

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DENNIS GORDAN, et al.,

Plaintiffs,

v.

MASSACHUSETTS MUTUAL LIFE
INSURANCE CO., et al.,

Defendants.

No. 13-CV-30184-MAP

**ORDER REGARDING PLAINTIFFS' MOTION FOR ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES, AND CASE CONTRIBUTION AWARDS FOR
NAMED PLAINTIFFS**

(Dkt. No. 119)

November 3, 2016

PONSOR, U.S.D.J.

I. INTRODUCTION

Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses and Case Contribution Awards for Named Plaintiffs is presented to this court for determination. (Dkt. No. 119.) In the motion, Class Counsel requests this court's approval of a fee for its services in obtaining a settlement of class claims described and detailed in the Settlement Agreement. (Dkt. No. 137). In support of their motion, Plaintiffs submitted the declarations of the AARP, the Pension Rights Center, the Centre for Fiduciary Excellence, Jerome J. Schlichter, Troy A. Doles, Sheri O'Gorman, and Thomas R. Theado, all of which the court has carefully reviewed.

The settlement provides a monetary award in the amount of \$30.9 million for the benefit of as many as 32,550 current and former participants in the MassMutual sponsored plans including the MassMutual Thrift Plan and the Massachusetts Mutual Life Insurance Company Agent

Pension Plan (collectively the “Plan” or “Plans”). In addition to the monetary recovery, the Settlement provides affirmative relief that will improve the design, administration, and management of the Plans for years to come.

Class Counsel requests a fee award of \$10,300,000, which constitutes 33 1/3% of the monetary settlement. In fact, the record reflects that improvements to the Plans confirmed in the settlement make the true value of the settlement far higher, perhaps as much as \$77.9 million. As a result, the claimed fee may well be considerably less than one-third of the true value of the settlement.

Significantly, Class Counsel has agreed to absorb all costs and expenses, in the amount of \$48,911.74, into its fee without any separate deduction from the settlement corpus. Also, Class Counsel has agreed to an award of \$20,000 as case contribution awards to each of the Class Representatives Dennis Gordan, John Hine, Donna Flieger, Patricia Hurley, Ronald Lindner, Janice Reynolds, and Sharon Jewell.

As part of its review of the settlement, the Independent Fiduciary for the Plans, Evercore Trust Company, N.A., examined in detail not only the terms of the settlement but also the reasonableness of Class Counsel’s requested attorneys’ fees and costs. The Independent Fiduciary found the requested attorneys’ fees to be reasonable and appropriate. (Dkt. No. 129, Attach. 1.)

As required by the settlement and the court’s Preliminary Approval Order (Dkt. No. 114), Class Counsel directed the mailing of individual notices to the Class Members and created a Class Member website to provide information to the class. Although over 32,550 individual notices were mailed to potential Class Members, only two filed objections of any kind to the settlement. Neither objector protested the reasonableness of the requested fees and costs. One did

not believe that Defendants should pay any settlement, and the other, without objecting to the requested amounts, believed Defendants should pay the fees in addition to the monetary amount agreed upon. Both these objections have been overruled. The record is clear that the Class Members overwhelmingly support this settlement and the work performed by Class Counsel.

II. FINDINGS AND CONCLUSIONS

A. Class Counsel's Requested Fee.

The “common-fund” doctrine allows counsel to draw a reasonable fee as a percentage of the fund created by a settlement for the benefit of the class. *Boeing Co. v. VanGemert*, 444 U.S. 472, 478 (1980). As held by the First Circuit, the “percentage of fund” approach offers distinctive advantages including: (1) it is less burdensome to administer; (2) it reduces the possibility of collateral disputes; (3) it enhances the efficiency throughout the litigation; (4) it is less taxing on judicial resources; and (5) it better approximates the workings of the marketplace. *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995). For these reasons, the First Circuit has stated that the “use of the [percentage of fund] method in common fund cases is the prevailing praxis.” *Id.*; see also *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 85–89 (D. Mass. 2005) (Young, J.) (approving 33 1/3% fee). Indeed, there is a “clear consensus among federal and state courts” that the percentage of fund approach is the more efficient, better reasoned, and effective method. *Archbold v. Wells Fargo Bank, N.A.*, No. 13-24599, 2015 U.S. Dist. LEXIS 92855, at *11 (S.D.W.Va. July 13, 2015) (citing a “clear consensus among federal and state courts...that the award of attorneys’ fees in common fund cases should be based on a percentage of the recovery” because “the percentage of fund approach is the better-reasoned and more equitable method of determining attorneys’ fees in such cases.”); *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998)(“When a class suit produces

a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund”); *Strang v. JHM Mortgage Sec. Ltd. Partnership*, 890 F. Supp. 499, 503 (E.D.Va. 1995) (“[T]he percentage method is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases.”). Moreover, courts in this district have recognized that an award from a common fund is appropriate in an ERISA class action. *Bilewicz v. FMR, LLC*, No. 13-10636, 2014 U.S. Dist. LEXIS 183213 (D. Mass. Oct. 15, 2014) (Casper, J.).

A review of criteria typically applied in determining fee awards in cases such as this one confirms that the one-third fee requested here is fair and reasonable.

