fees under Federal Rule of

Civil Procedure 23(h), "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 941. In this circuit, there are two primary methods to calculate attorneys fees: the lodestar method and the percentage-of-recovery method. *Id.* at 941–42. Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in this circuit, the benchmark percentage is 25%. *Id.* at 942. The lodestar method requires "multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Id.* at 941.

[20] While a district court has discretion in calculating fees, or approving a fee request, we have held that a district court "abuses that discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir.2010) (internal quotation marks omitted). One way that a court may demonstrate that its use of a particular method or the amount awarded is reasonable is by conducting a cross-check using the other method. For example, a crosscheck using the lodestar method "can 'confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate.' " *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 945 (quoting *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 n. 40 (3d Cir.1995)).

A

[21] We first consider the argument, advanced by several objectors, that the attorneys' fee award must comply with provisions of CAFA governing "coupon settlements." We conclude the district court properly decided that the portion of the settlement that will be paid in Walmart gift cards was not a "coupon settlement" within the meaning of CAFA. CAFA directs courts to apply heightened scrutiny to coupon settlements. 28 U.S.C. § 1712(e); *see also* *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir.2013) (citing *Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir.2006) ("[W]e note that in that statute Congress required heightened judicial scrutiny of coupon-based settlements....")). Objectors' primary reason for raising CAFA is Section 1712's requirement that "the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." 28 U.S.C. § 1712(a). In other words, Objectors contend that the Walmart gift cards are coupons and fall under CAFA and, as a result, ***950** the district court erred by calculating the fee award as a percentage of the overall settlement fund, including the total dollar value of the gift cards, instead of calculating the portion of the fee award based on the gift cards as a percentage of the gift cards that were actually redeemed.

The district court correctly held that the Walmart gift cards in this settlement do not constitute a coupon settlement that falls under the umbrella of CAFA.[8] In construing a statute, we first determine whether the statutory language is plain and unambiguous, examining not only the text, but "the structure of the statute as a whole, including its object and policy." *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir.1999). If the plain language is unambiguous, our inquiry is at an end. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877–78 (9th Cir.2001) (en banc).

Because Congress does not define the ambiguous term "coupon" within the statute, *see*28 U.S.C. § 1711; *see also* *In re EasySaver Rewards Litig.*, 921 F.Supp.2d 1040, 1047 (S.D.Cal.2013) ("[CAFA] does not define what constitutes a 'coupon.' "), "we may 'look to other interpretive tools, including the legislative history' in order to determine the statute's best meaning." *In re HP Inkjet Printer Litig.*, 716 F.3d at 1181 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005)). CAFA's legislative history, along with the decisions of district courts that have considered the issue, convince us that these gift cards are not coupons.

In CAFA's findings and purposes, Congress emphasized its concern about settlements when class members receive little or no value, including settlements in which "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." Class Action Fairness Act of 2005, Pub.L. No. 109–2, § 2, 119 Stat. 4 (2005). The Senate Judiciary Committee's Report offers more detail, stating that congressional hearings have exposed class action settlements in which "class members receive nothing more than promotional coupons to purchase more products from the defendants." S.Rep. No. 109–14, at 15

(2005), 2005 U.S.C.C.A.N. 3, 16. The report goes on to give twenty-nine examples of problematic coupon settlements. *Id.* at 15–20. The report cites and criticizes coupon settlement awards that provide class members with "$30 to $40 discounts" on a future cruise, "a $5 to $10 voucher good for future purchases of particular computer hardware or software products", "$1 off every subsequent $5 purchase" at a chain of restaurants, "a 30 percent discount on selected products" during a one-week time period, $55 to use on a purchase of a new crib from a defendant crib producer accused of making defective cribs, "$1.25 off a $25 dollar [video] game", and so on. *Id.* at 15–17.

The Walmart–Netflix settlement differs from the settlements that drew the attention of Congress. Affording over 1 million class members $12 in cash or $12 to spend at a low-priced retailer does not leave them with "little or no value." The district court did not err when it stated simply that "$12, while not a lot of money these days even at Wal–Mart, is $12." Moreover, this case is distinguishable from every single coupon-settlement example in the Senate report. The report focuses on ***951** settlements that involve a discount—frequently a small one—on class members' purchases from the settling defendant. S.Rep. No. 109–14, at 15–20; *see also* *True v. Am. Honda Motor Co.,* 749 F.Supp.2d 1052, 1069 (C.D.Cal.2010) (stating that $500 or $1000 rebates off the purchase of a new Honda or Acura vehicle are coupons and quoting *Fleury v. Richemont North America, Inc.,* No. C–05–4525 EMC, 2008 WL 3287154, at *2 (N.D.Cal. Aug. 6, 2008) for the proposition that coupons offer only " 'a discount on another product or service offered by the defendant in the lawsuit' "). These discounts require class members to hand over more of their own money before they can take advantage of the coupon, and they often are only valid for select products or services. The gift cards in this case are different. Instead of merely offering class members the chance to receive a percentage discount on a purchase of a specific item or set of items at Walmart, the settlement gives class members $12 to spend on any item carried on the website of a giant, low-cost retailer. The class member need not spend any of his or her own money and can choose from a large number of potential items to purchase. Even if the gift card is only worth $12, it gives class members considerably more flexibility than any of the coupon settlements listed in the Senate report.

District courts that have considered the issue have not classified gift cards as coupon settlements falling under CAFA. *See* *Reibstein v. Rite Aid Corp.,* 761 F.Supp.2d 241, 255–56 (E.D.Pa.2011) (holding that $20 Rite Aid gift cards with "actual cash value," that will be mailed to "(mostly) regular customers, have no expiration date, are freely transferrable, and can be used for literally thousands of products for which ordinary consumers ... have need", are "more like 'cash' than 'coupons' ")[9]; *Fernandez v. Victoria Secret Stores, LLC,* No. CV 06–04149, 2008 WL 8150856, at *2, *4–16 (C.D.Cal. Jul. 21, 2008) (approving a settlement and attorneys' fees award, outside the strictures of CAFA, that provides class members with gift cards to Victoria's Secret); *Petersen v. Lowe's HIW, Inc.,* Nos. C 11–01996 RS, C 11–03231 RS, C 11–02193 RS (N.D.Cal. Aug. 24, 2012) (approving a settlement and attorneys' fees award, outside the strictures of CAFA, that provides class members with $9 gift cards to Lowe's); *see also* *In re Bisphenol–A (BPA) Polycarbonate Plastic Prods. Liab. Litig.,* MDL No. 1967, Master Case No. 08–1967, 2011 WL 1790603, at *2–4 (W.D.Mo.2011) (holding that a settlement that provides class members with vouchers to obtain new products was not a coupon settlement because the vouchers do not require class members to spend their own money and do not require class members to purchase the same or similar products as those that gave rise to the litigation). Similar to the gift cards in these cases, the Walmart gift cards can be used for any products on walmart.com, are freely transferrable (though they cannot be resold on a secondary market) and do not expire, and do not require consumers to spend their own money.

Our conclusion that the settlement does not constitute a "coupon settlement" within ***952** the meaning of CAFA does not conflict with the Seventh Circuit's decision in *Synfuel Technologies, Inc.,* 463 F.3d at 654, as Frank suggests. The pre-paid shipping envelopes in *Synfuel* are different than the Walmart gift cards. Unlike a pre-paid shipping envelope, a gift card to walmart.com does not simply offer class members one type of complete product. It offers them a set amount of money to use on their choice of a large number of products from a large retailer. Like the gift cards to Rite Aid in *Reibstein,* part of what separates a Walmart gift card from a coupon is not merely the ability to purchase an entire product as opposed to simply reducing the purchase price, but also the ability to purchase one of many different types of products. That distinction also separates these gift cards from the e-credits we deemed coupons in *In re HP Inkjet Printer Litig.,* 716 F.3d at 1176 (labeling e-credits, which could be used to obtain Hewlett–Packard "printers and printer supplies," coupons).

Frank also argues that failing to apply CAFA to these gift cards will "eviscerate the Class Action Fairness Act," because settlements will be able to avoid CAFA merely by labeling their coupons as gift cards. Our holding will have no such effect. First, gift cards are a fundamentally distinct concept in American life from coupons. *Cf.* 15 U.S.C. § 1693*l*–1 (regulating gift cards, under the 1978 Electronic Fund Transfer Act and the Credit Card Accountability Responsibility and Disclosure Act of 2009, as an electronic form of cash (i.e., similar to credit or debit cards)). District courts are more than capable of ferreting out the deceitful coupon settlement that merely co-opts the term "gift card" to avoid CAFA's requirements. Second, our holding is limited. We conclude only that the gift cards in this case are not subject to CAFA, without making a broader pronouncement about every type of gift card that might appear.

Finally, Frank raises the concerns that these gift cards will not disgorge Walmart of ill-gotten gains and will force class members to buy from the defendant in their class action. But, giving thousands of consumers the ability to purchase $12 in goods from the Walmart website for free will not be insignificant to the retailer. Moreover, this case does not present the same problems as one like *Young v. Polo Retail, LLC,* in which the class members were former Polo Retail employees who complained about being forced to purchase Polo clothing and were then given Polo Retail gift cards. No. C–02–4546, 2006 WL 3050861, at *3–5 (N.D.Cal.2006) ("[W]hy would former employees, who allegedly were forced to buy a great deal of unwanted Polo products, desire product vouchers so that they could purchase even more clothes?"). Here, class members are suing due to an online-DVD rental agreement between Walmart and Netflix. Since Walmart sells many products beyond DVDs, class members have less reason to be wary of a gift card to the defendant retailer than did the plaintiffs in *Young.* Moreover, the claimants in this case had the option of obtaining cash instead of a gift card, undercutting the argument that the settlement forces them to buy from the defendant. In sum, we hold that the Walmart gift cards in this case are not coupons that fall under the umbrella of CAFA.[10] The district court did not err in failing to apply CAFA to this case.[11]

***953** B

[22] The district court did not err in calculating the attorneys' fees award by calculating it as a percentage of the total settlement fund, including notice and administrative costs, and litigation expenses. Frank argues the $4.5 million in notice and administrative costs, which facilitate alerting class members to the settlement and processing claims submitted by class members, do not inure to the benefit of the class. *See In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 942 (noting that a percentage-of-recovery fee award is calculated by taking a percentage of the "common fund for the *benefit of the entire class* " (emphasis added)). He argues the district court's mode of calculation fails to encourage class counsel to reduce notice and administrative costs. He also contends that by basing the fee award on the entire common fund, some of class counsels' fees are simply a percentage of their litigation expenses award—thus their work is being "double-count[ed]."

The district court did not abuse its discretion in calculating the fee award as a percentage of the total settlement fund, including notice and administrative costs, and litigation expenses. We have repeatedly held "that the reasonableness of attorneys' fees is not measured by the choice of the denominator." *Powers v. Eichen,* 229 F.3d 1249, 1258 (9th Cir.2000) (rejecting an objector's argument that a fee award in a securities settlement should be based on "net recovery," which does not include "expert fees, litigation costs, and other expenses"); *see also Staton,* 327 F.3d at 974–75 ("The district court also did not abuse its discretion by including the cost of providing notice to the class ... as part of its putative fund valuation.... We have said that 'the choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable.' " (quoting *Powers,* 229 F.3d at 1258)). Here, the district court concluded that class counsels' fee request, which applied the 25% benchmark percentage to the entire common fund, was reasonable. Indeed, the court explicitly explained how administrative costs in particular make it possible to distribute a settlement award "in a meaningful and significant way." Similarly, notice costs allow class members to learn about a settlement and litigation expenses make the entire action possible. Thus, the court acted within its discretion under this court's precedent in *Powers* and *Staton.*[12]

***954** C

[23] The district court provided adequate notice to the class of the attorneys' fee petition. Federal Rule of Civil

Procedure 23(h)(1) requires a claim for attorneys' fees to be made by motion under Rule 54(d)(2) and for "[n]otice of the motion [to] be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." *In re Mercury Interactive Corp. Securities Litigation,* 618 F.3d at 993–95, analyzed the rule and rejected as insufficient Rule 23(h) notice when the motion for attorneys' fees was due after the deadline for class members to object to the attorneys' fees motion. In other words, even though class counsel had provided preliminary notice of the total amount they would seek in fees, they had not provided class members with "an adequate opportunity to object to the motion itself because, by the time they were served with the motion, the time within which they were required to file their objections had already expired." *Id.* at 994.

Citing *In re Mercury,* Objectors argue that class counsel here failed to provide adequate notice of their attorneys' fee petition to class members under Rule 23(h).[13] *See In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d at 993–94 ("The plain text of [Rule 23(h)] requires that any class member be allowed an opportunity to object to the fee 'motion' itself, not merely the preliminary notice that such a motion will be filed."). Objectors argue that by stating in the email and mail notices only that class counsel would seek attorneys' fees in the amount of 25% of the common fund, class counsel did not provide the "[n]otice of the motion" required by Rule 23(h).

The district court did not abuse its discretion in its approval of the attorneys' fees request. Here, the notice e-mailed and mailed to class members informed them that class counsel would be seeking fees in the amount of 25% of the total settlement fund of $27,250,000. The notice also gave class members a clear deadline of Feb. 14, 2012 for filing an objection. The district court set the deadline for filing a fee motion fifteen days before the deadline for filing an objection. Indeed, the motion was filed on January 30, 2012, and the objection deadline was February 14, 2012. This schedule satisfies the requirements of *In re Mercury.*

D

[24] The district court provided an adequate explanation of its rationale. In *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1047–50 (9th Cir.2002), we listed several factors courts may consider in assessing a request for attorneys' fees that was calculated using the percentage-of-recovery method. These factors include the extent to which class counsel "achieved exceptional results for the class," whether the case ***955** was risky for class counsel, whether counsel's performance "generated benefits beyond the cash settlement fund," the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis.[14] *See id.* at 1048–50 (internal quotation marks omitted). In addition, a court may cross-check its percentage-of-recovery figure against a lodestar calculation. *Id.* at 1050.

[25] Sullivan argues the district court failed to adequately explain its attorneys' fee award, and that the case should be remanded for the court to apply the list of six factors he gleaned from *Craft v. County of San Bernardino,* 624 F.Supp.2d 1113, 1116–17 (C.D.Cal.2008).[15] While there are no doubt many factors that a court could apply in assessing an attorneys' fees award and while *Vizcaino* does not purport to establish an exhaustive list, we conclude the district court did not abuse its discretion in its analysis, explanation, and approval of class counsels' request for attorneys' fees.

First, class counsel requested, and the court awarded, the 25% benchmark award only. While the benchmark is not per se valid, it is a helpful "starting point." *Vizcaino,* 290 F.3d at 1048. Second, the court did compare the benchmark to the summary lodestar numbers provided by class counsel and concluded those lodestar estimates were three times the benchmark. The district judge noted that while she frequently reduces a lodestar request, she has never reduced one by half. Thus, where, as here, the lodestar amount was *three times* the benchmark, it was not an abuse of discretion for the district court to accept the benchmark using a quick cross-check of class counsel's lodestar summary figures. Third, the judge did provide a reasoned explanation for her decision to approve the fee request, both in her order and in an oral ruling. The judge addressed many of Objectors' arguments, summarized her lodestar cross-check, and, applying a number of the *Vizcaino* factors, correctly noted that class counsel risked great time and effort and advanced significant costs on behalf of the class action. Thus, the court did not abuse its discretion in the explanation of its decision to approve the attorneys' fees award.[16]

***956** V

In sum, we affirm the district court's decision to approve the settlement between the class of Netflix subscribers and Walmart, to certify the settlement class, and to grant class counsels' motion for attorneys' fees.

AFFIRMED.

All Citations

779 F.3d 934, 2015-1 Trade Cases P 79,083, 15 Cal. Daily Op. Serv. 1987, 2015 Daily Journal D.A.R. 2322

Footnotes

[*] The Honorable Lloyd D. George, Senior District Judge for the U.S. District Court for the District of Nevada, sitting by designation.

[1] For ease of reference, "Wal–Mart Stores, Inc." and "walmart.com USA LLC" shall be collectively referred to as "Walmart" throughout this opinion.

[2] Netflix had alleged that Plaintiffs' lead counsel, Robert G. Abrams, had a conflict of interest because he had moved to a new firm, Baker & Hostetler, LLP, that represents Walmart on other, unrelated matters.

[3] The court chose an ending date for the class (i.e., a person who subscribes to Netflix after the ending date is not a class member) of September 2, 2011.

[4] Prior to final approval of the Walmart settlement, but after preliminary approval and after the initial notice was e-mailed to class members, the court granted Netflix's motion for summary judgment on November 23, 2011. The settlement website was updated to reflect the court's decision to grant Netflix's summary judgment motion. The version of the notice that was subsequently mailed to class members who did not receive an email was also updated.

[5] Incorporating Frank's arguments regarding the attorneys' fees in this case, Cox also claims class counsel "over-inflated their own fee award at the expense of unnamed class members," thereby creating a conflict of interest that bars certification. Because we reject Frank's arguments that the attorneys' fees in this case are unreasonable or over-inflated, *infra,* we also reject Cox's arguments that their fee request presents a conflict of interest.

[6] Settlements in which the settlement agreement is negotiated *prior* to formal class certification require "an even higher level of scrutiny." *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 946. Here, the court gave preliminary certification of the *settlement class* after the settlement agreement had been reached, and final approval did not occur until the court's March 29, 2012 order. Unlike in *In re Bluetooth,* however, the court did certify a Netflix litigation class in the action against both Netflix and Walmart before a settlement was reached. *See In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 939 (noting that "before any motion was made to certify a class for merits purposes," the parties reached a settlement agreement); *see also* William B. Rubenstein, *Newberg on Class Actions* § 11:27 (4th ed. 2002) ("The Manual [of Complex Litigation] also notes that approval under Rule 23(e) of settlements involving settlement classes, however, requires closer judicial scrutiny than approval of settlements where class certification has been litigated."). The litigation and settlement classes in this case are substantially the same. Thus, since the district court did not apply any heightened scrutiny, and since the parties have not raised this issue on appeal, we assume, without deciding, that the heightened scrutiny in *In re Bluetooth* does not apply here. *See Rodriguez,* 563 F.3d at 963–64 (applying the eight *Churchill* factors, but not heightened scrutiny, in a case in which settlement negotiations came after certification of a litigation class but before certification of a settlement class).

[7] Class counsel argues Cox waived this argument by not raising it below. Since the district court did rule on it, however, we consider it on appeal. *United States v. Northrop Corp.,* 59 F.3d 953, 957 n. 2 (9th Cir.1995).

[8] Frank argues that the issue of whether CAFA applies to the gift card portion of the settlement is an issue of statutory interpretation that should be reviewed de novo. *Bush v. Cheaptickets, Inc.,* 425 F.3d 683, 686 (9th Cir.2005) ("As we consider CAFA's requirements, we may review the construction, interpretation, or applicability of a statute de novo."). Even under de novo review, we hold that CAFA does not apply.

[9] Frank attempts to distinguish Reibstein from this case by arguing the gift cards in Reibsten, unlike in this case, "

'have actual cash value' and 'are freely transferrable.' " However, the Reibstein gift cards are not significantly different than in this case. The Reibstein court clarifies, elsewhere in the decision, that the Rite Aid gift cards are " 'not redeemable for cash' " and simply that they are "freely transferrable." *Reibstein,* 761 F.Supp.2d at 246. Similarly, the gift cards in this settlement agreement are "fully transferrable," though they cannot be resold. Both appear to be equally freely transferrable and, to the extent they have cash value, it is because they are equal to a certain dollar amount and can be spent on a variety of useful goods.

10 Because we reject Objectors' argument that this settlement should fall under CAFA, we also reject Objectors' argument that the case should be remanded for the district court to analyze the settlement itself under the heightened scrutiny required by CAFA.

11 Pointing to empirical studies, Zimmerman also argues gift cards are generally not worth their face value. He raises this point, however, in the context of arguing the gift cards in this case are coupons. Since we have held that CAFA does not apply to this settlement, we need not consider this argument. Nevertheless, courts still have an obligation to review a settlement carefully, whether CAFA applies or not. Fed.R.Civ.P. 23(e)(2). Indeed, some district courts have valued gift cards, in settlements, at less than their dollar value. *Fernandez,* 2008 WL 8150856 at *10–11 (valuing Victoria's Secret gift cards at 85% of their face value and thus valuing the $10 million gift card settlement fund at $8.5 million "for [the] purposes of evaluating counsel's fee request"). Even if we construed Zimmerman's argument to mean he seeks a remand regardless of whether CAFA applies, we still would conclude the court did not abuse its discretion in valuing the Walmart gift cards at 100% of their face value. Although the court did not explicitly consider on the record whether the gift cards might be worth less than face value, the court did note that the "vast majority" of class members elected to obtain gift cards, concluding this settlement was similar to an all-cash settlement. Moreover, unlike the gift cards in *Fernandez* or the vouchers in *Young,* these gift cards provide class members with the ability to purchase a wide variety of items. Thus, the court was within its discretion to value the gift cards at 100% of their face value.

12 Sullivan briefly argues that some of the litigation expenses are not properly reimbursable, because they relate to the related litigation against Netflix. We disagree and hold that the district court did not abuse its discretion in approving class counsel's request for $1.7 million in litigation expenses. The court oversaw both the Walmart settlement and the litigation against Netflix and interacted with attorneys on both sides. It was within its discretion to accept class counsels' contentions that the expenses requested were "only approximately half the expenditures by Class Counsel" on the litigation and that certain experts were needed in the Walmart litigation to help push the company toward settlement.

13 Sullivan contends that because class counsels' notice regarding the settlement, including the notice of the attorneys' fee request, violates due process, the court should review the issue de novo. *See* *Torrisi,* 8 F.3d at 1374 ("We review de novo whether notice of a proposed settlement satisfies due process."). Sullivan's argument, however, focuses on whether the notice of the attorneys' fees request violates Rule 23(h). Thus, we review this argument for abuse of discretion. *In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d at 993 (reviewing a challenge under Rule 23(h) to notice of an attorneys' fee motion under the abuse of discretion standard).

14 Although the Supreme Court in *City of Burlington v. Dague,* 505 U.S. 557, 566, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) rejected using a case's contingency status for "the determination of a reasonable fee," it did so in the context of using a lodestar method to calculate the fee. *See* *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d at 942 n. 7 (noting, in a discussion of the lodestar calculation method, that the Supreme Court had rejected the "contingency" factor that this court established in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir.1975)). Thus, the *Vizcaino* court, in analyzing a percentage-of-recovery fee request, appropriately noted that class counsel had litigated the action on contingency for eleven years. *Vizcaino,* 290 F.3d at 1050.

15 In addition to arguing for remand, Sullivan also argues that "six 'special circumstances' justify (and mandate) an award of less than the 'benchmark' " in this case. These special circumstances include undisclosed conflicts of

interest on the part of class counsel, the lack of risk and low level of skill needed to litigate the Netflix and Walmart cases, and the "partial" nature of the settlement. Because it appears these "circumstances" are what Sullivan believes the district court should properly apply on remand to reduce the attorneys' fees award, and because we hold that the district court did not abuse its discretion in approving the fee award or in its explanation of that decision, we do not address each of these "special circumstances" individually.

16 Cope and Bandas also argue that the district court failed to properly respond to their argument that class counsels' fee petition was substantively insufficient. We conclude, however, that the district court did provide a reasoned explanation. Moreover, Cope and Bandas's citation to *In re Bluetooth,* which involves a lodestar fee request, does not support its contention that class counsel's fee motion was insufficiently detailed.

End of Document

- Exhibit 6 -

2024 WL 4371559
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Tracey LIU, et al., Plaintiffs,
v.
HOME DEPOT USA, INC., Defendant.

CASE NO. C23-1217JLR
|
Signed October 2, 2024

Attorneys and Law Firms

Grace Bennett, Pro Hac Vice, Simon Franzini, Pro Hac Vice, Dovel & Luner LLP, Santa Monica, CA, Wright A. Noel, Carson & Noel PLLC, Issaquah, WA, for Plaintiff Tracey Liu.

Grace Bennett, Pro Hac Vice, Simon Franzini, Dovel & Luner LLP, Santa Monica, CA, for Plaintiff Kristie Rudham.

Allexia Bowman Roberts, King & Spalding LLP, Atlanta, GA, for Defendant.

ORDER

JAMES L. ROBART, United States District Judge

I. INTRODUCTION

***1** Before the court are (1) Plaintiffs Tracey Liu and Kristie Rudham's (together, "Plaintiffs") unopposed motion for final approval of their proposed class action settlement with Defendant Home Depot USA, Inc. ("Defendant") (Approval Mot. (Dkt. # 35)) and (2) Plaintiffs' unopposed motion for attorneys' fees, costs, and incentive awards (Fees Mot. (Dkt. # 32)). The court heard from the parties at a final approval hearing on September 30, 2024, where it determined that the settlement satisfies the requirements set forth in Federal Rule of Civil Procedure 23(e). (*See* 9/30/24 Min. Entry (Dkt. # 42).) Being fully advised, the court GRANTS the motion for final approval for the reasons set forth on the record during the September 30, 2024 hearing; GRANTS Class Counsel's requests for costs and incentive awards in their entirety, and GRANTS IN PART Class Counsel's motion for attorneys' fees. Below, the court addresses the objections filed by California attorney Michael Geller (Obj. (Dkt. # 34)) and Class Counsel's request for an award of attorneys' fees. [1]

II. OBJECTIONS

For the reasons stated on the record during the September 30, 2024 hearing, the court finds that the relief offered to the Settlement Class is fair, reasonable, and adequate. As the court noted at the hearing, Mr. Geller raised several objections to the settlement. The court addresses these objections below. [2]

First, Mr. Geller asserts that the settlement is based on "worthless coupons that no one is going to use" and fails to satisfy the requirements of a "coupon settlement" under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1712. (Obj. at 2-4; [3] *see* Obj. Resp. (Dkt. # 36) at 3-9 (responding to this objection).) CAFA requires courts to apply "heightened scrutiny" when approving "coupon settlements" and to use "specific rules" to evaluate fee awards in such cases. *See McKnight v. Hinojosa*, 54 F.4th 1069, 1075 (9th Cir. 2022) (citing 28 U.S.C. § 1712). These rules only apply, however, if the settlement is a "coupon settlement." *Id.* Because "coupon" is not defined in the statute, *see* 28 U.S.C. § 1712, courts review three factors to determine whether the relief offered to the class is a "coupon": "(1) whether class members have 'to hand over more of their own money before they can take advantage of' a credit, (2) whether the credit is valid only 'for select products or services,' and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable." *McKnight*, 54 F.4th at 1075 (quoting *In re Easysaver Rewards Litig.*, 906 F.3d 747, 755 (9th Cir. 2018)).

***2** The court concludes, based on these factors, that the parties' settlement is not a "coupon settlement" within the meaning of CAFA. First, Settlement Class Members will not have to "hand over more money" to take advantage of the Credit Benefits because Defendant's websites offer over 100 products valued at $50 or less, with free shipping on all orders. (*See* 5/31/24 Franzini Decl. (Dkt. # 33) ¶ 23.) Second, although the Credit Benefits can only be used to purchase products available on Defendant's websites, they can be used without restrictions, including on already discounted products. (Agreement § III(C)(5).) And third, the Credit Benefits are valid for three years and are freely transferrable. (*Id.*); *see also McKnight*, 54 F.4th at 1075-77 (concluding that credits offered as part of a settlement were not "coupons"

and thus CAFA did not apply). Because this is not a "coupon settlement," CAFA's heightened scrutiny and attorneys' fees requirements do not apply, and Mr. Geller's objection is overruled.

Second, Mr. Geller argues that the settlement should provide cash refunds based on the amount each Settlement Class Member spent on Defendant's websites during the class period, instead of a flat $50 refund. (Obj. at 3.) Class Counsel respond that a flat refund is appropriate because all of the class members suffered the same harm—they were all misled by Defendant's misrepresentations of the cost of the products on the websites. (Obj. Resp. at 2 n.1.) The court concludes that Mr. Geller's objection simply states his preference for an alternative remedy. This is not, in the court's view, a valid ground for denying final approval of the settlement. *See* *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("[T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." (internal quotation marks and citation omitted)). Therefore, the court overrules Mr. Geller's second objection.

Third, Mr. Geller objects that Settlement Class Members should not be required to complete a claim form to receive a Cash Benefit because Defendant knows how much each Settlement Class Member spent on its websites. (Obj. at 3.) According to Mr. Geller, the settlement should instead provide automatic cash payments. (*Id.*) Class Counsel responds that it is "typical and well-accepted" for settlements to offer class members credits as a default remedy with the option to receive cash by filing a claim. (Obj. Resp. at 1-2 (compiling cases).) They point out that in deceptive price advertising cases like this one, there is nothing wrong with the products themselves; instead, the sole problem is that the defendant represented that its products were worth more than they truly were. (*Id.*) As a result, according to Class Counsel, there is no reason to assume that Settlement Class Members would be dissatisfied with the Credit Benefits. (*Id.*) The court agrees that the structure of the parties' proposed settlement is consistent with many other consumer class action settlements and finds nothing about the settlement that would require the parties to depart from that model. Therefore, the court overrules Mr. Geller's third objection.

Finally, Mr. Geller objects to Class Counsel's attorneys' fee request, asserting that fees measured against a percentage of recovery should be based on the $4.95 million Cash Settlement Fund rather than Class Counsel's inflated $19 million settlement valuation. (Obj. at 4.) He points out that $3.5 million is 71% of the Cash Settlement Fund, and asserts that amount is far too high. (*Id.*) The court agrees with Mr. Geller that Class Counsel's proposed $3.5 million fee award is too high but disagrees that the award should be based solely on the Cash Settlement Fund. As discussed in more detail below, the court sustains in part Mr. Geller's fourth objection and awards Class Counsel $2.875 million in attorneys' fees.

III. ATTORNEYS' FEES

"The touchstone for determining the reasonableness of attorneys' fees in a class action is the benefit to the class." *Lowery v. Rhapsody Int'l, Inc.*, 75 F.4th 985, 988 (9th Cir. 2023). District courts "have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). A district court can employ either of two methods to calculate a fee award—the lodestar or a percentage of the recovery. *Kim v. Allison*, 8 F.4th 1170, 1180 (9th Cir. 2021). Although courts may employ either method, they "often employ the other method as a cross-check that the award is reasonable." *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 784 (9th Cir. 2022).

***3** Here, Class Counsel vigorously argue that the court should use "the favored, percentage-of-the-fund method" for determining reasonable attorneys' fees (Fees Mot. at 1) and assert that "[a] lodestar cross-check is unnecessary and counter-productive" (*id.* at 15). The court declines Class Counsel's invitation to disregard the lodestar cross-check. Thus, the court begins by reviewing Class Counsel's request for fees calculated as a percentage of the class recovery, and then cross-checks that amount against the lodestar.

The percentage of recovery approach is generally used " 'where the defendants provide monetary compensation to the plaintiffs' and class benefit is easy to quantify." *Kim*, 8 F.4th at 1181. The court must consider the settlement's "actual or anticipated value to the class members, not the maximum amount that hypothetically could have been paid to the class." *Lowery*, 75 F.4th at 988-89; *Kim*, 8 F.4th at 1181 (reversing a fee award where the district court calculated case value assuming a 100% claims rate and failed to consider "the amount of anticipated monetary relief based on the timely

submitted claims"). In common fund cases, the benchmark for a reasonable fee award is 25% of the fund. *In re Bluetooth*, 654 F.3d at 942.

In their fees motion and at oral argument, Class Counsel repeatedly asserted that their $3.5 million request amounts to less than 18.4% of a total settlement value of over $19 million. They calculate this valuation by adding the $4.95 million Cash Settlement Fund (which covers claimed Cash Benefits, attorney's fees and costs, administrative costs, and incentive awards) to the total value of the $50 Credit Benefits sent to Settlement Class Members who did not submit claims for Cash Benefits. As the court pointed out at the final approval hearing, Class Counsel's $19 million valuation depends on (1) valuing the Credit Benefits the same as cash and (2) assuming that 100% of the class will redeem their Credit Benefits. The court finds that these assumptions are unreasonable.

In the court's view, a more realistic (but still generous) estimate of the total benefit to the class would be based on the number of Credit Benefits redeemed. *See, e.g.*, *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1054 (9th Cir. 2019) (applying CAFA principles to a non-coupon settlement and reversing settlement approval and fee award where district court failed to scrutinize the parties' claimed settlement valuation). Here, Class Counsel's research indicates that approximately 44.4% of customers who purchase items from Defendant's websites make a second purchase within three years. (*See* 8/30/24 Franzini Decl. (Dkt. # 35-1) ¶ 20.) As Class Counsel recognized at the final approval hearing, if approximately 44.4% of the Settlement Class redeem their Credit Benefits, the result would be a total credit redemption value of about $6.5 million and a total settlement value, including the $4.95 million Cash Settlement Fund, of about $11.5 million. Class Counsel's requested $3.5 million award is about 30.4% of that total—more than the Ninth Circuit's 25% benchmark.

To perform the lodestar cross-check, the district court "multiplies the number of hours the prevailing party reasonably spent on litigation by a reasonable hourly rate to determine a presumptively reasonable fee award." *Kim*, 8 F.4th at 1180. The court can then adjust the lodestar amount to account for "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id.* at 1180-81 (quoting *In re Bluetooth*, 654 F.3d at 941-42). At the September 30, 2024 hearing, the court found that Class Counsel's hourly rates and hours worked were reasonable. (*See* 8/30/24 Franzini Decl. ¶ 26 (setting forth Class Counsel's rates and hours worked).) Class Counsel's requested $3.5 million award, however, represents a lodestar multiplier of 3.94 based on hours worked as of August 29, 2024 (*see id.*), which the court found was unreasonably high.

***4** The court concludes that an award of 25% of the more realistic $11.5 million settlement valuation is appropriate here. This award amounts to $2.875 million, or a lodestar multiplier of 3.24 based on the hours worked as of August 29, 2024. *See, e.g.*, *McKnight*, 54 F.4th at 1074-75, 1077 (affirming the district court's reduction of the fee award from the requested 4.14 lodestar multiplier to a 2.9 lodestar multiplier where counsel's request would have "overcompensated class counsel compared to their lodestar"). The court finds that this award will adequately compensate Class Counsel for their efforts in achieving the settlement and the risks they took in pursuing this litigation without resulting in a disproportionate fee award. The court also finds that the lodestar multiplier is consistent with those awarded in similar cases and is sufficiently high as to not disincentivize attorneys from pursuing class action litigation. *See* *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 (9th Cir. 2002) (noting that the lodestar typically ranges from 1.0% to 4.0% in common fund cases). [4]

IV. CONCLUSION

For the reasons set forth above and on the record during the September 30, 2024 final approval hearing, the court GRANTS Plaintiffs' motion for final approval of their class action settlement (Dkt. # 35) and GRANTS in part Plaintiffs' motion for attorneys' fees, costs, and incentive awards (Dkt. # 32). The court ORDERS and makes the following findings and determinations:

1. The court has personal jurisdiction over all of the Parties to this Action, including Settlement Class Members. The court has subject matter jurisdiction over this Action, and all matters related to the Settlement.

2. The Settlement Agreement (Dkt. # 26-1 ("Agreement")), is incorporated by reference into this order and is adopted by the court.

Approval of Notice and Settlement Administration

3. Direct notice was distributed to Settlement Class Members as ordered in this court's Preliminary Approval Order (Dkt. # 31).

4. The court finds that Notice was disseminated in a manner that: (a) constituted the best notice practicable under the circumstances; (b) was reasonably calculated to inform all Settlement Class Members of this Action, of the terms and effect of this Settlement, of their right to opt out of or object to this Settlement, of the final approval hearing, of Class Counsel's fees and costs request, and of the Class Representatives' request for incentive awards; (c) constituted adequate and sufficient notice to all Settlement Class Members; and (d) satisfied the requirements of the United States Constitution, Rule 23 of the Federal Rules of Civil Procedure, and all other applicable law. The court notes that between email and U.S. Mail, the notice program resulted in near-universal notice to Settlement Class Members. (*See* Marra Decl. (Dkt. # 35-2) ¶ 13 (explaining that over 99% of Class Members received notice).)

5. The notices provided all relevant information concerning the claims, the Settlement's terms and impact, and Settlement Class Members' ability to opt out of or object to the Settlement. (*See* Agreement, Exs. A, B, D.) In addition to distributing direct notice, the Settlement Administrator established and ran a Settlement Website that provided additional information to Class Members. The Parties also directed the Settlement Administrator to send a second reminder email prior to the Claim Deadline to ensure Settlement Class Members who wanted to file claims for cash had ample opportunity to do so. In sum, the court finds that thorough and effective Notice was successfully administered.

***5** 6. The court also finds the Settlement Administrator's $54,000 in estimated costs for notice and administration are fair and reasonable, and confirms Simpluris Inc. as the Settlement Administrator.

Certification of the Settlement Class

7. Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), the court finally certifies the following Class, for settlement purposes only:

- All persons who, while in the State of California, purchased one or more products advertised as being subject to a purported discount on Defendant's websites Blinds.com, JustBlinds.com, and AmericanBlinds.com from January 26, 2020, to December 5, 2023 ("California Settlement Subclass"); and
- All persons who, while in the State of Washington, purchased one or more products advertised as being subject to a purported discount on Defendant's websites Blinds.com, JustBlinds.com, and AmericanBlinds.com from August 9, 2019, to December 5, 2023 ("Washington Settlement Subclass").

8. This Class is the same as was conditionally certified in the court's Preliminary Approval Order. (*See* Dkt. # 31 at 3.) The court again finds that this Settlement Class satisfies the requirements of Rule 23(a) and 23(b)(3).

9. First, the Settlement Class, which consists of more than 300,000 members, is so numerous that joinder of all Settlement Class Members in a single action is impracticable. Second, there are numerous common questions of law and fact, and these common questions predominate over all individual questions. Third, the claims of the two Class Representatives are typical of the Settlement Class. Fourth, the Class Representatives, along with Class Counsel, have no conflicts with Settlement Class Members and have fairly and adequately represented the Class's interests. Finally, because the claims are numerous and relatively low in value, a class action is a superior mechanism for their resolution.

The Settlement Warrants Final Approval

10. Pursuant to Rule 23(e)(2) of the Federal Rules of Civil Procedure, the court grants final approval of the Settlement.

11. Under the Agreement, each Settlement Class Member will receive a direct benefit of at least $50—in either cash or store credit (to be used on any purchase from Defendant's three websites at issue in this case). Settlement Class Members who did not file a claim will automatically receive a store credit. Those who choose to file a claim will receive their benefit in cash. In addition, pursuant to the Settlement, Defendant has modified its price advertising. This is an excellent outcome for the Settlement Class and compares favorably to settlements in similar class actions.

12. Both the Class Representatives and Class Counsel adequately represented the Class and recommended this Settlement. The Class Representatives actively participated in the Action and provided valuable service to the Class. And Class Counsel vigorously negotiated this Settlement.

See Fed. R. Civ. P. 23(e)(2)(A). Because Class Counsel has substantial experience litigating class actions, including a special expertise in cases alleging deceptive price advertising such as this one, Class Counsel's recommendation of this Settlement is entitled to weight.

13. For these reasons, the court reaffirms its preliminary appointment of Tracey Liu and Kristie Rudham as Class Representatives, and Dovel & Luner LLP as Class Counsel.

***6** 14. The Settlement was negotiated at arm's length with the aid of an experienced mediator. The Parties participated in two mediations and then continued to negotiate, through the mediator, until finally accepting the mediator's proposal. Prior to mediation, the Parties exchanged significant information, including detailed financial and sales records from Defendant. Class Counsel also represents that it engaged experts to assist with the damages and liability analyses and continued to monitor and document Defendant's price advertising. Thus, the Parties approached negotiations with sufficient information to thoroughly evaluate the value of the case and potential agreements. *See* Fed. R. Civ. P. 23(e)(2)(B).

15. The settlement is fair, reasonable, and adequate in light of the costs, risks, and delay of continued litigation. The Parties vigorously contest liability and damages in this Action, and, without settlement, the Plaintiffs would face numerous obstacles at each stage of litigation. Plus, regardless of Plaintiffs' future success, continued litigation would impose additional expense and delay that could undercut any potential recovery for the Class. *See* Fed. R. Civ. P. 23(e)(2)(C)(i).

16. The proposed method of distributing relief to the class is reasonable and favors settlement. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii).

17. The "subtle signs" of collusion set forth in *In re Bluetooth*, 654 F.3d at 946, are not present in this settlement. First, although high, Class Counsel's fees request is not so far beyond the bounds of fee awards approved in this Circuit as to raise concerns about collusion. Second, the Settlement does not include a clear sailing provision—Defendant was entitled to oppose Class Counsel's fee request. (Agreement § III(E)(1).) Finally, none of the benefits under the Settlement will revert to Defendant. (Agreement §§ III(C)(3), VIII); *see* Fed. R. Civ. P. 23(e)(2)(C)(iii).

18. Finally, the reaction of the Settlement Class favors approval. Despite a robust notice program, only one Class Member objected to the Settlement, and only four Class Members opted out. (Marra Decl. ¶¶ 17-19.) The court has considered the objections filed by the sole objector and overrules those objections for the reasons set forth above.

Approval of Attorneys' Fees, Costs, and Incentive Awards

19. For the reasons set forth above, the court denies counsel's request for an award of $3.5 million in fees and awards counsel $2.875 million. As explained above, this award is based on approximately 25% of an estimated settlement value of $11.5 million and represents a lodestar multiplier of approximately 3.24%

20. The court finds that the costs incurred by Counsel were reasonable and grants Class Counsel's request for $50,279.85 in cost reimbursements.

21. The court grants the Class Representatives' request for $2,500 incentive awards, for a total of $5,000. These awards are justified given the Class Representatives' active participation in this Action and their service to the Settlement Class.

Release of Claims

22. The Settlement Agreement requires Settlement Class Members to release all claims that "arise from the same facts and claims alleged in the operative complaint." (Agreement § III(D)(1).)

23. This release is sufficiently narrowly tailored. Upon entry of this Order, the claims asserted in this Action, and the Released Claims of each Settlement Class Member, are fully, finally, and forever released and discharged by Settlement Class Members who did not submit valid requests for exclusion, pursuant to the terms of the Settlement Agreement.

