IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 16-cv-00175-REB-SKC

DEBORAH TROUDT, et al., individually and as representatives of a class of plan participants, on behalf of the Oracle Corporation 401(k) Savings and Investment Plan,

Plaintiffs,

v.

ORACLE CORPORATION, et al.,

Defendants.

ORDER GRANTING PLAINTIFFS' UNOPPOSED MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARDS

Blackburn, J.

This matter is before the court on **Plaintiffs' Unopposed Motion for Approval of Attorneys' Fees, Expenses, and Incentive Awards** [#223],[1] filed May 8, 2020. The court considered this motion in connection with the final fairness hearing to consider the parties' settlement of this class action on July 9, 2020. Having approved the Settlement Agreement as fair, reasonable, and adequate (***see* Order Final Judgment and Order of Dismissal** [#235], filed July 9, 2020); having considered the evidence presented, arguments presented, and authorities cited by the parties in the motion and at the hearing; and having considered and overruled the sole objection filed in the case (***see id.*** ¶ 6 at 2), the court finds and concludes that the motion is well-taken and should be granted.

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[1] "[#223]" is an example of the convention the court uses to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). The court uses this convention throughout this order.

I. BACKGROUND

By this lawsuit, plaintiffs alleged defendants breached their fiduciary duties to the Oracle Corporation 401(k) Savings and Investment Plan in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. As the court's docket indicates, this case has been hard-fought and survigorously litigated at all stages. Counsel for plaintiffs actively sought discovery of relevant and responsive information from defendants and reviewed and analyzed thousands of pages of documents. They defended seven depositions of the class representatives and took 12 depositions of fact witnesses. Plaintiffs also took one expert deposition and defended two more.

After a class was certified, the court granted defendants' motion for summary judgment in part, leaving for trial plaintiffs' claims alleging defendants breached their fiduciary duties by causing the Plan to retain two underperforming investments. The parties fully prepared the case for trial, which was set to commence on December 2, 2019. That morning, however, just prior to the commencement of trial, the parties reached an agreement settling the case and per force vacating the trial.

Thereafter, the court granted the parties' joint motion for preliminary approval of the settlement and joint motion for certification of a settlement only class defined as

> All persons who are or were participants or beneficiaries in the Oracle Corporation 401(k) Savings and Investment Plan at any time during the Class Period, including any Beneficiary of a deceased person who participated in the Plan at any time during the Class Period, and/or Alternate Payee, in the case of a person subject to a Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Gayle Fitzpatrick, John Gawkowski,

Dan Sharpley, Peter Shott, Mark Sunday and Amit Zavery.

As noted above, the court held a final fairness hearing on July 9, 2020, and approved the settlement.

By this motion, class counsel requests one-third of the amount of the total recovery, or $4,000,000, in attorney fees, as well as reimbursement of $410,501.60 in litigation expenses, and incentive awards of $25,000 for each of the named class representatives. Defendants do not oppose the motion.[2] I find and conclude that these requests are reasonable and appropriate in light of all relevant considerations of law and fact, as set forth herein.

II. ATTORNEY FEES

In a class action, the court may award reasonable attorney fees and nontaxable costs as authorized by law or by agreement. **FED. R. CIV. P**. 23(h). In a common-fund case such as this, "a reasonable fee is based on a percentage of the fund bestowed on the class." ***Blum v. Stenson***, 465 U.S. 886, 900 n.16, 104 S.Ct. 1541, 1550 n.16, 79 L.Ed.2d 891 (1984). "The Tenth Circuit favors the common fund approach, as opposed to the lodestar method, because a percentage of the common fund is less subjective than the lodestar plus multiplier approach, matches the marketplace most closely, and is the better suited approach when class counsel were retained on a contingent fee basis, as in this case." ***Shaw v. Interthinx, Inc.***, 2015 WL 1867861 at *5 (D. Colo. April 21, 2015).

[2] As noted above, although a putative class member submitted an objection, the court found that objection to be without merit and thus overruled it. (***See*** **Order Final Judgment and Order of Dismissal** ¶ 6 at 2 [#235], filed July 9, 2020.)

"In assessing the reasonableness of the percentage of the common fund awarded to class counsel for attorneys' fees, courts within the Tenth Circuit weigh the twelve factors identified by the Fifth Circuit in ***Johnson v. Georgia Highway Express, Inc***., 488 F.2d 714 (5th Cir. 1974)." ***Id.*** (citing ***Gottlieb v. Barry***, 43 F.3d 474, 483 (10th Cir. 1994)). The factors include:

> (1) the time and labor required; (2) the novelty and difficulty of the case; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (5) the customary fee for similar work; (6) whether the fee is fixed or contingent; (7) any 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.

Id. (citing ***Johnson***, 488 F.2d at 717-19). "A court may assign different relative weights to the factors – that is, none of the factors is inherently equiponderant, preponderant, or dispositive." ***Id.*** (internal quotation marks omitted). Consideration of these factors supports a fee award equal to one-third of the common fund in this case.

