

October 20 2020 3:21 PM

The Honorable ELIZABETH MARTIN
KEVIN STOCK
COUNTY CLERK
NO: 19-2-12357-1

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7 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
8 IN AND FOR PIERCE COUNTY

9 LANCE MILLER,

10 Plaintiff,

11 v.

12 MUTUAL OF ENUMCLAW INSURANCE
13 COMPANY and ENUMCLAW PROPERTY
14 AND CASUALTY INS COMPANY,

15 Defendant.

NO. 19-2-12357-1

MOTION FOR AWARD OF
ATTORNEY'S FEES, COSTS, AND
CLASS REPRESENTATIVE
INCENTIVE AWARD

Hearing Date: December 11, 2020

16 **I. MOTION/RELIEF REQUESTED**

17 COMES NOW the Plaintiff/CLASS REPRESENTATIVE, LANCE MILLER, through
18 Class Counsel, and moves the Court for entry of an order which provides for the following relief:

19 1) Awards attorney's fees of \$346,500.00, costs of \$6,000.00, and a class
20 representative's incentive award of \$7,500.00.

21 **II. EVIDENCE RELIED UPON**

- 22 1. *Motion for Preliminary Approval of Class Action Settlement* (filed August 3,
23 2020).

24 **III. STATUS UPDATE**

25 Plaintiff's *Motion for Preliminary Approval of Settlement* was filed on August 3, 2020.
26 The Court granted the motion and confirmed the proposed notice plan for the settlement on
27

1 August 14, 2020. The deadline for mailing objections to the proposed settlement is
2 November 11, 2020. Plaintiff, in his preliminary approval motion, advised the Court that he
3 would file a motion for approval of attorney's fees, costs, and an incentive award no later than 21
4 days prior to the deadline to file objections so that the motion could be on file prior to that
5 deadline.

6
7 Following the grant of preliminary approval, individualized Claim Forms have been
8 mailed to Class Members by the Court-approved Claims Administrator. Each Claim Form was
9 customized with the member's name; address; date of accident; and vehicle make, model and
10 year. Each packet also included a settlement notice. A comprehensive website was created which
11 made available the documents relevant to the claims, defenses, and the proposed settlement. The
12 website for the settlement, <https://www.millermoe.com/> has gone live. The Claims Administrator
13 will continue to process and re-mail any undeliverable Notice Packets (if any) through the claim
14 filing deadline. Plaintiff will address any objections to the request herein, to the extent that any
15 is received, in their reply submission.
16

17 **IV. THE REQUESTED FEE/COST AND INCENTIVE**
18 **AWARDS SHOULD BE APPROVED**

19 ***1. The Common Fund Exception to the American Rule***

20 The Court has equitable powers to award fees and costs in a common fund case. The
21 "common fund" exception "rests on the perception that persons who obtain the benefit of a
22 lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."
23 *Boeing Co. v. Van Gernert*, 444 U.S. 472, 478 (1980). Since the decisions in *Trustees v.*
24 *Greenough*, 105 U.S. 527, 537 (1881), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S.
25 116, 124 (1885), the courts have recognized consistently that a litigant or a lawyer whose efforts
26 create a common fund for the benefit of persons other than himself or his client is entitled to a
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1 reasonable attorneys' fee and expenses from the fund as a whole. *Boeing*, 444 U.S. at 478; *Mills*
2 *v. Electric Auto-lite Co.*, 396 U.S. 375, 395 (1970); *Sprague v. Ticonic National Bank*, 307 U.S.
3 161, 167 (1939); *Hall v. Cole*, 412 U.S. 1, 13 (1973); *Camden I Condominium Ass'n v. Dunkle*,
4 946 F.2d 768,771 (11th Cir. 1991). As a leading case notes: "We take as a starting point the
5 settled principle that passive members of a class who 'accepted the fruits' of the labors of others
6 are obligated to contribute to the attorney for the active members who created the fund." *Lindy*
7 *Bros Builders v. American Radiator and Standard Sanitary Corp.* 540 F.2d 102, 119 (3d Cir.
8 1976); *Central Railroad & Banking*, 113 U.S. at 127, and "Absent extraordinary circumstances,
9 the unrepresented claimants should pay for the attorneys' services in proportion to their benefit
10 from them-that is, the unrepresented claimants should pay a percentage of the reasonable value of
11 the attorneys' services to the class equal to their percentage of the class' recovery." *Lindy Bros.*,
12 487 F. 2d at 169. The equitable powers of the courts over the fund created by the litigation allows
13 a court to prevent inequity by assessing attorneys' fees against the entire fund, thus spreading fees
14 proportionately among those benefited by the suit. *Boeing*, 444 U.S. at 478; *Mills*, 396 U.S. at
15 394.