Final Judgment and Schedule

24. As a result of the Settlement's Final Approval, Final Judgment is entered based on the Parties' Settlement Agreement. Accordingly, this action is DISMISSED WITH PREJUDICE, with all Parties to bear their own costs and fees except as set forth herein.

***7** 25. Notwithstanding the foregoing, and without affecting the finality of this Order in any way, the court shall retain jurisdiction to enforce the terms of the Settlement Agreement, and guarantee that its terms and this Order are carried out.

26. The Clerk is DIRECTED to enter Judgment and close the case.

All Citations

Not Reported in Fed. Supp., 2024 WL 4371559

Footnotes

1 The court assumes the reader is familiar with the parties' settlement agreement ("Agreement"). (*See generally* Agreement (Dkt. # 26-1).) Capitalized terms in this order are defined in the Agreement. (*See id.* § I.)

2 "An objector to a proposed settlement agreement bears the burden of proving any assertions they raise challenging the reasonableness of a class action settlement." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 583 (N.D. Cal. 2015).

3 Mr. Geller offers his own calculations of the benefits provided by the settlement. (Obj. at 2.) The court does not address those calculations in this order because they are based on incorrect assumptions about the structure of the settlement. (*See id.*)

4 The court has reviewed Class Counsel's cited cases, including *Hendricks v. Starkist Co.*, which Class Counsel discussed in the final approval hearing. No. 13-cv-00729-HSG, 2016 WL 5462423 (N.D. Cal. Sept. 29, 2016), *aff'd sub nom. Hendricks v. Ference*, 754 F. App'x 510 (9th Cir. 2018); (*see also* Obj. Resp. at 10-12 (compiling cases)). The court concludes that none of Class Counsel's cited cases require the court to depart from the analysis presented in this order.

- Exhibit 7 -

KeyCite Yellow Flag
Declined to Extend by Aquino v. Klein, Cal.App. 2 Dist., April 8, 2021

534 F.3d 1106
United States Court of Appeals, Ninth Circuit.

Mario R. MORENO, Plaintiff–Appellant,
v.
CITY OF SACRAMENTO; Max Fernandez; Joshua Pino; John Vanella, Defendants–Appellees,
and
Voluntary Dispute Resolution Neutral, Defendant.

No. 06–15021
|
Argued & Submitted Dec. 5, 2007.
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Submission Deferred Dec. 5, 2007.
|
Submitted July 28, 2008.
|
Filed July 28, 2008.

Synopsis
Background: After owner prevailed in § 1983 suit against city on claims of inverse condemnation, substantive due process, unreasonable search and seizure, and procedural due process violations, in connection with city's demolishing of owner's building, owner requested award of attorney fees. The United States District Court for the Eastern District of California, David F. Levi, J., awarded fees but reduced jury award to 40% lower than requested. Appeal was taken.

Holdings: The Court of Appeals, Kozinski, Chief Judge, held that:

[1] 25% reduction in requested hours for legal research lacked clear explanation;

[2] 50% reduction in trial preparation hours lacked clear explanation;

[3] 33% reduction in appeal preparation hours lacked clear explanation;

[4] 50% reduction for hours spent interviewing and investigating lacked clear explanation;

[5] $50 per hour reduction in hourly rate was based on impermissible considerations; and

[6] reduction in hourly rate was impermissibly double counted.

Vacated and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (32)

[1] **Civil Rights**—Amount and computation
Because attorney fee awards are not negotiated at arm's length, there is a risk of overcompensation for successful plaintiffs in a civil rights action, and thus, a district court awards only the fee deemed reasonable. 42 U.S.C.A. § 1988.

12 Cases that cite this headnote

[2] **Civil Rights**—Time expended; hourly rates
In awarding attorney fees to a prevailing plaintiff in a civil rights action, the district court must strike a balance between granting sufficient fees to attract qualified counsel to civil rights cases and avoiding a windfall to counsel, by compensating counsel at the prevailing rate in the community for similar work, but no more and no less. 42 U.S.C.A. § 1988.

107 Cases that cite this headnote

[3] **Civil Rights**—Amount and computation
Under the "lodestar method" of calculating an attorney fee award, for a prevailing plaintiff in a civil rights action, a district court must start by determining how many hours were reasonably expended on the litigation, and then multiply those hours by the prevailing local rate for an attorney of the skill required to perform the litigation; the district court may then adjust upward or downward based on a variety of factors. 42 U.S.C.A. § 1988.

263 Cases that cite this headnote

[4] **Civil Rights**Time expended; hourly rates

Under the lodestar method of calculating an attorney fee award, for a prevailing plaintiff in a civil rights action, the number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client. 42 U.S.C.A. § 1988.

288 Cases that cite this headnote

[5] **Federal Courts**Costs and attorney fees

Court of Appeals reviews for abuse of discretion the district court's calculation of the reasonable hours and hourly rate for award of attorney fees to prevailing plaintiff in a civil rights action. 42 U.S.C.A. § 1988.

453 Cases that cite this headnote

[6] **Civil Rights**Taxation

When the district court awards attorney fees to a prevailing plaintiff in a civil rights action, the court must explain how it came up with the amount; the explanation need not be elaborate, but it must be comprehensible, or in other words, the explanation must be concise but clear. 42 U.S.C.A. § 1988.

111 Cases that cite this headnote

[7] **Civil Rights**Taxation

Where the difference between the lawyer's request for attorney fees, after prevailing in a civil rights action, and the district court's award is relatively small, a somewhat cursory explanation by the court will suffice; but where the disparity is larger, a more specific articulation of the court's reasoning is expected. 42 U.S.C.A. § 1988.

95 Cases that cite this headnote

[8] **Federal Courts**Costs and attorney fees

Court of Appeals reviews de novo the legal principles underlying the attorney fee award to a prevailing plaintiff in a civil rights action. 42 U.S.C.A. § 1988.

2 Cases that cite this headnote

[9] **Civil Rights**Taxation

District court's explanation of attorney fee award to prevailing plaintiff in civil rights action that reduced requested hours for legal research by 25%, on grounds that work was duplicative due to substantial time spent preparing motions and briefs dealing with similar issues, provided insufficient reasoning to sustain substantial 25% reduction, which required specific and clear explanation as to which fees were duplicative or why; counsel had already cut her fees by 9%, so additional cut of 25% would amount to almost one-third of requested fees, and previous appeal of district court's grant of summary judgment would have added to delay and rendered research stale. 42 U.S.C.A. § 1988.

22 Cases that cite this headnote

[10] **Civil Rights**Time expended; hourly rates

The district court may reduce the number of hours awarded to prevailing plaintiff in civil rights action because the lawyer performed unnecessarily duplicative work. 42 U.S.C.A. § 1988.

89 Cases that cite this headnote

[11] **Civil Rights**Services or activities for which fees may be awarded

A lawyer's time spent getting up to speed with previously performed research due to stale work product from litigation that has gone on for many years is duplication of work, but necessary duplication, when considering award of attorney fees for prevailing plaintiff in civil rights action. 42 U.S.C.A. § 1988.

44 Cases that cite this headnote

[12] **Civil Rights**Time expended; hourly rates

Generally, for award of attorney fees, the district court should defer to the winning lawyer's professional judgment as to how much time he was required to spend to prevail in a civil rights action. 42 U.S.C.A. § 1988.

591 Cases that cite this headnote

[13] **Civil Rights**Amount and computation
Civil Rights Taxation

For award of attorney fees to prevailing plaintiff in a civil rights action, the district court can impose a small reduction, no greater than a 10 percent "haircut" based on its exercise of discretion and without a more specific explanation. 42 U.S.C.A. § 1988.

492 Cases that cite this headnote

[14] **Civil Rights**Taxation

District court's sole opaque explanation as "excessive," to support 50% reduction in requested hours for counsel's preparation for first two trial dates, while not reducing requested hours for third trial date, in awarding attorney fees to prevailing plaintiff in civil rights action, was insufficiently clear reasoning to sustain substantial 50% reduction; reduction of 50% amounted to 20% of total fees billed for trial, counsel had already cut her fees by 9%, and time spent preparing for first trial would have been of relatively little use by time case was actually presented to jury three years later. 42 U.S.C.A. § 1988.

8 Cases that cite this headnote

[15] **Civil Rights**Time expended; hourly rates

In calculating an attorney fee award for prevailing plaintiff in civil rights action, necessary duplication of attorney hours, based on the vicissitudes of the litigation process, cannot be a legitimate basis for a fee reduction; it is only where the lawyer does unnecessarily duplicative work that the district court may legitimately cut the hours. 42 U.S.C.A. § 1988.

100 Cases that cite this headnote

[16] **Civil Rights**Costs and fees on appeal

District court's explanation for 33% reduction in requested hours for counsel's preparation for first appeal, on grounds that counsel spent twice as long on appeal than on summary judgment, was insufficiently clear reasoning to sustain substantial 33% reduction in awarding attorney fees to prevailing plaintiff in civil rights action; plaintiff lost summary judgment, but ultimately won on appeal, and counsel had already cut her fees by 9%. 42 U.S.C.A. § 1988.

1 Case that cites this headnote

[17] **Civil Rights**Costs and fees on appeal
Federal Courts Costs and attorney fees

Court of Appeals looks more closely at fee awards involving appeals in civil rights actions. 42 U.S.C.A. § 1988.

2 Cases that cite this headnote

[18] **Civil Rights**Taxation

If the district court believes the overall attorney fee award to a prevailing plaintiff in a civil rights action is too high, the court needs to say so and explain why, rather than making summary cuts in various components of the award. 42 U.S.C.A. § 1988.

7 Cases that cite this headnote

[19] **Federal Courts**Costs and attorney fees

While the Court of Appeals accords deference to the district court's explanation of why a requested attorney fee is excessive, in reducing requested fees for a prevailing plaintiff in a civil rights action, deference is required only if the district court provides an explanation that can be meaningfully reviewed. 42 U.S.C.A. § 1988.

37 Cases that cite this headnote

[20] **Civil Rights**Taxation

Findings of duplicative work should not become a shortcut for reducing an award of attorney fees to prevailing plaintiff in a civil rights action without identifying just why the requested fee was excessive and by how much. 42 U.S.C.A. § 1988.

29 Cases that cite this headnote

[21] **Civil Rights**Taxation

District court's conclusory explanation for 50% reduction in requested hours for counsel's time

spent performing interviews and investigation, on grounds that counsel spent unreasonable amount of time engaged in such activities, despite finding that activities were appropriate, was insufficiently clear reasoning to sustain substantial 33% reduction, in awarding attorney fees to prevailing plaintiff in civil rights action. 42 U.S.C.A. § 1988.

22 Cases that cite this headnote

[22] **Federal Courts** Reasons for decision

While hour-by-hour explanations are not required from the district court, in awarding attorney fees to prevailing plaintiffs in civil rights actions, conclusory findings do not allow for meaningful appellate review. 42 U.S.C.A. § 1988.

3 Cases that cite this headnote

[23] **Civil Rights** Time expended; hourly rates

The hourly rate for successful civil rights attorneys is to be calculated by considering certain factors, including the novelty and difficulty of the issues, the skill required to try the case, whether or not the fee is contingent, the experience held by counsel, and fee awards in similar cases. 42 U.S.C.A. § 1988.

103 Cases that cite this headnote

[24] **Civil Rights** Time expended; hourly rates
Civil Rights Taxation

District court's speculation that other law firms would have used less skilled attorney rather than lead counsel to perform document review was impermissible consideration for reducing successful counsel's rate by $50 dollars, from $300 to $250 per hour, based on improper policy of awarding such rate to prevailing plaintiffs in civil rights actions. 42 U.S.C.A. § 1988.

10 Cases that cite this headnote

[25] **Civil Rights** Time expended; hourly rates
Civil Rights Taxation

While it is appropriate to consider the skill required to perform a task, in awarding attorney fees to prevailing plaintiff in civil rights action the district court may not set the attorney's fee based on speculation as to how other firms would have staffed the case. 42 U.S.C.A. § 1988.

51 Cases that cite this headnote

[26] **Civil Rights** Amount and computation

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, the district court's inquiry must be limited to determining whether the fees requested by the particular legal team are justified for the particular work performed and the results achieved in that particular case. 42 U.S.C.A. § 1988.

26 Cases that cite this headnote

[27] **Civil Rights** Time expended; hourly rates
Civil Rights Taxation

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, the district court may permissibly look to the hourly rates charged by comparable attorneys for similar work, but may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. 42 U.S.C.A. § 1988.

107 Cases that cite this headnote

[28] **Civil Rights** Time expended; hourly rates

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, the difficulty and skill level of the work performed, and the result achieved, not whether it would have been cheaper to delegate the work to other attorneys, must drive the district court's decision. 42 U.S.C.A. § 1988.

35 Cases that cite this headnote

[29] **Civil Rights** Time expended; hourly rates

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, district judges can consider the fees awarded by other judges in the same locality in similar cases, but adopting a court-wide policy, even an informal one, of "holding the line" on fees at a

certain level goes well beyond the discretion of the district court. 42 U.S.C.A. § 1988.

62 Cases that cite this headnote

[30] **Civil Rights** Time expended; hourly rates

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, if the lodestar leads to an hourly rate that is higher than past practice, the district court must award that rate without regard to any contrary practice. 42 U.S.C.A. § 1988.

20 Cases that cite this headnote

[31] **Civil Rights** Time expended; hourly rates

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, double counting of reductions of the hourly rate for some tasks is impermissible. 42 U.S.C.A. § 1988.

2 Cases that cite this headnote

[32] **Civil Rights** Time expended; hourly rates

District court's double counting of reduction in hourly rate of attorney fees for summarizing depositions was impermissible in granting fee award to prevailing plaintiff in civil rights action. 42 U.S.C.A. § 1988.

13 Cases that cite this headnote

Attorneys and Law Firms

***1110** Andrea M. Miller, Nageley, Meredith & Miller, Inc., Sacramento, CA, for the appellant.

Thomas A. Cregger, Randolph Cregger & Chalfant LLP, Sacramento, CA, for the appellees.

Appeal from the United States District Court for the Eastern District of California; David F. Levi, District Judge, Presiding. D.C. No. CV–01–00725–DFL/DAD.
Before: ALEX KOZINSKI, Chief Judge, ROBERT E. COWEN* and HAWKINS, Circuit Judges.

Opinion

KOZINSKI, Chief Judge:

We consider various issues pertaining to the district court's award of attorneys' fees under 42 U.S.C. § 1988.

Facts

Moreno sued the City of Sacramento and several other defendants, alleging that they violated his civil rights by seizing and destroying his property without due process. After lengthy pre-trial proceedings and a previous appeal, a jury awarded Moreno $717,000 in compensatory and punitive damages. Moreno's principal trial counsel, Andrea Miller, sought an award of attorneys' fees under 42 U.S.C. § 1988. Miller requested $704,858.07 for herself and her staff, including compensation for 1,973.6 hours of her own time, at a rate of $300 per hour. This request excluded around 9 percent of the total hours actually spent on the case.

The district court reduced the hours further, concluding that around a quarter to a third of the time spent on research, appeal and trial preparation and half the time spent on investigation was unnecessary. ***1111** The district court also reduced Miller's hourly rate to that of a paralegal for the time she spent summarizing depositions. Finally, the district court reduced Miller's hourly rate from $300 to $250 an hour. The resulting award was $428,053.00, around 40 percent lower than requested.

Analysis

[1] Lawyers must eat, so they generally won't take cases without a reasonable prospect of getting paid. Congress thus recognized that private enforcement of civil rights legislation relies on the availability of fee awards: "If private citizens are to be able to assert their civil rights, and if those who violate the Nation['s] fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S.Rep. No. 94–1011, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.[1] At the same time, fee awards are not negotiated at arm's length, so there is a risk of overcompensation. A district court thus awards only the fee that it deems reasonable. *See* *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The

client is free to make up any difference, but few do. As a practical matter, what the district court awards is what the lawyer gets.

[2] In making the award, the district court must strike a balance between granting sufficient fees to attract qualified counsel to civil rights cases, *City of Riverside v. Rivera,* 477 U.S. 561, 579–80, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986), and avoiding a windfall to counsel, *see* *Blum v. Stenson,* 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (quoting S.Rep. No. 94–1011, at 6 (1976)). The way to do so is to compensate counsel at the prevailing rate in the community for similar work; no more, no less.

[3] [4] [5] In this case, the district court used the lodestar method to calculate fees. Under this method, a district court must start by determining how many hours were reasonably expended on the litigation, and then multiply those hours by the prevailing local rate for an attorney of the skill required to perform the litigation. *See* *Blum,* 465 U.S. at 895, 104 S.Ct. 1541. The district court may then adjust upward or downward based on a variety of factors. *Hensley,* 461 U.S. at 434, 103 S.Ct. 1933. The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client. *Id.* We review the district court's calculation of the reasonable hours and hourly rate for abuse of discretion. *See* *Camacho v. Bridgeport Fin., Inc.,* 523 F.3d 973, 977–78 (9th Cir.2008).

[6] [7] [8] When the district court makes its award, it must explain how it came up with the amount. The explanation need not be elaborate, but it must be comprehensible. As *Hensley* described it, the explanation must be "concise but *clear.*" 461 U.S. at 437, 103 S.Ct. 1933 (emphasis added). Where the difference between the lawyer's request and the court's award is relatively small, a somewhat cursory explanation will suffice. But where the disparity is larger, a more specific articulation of the court's reasoning is expected. *See* *Bogan v. City of Boston,* 489 F.3d 417, 430 (1st Cir.2007). We review the legal principles underlying the fee award de novo. ***1112** *Ferland v. Conrad Credit Corp.,* 244 F.3d 1145, 1148 (9th Cir.2001).

[9] **1. Reduction for Duplicative Work:** Plaintiff requested fees for 227.9 hours of research, and the district court awarded fees for 171 hours. The district court found the hours requested to be excessive, suggesting that some of the research was duplicative because counsel spent substantial time preparing motions and briefs dealing with similar issues.

[10] [11] The court may reduce the number of hours awarded because the lawyer performed unnecessarily duplicative work, but determining whether work is unnecessarily duplicative is no easy task. When a case goes on for many years, a lot of legal work product will grow stale; a competent lawyer won't rely entirely on last year's, or even last month's, research: Cases are decided; statutes are enacted; regulations are promulgated and amended. A lawyer also needs to get up to speed with the research previously performed. All this is duplication, of course, but it's *necessary* duplication; it is inherent in the process of litigating over time. Here, there was a previous appeal (of the district court's grant of summary judgment) which would have added to the delay and rendered much of the research stale. One certainly expects *some* degree of duplication as an inherent part of the process. There is no reason why the lawyer should perform this necessary work for free.

[12] It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning. By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

[13] The district court has a greater familiarity with the case than we do, but even the district court cannot tell by a cursory examination which hours are unnecessarily duplicative. Nevertheless, the district court can impose a small reduction, no greater than 10 percent—a "haircut"—based on its exercise of discretion and without a more specific explanation. Here, however, the district court cut the number of hours by 25 percent, and gave no specific explanation as to which fees it thought were duplicative, or why. While we don't require the explanation to be elaborate, it must be clear, and this one isn't. Plaintiff's counsel had already cut her fees by 9 percent, so an additional 25 percent cut would amount to almost one third. The court has discretion to make such an adjustment, but we cannot sustain a cut that substantial unless the district court articulates its reasoning with more specificity. We therefore conclude that

the district court's explanation is insufficient to sustain a 25 percent cut based on duplication.

[14] Plaintiff also requested fees for 266.6 hours of preparation for the first two trial dates, July 2002 and February 2005, without indicating how much time was spent preparing for each date. Plaintiff requested fees for 340.7 hours for the third trial date, May 2005. The district court awarded the full hours for the third trial date, but reduced the hours for the first two dates by half, to 133.3. As with the research hours, the cut here is substantial, amounting to 20 percent of the total fees billed for trial, in addition to the 9 percent already cut by plaintiff's counsel.

[15] The district court did not explain the necessity or degree of the cut, other than to say that the amount of time plaintiff's ***1113** counsel spent was "excessive." We also find it curious—and somewhat arbitrary—that the district court simply cut the costs of preparation for the first two trials by 50 percent. The first two trial dates were three years apart; the time spent preparing for the first trial would be of relatively little use by the time the case was actually presented to the jury, so it is difficult to understand how a cut of those fees would be justified, much less a cut of a full 50 percent. The second and third trial dates were only about three months apart, so it is possible there was some duplication. After all, duplication always happens when a task is started, stopped and then taken up again later. But necessary duplication—based on the vicissitudes of the litigation process—cannot be a legitimate basis for a fee reduction. It is only where the lawyer does *unnecessarily* duplicative work that the court may legitimately cut the hours.

Of course, the court might have some specific reason for believing that work is excessive or duplicative, but it must explain why. We cannot sustain a 50 percent cut, over and above the 9 percent cut plaintiff's counsel already imposed on herself, without a clear explanation that we can review. The opaque explanation provided here is an insufficient basis for the district court's Draconian cut.

[16] [17] The district court awarded fees for 180 hours of time spent preparing the earlier appeal. Plaintiff requested 269.3 hours. We "look more closely" at fee awards involving appeals, *Suzuki v. Yuen,* 678 F.2d 761, 762–63 (9th Cir.1982), and can find no justification for a cut of 33 percent, on top of plaintiff's counsel's own cut. The district court noted that plaintiff's counsel spent twice as long on the appeal than on the summary judgment, but this does not mean the additional time spent on appeal was unjustified; after all, plaintiff lost claims at summary judgment that he won on appeal. More fundamentally, preparing summary judgment motions and appeals are not commensurate tasks, though they have some elements in common. What matters is whether spending more time winning on appeal than losing on summary judgment was an imprudent use of hours. The district court points to nothing to support the conclusion that it was.

[18] [19] [20] Cutting fees for "duplication of effort" appears to have been an easy way for the district court to reduce an award it may have felt was too high. But if the court believes the overall award is too high, it needs to say so and explain why, rather than making summary cuts in various components of the award. While we accord deference to the district court's explanation of why a requested fee is excessive, we can only do so if the district court provides an explanation that we can meaningfully review. Findings of duplicative work should not become a shortcut for reducing an award without identifying just why the requested fee was excessive and by how much. As the reduction passes well beyond the safety zone of a haircut, which plaintiff's counsel seems to have given herself already, the district court's justification for the cuts must be weightier and more specific.

[21] [22] **2. Interviews and Investigation:** For many of the same reasons, the district court failed to adequately justify its reduction of the time spent performing interviews and investigation, from 137.3 hours to 68.7 hours. This 50 percent reduction is not supported by the district court's cursory explanation. The district court apparently rejected defendant's argument for the cut—that the interviews and investigation were unnecessary because much of the information was not used at trial—and held that the work was "appropriate." But the court then ***1114** concluded that counsel "spent an unreasonable amount of time engaged in this activity," and that "[t]his time should be reduced by 50%," without further explaining this dramatic reduction. *See* *Gates v. Deukmejian,* 987 F.2d 1392, 1400 (9th Cir.1993) (as amended) ("the use of percentages" does not "discharge[ ] the district court from its responsibility to set forth a 'concise but clear' explanation of its reason for choosing a given percentage reduction"). While we do not require hour-by-hour explanations from the district court, the conclusory finding of the court here does not allow for meaningful appellate review.

[23] [24] **3. Impermissible Methodologies:** The hourly rate for successful civil rights attorneys is to be calculated by considering certain factors, including the novelty and difficulty of the issues, the skill required to try the case, whether or not the fee is contingent, the experience held by counsel and fee awards in similar cases. *See* *Hensley,* 461 U.S. at 430 n. 3, 103 S.Ct. 1933 (citing *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir.1974)). Here, the district court properly considered the difficulty of trying the case, the rates charged by other attorneys in similar lawsuits, the skill of plaintiff's counsel, that plaintiff obtained excellent results and that counsel was to be compensated only if the lawsuit was successful. The district court suggested that an appropriate rate in light of these factors would be $300 an hour. So far, so good.

[25] But the district court went on to consider impermissible factors. The district court reduced the hourly rate from $300 an hour to $250 an hour, in part because it thought that other firms could have staffed the case differently. The court speculated that other firms would have used a less skilled attorney, rather than the lead counsel, to perform document review. While it is appropriate to consider the skill required to perform a task, *Hensley,* 461 U.S. at 430 n. 3, 103 S.Ct. 1933, the district court may not set the fee based on speculation as to how other firms would have staffed the case.

The cost effectiveness of various law firm models is an open question,[2] and it is by no means clear whether a larger law firm would have billed more or less for the entire case. The district court may have ***1115** been right that a larger firm would employ junior associates who bill at a lower rate than plaintiff's counsel, but a larger firm would also employ a partner—likely billing at a higher rate than plaintiff's counsel—to supervise them. And the partner in charge would still have had to familiarize himself with the documents, a step that plaintiff's counsel avoided by reviewing the documents herself. Moreover, lead counsel can doubtless complete the job more quickly, being better informed as to which documents are likely to be irrelevant, and which need to be examined closely. Modeling law firm economics drifts far afield of the *Hensley* calculus and the statutory goal of sufficiently compensating counsel in order to attract qualified attorneys to do civil rights work.

[26] [27] [28] The district court's inquiry must be limited to determining whether the fees requested by this particular legal team are justified for the particular work performed and the results achieved in this particular case. The court may permissibly look to the hourly rates charged by comparable attorneys for similar work, but may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. The difficulty and skill level of the work performed, and the result achieved—not whether it would have been cheaper to delegate the work to other attorneys—must drive the district court's decision.

The court also erred by applying what appears to be a de facto policy of awarding a rate of $250 an hour to civil rights cases. At the fees hearing, the district court noted that "300 an hour is a fairly big step for me, and I think for the court generally" and that "the court has pretty much held the line at 250 [an hour] for the past ten years." While the district court's final fee order does not reiterate this reasoning, an effort to adhere to this de facto policy probably influenced the final rate awarded, which was $250 an hour. Nothing else supports the $50 an hour reduction.

[29] [30] District judges can certainly consider the fees awarded by other judges in the same locality in similar cases. But adopting a court-wide policy—even an informal one—of "holding the line" on fees at a certain level goes well beyond the discretion of the district court. One problem with any such policy is that it becomes difficult to revise over time, as economic conditions change; here the rate apparently hadn't changed for 10 years, and even a $50 increase in the hourly rate was considered a "big step ... for the court generally." Unless carefully administered and updated, any such policy becomes a strait-jacket. More fundamentally, such a policy—no matter how well intentioned or administered—is inconsistent with the methodology for awarding fees that the Supreme Court and our court has adopted. The district court's function is to award fees that reflect economic conditions in the district; it is not to "hold the line" at a particular rate, or to resist a rate because it would be a "big step." If the lodestar leads to an hourly rate that is higher than past practice, the court must award that rate without regard to any contrary practice.

[31] [32] The district further erred by double counting the reduction in hourly rate for some tasks; such double counting is impermissible. *See* *Cunningham v. County of Los Angeles,* 879 F.2d 481, 489 (9th Cir.1988). It is possible, of course, for

a district court to reduce both the hours and hourly rate awarded for some tasks. But the district court must exercise extreme care in making such reductions to avoid double counting. Here, the district court reduced the reasonable hourly rate from $300 to $75 an hour, the paralegal ***1116** rate, for 275.2 hours spent summarizing depositions, based on its conclusion that summarizing depositions was simple enough for a paralegal to perform. But the district court then used the simplicity of summarizing depositions to justify its reduction in the reasonable hourly rate for the remainder of the case from $300 to $250 an hour. Thus, the district court double counted its reduction for summarizing depositions: Each hour spent summarizing depositions was already reduced to $75 an hour, so there was no reason to reduce the overall rate. The district court may properly use the simplicity of a given task as justification for a reduction in the rate for the hours spent performing that task or as justification for a reduction in the overall rate, but not both.

* * *

The district court has discretion to determine the appropriate fee award, because its familiarity with the case allows it to distinguish reasonable from excessive fee requests. But gut feelings are not enough; if the district court is going to make substantial cuts to a winning lawyer's fee request, it needs to explain why with sufficient specificity that the lawyer can meaningfully object and we can meaningfully review the objection. We can't defer to reasoning that we can't review; if all the district court offers is a conclusory statement that a fee request is too high, then we can't tell if the court is applying its superior knowledge to trim an excessive request or if it is randomly lopping off chunks of the winning lawyer's reasonably billed fees.

We are well aware that awarding attorneys' fees to prevailing parties in civil rights cases is a tedious business. And it may be difficult for the district court to identify the precise spot where a fee request is excessive. But the burden of producing a sufficiently cogent explanation can mostly be placed on the shoulders of the losing parties, who not only have the incentive, but also the knowledge of the case to point out such things as excessive or duplicative billing practices. If opposing counsel cannot come up with specific reasons for reducing the fee request that the district court finds persuasive, it should normally grant the award in full, or with no more than a haircut.

The district court's fee award is vacated and the case is remanded with instructions that the court enter a new fee award consistent with this opinion.

VACATED AND REMANDED.

All Citations

534 F.3d 1106, 08 Cal. Daily Op. Serv. 9624

Footnotes

[*] The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

[1] Congress emphasized the importance of attorneys' fees in cases seeking injunctive relief, where there is no monetary light at the end of the litigation tunnel: "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts." S.Rep. No. 94–1011, at 3 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

[2] Several courts have struggled with this issue. Some have opined that "[n]o rule of court should force a trial attorney to assign the duties of assembling documents and files for trial to an underling upon pain of not being paid for the work," *M.S.R. Imports, Inc. v. R.E. Greenspan Co., Inc.,* 574 F.Supp. 31, 34 (E.D.Pa.1983), or noted that litigation staffed only by senior attorneys might reduce costs, *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo,* 574 F.Supp. 994, 999 (E.D.N.Y.1983), *vacated on other grounds,* 737 F.2d 1253 (2d Cir.1984); *see also* *United States v. City & County of San Francisco,* 748 F.Supp. 1416, 1432 (N.D.Cal.1990) (noting that the "the efficacy of the pyramidal staffing pattern is a matter of some debate"), *remanded in part on other grounds by* *Davis v. City & County of San Francisco,* 976 F.2d 1536, 1548 (9th Cir.1992).
Other courts have adhered more to the pyramid structure in measuring fee awards. *See, e.g.,* *Loughner v. Univ. of Pittsburgh,* 260 F.3d 173, 180 (3d Cir.2001) ("A claim by a lawyer for maximum rates for telephone calls with a client, legal research, a letter concerning a discovery request, the drafting of a brief, and trial time in court is neither fair nor reasonable. Many of these tasks are effectively performed by administrative assistants, paralegals, or secretaries."); *Bee v. Greaves,* 669 F.Supp. 372, 377 (D.Utah 1987), *rev'd in part on other grounds,* 910 F.2d 686 (10th Cir.1990) (reducing overall rate awarded because less experienced attorneys could have performed much of the work); *Mautner v. Hirsch,* 831 F.Supp. 1058, 1076 (S.D.N.Y.1993), *rev'd in part on other grounds,* 32 F.3d 37 (2d Cir.1994) (reducing lodestar for using senior attorneys when junior attorneys and paralegals were available).

- Exhibit 8 -

KeyCite Yellow Flag
Distinguished by Monterrubio v. Best Buy Stores, L.P., E.D.Cal., May 14, 2013

592 F.Supp.2d 1322
United States District Court, W.D. Washington, at Seattle.

Stanley PELLETZ, Betty Pelletz, Joseph Jamruk, Stacey Jamruk, Michael Mustac, and Greg Knudtson, on behalf of themselves and on behalf of all others similarly situated, Plaintiffs,
v.
WEYERHAEUSER COMPANY; and Advanced Environmental Technologies, Inc., Defendants.

Nos. C08–0334 JCC, C08–0403 JCC
|
Jan. 9, 2009.

Synopsis
Background: Plaintiffs filed class actions alleging that defendants' deck-building products were defective. After actions were consolidated, plaintiffs obtained final approval of settlement and moved for attorney fees, costs, and service awards.

Holdings: The District Court, John C. Coughenour, J., held that:

[1] under both federal law and Washington law, lodestar method was best method to evaluate attorney fee request;

[2] attorney fee award based upon combined lodestar for class counsel of $921,182.05 and multiplier of 1.82 was warranted; and

[3] named class representatives' contribution to litigation and settlement process was sufficient to warrant incentive payment awards.

Ordered accordingly.

See also 255 F.R.D. 537, 2009 WL 59126.

West Headnotes (11)

[1] **Attorneys and Legal Services** Reasonableness in general

Courts have the discretion to choose either the lodestar/multiplier method or the percentage-of-the-fund method to determine a reasonable attorney fee following class action settlement, depending upon the case.

[2] **Federal Courts** Costs and attorney fees

Washington law governed determination of appropriate attorney fee award in settled class action that was brought in Washington and governed by state substantive law.

1 Case that cites this headnote

[3] **Attorneys and Legal Services** Lodestar method
Attorneys and Legal Services Percentage method

Washington law recognizes both the lodestar method and the percentage-of-the-fund method for determining appropriate attorney fee in settled class action.

1 Case that cites this headnote

[4] **Attorneys and Legal Services** Lodestar method

Under the lodestar/multiplier method for determining reasonable attorney fee from settlement fund, district court first calculates the lodestar by multiplying the reasonable hours expended by counsel by a reasonable hourly rate; court may then enhance the lodestar with a multiplier, if necessary, to arrive at a reasonable fee.

9 Cases that cite this headnote

[5] **Attorneys and Legal Services** Reasonableness in general

Under percentage-of-the-fund method for determining reasonable attorney fee from settlement fund, court simply awards a percentage of the funds awarded to plaintiffs sufficient to provide plaintiffs' attorneys with a

reasonable fee, consistent with the overriding principle that the award be reasonable under the circumstances.

[6] **Compromise, Settlement, and Release**🔑Class settlements

Under both federal law and Washington law, lodestar method was best method to evaluate attorney fee request in settled class action in which plaintiffs had alleged that defendants' deck-building products were defective, given that settlement relief was to be paid on claims-made basis, with no cap to relief available, such that settlement's total value was difficult to monetize, and that fees were to be assessed against defendants without reducing relief available to class.

[7] **Costs, Fees, and Sanctions**🔑Lodestar or touchstone in general

In approving a fee request under lodestar method, trial court should consider (1) time and labor required, (2) novelty and difficulty of questions involved, (3) skill requisite to perform legal service properly, (4) preclusion of other employment by attorney due to acceptance of case, (5) customary fee, (6) whether fee is fixed or contingent, (7) time limitations imposed by client or circumstances, (8) amount involved and results obtained, (9) experience, reputation, and ability of the attorneys, (10) undesirability of case, (11) nature and length of attorney's professional relationship with client, and (12) awards in similar cases.

[8] **Compromise, Settlement, and Release**🔑Class settlements

Pursuant to lodestar method of evaluating attorney fee requests, attorney fee award based upon combined lodestar for class counsel of $921,182.05 and multiplier of 1.82 was warranted in settled class action alleging that defendants' deck-building products were defective, given that time and labor expended by class counsel, totaling 2,407.4 hours, was reasonable, that class counsel retained significant responsibilities throughout upcoming claims process, which was expected to last several years, that case was particularly complex and raised difficult and novel questions, that demands of action precluded class counsel from accepting other potentially profitable work, that class counsel undertook case on contingent basis, and that settlement provided class members with substantial benefits and result was achieved in expeditious manner.

5 Cases that cite this headnote

[9] **Costs, Fees, and Sanctions**🔑Skill, standing, and experience of attorneys involved

Costs, Fees, and Sanctions🔑Results obtained; benefit to client

Lodestar method for determining reasonable attorney fee award permits court to recognize and reward achievements of a particularly resourceful attorney who secures a substantial benefit for his clients with a minimum of time invested.

[10] **Costs, Fees, and Sanctions**🔑Class actions; incentive awards

Trial court has discretion to award incentives to class representatives.

40 Cases that cite this headnote

[11] **Costs, Fees, and Sanctions**🔑Class actions; incentive awards

Named class representatives' contribution to litigation and settlement process was sufficient to warrant requested incentive payment awards of $7,500 in settled class action alleging that defendants' deck-building products were defective, given that class representatives assisted counsel with preparation of complaints and amended complaints, produced relevant documents and responded to other informal written discovery, opened up their homes to day-long inspections, cleanings, and sampling of their decks, stayed abreast of settlement negotiations, reviewed settlement terms, and prepared and submitted declarations to court.

11 Cases that cite this headnote

Attorneys and Law Firms

***1324** Don J. Young, III, Gary, Naegele & Theado LLC, Lorain, OH, James J. Pizzirusso, Richard S. Lewis, Hausfeld LLP, Washington, DC, John H. Bright, Mark Adam Griffin, Keller Rohrback, Kim D. Stephens, Seattle, WA, Jori Bloom Naegele, Gary, Naegele & Theado LLC, Lorain, OH, for Plaintiffs.

Thomas L. Boeder, Perkins Coie, Blake Edward Marks–Dias, Douglas H. Fleming, Riddell Williams, Seattle, WA, Carl C. Scherz, Jeffrey Logan, Locke Lord Bissell & Liddell LLP, Dallas, TX, for Defendants.

ORDER APPROVING MOTION FOR ATTORNEYS' FEES AND COSTS AND SERVICE AWARDS TO THE NAMED PLAINTIFFS

JOHN C. COUGHENOUR, District Judge.

This matter comes before the Court on Plaintiffs' Application For An Award of Attorneys' Fees and Costs and Service Awards for the Named Plaintiffs (the "Fee Application") (Dkt. No. 121). The Court has carefully considered the Fee Application, all supporting declarations and exhibits, including the detailed fees and costs breakdowns submitted to the Court for *in camera* review, and all other materials relating to the Fee Application. In addition, the Court has considered the arguments of counsel at the fairness hearing held on ***1325** January 8, 2009. The Court hereby finds and rules as follows.

I. BACKGROUND

This fee application arises in the context of a class action Settlement reached by the parties, which has been finally approved by the Court in a separate order dated today. Plaintiffs' counsel's attorney fees were negotiated after the Settlement Agreement was executed and are capped at $1.75 million. The requested fee is in addition to, and in no way diminishes, the benefit to the class. (Mot. 1 (Dkt. No. 121 at 7).) The parties have agreed that Defendant AERT will pay the attorney's fees and costs if approved by the Court. (*Id.*)

Specifically, Plaintiffs' counsel requests that the Court award the following:

(1) $1,673,527.64 in attorney's fees;

(2) $76,472.36 in costs; and

(3) $30,000 in incentive/service awards to each household of named Plaintiffs ($7,500 each to the Pelletzes, the Jamruks, Mr. Knudtson, and Mr. Mustac), for the services they rendered to the Class by participating in this litigation, which resulted in a substantial class Settlement. (*Id.*)

II. ANALYSIS

[1] [2] In the context of class action settlements, courts have the discretion to choose either the "lodestar/multiplier" method or the "percentage" method to determine a reasonable attorneys' fee, depending on the case. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir.1998). However, the Ninth Circuit has held that when state substantive law applies, attorneys' fees are to be awarded in accordance with state law. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.2002). Because Washington is the forum state, Washington law should be applied to the determination of an appropriate fee award. *Id.*

[3] [4] [5] Washington law also recognizes both the lodestar method and the percentage of the fund methods for determining appropriate attorneys' fees. *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wash.2d 52, 847 P.2d 440, 450–51 (1993). "Under the lodestar/multiplier method, the district court first calculates the 'lodestar' by multiplying the reasonable hours expended by a reasonable hourly rate." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 n. 2 (9th Cir.1994). "The court may then enhance the lodestar with a 'multiplier,' if necessary, to arrive at a reasonable fee." *Id.* (citation omitted); *Vizcaino*, 290 F.3d at 1052–54 (approving multiplier of 3.65 and citing a survey of class settlements from 1996–2001 indicating that most multipliers range from 1.0 to 4.0). "Under the percentage method, the court simply awards the attorneys a percentage of the funds sufficient to provide plaintiffs' attorneys with a reasonable fee." *In re Wash. Pub. Power Supply*, 19 F.3d at 1295 n. 2 (citation omitted). The overriding principle is that the award be " 'reasonable under the circumstances.' " *Id.* (*quoting* *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir.1990)).

[6] Under both federal law and Washington law, the lodestar method is best suited to evaluate the attorneys' fees request in this case. First, Settlement relief will be paid on a claims made basis with no cap to the relief available, so the total value of the Settlement is difficult to monetize. Thus, the requested attorneys' fees do not lend themselves to a percentage of the fund analysis. *Compare* *Hanlon,* 150 F.3d at 1029 (explaining that courts often use a lodestar calculation where there is no way to gauge the net value of the settlement or any percentage thereof). Second, because the attorneys' ***1326** fees will be assessed against the Defendants without reducing the relief available to the Class, the lodestar method is more appropriate. *Bowles,* 847 P.2d at 450–51.

A. *THE REQUESTED AWARD OF ATTORNEYS' FEES IS APPROPRIATE UNDER THE LODESTAR METHOD*

1. The Reasonable Hours Expended Multiplied by a Reasonable Hourly Rate

Plaintiffs' counsel have submitted detailed breakdowns of the time the lawyers at each firm spent working on this case and the billing rates of each. The Court has reviewed these documents and finds that the time spent by the attorneys was reasonably and necessarily expended in the course of representing Plaintiffs in this matter. Class Counsel: (1) investigated and filed these actions; (2) responded to over 900 inquiries throughout their investigation and collected photographs, purchase information, and other facts from almost 500 of them, which helped determine the scope of the problem and define the Class; (3) coordinated fourteen deck inspections throughout the country, in each instance facilitating informal discovery from the homeowners, as well as commissioning expert laboratory analysis of many of the decks, and follow-up visits and inspections of two of them; (4) engaged multiple experts to assess the nature and scope of the defect, evaluate potential cleaning methods and mold inhibitors, assess objective criteria for evaluating claim forms, and generally assist with various technical matters; (5) obtained and reviewed information directly from Defendants, including confidential product formulations and sales data; (6) crafted a Settlement after almost a year of investigation, informal discovery and arms-length negotiations; (7) successfully moved for preliminary approval of the Settlement; (8) played a major role in developing the class notice materials and claim forms; and (9) responded to Class member questions concerning the Class notice and Settlement.[1]

The Court summarizes the reported hours and billing rates as follows:

The Leiff Cabraser Heimann & Bernstein, LLP attorneys, from New York City, billed for partners at between $405 and $800 per hour (the vast majority of the work was performed by Jonathan Selbin at $600 per hour), and for associates at $305 to $380 per hour. This firm totaled 1,304.6 hours and $421,387.50 in billings.