Class counsel dedicated substantial time and effort to prosecuting plaintiffs' claims for nearly four years. Class counsel reviewed thousands of pages of documents; filed, responded to, and reviewed multiple complex motions; attended several court hearings; traveled to 22 depositions throughout the country; and fully prepared for trial, reaching settlement only on the morning of trial.

The case also was novel and difficult. ERISA is "an enormously complex and detailed statute" which "[v]ery few lawyers . . . understand." ***Teets v. Great-West Life***

& Annuity Insurance Co., 315 F.R.D. 362, 370 (D. Colo. 2016). ***See also Martin v. Caterpillar, Inc.***, 2010 WL 3210448 at *2 (C.D. Ill. Aug. 12, 2010) (noting ERISA claims "are not only dependent on the statute but also on various regulations that implement ERISA"). In particular, "ERISA 401(k) fiduciary breach class actions involve complex questions of law and have not been widely litigated to this point." ***Waldbuesser v. Northrop Grumman Corp***., 2017 WL 9614818 at *4 (C.D. Cal. Oct. 24, 2017) (citation omitted). This "rapidly evolving" and complex area of law places demands on counsel and the court that "require the devotion of significant resources." ***In re Wachovia Corp. ERISA Litigation***, 2011 WL 5037183 at *4 (W.D.N.C. Oct. 24, 2011).

Given this complexity, it is "well established that complex ERISA litigation" such as this requires "special expertise," ***Tussey v. ABB, Inc***., 2012 WL 5386033 at *3 (W.D. Mo. Nov. 2, 2012), and class counsel of the "the highest caliber," ***Nolte v. Cigna Corp***., 2013 WL 12242015 at *3 (C.D. Ill. Oct. 15, 2013). Class counsel plainly meet these criteria. They have been dedicated, knowledgeable, and dogged advocates throughout this litigation, artfully illuminating this byzantine niche of law for the court's consideration and determination.

Moreover, for class counsel to obtain a recovery on behalf of the Plan required a willingness to risk significant time and money in the face of a vigorous defense by the defendants. The more than 6,300 hours expended by class counsel required a willingness to finance this case for years, with no guarantee of reward. It also undoubtedly impacted the firm's ability to handle other clients and actions. These considerations make it undesirable for most firms to bring these types of cases.

The weight of authority more than demonstrates that a fee of one-third is customary and justifiable. ***See Shaw***, 2015 WL 1867861 at *6 ("The customary fee awarded to class counsel in a common fund settlement is approximately one third of the total economic benefit bestowed on the class.") In similar ERISA 401(k) excessive fee cases, and in particular those brought by class counsel, district courts have consistently recognized a one-third fee is the prevailing standard. ***See, e.g.***, ***Kelly v. Johns Hopkins University***, 2020 WL 434473 at *3 (D. Md. Jan. 20, 2020) (citing cases).

The requested fee of one-third of the monetary recovery also is reasonable and appropriate given"the novel nature of this case and adverse precedents," which portend a "significant risk of nonpayment" in these types of cases. ***Kruger v. Novant Health, Inc.***, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016). ***See also Shaw***, 2015 WL 1867861 at *7. The outcome of the trial was not assured. Even if plaintiffs prevailed at trial, the probability of an appeal would have left class members waiting years to receive compensation, if any.[3] Instead, as a result of the settlement, the Plan, and by extension the members of the class, will receive their due compensation now. ***Kruger***, 2016 WL 6769066 at *5.

Counsel have shown their ability by achieving the excellent result obtained for the class in this case, supporting the requested fee award. Counsel's conduct and filings in this case have been of the highest caliber. The court agrees that class counsel are experts in ERISA litigation. Given the robust defense presented in this case and the potential uncertainty of recovery following trial, the results obtained by class counsel are

[3] In another case handled by class counsel, ***Tussey v. ABB, Inc.***, the parties litigated for over twelve years, including a trial and multiple appeals before the parties reached a settlement in 2019.

excellent. Class counsel admirably served as private attorneys general in this instance, fulfilling one of the purposes of ERISA.

For these reasons, the court finds and concludes that class counsel's requested one-third fee of $4,000,000 is reasonable and will approve that award.[5]

III. COSTS

"As with attorney fees, the common fund doctrine allows for an award of costs so that the beneficiaries of the fund share the cost of creating the fund." ***In re Qwest Communications International, Inc. Securities Litigation***, 625 F.Supp.2d 1143,1154 (D. Colo. 2009). Under Rule 23(h), a trial court may award nontaxable costs authorized by law or or agreement of the parties. **FED. R. CIV. P.** 23(h). In this case, a cost award is authorized by both.