18 **2. The Common Fund Exception in Washington**

19 In the case of *Bowles v. Dep't. of Retirement Sys.*, 121 Wn.2d 52, 847 P.2d 440 (1993),
20 the Washington Supreme Court held that, where attorneys create a common fund, they are
21 entitled to collect attorney fees from that fund. *Id.* at 450. In recognizing this equitable theory
22 for the award of attorney fees, the Court stated:
23

24 We note in passing that this holding also furthers important policy interests.
25 When attorney fees are available to prevailing class action plaintiffs, plaintiffs
26 will have less difficulty obtaining counsel and greater access to the judicial
27 system. Little good comes from a system where justice is available only to
those who can afford its price.

1 *Id.* After recognizing the equitable common fund theory, the *Bowles* court provided the
2 methodology by which attorney fees are to be calculated in the state of Washington.
3 Specifically, the Court adopted the "percentage of recovery approach" as the method to be
4 utilized in Washington for common fund cases. *Id.* at 451. The Court explained that under the
5 percentage of recovery approach, "[t]he attorneys are to be compensated according to the size of
6 the judgment recovered, not the actual hours expended." *Id.* at 452. The rationale for applying
7 the percentage method was also explained in the Manual for Complex Litigation as follows:
8

9 Indeed, one purpose of the percentage method is to encourage early
10 settlements by not penalizing efficient counsel, thus ensuring that competent
11 counsel continues to be willing to undertake risky, complex, and novel litigation.
12 Generally, the factor given the greatest emphasis is the size of the fund
created, because a common fund is itself the measure of success and represents
the benchmark from which a reasonable fee will be awarded.

13 *See Manual* §14.121 at 193; *See also, Bowles*, 847 P.2d at 451 (In common fund cases, the size
14 of the recovery constitutes a suitable measure of the attorneys' performance). Here, the size of
15 the common fund, \$1,386,000.00, is an excellent measure of Class Counsel's success and
16 speaks volumes of Class Counsel's performance.
17

18 The advantage of using the percentage of recovery method was also addressed in
19 the well-recognized class action treatise, *Newberg on Class Actions*. There, the author points
20 out that under the percentage of recovery method, the more the attorney succeeds in
21 recovering money for the client, with the fewest number of legal hours expended to reach
22 that result, the higher the dollar amount of fees the lawyer earns. Thus,
23

24 [o]ne of the primary advantages of the POR method is that it is thought to
25 equate the interests of class counsel with those of the class members and
encourage class counsel to prosecute the case in an efficient manner.
26
27

1 Heubert B. Newberg & Alba Conte, *4 Newberg on Class Actions* §14:06, at 566-67 (4th Ed.
2 2002). The Stipulation of Settlement achieved by Class Counsel clearly evidences the
3 efficient manner in which Class Counsel brought an end to this litigation. The Stipulation of
4 Settlement also addresses equally both the Class's interest in receiving an immediate cash
5 payment and Class Counsel's interest in receiving a fee for their efforts in creating a common
6 fund.
7

8 After adopting the percent of recovery approach, the Washington Supreme
9 Court established a "benchmark" of 25% of the common fund as a reasonable fee. *Bowles*,
10 847 P.2d. at 451. *See also Manual*, §14.121 at 188 (Awarding attorneys 25% of a common
11 fund represents a typical benchmark). Here, Class Counsel's fee request – which represents the
12 amount negotiated between Mutual of Enumclaw's Counsel and Class Counsel after all other
13 material terms of the settlement were agreed, of \$346,500.00 is 25% of the common fund
14 created for the benefit of Class Members. As such, under the precedent set in *Bowles*, this
15 Court should approve the fee as a reasonable (and in fact conservative, given the status of the
16 case and the superb outcome) award for Class Counsel's success on behalf of the Class.
17

18 **3. *Plaintiff's Request is Reasonable and Should be Approved***

19 Here, the size of the common fund, \$1,386,000.00, is an excellent measure of Class
20 Counsel's success and speaks volumes of Class Counsel's performance.
21

22 The percentage of the fee award (25%) is in fact lower than the range of awards confirmed
23 in recent diminished value class action litigation after Class Certification and with similar per
24 claim recoveries for the Class. *See Meyer v. American Family Mutual Insurance Company*,
25 United States District Court, Western District of Washington, No. 3:14-cv-05305 RBL (June 3,
26 2016) (30% fee); *Merrill v. PEMCO*, Pierce County Superior Court Cause No. 13-2-13764-5
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1 (September 23, 2015) (30% fee); and *Moeller v. Farmers Insurance Company of Washington*,
2 Pierce County Superior Court Cause No. 99-2-07850-6 (December 4, 2013) (30% fee).