Goldenberg Heller Antognoli & Rowland, P.C., in Illinois, billed for partners at between $425 and $450 per hour and for associates at $310 per hour. They worked for 248.1 hours for a total of $104,141.50.

Gary, Naegele & Theado, LLC, in Ohio, billed at rates from $275 to $575 per hour, for a total of 346.30 hours and $179,341.25 in billings.

Hausfeld LLP, in Washington D.C., spent a total of 296.5 hours for a total of $111,742.00 in billings.

Keller Rohrback LLP, in Seattle, spent a total of 164.7 hours, billing from $415 to $660 per hour, for a total of $76,746.80 in billings.

Tousley Brain & Stephens, in Seattle, billed at $475 to $760 per hour and worked for 47.20 hours for a total of $27,822.50 in billings.

The Court finds that the hourly rates charged by the attorneys in this case are reasonable for the work performed in each of the respective relevant communities by ***1327** attorneys of similar skill, experience, and reputation. Defendants do not contest that the rates stated are the prevailing rates for similarly situated attorneys in the pertinent regions. The Court notes that the hourly rates of Co–Lead Counsel from Lieff Cabraser (the firm with the highest lodestar) and Class Counsel from Tousley Brain Stephens were recently approved by Judge Leighton in this district after a reasonableness review. *See Grays Harbor Adventist Christian Sch. v. Carrier Corp.,* No. C05–5437–RBL, 2008 WL 1901988, at *3 (W.D.Wash. Apr. 24, 2008). Having reviewed the detailed reports and summaries submitted by counsel, the Court finds that the combined lodestar for class

counsel amounts to $921,182.05, for a combined total of 2,407.40 hours reasonably expended.

2. *Kerr* Factors

[7] [8] The Ninth Circuit has enumerated factors to consider in determining the appropriateness of a fee using the lodestar method. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975); *see also* *Hanlon*, 150 F.3d at 1029. In approving a fee request under the lodestar method, trial courts should consider:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr, 526 F.2d at 70. The Court has considered these factors and determines that the requested award of attorneys' fees and reimbursement of expenses is appropriate. The Court finds that the amount of fees and costs awarded herein is fair and reasonable to the Class in light of the result achieved, the effort that was spent, the complexity of the issues presented, and the numerous risks faced by Class Counsel in obtaining a successful result.[2] Specifically, the Court finds, based on the record submitted, that the attorneys' fees awarded herein are justified in light of, *inter alia,* the following factors:

Time and Labor Required: As described above, Class Counsel provided summary reports of each firm's lodestar with their Fee Application on December 4, 2008 and later supplemented those records with detailed time reports, which Class Counsel submitted for *in camera* review. Based on a review of these materials, the Court finds that the 2,407.4 hours Class Counsel collectively expended on this case were reasonably spent. Furthermore, pursuant to the Settlement Agreement, and as argued at the fairness hearing, Class Counsel will retain significant responsibilities throughout the claims period, which is expected to last several years. Class Counsel can reasonably expect to spend hundreds of additional hours overseeing the claims resolution process and assisting Class members. The Court considers this factor especially persuasive in applying the multiplier of 1.82 on class counsel's combined lodestar. The Court also notes the fact that the time reports submitted to the Court represented only work performed through the end of November ***1328** 2008. Accordingly, the multiplier is justified in part by the work that Plaintiffs' counsel necessarily performed in addition to those hours reported since the end of November 2008, such as the preparation for and attendance at the fairness hearing held on January 8, 2009.

Based on a review of those lodestar reports, the Court is satisfied that the time and labor Class Counsel expended is reasonable and supports their request for an award of attorneys' fees.

The Novelty and Difficulty of the Questions Involved: The Court recognizes that defective product class actions are complex and involve risk. This case is particularly complex because it involves a dispute over an aesthetic and maintenance issue for a product sold to 150,000 homeowners in diverse locations, under varying circumstances, and over the period of many years. The Court finds that the novelty and difficulty of the questions involved here supports Class Counsel's fee request.

The Preclusion of Other Employment: The Court is satisfied that the demanding nature of this action precluded Class Counsel from accepting other potentially profitable work.[3]

The Customary Fee: The modest 1.82 multiplier requested by Class Counsel falls well within the range of multipliers approved by Ninth Circuit courts. *See* *Vizcaino*, 290 F.3d at 1052–54 (approving multiplier of 3.65 and citing a survey of class settlements from 1996–2001 indicating that most multipliers range from 1.0 to 4.0). In light of the range of multipliers commonly approved by courts within the Ninth Circuit, and the substantial additional work Class Counsel are certain to dedicate to this case, the fee request is reasonable.

Whether the Fee is Contingent: Class Counsel undertook this class action on a purely contingent basis, with no assurance of recovering expenses or attorneys' fees.[4] Despite this lack

of assurance, Class Counsel expended considerable time and resources to prosecute the case successfully on behalf of the Class.

The Results Obtained: As discussed in detail in this Court's Order Granting Final Approval of Class Action Settlement, entered concurrently, the Court is satisfied that the Settlement provides Class members with substantial benefits by providing a combination of free and discounted cleanings, mold inhibitor treatments, credit vouchers for use at home improvement stores, cash refunds, and/or full replacement material.

[9] In addition, Class Counsel achieved this result in an expeditious manner, without the delay, expense and risk of litigation. The lodestar method "permits the court to recognize and reward achievements of a particularly resourceful attorney who secures a substantial benefit for his clients with a minimum of time invested." *Merola v. Atl. Richfield Co.,* 515 F.2d 165, 168 (3d Cir.1975). *See also Arenson v. Bd. of Trade of City of Chicago,* 372 F.Supp. 1349, 1358 (N.D.Ill.1974). Here, Class Counsel avoided considerable burden and expense to the parties and the judicial system by conducting a thorough investigation, facilitating informal discovery that proceeded smoothly and effectively without Court intervention, and achieving a favorable Settlement in a timely fashion. The multiplier of 1.82 is especially reasonable in light of the benefits derived from Class Counsel's efforts.

***1329** *The Experience, Reputation and Ability of the Attorneys:* The Court is satisfied that the reputation, experience, and ability of Class Counsel were essential to success in this litigation. Class Counsel have substantial experience in consumer class action litigation.[5]

B. *CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF COSTS IS REASONABLE*

The Court further finds that Class Counsel's request for reimbursement of costs is also reasonable. Throughout the course of this litigation, Class Counsel incurred out-of-pocket costs totaling $76,472.36.[6] The Ninth Circuit allows recovery of pre-settlement litigation costs in the context of class action settlement. *Staton v. Boeing Co.,* 327 F.3d 938, 974 (9th Cir.2003); *In re Media Vision Tech. Sec. Litig.,* 913 F.Supp. 1362, 1366 (N.D.Cal.1996); *Grays Harbor,* 2008 WL 1901988, at *4. Where, as here, the requested attorneys' fees and costs will be paid in addition to (and not out of) the relief available to the Class, reimbursement of reasonable costs is fully in keeping with applicable law. Based on a review of Class Counsel's summary expense reports and the detailed expense reports submitted for *in camera* review, the Court is satisfied that the requested costs are relevant to the litigation and reasonable in amount.

C. *INCENTIVE AWARDS FOR THE NAMED PLAINTIFFS ARE APPROPRIATE*

[10] [11] Plaintiffs request combined service payments of $30,000, consisting of $7,500 payments to the Jamruks, the Pelletzes, Mr. Mustac, and Mr. Knudtson. The trial court has discretion to award incentives to the class representatives. *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 463 (9th Cir.2000); *Grays Harbor,* 2008 WL 1901988, at *6. The criteria that courts have used in considering the propriety and amount of an incentive award include: (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. *Van Vranken v. Atl. Richfield Co.,* 901 F.Supp. 294, 299 (N.D.Cal.1995); *see also Federal Judicial Center, Manual for Complex Litigation* § 21.62 n. 971 (4th ed. 2004) (enhancement payments may be "merited for time spent meeting with class members, monitoring cases, or responding to discovery").

Here, the record indicates that the Class Representatives contributed to the litigation by: (1) assisting counsel with the preparation of the complaints and amended complaints; (2)producing relevant documents and responding to other informal written discovery; (3)opening up their homes to day-long inspections, cleanings and sampling of their decks, (4)staying abreast of the settlement negotiations; (5) reviewing the Settlement terms; and (6) preparing and submitting declarations to ***1330** the Court.[7] In light of these facts, the Court finds that each Class Representative's contribution to the litigation and Settlement process was sufficient to warrant an incentive payment award.[8]

When compared to service awards in other cases, the $7,500 payments requested here are justified.[9] In light of the Class

Representatives' efforts and the risks undertaken to obtain the Settlement for the Class, the Court hereby approves the payment of $7,500 each to the Jamruks, the Pelletzes, Mr. Mustac, and Mr. Knudtson.

* * *

Due and adequate notice having been given to the Class as required in this Court's September 15, 2008 Preliminary Approval Order, and the Court having considered all papers filed and proceedings had herein, and otherwise being fully informed, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

This Court hereby finds and concludes that due and adequate notice was directed to all persons and entities who are Class Members, advising them of Class Counsel's intent to seek attorneys' fees and expenses, the proposed Class representatives' stipends, and of their right to object thereto.[10]

A full and fair opportunity was accorded to all such persons and entities to be heard with respect to the Fee Application.

The Court hereby grants Class Counsel's request for reimbursement of $76,472.36 in out-of-pocket costs, plus attorneys' fees in the amount of $1,673,527.64, for a combined total of $1,750,000. The fee award represents a modest 1.82 multiplier on Class Counsel's lodestar of $921,182.05 as of November 30, 2008, a figure which is likely to grow over the coming years for the reasons described above.[11]

In addition to any relief they may receive under the Settlement Agreement, the Court approves payment of a $7,500 incentive payment to the Jamruks, the Pelletzes, Mr. Mustac, and Mr. Knudtson. Defendants shall pay the Court-approved stipend to Class Counsel, in trust for the Class Representatives, promptly after final disposition of any appeals arising from this Order or this Court's concurrent Order ***1331** Granting Final Approval of Class Action Settlement.

The awarded attorneys' fees and costs shall be paid pursuant to the terms, conditions and obligations of the Settlement Agreement, which provides for payment in three tranches, with the first third to be paid after final approval, and the remaining installments made at six-month intervals. The payment of the awarded fees and costs is conditioned on the Stipulated Undertaking for Repayment of Attorneys' Fees and Costs, which has been signed by the parties and was approved by this Court on September 15, 2008.

The awarded fees and expenses shall be directed to Class Counsel for distribution in a manner that reflects each firm's contribution to the initiation, prosecution and resolution of this litigation. The Court authorizes the co-lead counsel firms of Lieff Cabraser Heimann & Bernstein, LLP and Gary, Naegele & Theado, LLC, to allocate the fee award among the Class Counsel firms.

Without affecting the finality of this Order, the Court reserves continuing and exclusive jurisdiction over parties to the Settlement Agreement to settle any disputes related to the allocation of the costs and fees awarded by this Order.

IT IS SO ORDERED.

All Citations

592 F.Supp.2d 1322

Footnotes

[1] *See* Declarations of Selbin ¶¶ 7–11 (Dkt. No. 122 at 5), Heller ¶¶ 4–8 (Dkt. No. 123 at 2–3), Lewis ¶¶ 7–13 (Dkt. No. 126 at 4–7), Naegele ¶¶ 6–9 (Dkt. No. 125 at 3).

[2] Notably, no objections were filed against the fee request. One of the three objectors actually supported the fee request despite his other objections. (Volin Objection, Docket No. 92.)

[3] *See* Declarations of Selbin ¶ 18 (Dkt. No. 122 at 9), Naegele ¶ 15 (Dkt. No. 125 at 5).

[4] *See* Declarations of Selbin ¶ 17 (Dkt. No. 122 at 9), Heller ¶ 16 (Dkt. No. 123 at 4), Naegele ¶ 14 (Dkt. No. 125 at 5).

[5] *See* Declarations of Selbin ¶¶ 2–6 (Dkt. No. 122 at 2–5), Stephens ¶¶ 2–5 (Dkt. No. 124 at 2–4), Heller ¶¶ 2–3 (Dkt. No. 123 at 2), Lewis ¶¶ 2–6 (Dkt. No. 126 at 2–4), Naegele ¶¶ 2–5 (Dkt. No. 125 at 2–3), and Griffin ¶ 2 (Dkt. No. 127 at 2).

[6] *See* Declarations of Selbin ¶¶ 15–16 (Dkt. No. 122 at 9), Stephens, Exh. A (Dkt. No. 124 at 7), Heller ¶ 14 (Dkt. No. 123 at 4), Lewis ¶ 16 (Dkt. No. 126 at 8), Naegele ¶ 13 (Dkt. No. 125 at 5), and Griffin ¶ 4 (Dkt. No. 127 at 2–3).

[7] *See* Declarations of Joseph and Stacey Jamruk (Dkt. No. 131), Michael Mustac (Dkt. No. 132), Greg Knudtson (Dkt. No. 133), and Betty and Stanley Pelletz (Dkt. No. 130).

[8] The sole objector to the stipend payments offered no rationale or basis for his objection. (Volin Objection, Docket No. 92.) The objection is overruled.

[9] *See, e.g., Hughes v. Microsoft Corp.,* C98–1646C, 93–0178C, 2001 WL 34089697, at *12–*13 (W.D.Wash. Mar. 26, 2001) (approving incentive awards of $7,500, $25,000, and $40,000); *Carroll v. Blue Cross & Blue Shield of Mass.,* 157 F.R.D. 142, 143 (D.Mass.1994), *aff'd* 34 F.3d 1065 (1st Cir.1994) ("the class representatives shall receive payments of $7,500 each as compensation for services rendered to the class in initiating and prosecuting this action"); *Bogosian v. Gulf Oil Corp.,* 621 F.Supp. 27, 32 (E.D.Pa.1985) (stating "the propriety of allowing modest compensation to class representatives seems obvious," and awarding $20,000 to two named class representatives). *See In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 457, 463 (9th Cir.2000) (approving service awards of $5,000 from a total settlement of $1,725,000); *Razilov v. Nationwide Mut. Ins. Co.,* No. 01–CV–1466–BR, 2006 WL 3312024, at *3–*4 (D.Or. Nov. 13, 2006) (approving $10,000 award to each class representative).

[10] *See generally* Keough Declaration (Dkt. No. 136).

[11] *See* Selbin Decl. ¶ 19 (Dkt. No. 122 at 9–10).

- Exhibit 9 -

KeyCite Yellow Flag
Declined to Extend by Westfall v. Ball Metal Beverage Container Corporation, E.D.Cal., September 16, 2021

715 F.3d 1157
United States Court of Appeals, Ninth Circuit.

Robert RADCLIFFE; Chester Carter; Maria Falcon; Clifton C. Seale, III; Arnold Lovell, Jr., Plaintiffs–Appellants,
Christy Driver; Ivonne Martinez; Kelly J. Porter; Lisa Brisbane; Brenda Melendez; Ralph Michael Porter, Objectors–Appellants,
and
Kathryn Pike; Bertram Robison; Robert Randall; Jose Hernandez, Plaintiffs,
Walter Ellingwood, Nancy Segarra; Maria L. Borbon; Marcia Green; Jimmy Green; Thomas A. Carder; Glenda W. Schilleci; Steven C. Singer; Naomi Sandres, Objectors,
v.
EXPERIAN INFORMATION SOLUTIONS INC.; TransUnion, LLC; Equifax Information Services LLC, Defendants–Appellees.
Maria L. Borbon, Objector–Appellant,
v.
Jose Hernandez; Kathryn Pike; Robert Randall; Bertram Robison, Plaintiffs–Appellees,
and
Experian Information Solutions Inc.; TransUnion, LLC; Equifax Information Services LLC, Defendants–Appellees.
Terri N. White, Plaintiff,
Jose Hernandez; Robert Randall; Bertram Robison; Kathryn Pike, Plaintiffs–Appellees,
and
Experian Information Solutions Inc.; TransUnion, LLC; Equifax Information Services LLC, Defendants–Appellees,
v.
Glenda W. Schilleci; Thomas A. Carder, Objectors–Appellants.
Terri N. White, Plaintiff,
Jose Hernandez; Robert Randall; Bertram Robison; Kathryn Pike, Plaintiffs–Appellees,
and
Experian Information Solutions Inc.; TransUnion, LLC; Equifax Information Services LLC, Defendants–Appellees,
v.
Charles Juntikka, Esquire, Objector–Appellant.
Terri N. White, Plaintiff,
Jose Hernandez; Robert Randall; Bertram Robison; Kathryn Pike, Plaintiffs–Appellees,
and
Experian Information Solutions Inc.; TransUnion, LLC; Equifax Information Services LLC, Defendants–Appellees,
v.
Steven C. Signer, Objector–Appellant.
Robert Radcliffe; Chester Carter; Arnold Lovell, Jr.; Maria Falcon; Clifton C. Seale, III; Jose Hernandez; Robert Randall; Bertram Robison; Kathryn Pike, Plaintiffs–Appellees,
and
Experian Information Solutions, Inc.; TransUnion, LLC; Equifax Information Services LLC, Defendants–Appellees,
v.
Walter Ellingwood, Objector–Appellant.
Terri N. White, Plaintiff,
Robert Radcliffe; Chester Carter; Arnold Lovell, Jr.; Jose Hernandez; Clifton C. Seale, III; Maria Falcon; Robert Randall; Bertram Robison; Kathryn Pike, Plaintiffs–Appellees,
and
Experian Information Solutions, Inc.; TransUnion, LLC; Equifax Information Services LLC, Defendants–Appellees,
v.
Marcia Green; Jimmy Green, Objectors–Appellants.

Nos. 11–56376, 11–56387, 11–56389, 11–56397, 11–56400, 11–56440, 11–56482
|
Argued and Submitted March 4, 2013.
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Filed April 22, 2013.
|
Amended May 2, 2013.

Synopsis

Background: Consumers brought class actions against consumer reporting agencies (CRA), alleging reckless and/or negligent violations of Fair Credit Reporting Act (FCRA) and state law. After actions were consolidated, the United States District Court for the Central District of California, David O. Carter, J., approved class action settlement, 803 F.Supp.2d 1086, and granted in part plaintiffs' motions for attorney fees, 2011 WL 2971836, 2011 WL 2971957. Several named plaintiffs and objectors appealed.

[Holding:] The Court of Appeals, Gould, Circuit Judge, held that district court abused its discretion in approving settlement.

Reversed and remanded.

Haddon, District Judge, sitting by designation, concurred and filed opinion.

Procedural Posture(s): On Appeal.

West Headnotes (3)

[1] **Federal Courts** Class actions

Court of Appeals reviews district court's approval of class-action settlement for abuse of discretion.

120 Cases that cite this headnote

[2] **Compromise, Settlement, and Release** Costs and Fees of Litigation

Conditional incentive awards in class action settlement caused class representatives' interests to diverge from class's interests and class counsel to engage in conflicted representation by continuing to represent settling class representatives and class at large, and thus district court abused its discretion in approving settlement and attorney fee award, where settlement agreement told class representatives that they would not receive incentive awards unless they supported settlement, and conditional incentive awards significantly exceeded in amount what absent class members could expect to get upon settlement approval. Fed.Rules Civ.Proc.Rule 23(a)(4), (g)(1)(B), 28 U.S.C.A.

691 Cases that cite this headnote

[3] **Federal Civil Procedure** Representation of class; typicality; standing in general

Adequate representation by class representatives depends upon absence of antagonism and sharing of interests between representatives and absentees. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

163 Cases that cite this headnote

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Appeal from the United States District Court for the Central District of California, David O. Carter, District Judge, Presiding. D.C. No. 8:05–cv–01070–DOC–MLG.
Before: KIM McLANE WARDLAW and RONALD M. GOULD, Circuit Judges, and SAM E. HADDON, District Judge.*

Opinion by Judge GOULD; Concurrence by Judge HADDON.

ORDER

The opinion filed on April 22, 2013, and published at 2013 WL 1715422, is amended as follows:

At slip opinion page 23, lines 17–19, replace <Conflicted representation provides an independent ground for reversing the settlement and the awards of attorneys' fees and costs.[5] *Cf. Rodriguez II,* 688 F.3d at 656–60.> with the following:

> Conflicted representation provides an independent ground for reversing the settlement. *Cf. id.* (citing Fed.R.Civ.P. 23(a)(4), (g)(4)). Because we reverse the settlement, we must also reverse the awards of attorneys' fees and costs. *See In re Bluetooth,* 654 F.3d at 940. Additionally, we reverse the awards because the district court abused its discretion by not considering "whether class counsel has properly discharged its duty of loyalty to absent class members" in its award of attorneys' fees and costs.[5] *Cf. Rodriguez II,* 688 F.3d at 655.

The text of footnote 5 is unchanged.

At slip opinion page 23, line 24 to page 24, line 2, replace <On remand, the district court should determine when the conflict arose, if the conflict continues under any future settlement agreement, and how the conflicted representation should affect any attorneys' fees awards. *See Rodriguez I,* 563 F.3d at 967–68.> with the following:

> On remand, the district court should determine when the conflict arose and if the conflict continues under any future settlement agreement. Should the district court approve such an agreement, it may then exercise its discretion in deciding whether, and to what extent, class counsel are entitled to fees under the common-fund doctrine.[6] *SeeRodriguez II,* 688 F.3d at 657; *Rodriguez I,* 563 F.3d at 967–68.

The call number for footnote 6 should be moved to follow <common-fund doctrine.>, as shown above.

At slip opinion page 24, footnote 6, replace the text of the footnote with the following:

> Because we reverse the settlement and the awards of fees and costs based on ***1161** the conditional incentive awards, we do not reach the issue of whether the subset of class counsel who brought the *Acosta* and *Pike* suits, which were consolidated with this case, faced an independent conflict of interest because of the fee-sharing agreement they executed with the rest of class counsel. The district court should revisit that issue in light of our holding.

An amended opinion is filed concurrently with this order.

In light of these amendments, any petition for panel rehearing or rehearing en banc shall be filed within fourteen days from the date of this order.

IT IS SO ORDERED.

OPINION

Opinion

GOULD, Circuit Judge:

Several named plaintiffs and objectors appeal the district court's approval of a class-action settlement. The settlement agreement, like others we have approved in the past, granted incentive awards to the class representatives for their service to the class. But unlike the incentive awards that we have approved before, these awards were conditioned on the class representatives' support for the settlement. These conditional incentive awards caused the interests of the class representatives to diverge from the interests of the class because the settlement agreement told class representatives that they would not receive incentive awards unless they supported the settlement. Moreover, the conditional incentive awards significantly exceeded in amount what absent class members could expect to get upon settlement approval. Because these circumstances created a patent divergence of interests between the named representatives and the class, we conclude that the class representatives and class counsel did not adequately represent the absent class members, and for this reason the district court should not have approved the class-action settlement. We have jurisdiction under 28 U.S.C. § 1291, and we reverse the district court's approval of the settlement.

I

The plaintiffs below—consumers who have been through bankruptcy—allege that Defendants Experian Information Systems, Inc., TransUnion LLC, and Equifax Information Services LLC issued consumer credit reports with negative entries for debts already discharged in bankruptcy. In other words, Defendants allegedly issued credit reports that stated that the plaintiffs were delinquent in making payments on debts that had been extinguished in bankruptcy. A smaller subset of the plaintiffs also contends that the credit-reporting agencies did not investigate these errors, even after the plaintiffs had notified the agencies of the errors on their reports. Defendants allegedly violated the Fair Credit Reporting Act and its California state-law counterparts because (1) they did not use "reasonable procedures to assure maximum possible accuracy" in reporting debts discharged in bankruptcy, 15 U.S.C. § 1681e(b), and (2) after being informed of the credit-report errors, Defendants did not "conduct a reasonable reinvestigation to determine whether the disputed information [was] inaccurate," 15 U.S.C. § 1681i(a). *See also* Cal. Civ.Code §§ 1785.14(b), 1785.16; Cal. Bus. & Prof.Code § 17200.

The cases began as multiple lawsuits filed in 2005 and 2006.[1] The district court ***1162** consolidated the suits, which raised similar claims, and the parties began mediation. In April 2008, the parties reached a settlement for injunctive relief, which the district court approved in August 2008. As part of that settlement, Defendants agreed to implement procedures that would presume the discharge of certain pre-bankruptcy debts. No appellant challenges this settlement.

In February 2009, the parties reached an agreement for monetary relief. The monetary settlement creates a common fund of $45 million, $15 million contributed by each of the three defendants. After the costs of settlement administration are deducted, the rest of the fund will be distributed as follows: First, the settlement fund will pay "actual-damage awards" to class members who demonstrate that they were actually harmed by Defendants' conduct. Class members denied employment will receive $750, those denied a mortgage or housing rental will receive $500, and those denied credit or auto loans will receive $150. About 15,000 class members claimed actual-damage awards. Second, the settlement fund will pay the class representatives and class counsel for their service in prosecuting the suit. The agreement provides for incentive awards:

> On or before October 19, 2009, Proposed 23(b)(3) Settlement Class Counsel shall file an application or applications to the Court for an incentive award, to each of the Named Plaintiffs serving as class representatives in support of the Settlement, and each such award not to exceed $5,000.00.

The agreement also states that class counsel should petition the court for an award of attorneys' fees and costs, to be paid out of the monetary-settlement fund. The agreement does not specify the amount of such fees and costs. Third, the remainder of the fund will be distributed to the rest of the class as "convenience awards." Claimants simply need to attest that they qualify as class members to receive convenience awards. Approximately 755,000 class members

submitted these claims. Each claimant will receive about $26.

The court preliminarily approved the settlement and provisionally certified the settlement class on May 7, 2009. After two rounds of notice to the class, the district court held a series of fairness hearings on the settlement. Several named plaintiffs—formerly class representatives—and objectors (collectively "Objecting Plaintiffs") challenged the settlement. The district court considered but rejected their objections and found that the settlement was fair, reasonable, and adequate. The court issued an order granting final approval of the monetary-relief settlement on July 15, 2011. *White v. Experian Info. Solutions, Inc.,* 803 F.Supp.2d 1086 (C.D.Cal.2011). The court also awarded attorneys' fees and costs to class counsel. Objecting Plaintiffs appealed.

On appeal, Objecting Plaintiffs give several arguments as to why the settlement was not fair, reasonable, and adequate. But we only reach the issue of whether class representatives and class counsel are adequate where the settlement agreement conditions payment of incentive awards on the class representatives' support for the settlement.

II

[1] We review the district court's approval of a class-action settlement for abuse of discretion. *Rodriguez v. W. Pub. Corp.* (*Rodriguez I*), 563 F.3d 948 (9th Cir.2009). Under abuse-of-discretion review we "must affirm unless the district court applied the wrong legal standard or its findings of fact were illogical, implausible, or without support in the record." *Rodriguez v. Disner* (*Rodriguez II*), 688 F.3d 645, 653 (9th Cir.2012) (citing ***1163** *United States v. Hinkson,* 585 F.3d 1247, 1262 (9th Cir.2009) (en banc)).

III

[2] Objecting Plaintiffs contend that the settlement agreement, which provides for incentive awards to named plaintiffs "in support of the [s]ettlement," created a conflict of interest between the class representatives and the class. Objecting Plaintiffs also assert that, as a result of this conflict, class counsel engaged in conflicted representation by continuing to represent the settling class representatives ("Settling Plaintiffs" or "class representatives") and the class at large after the two groups developed divergent interests. Objecting Plaintiffs thus contend that the class representatives and class counsel were inadequate to represent the absent class members. *See* Fed.R.Civ.P. 23(a)(4), 23(g)(1)(B). Upon review of the record and reflection on our precedents, we agree.

A

Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit. *See Rodriguez I,* 563 F.3d at 958–59; *see also* 2 McLaughlin on Class Actions § 6:28 (9th ed. 2012). In cases where the class receives a monetary settlement, the awards are often taken from the class's recovery. *See id.* Although we have approved incentive awards for class representatives in some cases, we have told district courts to scrutinize carefully the awards so that they do not undermine the adequacy of the class representatives. *See Staton v. Boeing Co.,* 327 F.3d 938, 977 (9th Cir.2003). Settling Plaintiffs misinterpret the scope of our precedent about incentive awards, so we begin by reviewing that precedent.

In *Staton v. Boeing Company,* 327 F.3d at 975–78, we reversed the district court's approval of a class-action settlement because the settlement provided for disproportionately large payments to class representatives. The settlement awarded the 29 class representatives up to $50,000 each. We noted that in some cases incentive awards may be proper but cautioned that awarding them should not become routine practice: "[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard." *Id.* at 975 (alteration in original) (quoting *Weseley v. Spear, Leeds & Kellogg,* 711 F.Supp. 713, 720 (E.D.N.Y.1989)). The settlement in *Staton* magnified the risks associated with incentive awards because the awards there were much larger than the payments to individual class members, "eliminat[ing] a critical check on the fairness of the settlement for the class as a whole." *Id.* at 977. Where a class representative supports the settlement and is treated equally by the settlement, "the likelihood that the settlement is forwarding the class's interest to the maximum degree practically possible increases." *Id.* But if "such members of the class are provided with special 'incentives' in the

settlement agreement, they may be more concerned with maximizing those incentives than with judging the adequacy of the settlement as it applies to class members at large." *Id.* We held that the awards in *Staton* were so disproportionate to the class's recovery that the district court abused its discretion in finding that the settlement agreement was fair, adequate, and reasonable. *Id.* at 978.

In *Rodriguez I,* we again confronted improper incentive awards. At the start of the litigation, several class representatives signed retainer agreements that required class counsel to request incentive awards that increased on a sliding scale as the class's monetary recovery increased. *Rodriguez I,* 563 F.3d at 957. The awards maxed out at $75,000 if the total settlement ***1164** amount was $10 million or more. *Id.* "We expressed disapproval of these incentive agreements, and stated that [the agreements] 'created an unacceptable disconnect between the interests of the contracting representatives and class counsel, on the one hand, and members of the class on the other.' " *Rodriguez II,* 688 F.3d at 651 (quoting *Rodriguez I,* 563 F.3d at 960). The named plaintiffs had no incentive to settle for anything other than monetary relief of $ 10 million, and they had no incentive to go to trial and risk their incentive awards, even if going to trial was best for the class. More than a "typical" incentive award, the provisions in the retainer agreements "ma[de] the contracting class representatives' interests actually different from the class's interests." *Rodriguez I,* 563 F.3d at 959. The class representatives thus did not adequately represent the class. *Rodriguez II,* 688 F.3d at 656–57. Moreover, we held that the retainer agreements "implicate[d] California ethics rules that prohibit representation of clients with conflicting interests." *See Rodriguez I,* 563 F.3d 948, 960; *see also Rodriguez II,* 688 F.3d at 656–60.[2]

B

As in *Staton* and *Rodriguez I,* the incentive awards here corrupt the settlement by undermining the adequacy of the class representatives and class counsel. In approving the settlement agreement, the district court misapprehended the scope of our prior precedents. We once again reiterate that district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives. The conditional incentive awards in this settlement run afoul of our precedents by making the settling class representatives inadequate representatives of the class.

The settlement agreement explicitly conditions the incentive awards on the class representatives' support for the settlement. This interpretation is clear from the language of the agreement.[3] Settling Plaintiffs contend that the settlement agreement did not explicitly condition the incentive awards on support of the settlement but was merely descriptive of those named representatives who were seeking judicial approval of the agreement. We disagree that the language is susceptible to this interpretation. But if there were any doubt, the conduct and communications of class counsel confirmed this interpretation. Counsel told a plaintiff below that he would "not be entitled to anything" and that he would "jeopardize the $5,000 [he] would receive [under the settlement]" if he did not support the settlement. Class counsel also told the district court that they had told other plaintiffs that they "don't see a way for people who don't ***1165** support the settlement to receive an incentive award." On appeal, Settling Plaintiffs' argument for an alternative interpretation is unpersuasive.

With the prospect of receiving $5,000 incentive awards only if they supported the settlement, Settling Plaintiffs had very different interests than the rest of the class. Like the agreements in *Rodriguez,* the conditional incentive awards changed the motivations for the class representatives. Instead of being solely concerned about the adequacy of the settlement for the absent class members, the class representatives now had a $5,000 incentive to support the settlement regardless of its fairness and a promise of no reward if they opposed the settlement. The conditional incentive awards removed a critical check on the fairness of the class-action settlement, which rests on the unbiased judgment of class representatives similarly situated to absent class members.

Although the conditional incentive awards themselves are sufficient to invalidate this settlement, the significant disparity between the incentive awards and the payments to the rest of the class members further exacerbated the conflict of interest caused by the conditional incentive awards. As the district court below noted, "[c]oncerns over potential conflicts may be especially pressing where, as here, the proposed service fees greatly exceed the payments to absent class members." *White,* 803 F.Supp.2d at 1112. There is a serious question whether class representatives could be expected to fairly evaluate whether awards ranging from $26

to $750 is a fair settlement value when they would receive $5,000 incentive awards. Under the agreement, if the class representatives had concerns about the settlement's fairness, they could either remain silent and accept the $5,000 awards or object to the settlement and risk getting as little as $26 if the district court approved the settlement over their objections. The conditional incentive awards at issue here, like the disproportionately large awards in *Staton,* fatally alter the calculus for the class representatives, pushing them to be "more concerned with maximizing [their own gain] than with judging the adequacy of the settlement as it applies to class members at large." *Staton,* 327 F.3d at 977.

The class representatives' divergent interests, as a result of the conditional incentive payments, undermined their ability to "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This requirement is rooted in due-process concerns—"absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir.1998).

[3] Adequate representation depends upon "an absence of antagonism [and] a sharing of interests between representatives and absentees." *Molski v. Gleich,* 318 F.3d 937, 955 (9th Cir.2003), *overruled on other grounds by* *Dukes v. Wal–Mart Stores, Inc.,* 603 F.3d 571 (9th Cir.2010). Where, as here, the class representatives face significantly different financial incentives than the rest of the class because of the conditional incentive awards that are built into the structure of the settlement, we cannot say that the representatives are adequate. *See* *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 627, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation....").

Settling Plaintiffs counter this analysis through three arguments, but we reject each of these arguments. First, Settling Plaintiffs claim that incentive awards for named plaintiffs are typical, so any distortion in the interest of Settling Plaintiffs is common to all class actions. Although ***1166** incentive awards may be common, *see* *Rodriguez I,* 563 F.3d at 958, explicitly conditioning incentive awards to named representatives on their support for the settlement is not at all typical. Professor William Rubenstein, a class-action expert, testified before the district court that in his experience such provisions are "not common" and that his research revealed "not one" settlement agreement that "contain[ed] a restriction on an incentive award like the one here that permits incentive awards be sought only for those representatives 'in support of the settlement.' " Brad Seligman, another expert witness, testified that he had "reviewed literally hundreds of class actions settlements" but could "not recall ever seeing a class settlement that expressly states only that class representatives who support the settlement are entitled to an incentive payment." Thus, we are not confronted with run-of-the-mill incentive awards, but rather a settlement provision that weighs on the class representatives' independent judgment on whether to support the settlement by calling for the denial of incentive awards if they do not support it.

Second, Settling Plaintiffs point out that the district court—not the settlement agreement—determines who receives incentive awards and in what amount and that Objecting Plaintiffs could have sought their own incentive awards from the district court. They therefore contend that the provision in the settlement agreement is irrelevant. But this argument misapprehends the nature of the adequacy inquiry. That Objecting Plaintiffs could have petitioned for incentive awards is irrelevant to the conflict created by the settlement agreement. We are concerned about the destruction of the "shar [ed] ... interests between the representatives and absentee[ ]" class members as a result of the conditional incentive awards. *Rodriguez I,* 563 F.3d at 960 (quoting *Molski,* 318 F.3d at 955). We examine the class representatives' incentives based on both the settlement agreement and the final awards approved by the district court. Here, our analysis focuses on the agreement. There is a lack of congruent interests between Settling Plaintiffs and the class at large because the class representatives would be expected to support the settlement so that class counsel would request awards on their behalf. *See id.* That the award ultimately must come from the district court is of no moment because the district court may want to rely on the judgment of the class representatives supporting a settlement. *See* *Staton,* 327 F.3d at 977.

Third, Settling Plaintiffs contend that even if the conditional incentive awards created a potential conflict of interest with the class, no actual conflict developed. To support this assertion, Settling Plaintiffs point to their own testimony that their decisions to support the settlement were not influenced by the prospect of incentive awards. Again, Settling Plaintiffs misapprehend our holding in *Rodriguez I.* Our inquiry in *Rodriguez I* was not whether there was an actual injury to the

class in the form of a lower settlement amount because of the improper incentive-awards agreements. *See* *Rodriguez I,* 563 F.3d at 960; *see also* *Rodriguez II,* 688 F.3d at 658. Rather, the adequacy of the *Rodriguez* plaintiffs' representation was undermined by the presence of the agreements that created the conflict of interest. In fact, the settlement in *Rodriguez I*—$49 million—was much larger than the amount that would maximize the incentive awards under the incentive-awards agreements—$10 million. *See* *id.* at 956–57. But that did not change the fact that the incentive agreements themselves created a conflict of interest by tying the incentive awards to the settlement amount. That the ultimate settlement amount was $49 million instead of $ 10 million did not eliminate the conflict of interest. The same is true here. The ***1167** conditional-incentive-awards provision in the settlement agreement made the interests of the class representatives actually different than those of the rest of the class.

In *Rodriguez I,* after holding that the retainer agreements created a conflict of interest, we "conclude[d] that the presence of conflicted representatives was harmless" because two other class representatives had retainer agreements that did not contain the incentive-awards agreements that created the conflict. *Rodriguez I,* 563 F.3d at 961. Here, however, the conflict created by the conditional incentive awards in the settlement is not harmless. It affected all class representatives who supported the settlement. We conclude that the settlement must be reversed because the interests of class representatives who would get incentive awards diverged from the interests of the absent class members. We reverse the district court's approval of the monetary-relief settlement.[4] Because we reverse the settlement, we also reverse the awards of attorneys' fees and costs. *See* *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d 935, 940 (9th Cir.2011).

C

Having determined that Settling Plaintiffs did not adequately represent the class, we now turn to the question of whether the class representatives' lack of adequacy—based on the conditional incentive awards—also made class counsel inadequate to represent the class. We hold that it did.

Class counsel has a fiduciary duty to the class as a whole "and it includes reporting potential conflict issues" to the district court. *Rodriguez I,* 563 F.3d at 948; *see also* *id.* at 968 ("The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel." (quoting *Kayes v. Pac. Lumber Co.,* 51 F.3d 1449, 1465 (9th Cir.1995))). Under the district court's local rules, California law governs whether an ethical violation has occurred. *See* C.D. Cal. R. 83–3.1.2; *see also* *Rodriguez II,* 688 F.3d at 656. California Rule of Professional Conduct 3–310(C) prohibits the representation of clients with actual or potential conflicts of interest absent an express waiver. *See* *Rodriguez II,* 688 F.3d at 656–57 (collecting California cases); *see also* *Image Tech. Serv., Inc. v. Eastman Kodak Co.,* 136 F.3d 1354, 1358 (9th Cir.1998) (noting that "[s]imultaneous representation of clients with conflicting interests (and without informed written consent) is an automatic ethics violation in California"); *Flatt v. Superior Court,* 9 Cal.4th 275, 36 Cal.Rptr.2d 537, 885 P.2d 950, 955 (1994).

As soon as the conditional-incentive-awards provision divorced the interests of the class representatives from those of the absent class members, class counsel was simultaneously representing clients with conflicting interests. *See* *Rodriguez I,* 563 F.3d at 959; *Rodriguez II,* 688 F.3d at 656. Class counsel made no attempt to obtain a waiver for the conflict or to contain the conflict by alerting the district court. *See* *Rodriguez I,* 563 F.3d at 959. Instead, class counsel took the position that a conflict did not even exist. Moreover, the conditional-incentive-awards provision affected all settling class counsel. *Cf.* *Rodriguez I,* 563 F.3d at 961. Class counsel thus was not adequate and could not settle the case on behalf of the absent class members. Conflicted representation provides an independent ground for reversing the settlement. *Cf. id.* (citing Fed.R.Civ.P. 23(a)(4), (g)(4)). Because we reverse ***1168** the settlement, we must also reverse the awards of attorneys' fees and costs. *See* *In re Bluetooth,* 654 F.3d at 940. Additionally, we reverse the awards because the district court abused its discretion by not considering "whether class counsel has properly discharged its duty of loyalty to absent class members" in its award of attorneys' fees and costs.[5] *Cf.* *Rodriguez II,* 688 F.3d at 655.

But this case is different than *Rodriguez I* and *Rodriguez II* because the conditional incentive awards at issue here did not create a conflict "from day one." *Rodriguez I,* 563 F.3d at 959. Rather, the conflict developed late in the course

of representation. On remand, the district court should determine when the conflict arose and if the conflict continues under any future settlement agreement. Should the district court approve such an agreement, it may then exercise its discretion in deciding whether, and to what extent, class counsel are entitled to fees under the common-fund doctrine.[6] *See* *Rodriguez II,* 688 F.3d at 657; *Rodriguez I,* 563 F.3d at 967–68.

IV

In sum, we hold that the district court abused its discretion in approving this settlement where the class representatives and class counsel did not adequately represent the interests of the class. We must be vigilant in guarding against conflicts of interest in class-action settlements because of the "unique due process concerns for absent class members" who are bound by the court's judgments. *In re Bluetooth,* 654 F.3d at 946 (quoting *Hanlon,* 150 F.3d at 1026). And where, as here, the "settlement agreement is negotiated *prior* to formal class certification ..., there is an even greater potential for a breach of fiduciary duty owed the class." *Id.* "Accordingly, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *Id.* We hold that the settlement at issue here cannot withstand this scrutiny, and it was therefore an abuse of discretion for the district court to approve the settlement.[7] Although this case does not go back to square one, the settlement cannot be approved. The case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HADDON, District Judge, concurring:

I join in the decision to reverse approval of the settlement for the reasons clearly stated in Judge Gould's well-written opinion. ***1169** However, class counsels' actions in orchestrating and advocating the disparate incentive award scenario without any concern for, or even recognition of, the obvious conflicts presented underscore, in my opinion, that class counsel were singularly committed to doing whatever was expedient to hold together an offer of settlement that might yield, as it did, an allowance of over $16 million in lawyers' fees.[1] Such adherence to self-interest, coupled with the obvious fundamental disregard of responsibilities to all class members—members who had little or no real voice or influence in the process—should not find favor or be rewarded at any level. Although within the discretion of the district court in the first instance, I conclude that class counsel should be disqualified from participation in any fee award ultimately approved by the district court upon resolution of the case on the merits.