1. Size of the Fund and Number of Persons Benefitted.

The monetary recovery obtained in the settlement of \$30.9 million is, by itself, substantial. Moreover, the settlement provides for current participants to receive tax-deferred distributions in the form of direct deposits to their existing accounts and gives former participants the right to direct their distribution from the common fund into a tax-deferred vehicle, such as an IRA. Given this, the ultimate value of the monetary relief to class members will likely be substantially more than \$30.9 million.

Beyond the strictly monetary recovery, Class Counsel’s efforts resulted in fundamental changes to the overall operation, administration, and management of the Plans, which will result in potential savings of additional tens of millions of dollars for participants and retirees in the coming years alone. Taking into account this total value, Class Counsel’s requested fee represents much less than one-third of the *total* value of the settlement.

2. Absence of Substantial Objection.

As noted, there is overwhelming support for this settlement from the class. With 32,550 individual notices mailed to potential Class Members, only two filed an objection of any kind to the settlement. Neither objects to the reasonableness of the requested attorneys' fees.

3. Skill and Efficiency of Class Counsel and Complexity of Case.

In obtaining this outstanding result for the class, Class Counsel has demonstrated extraordinary resourcefulness, skill, efficiency and determination. *Relafen*, 231 F.R.D. at 85–89. Class Counsel performed substantial work for almost an entire year before filing suit, investing hundreds of hours of attorney time investigating and developing the theories in this matter. Class Counsel's work included meeting with the Plans' participants, obtaining documents from public sources, reviewing and analyzing plan documents and financial statements, building on expertise regarding industry practices, conducting extensive legal research, and fashioning the causes of action. The exceptional result in this case is the direct result of Class Counsel's unique expertise and outstanding effort.

4. Amount of Time Devoted to the Case by Class Counsel.

Given the advantages identified by the First Circuit of using the "percentage of fund" method for awarding fees in common fund cases, it would be inappropriate to employ the lodestar method to calculate the fee here. However, a lodestar analysis may be performed as a cross-check to ensure that the percentage award is fair and reasonable. The court requested that Class Counsel provide this type of lodestar cross-check. This analysis demonstrates that Class Counsel's requested fee is appropriate.

The loadstar method multiplies the reasonable hours spent in litigating the case by the reasonable hourly rates of the attorneys who worked on the case. A multiplier of the lodestar rate is used to account for the risk and the scale of the results.

The record reflects that Class Counsel has spent 3,485.90 hours of attorney time, along with 251.60 hours of legal assistant time, litigating this case. These hours do not take into account additional work related to Class Counsel's commitment to monitor, over the four year enforcement period, Defendants' compliance with the terms of the settlement. In addition, the submitted hours do not take into account the additional hours that would be spent if Class Counsel has to bring an enforcement action. Using the hours submitted, and applying the reasonable rates suggested by counsel, the court finds that the lodestar is approximately \$2,816,299.40.

5. Financial Risk of Nonpayment Taken on by Class Counsel.

In cases where there is high risk and the likelihood of receiving no little or no recovery is a distinct possibility, it is common for a court to apply a multiplier to compensate the attorneys for the risk of nonpayment. In this case, counsel faced a high risk of non-payment, not only in light of the novel nature of this case but also in light of the dismissals in other cases, as well as statements made by this court in relation to Defendants' Motion to Dismiss. Thus, the court finds that a multiplier is particularly warranted in this case.

Class Counsel's requested fee of \$10,300,000 is 3.66 times the lodestar. Under the circumstances of this case, this multiplier is eminently reasonable and is within a range approved by, numerous other courts.

Significantly, each of the Named Plaintiffs separately entered into a 33 1/3% contingent contract with Class Counsel. (Dkt. No. 120, Attach. 5 at ¶22.) Moreover, the Independent Fiduciary for the Plans previously conducted a detailed review and assessment of the settlement terms, including Class Counsel's request for attorneys' fees and costs, and determined that the fee award and costs were reasonable in light of the settlement achieved. (Dkt. No. 129, Attach.

1.) This conclusion has been buttressed by supporting submissions from the AARP and the Pension Rights Center. (Dkt. Nos. 120, Attach. 2 & 125, Attach. 1.)

Finally, the court notes Class Counsel's good faith in agreeing to absorb all costs as part of the fee award without seeking separate reimbursement for them.

B. Named Plaintiff Contribution Awards.

The court also awards each of the Named Plaintiffs \$20,000 for their vital contributions to this case. As an award for their time and efforts they have invested for the benefit of the class, courts may award special compensation to the class representatives. In this case, the Named Plaintiffs are deserving of these awards. By searching for, providing, requesting and obtaining critical documents regarding the Plans, the Named Plaintiffs significantly aided Class Counsel's investigation and ability to prepare a detailed complaint. For these reasons, the court finds that a case contribution award of \$20,000 for each Named Plaintiff is reasonable and fair.

III. CONCLUSION

After consideration of Class Counsel's Motion, and consistent with the findings of the Independent Fiduciary, this court concludes that the requested attorneys' fees are fair, reasonable and merited. For the foregoing reasons, Plaintiffs' motion is hereby ALLOWED. Accordingly, the Settlement Administrator shall pay the sum of \$10,300,000 to the firm of Schlichter, Bogard & Denton out of the Settlement Fund and shall separately pay each Named Plaintiff \$20,000.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
United States District Court Judge