3 The results in this case – with a simpler claims process than in *Mansker* and *Moeller*, a
4 much more favorable challenge process to Class members than in *Mansker*, a similar recovery on
5 a per-claim basis to that in *Merrill* and *Moeller*, suggest the requested percentage is well in line
6 with (and in fact more conservative) than that in similar recent cases, particularly given the
7 extensive work done by Counsel given the size of the eventual recovery.
8

9 Per the Stipulation of Settlement, Defendant has agreed that Defendant will not contest
10 Plaintiff's request for a \$346,500.00 attorney's fee award. Plaintiff's attorneys incurred costs of
11 \$6,000.00. These costs included the filing fee, service of process, and costs related to retention of
12 expert witnesses.
13

14 With respect to the requested incentive award, the Stipulation of Settlement provides that
15 Defendants will pay the class representative the sum of \$7,500.00, and the notice informed Class
16 Members of this request.

17 The granting of an incentive award to a class representative lies within the Court's sound
18 discretion. See, e.g., *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000). The
19 size of an incentive award depends on several factors, including the amount of risks to the class
20 representative, both financial and otherwise, in becoming and continuing as a litigant; the time
21 and effort expended by the representative in assisting in the prosecution of the litigation or in
22 bringing to bear added value; and any other burden sustained by the representative in lending
23 himself to prosecute an ultimate recovery of those claims. See, e.g., *Roberts v. Texaco, Inc.*, 979
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1 F. Supp. 185, 199 (S.D.N.Y. 1997); *In re Catfish Antitrust Litig.*, 939 F. Supp. 493 (N.D. Miss.
2 1996); *Spicer v. Chicago Bd. Options Exch. Inc.*, 844 F. Supp. 1226, 1266 (N.D. Ill. 1993).¹

3 Here, the class representative, Mr. Miller, was an active participant in the prosecution of
4 the settled case. He reviewed and provided relevant information regarding the Complaint and was
5 an active participant in the settlement of the litigation. Given the commitment of time and
6 attention to this litigation, and the willingness to subject himself to scrutiny, the requested
7 incentive award is well within the range of incentive awards that have been granted in other,
8 similar cases, including most recently in *Snyder, Meyer*, and *Merrill* where an incentive award of
9 \$10,000 was also approved.
10

11 VI. CONCLUSION

12 Class Counsel respectfully request that the Court GRANT Final Approval of the
13 settlement, that their Motion for an award of attorney fees and costs be GRANTED, awarding
14 Class Counsel \$346,500.00 in attorney's fees, \$6,000.00 in costs, and that the class representative,
15 Mr. Miller, be awarded \$7,500.00 as an incentive award.
16

17 RESPECTFULLY SUBMITTED this 20th day of October 2020.

18 Law Offices of STEPHEN M. HANSEN, PS

19 
20 _____
21 STEPHEN M. HANSEN, WSBA # 15642
22 Of Attorneys for Class

23 Scott P. Nealey (admitted pro hac vice)
24 LAW OFFICE OF SCOTT P. NEALEY

25 ¹ Such bonuses can be quite large, see e.g. *In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 357-58
26 (N.D.Ga.1993) (awarding \$142,500 to class representatives); *In re Dun & Bradstreet Credit Services Customer*
27 *Litigation*, 130 F.R.D. 366, 373-4 (S.D. Ohio 1990) (awarding \$215,000 to several class representatives); *Van*
Vranken v. Atlantic Richfield Co., 901 F.Supp. 294, 299 (N.D. Cal. 1995)(\$50,000 award to one class representative),
and the requested amount – negotiated with numerous defendants in this State, is comparatively small.

1 71 Stevenson Street, Suite 400,
2 San Francisco, CA 94105
3 Telephone: (415) 231-5311
4 Facsimile: (415) 231-5313
5 snealey@nealeylaw.com

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7 **CERTIFICATE OF SERVICE**

8 The undersigned certifies, under penalty of perjury under the laws of the State of
9 Washington, that on the 20th day of October, 2020, I e-mailed mailed via regular U.S.
10 mail faxed delivered by legal messenger a true and correct copy of this document to
11 counsel of record.
12

13 DATED this 20th day of October, 2020 at Tacoma, Washington.

14 
15 _____
16 SARA B. WALKER, Legal Assistant