All Citations

715 F.3d 1157, 13 Cal. Daily Op. Serv. 4432, 2013 Daily Journal D.A.R. 5669

Footnotes

[*] The Honorable Sam E. Haddon, District Judge for the U.S. District Court for the District of Montana, sitting by designation.

[1] The procedural history of the litigation is complex but not relevant for our purposes because we reach only one issue raised in this consolidated appeal—the effect of the conditional incentive awards to class representatives.

[2] In *Rodriguez I,* we remanded "for the district court to consider whether counsel could represent both the class representatives with whom there was an incentive agreement, and absentee class members, without affecting the entitlement to fees." *Rodriguez I,* 563 F.3d at 968. In *Rodriguez II,* the case returned to us after the district court, relying on *Rodriguez I,* found "that the incentive agreements gave rise to a conflict of interest between the class representatives and the other members of the class that tainted [class counsel's] representation, and ... [therefore denied] attorneys' fees." *Rodriguez II,* 688 F.3d at 652 (internal quotation marks omitted). We affirmed. *Id.* at 960. The district court here did not have the benefit of our decision in *Rodriguez II.*

[3] We must presume that Settling Plaintiffs knew the contents of the settlement agreement that they supported in the district court. *See* *Bingham v. Holder,* 637 F.3d 1040, 1045 (9th Cir.2011) ("[A] party who signs a written contract 'in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them.' " (quoting 27 Richard A. Lord, *Williston on Contracts* § 70:113 (4th ed. 2009))).

[4] Because we reverse based on the conditional incentive awards, we express no opinion on the reasonableness and adequacy of the $45 million settlement presented.

[5] To be clear, we reverse both awards of attorneys' fees and both awards of costs.

[6] Because we reverse the settlement and the awards of fees and costs based on the conditional incentive awards, we do not reach the issue of whether the subset of class counsel who brought the *Acosta* and *Pike* suits, which were consolidated with this case, faced an independent conflict of interest because of the fee-sharing agreement they executed with the rest of class counsel. The district court should revisit that issue in light of our holding.

[7] Because we reverse the settlement and the award of attorneys' fees and costs on account of the conditional incentive awards, we do not reach the other arguments raised in this appeal. In particular, we decline to review Attorney–Appellant Charles Juntikka's challenge to the district court's order restricting his ability to contact his former clients. The issue is moot because we reverse the order approving the settlement that Juntikka opposes and the issue may not arise again on remand. If it does, the district court should address whether any new restrictions on speech comply with *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981), and *Domingo v. New England Fish Co.,* 727 F.2d 1429, 1439–42, *modified,* 742 F.2d 520 (9th Cir.1984).

[1] The total fees approved were $16,747,147.68.

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- Exhibit 10 -

KeyCite Yellow Flag
Not Followed on State Law Grounds Jefferson City Medical Group, P.C. v. Brummett, Mo.App. W.D., April 18, 2023

134 S.Ct. 773
Supreme Court of the United States

RAY HALUCH GRAVEL COMPANY, et al.,
Petitioners
v.
CENTRAL PENSION FUND OF the INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS et al.

No. 12–992
|
Argued Dec. 9, 2013.
|
Decided Jan. 15, 2014.

Synopsis
Background: Employee benefit funds brought cause of action under the Employee Retirement Income Security Act (ERISA) to recover additional contributions allegedly owing to funds under collective bargaining agreement (CBA) by employer that was signatory thereto. Funds also asserted claim, both under ERISA and under terms of the CBA, for award of attorney fees and costs. The United States District Court for the District of Massachusetts, Michael A. Ponsor, J., 792 F.Supp.2d 129, entered judgment in favor of funds, but for less than amount of unpaid contributions which they had sought, and later, 792 F.Supp.2d 139, granted funds' motion for fees and costs. Funds waited until after the District Court's decision on fee motion to appeal both orders, and employer moved to dismiss appeal from merits holding as untimely. The United States Court of Appeals for the First Circuit, Selya, Circuit Judge, 695 F.3d 1, denied dismissal motion and vacated and remanded both decisions by the District Court. Certiorari was granted.

[Holding:] The Supreme Court, Justice Kennedy, held that whether claim for attorney fees is based on statute, on contract, or on both, pendency of ruling on award for fees and costs does not, as general rule, prevent the merits judgment from becoming "final" for purposes of appeal, abrogating *Carolina Power & Light Co. v. Dynegy Marketing & Trade,* 415 F.3d 354; *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.,* 312 F.3d 1349; *Gleason v. Norwest Mortgage, Inc.,* 243 F.3d 130; and *Justine Realty Co. v. American Nat. Can Co.,* 945 F.2d 1044.

Reversed and remanded.

West Headnotes (5)

[1] **Federal Courts** Fees and costs
Whether claim for attorney fees is based on statute, on contract, or on both, pendency of ruling on award for fees and costs does not, as general rule, prevent the merits judgment from becoming "final" for purposes of appeal; abrogating *Carolina Power & Light Co. v. Dynegy Marketing & Trade,* 415 F.3d 354; *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.,* 312 F.3d 1349; *Gleason v. Norwest Mortgage, Inc.,* 243 F.3d 130; and *Justine Realty Co. v. American Nat. Can Co.,* 945 F.2d 1044. 28 U.S.C.A. § 1291.

64 Cases that cite this headnote

[2] **Federal Courts** Effect of delay and excuses in general
Timely filing of notice of appeal in civil case is jurisdictional requirement. F.R.A.P.Rule 4(a)(1)(A), 28 U.S.C.A.

18 Cases that cite this headnote

[3] **Federal Courts** What constitutes finality in general
"Final decision," from which appeal will lie, is one that ends litigation on merits and leaves nothing for court to do but execute judgment. 28 U.S.C.A. § 1291.

88 Cases that cite this headnote

[4] **Federal Courts** Fees and costs

Federal Courts Time of Taking Proceeding or Filing Notice of Appeal

Order of district court resolving claims by employee benefit funds for additional contributions allegedly owing to funds under collective bargaining agreement (CBA) was "final" order, from which appeal had to be brought within the 30-day period specified in the Federal Rules of Appellate Procedure, notwithstanding that district court had not yet resolved claim for attorney fees and costs asserted by funds both under ERISA and under terms of the CBA. 28 U.S.C.A. § 1291; Employee Retirement Income Security Act of 1974, § 502(g)(2)(D), 29 U.S.C.A. § 1132(g)(2)(D); F.R.A.P.Rule 4(a)(1)(A), 28 U.S.C.A.

25 Cases that cite this headnote

[5] **Federal Courts** Fees and costs

Fact that some of fees and costs that employee benefit funds sought to recover in their as yet unresolved motion for award of attorney fees and costs against employer that had been found to have unpaid contribution obligations to funds were for fees and costs incurred prior to commencement of funds' suit to compel payment of these contributions did not affect the "finality," for purposes of appeal, of district court's ruling on merits of contribution claim, at least not where these prepetition fees and costs were for investigation, preliminary legal research, drafting of demand letter, and working on initial complaint, all standard preliminary steps toward litigation. 28 U.S.C.A. § 1291; Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

60 Cases that cite this headnote

****775** *Syllabus*[*]

***177** Respondents, various union-affiliated benefit funds (Funds), sued petitioner Ray Haluch Gravel Co. (Haluch) in Federal District Court to collect benefits contributions required to be paid under federal law. The Funds also sought attorney's fees and costs, which were obligations under both a federal statute and the parties' collective bargaining agreement (CBA). The District Court issued an order on June 17, 2011, on the merits of the contribution claim and a separate ruling on July 25 on the Funds' motion for fees and costs. The Funds appealed both decisions on August 15. Haluch argued that the June 17 order was a final decision pursuant to 28 U.S.C. § 1291, and thus, the Funds' notice of appeal was untimely since it was not filed within the Federal Rules of Appellate Procedure's 30–day deadline. The Funds disagreed, arguing that there was no final decision until July 25. The First Circuit acknowledged that an unresolved attorney's fees issue generally does not prevent judgment on the merits from being final, but held that no final decision was rendered until July 25 since the entitlement to fees and costs provided for in the CBA was an element of damages and thus part of the merits. Accordingly, the First Circuit addressed the appeal with respect to both the unpaid contributions and the fees and costs.

Held : The appeal of the June 17 decision was untimely. Pp. 778 – 783.

(a) This case has instructive similarities to *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178. There, this Court held a district court judgment to be a "final decision" for § 1291 purposes despite an unresolved motion for statutory-based attorney's fees, noting that fee awards do not remedy the injury giving rise to the action, are often available to the defending party, and were, at common law, an element of "costs" awarded to a prevailing party, not a part of the merits judgment. *Id.*, at 200, 108 S.Ct. 1717. Even if laws authorizing fees might sometimes treat them as part of the merits, considerations of "operational consistency and predictability in the overall application of § 1291" favored a "uniform rule." *Id.*, at 202, 108 S.Ct. 1717. Pp. 778 – 780.

***178** (b) The Funds' attempts to distinguish *Budinich* fail. Pp. 780 – 783.

(1) Their claim that contractual attorney's fees provisions are always a measure of damages is unpersuasive, for such provisions ****776** often provide attorney's fees to prevailing defendants. More basic, *Budinich* 's uniform rule did not depend on whether the law authorizing a particular fee claim treated the fees as part of the merits, 486 U.S., at 201, 108

S.Ct. 1717, and there is no reason to depart from that sound reasoning here. The operational consistency stressed in *Budinich* is not promoted by providing for different jurisdictional effect based solely on whether an asserted right to fees is based on contract or statute. Nor is predictability promoted since it is not always clear whether and to what extent a fee claim is contractual rather than statutory. The Funds urge the importance of avoiding piecemeal litigation, but the *Budinich* Court was aware of such concerns when it adopted a uniform rule, and it suffices to say that those concerns are counterbalanced by the interest in determining with promptness and clarity whether the ruling on the merits will be appealed, especially given the complexity and amount of time it may take to resolve attorney's fees claims. Furthermore, the Federal Rules of Civil Procedure provide a means to avoid a piecemeal approach in many cases. See, *e.g.,* Rules 54(d)(2), 58(e). Complex variations in statutory and contractual fee-shifting provisions also counsel against treating attorney's fees claims authorized by contract and statute differently for finality purposes. The *Budinich* rule looks solely to the character of the issue that remains open after the court has otherwise ruled on the merits. The Funds suggest that it is unclear whether *Budinich* applies where, as here, nonattorney professional fees are included in a motion for attorney's fees and costs. They are mistaken to the extent that they suggest that such fees will be claimed only where a contractual fee claim is involved. Many fee-shifting statutes authorize courts to award related litigation expenses like expert fees, see *West Virginia Univ. Hospitals, Inc. v. Casey,* 499 U.S. 83, 89, n. 4, 111 S.Ct. 1138, 113 L.Ed.2d 68, and there is no apparent reason why parties or courts would find it difficult to tell that *Budinich* remains applicable where such fees are claimed and awarded incidental to attorney's fees. Pp. 780 – 782.

(2) The Funds' claim that fees accrued prior to the commencement of litigation fall outside the scope of *Budinich* is also unpersuasive. *Budinich* referred to fees "for the litigation in question," 486 U.S., at 202, 108 S.Ct. 1717, or "attributable to the case," *id.*, at 203, 108 S.Ct. 1717, but this Court has observed that "some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed 'on the litigation,' " *Webb v. Dyer County Bd. of Ed.,* 471 U.S. 234, 243, 105 S.Ct. 1923, 85 L.Ed.2d 233. Here, the fees for investigation, preliminary legal research, drafting of demand letters, ***179** and working on the initial complaint fit the description of standard preliminary steps toward litigation. Pp. 782 – 783.

695 F.3d 1, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

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Kenneth L. Wagner, Blitman & King LLP, Syracuse, NY, Stephanos Bibas, James A. Feldman, Counsel of Record, ****777** Nancy Bregstein Gordon, Univ. of Pennsylvania Law School Supreme Court Clinic, Philadelphia, PA, for Respondents.

Opinion

Justice KENNEDY delivered the opinion of the Court.

[1] Federal courts of appeals have jurisdiction of appeals from " final decisions" of United States district courts. 28 U.S.C. § 1291. In *Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), this Court held that a decision on the merits is a "final decision" under § 1291 even if the award or amount of attorney's fees for the litigation remains to be determined. The issue in this case is whether a different result obtains if the unresolved claim for attorney's fees is based on a contract rather than, or in addition to, a statute. The answer here, for purposes of § 1291 and the Federal Rules of Civil Procedure, is that the result is not different. Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.

I

Petitioner Ray Haluch Gravel Co. (Haluch) is a landscape supply company. Under a collective-bargaining agreement (CBA) with the International Union of Operating Engineers,

Local 98, Haluch was required to pay contributions to union-affiliated benefit funds. Various of those funds are respondents here.

***180** In 2007, respondents (Funds) commissioned an audit to determine whether Haluch was meeting its obligations under the CBA. Based on the audit, the Funds demanded additional contributions. Haluch refused to pay, and the Funds filed a lawsuit in the United States District Court for the District of Massachusetts.

The Funds alleged that Haluch's failure to make the required contributions was a violation of the Employee Retirement Income Security Act of 1974 (ERISA) and the Labor Management Relations Act, 1947. The Funds also sought attorney's and auditor's fees and costs, under § 502(g)(2)(D) of ERISA, 94 Stat. 1295, 29 U.S.C. § 1132(g)(2)(D) (providing for "reasonable attorney's fees and costs of the action, to be paid by the defendant"), and the CBA itself, App. to Pet. for Cert. 52a (providing that "[a]ny costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer").

At the conclusion of a bench trial, the District Court asked the parties to submit proposed findings of fact and conclusions of law to allow the court "to consider both the possibility of enforcing [a] settlement and a decision on the merits at the same time." Tr. 50 (Feb. 28, 2011). These submissions were due on March 14, 2011. The District Court went on to observe that "[u]nder our rules ... if there is a judgment for the plaintiffs, typically a motion for attorney's fees can be filed" shortly thereafter. *Id.,* at 51. It also noted that, "[o]n the other hand, attorney's fees is part of the damages potentially here." *Ibid*. It gave the plaintiffs the option to offer a submission with regard to fees along with their proposed findings of fact and conclusions of law, or to "wait to see if I find in your favor and submit the fee petition later on." *Ibid.*

The Funds initially chose to submit their fee petition at the same time as their proposed findings of fact and conclusions ****778** of law, but they later changed course. They requested an extension of time to file their "request for reimbursement of attorneys' fees and costs in the above matter." Motion ***181** to Extend Time to Submit Request for Attorneys' Fees in No. 09–cv–11607–MAP (D Mass.), p. 1. The District Court agreed; and on April 4, the Funds moved "for an [o]rder awarding the total attorneys' fees and costs incurred ... in attempting to collect this delinquency, in obtaining the audit, in protecting Plaintiffs' interests, and in protecting the interests of the participants and beneficiaries." App. 72. The motion alleged that "[t]hose fees and costs ... amount to $143,600.44," and stated that "[d]efendants are liable for these monies pursuant to" ERISA, "and for the reasons detailed in the accompanying" affidavit. *Ibid.* The accompanying "affidavit in support of [the] application for attorneys' fees and costs," in turn, cited the parties' agreements (including the CBA, as well as related trust agreements) and § 502(g)(2)(D) of ERISA. *Id.,* at 74.

As to the merits of the claim that Haluch had underpaid, on June 17, 2011, the District Court issued a memorandum and order ruling that the Funds were entitled to certain unpaid contributions, though less than had been requested. *International Union of Operating Engineers, Local 98 Health and Welfare, Pension and Annuity Funds v. Ray Haluch Gravel Co.,* 792 F.Supp.2d 129 (Mass.). A judgment in favor of the Funds in the amount of $26,897.41 was issued the same day. App. to Pet. for Cert. 39a–40a. The District Court did not rule on the Funds' motion for attorney's fees and costs until July 25, 2011. On that date it awarded $18,000 in attorney's fees, plus costs of $16,688.15, for a total award of $34,688.15. 792 F.Supp.2d 139, 143. On August 15, 2011, the Funds appealed from both decisions. Haluch filed a cross-appeal a week later.

In the Court of Appeals Haluch argued that there had been no timely appeal from the June 17 decision on the merits. In its view, the June 17 decision was a final decision under § 1291, so that notice of appeal had to be filed within 30 days thereafter, see Fed. Rule App. Proc. 4(a)(1)(A). The Funds disagreed. They argued that there was no final decision until July 25, when the District Court rendered a decision ***182** on their request for attorney's fees and costs. In their view the appeal was timely as to all issues in the case. See *Digital Equipment Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994).

The Court of Appeals agreed with the Funds. 695 F.3d 1, 7 (C.A.1 2012). It acknowledged this Court's holding that an unresolved issue of attorney's fees generally does not prevent judgment on the merits from being final. But it held that this rule does not "mechanically ... apply to all claims for attorneys' fees, whatever their genesis," and that, instead, "[w]here, as here, an entitlement to attorneys' fees derives from a contract ... the critical question is whether the claim for attorneys' fees is part of the merits." *Id.,* at 6.

Interpreting the CBA in this case as "provid[ing] for the payment of attorneys' fees as an element of damages in the event of a breach," the Court of Appeals held that the June 17 decision was not final. *Ibid.* Concluding that the appeal was timely as to all issues, the Court of Appeals addressed the merits of the dispute with respect to the amount of unpaid remittances as well as the issue of fees and costs, remanding both aspects of the case to the District Court. *Id.*, at 11.

Haluch sought review here, and certiorari was granted to resolve a conflict in the Courts of Appeals over whether and when an unresolved issue of attorney's fees based on a contract prevents a judgment ****779** on the merits from being final. 570 U.S. ——, 133 S.Ct. 2825, 186 L.Ed.2d 883 (2013). Compare *O & G Industries, Inc. v. National Railroad Passenger Corporation,* 537 F.3d 153, 167, 168, and n. 11 (C.A.2 2008); *United States ex rel. Familian Northwest, Inc. v. RG & B Contractors, Inc.,* 21 F.3d 952, 954–955 (C.A.9 1994); *Continental Bank, N.A. v. Everett,* 964 F.2d 701, 702–703 (C.A.7 1992); and *First Nationwide Bank v. Summer House Joint Venture,* 902 F.2d 1197, 1199–1200 (C.A.5 1990), with *Carolina Power & Light Co. v. Dynegy Marketing & Trade,* 415 F.3d 354, 356 (C.A.4 2005); ***183** *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.,* 312 F.3d 1349, 1355 (C.A.11 2002) (*per curiam*); *Gleason v. Norwest Mortgage, Inc.,* 243 F.3d 130, 137–138 (C.A.3 2001); and *Justine Realty Co. v. American Nat. Can Co.,* 945 F.2d 1044, 1047–1049 (C.A.8 1991). For the reasons set forth, the decision of the Court of Appeals must be reversed.

II

[2] Title 28 U.S.C. § 1291 provides that "[t]he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States...." "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell,* 551 U.S. 205, 214, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007). Rule 4 of the Federal Rules of Appellate Procedure provides, as a general matter and subject to specific qualifications set out in later parts of the Rule, that in a civil case "the notice of appeal ... must be filed ... within 30 days after entry of the judgment or order appealed from." Rule 4(a)(1)(A). The parties in this case agree that notice of appeal was not given within 30 days of the June 17 decision but that it was given within 30 days of the July 25 decision. The question is whether the June 17 order was a final decision for purposes of § 1291.

[3] In the ordinary course a "final decision" is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945). In *Budinich,* this Court addressed the question whether an unresolved issue of attorney's fees for the litigation prevents a judgment from being final. 486 U.S., at 202, 108 S.Ct. 1717. There, a District Court in a diversity case had entered a judgment that left unresolved a motion for attorney's fees based on a Colorado statute providing attorney's fees to prevailing parties in certain cases. *Id.*, at 197, 108 S.Ct. 1717. The Court held that the judgment was final for purposes of § 1291 despite the unresolved issue of attorney's fees. *Id.*, at 202, 108 S.Ct. 1717.

The Court in *Budinich* began by observing that "[a]s a general matter, at least, ... a claim for attorney's fees is not ***184** part of the merits of the action to which the fees pertain." *Id.*, at 200, 108 S.Ct. 1717. The Court noted that awards of attorney's fees do not remedy the injury giving rise to the action, are often available to the party defending the action, and were regarded at common law as an element of "costs" awarded to a prevailing party, which are generally not treated as part of the merits judgment. *Ibid.* Though the Court acknowledged that the statutory or decisional law authorizing the fees might sometimes treat the fees as part of the merits, it held that considerations of "operational consistency and predictability in the overall application of § 1291" favored a "uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final." *Id.*, at 202, 108 S.Ct. 1717.

****780** The facts of this case have instructive similarities to *Budinich*. In both cases, a plaintiff sought to recover employment-related payments. In both cases, the District Court entered a judgment resolving the claim for unpaid amounts but left outstanding a request for attorney's fees incurred in the course of litigating the case. Despite these similarities, the Funds offer two arguments to distinguish *Budinich*. First, they contend that unresolved claims for attorney's fees authorized by contract, unlike those authorized by statute, are not collateral for finality purposes. Second, they argue that the claim left unresolved as of June 17 included fees incurred prior to the commencement of

formal litigation and that those fees, at least, fall beyond the scope of the rule announced in *Budinich*. For the reasons given below, the Court rejects these arguments.

III

A

[4] The Funds' principal argument for the nonfinality of the June 17 decision is that a district court decision that does not resolve a fee claim authorized by contract is not final for purposes of § 1291, because it leaves open a claim for contract ***185** damages. They argue that contractual provisions for attorney's fees or costs of collection, in contrast to statutory attorney's fees provisions, are liquidated-damages provisions intended to remedy the injury giving rise to the action.

The premise that contractual attorney's fees provisions are always a measure of damages is unpersuasive, for contractual fee provisions often provide attorney's fees to prevailing defendants. See 1 R. Rossi, Attorneys' Fees § 9:25, p. 9–64 (3d ed. 2012); cf. *Gleason, supra,* at 137, n. 3. The Funds' argument fails, however, for a more basic reason, which is that the Court in *Budinich* rejected the very distinction the Funds now attempt to draw.

The decision in *Budinich* made it clear that the uniform rule there announced did not depend on whether the statutory or decisional law authorizing a particular fee claim treated the fees as part of the merits. 486 U.S., at 201, 108 S.Ct. 1717. The Court acknowledged that not all statutory or decisional law authorizing attorney's fees treats those fees as part of "costs" or otherwise not part of the merits; and the Court even accepted for purposes of argument that the Colorado statute in that case "ma[de] plain" that the fees it authorized "are to be part of the merits judgment." *Ibid.* But this did not matter. As the Court explained, the issue of attorney's fees was still collateral for finality purposes under § 1291. The Court was not then, nor is it now, "inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known." *Id.,* at 202, 108 S.Ct. 1717. There is no reason to depart here from this sound reasoning. By arguing that a different rule should apply to fee claims authorized by contract because they are more often a matter of damages and thus part of the merits, the Funds seek in substance to relitigate an issue already decided in *Budinich*.

Were the jurisdictional effect of an unresolved issue of attorney's fees to depend on whether the entitlement to fees is asserted under a statute, as distinct from a contract, the ***186** operational consistency and predictability stressed in *Budinich* would be compromised in many instances. Operational consistency is not promoted by providing for different jurisdictional effect to district court decisions that leave unresolved otherwise identical fee claims based solely on whether the asserted right to fees is based on a contract or a statute.

****781** The Funds' proposed distinction also does not promote predictability. Although sometimes it may be clear whether and to what extent a fee claim is contractual rather than statutory in nature, that is not always so. This case provides an apt illustration. The Funds' notice of motion itself cited just ERISA; only by consulting the accompanying affidavit, which included an oblique reference to the CBA, could it be discerned that a contractual fee claim was being asserted in that filing. This may explain why the District Court's July 25 decision cited just ERISA, without mention or analysis of the CBA provision or any other contractual provision. 792 F.Supp.2d, at 140.

The Funds urge the importance of avoiding piecemeal litigation. The basic point is well taken, yet, in the context of distinguishing between different sources for awards of attorney's fees, quite inapplicable. The Court was aware of piecemeal litigation concerns in *Budinich,* but it still adopted a uniform rule that an unresolved issue of attorney's fees for the litigation does not prevent judgment on the merits from being final. Here it suffices to say that the Funds' concern over piecemeal litigation, though starting from a legitimate principle, is counterbalanced by the interest in determining with promptness and clarity whether the ruling on the merits will be appealed. This is especially so because claims for attorney's fees may be complex and require a considerable amount of time to resolve. Indeed, in this rather simple case, the fee-related submissions take up well over 100 pages in the joint appendix. App. 64–198.

The Federal Rules of Civil Procedure, furthermore, provide a means to avoid a piecemeal approach in the ordinary ***187** run of cases where circumstances warrant delaying the time to appeal. Rule 54(d)(2) provides for motions claiming

attorney's fees and related nontaxable expenses. Rule 58(e), in turn, provides that the entry of judgment ordinarily may not be delayed, nor may the time for appeal be extended, in order to tax costs or award fees. This accords with*Budinich* and confirms the general practice of treating fees and costs as collateral for finality purposes. Having recognized this premise, Rule 58(e) further provides that if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect as a timely motion under Rule 59 for purposes of Federal Rule of Appellate Procedure 4(a)(4). This delays the running of the time to file an appeal until the entry of the order disposing of the fee motion. Rule 4(a)(4)(A)(iii).

In their brief in opposition to the petition for certiorari, the Funds argued that in their case this procedure would not have been applicable. Brief in Opposition 34. Rule 54(d)(2) provides that "[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." The Advisory Committee Notes to Rule 54(d)(2) state that the procedure outlined in that Rule "does not ... apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury." Advisory Committee's 1993 Note on subd. (d), par. (2) of Fed. Rule Civ. Proc. 54, 28 U.S.C.App., pp. 240–241.

The Funds no longer rely on their reading of Rule 54 and the Advisory Committee Notes as a basis for their argument that the June 17 decision was not final under § 1291. And this is not a case in which the parties attempted to invoke Rule **782 58(e) to delay the time to appeal. Regardless of how the Funds' fee claims could or should have been litigated, *188 however, the Rules eliminate concerns over undue piecemeal appeals in the vast range of cases where a claim for attorney's fees is made by motion under Rule 54(d) (2). That includes some cases in which the fees are authorized by contract. See 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶ 18.01[1] [c], pp. 18–7 to 18–8 (2013) (remarking that Rule 54(d)(2) applies "regardless of the statutory, contractual, or equitable basis of the request for fees," though noting inapplicability where attorney's fees are an element of damages under the substantive law governing the action).

The complex variations in statutory and contractual fee-shifting provisions also counsel against making the distinction the Funds suggest for purposes of finality. Some fee-shifting provisions treat the fees as part of the merits; some do not. Some are bilateral, authorizing fees either to plaintiffs or defendants; some are unilateral. Some depend on prevailing party status; some do not. Some may be unclear on these points. The rule adopted in *Budinich* ignores these distinctions in favor of an approach that looks solely to the character of the issue that remains open after the court has otherwise ruled on the merits of the case.

In support of their argument against treating contractual and statutory fee claims alike the Funds suggest, nevertheless, that it is unclear whether *Budinich* still applies where, as here, auditor's fees (or other nonattorney professional fees) are included as an incidental part of a motion for attorney's fees and costs. (In this case, auditor's fees accounted for $6,537 of the $143,600.44 requested in total.) To the extent the Funds suggest that similar fees will be claimed alongside attorney's fees only where a contractual fee claim is involved, they are incorrect. Statutory fee claims are not always limited to attorney's fees *per se*. Many fee-shifting statutes authorize courts to award additional litigation expenses, such as expert fees. See *West Virginia Univ. Hospitals, Inc. v. Casey,* 499 U.S. 83, 89, n. 4, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) (listing statutes); *189 cf. Fed. Rule Civ. Proc. 54(d)(2)(A) (providing mechanism for claims by motion for "attorney's fees and related nontaxable expenses"). Where, as here, those types of fees are claimed and awarded incidental to attorney's fees, there is no apparent reason why parties or courts would find it difficult to tell that *Budinich* remains applicable.

B

[5] The Funds separately contend that the June 17 decision was not final because their motion claimed some $8,561.75 in auditor's and attorney's fees (plus some modest additional expenses) incurred prior to the commencement of litigation. These included fees for the initial audit to determine whether Haluch was complying with the CBA, as well as attorney's fees incurred in attempting to obtain records from Haluch, researching fund auditing rights, drafting a letter demanding payment, and working on the initial complaint. Brief for Respondents 4–5; App. 64–67, 81–88. The Funds argue that these fees do not fall within the scope of *Budinich,* because the Court in *Budinich* referred only to fees "for the litigation

in question," 486 U.S., at 202, 108 S.Ct. 1717, or, equivalently, "attributable to the case," *id.*, at 203, 108 S.Ct. 1717.

The fact that some of the claimed fees accrued before the complaint was filed is inconsequential. As this Court has observed, "some of the services performed before a lawsuit is formally commenced by ****783** the filing of a complaint are performed 'on the litigation.' " *Webb v. Dyer County Bd. of Ed.*, 471 U.S. 234, 243, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985). "Most obvious examples" include "the drafting of the initial pleadings and the work associated with the development of the theory of the case." *Ibid.* More generally, prefiling tasks may be for the litigation if they are "both useful and of a type ordinarily necessary to advance the ... litigation" in question. *Ibid.*

The fees in this case fit that description. Investigation, preliminary legal research, drafting of demand letters, and working on the initial complaint are standard preliminary ***190** steps toward litigation. See *id.*, at 250, 105 S.Ct. 1923 (Brennan, J., concurring in part and dissenting in part) ("[I]t is settled that a prevailing party may recover fees for the time spent before the formal commencement of the litigation on such matters as ... investigation of the facts of the case, research on the viability of potential legal claims, [and] drafting of the complaint and accompanying documents...."); 2 Derfner, *supra,* ¶ 16.02[2][b], at 16–15 ("[H]ours ... spent investigating facts specific to the client's case should be included in the lodestar, whether [or not] that time is spent prior to the filing of a complaint"). To be sure, the situation would differ if a party brought a freestanding contract action asserting an entitlement to fees incurred in an effort to collect payments that were not themselves the subject of the litigation. But that is not this case. Here the unresolved issue left open by the June 17 order was a claim for fees for the case being resolved on the merits.

* * *

There was no timely appeal of the District Court's June 17 order. The judgment of the Court of Appeals is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

All Citations

571 U.S. 177, 134 S.Ct. 773, 187 L.Ed.2d 669, 198 L.R.R.M. (BNA) 2129, 82 USLW 4061, 87 Fed.R.Serv.3d 1079, 14 Cal. Daily Op. Serv. 411, 2014 Daily Journal D.A.R. 503, 24 Fla. L. Weekly Fed. S 517

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

- Exhibit 11 -

KeyCite Yellow Flag
Declined to Extend by Retta v. Millennium Products, Inc., C.D.Cal., September 21, 2016

563 F.3d 948
United States Court of Appeals, Ninth Circuit.

RODRIGUEZ, et al., Plaintiff–Appellee,
George Schneider; Jonathan M. Slomba; James Puntumapanitch; Justin Head; Ryan Helfrich, Appellants,
v.
WEST PUBLISHING CORPORATION, a Minnesota corporation, dba BAR–BRI; Kaplan, Inc., a Delaware corporation, Defendants–Appellees.
Rodriguez, et al., Plaintiff–Appellee,
David Feldman; Cameron Gharabiklou; Emily Grant; Jeff Lang; Sarah McDonald; Cara Patton; Rachel Schwartz; Greg Thomas, Appellants,
v.
West Publishing Corporation, a Minnesota corporation, dba BAR–BRI; Kaplan, Inc., a Delaware corporation, Defendants–Appellees.
Rodriguez, et al., Plaintiff–Appellee,
David Oriol; Jason Tingle, Appellants,
v.
West Publishing Corporation, a Minnesota corporation, dba BAR–BRI; Kaplan, Inc., a Delaware corporation, Defendants–Appellees.
Rodriguez, et al., Plaintiff–Appellee,
James Juranek; Audrey Juranek; Richard P. Le Blanc, Appellants,
v.
West Publishing Corporation, a Minnesota corporation, dba BAR–BRI; Kaplan, Inc., a Delaware corporation, Defendants–Appellees.
Rodriguez, et al., Plaintiff–Appellee,
Evans & Mullinix, P.A.; Sarah Siegel; Jennifer Brown McElroy; Daniel Schafer, Appellants,
v.
West Publishing Corporation, a Minnesota corporation, dba BAR–BRI; Kaplan, Inc., a Delaware corporation, Defendants–Appellees.
Rodriguez, et al., Plaintiff–Appellee,
Robert Gaudet, Jr.; Andrea Boggio; Sandeep Gopalan; Elizabeth De Long, Appellants,
v.
West Publishing Corporation, a Minnesota corporation, dba BAR–BRI; Kaplan, Inc., a Delaware corporation, Defendants–Appellees.
Rodriguez, et al., Plaintiff–Appellee,
Pamela Collins, Appellants,
v.
West Publishing Corporation, a Minnesota corporation, dba BAR–BRI; Kaplan, Inc., a Delaware corporation, Defendants–Appellees.

Nos. 07–56643, 07–56833, 07–56645, 07–56646, 07–56647, 07–56649, 07–56650, 07–56651
|
Argued and Submitted March 3, 2009.
|
Filed April 23, 2009.

Synopsis
Background: Customers brought class antitrust action against providers of bar review courses. The United States District Court for the Central District of California, Manuel L. Real, J., 2007 WL 2827379, approved settlement. The District Court, 2007 WL 3165661, granted attorney fees to class action counsel. Settlement objectors appealed.

Holdings: The Court of Appeals, Rymer, Circuit Judge, held that:

[1] although incentive agreements between named plaintiffs and class counsel created conflicts of interest, District Court was not required to reject settlement on such account, since there were two other class representatives who had no incentive agreements;

[2] notice of settlement was not fatally defective for failing to disclose existence of incentive agreements;

[3] notice of settlement satisfied due process concerns;

[4] District Court clearly erred in rejecting objectors' request for attorney fees on ground that they "did not add anything" to Court's decision to deny incentive awards;

[5] District Court did not abuse its discretion in approving $49 million settlement; and

[6] in considering attorney fees, District Court should have considered conflicts of interest and ethical concerns arising from incentive agreements.

Affirmed in part; reversed and remanded in part.

Procedural Posture(s): On Appeal.

West Headnotes (34)

[1] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

Courts considering whether to approve settlements of class action antitrust cases are not precluded from comparing the monetary component of a settlement to the estimated treble damages if, in their informed judgment, the strength of the particular case warrants it; but they are not obliged to do so in every antitrust class action. Clayton ACt, § 4(a), 15 U.S.C.A. § 15(a); Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

8 Cases that cite this headnote

[2] **Costs, Fees, and Sanctions** Class actions; incentive awards

Incentive awards in class action cases are discretionary, and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

1027 Cases that cite this headnote

[3] **Federal Civil Procedure** Representation of class; typicality; standing in general
Federal Civil Procedure Antitrust plaintiffs

Class counsel should have disclosed incentive agreements between named plaintiffs and class counsel at class certification stage of antitrust action against bar review course providers, since ex ante incentive agreements were relevant to whether named plaintiffs who were parties to agreement could adequately represent class. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

132 Cases that cite this headnote

[4] **Federal Civil Procedure** Representation of class; typicality; standing in general

Uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the inquiry into whether the named parties can adequately represent the class. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

36 Cases that cite this headnote

[5] **Federal Civil Procedure** Representation of class; typicality; standing in general

An absence of material conflicts of interest between the named plaintiffs and their counsel with other class members is central to the question whether the named parties can adequately represent the class and, in turn, to the question of due process for absent members of the class. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

69 Cases that cite this headnote

[6] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

Although incentive agreements between named plaintiffs and class counsel, which required class counsel to apply to court for incentive award for named plaintiffs and tied named plaintiffs' compensation to sliding scale based on amount recovered, created conflicts among named plaintiffs, their counsel, and rest of class, district court was not required to reject settlement of antitrust action against bar review course providers on such account, since there were two other class representatives who had no incentive agreements and whose separate counsel were not conflicted. Fed.Rules Civ.Proc.Rule 23(a)(4), (g)(4), 28 U.S.C.A.

433 Cases that cite this headnote

[7] **Federal Civil Procedure**Representation of class; typicality; standing in general

The interests of contracting class representatives and class counsel, on the one hand, and members of the class on the other, are expected to be congruent, if the named parties are to adequately represent the class. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

499 Cases that cite this headnote

[8] **Compromise, Settlement, and Release**Form, requisites, and sufficiency
Federal Civil Procedure Sufficiency

Notice of settlement of antitrust action against bar review course providers was not fatally defective for failing to disclose existence of incentive agreements requiring class counsel to apply to court for incentive award for named plaintiffs, which agreements created conflicts among named plaintiffs, their counsel, and rest of class, where both settlement notice and settlement agreement showed that incentive awards would be sought. Fed.Rules Civ.Proc.Rule 23(e)(1), 28 U.S.C.A.

98 Cases that cite this headnote

[9] **Compromise, Settlement, and Release**Form, requisites, and sufficiency
Constitutional Law Compromise and settlement
Federal Civil Procedure Sufficiency

Notice of settlement of antitrust action against bar review course providers communicated essentials of proposed settlement in sufficiently balanced, accurate, and informative way to satisfy due process concerns, in that it advised class members that majority of class representatives approved settlement, it described aggregate amount of settlement fund and plan for allocation, and, although it did not detail content of objections or analyze expected value, it was not required to do so. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 23(e)(1), 28 U.S.C.A.

53 Cases that cite this headnote

[10] **Compromise, Settlement, and Release**Form, requisites, and sufficiency
Federal Civil Procedure Sufficiency

Settlement notices in class actions are supposed to present information about a proposed settlement neutrally, simply, and understandably. Fed.Rules Civ.Proc.Rule 23(e)(1), 28 U.S.C.A.

22 Cases that cite this headnote

[11] **Attorneys and Legal Services**Antitrust

District court clearly erred in rejecting request for attorney fees by objectors opposing settlement of class antitrust claims against bar review course providers, on ground that counsel for objectors “did not add anything” to court's decision to deny incentive awards to named plaintiffs, where court was not focused on incentive agreements before objectors took exception to them, and denial of incentive awards had effect of leaving $325,000 in settlement fund for distribution to class as whole that otherwise would have gone to named plaintiffs. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

70 Cases that cite this headnote

[12] **Compromise, Settlement, and Release**Class actions, claims, and settlements in general

A district court may consider some or all of the following factors when assessing whether a class action settlement agreement is fair, reasonable, and adequate, as required for judicial approval: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

366 Cases that cite this headnote

[13] **Federal Courts** Class actions

Approval of a class action settlement is reviewed for a clear abuse of discretion. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

11 Cases that cite this headnote

[14] **Federal Courts** Class actions

Under the clear abuse of discretion standard of review, the Court of Appeals will affirm a class action settlement if the district judge applies the proper legal standard and his or her findings of fact are not clearly erroneous. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

25 Cases that cite this headnote

[15] **Federal Courts** Class actions

To survive appellate review of a class action settlement under clear abuse of discretion standard of review, the district court must show it has explored comprehensively all factors, but a court is not required to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

16 Cases that cite this headnote

[16] **Compromise, Settlement, and Release**
Antitrust, trade regulation, fraud, and consumer protection

District court did not abuse its discretion in weighing strength of customers' case in favor of approving settlement of class antitrust action against bar review course providers, where court noted that class's successful opposition to summary judgment motion did not mean that class had established liability or would obtain favorable, unanimous jury verdict, and noted difficulty of proving antitrust case, as well as fact that providers had substantive and procedural defenses to all three of class's claims. Fed.Rules Civ.Proc.Rule 23(e), 56, 28 U.S.C.A.

5 Cases that cite this headnote

[17] **Compromise, Settlement, and Release**
Antitrust, trade regulation, fraud, and consumer protection

District court could consider only estimates of single damages in deciding whether to approve settlement of class antitrust action against bar review course providers, even though treble damages are automatic component of recovery of antitrust damages; all parties were represented by experienced counsel who would be aware of exposure to treble damages, negotiated amount of $49 million was fair and reasonable, there was no evidence of fraud, overreaching, or collusion, and, even considering trebling effect, settlement amount represented approximately 10% of class's estimate of its own trebled damages and more than twice that estimated by providers. Clayton ACt, § 4(a), 15 U.S.C.A. § 15(a); Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

51 Cases that cite this headnote

[18] **Compromise, Settlement, and Release**
Antitrust, trade regulation, fraud, and consumer protection

In deciding whether to approve settlement of class antitrust action against bar review course providers, district court was not required to specifically weigh merits of class's case against settlement amount and quantify expected value of fully litigating the matter. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

16 Cases that cite this headnote

[19] **Compromise, Settlement, and Release**
Negotiation at arm's length; fraud or collusion

In deciding whether to approve a class action settlement, the Court of Appeals puts a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

297 Cases that cite this headnote

[20] **Federal Courts** Particular cases

Objector's challenge to cy pres provision of settlement of class antitrust action against bar review course providers was not ripe for review, where cy pres disbursement would occur only if entire settlement fund was not distributed to class

members, no such disbursement was imminent, and settlement fund might well be depleted before cy pres would be triggered. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

41 Cases that cite this headnote

[21] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

Factor of risk, expense, complexity, and likely duration of further litigation favored settlement of class antitrust action against bar review course providers, where class did not have benefit, as in some antitrust cases, of previous litigation between defendants and government, and serious hurdles remained, including *Daubert* motions, anticipated motion for summary judgment, motion to bifurcate, and appeals, which would likely prolong litigation for years. Fed.Rules Civ.Proc.Rule 23(e), 56, 28 U.S.C.A.