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[5] Courts may use a lodestar crosscheck to confirm the reasonableness of the requested fee. ***See Shaw***, 2015 WL 1867861 at *8. Because this calculation serves merely as a cross-check, the court need not undertake an exhaustive analysis. ***See In re Crocs Securities Litigation***, 2014 WL 4670886 at *4 n. 4 (D. Colo. Sep. 18, 2014) ("[The] lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. ") (citation and internal quotation marks omitted).

To date, class counsel have spent at least 6,327.60 hours litigating this matter. As recently as January 2020, class counsel's reasonable hourly rates were approved by a district court in a similar ERISA class action litigation, which are: for attorneys with at least 25 years of experience, $1,060 per hour; for attorneys with 15-24 years of experience, $900 per hour; for attorneys with 5-14 years of experience, $650 per hour; for attorneys with 2-4 years of experience, $490 per hour; and for paralegals and law clerks, $330 per hour. ***See Kelly***, 2020 WL 434473 at *6-*7 (citing other ERISA decisions approving these rates). Given the close similarities between the claims in those cases and this one, the recency of the decisions, and the fact that the same class counsel was involved, the court finds these hourly rates to be reasonable.

Multiplying these rates by the hours expended yields a lodestar amount of $4,316,867.00. The requested $4 million fee award thus represents a lodestar multiplier of less than one. Not only is that figure significantly lower than lodestar multipliers which have been approved in other ERISA class action cases, it includes no multiplier for risk or delayed payment. ***See, e.g.***, ***Miniscribe Corp. v. Harris Trust Co. of California***, 309 F.3d 1234, 1245 (10th Cir. 2002) (affirming fee award based on a lodestar multiplier of 2.57); ***Shaw***, 2015 WL 1867861 at *8 (collecting cases approving multipliers ranging from 1.87 to 4.6).

Here, class counsel requests reimbursement of expenses in the amount of $410,501.60. Reimbursable expenses include expert fees, travel, long-distance and conference telephone, postage, delivery services, and computerized legal research. Alba Conte, 1 **Attorney Fee Awards** §2:19 (3rd ed. 2004); ***Spano***, 2016 WL 3791123 at *4. The expenses requested are all for legitimate costs associated with prosecuting the case, and the amounts requested are reasonable and not excessive given the scope and duration of the case.[6] The court thus finds class counsel's request for expenses to be fair and reasonable and will approve it.

IV. INCENTIVE AWARDS

"[I]ncentive awards are an efficient and productive way to encourage members of a class to become class representatives, and to reward the efforts they make on behalf of the class." ***Shaw***, 2015 WL 1867861 *8 (citation and internal quotation marks omitted). Here, class counsel requests a case contribution award of $25,000 for each of the class representatives. This request is consistent with incentive awards in other ERISA cases and other class actions in this district. ***See id.*** at *9 (collecting cases). ***See also, e.g.***, ***Kelly***, 2020 WL 434473 at *8; ***Kruger***, 2016 WL 6769066 at *6.

The class representatives provided invaluable assistance to class counsel in prosecuting the case, providing class counsel with critical documents and other information prior to preparing the Complaint, responding to written discovery, producing

[6] Expense limitation and efficiency is inherent in contingent fee arrangements because class counsel bears the risk of absorbing all case expenses if the case is ultimately unsuccessful. Indeed, class counsel has been required to absorb all expenses on several occasions when the dismissal of claims ultimately was upheld by the Courts of Appeals. ***See, e.g.***, ***Hecker v. Deere & Co.***, 556 F.3d 575 (7th Cir. 2009); ***Loomis v. Exelon Corp***., 658 F.3d 667 (7th Cir. 2011); ***Renfro v. Unisys Corp***., 671 F.3d 314 (3rd Cir. 2011).

documents, sitting for depositions, and submitting declarations in support of motions. Several of the named plaintiffs also prepared for and attended the trial. Further, by challenging their employer, they risked their reputations and alienation from both the employer and their peers. ***Kruger***, 2016 WL 6769066 at 6. The court thus finds a case contribution award of $25,000 for each class representative is reasonable and appropriate in light of their contributions to the case.

THEREFORE, IT IS ORDERED as follows:

1. That **Plaintiffs' Unopposed Motion for Approval of Attorneys' Fees, Expenses, and Incentive Awards** [#223], filed May 8, 2020, is granted;

2. That class counsel is awarded attorney fees of $4,000,000, to be paid from the settlement amount;

3. That class counsel is awarded expenses of $410,501.60, to be paid from the settlement amount; and

4. That a case contribution award of $25,000 is awarded to each of the named plaintiffs: Deborah Troudt, Brad Stauf, Susan Cutsforth, Wayne Seltzer, Michael Harkin, Miriam Wagner, and Michael Foy, to be paid from the settlement amount.

Dated July 10, 2020, at Denver, Colorado.

BY THE COURT:

Bob Blackburn

Robert E. Blackburn
United States District Judge