74 Cases that cite this headnote

[22] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

District court was not required to analyze probabilities that bar review course providers would seek decertification of nationwide class and succeed in that endeavor in order to weigh factor of risk of maintaining class action status in favor of settlement of customers' antitrust claims. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

22 Cases that cite this headnote

[23] **Federal Civil Procedure** Hearing and determination; decertification; effect

A district court may decertify a class at any time. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

92 Cases that cite this headnote

[24] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

District court could weigh factor of completion of discovery and state of proceedings in favor of settlement of class antitrust action against providers of bar review courses, in that court could find from fact that extensive discovery had been conducted and fact that parties had gone through one round of summary judgment proceedings that counsel had good grasp on merits of case before settlement talks began, and counsel had considerable experience in litigating antitrust matters, class actions, and other complex litigation. Fed.Rules Civ.Proc.Rules 23(e), 56, 28 U.S.C.A.

36 Cases that cite this headnote

[25] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

District court did not abuse its discretion in finding favorable reaction among class members to settlement of antitrust action against bar review course providers, and that such factor weighed in favor of approving settlement, given that, of 376,301 putative class members to whom notice of settlement was sent, 52,000 submitted claims forms and only 54 submitted objections. Fed.Rules Civ.Proc.Rules 23(e), 56, 28 U.S.C.A.

95 Cases that cite this headnote

[26] **Records** Time for proceedings; limitations and laches

District court had discretion to deny as untimely class settlement objectors' motion, filed more than three weeks after deadline for filing objections, seeking to unseal records that had been sealed pursuant to protective order in antitrust litigation. Fed.Rules Civ.Proc.Rules 23, 56, 28 U.S.C.A.

1 Case that cites this headnote

[27] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

District court did not abuse its discretion in approving $49 million settlement of customers' antitrust action against bar review course providers, given that court could base monetary

portion of settlement only on estimate of single damages, as opposed to treble damages available in antitrust actions, and that approval of settlement was favored by various factors including strength of customers' case, risk of further litigation, completion of discovery, and favorable reaction among class members. Clayton ACt, § 4(a), 15 U.S.C.A. § 15(a); Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

9 Cases that cite this headnote

[28] **Attorneys and Legal Services**—Antitrust

In considering award of attorney fees to class counsel from settlement fund in antitrust action against bar review course providers, district court should have considered conflicts of interest and ethical concerns arising from incentive agreements between named plaintiffs and class counsel. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

51 Cases that cite this headnote

[29] **Federal Courts**—Costs and attorney fees

Under abuse of discretion standard of review, the Court of Appeals requires only that attorney fee awards be reasonable in the circumstances.

2 Cases that cite this headnote

[30] **Federal Courts**—Costs and attorney fees

Review of attorney fee awards is for abuse of discretion.

1 Case that cites this headnote

[31] **Attorneys and Legal Services**—Lodestar method
Attorneys and Legal Services—Percentage method

A district court may award attorney fees pursuant to either a lodestar or a straight percentage of a settlement fund.

6 Cases that cite this headnote

[32] **Attorneys and Legal Services**—Lodestar method

A court awarding attorney fees from a settlement fund may apply a multiplier to the lodestar calculation.

5 Cases that cite this headnote

[33] **Attorneys and Legal Services**—Fiduciary Duties
Attorneys and Legal Services—Disclosure, waiver, or consent

Class counsel's fiduciary duty is to the class as a whole and it includes reporting potential conflict issues. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

5 Cases that cite this headnote

[34] **Attorneys and Legal Services**—Measure and Amount of Compensation in General

At the fee-setting stage when fees are to come out of a class action settlement fund, the district court has a fiduciary role for the class. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

80 Cases that cite this headnote

Attorneys and Law Firms

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Charles A. Sturm, Steele Sturm PLLC, Houston, TX, on behalf of objectors-appellants James Juranek, Audrey Juranek, and Richard P. LeBlanc.

Scott L. Nelson, Public Citizen Litigation Group, Washington, D.C., on behalf of objectors-appellants Robert Gaudet, Jr., Andrea Boggio, Sandeep Gopalan, Elizabeth De Long.

Steven F. Helfand, Helfand Law Offices, San Francisco, CA, on behalf of objectors-appellants David Feldman, Cameron Gharabiklou, Emily Grant, Jeff Lang, Sarah McDonald, Cara Patton, Rachel Schwartz, and Greg Thomas.

J. Darrell Palmer, Law Offices of Darrell Palmer, Solana Beach, CA, on behalf of objectors-appellants Evans & Mullinix, P.A., Sarah Siegel, Jennifer Brown McElroy, Daniel Schafer, David Oriol, and Jason Tingle.

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Stuart N. Senator, Munger, Tolles & Olson LLP, Los Angeles, CA, on behalf of defendant-appellee Kaplan, Inc.

James P. Tallon, Shearman & Sterling LLP, New York, NY, on behalf of defendant-appellee West Publishing Corporation.

Appeal from the United States District Court for the Central District of California, Manuel L. Real, District Judge, Presiding. D.C. No. CV–05–03222–R(MC).
Before DIARMUID F. O'SCANNLAIN, PAMELA ANN RYMER and KIM McLANE WARDLAW, Circuit Judges.

OPINION

RYMER, Circuit Judge:

West Publishing Corp. and Kaplan, Inc. entered a settlement agreement in an antitrust class action brought by those who purchased a BAR/BRI course between August 1, 1997 and July 31, 2006. (BAR/BRI is a subsidiary of West that provides preparation courses for state bar exams.) The district court approved the settlement, and several class members who object (Objectors) appeal. Their principal objection relates to incentive agreements that were entered into at the onset of litigation between class counsel and five named plaintiffs ***955** who became class representatives. They also contend that the district court improperly failed to compare the amount of the settlement to the likely recovery of treble, as well as single, damages.

We agree that the ex ante incentive agreements created conflicts among the five contracting class representatives, their counsel, and the rest of the class. We disapprove of them. Nevertheless, there were two other class representatives who had no incentive agreements and whose separate counsel were not conflicted. They provided adequate representation and the court was not required to reject the settlement on this account.

[1] We conclude that the district court did not clearly abuse its discretion in finding that the $49 million settlement was fair, adequate, and reasonable even though it evaluated the monetary portion of the settlement based only on an estimate of single damages. Courts are not precluded from comparing the monetary component of a settlement to the estimated treble damages if, in their informed judgment, the strength of the particular case warrants it; but they are not obliged to do so in every antitrust class action. In this case, the settlement is substantial and meets the standard for approval by any measure.

Finally, we believe that the incentive agreements may have an effect on attorney's fees that the district court did not acknowledge. It gave no weight to the Objectors' role in securing denial of incentive awards, nor did the court take into account ethics concerns arising out of the incentive agreements when it awarded attorney's fees to class counsel. Both issues need to be revisited.

The Objectors' remaining arguments lack force. Accordingly, we affirm approval of the settlement. We reverse the orders denying any fee award to Objectors and granting the fee award to class counsel, and remand.

I

Ryan Rodriguez and Reena B. Frailich brought this action on behalf of themselves and "[a]ll persons who purchased a bar review course from BAR/BRI in the United States from August 1997 to the present" against West and Kaplan. They filed a first amended complaint in May 2005 joined by Loredana Nesci, Jennifer Brazeal, and Lisa Gintz. Kari Brewer and Lorraine Rimson were named plaintiffs in a related action (*Brewer v. West Publishing Corp.*) that was consolidated with *Rodriguez.* All were eventually designated as class representatives. McGuireWoods LLP was appointed class counsel.

The operative complaint alleges that BAR/BRI has been the major provider of bar preparation courses throughout the United States for decades. In 1995, West started a business called West Bar Review that competed with BAR/BRI in the market for state bar preparation courses. Thomson Company acquired West in 1996 and sought to divest itself of West Bar

Review. Kaplan entered into a letter of intent to acquire West Bar Review by early August 1997. BAR/BRI, unaffiliated with West or Kaplan at that time, allegedly sought to thwart the sale of West Bar Review to Kaplan by entering a market division agreement with Kaplan whereby BAR/BRI agreed to pay Kaplan and to withdraw from markets for other test preparation courses, while Kaplan agreed not to enter BAR/BRI's primary market through acquisition of West Bar Review. BAR/BRI then acquired West Bar Review in the fall of 1997. A few years later, in 2001, West bought BAR/BRI.

The pleading also alleges that BAR/BRI erected and maintained various entry barriers to the market for bar preparation ***956** courses that included targeting first-year law students with a non-refundable option for BAR/BRI's course when they graduate; offering free access to its Westlaw service to students enrolled in a BAR/BRI course; and advertising constantly on Westlaw, which often has a captive audience of law students required to use the service. It avers that BAR/BRI engaged in numerous other acts of anticompetitive conduct such as entering into an agreement that eliminated a competitor in New York (Marino Bar Review); including non-compete clauses in contracts with law school faculty and other staff to prevent them from working for competitors; destroying competitors' advertising; paying fees to law schools for preferable access; offering a purported scholarship program that actually subsidized students considering a competitor's course; and paying Louisiana State University, a BAR/BRI competitor for preparation courses for the Louisiana bar, to discontinue its course.

Claims are stated for violation of section 7 of the Clayton Act, 15 U.S.C. § 18, by West for the acquisition of West Bar Review by BAR/BRI; violation of section 1 of the Sherman Act, 15 U.S.C. § 1, by West and Kaplan for their market division agreement; and violation of section 2 of the Sherman Act, 15 U.S.C. § 2, by West for BAR/BRI's anticompetitive conduct. The class seeks recovery of actual damages of at least $300 million ($1,000 for each of the estimated 300,000 members) for each claim, treble damages, and injunctive relief.

On May 15, 2006, the district court certified a Fed.R.Civ.P. 23(b)(3) class[1] consisting of all persons who purchased a bar review course from BAR/BRI in the United States from August 1997 to the present. West and Kaplan sought interlocutory review of the certification order, which we declined to allow. A notice of class certification was sent to putative class members in the summer of 2006, informing them of their right to opt-out of the class before August 13, 2006.

During discovery, class counsel reviewed more than 400,000 pages of documents, deposed fourteen fact witnesses, and took one deposition pursuant to Fed.R.Civ.P. 30(b)(6). West and Kaplan deposed the seven class representatives and three non-party witnesses. The parties also conducted depositions of five expert witnesses.

Kaplan moved for summary judgment, which the district court denied. West had yet to file a motion for summary judgment when a settlement was reached.

Settlement negotiations began in November 2006. The sessions were mediated by the Honorable Daniel Weinstein (Ret. Superior Court of California, San Francisco County) of JAMS, a provider of ADR services, who had extensive experience in this type of case. An agreement was executed on February 2, 2007, though class representatives Rodriguez, Nesci, and Gintz objected and refused to authorize ***957** execution on their behalf. Under the agreement, West and Kaplan agreed to pay $49 million into a settlement fund. The fund is to be allocated pro rata to class members based on the amount each paid for BAR/BRI courses relative to the amounts paid by all other class members who file an allowable claim. Each class member's allocation from the settlement fund is capped at thirty percent of the amount that member paid to BAR/BRI. Any remaining funds are to be distributed by the district court through application of the *cy pres* doctrine. West and Kaplan also agreed to terminate their marketing agreement; West agreed to include on the form used to enroll law students a statement that an initial payment to BAR/BRI is not a commitment to full payment; and West agreed "that it is committed to accurate advertising as required by the Lanham Act, the Federal Trade Commission Act and similar laws, regulations and rules." In exchange, class members agreed to release all claims against West and Kaplan related to the conduct alleged in the complaint. In Judge Weinstein's opinion, the settlement "was arrived at through arm's length negotiations by counsel who were skilled and knowledgeable about the facts and law of this case," and it was "fair, reasonable and adequate in light of the strengths and weaknesses of the claims and defenses and the risks of establishing liability and damages."

On March 26, 2007, over the objections of Rodriguez, Nesci, and Gintz, the district court granted preliminary approval of

the settlement and directed that notice of the settlement be sent to the class, defined as all persons who purchased a bar review course from BAR/BRI anywhere in the United States anytime from August 1, 1997 through July 31, 2006. The Settlement Notice informed class members of the $49 million settlement fund, the methodology for allocating the fund, the non-monetary relief, class counsel's intent to seek twenty-five percent of the settlement fund for attorney's fees and expenses, and counsel's plan to request incentive awards of $25,000 for class representatives Brazeal, Brewer, Frailich, and Rimson, and $75,000 for class representatives Gintz, Nesci, and Rodriguez. It indicated that a final settlement hearing would be held on June 18, 2007, and that the deadline for filing objections was May 21, 2007. The Settlement Notice was mailed to 376,301 people and published in several national periodicals. Fifty-four objections were filed.

Class counsel filed a motion seeking incentive awards for the class representatives after preliminary approval of the settlement and dissemination of the Settlement Notice, but before the final fairness hearing. It turns out that, as part of their retainer agreement, the named plaintiffs in *Rodriguez* (Rodriguez, Frailich, Nesci, Brazeal, and Gintz) had entered into an incentive arrangement with Van Etten Suzumoto & Becker, which preceded McGuireWoods LLP. The incentive agreements obligated class counsel to seek payment for each of these five in an amount that slid with the end settlement or verdict amount: if the amount were greater than or equal to $500,000, class counsel would seek a $10,000 award for each of them; if it were $1.5 million or more, counsel would seek a $25,000 award; if it were $5 million or more, counsel would seek $50,000; and if it were $10 million or more, counsel would seek $75,000. Neither Brewer nor Rimson, the other two class representatives, was party to an incentive agreement. They were separately represented, by Finkelstein Thompson LLP, and Zwerling, Shachter & Zwerling, LLP. By the time the motion was filed, Brazeal and Frailich had agreed to lower their request to $25,000 from the $75,000 promised in the incentive agreement, but Gintz, Nesci, and Rodriguez, ***958** who objected to the settlement, did not. Incentive awards in the amount of $25,000 were also sought for Brewer and Rimson.

A final hearing on the fairness, reasonableness, and adequacy of the settlement was held on June 18 and July 9, 2007. Twelve groups of Objectors questioned the failure to bifurcate the section 7 claim, adequacy of the monetary portion of the settlement, not providing for the break-up of BAR/BRI, the *cy pres* award, and sealing of documents pursuant to a protective order. On September 10, 2007, the district court gave final approval to the settlement agreement in a thirty-seven page Settlement Order and fifty pages of Findings of Fact and Conclusions of Law. It found that the Settlement Notice and dissemination were adequate, and that the settlement was fair, adequate, and reasonable despite the conflict of interest between class representatives and class members. The court denied the motion for incentive awards to all seven class representatives, finding that the amount was unreasonable in light of the work and risk undertaken, and that the incentive agreements created actual conflicts of interest in violation of public policy. It denied fees to Objectors' counsel because they "did not add anything to the court's order denying" the motion for incentive awards, but awarded class counsel its lodestar, enhanced by a 1.75 multiplier, up to a limit of twenty-five percent of the settlement fund.

Six groups of Objectors have timely appealed.[2]

II

Much of the appeal turns on the presence—and nondisclosure to the class—of the incentive agreements. In particular, Objectors assert that the Settlement Notice offends due process because it omitted material information about the agreements, and that the settlement itself should have been rejected because the incentive agreements prevented the class representatives from providing adequate representation. Relatedly, Objectors contend that they benefitted the class by successfully opposing the incentive awards and should be allowed attorney's fees for the effort. Conversely, they question the attorney's fee award to class counsel as California law precludes the recovery of fees for conflicting representation.

A

[2] Incentive *awards* are fairly typical in class action cases. *See* 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4th ed.2008); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study,* 53 U.C.L.A. L.Rev. 1303 (2006) (finding twenty-eight percent of settled class actions between 1993 and 2002 included an incentive award to class

representatives). Such awards are discretionary, *see* *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir.2000), and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, ***959** and, sometimes, to recognize their willingness to act as a private attorney general. Awards are generally sought after a settlement or verdict has been achieved.

The incentive *agreements* entered into as part of the initial retention of counsel in this case, however, are quite different. Although they only bound counsel to apply for an award, thus leaving the decision whether actually to make one to the district judge, these agreements tied the promised request to the ultimate recovery and in so doing, put class counsel and the contracting class representatives into a conflict position from day one.

[3] [4] [5] The arrangement was not disclosed when it should have been and where it was plainly relevant, at the class certification stage. Had it been, the district court would certainly have considered its effect in determining whether the conflicted plaintiffs—Rodriguez, Frailich, Nesci, Brazeal, and Gintz—could adequately represent the class. The conflict might have been waived, or otherwise contained, but the point is that uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry. *See* *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)); *see also* *Amchem Prods.,* 521 U.S. at 625–26, 117 S.Ct. 2231. An absence of material conflicts of interest between the named plaintiffs and their counsel with other class members is central to adequacy and, in turn, to due process for absent members of the class. *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir.1998).

In fact, the incentive agreements came to the fore when Objectors pounced on them in opposing class counsel's motion for incentive awards to the class representatives. This happened after preliminary approval of the settlement. In that context the district court held that the agreements were inappropriate and contrary to public policy for a number of reasons: they obligate class counsel to request an arbitrary award not reflective of the amount of work done, or the risks undertaken, or the time spent on the litigation; they create at least the appearance of impropriety; they violate the California Rules of Professional Conduct prohibiting fee-sharing with clients and among lawyers; and they encourage figurehead cases and bounty payments by potential class counsel. The court found it particularly problematic that the incentive agreements correlated the incentive request solely to the settlement or litigated recovery, as the effect was to make the contracting class representatives' interests actually different from the class's interests in settling a case instead of trying it to verdict, seeking injunctive relief, and insisting on compensation greater than $10 million. It further observed that the parties' failure to disclose their agreement to the court, and to the class, violated the contracting representatives' fiduciary duties to the class and duty of candor to the court.

We agree. By tying their compensation—in advance—to a sliding scale based on the amount recovered, the incentive agreements disjoined the contingency financial interests of the contracting representatives from the class. As the district court observed, once the threshold cash settlement was met, the agreements created a disincentive to go to trial; going to trial would put their $75,000 at risk in return for only a marginal individual gain ***960** even if the verdict were significantly greater than the settlement. The agreements also gave the contracting representatives an interest in a monetary settlement, as distinguished from other remedies, that set them apart from other members of the class. Further, agreements of this sort infect the class action environment with the troubling appearance of shopping plaintiffships. If allowed, ex ante incentive agreements could tempt potential plaintiffs to sell their lawsuits to attorneys who are the highest bidders, and vice-versa. In addition, these agreements implicate California ethics rules that prohibit representation of clients with conflicting interests.[3] *See* *Image Tech. Serv., Inc. v. Eastman Kodak Co.,* 136 F.3d 1354, 1358 (9th Cir.1998) (noting that "[s]imultaneous representation of clients with conflicting interests (and without informed written consent) is an automatic ethics violation in California"); *Flatt v. Superior Court,* 9 Cal.4th 275, 36 Cal.Rptr.2d 537, 885 P.2d 950, 955 (1994).

Although we have not previously encountered incentive *agreements,* we expressed concern about similar problems

with incentive *awards* in *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir.2003). There, we declined to approve a settlement agreement where the awards request indicated that the class representatives were "more concerned with maximizing [their own] incentives than with judging the adequacy of the settlement as it applies to class members at large." *See* *Staton*, 327 F.3d at 977–78. We explained that excess incentive awards may put the class representative in a conflict with the class and present a "considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement for themselves and then trading on that leverage in the course of negotiations." *Id.* at 976–77.[4] The danger is exacerbated if the named plaintiffs have an advance guarantee that a request for a relatively large incentive award will be made that is untethered to any service or value they will provide to the class.

[6] [7] In sum, we disapprove of the incentive agreements entered into between the named plaintiffs and class counsel in this case. They created an unacceptable disconnect between the interests of the contracting representatives and class counsel, on the one hand, and members of the class on the other. We expect those interests to be congruent. *See* *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir.2003) (noting that adequate representation consists of an "absence of antagonism" and a "sharing of interests between representatives and absentees") (internal quotation marks and citation omitted). They also gave rise to a disturbing appearance of impropriety. And failing to disclose the incentive arrangements in connection with class certification compounded these problems by depriving the court, and the class, of the safeguard of informed judicial consideration of the adequacy of class representation.

***961** This said, we do not believe the district court was required to reject the settlement for inadequate representation. Only five of the seven class representatives had an incentive agreement. Brewer and Rimson did not. "[T]he adequacy-of-representation requirement is satisfied as long as one of the class representatives is an adequate class representative." *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 n. 2 (9th Cir.2001); 7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1765, at 326 (2005) ("[I]f there is more than one named representative, it is not necessary that all the representatives meet the Rule 23(a)(4) standard; as long as one of the representatives is adequate, the requirement will be met."). Brewer and Rimson were also separately represented. There is no evidence or contention that these two had any other conflict with the class.

Objectors submit only that Brewer and Rimson should have told the district court about the incentive agreements. Even assuming these two knew about the incentive agreements and understood the implications, this did not create a conflict of interest or otherwise interfere with their ability or motivation to represent the class. Other factors indicate that the class was adequately represented: Judge Weinstein, who mediated the settlement, attested that the negotiations were conducted at arm's length; there was no evidence of collusion;[5] and the settlement fund far exceeded the ten million dollar trigger for the contracting class representatives' incentive agreements.

Accordingly, we conclude that the presence of conflicted representatives was harmless. Similarly, the adequacy requirement for class counsel is satisfied. Fed.R.Civ.P. 23(a)(4), (g)(4). Class counsel vigorously prosecuted the case through to a fair settlement with the participation of two nonconflicted law firms that represented class representatives Brewer and Rimson. *See* *Hanlon*, 150 F.3d at 1020. The court found their representation was adequate; and Judge Weinstein, who oversaw the settlement negotiations, believed that "[e]ach side aggressively advocated their positions," class counsel "ha[d] as their primary goal achieving the maximum substantive relief that they could," and agreement "was arrived at through arm's length negotiations by counsel who were skilled and knowledgeable about the facts and law of this case." Moreover, the participation of two firms that did not enter incentive agreements, Finkelstein Thompson and Zwerling, Shachter & Zwerling, assuages any additional concerns that a conflict created by the incentive agreements may have adversely affected the adequacy of representation. *See* *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir.1998) ("[T]he addition of new and impartial counsel can cure a conflict of interest even where previous counsel continues to be involved in the case.").[6]

***962** B

[8] It follows that the Settlement Notice was not fatally defective for failing to disclose the actual or potential conflict arising out of the existence of incentive agreements.

"The court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed.R.Civ.P. 23(e)(1). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.' " *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir.1980)).

The Settlement Notice advised absent class members that an application would be made to the court for an incentive award of $25,000 for Frailich, Brazeal, Brewer, and Rimson, and $75,000 for Rodriguez, Nesci, and Gintz to compensate them for their participation in, and prosecution of, this case on behalf of the class, and that the petition for incentive awards, which would be filed before May 7, 2007, would be available for inspection at the clerk's office. Rodriguez, Nesci, and Gintz disclosed the existence of the incentive agreements in a document filed with the court on March 6, 2007. The Notice also indicated that the settlement agreement and related documents were posted at www.barbri-classaction.com, and provided class counsel's phone number and an email address to which inquires could be sent. The settlement agreement itself states that whether incentive awards should be awarded to class representatives, as well as attorney's fees, will be determined at the final settlement hearing. It also provides that class counsel will submit an application for an incentive award to each class representative to be paid from the gross settlement fund, and that West and Kaplan agree not to oppose any application for an incentive award seeking no more than $25,000.

While neither the Settlement Notice nor the settlement agreement discloses the incentive agreements, both show that incentive awards will be sought. In the circumstances this was sufficient to alert class members to follow-up if they had concerns. *See id.*

[9] [10] Objectors contend that the Settlement Notice also failed to provide a meaningful description of the terms of the settlement, including the content of objections and the expected value of fully litigating the case. In our view, the Notice contains adequate information, presented in a neutral manner, to apprise class members of the essential terms and conditions of the settlement. The Notice advises class members that a majority (hence, not all) of the class representatives approve the settlement. It describes the aggregate amount of the settlement fund and the plan for allocation, thereby complying with what we require. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1373–74 (9th Cir.1993); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177–78 (9th Cir.1977). While the Notice does not detail the content of objections, or analyze the expected value, we do not see why it should. Settlement notices are supposed to present information about a proposed settlement neutrally, simply, and understandably[7]—objectives ***963** not likely served by including the adversarial positions of objectors. We therefore conclude that the Notice communicated the essentials of the proposed settlement in a sufficiently balanced, accurate, and informative way to satisfy due process concerns.

C

[11] Objectors who challenged the incentive awards argue that the district court improperly denied fees attributable to that work. The court rejected their request for fees on the footing that Objectors' counsel "did not add anything" to its decision to deny incentive awards. This seems clearly erroneous to us. The court was not focused on the incentive agreements before Objectors took exception to them after the motion to award payments to the class representatives was filed. In the wake of that objection, the court denied the motion for incentive awards in its entirety because the amounts requested were unreasonable and the incentive agreements were inappropriate and contrary to public policy. The net effect was to leave $325,000 in the settlement fund—for distribution to the class as a whole—that otherwise would have gone to the class representatives. Given this, we cannot let stand a ruling that Objectors did nothing that increased the fund or substantially benefitted the class members. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir.2002). Therefore, we remand for the district court to reconsider the extent to which Objectors added value that increased the fund or substantially benefitted the class members, and to award attorney's fees accordingly.

III

Objectors press a number of issues apart from the effect of the incentive agreements that bear on whether the settlement was fair, adequate, and reasonable. The most serious have to do with the district court's evaluation of the amount offered in settlement, in particular, its failure to estimate the range of possible outcomes and ascribe a probability to those outcomes, and to consider treble damages.

[12] Fed.R.Civ.P. 23(e) requires judicial approval of any settlement by a certified class. The settlement must be "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). A district court "may consider some or all of the following factors" when assessing whether a class action settlement agreement meets this standard:

> [1] the strength of plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class members to the proposed settlement.

Molski, 318 F.3d at 953; *accord* *Staton,* 327 F.3d at 959.

[13] [14] [15] We review approval of a class action settlement for a "clear abuse of discretion." *Molski,* 318 F.3d at 953. This court " 'will affirm if the district judge applies the proper legal standard and his or her findings of fact are not clearly erroneous.' " *Id.* (quoting ***964** *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d at 458). "Our review of the district court's decision to approve a class action settlement is extremely limited. It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon,* 150 F.3d at 1026 (internal citation omitted). "To survive appellate review, the district court must show it has explored comprehensively all factors," *id.,* but a court is not required to "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements," *Officers for Justice v. Civil Serv. Comm'n of San Francisco,* 688 F.2d 615, 625 (9th Cir.1982).

Here, the court balanced each of the relevant factors in approving the settlement.

[16] *Strength of the plaintiffs' case.* The court noted that successfully opposing Kaplan's motion for summary judgment did not mean that the class had established liability or would obtain a favorable, unanimous jury verdict. This is, of course, correct. It noted the difficulty of proving an antitrust case, and that Kaplan and West had substantive and procedural defenses to all three of the class's claims (including a potential statute of limitations defense that could decrease the size of the class). Also, there were no government coattails for the class to ride. Counting this factor in favor of settlement was not a clear abuse of discretion.

[17] *Amount offered in settlement.* Objectors claim it was legal error for the court to consider only estimates of *single* damages without considering the *treble* damages that are an automatic component of the recovery of antitrust damages. 15 U.S.C. § 15(a). The district court found that the $49 million settlement represented thirty percent of the damages estimated by the class expert—$158 million to $168 million. This analysis compared the settlement amount to the best possible outcome for the class, without taking into account the significant difference between the class's estimate and the defense's. The defense expert had opined that there likely would be no damages but if there were any, they would not exceed $7 million. In any event, the court declined to accept Objectors' argument that the monetary portion of the settlement was inadequate because the section 7 claim was worth treble the class expert's single damages estimate—or $360 million. It reasoned that doing so would presuppose that plaintiffs prevail at the end of trial (thus undercutting the point of a negotiated resolution where defendants do not admit liability); it would be speculative; and, as the Second Circuit indicated in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 458 (2d Cir.1974), *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), courts do not traditionally factor treble damages into the calculus for determining a reasonable settlement value.

It is our impression that courts generally determine fairness of an antitrust class action settlement based on how it compensates the class for past injuries, without giving much, if any, consideration to treble damages.[8] At the same time,

treble damages are a fact of life in antitrust litigation. In some cases a court, asked to approve a settlement, may believe the class's claim is so strong that the merits of the amount ***965** negotiated cannot reasonably be evaluated without measuring it against the likelihood of a treble as well as a single damages recovery. We have never precluded courts from comparing the settlement amount to both single and treble damages. By the same token, we do not require them to do so in all cases.

This circuit has long deferred to the private consensual decision of the parties. *See* *Hanlon,* 150 F.3d at 1027. Experienced counsel such as those representing all the parties in this case will certainly be aware of exposure to treble damages in an antitrust action. Likewise, the mediator in this case. As we have emphasized,

> 'the 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.'

Id. (quoting *Officers for Justice,* 688 F.2d at 625).

In this case, the negotiated amount is fair and reasonable no matter how you slice it. There is no evidence of fraud, overreaching, or collusion. Even considering the trebling effect, the settlement amount represents approximately ten percent of the class's estimate of its own trebled damages and more than twice that estimated by West and Kaplan. The $49 million is in cash, not in kind, which is a good indicator of a beneficial settlement. All things considered, the district court neither committed legal error, nor aside from that, clearly abused its discretion in weighing the amount offered in settlement in favor of approving the settlement.

[18] [19] We are not persuaded otherwise by Objectors' further submission that the court should have specifically weighed the merits of the class's case against the settlement amount and quantified the expected value of fully litigating the matter. For this they rely on the Seventh Circuit's opinion in *Synfuel Tech., Inc. v. DHL Express (USA), Inc.,* 463 F.3d 646 (7th Cir.2006), which follows that circuit's precedent requiring district courts to determine the strength of the plaintiff's case on the merits balanced against the amount offered in settlement by " 'quantifying the net expected value of continued litigation to the class.' " *Id.* at 653 (quoting *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 284–85 (7th Cir.2002)). To do this, the Seventh Circuit directs courts to " 'estimate the range of possible outcomes and ascrib [e] a probability to each point on the range.' " *Id.* However, our approach, and the factors we identify, are somewhat different. We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution, *Hanlon,* 150 F.3d at 1027; *Officers for Justice,* 688 F.2d at 625, and have never prescribed a particular formula by which that outcome must be tested. As we explained in *Officers for Justice,* "[u]ltimately, the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." 688 F.2d at 625 (internal quotation marks and citation omitted). The Seventh Circuit also recognizes that precision is impossible, and that even its more structured approach is apt to produce only a "ballpark valuation." *Synfuel,* 463 F.3d at 653.

In reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value. *See* Federal Judicial Center, Manual for Complex Litigation § 21.62, at 316 (4th ed.2004) (one factor "that may bear on review of a settlement" ***966** is "the advantages of the proposed settlement versus the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members"); *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 806 (3d Cir.1995).

Although the district court did not put it this way, the amount of the alleged overcharge, the estimated recovery ranges by both parties and their experts, and the results of a mediated resolution, were before it. Objectors do not explain how reversing the math on the record would have yielded a meaningfully different result. Accordingly, the court did not clearly abuse its discretion in concluding that this factor weighs in favor of approving the settlement.

[20] In an argument related to their position on treble damages, Objectors also challenge the *cy pres* provision, which they point out is a disfavored substitute for distribution of benefits directly to class members. *See* *Molski,* 318 F.3d at 954–55. Here, their argument goes, the

settlement agreement distributes funds to class members up to thirty percent of the amount each paid to BAR/BRI; this is based on an estimate of single damages; thus, the *cy pres* provision effectively substitutes for treble damages that should also be distributed to class members. However, this issue becomes ripe only if the entire settlement fund is not distributed to class members. *See* *Six (6) Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1313 (9th Cir.1990) (Fernandez, J., concurring). That trigger point has not been reached; no *cy pres* disbursement is imminent; and the fund in this case may well be depleted before *cy pres* kicks in. We therefore decline to consider the propriety of *cy pres* at this time.

[21] *Risk, expense, complexity, and likely duration of further litigation.* The court found, with substantial support in the record, that the case is complex and likely to be expensive and lengthy to try. The class in this case does not have the benefit, like some other antitrust classes, of previous litigation between the defendants and the government. While Objectors point out that much heavy-lifting had already been done, a number of serious hurdles remained—*Daubert* motions,[9] West's anticipated motion for summary judgment, and a motion to bifurcate. Inevitable appeals would likely prolong the litigation, and any recovery by class members, for years. This factor, too, favors the settlement.

[22] [23] *Risk of maintaining class action status.* The court did not have to analyze the probabilities that West and Kaplan would seek decertification of the nationwide class and succeed in the endeavor, as Objectors suggest, to weigh this factor in favor of the settlement. A district court may decertify a class at any time. *See* *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). West and Kaplan vigorously opposed certification of a nationwide class, sought (albeit unsuccessfully) to take an interlocutory appeal from that order, and would undoubtedly have appealed certification if there were a final, adverse judgment. At the time of settlement, the risk remained that the nationwide class might be decertified; it was not so minimal that this factor could not weigh in favor of the settlement. Bar review courses are given on a state-by-state basis; states are distinct markets geographically, and possibly in other respects. This could call the nationwide class into question.

***967** [24] *Discovery completed; state of proceedings.* Extensive discovery had been conducted, and the parties had gone through one round of summary judgment proceedings. From this the district court could find that counsel had a good grasp on the merits of their case before settlement talks began. Nor is there any dispute that counsel had considerable experience in litigating antitrust matters, class actions, and other complex litigation. As we have held that "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation," *In re Pac. Enters. Sec. Litig.,* 47 F.3d 373, 378 (9th Cir.1995), the court could weigh this factor in favor of approval.

[25] [26] *Reaction to proposed settlement.* The court had discretion to find a favorable reaction to the settlement among class members given that, of 376,301 putative class members to whom notice of the settlement had been sent, 52,000 submitted claims forms and only fifty-four submitted objections. *See, e.g.,* *Churchill Village,* 361 F.3d at 577 (affirming approval of a class action settlement where forty-five objections were received out of 90,000 notices).[10]

[27] For these reasons, we cannot say that the district court clearly abused its discretion in approving the settlement.

IV

[28] Having upheld approval of the settlement agreement, we must consider the award of attorney's fees to class counsel. This brings us back to the incentive agreements.

[29] [30] [31] [32] We require only that fee awards be reasonable in the circumstances, *In re Wash. Pub. Power Supply Sys. Sec. Litig.,* 19 F.3d 1291, 1294 n. 2 (9th Cir.1994), and our review is for abuse of discretion, *Powers v. Eichen,* 229 F.3d 1249, 1256 (9th Cir.2000). The district court may award fees pursuant to either a lodestar or a straight percentage of the settlement fund. *Id.* (quoting *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,* 109 F.3d 602, 607 (9th Cir.1997)). Here it adopted the lodestar. A court may also apply a multiplier to the lodestar calculation, which the district court did. *Wash. Pub. Power Supply Sys. Sec. Litig.,* 19 F.3d at 1299–1301. In doing so it found that counsel faced substantial risk in prosecuting this action; did not have the benefit of fruits from underlying government actions; there were no controlling precedents, especially with regard to the section 7 claim; defense counsel were skilled and formidable; and

there were a number of hurdles in proving both damages and liability. The problem is that the district court nowhere appears to have considered the effect on the award of attorney's fees of the conflict of interest that resulted from the incentive agreements.

By virtue of the district court's local rules, California law controls whether an ethical violation occurred. C.D. Cal. L.R. 83–3.1.2. "Simultaneous representation of clients with conflicting interests (and without written informed consent) is an automatic ethics violation in California and grounds for disqualification." *Image Tech. Serv.,* 136 F.3d at 1358; *Flatt,* 36 Cal.Rptr.2d 537, 885 P.2d at 955. Under California ***968** law, "[a]n attorney cannot recover fees for such conflicting representation." *Image Tech. Serv.,* 136 F.3d at 1358. "An attorney may claim fees only for services provided before the conflict arose and the ethical breach occurred." *Id.*

[33] We express no opinion on the impact of these principles on the fees request in this case, but it is apparent that they are, at least, implicated. We realize that conflicts of interest among class members are not uncommon and arise for many different reasons. However, the conflict of interest inhering in the incentive agreements did not just happen, nor was it a conflict that developed beyond the control or perception of class counsel. It was inserted into the retainer agreement. " 'The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.' " *Kayes v. Pac. Lumber Co.,* 51 F.3d 1449, 1465 (9th Cir.1995) (quoting *Sullivan v. Chase Inv. Servs. of Boston, Inc.,* 79 F.R.D. 246, 258 (N.D.Cal.1978)). In addition, class counsel's fiduciary duty is to the class as a whole and it includes reporting potential conflict issues. Neither the incentive agreements nor the possibility of conflict was disclosed to the court so that it could take steps to protect the interests of absentee class members. We think it appropriate for the district court to consider whether counsel could represent both the class representatives with whom there was an incentive agreement, and absentee class members, without affecting the entitlement to fees.

[34] At the fee-setting stage when fees are to come out of the settlement fund, the district court has a fiduciary role for the class. *See* *Wash. Pub. Power Supply Sys. Sec. Litig.,* 19 F.3d at 1302. It may be that the record is insufficient for the court to make a reasoned judgment; if so, an opportunity should be afforded for the parties to develop the record. Accordingly, we remand for the district court to consider in the first instance the effect, if any, of the conflict arising out of the incentive agreements on the request by class counsel for an attorney's fee award.

Objectors argue the amount of the fee award to class counsel, including the 1.75 multiplier and the cap at twenty-five percent of the settlement fund, is grossly excessive. We decline to address this argument at this time. On remand, we expect the district court to revisit all aspects of the award to class counsel.

V

We conclude that incentive agreements, entered into as part of five named plaintiffs' retainer agreement with counsel, created conflicts among them (later certified as class representatives), their counsel (later certified as class counsel), and the rest of the class. It was inappropriate not to disclose these agreements at the class certification stage, because an ex ante incentive agreement is relevant to whether a named plaintiff who is party to one can adequately represent the class. However, this impropriety did not require the district court to reject the settlement negotiated in this case because two non-conflicted class representatives with non-conflicted counsel participated. Nor did the district court clearly abuse its discretion in determining that the amount of the settlement favored approval, whether compared to the likely recovery of single, or treble, damages. By any measure, this settlement is fair, adequate, and reasonable.

The district court should have recognized that Objectors' position on the impropriety of incentive agreements had some effect on its decision to deny the request for incentive awards; and it should have considered what effect, if any, the ethics implications of a conflict of interest ***969** created by the incentive agreements had on class counsel's request for an award of attorney's fees.

Therefore, we affirm approval of the settlement. We reverse and remand the award of attorney's fees to class counsel for consideration of the effect, if any, of the incentive agreements on entitlement to fees. We also reverse and remand the denial of fees to Objectors' counsel for a determination of a reasonable amount given their contribution to the denial of the requests for incentive awards.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Each party shall bear its own costs on appeal.

All Citations

563 F.3d 948, 2009-1 Trade Cases P 76,614, 09 Cal. Daily Op. Serv. 4853, 2009 Daily Journal D.A.R. 5810, 60 A.L.R.6th 723

Footnotes

1 Rule 23(b) provides that a class "may be maintained if Rule 23(a) is satisfied and if:

> ...
> (3) the court finds that 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. The matters pertinent to these findings include:
>
> (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."

2 James Juranek, Audrey Juranek, Richard P. Leblanc; Robert Gaudet, Andrea Boggio, Sandeep Gopalan, Elizabeth DeLong; Pamela Collins; David Feldman, Cameron Gharabiklou, Emily Grant, Jeff Lang, Sarah McDonald, Cara Patton, Rachel Schwartz, Greg Thomas; Sarah Siegel, Evans & Mullinix, P.A., Jennifer Brown McElroy, Daniel Schafer, Jason Tingle, David Oriol; and George Schneider, Jonathan M. Slomba, James Puntumapanitch, Justice Head, Ryan Helfrich. We refer to these groups collectively as "Objectors" and treat the issues as if raised by all of them. Each group does, however, make discrete arguments. We have considered all of the arguments even though we may not discuss them specifically. To the extent not addressed, we are not persuaded of their merit.

3 The Central District of California has adopted the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions applicable to the Act and Rules. C.D. Cal. L.R. 83–3.1.2.

4 Congress has also expressed concern with the potential abuses of incentive awards. The Private Securities Litigation Reform Act of 1995 (PSLRA) prohibits granting incentive awards to class representatives in securities class actions. *See* 15 U.S.C. § 78u–4(a)(2)(A)(vi). More recently, in the Class Action Fairness Act of 2005 (CAFA), Congress made the following finding: "Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where ... (B) unjustified awards are made to certain plaintiffs at the expense of other class members." Pub.L. No. 109–2, § 2(a)(3), 119 Stat. 4.

5 Objectors suggest that the "clear sailing" provision by which West and Kaplan agreed not to contest attorney's fees or incentive awards of no more than $25,000 evinces collusion. However, both payments were to be made from the settlement fund, capped at $49 million. This scenario does not signal the possibility of collusion because, by agreeing to a sum certain, West and Kaplan were acting consistently with their own interests in minimizing liability. *Cf.* *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir.1991) (inferring collusion from a "clear sailing" provision when the attorney's fees were to be paid on top of the settlement fund as this is counterintuitive defense behavior).

6 No other adequacy-based ground for rejecting the settlement appears. Objectors suggest that an intra-class conflict exists based on speculation that the statute of limitations and tolling principles would allow only a subclass to pursue the section 7 claim, but whether a subclass actually exists has not been adjudicated. The first amended complaint alleges the section 7 claim on behalf of the entire class, and the settlement provides compensation to the entire class for this claim. Thus, any potential conflict did not materialize and there is no cognizable prejudice. *See generally* *Amchem Prods.*, 521 U.S. at 627, 117 S.Ct. 2231.

7 *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615,

630 (6th Cir.2007) ("Rule 23(e) does not require the notice to set forth every ground on which class members might object to the settlement."); *In re Traffic Executive Ass'n Eastern R.R.,* 627 F.2d 631, 634 (2d Cir.1980) (requiring the class notice to be "scrupulously neutral"); *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 122 (8th Cir.1975) (same).

[8] *But see* *In re Compact Disc Minimum Advertised Price Antitrust Litig.,* 216 F.R.D. 197, 210 n. 30 (D.Me.2003); *In re Auction Houses Antitrust Litig.,* No., 00 Civ. 0648(LAK), 2001 WL 170792, at **7–10 (S.D.N.Y. Feb. 22, 2001).

[9] *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (establishing threshold standards for admissibility of expert scientific testimony).

[10] To the extent one group of objectors claims this is misleading because class members lacked access to records that were sealed pursuant to a protective order, that group did not take advantage of access which was provided and sought to unseal those records more than three weeks after the deadline for filing objections. The district court denied that motion as untimely, which it had discretion to do. *See* *United States v. W.R. Grace,* 526 F.3d 499, 508–09 (9th Cir.2008) (en banc).

End of Document

- Exhibit 12 -

2023 WL 8891575
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Stephen J. TUTTLE, et al., Plaintiffs,
v.
AUDIOPHILE MUSIC DIRECT, INC., et al., Defendants.

CASE NO. C22-1081JLR
|
Signed December 26, 2023

Attorneys and Law Firms

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ORDER

JAMES L. ROBART, United States District Judge

I. INTRODUCTION

***1** Before the court are Plaintiffs Stephen J. Tuttle and Dustin Collman's (collectively, "Plaintiffs") motions for (1) final approval of their proposed class action settlement with Defendants Audiophile Music Direct, Inc. ("Music Direct") and Mobile Fidelity Sound Lab Inc. ("MoFi") (together, "Defendants") (Approval Mot. (Dkt. # 56)) and (2) approval of attorneys' fees, costs, and class representative service awards (Fees Mot. (Dkt. # 49)). The court received seven objections to the proposed settlement. (Objs. (Dkt. ## 44-47, 52-54).) Class counsel filed a response to the objections, and Defendants filed a brief in support of Plaintiffs' motion for final approval. (Objs. Resp. (Dkt. # 58); Approval Resp. (Dkt. # 60).)

The court held a final approval hearing on October 30, 2023, during which counsel for Plaintiffs and Defendants presented argument in support of the parties' settlement. (*See* 10/30/2023 Min. Entry (Dkt. # 64); 10/30/23 Hr'g Tr. (Dkt. # 67).) None of the Objectors appeared at the hearing. (*See* 10/30/2023 Min. Entry.) On November 13, 2023, Plaintiffs filed supplemental information in response to questions the court asked at the hearing. (11/13/23 Supp. (Dkt. # 70); *see* 10/30/23 Min. Order (Dkt. # 65) at 2 (listing the court's questions).) The court has reviewed all of the foregoing, the relevant portions of the record, and the governing law. Being fully advised, the court GRANTS Plaintiffs' motions for final approval of the class action settlement and for attorneys' fees, costs, and class representative service awards.

II. BACKGROUND

Below, the court sets forth the factual and procedural background relevant to Plaintiffs' motions.

A. Factual Background

Defendants are producers and sellers of vinyl music records. (Am. Compl. (Dkt. # 14) ¶ 1.) One of Defendants' product lines, according to Plaintiffs, "consists of analog recordings that are made without the use of digital processing, i.e., by duplicating the original analog master recordings using only analog processes." (*Id.*) Plaintiffs assert that recordings made without a digital processing step, known as "triple-analog" recordings, are "highly valued by high-end audiophiles and collectors" and as a result, Defendants were able to charge a "high premium" for recordings that they claimed were produced without a digital processing step. (*Id.* ¶¶ 1, 22-24.)

At issue in this case are 124 of Defendants' "Original Master Recording" ("OMR") and "Ultradisc One-Step" ("One-Step") recordings, which, according to Plaintiffs, Defendants represented as being triple-analog offerings when they in fact were produced using a digital processing step (the "Applicable Records"). (*Id.* ¶¶ 2-3; *see also id.* ¶ 27 (quoting a July 27, 2022 statement in which Defendants' president, James Davis, acknowledged that Defendants had used digital technology in their mastering chain); 3/31/23 Davis Decl. (Dkt. # 41-1) ¶ 2 (stating that Defendants' investigation identified 124 Applicable Records); 2/2/23 Turner Decl. (Dkt. # 28) ¶ 2, Ex. 1 ("Agreement"), Ex. A (listing the Applicable Records).) Defendants also offer base-level

"Silver Label" recordings that retail for $29.99. (3/31/23 Davis Decl. ¶ 8(a).) OMR recordings, which sell for $39.99, are made of heavier and costlier vinyl than the Silver Label recordings and are "produced using a more expensive manufacturing process, a more expensive and higher grade of packaging, a higher level of quality control, and a more exacting and time-consuming mastering process." (*Id.*) One-Step recordings, which retail for approximately $120.00, are double-album box sets made from even higher-grade vinyl than the OMR recordings and are produced using a "more time-consuming and vastly more expensive 'One-Step' plating and cutting process" than the OMR and Silver Label recordings. (*Id.* ¶¶ 8(b)-(c).) In addition, each One-Step box set "includes additional, premium packaging, including the cover box itself, gold-foil stamping, inner liners and protective foam inserts, and other inserts and/or photos not otherwise available" in Defendants' other recordings. (*Id.* ¶ 8(d).) Plaintiffs assert, on behalf of themselves and proposed Washington and nationwide classes, that they reasonably relied on Defendants' representations that the Applicable Records were produced using analog-only processes; purchased the recordings either directly from Defendants or from third-party retailers in reliance on those representations; and suffered damage as a result. (Am. Compl. ¶¶ 2, 30, 35 (proposed Washington class definition), 36 (proposed national class definition).)

***2** Defendants' sales records indicate that they sold over 634,000 Applicable Records between 2007 and July 27, 2022. (1/15/23 Turner Decl. (Dkt. # 18) ¶ 2.) Defendants sold approximately 25% of the Applicable Records directly to retail customers ("direct purchasers"), and the remaining 75% through other retailers such as Target and Walmart ("indirect purchasers"). (*Id.*) Plaintiffs' research indicates that "most, if not all" of the Applicable Records that have been cared for properly have a value on the secondary market that exceeds their original purchase price. (*Id.* ¶ 4; 3/31/23 Turner Decl. (Dkt. # 40) ¶ 3 (listing the resale value for a sampling of Applicable Records).)

B. Procedural Background

Plaintiffs filed this action on August 2, 2022, and amended their complaint on December 20, 2022. (Compl. (Dkt. # 1); Am. Compl.) They raised a claim for violation of the Washington Consumer Protection Act, ch. 19.86 RCW, on behalf of the Washington class and claims for breach of contract, unjust enrichment, and violation of the Illinois Consumer Fraud Act, 815 Ill. Comp. Stat. 505/2, on behalf of the nationwide class. (Am. Compl. ¶¶ 35-36, 46-69.)

Between August 18 and September 23, 2022, other sets of plaintiffs filed separate proposed class actions against Defendants in the Northern District of Illinois, the Central District of California, and the Northern District of California. *See Stiles v. Mobile Fidelity Sound Lab, Inc.*, No. 1:22-cv-04405 (N.D. Ill.) (filed August 18, 2022); *Bitterman v. Mobile Fidelity Sound Lab, Inc.*, No. 1:22-cv-04714 (N.D. Ill.) (filed September 1, 2022); *Allen v. Audiophile Music Direct*, No. 2:22-cv-08146-GW-MRW (C.D. Cal.) (filed September 22, 2022, in Los Angeles County Superior Court before being removed to federal court); *Molinari v. Audiophile Music Direct*, No. 4:22-cv-05444-CRB (N.D. Cal.) (filed September 23, 2022). Thus, this case is the first-filed action challenging Defendants' alleged misrepresentation of their OMR and One-Step recordings as triple-analog.

Plaintiffs originally moved for preliminary approval of the parties' class action settlement on January 15, 2023. (1/15/23 Mot. (Dkt. # 17).) On January 20, 2023, the court denied the motion without prejudice; directed Plaintiffs to correct several issues the court had identified in Plaintiffs' preliminary approval materials; and granted Plaintiffs leave to submit revised materials with a renewed motion for preliminary approval. (*See generally* 1/20/23 Order (Dkt. # 21).)

On January 27, 2023, Adam Stiles, Omar Flores, and Gregory Bitterman (collectively, "Intervenors"), the named plaintiffs in the *Stiles* and *Bitterman* matters in the Northern District of Illinois, filed a motion to intervene in this case. (MTI (Dkt. # 23).) Plaintiffs filed their revised motion for preliminary approval and amended settlement agreement (the "Agreement") on February 2, 2023. (2/2/23 Mot. (Dkt. # 26); Agreement.) On March 13, 2023, the court granted Intervenors' motion to intervene for the limited purpose of opposing Plaintiffs' revised motion. (3/13/23 Order (Dkt. # 36) at 2.[1])

The court granted Plaintiffs' revised motion for preliminary approval on May 9, 2023. (5/9/23 Order (Dkt. # 42).) In relevant part, the court rejected Intervenors' arguments that the court should deny preliminary approval because the settlement was the result of a "collusive reverse auction"[2] and the relief provided for the class was inadequate. (*See*

generally id.; Intervenors' Resp. (Dkt. # 37).) First, the court determined that the proposed settlement was not the result of a reverse auction because it lacked "the hallmarks of a reverse auction recognized in the case law: ineffectual lawyers, evidence that the defendant negotiated with those lawyers *because of* their supposed ineffectiveness, and overly generous attorneys' fees compared to the relief offered to the class." (5/9/23 Order at 10-13.) Second, the court determined, for the purpose of preliminary approval, that (1) the relief offered to the class was adequate, (2) the scope of the proposed settlement class was reasonable, (3) the Full Refund component of the settlement was not illusory; (4) Intervenors' estimate of Defendants' potential liability did not withstand scrutiny; and (5) the risks of trial and appeal justified the proposed settlement. (*Id.* at 14-21.)

***3** Ultimately, the court concluded that preliminary approval was appropriate under Federal Rule of Civil Procedure 23(e)(1)(B), which requires the settling parties to show that the court "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B); (*see generally* 5/9/23 Order). The court appointed Kroll Settlement Administration, LLC ("Kroll") as Settlement Administrator; Plaintiffs as class representatives for the purpose of settlement; and Plaintiffs' attorney, Duncan Calvert Turner of Badgley Mullins Turner PLLC, as class counsel for the purpose of settlement. (*Id.* at 25.) The court also conditionally certified the proposed settlement class and approved Plaintiffs' proposed notice plan. (*Id.* at 25-26.)

C. Settlement Terms

The proposed settlement class (the "Class") is comprised of:

> All original retail consumers in the United States who, from March 19, 2007, through July 27, 2022 purchased, either directly from a Defendant or other retail merchants, new and unused Mobile Fidelity Sound Lab, Inc. ("MoFi") vinyl recordings which were marketed by Defendants using the series labeling descriptors "Original Master Recording" and/or "Ultradisc One-Step," that were sourced from original analog master tapes and which utilized a direct stream digital transfer step in the mastering chain, and provided that said purchasers still own said recordings (the "Applicable Records"). Excluded from the Class are persons who obtained subject Applicable Records from other sources.

(Agreement ¶ 4.28.) Thus, individuals who (1) no longer own the Applicable Records they purchased, (2) purchased their Applicable Records on the secondary market, or (3) received their Applicable Records from third parties (for example, as gifts) are expressly excluded from the Class. (*See id.*)

The proposed settlement offers class members their choice of three forms of relief. Class members may choose to return their Applicable Records and receive a full refund of the price they paid for those records, plus tax and shipping costs ("Full Refund"). (*Id.* ¶ 5.1(a).) Class members who wish to keep their Applicable Records, meanwhile, may choose either: (1) a refund of five percent of the price they paid for their Applicable Records, plus tax and shipping ("5% Refund"), or (2) a coupon for ten percent of the price they paid for their Applicable Records, plus tax and shipping, that can be redeemed for the purchase of any product offered on Defendants' Music Direct website ("10% Coupon"). (*Id.* ¶¶ 5.1(b)-(c).) Coupons expire 180 days after issuance and are not transferable. (*Id.* ¶ 5.1(c).) A class member may combine the value of multiple coupons when making a purchase on Defendants' website. (*Id.*)

Class members who purchased multiple Applicable Records may select among the three forms of relief for each record—for example, a class member may choose to receive a full refund for one record and a coupon for another. (*Id.* ¶ 5.1(d).) Class members must show both proof of purchase and proof of ownership of their Applicable Records to receive a refund or coupon. (*Id.* ¶¶ 4.23, 4.24, 5.1.) Class members who purchased their records directly from Defendants' websites (that is, "direct purchaser" class members) face a relaxed requirement for showing proof of purchase. (*Id.* ¶ 4.23(d) (stating that these class members need only provide their name plus certain additional information, rather than a receipt).)

Class members who do not opt out of the settlement agree to release Defendants from any claims, known or unknown, which "arise out of or are in any way related to Defendants' marketing, promotion, and sale of the Applicable Records" between March 19, 2007, and July 17, 2022, or which could have been raised in this litigation related to the Applicable Records. (*Id.* ¶¶ 4.1, 4.26, 4.33, 5.6.)

***4** The Agreement also provides that Plaintiffs will request an award of attorneys' fees and costs of $290,000 and ask the court to approve a service award of $10,000 for each of the named Plaintiffs. (*Id.* ¶¶ 5.7.1, 5.7.2.) Attorneys' fees, costs, and service awards will be paid directly by Defendants, and Defendants will bear all expenses and costs arising from the administration of the settlement. (*Id.* ¶¶ 5.3.8, 5.7.1, 5.7.2, 5.8.)

D. Class Response

Defendants estimate that the Class could potentially include 47,000 members: approximately 27,000 direct purchasers plus an additional 20,000 indirect purchasers. (Finegan Decl. (Dkt. # 57) ¶ 5 (stating Kroll identified approximately 27,434 direct purchasers); 1/15/23 Davis Decl. (Dkt. # 19) ¶ 5 (estimating 20,000 indirect purchasers).) As discussed in more detail below, nearly all of the direct purchasers received notice of the settlement by mail or email, and Kroll implemented an extensive publicity campaign that included a press release, summary notice in print publications, and online advertisements in an effort to reach indirect purchasers. (*See infra* Section III.B.) Kroll reports that 1,117 class members filed claims for relief. (11/13/23 Supp. at 2.) Of these, approximately 1,041 claimants received direct notice of the settlement via mail or email. (*Id.*) Kroll's records indicate that nearly 400 claimants purchased Applicable Records both directly from Defendants and indirectly through third-party retailers. (*Id.*)

Claimants filed claims for 12,280 Applicable Records. (*Id.*) Claimants chose the Full Refund option for 2,712 records (22.1%); the 5% Refund option for 3,034 records (24.7%); and the 10% Coupon option for 6,534 records (53.2%). (*Id.*) Kroll estimates that the total monetary benefit to the Class is $359,810.16. (*Id.* at 6.)

Kroll received four requests for exclusion. (*See* Fenwick Decl. (Dkt. # 55) ¶ 5, Ex. A (listing the identifiers for the class members who opted out).) The court received seven objections (*see generally* Objs.), which the court addresses below in context as it reviews the settlement. *See McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 606 (9th Cir. 2021) (requiring district courts to "give a reasoned response to all non-frivolous objections").

III. MOTION FOR FINAL APPROVAL

To grant final approval of a class action settlement, the court must determine that (1) the class meets the requirements for certification under Federal Rule of Civil Procedure 23(a) and (b); (2) notice to the class was adequate; and (3) the settlement reached on behalf of the class is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e). Where the parties reach a settlement agreement before class certification, the court "must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011) (instructing district courts to apply "an even higher level of scrutiny for evidence of collusion or other conflicts of interest" when evaluating pre-certification settlements).

A. Certification of the Settlement Class

The court begins by certifying the Class for the purpose of settlement. Having reviewed the record now before it, the court finds no cause to depart from the reasoning underlying its provisional certification of the Class. (*See* 5/9/23 Order at 21-24 (concluding that the court would likely be able to certify the Class for settlement purposes under Rules 23(a) and 23(b)(3))); *see Juarez v. Soc. Fin., Inc.*, No. 20-cv-03386-HSG, 2023 WL 3898988, at *3 (N.D. Cal. June 8, 2023) (certifying a settlement class for final approval when no material changes occurred between preliminary and final certification); *Lalli v. First Team Real Est.-Orange Cnty.*, No. 8:20-cv-00027-JWH-ADS, 2022 WL 8207530, at *4 (C.D. Cal. Sept. 6, 2022) (same). Accordingly, the court finds that Plaintiffs have met their burden of showing that the requirements of Rules 23(a) and 23(b)(3) have been met and certifies the Class for the purpose of final approval.

B. Adequacy of Notice

***5** The court is satisfied that class members received the "best notice that is practicable under the circumstances," Fed. R. Civ. P. 23(c)(2)(B), and that the notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715 ("CAFA"), were fully discharged. The court found at preliminary approval that the form of notice fully complies with the requirements of Rule 23(c)(2)(B) and sees no reason to depart from that finding now. (5/9/23 Order at 6, 26; *see* Agreement, Exs. C (summary notice), D (long-form notice),

E (claim form).) The notice program included the following components:

Direct Mailed Notice: Kroll used Defendants' records to identify the addresses of 27,434 potential class members who were direct purchasers of Applicable Records. (Finegan Decl. ¶ 5.) On June 23, 2023, Kroll mailed these potential class members a copy of the long-form notice and claim form via first class mail. (*Id.* ¶ 7.) Of these, 876 notices were returned as undeliverable. (*Id.*) Kroll was able to identify 661 updated addresses and re-mailed the notice and claim form to those addresses. (*Id.*)

Direct Emailed Notice: On June 23, 2023, Kroll emailed summary notice to the 27,143 email addresses it had on file for potential direct-purchaser class members and third-party retail merchants. (*Id.* ¶ 8.) Of these, 5,388 emails were rejected or bounced back as undeliverable. (*Id.*) Altogether, Kroll estimates that approximately 99.2% of the potential direct-purchaser class members received notice by mail or email. (Approval Mot. at 4 (citing 10/6/23 Turner Decl. (Dkt. # 59) ¶ 3, Ex. B (Kroll report dated October 1, 2023)).)

Publication in Print Magazines: Kroll published summary notice in three magazines popular with audiophiles: *Goldmine Magazine*, *Stereophile Magazine*, and *The Absolute Sound Magazine.* (Finegan Decl. ¶ 10; *see also id.* ¶ 11, Ex. E (tear-sheet proofs of publication).) Together, these magazines have a circulation of over 107,000. (*Id.* ¶ 11.)

Online Display and Social Media Ads: Kroll purchased online display ads targeted to the websites for *Goldmine Magazine*, *Stereophile Magazine*, and *The Absolute Sound Magazine.* (*Id.* ¶ 12; *see also id.*, Ex. F (examples of online display ads).) It also purchased (1) social media ads on Facebook and Instagram targeted to people who liked, followed, interacted with, or became fans of certain Facebook and Instagram pages, accounts, groups, and hashtags and (2) display ads on "YouTube channels and/or content relevant to vinyl record collectors, original master recordings, audiophiles, Stereophile, and MoFi." (*Id.* ¶¶ 13-16; *see also id.* ¶ 17, Ex. G (examples of social media ads).) In total, more than 1,500,000 online and social media ad impressions were served. (*Id.* ¶ 18.)

Press Release: On July 5, 2023, Kroll distributed a press release regarding the Settlement on PR Newswire USA. (*Id.* ¶ 19; *see id.*, Ex. H (press release and pick-up report).) The press release resulted in 391 mentions of the settlement in news media. (*Id.* ¶ 19.)

Settlement Website: The settlement website, www.audiophilesettlement.com, "went live" on June 23, 2023. (*Id.* ¶ 20.) The website included a summary of the settlement; key documents related to the settlement; a means to contact Kroll with questions; notice of important deadlines; and a form allowing class members to file claims. (*Id.*) The website received over 17,000 unique visitors. (*Id.*) Kroll also established a toll-free telephone number that potential class members could call for information about the Settlement. (*Id.* ¶ 21.) As of October 4, 2023, 588 individuals had called that number. (*Id.*)

***6** CAFA Notice: Kroll sent timely notice of the settlement to the United States Attorney General and all state Attorneys General. (*Id.* ¶ 9, Ex. D (CAFA notice).)

Based on the foregoing, the court concludes that the notice program, as implemented, provided the "best notice that [was] practicable under the circumstances," as required by Rule 23(c)(2)(B) and weighs in favor of final approval of the settlement.

C. Rule 23(e)(2) Analysis

Federal Rule of Civil Procedure 23(e)(2) requires a court to find that a settlement "is fair, reasonable, and adequate" before granting final approval. Fed. R. Civ. P. 23(e)(2). In making this determination, the court must consider 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), [requiring the parties seeking approval to file a statement identifying any agreement made in connection with the proposal]; and
>
> (D) the proposal treats class members equitably relative to each other.

Id. "To survive appellate review, the district court must show it has explored comprehensively all [Rule 23(e)(2)] factors, and must give a reasoned response to all non-frivolous objections." *McKinney-Drobnis*, 16 F.4th at 606 (quoting *Allen v. Bedolla*, 787 F.3d 1218, 1223-24 (9th Cir. 2015)). District courts examining whether a proposed settlement comports with Rule 23(e)(2) are also guided by the eight "*Churchill* factors." *Kim v. Allison*, 8 F.4th 1170, 1178 (9th Cir. 2021). These factors are: "(1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

The court may not apply a presumption that the settlement was fair and reasonable, and settlements reached before class certification are subject to "extra scrutiny." *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 776 (9th Cir. 2022). "This more exacting review [helps] to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the unnamed plaintiffs who class counsel had a duty to represent." *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 (9th Cir. 2019) (cleaned up).

> 1. Whether the class representatives and class counsel have adequately represented the class under Rule 23(e)(2)(A) and whether the proposal was negotiated at arm's length under Rule 23(e)(2)(B).

***7** Because Intervenors' allegation that the settlement was the result of a collusive reverse auction implicated both the adequacy of representation and the propriety of the parties' settlement negotiations, the court addressed Rules 23(e)(2)(A) and (B) together in its preliminary approval order. (*See* 5/9/23 Order at 9-14.) The court does the same in this order and concludes that Rules 23(e)(2)(A) and (B) favor final approval.

In its preliminary approval order, the court rejected Intervenors' argument that the settlement resulted from a collusive reverse auction and found that the parties' settlement was the result of an arm's-length negotiation. (*See* 5/9/23 Order at 9-14.) None of the Objectors raised concerns about collusion and the court finds nothing in the record now before it that would call its original finding into question. (*See generally* Objs.; *see also infra* Section III.C.2.d (addressing the *Bluetooth* factors, which require the court to review the settlement for "subtle signs" that the settlement is the result of collusion. *See In re Bluetooth*, 654 F.3d at 947.).) Therefore, the court incorporates into this order the portion of its preliminary approval order in which it rejected Intervenors' argument that the settlement is the product of a reverse auction and renews its conclusion that the settlement was negotiated at arm's length. (5/9/23 Order at 9-14.)

Second, the court preliminarily approved Mr. Turner and his law firm as class counsel for the purpose of settlement after concluding that the settlement was not a collusive reverse auction and considering counsel's record of effective class action advocacy. (*See id.* at 9-14, 25.) None of the Objectors raised any concerns about the adequacy of class counsel (*see generally* Objs.), and the court finds no reason in the record now before it to depart from its original finding. Therefore, the court finds for purposes of final approval that Mr. Turner and his firm have adequately represented the Class.

Third, the court preliminarily appointed Plaintiffs as class representatives based on class counsel's representation that they had provided useful information "about the relevant recordings, the technical aspects of the recording market, and the primary and secondary markets for the Applicable Records." (5/9/23 Order at 13-14 (citing 1/15/23 Turner Decl. ¶ 6), 25.) The court also preliminarily concluded that the $10,000 service awards would "not undermine [Plaintiffs'] adequacy as representatives because the settlement is not contingent on the court awarding the requested awards and the awards are not tied to the ultimate class recovery." (*Id.* at 14 (citing *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009)).) More recently, class counsel stated that:

> Prior to settlement, both Class Representatives assisted [class counsel] in understanding the

> audiophile community, the market for limited-run vinyl records, and the manufacturing processes at play in this dispute. Since settlement, they have continued to monitor the status of the notice program and remain in close communication and are available to respond to any questions or inquiries [class counsel] raise[s]. Their proactive contribution to this litigation has been substantial, especially given the reputational risk associated with representing a class of over 25,000 individuals.

(7/18/23 Turner Decl. (Dkt. # 50) ¶ 21.) Mr. Tuttle estimates that he contributed a minimum of 20 hours to this case and Mr. Collman estimates that he contributed at least 100 hours. (11/13/23 Supp. at 5-6.) Based on this information, the court concludes that Plaintiffs have adequately represented the Class. Thus, the court finds that Rules 23(e)(2)(A) and (B) weigh in favor of final approval of the settlement.

2. Whether the relief provided to the class members is adequate, taking into account the four Rule 23(e)(2)(C) factors.

***8** The court preliminarily concluded, after considering the Rule 23(e)(2)(C) subfactors, that the relief the settlement provides to the class is adequate. (*See* 5/9/23 Order at 14-21.) Several Objectors, however, have raised concerns about the adequacy of relief. (*See generally* Objs.) "An objector to a proposed settlement agreement bears the burden of proving any assertions they raise challenging the reasonableness of a class action settlement." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 583 (N.D. Cal. 2015) (citing *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990)); *see also* *Sekiya v. Gates*, 508 F.3d 1198, 1200 (9th Cir. 2007) (rejecting objections that contained "[b]are assertions and lists of facts unaccompanied by analysis and completely devoid of caselaw"). The court considers the relevant objections below in the context of its analysis of the Rule 23(e)(2)(C) subfactors. *See* *McKinney-Drobnis*, 16 F.4th at 606.

a. General Objections to the Relief Offered

Several Objectors complain in general terms that the compensation the Settlement offers to class members is inadequate. None of these objections, however, sway the court from its initial conclusion that the relief offered is adequate.

First, Konstantin Azvolinsky and Mark Allen[3] object that the settlement underestimates the premium that class members paid to purchase triple-analog recordings. (Azvolinsky Obj. (Dkt. # 47); Allen Obj. (Dkt. # 54) at 10-11.) Mr. Azvolinsky argues that the 5% Refund option is inadequate in light of the "price gap" between "regular MoFi" recordings and the higher-priced One-Step recordings and similar high-end recordings sold by other entities. (Azvolinsky Obj.) He asserts that a 25% refund would be sufficient. (*Id.*) He does not, however, include any evidence or analysis to support his proposal. (*Id.*) Mr. Allen also argues that the premium class members paid for OMR and One-Step recordings "far exceeded the 5% or 10% offered" by the settlement. (Allen Obj. at 10.) He argues that it "strains credulity to believe that Defendants would have put so much marketing effort to misrepresent to consumers that its titles were all-analog or AAA vinyl reissues and, as they argue, use premium materials for their OMR and [One-Step recordings] to capture only a 5% or 10% premium price." (*Id.*) To support this assertion, Mr. Allen offers links to pages on MoFi competitor Acoustic Sounds' website, which offers a triple-analog recording of *Pretzel Logic* by Steely Dan for $150.00 and the same album recorded with a digital step for $29.98. (*Id.*)

The court addressed this issue in depth in its preliminary approval order and determined that the higher price of OMR and One-Step recordings was based not only on being marketed as triple-analog but also on factors such as packaging, vinyl quality, and the manufacturing process. (*See* 5/9/23 Order at 18-19.) Mr. Azvolinsky and Mr. Allen offer nothing new to alter this conclusion. Indeed, in the court's view, Mr. Allen's objection *supports* the conclusion that the price difference between MoFi's Silver Label and One-Step recordings cannot be attributed solely to Defendants' representation that One-Step recordings were triple-analog. (*See id.*) According to Acoustic Sounds' website, the $150.00 "Ultra High Quality Record" version of *Pretzel Logic* is a limited-edition release on 200-gram clear vinyl with premium packaging, while its $29.98 offering is on 180-gram vinyl and the website says nothing about packaging or whether the release was limited.[4] Thus, the differences between Acoustic Sounds' standard and premium releases that justify the higher price of the premium offering are very similar to the differences between MoFi's Silver Label and One-Step releases. The court overrules Mr. Azvolinsky and

Mr. Allen's objections relating to the price premium associated with triple-analog recordings.[5]

***9** Second, Kevin Gashlin objects that the proposed settlement is inadequate because it does not take into account the effect of inflation since class members originally purchased their Applicable Records as many as 15 years ago. (Gashlin Obj. (Dkt. # 52).) Mr. Gashlin points to no authority that supports his position (*see id.*), and the court is unaware of any case in which a court found class relief inadequate because refunds were not adjusted for inflation. To the contrary, the court agrees with class counsel that the cumulative effect of inflation has been offset by the value class members have realized by having "had the benefit of having the recordings for all these years." (10/30/23 Hr'g Tr. (Dkt. # 67) at 13:10-19.) Therefore, the court overrules Mr. Gashlin's first objection.

Third, Mr. Gashlin objects that the settlement does not include compensation for the purchase of shipping containers or insurance for use when returning Applicable Records for a refund. (Gashlin Obj.) He is concerned that damage to the records during transit could affect the refund issued. (*Id.*) In response, counsel for Defendants represented at oral argument that (1) MoFi will work with Kroll and the claimants in administering the Full Refund component of the settlement and (2) the audiophiles who purchase records from Defendants are generally accustomed to buying and shipping records and are thus likely to have proper packaging. (10/30/23 Hr'g Tr. at 28:22.) The court is satisfied with Defendants' representation that they will assist class members who chose to return their records for a refund.

Fourth, Mr. Gashlin also objects that the amount of compensation offered to class members is not enough to have a deterrent effect on Defendants. (Gashlin Obj.) Mr. Gashlin does not provide evidence or argument to support this contention, nor does he suggest how much compensation would be sufficient to deter wrongdoing. (*See generally id.*) *See Quiruz v. Specialty Commodities, Inc.*, No. 17-cv-03300-BLF, 2020 WL 6562334, at *8 (N.D. Cal. Nov. 9, 2020) (rejecting objection that the settlement "should be ten times greater" that was "devoid of supporting facts or legal citations") (citing *Young v. LG Chem Ltd.*, 783 F. App'x 727, 737 (9th Cir. 2019)). In addition, counsel for Defendants represented at oral argument that the damage to Defendants' reputation arising from the alleged misrepresentation and the costs of the settlement have had a substantial deterrent effect and have changed the way Defendants explain how their records are made. (10/30/23 Hr'g Tr. at 24:18-25:14, 28:23-29:15.) Therefore, the court also overrules this objection.

Finally, Mr. Allen objects that the court must "more carefully scrutinize" settlements that involve coupons as part of the consideration. (Allen Obj. at 3.) To support this contention, he cites 28 U.S.C. § 1712—CAFA's coupon settlement provision—and *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 830 (N.D. Cal. 2017). (Allen Obj. at 3.) Mr. Allen does not, however, discuss in any detail what that more careful scrutiny should entail, how the court should apply CAFA, or how *Knapp* should inform the court's review of the settlement in this case. (*See id.*) In any event, *Knapp* is distinguishable. That case involved a settlement in which the *only* monetary relief provided to class members was a $10.00 voucher that could be used toward the purchase of any product on the defendants' websites, and the plaintiffs based the value of the settlement on the total cash value of the vouchers, whether they had been redeemed or not. *Knapp*, 283 F. Supp. 3d at 829, 836. The court held that it could not determine an attorneys' fee award until it knew the value of the coupons that class members had actually redeemed. *Id.* at 837-38. Here, in contrast, class members can select a cash refund rather than a coupon; the court is aware of how many coupons class members have requested and the total value of those coupons; and the coupon option has proven to be the most popular choice among class members who have filed claims. (*See* 11/13/23 Supp. at 2.) For these reasons, the court overrules this objection.

***10** The court concludes by observing that every settlement, by its nature, is the result of compromise. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("[T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." (internal quotation marks omitted)). Thus, courts regularly approve class settlements where class members recover far less than the maximum potential recovery. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving a settlement amount that was approximately one-sixth of the maximum possible recovery); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) (approving a settlement amount that was approximately 8.5% of the maximum recovery amount). Here, by contrast, every class member had the opportunity to recover 100% of the amount they paid for their Applicable Records, including tax and shipping. The court concludes that the amount of the settlement is reasonable.

b. Rule 23(e)(2)(C)(i)

The first Rule 23(e)(2)(C) factor requires the court to consider "the costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C)(i). Only Mr. Allen objects on this ground. (*See generally* Objs.) He argues that Plaintiffs have underestimated their risk at trial because Defendants' "liability is more than probable" and explains in detail why he holds this belief. (*See* Allen Obj. at 4-10.) The court, however, agrees with Plaintiffs that their primary risk in this case is not in proving liability, but rather in proving that class members suffered damage when many of the Applicable Records have a higher price on the secondary market than their original purchase price. (Obj. Resp. at 5; *see also* 5/9/23 Order at 20-21 (agreeing with Plaintiffs that their key risk at trial is proof of damages); Koloda Obj. (Dkt. # 46) at 1 (pointing out that one of Defendants' One-Step recordings is "going for between $1500.00 and $4000.00 on e[B]ay[, s]imilar to other limited edition issues by" MoFi).) The court also agrees with Plaintiffs that if the case were to proceed to trial, Defendants would likely argue that class members were "unable to audibly discern between all-analog and digital manufacturing processes, and therefore were not harmed." (Approval Mot. at 7; *see also* Koloda Obj. at 1-2 (questioning whether "these ersatz audiophiles could actually tell the difference between a true analog and a 'tainted' analog product in a blind listening test"); 3/31/23 Davis Decl. ¶ 4 (stating that Defendants "ha[d] not experienced any appreciable loss in sales of OMR and One-Step records ... since July 27, 2022," when Mr. Davis acknowledged that Defendants had used digital technology in their mastering chain).) Thus, Mr. Allen's objection does not move the court to depart from its original conclusion that Plaintiffs would likely face substantial risk at trial. *See, e.g.*, *In re Toys R Us-Del., Inc.--Fair & Accurate Credit Transactions Act Litig.*, 295 F.R.D. 438, 454 (C.D. Cal. 2014) (finding that the amount of the settlement weighed in favor of final approval "[g]iven the likelihood that plaintiffs would have been unable to prove actual damages"). The court concludes that Rule 23(e)(2)(C)(i) favors final approval.

c. Rule 23(e)(2)(C)(ii)

The second Rule 23(e)(2)(C) factor requires the court to consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). The proposed method for processing claims "should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. The court preliminarily approved the settlement's methods of distributing relief and processing claims. (5/9/23 Order at 14-20 (concluding that Rule 23(e)(2)(C) favored preliminary approval).)

***11** Several objectors complain that the settlement's proof of purchase and proof of ownership requirements are too burdensome, especially for records they purchased years ago. Omar Ghaffar objects in general that that the burden of gathering proof of purchase and ownership materials outweighs the value of the settlement, and more specifically that he cannot provide proof of purchase for records he bought at an audio show because he was not given a receipt. (Ghaffar Obj. (Dkt. # 53).[6]) James Luehman complains that he cannot obtain proof of purchase of four records that he purchased eight years ago from a now-defunct retailer. (Luehman Obj. (Dkt. # 44).) And Robbie Hewitt asserts that researching his past transactions and associating them with specific records is overwhelming and onerous. (Hewitt Obj. (Dkt. # 45).) The court overrules these objections.

The court is sympathetic to the difficulty of complying with the proof of purchase requirements, particularly where class members bought their records long ago from third-party retailers. Nonetheless, the court finds that providing proof of purchase and ownership is necessary to ensure that payment is properly made to individuals belonging to the settlement class. *See, e.g.*, *Abadilla v. Precigen, Inc.*, No. 20-CV-06936-BLF, 2023 WL 7305053, at *12 (N.D. Cal. Nov. 6, 2023) (finding requirement to provide proof of purchase of defendant's stock necessary "in light of the prevalence of fraudulent financial activity"); *Broomfield v. Craft Brew All., Inc.*, No. 17-cv-01027, 2020 WL 1972505, at *21 (N.D. Cal. Feb. 5, 2020) (finding age certification provision "necessary to ensure that only those who are legally allowed to purchase Kona Beers received compensation under the Settlement Agreement"). In addition, Defendants' own sales records satisfy the proof of purchase requirement for class members like Mr. Hewitt who were direct purchasers from Music Direct. (Agreement ¶¶ 4.23(c)-(d); *see* Hewitt Obj. (stating that he received direct-mailed notice).) And finally, the Agreement requires Kroll to evaluate proof of purchase and proof of ownership "under liberal term to effect the

intent and purpose of the Settlement." (Agreement ¶¶ 4.23(e), 4.24(c).) The court overrules the objections to the method of distributing relief and concludes that Rule 23(e)(2)(C)(ii) favors final approval.

d. Rule 23(e)(2)(C)(iii)

The third Rule 23(e)(2)(C) factor requires the court to consider whether the terms of the award of attorneys' fees favor approval. Fed. R. Civ. P. 23(e)(2)(C)(iii). In evaluating the proposed award, the district court should be watchful for "subtle signs" that class counsel and the class representatives permitted self-interest to trump their obligation to ensure a fair settlement for the class as a whole. *In re Bluetooth*, 654 F.3d at 947; *see also* *Briseño v. Henderson*, 998 F.3d 1014, 1026 (9th Cir. 2021) (holding that district courts must apply the *Bluetooth* factors even after the 2018 reenactment of Rule 23(e)(2)). These signs are: (1) whether the settlement terms result in class counsel receiving a disproportionate share of the settlement; (2) the presence of a clear sailing provision, under which the defendant agrees not to object to the plaintiff's fee request; and (3) an agreement that unawarded attorneys' fees will revert to the defendant rather than to the class fund. *In re Bluetooth*, 654 F.3d at 947.

The court concludes that the *Bluetooth* factors do not weigh against final approval of the settlement. First, as discussed in detail below, the court has carefully reviewed the record in this case and finds that Plaintiffs' request for $290,000 in combined attorneys' fees and costs is not disproportionate to the amount of the settlement. (*See infra* Section IV.A (approving Plaintiffs' request for attorneys' fees and costs).) Second, the Agreement does not appear to include a clear sailing provision. (*See* Agreement ¶ 5.7.1 (saying nothing about an agreement not to object to the fee request).) Finally, the third sign of collusion—a reversionary provision—is absent from this claims-made settlement. (*See generally id.*) As a result, the court finds that the *Bluetooth* factors do not warrant a finding of collusion and concludes that Rule 23(e)(2)(C)(iii) favors final approval.

e. Rule 23(e)(2)(C)(iv)

***12** The fourth Rule 23(e)(2)(C) factor requires the court to consider "any agreement required to be identified under Rule 23(e)(3)"–that is, "any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(2)(C)(iv), 23(e)(3). No such agreements are at issue in this case. (*See generally* Agreement.)

In sum, the court concludes, based on its review of the Rule 23(e)(2)(C) factors, that the relief the settlement provides to the class is adequate.

3. Whether the proposal treats class members equitably relative to each other under Rule 23(e)(2)(D).

Rule 23(e)(2)(D) requires the court to evaluate whether the settlement proposal "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). The court preliminarily determined that the settlement satisfies Rule 23(e)(2)(D), and reiterates that conclusion here. (5/9/23 Order at 21.) Each class member's recovery is based on the records for which that class member provides proof of purchase and ownership, and the form of relief the class member selected for each record. Furthermore, as explained below in Section IV.B, the court finds that the Plaintiffs' requested $10,000 service awards are reasonable and do not affect the equity of the class compensation on the whole. The court concludes that Rule 23(e)(2)(D), like the other Rule 23(e)(2) factors, weighs in favor of final approval.

4. The *Churchill* Factors Factors

Finally, the *Churchill* factors also support final approval of the settlement. The court considered most of these factors while reviewing the Rule 23(e)(2) factors. *See* *Briseño*, 998 F.3d at 1026 (noting that many of the *Churchill* factors "fall within the ambit of the revised Rule 23(e)"). The court considers the unaddressed factors below.

The court begins with the eighth *Churchill* factor, the reaction of the class, and concludes that this factor favors approval. As discussed above, the court received only seven objections and four requests for exclusion. (*See supra* Section II.D.) Assuming that the class consists of approximately 27,000 direct purchasers and 20,000 indirect purchasers (*see* 11/13/23 Supp. at 3), the result is an objection rate of approximately 0.0149% and an exclusion rate of approximately 0.009%. These rates compare favorably to rates that courts in this Circuit have found support settlement approval. *See, e.g.*, *Churchill*, 361 F.3d

at 577 (affirming the approval of a settlement where the court received 45 objections (0.05%) and 500 opt-outs (0.556%) out of 90,000 class members who received notice); *Rodriguez*, 563 F.3d at 967 (affirming the district court's finding that 54 objections (0.0144%) out of 376,301 putative class members reflected a favorable class reaction); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (approving settlement where 4.86% of the class opted out). In addition, 1,117 claimants out of a potential 47,000-member class results in a claim rate of approximately 2.38%. (*See supra* Section II.D; *see also* 10/30/23 Hr'g Tr. at 7:8-10:3 (questioning counsel about the claims rate).) This rate, too, compares favorably to claim rates that courts in this Circuit have found satisfactory in claims-made settlements. *See, e.g.*, *Johnson v. Metro-Goldwyn-Mayer Studios Inc.*, No. C17-0541RSM, 2018 WL 5013764, at *10 (W.D. Wash. Oct. 16, 2018) (approving settlement where only 0.21% of the class participated in the settlement), *aff'd sub nom. Johnson v. MGM Holdings, Inc.*, 943 F.3d 1239 (9th Cir. 2019), and *aff'd sub nom. Johnson v. MGM Holdings, Inc.*, 794 F. App'x 584 (9th Cir. 2019); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 321 (N.D. Cal. 2018) (approving claim rate of 1.8%, and discussing class actions against Home Depot and Target with claim rates of approximately 0.2% and 0.23%). Accordingly, the court concludes that the positive response of the class members supports approval of the settlement.

***13** The sixth *Churchill* factor, the experience and views of counsel, also favors approval. "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967. Here, class counsel "believe that the Settlement is a 'strong' outcome in light of potential risks of continued litigation" and based on the potential compensation offered to class members. (Approval Mot. at 8.)

Finally, the seventh *Churchill* factor, the presence of a governmental participant, does not apply here. As noted above, Kroll sent timely notice of the settlement pursuant to CAFA (*see supra* Section III.B) and none of the recipient Attorneys General sought to intervene in this action (*see generally* Dkt.).

In sum, the court finds that (1) the class meets the requirements for certification under Rules 23(a) and (b)(3); (2) notice to the class was adequate; and (3) the settlement reached on behalf of the class is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e). Therefore, the court grants Plaintiffs' motion for final approval of the class action settlement.

IV. MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

Plaintiffs move the court to approve an award of $290,000 in combined attorneys' fees and costs and a $10,000 service award for each Plaintiff. (*See generally* Fees Mot.) The court grants Plaintiffs' motion.

A. Attorneys' Fees and Costs

"The touchstone for determining the reasonableness of attorneys' fees in a class action is the benefit to the class." *Lowery v. Rhapsody Int'l, Inc.*, 75 F.4th 985, 988 (9th Cir. 2023). District courts "have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth*, 654 F.3d at 941. A district court can employ either of two methods to calculate fees—the lodestar or a percentage of the recovery. *Kim*, 8 F.4th at 1180. Under the lodestar method, the district court "multiplies the number of hours the prevailing party reasonably spent on litigation by a reasonable hourly rate to determine a presumptively reasonable fee award." *Id.* The court can then adjust the lodestar amount "by an appropriate positive or negative multiplier" to account for factors such as "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id.* at 1180-81 (quoting *In re Bluetooth*, 654 F.3d at 941-42). Under the percentage of the recovery method, meanwhile, "the court simply awards the attorneys a percentage of the [class] fund sufficient to provide class counsel with a reasonable fee." *Id.* at 1181 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998), *overruled on other grounds as recognized by Castillo v. Bank of Am.*, 980 F.3d 723, 729 (9th Cir. 2020)). The court can also adjust this percentage upward or downward. *In re Apple Inc.*, 50 F.4th at 784. Although courts may employ either method, they "often employ the other method as a cross-check that the award is reasonable." *Id.*; *see also* *In re Bluetooth*, 654 F.3d at 942.

1. Lodestar

Because the settlement's value is based on the claims made by the members of the class rather than on a common fund, the court begins by evaluating class counsel's lodestar. *See Johnson*, 2018 WL 5013764, at *6, *12 (finding the lodestar method more appropriate where the settlement "did not create a true common fund as it did not establish a single sum for both class compensation and attorneys' fees").

***14** To determine a reasonable number of hours, the court must consider "whether, in light of the circumstances, the time could reasonably have been billed to a private client." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). The court may reduce the hours claimed if the "documentation of the hours is inadequate"; "if the case was overstaffed and hours are duplicated"; or "if the hours expended are deemed excessive or otherwise unnecessary." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). As of November 13, 2023, class counsel spent a total of 409.2 hours litigating this case. (11/13/23 Supp. at 5.) Mr. Turner, Plaintiffs' lead counsel, billed nearly half of these hours. (*See id.*) The remaining hours were incurred by Mr. Turner's firm's associates and paralegals. (*Id.*; *see* 7/18/23 Turner Decl. ¶¶ 6-14 (describing the role of each individual who billed time to the case).) The court has reviewed class counsel's billing records and concludes that counsel's time has been appropriately documented, that counsel has not unduly duplicated efforts, and that the claimed hours are reasonable. (*See* 7/18/23 Turner Decl. ¶ 16, Ex. 1 (billing records through July 17, 2023).)

The "reasonable hourly rate" used in the lodestar "is the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (internal quotation marks and citations omitted). The relevant community "is the forum in which the district court sits." *Id.* (citing *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)). District judges can also "consider the fees awarded by other judges in the same locality in similar cases," *Moreno*, 534 F.3d at 1115, and rely on their own knowledge and familiarity with the legal market in setting a reasonable rate, *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011) (per curiam). Here, class counsel's hourly rates range from $120.00 for work performed by a legal assistant to $565.00 for Mr. Turner's work. (11/13/23 Supp. at 5; *see* 1/15/23 Turner Decl. ¶¶ 9-12 (describing the class action litigation experience of Mr. Turner and his firm); 7/18/23 Turner Decl. ¶¶ 6-14 (describing the experience and billing rates of Mr. Turner's associate and legal staff).) Based on the totality of the record and the court's familiarity with the Seattle legal market and the fees awarded by other judges in this District, the court is satisfied that the hourly rates requested here are reasonable.

Class counsel represent that their lodestar was $162,053.00 as of November 13, 2023. (11/13/23 Supp. at 5.) As a result, class counsel's requested attorneys' fees award is approximately 1.79 times the lodestar. (*Id.*) A 1.79 multiplier is within the typical range for attorneys' fee awards in the Ninth Circuit. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051-54 & n.6 (9th Cir. 2002) (noting that the majority of fee awards in the district courts in the Ninth Circuit are 1.5 to 3 times higher than the lodestar). Based on the record before it, the court concludes that a 1.79 multiplier is reasonable based on the quality of representation, the benefit obtained for the class, the issues presented, and the contingent nature of this action. *See Kim*, 8 F.4th at 1180-81.

2. Percentage of Recovery Cross-Check

In performing a cross-check against the percentage of recovery, the court must consider the settlement's "actual or anticipated value to the class members, not the maximum amount that hypothetically could have been paid to the class." *Lowery*, 75 F.4th at 988-89; *Kim*, 8 F.4th at 1181 (reversing a fee award because the district court failed to consider "the amount of anticipated monetary relief based on the timely submitted claims."). In common fund cases, the benchmark for a reasonable fee award is 25% of the fund. *In re Bluetooth*, 654 F.3d at 942. Where the settlement is not based on a common fund, the court can cross-check the lodestar against a "constructive fund" based on the amount the defendant is spending to resolve the case. *See id.* at 945 (comparing the lodestar against a constructive fund consisting of attorneys' fees, incentive awards, a *cy pres* award, and administrative costs); *see also Lennartson v. Papa Murphy's Int'l LLC*, No. C15-5307RBL, 2018 WL 4252039, at *2 (W.D. Wash. Sept. 6, 2018) (including administrative costs in the court's calculation of the total class benefit in a claims-made settlement); *Staton*, 327 F.3d at 975 (holding that where the defendant pays the justifiable cost of notice to the class, it is reasonable to include that cost in a putative common fund benefiting the plaintiffs for all purposes); *Johnson*, 2018 WL 5013764, at

*10 (calculating a constructive common fund based on attorneys' fees, costs, and service award).

***15** Here, the constructive fund created by the settlement totals at least $830,000, comprised of approximately $360,000 in class relief (11/13/23 Supp. at 6); $160,000 in administrative costs incurred to date (*id.* at 7) (citing 11/13/23 Madonia Decl. (Dkt. # 71) ¶¶ 2-3); $290,000 in requested attorneys' fees and costs (Agreement ¶ 5.7.1); and $20,000 in requested service awards (*id.* ¶ 5.7.2). Plaintiffs' proposed $290,000 fees and costs award represents approximately 35% of that total. Although this percentage is higher than the 25% benchmark, it is not so high, in the court's view, as to render the requested fee award unreasonable. *See, e.g.*, *Paredes Garcia v. Harborstone Credit Union*, No. C21-5148LK, 2023 WL 7412842, at *8 (W.D. Wash. Nov. 9, 2023) (awarding fees constituting 41% of the "total cash going toward settlement"); *Lalli*, 2022 WL 8207530, at *6 (finding an award of attorneys' fees and costs constituting 43% of the total settlement fund "steep, but not necessarily disproportionate"); *Johnson*, 2018 WL 5013764, at *10 (awarding fees constituting 54.81% of the constructive fund). The court concludes that the percentage of recovery cross-check supports approval of Plaintiffs' attorneys' fees motion.[7]

3. Costs

The court also concludes that class counsel's claimed costs are reasonable. Class counsel may recover reasonable expenses that "would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (quoting *Chalmers*, 796 F.2d at 1216 n.7). Class counsel represent that they incurred $2,157.44 in litigation costs through November 13, 2023. (11/13/23 Supp. at 5; *see also* 7/18/23 Turner Decl. ¶ 23, Ex. 2 (cost records through July 18, 2023).) The costs are included in the $290,000 fees award, and thus do not affect the relief received by the Class. (*See* Agreement ¶ 5.7.1.) The court has reviewed the costs incurred by class counsel and finds that they were reasonable, necessary, and the types of costs normally charged to a paying client. Therefore, the court approves Plaintiffs' request for a combined award of $290,000 in attorneys' fees and costs.

B. Service Awards

Finally, the court grants Plaintiffs' request for a $10,000 service award for each class representative. Service awards are commonplace in class actions and are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d at 958-59. When evaluating the propriety of such payments, district courts consider, among other factors, " 'the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation,' and any financial or reputational risks the plaintiff faced." *In re Apple Inc.*, 50 F.4th at 786 (quoting *SFBSC Mgmt., LLC*, 944 F.3d at 1057). "[D]istrict courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives." *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013). Service awards are less likely to create conflicts between the named plaintiff and absent class members when (1) there is no *ex ante* agreement between the class representative and class counsel regarding the award; (2) the discretion to make an award is left to the district court; and (3) the awards are not conditioned on the class representative's support for the settlement agreement. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015). In the Ninth Circuit, a $5,000 service award "is presumptively reasonable." *McDonald v. CP OpCo, LLC*, No. 17-CV-04915-HSG, 2019 WL 2088421, at *7 (N.D. Cal. May 13, 2019) (compiling cases).

***16** The court preliminarily concluded that the proposed $10,000 awards were reasonable and did not undermine Plaintiffs' adequacy as class representatives "because the settlement is not contingent on the court awarding the requested awards and the awards are not tied to the ultimate class recovery." (5/9/23 Order at 14 (citing *Rodriguez*, 563 F.3d at 958-59); *see also* Agreement ¶ 5.7.2.) Since then, class counsel has provided additional information about the actions Plaintiffs have taken to assist in the prosecution of this case. (*See supra* Section III.C.1; *see also* Fees Mot. at 16 (noting that Plaintiffs risked "reputational harm among the audiophile community" by pursuing this action).) Although a $10,000 service award is twice the benchmark, it is not an unreasonable amount considering the service Plaintiffs have provided to the class and the potential for reputational harm. *See, e.g.*, *McDonald*, 2019 WL 2088421, at *8 (rejecting a

request for a $15,000 service award but concluding that an award of $10,000—"twice the presumption"—was reasonable to compensate the class representative for his involvement in the lawsuit and the reputational risk he incurred). In addition, courts in this District have approved service awards of $10,000 or more. *See, e.g.*, *Wilson v. Huuuge*, No. C18-5276RSL, 2021 WL 512229, at *2 (W.D. Wash. Feb. 11, 2021) (approving a $10,000 service award); *Reed v. Light & Wonder, Inc.*, No. C18-0565RSL, 2022 WL 3348217, at *2 (W.D. Wash. Aug. 12, 2022) (same); *Lennartson*, 2018 WL 4252039, at *2 (awarding $15,000 to each class representative). The court concludes that the $10,000 service awards requested are reasonable.

The court received one objection relating to the service awards. Richard J. Koloda objects to the court awarding Plaintiffs $10,000 each while they are still allowed to keep their allegedly "defective" records. (Koloda Obj. at 1-2.) He thinks it is unfair that Plaintiffs are "permitted to retain a valuable product that will only increase as an asset" and finds it "disconcerting" that Plaintiffs only filed their complaint after Defendants acknowledged that the Applicable Records included a digital processing step. (*Id.* at 2 (pointing out that the quality of the recordings is excellent and that the allegedly "tainted" records have been well-received for years).) As class representatives, however, Mr. Tuttle and Mr. Collman are entitled to receive the benefit of the settlement they helped to obtain. Therefore, the court overrules Mr. Koloda's objection and grants Plaintiffs' request for a $10,000 service award for each class representative.

V. CONCLUSION

For the foregoing reasons, the court GRANTS Plaintiffs' motions for final approval of the parties' class action settlement (Dkt. # 56) and for attorneys' fees, costs, and class representative service awards (Dkt. # 49). The court ORDERS as follows:

1. The parties' proposed class action settlement is APPROVED;

2. Plaintiffs' request for an award of $290,000 in combined attorneys' fees and costs is GRANTED;

3. Plaintiff's request for $10,000 service awards for class representatives Stephen J. Tuttle and Dustin Collman is GRANTED;

4. The Parties are DIRECTED to proceed with the settlement payment procedures specified in the settlement Agreement;

5. Defendants are DIRECTED to fund the settlement; 6. The Settlement Administrator is AUTHORIZED to distribute the settlement funds;

7. The Settlement Administrator is DIRECTED to distribute the attorneys' fees and service awards as provided in this order;

8. The court RESERVES jurisdiction over the parties as to all matters relating to the administration, consummation, enforcement, and interpretation of the settlement Agreement, this order; and for any other necessary purposes;

9. The settlement Agreement is given full force and effect, and the Released Claims of the class representatives and individual settlement class members, as articulated in the settlement Agreement, are released and forever discharged; and

10. This action is DISMISSED in its entirety with prejudice.

All Citations

Not Reported in Fed. Supp., 2023 WL 8891575

Footnotes

1 None of the Intervenors filed objections to the settlement. (*See generally* Dkt.)

2 "A reverse auction is said to occur when 'the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant.' " *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1099 (9th Cir. 2008) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002)).

3 Mr. Allen is the named plaintiff in *Allen v. Audiophile Music Direct.* (*See supra* Section II.B.)

4 *Compare Steely Dan - Pretzel Logic (45 RPM 200 Gram Clarity Vinyl)*, Acoustic Sounds, https://store.acousticsounds.com/d/171037/Steely_Dan-Pretzel_Logic-UHQR_Vinyl_Record (last visited Dec. 22, 2023) ($150.00 offering), *with Steely Dan - Pretzel Logic*, Acoustic Sounds, https://store.acousticsounds.com/d/179567/Steely_Dan-Pretzel_Logic-180_Gram_Vinyl_Record (last visited Dec. 22, 2023) ($29.98 offering).

5 Mr. Azvolinsky asks to be excluded from the settlement if the court approves it as is. (Azvolinsky Obj.) Because the court grants Plaintiffs' motion for final approval, the court grants Mr. Azvolinsky's request for exclusion.

6 Mr. Ghaffar also objects that he does not have receipts for recordings he received as gifts. (*Id.*) Recordings transferred from third parties, including gifts, are expressly excluded from the settlement. (*See* 5/9/23 Order at 15-16.)

7 The court notes that the constructive fund totals approximately $772,000 if the value of the 10% Coupon option is subtracted from the class relief. (*See* 11/13/23 Supp. at 2 (stating that the total base value of the 10% Coupon option is $48.418.99, based on class members' selections), 6 (stating that $4,962.95 in taxes and $4,363.64 in shipping costs are attributable to the 10% Coupon option).) The proposed $290,000 fees and costs award represents approximately 37.6% of that total. Thus, even if the court does not include the value of the coupons in the constructive fund, *see Knapp*, 23 F. Supp. 3d at 838, the percentage of the fund attributable to attorneys' fees and costs is still within the range that courts have found reasonable.

- Exhibit 13 -

KeyCite Yellow Flag
Declined to Extend by Fritsch v. Swift Transportation Company of Arizona, LLC, 9th Cir.(Cal.), August 8, 2018

290 F.3d 1043
United States Court of Appeals, Ninth Circuit.

Donna VIZCAINO; Lesley Stuart, Plaintiffs–Appellants,
Donna Vizcaino; Jon R. Waite; Mark Stout; Geoffrey Culbert; Lesley Stuart; Thomas Morgan; Elizabeth Spokoiny; Larry Spokoiny, Plaintiffs–Appellees,
v.
MICROSOFT CORPORATION, and its health and benefits plans: Health Benefit Plan, Life Insurance Plan, Short–Term and Long–Term Disability Plans, and Savings (401K) Plan, Defendant.
Donna Vizcaino; Lesley Stuart, Plaintiffs–Appellants, and
Donna Vizcaino; Jon R. Waite; Mark Stout; Geoffrey Culbert; Thomas Morgan; Elizabeth Spokoiny; Larry Spokoiny; Lesley Stuart, Plaintiffs–Appellees,
v.
Microsoft Corporation, and its health and benefits plans: Health Benefit Plan, Life Insurance Plan, Short–Term and Long–Term Disability Plans, and Savings (401K) Plan, Defendant.

Nos. 01–35494, 01–35644
|
Argued and Submitted Feb. 20, 2002.
|
Filed May 15, 2002.

Synopsis
After reaching $96.885 million settlement agreement for employee benefits under software company's employee stock purchase plan (ESPP) on behalf of class of employees, attorneys for the employees sought approval for their request for percentage-based fee of $27,127,800, which was 28% of settlement fund. The United States District Court for the Western District of Washington, John C. Coughenour, Chief Judge, approved fee request. Appeal was taken, and the Court of Appeals, Schwarzer, Senior District Judge, sitting by designation, held that: (1) district court did not abuse its discretion by finding a 28% attorney fee award to be reasonable, under the percentage method; (2) application of lodestar cross-check, which resulted in multiplier of 3.65, to approve award was within court's discretion; and (3) objectors to fee award did not bring a benefit to class or increase fund, and thus were not entitled to recover attorney fees.

Affirmed.

West Headnotes (15)

[1] **Federal Courts** Costs and attorney fees
Court of Appeals reviews for abuse of discretion an order approving a request by class counsel for attorney fees.
49 Cases that cite this headnote

[2] **Federal Courts** Costs and attorney fees
Washington law, which governed claim asserted in class action, also governed award of attorney fees out of common fund.
65 Cases that cite this headnote

[3] **Attorneys and Legal Services** Percentage method
Under Washington law, the percentage-of-recovery approach is used in calculating attorney fees in common fund cases.
184 Cases that cite this headnote

[4] **Attorneys and Legal Services** Lodestar method
Attorneys and Legal Services Percentage method
In determining attorney fee awards in common fund cases, district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method.
951 Cases that cite this headnote

[5] **Attorneys and Legal Services** Percentage method
In passing on post-settlement attorney fee

applications in common fund cases, courts cannot rationally apply any particular percentage in the abstract, without reference to all the circumstances of the case, and the question is not whether the district court should have applied some other percentage, but whether in arriving at its percentage it considered all the circumstances of the case and reached a reasonable percentage.

46 Cases that cite this headnote

[6] **Attorneys and Legal Services**🔑Labor and employment

Under Washington law, district court did not abuse its discretion by finding a 28% attorney fee award to be reasonable, under the percentage method, for class counsel who had represented freelance workers employed by software company in action for benefits under company's employee stock purchase plan (ESPP), which had resulted in $96.885 million settlement; counsel achieved exceptional results in case that was extremely risky, performance of counsel generated benefits beyond settlement fund, and representation imposed significant burden on counsel.

230 Cases that cite this headnote

[7] **Attorneys and Legal Services**🔑Measure and Amount of Compensation in General

Exceptional results are a relevant circumstance in calculating attorney fee award in a common fund case.

116 Cases that cite this headnote

[8] **Attorneys and Legal Services**🔑Measure and Amount of Compensation in General

Risk is a relevant circumstance in calculating attorney fee award in a common fund case.

183 Cases that cite this headnote

[9] **Attorneys and Legal Services**🔑Labor and employment

District court did not abuse its discretion when it applied lodestar cross-check, which resulted in multiplier of 3.65, in approving 28% attorney fee award under percentage method for class counsel who had represented freelance workers employed by software company in action for benefits under company's employee stock purchase plan (ESPP), which had resulted in $96.885 million settlement.

218 Cases that cite this headnote

[10] **Attorneys and Legal Services**🔑Lodestar and percentage methods compared or combined

Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award of attorney fees in a common fund case.

639 Cases that cite this headnote

[11] **Attorneys and Legal Services**🔑Labor and employment

District court acted within its discretion when it calculated fees incurred by attorneys who represented class at prevailing rates, in order to compensate for delay in receipt of payment, when it applied lodestar cross-check to attorney fee award from common fund, that was made under the percentage method, to class counsel who had represented freelance workers employed by software company in action for benefits under company's employee stock purchase plan (ESPP), which had resulted in $96.885 million settlement.

395 Cases that cite this headnote

[12] **Attorneys and Legal Services**🔑Measure and Amount of Compensation in General

Bar against risk multipliers in statutory attorney fee cases does not apply to common fund cases.

92 Cases that cite this headnote

[13] **Attorneys and Legal Services**🔑Labor and employment

Under Washington law, class members who objected to initial award of attorney fees out of common fund for class counsel that represented freelance workers employed by software company in action for benefits under company's employee stock purchase plan (ESPP), which had

resulted in $96.885 million settlement, did not increase the fund or otherwise substantially benefit the class members, and thus were not entitled to recovery attorney fees.

133 Cases that cite this headnote

[14] **Attorneys and Legal Services** Compensation from Funds in Court; Common Fund

Under Washington law, equitable common fund/common benefit doctrine authorizes attorney fees only when the litigants preserve or create a common fund for the benefit of others as well as themselves.

17 Cases that cite this headnote

[15] **Attorneys and Legal Services** Compensation from Funds in Court; Common Fund

Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts awarding attorney fees from a common fund must assume the role of fiduciary for the class plaintiffs, and accordingly, fee applications must be closely scrutinized, and rubber-stamp approval, even in the absence of objections, is improper.

74 Cases that cite this headnote

Attorneys and Law Firms

***1045** Charles K. Wiggins, Bainbridge Island, Washington, and Stephen K. Strong, David F. Stobaugh, Stephen K. Festor and Brian J. Waid, Bendich, Stobaugh & Strong, P.C., Seattle, WA, for the plaintiffs-appellees.

***1046** Lawrence W. Schonbrun, Law Offices of Lawrence W. Schonbrun, Berkeley, CA, for the plaintiffs-objectors-appellants.

Carol S. Arnold, Seattle, WA, for the defendant-appellee.

Before REINHARDT and HAWKINS, Circuit Judges, and SCHWARZER,* Senior District Judge.

OPINION

SCHWARZER, Senior District Judge.

Once more we must address an issue arising out of the protracted litigation between Microsoft Corporation and its freelance workers, this time to decide whether the district court abused its discretion in the amount of attorneys' fees it awarded to class counsel.

FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 1987, Microsoft supplemented its workforce with workers known as "freelancers," who agreed in writing that they would not be eligible for Microsoft employee benefits, including the Employee Stock Purchase Plan ("ESPP") and the Savings Plus Plan ("SPP"). In 1992, eight former freelancers brought this action challenging Microsoft's refusal to provide them with benefits under these plans. The district court certified a class and dismissed the action. After a panel of this court reversed the dismissal of both the ESPP and SPP claims,[1] the full court voted to rehear the case en banc. The en banc court also reversed the district court's dismissal of the ESPP claim, but held that plaintiffs had not exhausted their administrative remedies for the SPP claim, and remanded that claim to the plan administrator for adjudication in the first instance. *Vizcaino v. Microsoft Corp.,* 120 F.3d 1006 (9th Cir.1997). On remand, the district court substantially narrowed the class. *Vizcaino v. Microsoft Corp.,* 21 Employee Benefits Cas. 2821(BNA), 1998 WL 122084 (W.D.Wash.1998). This court then granted mandamus, held the class to include persons who had worked for Microsoft after 1990, and identified factors to be applied in determining individual eligibility. *Vizcaino v. United States Dist. Ct. for the W. Dist. of Wash.,* 173 F.3d 713 (9th Cir.1999). Settlement negotiations followed, and after two years the parties submitted a proposed settlement of all claims to the district court. The agreement required Microsoft to deposit $96,885,000 into a settlement fund, to be distributed to the class members after payment of incentive awards, costs, and fees. Microsoft also changed its staffing and worker classification practices, resulting in the hiring of over 3000 class members as W–2 employees entitled to participate in employee benefit plans and programs.

[1] After receiving written submissions and hearing argument, the district court approved the settlement on extensive findings of fact and conclusions of law. It then received class counsel's application for an award of

attorneys' fees of $27,127,800 (28% of the cash settlement fund). Two members of the class objected. After considering the submissions of counsel and the objectors, and hearing argument on the fee award, the court entered an order approving class counsel's fee request. *Vizcaino v. Microsoft Corp.,* 142 F.Supp.2d 1299 (W.D.Wa.2001). Before us now is the objectors' appeal from that order. We review for abuse of discretion. *Class Plaintiffs v. Jaffe & Schlesinger, P.A.,* 19 F.3d 1306, 1308 (9th Cir.1994).

*1047 DISCUSSION

Objectors challenge the district court's order on three grounds: First, and principally, that in awarding a fee of 28% of the settlement fund, it ignored the so-called increase-decrease rule; second, that in applying a lodestar cross-check, it used an improper methodology; and third, that in denying objectors' fee request without explanation, it abused its discretion. We address each contention in turn.

I. THE DISTRICT COURT'S PERCENTAGE CALCULATION

[2] [3] [4] The district court found that the settlement fund was the product of the successful claim for benefits under Microsoft's ESPP.[2] Because Washington law governed the claim, it also governs the award of fees. *Mangold v. Calif. Pub. Utils. Comm'n,* 67 F.3d 1470, 1478 (9th Cir.1995). Under Washington law, the percentage-of-recovery approach is used in calculating fees in common fund cases. *Bowles v. Dep't of Ret. Sys.,* 121 Wash.2d 52, 72, 847 P.2d 440 (1993) (holding that in a common fund case, "the size of the recovery constitutes a suitable measure of the attorneys' performance"). The district court followed the Washington practice of looking to federal law for guidance in this area, and we will do the same. *See id.* Under Ninth Circuit law, the district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method. *In re Wash. Pub. Power Supply Sys. Sec. Litig.,* 19 F.3d 1291, 1295–96 (9th Cir.1994) ("*WPPSS* "). Objectors do not challenge the district court's choice of the percentage method, only its application.

The district court based its percentage award on *Bowles,* which states that "[i]n common fund cases, the 'benchmark' award is 25 percent of the recovery obtained," with 20–30% as the usual range. *Bowles,* 121 Wash.2d at 72–73, 847 P.2d 440. Ninth Circuit cases echo this approach. *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir.1989). Objectors contend that the award is nevertheless excessive, arguing that the court erred in failing to take into account that this is a megafund case to which it should have applied what objectors call the increase-decrease rule. They rely principally on *WPPSS,* in which the district court chose the lodestar rather than the percentage method in awarding fees from a $687 million settlement fund. The district court observed that "in many cases awards fall outside the 'typical' range and ... the percentage of an award generally decreases as the amount of the fund increases." *WPPSS,* 19 F.3d at 1297. We did not adopt this observation as a principle governing fee awards. Rather, we merely noted that in cases of that magnitude, fund size is one relevant circumstance to which courts must refer, stating:

> We agree with the district court that there is no necessary correlation between any particular percentage and a reasonable fee. With a fund this large, picking a percentage without reference to all the circumstances of the case, including the size of the fund, would be like picking a number out of the air.... Because a court must consider the fund's size in light of the circumstances of the particular case, we agree with the district court that the 25 percent ***1048** "benchmark" is of little assistance in a case such as this.

Id. We concluded that the district court had acted within its discretion in considering the size of the fund in adopting the lodestar method.

[5] [6] The 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases. Selection of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case. As we said in *WPPSS,* in passing on post-settlement fee applications, "courts cannot rationally apply any particular percentage—whether 13.6 percent, 25 percent or any other number—in the abstract, without reference to all the circumstances of the case." *Id.* at 1298; *see also Camden I Condominium Ass'n, Inc. v. Dunkle,* 946 F.2d 768, 775 (11th Cir.1991) (noting with approval that district courts are increasingly " 'supporting their percentage awards with particular findings showing factors considered.' " (quoting Herbert Newberg, Attorney Fee Awards § 2.07 (1st ed.1986))). Objectors' argument that the district court erred

in not fixing a lower percentage, such as one between 6% and 10%, flies in the face of this reasoning. The question is not whether the district court should have applied some other percentage, but whether in arriving at its percentage it considered all the circumstances of the case and reached a reasonable percentage. We now turn to the court's examination of those circumstances.

[7] First, the court found that counsel "achieved exceptional results for the class." *Vizcaino,* 142 F.Supp.2d at 1303. The court found that counsel pursued this case in the absence of supporting precedents, in the face of agreements signed by the class members forsaking benefits—a fact that led four judges of this court to dissent from the panel and en banc opinions—and against Microsoft's vigorous opposition throughout the litigation. Exceptional results are a relevant circumstance. *See* *Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1377 (9th Cir.1993) (considering counsel's "expert handling of the case"); *Six (6) Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir.1990) (noting plaintiffs' "substantial success"); *In re Prudential Ins. Co. Sales Practices Litig.,* 148 F.3d 283, 339 (3d Cir.1998) (observing that "results achieved were 'nothing short of remarkable' " (quoting *In re Prudential Ins. Co. Sales Practices Litig.,* 962 F.Supp. 572, 585–86 (D.N.J.1997))).

[8] Second, the court found the case to have been extremely risky for class counsel for the reasons just stated. Twice plaintiffs lost in the district court—once on the merits, once on the class definition—and twice counsel succeeded in reviving their case on appeal.[3] Risk is a relevant circumstance. *See* *In re Pac. Enter. Sec. Litig.,* 47 F.3d 373, 379 (9th Cir.1995) (holding fees justified "because of the complexity of the issues and the risks"); *Bebchick v. Wash. Metro. Area Transit Comm'n,* 805 F.2d 396, 408 (D.C.Cir.1986) (considering counsel's repeated successes in overturning adverse determinations) (calculating lodestar); *cf.* *WPPSS,* 19 F.3d at 1302 (finding district court's failure to apply multiplier to lodestar calculation was abuse of discretion where case was ***1049** "fraught with risk and recovery was far from certain").

Third, the court found that counsel's performance generated benefits beyond the cash settlement fund. During the litigation, Microsoft agreed to hire roughly 3000 class members as regular employees and to change its personnel classification practices, a benefit counsel valued at $101.48 million during the 1999–2001 period alone. *Vizcaino,* 142 F.Supp.2d at 1301 n. 1. The court observed that the litigation also benefitted employers and workers nationwide by clarifying the law of temporary worker classification. Moreover, it noted that as a result of this litigation, many workers who otherwise would have been classified as contingent workers received the benefits associated with full time employment. Incidental or non-monetary benefits conferred by the litigation are a relevant circumstance. *See* *In re Pac. Enter.,* 47 F.3d at 379 (considering "nonmonetary benefits in the derivative settlement"); *cf.* *Bebchick,* 805 F.2d at 408 (allowing an upward adjustment to the lodestar "to reflect the benefits to the public flowing from [the] litigation"); *Mills v. Elec. Auto–Lite Co.,* 396 U.S. 375, 395, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) (stating that a corporation may receive a substantial benefit from a derivative suit justifying a fee award regardless of whether the benefit is pecuniary).

Fourth, the court found the 28% rate to be at or below the market rate. It cited the retainer agreements between counsel and the named plaintiffs promising to pay class counsel 30% of any recovery. The agreements alone, although somewhat probative of a reasonable rate, are not particularly helpful. For instance, the retainer agreements did not involve the class and, because they were made precertification, are not binding on the class. However, the district court did credit class counsel's evidence showing that the retainer agreements reflected the standard contingency fee for similar cases. This finding does not constitute an abuse of the court's discretion.

We note with respect to this factor that we do not adopt the Seventh Circuit's approach in percentage fee award cases, as set forth in *In re Continental Illinois Securities Litigation,* 962 F.2d 566, 568 (7th Cir.1992). There, that court stated that in awarding fees in common fund cases, courts should determine a reasonable fee by attempting to replicate the market rate. While an exclusively market-based approach may have superficial appeal, in the context of class action litigation in which attorneys' fees are determined *post hoc* by the court (without regard to any private arrangement), it may in many cases be illusory. Unlike in cases where lawyers compete for lead counsel status and may even bid in a court-supervised auction, in employment class actions like this one, no ascertainable "market" exists. *See, e.g.,* Alan Hirsch And Diane Sheehey, Awarding Attorney's Fees And Managing Fee Litigation 99–101 (1994) (describing practice sometimes used in the Northern District of California); *In*

re Auction Houses Antitrust Litig., 2001 Trade Cas. (CCH) ¶ 73,170, 2001 WL 170792 (S.D.N.Y. Feb.22, 2001). The "market" is simply counsel's expectation of court-awarded fees. The Seventh Circuit's effort to construct a market for such cases by determining what counsel "would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client" seems to us an unhelpful measure in many cases, and certainly an inappropriate measure to apply to *all* cases. *In re Cont'l Ill.,* 962 F.2d at 572. Unlike commercial litigation where the fee is determined by application of the negotiated contingency percentage to the amount of the recovery, in class action litigation the fee is determined on the basis ***1050** of what a court finds to be reasonable. An attempt to "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers [ ] had bargaining occurred at the outset of the case" strikes us as entirely illusory and speculative. *In re Synthroid Mktg. Litig.,* 264 F.3d 712, 718 (7th Cir.2001). Where evidence exists, such as here, about the percentage fee to which some plaintiffs agreed *ex ante,* that evidence may be probative of the fee award's reasonableness. But, to the extent that a market analogy is on point, in most cases it may be more appropriate to examine lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size.[4]

Fifth, the court found that counsel's representation of the class—on a contingency basis—extended over eleven years, entailed hundreds of thousands of dollars of expense, and required counsel to forgo significant other work, resulting in a decline in the firm's annual income. These burdens are relevant circumstances. *Six (6) Mexican Workers,* 904 F.2d at 1311 (noting that litigation lasted more than thirteen years); *Torrisi,* 8 F.3d at 1377 (considering counsel's bearing the financial burden of the case); *Bebchick,* 805 F.2d at 407 (same).

We conclude that the district court considered the relevant circumstances and did not abuse its discretion in finding a 28% fee award to be reasonable under the percentage method.

II. THE DISTRICT COURT'S LODESTAR CROSS–CHECK

[9] [10] The district court applied the lodestar method as a cross-check of the percentage method. Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award. Where such investment is minimal, as in the case of an early settlement, the lodestar calculation may convince a court that a lower percentage is reasonable. Similarly, the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted. Thus, while the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award.[5]

[11] The court found that counsel's fees for work done on this case, if charged ***1051** at current hourly rates, would amount to $7,386,876. It found nothing in the record to suggest that any of the hours claimed should be disallowed. Objectors quibble about some of the hours and charges, but we find no abuse of discretion. *See WPPSS,* 19 F.3d at 1298–99. Calculating fees at prevailing rates to compensate for delay in receipt of payment was within the district court's discretion. *See Gates v. Deukmejian,* 987 F.2d 1392, 1406 (9th Cir.1992).

[12] Objectors' principal quarrel is with the district court's lode star cross-check, which resulted in a multiplier of 3.65. The court found this number reasonable by considering the factors in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 69–70 (9th Cir.1975), including "the complexity of this case, the risks involved and the length of the litigation." *Vizcaino,* 142 F.Supp.2d at 1306. The bar against risk multipliers in statutory fee cases does not apply to common fund cases. *WPPSS,* 19 F.3d at 1299–1300. Indeed, "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases." *Id.* at 1300. This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases. *Id.* at 1299. In common fund cases, "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." *Id.* at 1300–01 (internal citation and quotation omitted). Class counsel here have represented that they would not have taken this case other than on a contingency basis. They perform little work on an hourly basis, and the rates they submitted were what they took to be market rates,

in other words, rates that did not already reflect an expectation of excellent results.

Thus, a multiplier was appropriate in this case. The district court's percentage of the fund analysis discussed above addressed the substantial risk class counsel faced, compounded by the litigation's duration and complexity. The court considered these circumstances in arriving at a multiplier which was within the range of multipliers applied in common fund cases.[6] We find no abuse of discretion.[7]

III. THE DENIAL OF OBJECTORS' REQUEST FOR ATTORNEYS' FEES

[13] [14] Objectors contend that the district court abused its discretion in rejecting their request for attorneys' fees, arguing that they caused the district court to require class counsel to submit time records and that they brought about minor procedural changes in the settlement agreement. Because objectors did not increase the fund or otherwise substantially benefit the class members, they were not entitled to fees. *Bowles,* 121 Wash.2d at 70–71, 847 P.2d 440 (stating that under Washington law, fees may be awarded only if authorized by "contract, statute or recognized ground in equity" (internal citation and quotation omitted)). The equitable common fund/common benefit doctrine "authorizes attorney fees only when the litigants preserve or create a common fund ***1052** for the benefit of others as well as themselves." *Id.; Class Plaintiffs v. Jaffe & Schlesinger, P.A.,* 19 F.3d 1306, 1308 (9th Cir.1994). In the absence of a showing that objectors substantially enhanced the benefits to the class under the settlement, as a matter of law they were not entitled to fees, and the district court did not abuse its discretion.[8]

CONCLUSION

[15] "Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs." *WPPSS,* 19 F.3d at 1302. Accordingly, fee applications must be closely scrutinized. Rubber-stamp approval, even in the absence of objections, is improper. We are satisfied that in this case, the district court subjected the application to the requisite scrutiny and did not abuse its discretion in determining a reasonable fee in light of the relevant circumstances of the case.

AFFIRMED.

Appendix

Table of Percentage–Based Attorneys' Fee Awards in Common Fund Cases of $50–200 million (1996–2001)[1]

Case	*Fund*	*Fee(%)*	*Fee($)*	*Multiplier*
In re Rite Aid Corp. Sec. Litig., 146 F.Supp.2d 706 (E.D.Pa.2001)[2]	$193m	25.0%	$48m	4.5–8.5
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D.Tex.1999)	$190m	25.0%	$47m	1.4
In re Merry–Go–Round Enterprise, Inc., 244 B.R. 327 (Bankr.D.Md.2000)[3]	$185m	40.0%	$71m	19.6
In re Copley Farm., Inc., 1 F.Supp.2d 1407 (D.Wyo.1998)	$150m	13.0%	$20m	2.0
Walco Investments, Inc. v. Thenen, 975 F.Supp. 1468 (S.D.Fla.1997)[4]	$141m	15.0%	$21m	1.8
In Re Informix Corp. Sec. Litig., No. 97–1289 (N.D.Cal. Nov.23, 1999) (Breyer, J.); cited at 21 Class Action Reports 261 (2000)	$137m	30.0%	$40m	——
In Re Combustion, Inc., 968 F.Supp. 1116 (W.D.La.1997)	$127m	36.0%	$46m	3.0
Kurzweil v. Philip Morris Co., 1999 WL 1076105 (S.D.N.Y.1999) (Mukasey, J.)	$124m	30.0%	$37m	——
In Re Sumitomo Copper Litig., 74 F.Supp.2d 393 (S.D.N.Y.1999)[5]	$117m	27.5%	$32m	2.5
Local 56, United Food & Comm'l Workers Union v. Campbell Soup Co., 954 F.Supp. 1000 (D.N.J.1997)	$115m	2.8%	$ 3m	2.4
In Re Ikon Office Sol'ns, Inc., Sec. Litig., 194 F.R.D. 166 (E.D.Pa.2000)[6]	$112m	29.0%	$32m	2.5
In Re Sunbeam Sec. Litig., Fed. Sec. L. Rep. P 91,656, 2001 WL 1636315 (S.D.Fla. Nov.29, 2001)	$110m	25.0%	$28m	——
Bussie v. Allamerica Fin'l Corp., No. Civ. A. 97–40204, 1999 WL 342042 (D.Mass. May 19, 1999)[7]	$108m	7.1%	$ 8m	3.3
Haynes v. Shoney's, No. 89–30093–RV, 1993 WL 19915 (N.D.Fla. Jan.25, 1993)[8]	$105m	23.2%	$24m	——
Ingram v. The Coca–Cola Co., 200 F.R.D. 685 (N.D.Ga.2001)[9]	$104m	20.0%	$21m	2.5–4.0
Bowling v. Pfizer, Inc., 922 F.Supp. 1261 (S.D.Ohio 1996)[10]	$103m	10.0%	$10m	2.1

Fanning v. Acromed Corp., No. 1014, C.A. 97–381, 2000 WL 1622741 (E.D.Pa. Oct.23, 2000)[11]	$100 m	12.0%	$12m	0.6
Baird v. Thompson Consumer Elecs., No. 00–761 (Ill. Cir. Court. Madison Co. June 15, 2001) (Matoesian, J.); cited at 22 Class Action Reports 800 (2001)	$100 m	22.0%	$22m	——
Rosted v. First USA Bank, No. 97–1482 (W.D. Wash. June 15, 2001) (Lasnik), J.); cited at 22 Class Action Reports 799–800 (2001)[12]	$87m	11.8%	$10m	3.0
In Re Sorbates Direct Purchaser Antitrust Litig., No. 98–4886 (N.D.Cal. Nov. 20, 2000) (Legge, J.); cited at 22 Class Action Reports 90 (2001)	$82m	25.0%	$20m	——
In Re Aetna, Inc. Sec. Litig., Fed. Sec. L. Rep. P 91,322, 2001 WL 20928 (E.D.Pa. Jan.4, 2001)[13]	$83m	29.5%	$24m	3.6
In Re Paracelsus Corp. Sec. Litig., No. 96–3464 (S.D. Tex Jul 22, 99) (Werlein, J.); cited at 21 Class Action Reports 262 (2000)	$80m	23.0%	$18m	——
In Re Commercial Explosives Antitrust Litig., MDL No. 1093 (D.Utah Dec. 29, 1998)(Sam, J.); cited at 20 Class Action Reports 532 (1997)	$77m	30.0%	$23m	2.5
Van Vranken v. ARCO, 901 F.Supp. 294 (N.D.Cal.1995)	$76m	25.0%	$19m	3.6
Ramah Navajo Chapter v. Babbitt, 50 F.Supp.2d 1091 (D.N.M.1999)	$76m	11.0%	$ 8m	——
Branch v. F.D.I.C., No. Civ. A. 91–CV–13270, 1998 WL 151249 (D.Mass. March 24, 1998)[14]	$75m	8.6%	$ 6m	2.1
In Re IDB Communication Group, Inc., Sec. Litig., No. 94–3618 (C.D.Cal. Jan. 17, 1997)(Hupp, J.); cited at 19 Class Action Reports 472–73 (1996)[15]	$75m	16.5%	$12m	6.2
In Re 1996 Medaphis Corp. Sec. Litig., No. 96–2088 (N.D.Ga. Mar. 27, 1998) (Thrash, J.); cited at 20 Class Action Reports 295 (1997)[16]	$73m	25.0%	$18m	——
In Re MiniScribe Corp., 257 B.R. 56 (Bankr.D.Colo.2000)	$67m	4.5%	$ 3m	1.7
In Re Nat'l Health Laboratories Sec. Litig., Nos. 92–1949 & 93–1694 (S.D.Cal. Aug. 15, 1995) (Brooks, M.J.); cited at 19 Class Action Reports 64–65 (1996)[17]	$64m	30.0%	$19m	2.3
In Re Teletronics Pacing Systems, Inc., 137 F.Supp.2d 1029 (S.D.Oh.2001)	$62m	26.6%	$17m	1.0
In Re Medical Care America, Inc. Sec. Litig., No. 92–1996 (N.D.Tex. Apr. 26, 1996)(Robinson, J.); cited at 19 Class Action Reports 66 (1996)	$60m	27.5%	$17m	——
In Re Melridge, Inc., Sec. Litig., No. 87–1426 (D. Or. March 19, 1992, Nov. 1, 1993, and April 15, 1996)(Frye, J.); cited at 19 Class Action Reports 65–66 (1996)	$54m	37.1%	$20m	1.4
In Re Carbon Dioxide Antitrust Litig., 1996–2 Trade Cases P 71,522, 1996 WL 523534 (M.D.Fla. July 15, 1996)[18]	$53m	18.0%	$10m	1.2

All Citations

290 F.3d 1043, 27 Employee Benefits Cas. 2648, 02 Cal. Daily Op. Serv. 4161, 2002 Daily Journal D.A.R. 5321

Footnotes

[*] The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

[1] *Vizcaino v. Microsoft Corporation,* 97 F.3d 1187 (9th Cir.1996).

[2] The SPP claim, which arose under the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a), was referred to the SPP administrator and subsequently to the plan's administrative committee, which denied the appeal. The issue was ready for judicial review by the district court but had not been decided when the settlement of all claims was reached.

[3] Objectors' argument that the district court should have considered the IRS investigation, which resulted in subjecting the workers to income tax withholding, is beside the point. Because Microsoft had conceded that the workers were common law employees, the pivotal issue, to which the IRS investigation was irrelevant, was whether the signed agreements stipulating that they were "responsible to pay all ... [their] own benefits" precluded recovery. *Vizcaino,* 120 F.3d at 1009; *see also* *Vizcaino,* 97 F.3d at 1197–99.

[4] The award was within the range of fees awarded in settlements of comparable size. The Appendix to this opinion surveys fee awards from 34 common fund settlements of $50–200 million from 1996–2001, with fees awarded under the percentage method. Awards here range from 3–40%, with most (27 of 34, or 79%) awards around 10–30% and a bare majority (19 of 34, or 56%) clustered in the 20–30% range. *See also* Alba Conte, Attorney Fee Awards §§ 2.09, 2.33 and 2.34 (2d ed.1993and Nov. 2001 Supp.) (surveying common fund settlements of $25–200 million and finding a range of 1–30%, with most awards around 5–20%).

[5] We do not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly; in many instances, it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief. The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement. *Camden I Condominium Ass'n,* 946 F.2d at 773–74 (citing *Court Awarded Attorney Fees,* Report of the Third Circuit Task Force, 108 F.R.D. 237, 242 (1985)).

[6] *See* Appendix (finding a range of 0.6–19.6, with most (20 of 24, or 83%) from 1.0–4.0 and a bare majority (13 of 24, or 54%) in the 1.5–3.0 range); *Prudential,* 148 F.3d at 341 ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." (quoting 3 Newberg § 14.03 at 14–5)).

[7] Objectors' argument that the district court should have appointed an expert is meritless. While the court has discretion to appoint an expert under Federal Rule of Evidence 706, objectors have not shown how its decision not to do so was an abuse of discretion.

[8] Because the court could treat objectors' application for fees as a motion raising a dispositive issue of law, Federal Rule of Civil Procedure 54(d)(2)(C) did not apply and no findings of fact were required under Federal Rule of Civil Procedure 52(a).

1 This survey includes all class actions involving common funds of $50–200 million from which fees were calculated using the percentage method, found in the Westlaw ALLCASES database and Class Action Reports' attorneys' fees section from Jan. 1, 1996 through Dec. 31, 2001. All dollar amounts are rounded to the nearest million; all percentages are rounded to one-tenth of a percent. Multipliers are listed where courts conducted a lodestar cross-

check.

2 The court cited the multiplier range from counsel's estimates without extensive discussion. Id. at 736 n. 44.

3 The court calculated the multiplier based on counsel's logs of 12,087 hours and an assumed hourly rate of $300, concluding"that it is inappropriate to use a lode-star analysis post-recovery to determine a reasonable fee." Id. at 335.

4 The court noted that this fund included the cash value of waived claims (estimated at $15 million) and tax refunds (estimated at $1.5 million), and indicated that the actual value of the fund might be higher. Id. at 1470 n. 3.

5 Although recovery for the class was $135 million, preexisting agreement limited the compensable amount to $117 million. Based on the $135 million figure, the award percentage was 23.8%. Id. at 394.

6 The court based its calculations on what it described as the "net settlement fund," or roughly $108 million (roughly $112 million minus roughly $4 million in costs). We use the gross settlement fund amount, to maintain consistency with other cases listed. (Although it described the net fund as $108,915,874.43, the costs as $3,825,497.86, and 30% of the net fund as $32,404,744.33, the fees of roughly $32.4 million were actually 30% of $108,015,814.43. Id. at 193. Elsewhere, the court describes the gross fund as $111 million, with earned interest of $841,000 in five months. Id. at 172.)

7 The court estimated the fund value at $108 million but noted that"the actual value of the settlement may fall significantly short of the estimated value." Id. at *2. It therefore awarded the first $4 million in attorneys fees immediately and withheld the remainder pending further order. Id. at *3.

8 In addition to the common fund of $105 million, other relief was valued at $30 million.

9 The fund amount excludes $10 million in a "Promotional Achievement Fund" and $43.5 million in "future pay equity adjustments."Id. at 688.

10 The settlement allowed the fund of roughly $103 million to increase by up to roughly $63 million in the following ten years, and counsel were allowed to petition for 10% of the increase amount each year, up to an additional $6 million approximately. Id. at 780.

11 The defendant's assets were worth only $58 million. Id. at *5.

12 The court noted that a multiplier of at least 3.0 would be appropriate, but that would have resulted in an award greater than that requested by counsel.

13 The court described the fee as 30% of the net fund of roughly $81 million, after subtracting roughly $2 million in costs. We use the gross settlement fund amount, to maintain consistency with other cases listed.

14 The court described the $75 million figure as "the likely amount" of the fund. Id. at *2.

15 The court noted that the lodestar of approximately $2 million"would have to be deflated an estimated 10% to 20% for some excessive rates and duplicative hours," resulting in a multiplier of 6.9–7.7.

16 Fund consisted of a mix of cash, stock, and warrants, so fees were granted in same proportion.

17 The 2.3 multiplier is inflated because the lodestar is based on historical (not prevailing) hourly rates and therefore fails to compensate attorneys for the time value of money.

18 The court described the award as 18.5% of the net fund (after subtracting roughly $1.6 million in costs). Id. at *2.

- Exhibit 14 -

2014 WL 11961980
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Joseph Jerome WILBUR, et al., Plaintiffs,
v.
CITY OF MOUNT VERNON, et al., Defendants.

No. C11-1100RSL
|
Signed 04/15/2014

Attorneys and Law Firms

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ORDER AWARDING FEES AND COSTS

Robert S. Lasnik, United States District Judge

***1** This matter comes before the Court on "Plaintiffs' Motion for Award of Attorneys' Fees and Expenses." Dkt. # 331. Having reviewed the memoranda, declarations, and exhibits submitted by the parties,[1] the Court finds as follows:

Plaintiffs prevailed at trial, convincing a skeptical fact finder that the system of public defense in Mount Vernon and Burlington was constitutionally deficient, that the adjustments the Cities made mid-litigation did not remedy the situation, and that injunctive relief was necessary to ensure that indigent criminal defendants have the assistance of counsel to which they are entitled. Because no monetary relief was requested, plaintiffs' counsel essentially litigated the case on a pro bono basis. Plaintiffs request an award of $2,439,081.52 in fees plus $43,496.50 in expenses as prevailing parties under 42 U.S.C. § 1988.

Section 1988 authorizes an award of "reasonable attorney's fees" in order to encourage individuals and attorneys to take on the burden of vindicating "important civil and constitutional rights that cannot be valued solely in monetary terms." City of Riverside v. Rivera, 477 U.S. 561, 574 (1986). See also S. Rep. No. 94-1011, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation['s] fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."). In determining a presumptively reasonable fee amount, courts apply the lodestar method of multiplying a reasonable hourly rate by the number of hours reasonably expended on the litigation. Gonzalez v. City of Maywood, 729 F.3d 1196, 1202 (9th Cir. 2013).

A. Reasonable Hourly Rates

An hourly rate is reasonable if it falls within the range of "prevailing market rates in the relevant community" given "the experience, skill, and reputation of the attorney." Dang v. Cross, 422 F.3d 800, 813 (internal citations omitted). "[T]he burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984). In this case, class counsel have set forth their education, years of experience, practice areas, normal hourly rates, and contribution to the litigation. They have also provided declarations from three experienced and respected members of the bar of this Court to the effect that the rates charged by class counsel are reasonable based on their years of experience and the prevailing range of rates in the Seattle/Tacoma legal community. Two of the three declarants are managing partners of their law firms, one of whom shares responsibility for reviewing the prevailing rates charged in the market and periodically adjusting his firm's rates accordingly. All three declarants agree that experienced, well-regarded, civil litigators in this community can charge hourly rates above those charged in this case. Of particular relevance is evidence that partners working on behalf of plaintiffs in civil rights cases charge between $400 and $600

per hour on both hourly and contingent bases. The rates charged by associates varies greatly with years of experience, but the evidence shows that large and mid-sized firms in the area can charge up to $300 per hour for the work of their associates.[2]

***2** Defendants, for their part, offer evidence showing that their counsel charged $250-265 per hour in this litigation and that other respected and experienced defense lawyers charge $250-275 for their services. While it is undisputed that attorneys who defend civil rights lawsuits for municipalities charge less than $300 per hour, the economic forces that drive that market – including taxpayer financing, long-term defense contracts, and the likelihood of recurring business – are substantially different from the circumstances in which a plaintiff or class of plaintiffs seeks counsel to help them vindicate their rights. Trevino v. Gates, 99 F.3d 911, 925 (9th Cir. 1996) ("Private attorneys hired by [the] government ... are not in the same legal market as private plaintiff's attorneys who litigate civil rights cases.").[3] Defendants do not challenge plaintiffs' evidence regarding the fees charged when pursuing consumer protection, wage, or employment discrimination claims. Rather, they argue that civil rights litigation is fundamentally different in some way, such that a different prevailing market rate applies. Whether the cause of action arises under § 1983, Title VII, the Fair Labor Standards Act, or a consumer protection statute, the individual or class of individuals is seeking to vindicate their rights. The scope of work and the services rendered by plaintiffs' counsel are very similar regardless of the source of the rights. Defendants offer no analysis to support their argument that the market for representation in a civil rights case varies significantly from the market related to these other statutory and constitutional claims.

To the extent defendants are implying that persons complaining of excessive force or the deprivation of counsel under § 1983 are simply too poor to pay the market rates, that is exactly why Congress enacted § 1988 – to ensure that they can find competent counsel to help them vindicate important rights. The fact that counsel did not charge the indigent members of the plaintiff class for their services does not and cannot mean that a reasonable rate for those services was $ 0. "Determination of a reasonable hourly rate is not made by reference to rates actually charged the prevailing party." Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986). The reasonable rate for the lodestar analysis, as discussed above, is based on the prevailing market rate for similar services by lawyers of comparable experience, skill, and reputation. Where there is a divergence between the rate negotiated with an individual client and the prevailing market rate, the market rate governs. Welch v. Metropolitan Life Ins. Co., 480 F.3d 942 (9th Cir. 2007).

Nor is the Court persuaded that awards in other civil rights actions compel the conclusion that $250 or $275 is always the rate at which these cases should be compensated in this community. First, for every Levine v. City of Bothell, C11-1280MJP, in which a fee of $250 per hour was found reasonable, there is an Ostling v. City of Bainbridge Island, C11-5219RBL, in which a survey of attorneys in the greater Seattle area (including one of the law firms involved here) led to an award of $550 per hour. Second, the low rate allowed in Levine was the result of a number of factors not present in this case: prevailing counsel failed to provide any evidence in support of his fee request other than his own declaration, he had previously stated that his hourly rate was only $275, and Judge Pechman was obviously unimpressed with counsel's performance during the litigation. Levine, C11-1280MJP (Dkt. # 74 at 2) (W.D. Wash. Jan. 15, 2013). In this case, class counsel has presented sufficient evidence of the prevailing market rate for prosecuting a civil rights lawsuit, and there is no reason to suspect that counsel fall outside of the category of "experienced, skilled, and respected" litigators referenced in the declarations. In fact, the quality of the representation afforded by class counsel throughout the proceeding was superb. The Court has no trouble concluding that counsel's experience, skill, and reputation would command the highest hourly rate that the market would bear. Finally, the complexity of this litigation was significant, requiring nuanced analyses of the Sixth Amendment case law, privilege and representational issues, and theories of municipal liability in the context of a systemic challenge to a system of public defense. The market would compensate attorneys providing comparable services at the top of the market range.

***3** The Court finds that class counsel's hourly rates are generally within the prevailing market range. Counsel shall be compensated for the reasonable hours billed at the following rates:

> Matthew Zuchetto $330 Toby Marshall $375 Jennifer Rust Murray $285 Nancy Talner $400 Sarah Dunne $380 James F. Williams $580 J. Camille Fisher $260 Beau C. Haynes $190 Breena M. Roos $465 Erika L. Nusser $225

With regards to support staff, plaintiffs have provided the education, years of experience, skills, contributions, and hourly rate of each individual. They have not, however, provided any indication of the prevailing market rate for comparable paralegals, legal assistants, and law clerks. Defendants do not oppose a rate of $90 per hour or a lower requested rate. Thus, support staff will be billed at the following rates:

> Brianna Bledsoe $90 Jennifer L. Boschen $90 Kristy Bergland $90 Bradford Kinsey $90 Joel Y. Higa $90 Adam Webster $80 Christine Stanley $90

B. Reasonable Hours Expended

In order to determine the number of hours to be compensated, the Court must consider "whether, in light of the circumstances, the time could reasonably have been billed to a private client." Moreno v. City of Sacramento, 534 F.3d 1106, 1111 (9th Cir. 2008). The Court starts with counsel's billing records, then makes deductions for hours that were not reasonably billed, such as those that are "excessive, redundant, or otherwise unnecessary." Gonzalez, 729 F.3d at 1202-03 (quoting McCown v. City of Fontana, 565 F.3d 1097, 1102 (9th Cir. 2008)). Defendants seek reductions in the number of hours to account for redundant staffing decisions (attributed to the pro bono nature of the representation), unnecessary motions, and pre-litigation investigative activities. Defendants also seek the wholesale exclusion of any fees that were block-billed, related to the fee petition, or reflect counsels' overhead expenses rather than the costs of litigation.[4]

1. Redundant Staffing

Plaintiffs' counsel have already excluded from the fee petition approximately 18% of their hours after determining that they were duplicative or otherwise could have been spent more efficiently. Defendants identify additional entries as unnecessary or duplicative, focusing primarily on the time it took for each new timekeeper to review the file (*e.g.*, entries on 4/11/11 and 7/29/11), instances in which more than one timekeeper reviewed a document or researched an issue (*e.g.*, entries on 7/5/11 and 5/10/12), multiple billings for meetings or activities in which multiple timekeepers participated (*e.g.*, entries on 8/1/11 and 7/27/12), and time spent keeping abreast of the activities of other timekeepers (*e.g.*, entries on 11/28/11 and 12/1/11). While the Court is left with the overall impression that counsel managed this case efficiently and professionally, it is clear that having four separate organizations involved occasionally resulted in duplication of effort and, at the very least, required many hours of conferencing and correspondence in order to keep everyone informed and on the same page. If this case were being contemporaneously billed to a paying client, such duplication and oversight would likely have been excised by cutting the hours of junior timekeepers or not billing the hours spent updating the senior partner on the case. On the other hand, complex litigation often involves issues and tasks that require the expertise and participation of a number of individuals: some duplication is necessary to produce top notch work product and to achieve success in the litigation. Ultimately, the line between necessary and unnecessary duplication is not bright, but where the timekeeping entry reveals little more than plaintiff-side communication with no strategic input from, substantive value added by, or action items assigned to the timekeeper, the time has been cut. After reviewing the specific entries to which defendants raised objection, a total of 219 additional hours have been cut from the various timekeeper's records.

2. Unnecessary Motions

***4** Class counsels' written advocacy throughout the litigation was superb. The Court would have to search the lengthy docket to find an argument, much less a motion, that was asserted by plaintiffs and could legitimately be labeled "unnecessary." Plaintiffs' submissions were eminently reasonable, especially in light of the litigation strategy adopted by defendants, and ultimately informed the way plaintiffs tried and won this case.

3. Pre-Filing Investigation

There is no hard and fast rule against compensation for hours spent before the complaint is filed. "The time that is compensable under § 1988 is that reasonably expended *on the litigation*." Webb v. Bd. of Educ. of Dyer Cnty., 471 U.S. 234, 242 (1985) (emphasis in original, internal quotation marks omitted). Rule 11 requires counsel to perform a reasonable pre-filing inquiry to ensure that the claims asserted are warranted by both the law and the evidence: conducting this pre-filing inquiry is therefore a necessary part of the litigation and should be compensated. On the other hand, "it is difficult to treat time spent years

before the complaint was filed as having been 'expended on the litigation' or to be fairly comprehended as 'part of the costs' of the civil rights action" for purposes of § 1988. Id.

A review of the billing records suggests that the first few months of counsels' investigation involved general research regarding indigent defense funding, reform, and systems in Washington and the potential claims and mechanisms available for correcting deficiencies. While it may be nothing more than a function of cryptic timekeeping entries, the first mention of Mount Vernon occurs at the beginning of 2011. The Court will not presume that generalized research regarding a particular area of law, unrelated to these defendants, was expended "on this litigation." A total of 45.05 hours expended before January 17, 2011, have been cut.

4. Block Billing

Where a timekeeper's billing entry identifies a number of activities but only a single block of time, it makes it very difficult for the Court to separate compensable hours from non-compensable hours and a reduction in the claimed hours may be justified. Mendez v. Cnty. of San Bernardino, 540 F.3d 1109, 1128-29 (9th Cir. 2008).[5] The vast majority of the entries to which defendants object on this ground are either compensable or can be read in conjunction with the surrounding entries to accurately determine how much time was spent on a particular activity. Where the block-billing has made it impossible to differentiate between compensable and non-compensable time, the entry has been cut, for a total of 38.9 hours.

5. Fees Related to the Fee Petition

***5** Defendants argue that hours related to the fee petition should be cut because the petition was unnecessary. The argument is factually and legally untenable. There is no rule or procedure which would have required plaintiffs to attempt to resolve the fee issues informally: they had only fourteen days in which to submit the petition and none of the meet and confer requirements apply. Nor is there any reason to suspect that the parties could have reached an agreement on the amount of fees. Defendants have raised numerous objections to the request and the parties remain almost $1.5 million apart in their estimations of the value of class counsels' services. The fee petition was necessary, and the hours expended are reasonable.

6. Travel Time

The travel time reflected in the entries is reasonable and would have been billed to a paying client. Grove v. Wells Fargo Fin. Cal., Inc., 606 F.3d 577, 580-81 (9th Cir. 2010). No reduction is warranted.

7. Overhead Costs

Defendants have identified a significant number of time entries that should be deleted because they reflect the overhead incurred by class counsel to operate their law firms/ organizations and would not normally be charged to a paying client. "Overhead" is generally defined as expenses related to the operation of the business that are normally subsumed in the attorneys' hourly rates rather than being billed as a separate line item. See Nadaraja v. Holder, 569 F.3d 906, 921 (9th Cir. 2009). Expenses such as rent, utilities, and stationary are quintessential overhead costs: they are not incurred because of or for an individual client, and yet are necessary to counsel's ability to provide legal services. Defendants argue that costs related to parking, lodging, meals, postage, telephone, transportation expenses, and computer research fall within the category of "overhead" and should be excluded. These costs were incurred because of the litigation, however, and defendants offer no legal or factual support for the proposition that these costs constitute overhead or are not customarily billed to and paid by clients.

Defendants also object to compensation for certain work performed by paralegals and legal assistants. This request has some merit. Where a non-lawyer provides clerical support (data manipulation, word processing, transmitting documents, etc.), clients would reasonably expect that such tasks would be incorporated into the hourly rate charged by counsel. Id. If, however, the non-lawyer provides services that involve legal concepts (substantively reviewing documents, summarizing depositions, etc.), their work serves as a replacement for a more expensive attorney and is appropriately billed. See Missouri v. Jenkins by Agyei, 491 U.S. 274, 288 (1989). Having reviewed defendants' objections, the Court finds that 17.8 hours were spent performing clerical tasks that should not have been billed at an hourly rate.

For all of the foregoing reasons, the Court finds that the lodestar fee in this case is $2,168,653.70 and the reasonable expenses come to $43,496.50. Once a presumptively reasonable fee amount is identified using the lodestar method, the court may adjust the amount upwards or downward based on factors such as the results obtained and the level of success compared with the initial claims. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." Hensley v. Eckerhart, 461 U.S. 424, 434-35 (1983). Given the scope of the relief obtained and the overall excellence of class counsels' performance in this landmark litigation, they are entitled to a fully compensatory fee.

Dated this 15th day of April, 2014.

All Citations

Not Reported in Fed. Supp., 2014 WL 11961980

Footnotes

[1] This matter can be decided on the papers submitted. Plaintiffs' request for oral argument is DENIED. The Court further finds that notice to the class regarding this motion is unnecessary.

[2] Although one of the declarants is of the opinion that Ms. Fisher's charge of $330 per hour is reasonable, the market data provided suggests that associates with four years of experience are generally billed at a lower rate (somewhere around $260 per hour).

[3] The Court does not, therefore, find Higher Taste v. City of Tacoma, C10-5252BHS (Dkt. # 65) (W.D. Wash. Sept. 3, 2013), persuasive.

[4] In their margin notes on the billing records, defendants also point out a duplicative entry on September 17, 2012. The second entry for 2.1 hours of Mr. Marshall's time will be deleted.

[5] Even where all of the activities listed in the billing entry are recoverable, block-billing may have a tendency to increase the overall time recorded. If that is the case, the Court has the authority to reduce block-billed hours by an appropriate percentage to ensure that the hours are reasonable. Welch v. Metro. Life Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007). Although defendants identify a number of time entries as "BB" with no other objection stated, they do not request or justify any particular percentage reduction, instead asking that the Court simply exclude all block-billed hours. The case law does not support such a draconian reduction, which would be unrelated to the reasonableness of the hours expended on the identified tasks. Id.

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- Exhibit 15 -

5 Newberg and Rubenstein on Class Actions § 16:10 (6th ed.)

Newberg and Rubenstein on Class Actions | December 2025 Update
William B. Rubenstein[a0]

Chapter 16. Costs[*]

§ 16:10. Nontaxable costs—Standards governing the recovery of nontaxable costs

As discussed in preceding sections of the Treatise, while Rule 54(d)(1) and 28 U.S.C.A. § 1920 limit the recovery for taxable costs to a narrow list of enumerated costs,[1] courts have enabled the recovery of a broad group of nontaxable costs. These recoverable nontaxable costs include counsel's out-of-pocket expenses that would normally be charged to a fee paying client.[2] Rule 23(h) requires judicial review and authorizes a court to approve the reimbursement of "reasonable" nontaxable costs.[3]

Three principles therefore guide the recovery of nontaxable costs:

- *First*, the application for costs must be supported by the relevant documentary evidence to be recoverable.[4] The Seventh Circuit has characteristically held that the requisite level of detail should be that which "paying clients find satisfactory."[5] Most courts will give counsel a chance to re-file their cost claims with additional documentation if their initial filing is lacking.[6] Undocumented costs may be rejected.[7]
- *Second,* the expense for which reimbursement is sought must be one that would normally be charged to a fee paying client. This inquiry is largely settled by years of jurisprudence identifying those expenses deemed recoverable. Such a list can be found in the section of the Treatise defining nontaxable costs,[8] but the common core across the circuits are telephone, postage, photocopying, and travel expenses.
- *Third*, the level of reimbursement sought must be reasonable, not excessive.[9] This inquiry is generally governed by the fact that, as the Eleventh Circuit held more than 30 years ago, "the standard of reasonableness is to be given a liberal interpretation."[10] Nonetheless, excessive items or those that should not have been incurred in the first place—such as unnecessarily luxurious travel or copies of documents made solely for the convenience of counsel[11]—may be held unreasonable. Courts may also choose to deny reimbursement on equitable grounds, such as in situations where the plaintiff is of limited financial means.[12] The Seventh Circuit, again, judges reasonableness by what the market would bear.[13]

While cost recovery is straightforward and rather modest, the Treatise's author has elsewhere set forth an academic argument suggesting that courts should consider enabling counsel to profit from extraordinary cost expenditures in successful cases—with, for example, cost multipliers[14]—so as to ensure that contingent fee lawyers are not deterred from investing in meritorious, but cost-intensive, cases.[15]

Footnotes

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* Professor Rubenstein thanks Todd Logan, Harvard Law School Class of 2015, for his help in preparing this unit and Nicholas Abbott, Harvard Law School Class of 2022, Anne Deng, Harvard Law School Class of 2023, John Bailey and Mengjie Zou, Harvard Law School Class of 2017, for their help in editing it.

1 For a discussion of taxable costs, *see* Newberg and Rubenstein on Class Actions §§ 16:2 to 16:4 (6th ed.).

2 For a discussion of how courts have defined nontaxable costs, *see* Newberg and Rubenstein on Class Actions § 16:5 (6th ed.).
See also:
In re Lithium Ion Batteries Antitrust Litigation, 2020-2 Trade Cas. (CCH) ¶ 81483, 2020 WL 7264559, *23 (N.D. Cal. 2020), appeal dismissed in part, 2021 WL 6751856 (9th Cir. 2021) (citing **Newberg on Class Actions**) (observing that "class counsel can recover reasonable nontaxable costs including counsel's out-of-pocket expenses").

3 Fed. R. Civ. P. 23(h) ("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.").
See also:
In re LIBOR-Based Financial Instruments Antitrust Litigation, 2018-2 Trade Cas. (CCH) ¶ 80479, 2018 WL 3863445, *1 (S.D. N.Y. 2018) (citing **Newberg on Class Actions**) ("[A]s Rule 23(h) requires, expense requests must be reasonable.").

4 Hawthorne v. Umpqua Bank, 2015 WL 1927342, *6 (N.D. Cal. 2015) ("To support an expense award, Plaintiffs should file an itemized list of their expenses by category and the total amount advanced for each category in order for the Court to assess whether the expenses are reasonable.").
Dyer v. Wells Fargo Bank, N.A., 303 F.R.D. 326, 334 (N.D. Cal. 2014) (denying reimbursement because "counsel … provided no documentation supporting the claimed expenses" and because absent such documentation "the Court cannot determine whether the claimed expenses are the type normally charged to a paying client" but reserving funds from the common fund for potential reimbursement and directing class counsel to "file an itemization listing the expenses by category and the total amount advanced for each category within ten days of the issuance of this order") (internal quotation marks omitted).
In re Sinus Buster Products Consumer Litigation, 2014 WL 5819921, *13 (E.D. N.Y. 2014) ("Courts in this Circuit normally grant expense requests in common fund cases as a matter of course so long as counsel's documentation of them is adequate.") (internal quotation marks omitted).
In re Safety Components, Inc. Securities Litigation, 166 F. Supp. 2d 72, 108, Fed. Sec. L. Rep. (CCH) P 91625 (D.N.J. 2001) ("Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action.").

5 In re Synthroid Marketing Litigation, 264 F.3d 712, 722, 2001-2 Trade Cas. (CCH) ¶ 73407, 51 Fed. R. Serv. 3d 736 (7th Cir. 2001) ("If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more.").

6 Forauer v. Vermont Country Store, Inc., 2015 WL 225224, *1 (D. Vt. 2015) ("The court held a Fairness Hearing … at which time the court raised concerns about, *inter alia*, the scope of the general release in the Settlement Agreement and the failure of Plaintiffs' counsel to submit documentation to support the request for attorney's fees and costs. At the conclusion of the Fairness Hearing, the court ordered Plaintiffs' counsel to submit documentation of their attorney's fees and costs …").

7 Dyer v. Wells Fargo Bank, N.A., 303 F.R.D. 326, 334 (N.D. Cal. 2014) (denying reimbursement because "counsel … provided no documentation supporting the claimed expenses" and because absent such documentation "the Court cannot determine whether the claimed expenses are the type normally charged to a paying client" but reserving funds from the common fund for potential reimbursement and directing class counsel to "file an itemization listing the expenses by category and the total amount advanced for each category within ten days of the issuance of this order") (internal quotation marks omitted).
Pigford v. Vilsack, 89 F. Supp. 3d 25, 35 (D.D.C. 2015) ("Because … the Court cannot evaluate the reasonableness of Cross & Kearney's travel expenses based on its terse and vague billing entries, the Court agrees with USDA that the $1,080.65 not accounted for by any documentation cannot be reimbursed. Accordingly, Cross & Kearney's award will be reduced by that amount.").
Carr v. Tadin, Inc., 51 F. Supp. 3d 970, 986 (S.D. Cal. 2014) ("[O]ut-of-pocket costs may be recoverable as *attorneys' fees* if the charges are not already accounted for in the attorneys' hourly rates. Hence, at the final approval

hearing, the Court directed Class Counsel to provide proof that the costs claimed were out-of-pocket costs rather than overhead factored into the firm's hourly rates. Class Counsel, however, failed to do so … Accordingly, the Court … DENIES the remainder of the costs requested.") (citation omitted) (internal quotation marks omitted).

8 *See* Newberg and Rubenstein on Class Actions § 16:5 (6th ed.).

9 Henry v. Webermeier, 738 F.2d 188, 192 (7th Cir. 1984) ("[T]he district judge can, of course, and should, disallow particular expenses that are unreasonable whether because excessive in amount or because they should not have been incurred at all.").
Potter v. Blue Cross Blue Shield of Michigan, 10 F. Supp. 3d 737, 744 (E.D. Mich. 2014) (noting that nontaxable costs are recoverable "as long as they are reasonable out-of-pocket expenses incurred by the attorney that are normally charged to a fee-paying client in the course of providing legal services").

10 Dowdell v. City of Apopka, Florida, 698 F.2d 1181, 1192, 36 Fed. R. Serv. 2d 72 (11th Cir. 1983) ("As is true in other applications of section 1988, the standard of reasonableness is to be given a liberal interpretation.").

11 U.S. for Use and Benefit of Evergreen Pipeline Const. Co., Inc. v. Merritt Meridian Const. Corp., 95 F.3d 153, 173, 41 Cont. Cas. Fed. (CCH) P 76981, 45 Fed. R. Evid. Serv. 745 (2d Cir. 1996) (lowering recovery for photocopying costs from $17,690.78 to $5,000 because counsel "did not … itemize those costs or explain why all those copies were necessary" and because $5,000 "represented the court's estimate of the cost of photocopying the exhibits offered at trial and other papers submitted by plaintiff in connection with [the] trial") (internal quotation marks omitted).
Hawthorne v. Umpqua Bank, 2015 WL 1927342, *6 (N.D. Cal. 2015) (reducing reimbursement for travel expenses because, *inter alia*, "first-class airplane flights are not a reasonable expense or one that would normally be charged to plaintiff-clients in a consumer class action").
Potter v. Blue Cross Blue Shield of Michigan, 10 F. Supp. 3d 737, 772 (E.D. Mich. 2014) (holding a 10% reduction for costs related to copying was reasonable because counsel did not provide sufficient documentation to support the necessity of the requested copying amount).
Charboneau v. Severn Trent Laboratories, Inc., 97 Fair Empl. Prac. Cas. (BNA) 1761, 2006 WL 897131, *1 (W.D. Mich. 2006) ("Copies obtained only for the convenience of counsel, including extra copies of filed papers and correspondence, are ordinarily not recoverable.").
Florida Keys Citizens Coalition, Inc. v. U.S. Army Corps of Engineers, 386 F. Supp. 2d 1266, 1271 (S.D. Fla. 2005) (noting that only those copies of the administrative record which were not obtained for the convenience of counsel should be taxed, and hence halving the award of photocopying costs from $25,257.82 to $12,628.91).

12 Prado v. Federal Express Corporation, 2015 A.D. Cas. (BNA) 176448, 2015 WL 603194, *1–2 (N.D. Cal. 2015) (denying a prevailing party's request for nontaxable costs for deposition-related travel expenses and process server and expert witness fees because the court found "that it would be inequitable to impose additional costs on a plaintiff of limited financial means and that such an imposition would unreasonably chill future litigants in the realm of employment and disability disputes" in a case where the prevailing party sought $19,000 in nontaxable costs "from a man who earns $994 per month in social security payments and cannot find gainful employment because he is disabled").

13 In re Synthroid Marketing Litigation, 264 F.3d 712, 722, 2001-2 Trade Cas. (CCH) ¶ 73407, 51 Fed. R. Serv. 3d 736 (7th Cir. 2001) ("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.").

14 For a discussion of fee multipliers, *see* Newberg and Rubenstein on Class Actions § 15:87 (6th ed.).

15 Morris A. Ratner & William B. Rubenstein, *Profit for Costs*, 63 DePaul L. Rev. 587 (2014).

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- Exhibit 16 -

5 Newberg and Rubenstein on Class Actions § 17:1 (6th ed.)

Newberg and Rubenstein on Class Actions | December 2025 Update
William B. Rubenstein[a0]

Chapter 17. Incentive Awards[*]

§ 17:1. Incentive awards—Generally

A class action lawsuit is a form of representative litigation—one or a few class members file suit on behalf of a class of absent class members and pursue the class's claims in the aggregate.[1] At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.[2] Most courts call that payment an "incentive award," though some courts label it a "service award" or "case contribution award."[3] The names capture the sense that the payments aim to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function. Empirical evidence shows that incentive awards are now paid in most class suits and average between $10,000 to $15,000 per class representative.[4]

Courts and commentators have expressed concerns about incentive awards and have vigorously debated their propriety.[5] The concerns arise from the fact that these awards threaten to create incentives for the class representatives that may conflict with the class's interests. Specifically, if a settlement is proposed and the class representative may soon receive a significant monetary award beyond her recovery as a class member, she may support the settlement even if the class members' recoveries are suboptimal. This is the same concern that arises with regard to class counsel, who may be tempted to settle the class's claims at a discount in return for a robust—and prompt—fee. Indeed, the class representative's incentive award and class counsel's fee award are so intertwined that most class counsel seek judicial approval of both in a single motion. That approach was not historically contradicted by the text of Rule 23, which makes no explicit mention of incentive awards and hence provides no obvious process for their recovery.

As explained in detail in a subsequent section,[6] amendments to Rule 23 that went into effect in 2018 have helped focus the legal issues raised by incentive awards. Since December 2018, courts approving proposed class action settlements are required to ensure that the settlement proposal "treats class members equitably relative to each other."[7] This provision now lays the groundwork for judicial scrutiny of a proposed incentive award: because such an award generates a different monetary recovery for the class representative than the recovery of the other class members, it must be scrutinized to ensure that this differential recovery is justified by the class representative's contributions and hence is equitable. That said, courts have generally not yet recognized the relationship of the 2018 amendments to judicial review of incentive awards.

The succeeding sections of the Treatise attempt to untangle the following issues:

- the history and nomenclature of incentive awards;[8]
- the rationale for incentive awards;[9]
- the legal basis for incentive awards;[10]
- the financial source of incentive awards;[11]
- the eligibility requirements for incentive awards;[12]
- the frequency[13] and size of incentive awards;[14]
- the judicial review process, including the timing of the motion;[15] the burden of proof;[16] documentation requirements;[17] standards by which courts assess proposed awards;[18] and disfavored practices with regard to incentive awards, including conditional incentive awards,[19] percentage-based incentive awards,[20] *ex ante* incentive awards agreements,[21] and excessive incentive awards;[22]
- the Private Securities Litigation Reform Act of 1995 (PSLRA)'s approach to incentive awards;[23]
- the availability of incentive awards for objectors;[24] and

• the process for appellate review of incentive awards.[25]

Footnotes

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* Professor Rubenstein thanks Nicholas Abbott, Harvard Law School Class of 2022, Anne Deng, Harvard Law School Class of 2023, Shiyu (Vic) Xu, Harvard Law School Class of 2015, Ephraim McDowell, Harvard Law School Class of 2016, and John Bailey and Mengjie Zou, Harvard Law School Class of 2017, for their help in editing this unit.

1 Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members …").

2 Krant v. UnitedLex Corporation, 2024 WL 5187565, at *10 (D. Kan. 2024) (quoting **Newberg and Rubenstein on Class Actions**) ("At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.").
McFadden v. Sprint Communications, LLC, 2024 WL 3890182, at *8 (D. Kan. 2024) (quoting **Newberg and Rubenstein on Class Actions**) ("At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.").
In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation, 2022 WL 2663873, *6 (D. Kan. 2022) (quoting **Newberg and Rubenstein on Class Actions**) ("At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.").
In re Anadarko Basin Oil and Gas Lease Antitrust Litigation, 2019-1 Trade Cas. (CCH) ¶ 80749, 2019 WL 1867446, *3 (W.D. Okla. 2019) (quoting **Newberg on Class Actions**) ("At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.").
In re LIBOR-Based Financial Instruments Antitrust Litigation, 2018-2 Trade Cas. (CCH) ¶ 80479, 2018 WL 3863445, *2 (S.D. N.Y. 2018) (quoting **Newberg on Class Actions**) ("At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.").
In re Santander Consumer USA Holdings Inc. Stockholders' Litigation, 2025 WL 1012345, at *2 n.14 (Del. Ch. 2025) (quoting **Newberg and Rubenstein on Class Actions**) ("At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.").
Other class members may also be eligible for such awards. *See* Newberg and Rubenstein on Class Actions § 17:6 (6th ed.).

3 Strauch v. Computer Sciences Corporation, 2020 WL 4289955, *17 n.14 (D. Conn. 2020) (citing **Newberg on Class Actions**) (discussing such a payment as a "service award" but observing that "[s]uch awards are also commonly referred to as 'incentive awards'").
For a discussion of the history and nomenclature of incentive awards, *see* Newberg and Rubenstein on Class Actions § 17:2 (6th ed.).

4 For a discussion of empirical data on the frequency and size incentive awards, *see* Rubenstein, 5 **Newberg and Rubenstein on Class Actions** §§ 17:7 to 17:8 (6th ed.).
See also:

Seventh Circuit (District Court)
In re Broiler Chicken Antitrust Litigation, 2022 WL 6124787, at *5 (N.D. Ill. 2022) (quoting **Newberg on Class Actions**) ("Empirical evidence shows that incentive awards are now paid in most class suits and average between [$10,000 to] $15,000 per class representative.").

Tenth Circuit (District Court)
In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation, 2022 WL 2663873, *6 (D. Kan. 2022) (quoting **Newberg and Rubenstein on Class Actions**) ("Empirical evidence shows that incentive

awards are now paid in most class suits and average between $10,000 to $15,000 per class representative.").
Harlow v. Sprint Nextel Corporation, 2018 Wage & Hour Cas. 2d (BNA) 197179, 2018 WL 2568044, *7 (D. Kan. 2018) (citing **Newberg on Class Actions**).
Sibley v. Sprint Nextel Corporation, 2018 Wage & Hour Cas. 2d (BNA) 164708, 2018 WL 2134077, *10 (D. Kan. 2018) (citing **Newberg on Class Actions**).

5 Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 Fed. App. 0072P (6th Cir. 2003) (quoting **Newberg on Class Actions**).
Lane v. Page, 862 F. Supp. 2d 1182, 1237, Fed. Sec. L. Rep. (CCH) P 96834 (D.N.M. 2012) (quoting **Newberg on Class Actions**).
Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *6 (D.N.M. 2011) (quoting **Newberg on Class Actions**).
Estep v. Blackwell, 2006 WL 3469569, *6 (S.D. Ohio 2006) (quoting **Newberg on Class Actions**).

6 *See* Newberg and Rubenstein on Class Actions § 17:4 (6th ed.).

7 Fed. R. Civ. P. 23(e)(2)(D).

8 *See* Newberg and Rubenstein on Class Actions § 17:2 (6th ed.).

9 *See* Newberg and Rubenstein on Class Actions § 17:3 (6th ed.).

10 *See* Newberg and Rubenstein on Class Actions § 17:4 (6th ed.).

11 *See* Newberg and Rubenstein on Class Actions § 17:5 (6th ed.).

12 *See* Newberg and Rubenstein on Class Actions § 17:6 (6th ed.).

13 *See* Newberg and Rubenstein on Class Actions § 17:7 (6th ed.).

14 *See* Newberg and Rubenstein on Class Actions § 17:8 (6th ed.).

15 *See* Newberg and Rubenstein on Class Actions § 17:10 (6th ed.).

16 *See* Newberg and Rubenstein on Class Actions § 17:11 (6th ed.).

17 *See* Newberg and Rubenstein on Class Actions § 17:12 (6th ed.).

18 *See* Newberg and Rubenstein on Class Actions § 17:13 (6th ed.).

19 *See* Newberg and Rubenstein on Class Actions § 17:15 (6th ed.).

20 *See* Newberg and Rubenstein on Class Actions § 17:16 (6th ed.).

21 *See* Newberg and Rubenstein on Class Actions § 17:17 (6th ed.).

22 *See* Newberg and Rubenstein on Class Actions § 17:18 (6th ed.).

23 *See* Newberg and Rubenstein on Class Actions § 17:19 (6th ed.).

24 *See* Newberg and Rubenstein on Class Actions § 17:20 (6th ed.).

25 *See* Newberg and Rubenstein on Class Actions § 17:21 (6th ed.).

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